

November 9, 2017

Via Electronic Filing

Mr. Daniel Wolf
Executive Secretary
Minnesota Public Utilities Commission
121 Seventh Place East, Suite 350
St. Paul, MN 55101-2147

Re: *In the Matter of the Formal Complaint and Petition for Relief by Minnesota Energy Resources Corporation Against Northern States Power Company d/b/a/ Xcel Energy*

MPUC Docket No. _____

Dear Mr. Wolf:

Pursuant to Minn. Stat. § 216B.17, Minnesota Energy Resources Corporation (“MERC”) respectfully submits this Complaint, Request for Suspension of Natural Gas Competitive Agreements and Request for a Contested Case Hearing (“Complaint”) against Northern States Power Company d/b/a Xcel Energy (“Xcel Energy”). As set forth in the Complaint, MERC respectfully requests that the Commission: (1) immediately suspend Xcel’s unlawful “Natural Gas Competitive Agreement” and (2) refer this Complaint to the Office of Administrative Hearings for a contested case hearing to address the disputed issues of fact and to fully develop the record.

MERC considers certain information included within the exhibits to the attached Affidavit of Amber Lee to be proprietary and **TRADE SECRET INFORMATION**. Specifically, MERC has designated as **Trade Secret** a 1974 agreement between MERC’s predecessor Peoples Natural Gas/Utilicorp and Xcel Energy, attached as Exhibit H to the Lee Affidavit. That agreement includes competitive data regarding MERC’s system. In this respect, the information designated as **Trade Secret** is sensitive, competitive information, the disclosure of which could harm MERC and its customers. MERC has therefore included both a **Trade Secret** and Public version of Exhibit H.

Pursuant to Minn. Stat. § 13.37, subd. 1(b), the trade secret information set forth in this filing is properly designated by MERC as trade-secret because it: (1) is being supplied by MERC; (2) is the subject of reasonable efforts by MERC to maintain its secrecy; and (3) derives independent economic value, actual or potential, from not being generally known to or accessible to the public. MERC has identified the Trade Secret and other Non-Public Information pursuant to Minn. R. 7829.0500.

Further, MERC has provided a copy of this Complaint to Xcel Energy consistent with Minn. R. 7829.1700, subp. 2. Thank you for your attention to this matter. Please do not hesitate to contact me with any questions or concerns.

Mr. Daniel Wolf
November 9, 2017
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Sincerely,

/s/ Brian Meloy

Brian Meloy

Enclosures

**STATE OF MINNESOTA
BEFORE THE
PUBLIC UTILITIES COMMISSION**

)	
	)	MPUC Docket No. _____
)	
<i>Formal Complaint and Petition for</i>	)	COMPLAINT, REQUEST FOR
<i>Relief by Minnesota Energy Resources</i>	)	SUSPENSION OF NATURAL GAS
<i>Corporation Against Northern States</i>	)	COMPETITIVE AGREEMENTS AND
<i>Power Company d/b/a Xcel Energy</i>	)	REQUEST FOR A CONTESTED CASE
	)	HEARING OF MINNESOTA ENERGY
	)	RESOURCES CORPORATION
)	

Minnesota Energy Resources Corporation (“MERC”) respectfully submits this Formal Complaint, Request for Suspension of Natural Gas Competitive Agreements and Request for a Contested Case Hearing against Northern States Power Company, d/b/a Xcel Energy (“Xcel”) to the Minnesota Public Utilities Commission (“Commission”) pursuant to Minn. Stat. § 216B.17 and Minn. R. 7829.1700. MERC requests that the Commission (1) immediately suspend Xcel’s unlawful Competitive Agreement pending completion of the investigation in Docket No. G-999/CI-17-499; and (2) refer this Complaint to the Office of Administrative Hearings (“OAH”) for a contested case hearing to address disputed issues of fact and to fully develop the record.

As discussed below, Xcel continues to offer unlawful discounts to customers within the areas MERC currently serves to the detriment of MERC and its customers. Xcel’s use of its “Natural Gas Competitive Agreement” (“Competitive Agreement”) constitutes an impermissible discriminatory preference to new customers at the expense of existing customers in violation of Minnesota law, which prohibits natural gas public utilities from discounting their tariffed rates in competition with other natural gas public utilities. Such discounts also undermine fair and transparent competition between regulated gas utilities and result in inefficient duplication of gas facilities to the detriment of the customers of both Xcel and MERC who must pay full tariffed

rates. MERC respectfully requests that the Commission immediately prohibit Xcel from using its Competitive Agreement to offer rate discounts to customers who are already served, or would otherwise be served by, another natural gas utility with pre-existing distribution facilities in place.

I. EXECUTIVE SUMMARY

In its July 12, 2017, Order Dismissing Complaint, Requiring Filings and Opening Investigation issued in Docket No. G-011, G-002/C-17-305 and G999/CI-17-499 (“July 12 Order”), the Commission initiated an investigation on the “allowable parameters of gas-utility competition,” including the “use of promotional incentives and other non-tariffed payments.”¹ The investigation began after the Commission dismissed MERC’s complaint alleging that Xcel’s duplication of facilities and use of promotional incentives to secure the Minnesota Vikings Development was unlawful. Though the Commission’s investigation is necessary, it is not sufficient to remedy the continuing and immediate harm caused to MERC and its customers by Xcel’s repeated offering of unlawful discounts to customers that MERC serves or could readily serve with distribution facilities already in place.

In this instance, Xcel has entered into another Competitive Agreement, this time with United Properties to serve its “Boulder Lakes” development in Eagan, Minnesota (“United Development”). Under this Competitive Agreement, Xcel agreed to pay United a one-time “promotional incentive” simply for executing the Agreement and to provide other incentives over time. Xcel’s practice circumvents Minnesota law, which prohibits one natural gas utility from discounting its tariffed rates to compete with another natural gas utility. Xcel’s actions – if continued to be endorsed by the Commission – create an un-level playing field between two

¹ July 12 Order at p. 8.

utilities where one of them (*i.e.*, MERC) offers gas service in the City of Eagan in accordance with Commission approved tariffs and another utility (*i.e.*, Xcel) is allowed to sign up new gas customers by offering whatever de facto rate discount it decides is appropriate – without any meaningful oversight from the Commission. Xcel’s actions undermine the Filed Rate Doctrine and the Commission’s customer extension policies, which are intended to facilitate the orderly and economic extension of gas service to new customers.

Here, Xcel plans to serve United by extending a distribution line from the new Minnesota Vikings Development to cross and run parallel to MERC’s existing line on Ames Crossing Road. Xcel’s efforts to construct gas distribution facilities that are entirely duplicative of MERC’s existing facilities illustrates the difficult and burdensome position municipalities have been placed in when, in the absence of clear direction from the Commission, they must address whether to authorize the construction of duplicate facilities in their rights-of-way. This policy concern at least in part drove the City of Eagan’s September 22, 2017, decision to deny Xcel’s request for a right-of-way permit needed to construct the duplicate facilities. Xcel has appealed the City’s decision and alleged the City does not have the legal authority to evaluate the need for utility infrastructure when administering its right-of-way ordinance.

Because Xcel offered United service they cannot provide until they install new facilities, and because United required natural gas onsite beginning October 15, United initiated service with MERC, as the local natural gas service provider in the area, to meet United’s natural gas needs from its existing facilities after the denial of Xcel’s permit.² Notwithstanding the fact that MERC is currently United’s natural gas provider, MERC believes the filing of this Complaint is

² On October 31, 2017 a hearing was held in Xcel’s appeal of the denial of the permit. On November 3, 2017 the hearing examiner issued recommended alternatives to the City Council of Eagan. On November 6, 2017, the City Council adopted the hearing officer’s recommendation, and tabled the appeal until the Council’s meeting on December 5, 2017.

necessary to prevent Xcel from: (1) seeking to enforce the Competitive Agreement against United; and/or (2) offering additional incentives to entice United to disconnect from MERC, which Xcel did in the case of the Minnesota Vikings Development.

While MERC welcomes the opening of the investigation in Docket No. G999/CI-17-499 to reexamine the use of these types of promotional incentives by gas distribution utilities, the Commission should immediately suspend Xcel's use of its Competitive Agreement pending completion of the generic inquiry. The Competitive Agreement provides Xcel with an unlawful mechanism to effectively discount its tariffed rates in competition with other natural gas utilities without any limitation. This practice circumvents Minnesota law and creates an un-level playing field between regulated utilities. As explained below, the Legislature has clearly prescribed the circumstances under which a regulated gas utility may flex or discount its tariffed rates under Minn. Stat. § 216B.163. Critically, regulated gas utilities can take such action *only* in the face of "effective competition" from an *unregulated supplier*. By creating this exception, the Legislature proscribed all other exceptions, including Xcel's discounting rates to take customers away from a *regulated* supplier. For this reason alone, Xcel's use of its Competitive Agreement to compete with other natural gas public utilities should be immediately suspended.

Even if Xcel's use of its Competitive Agreement in this fashion was not contrary to clear statutory mandates, MERC calls upon the Commission to resolve the dispute between MERC and Xcel over which natural gas public utility should be allowed to serve United. As the Commission established in its July 12 Order, the Commission "evaluates disputes between competing natural gas utilities on a case-by-case basis, balancing the interests of the utilities, competed-for customers, and current customers."³ As explained herein and in the supporting

³ July 12 Order at p. 5.

Affidavit of Amber Lee (“Lee Affidavit”) a balancing of the interests based on the facts of this specific case shows that Commission intervention is warranted to prevent further harm to MERC and its customers that would result from Xcel’s proposed service to United. MERC recognizes, however, that balancing competing interests requires the development of a robust record to inform any Commission decision.⁴ Accordingly, MERC requests that the Commission refer this Complaint to OAH for a contested case hearing to address disputed issues of fact and to develop the record on the important issues set forth herein.

**II.
PARTIES AND JURISDICTION**

Complainant:	Minnesota Energy Resources Corporation 2665 145th Street West Rosemount, MN 55068
Complainant’s Rep:	Amber S. Lee Regulatory and Legislative Affairs Manager Minnesota Energy Resources Corporation 2665 145th Street West Rosemount, MN 55068
Complainant’s Counsel:	Brian Meloy Thomas Burman Stinson Leonard Street LLP 50 S. 6 th Street, Suite 2600 Minneapolis, MN 55402
Respondent:	Northern States Power Company, d/b/a Xcel Energy 414 Nicollet Mall Minneapolis, MN 55401
Respondent’s Counsel:	Scott Wilensky Executive Vice President and General Counsel Northern States Power Company, d/b/a Xcel Energy 414 Nicollet Mall Minneapolis, MN 55401

⁴ The Commission did not order a contested case with respect to the Minnesota Vikings Development. However, as the Commission noted “both MERC and Xcel recommended that the Commission resolve MERC’s complaint on an expedited schedule.” July 12 Order at p. 5.

The Commission has jurisdiction to hear this matter, make findings of fact, and order all appropriate relief under, *inter alia*, sections 216A.05, 216B.01, 216B.03, 216B.05, 216B.06, 216B.07, 216B.09 and 216B.17 of Minnesota Statutes, and Chapter 7829 of the Minnesota Rules.

III. FACTUAL ALLEGATIONS

1. MERC and Xcel are public utilities under Minn. Stat. § 216B.02, Subd. 4. MERC is a wholly-owned subsidiary of WEC Energy Group, Inc., and Xcel is a wholly-owned subsidiary of Xcel Energy, Inc. MERC delivers natural gas to more than 232,000 customers in communities across Minnesota. Both MERC and Xcel provide natural gas service to residential, commercial, and industrial customers in the City of Eagan, Minnesota.

2. The United Development consists of a 30-acre site in the City of Eagan that is being developed for Prime Therapeutics (“Prime”), which intends to consolidate its information technology and operations teams into a single location. The campus will consist of two large office buildings, joined by a centralized, connecting hub and will initially house approximately 2,000 employees with flexible space to accommodate future growth.⁵

3. During July and August 2017, MERC representatives engaged in discussions with United regarding MERC’s ability to serve Prime’s natural gas needs. In these discussions, United and MERC never discussed whether other utilities had facilities proximate to the area and MERC assured Prime that because MERC had facilities along the United Development perimeter, MERC could initiate service to United within a few days of a turn-on request.⁶ Until United informed MERC that it had signed a Competitive Agreement with Xcel, MERC was

⁵ Lee Affidavit at ¶ 6.

⁶ Lee Affidavit at ¶ 7.

unaware that Xcel had engaged United and offered monetary incentives if United agreed to take natural gas service from Xcel.⁷

4. On August 15, 2017, Xcel entered into a Competitive Agreement with United to provide natural gas service to the United Development. Through the Agreement, Xcel offered a \$25,000 “promotional incentive” to provide service to the United Development and, in Exhibit B to the Agreement, Xcel identified other alleged “Competitive Incentives” and savings. Exhibit B is not included in Xcel’s Tariff; nor is any calculation or methodology to determine the incentive and savings amounts. The Agreement was filed in Docket No. G999/CI-17-499 on August 18, 2017, and is attached as Exhibit A to the Lee Affidavit.

5. To provide natural gas service to the United Development via the public right-of-way, Xcel proposes to extend service from the Vikings Development by constructing a new gas distribution pipeline to the United Development along Ames Crossing Road. Xcel’s pipeline would entirely duplicate MERC’s existing gas distribution facilities, which already occupy the right-of-way along Ames Crossing Road and are adjacent to the west side of the street from the United Development parcel.⁸

6. It is also possible for Xcel to extend service to the United Development via private easement, although routes via private easements could be burdensome to secure and therefore could result in lengthy delays (and unknown costs) to initiate natural gas service to the United Development. Xcel’s proposed route via private easement also runs through environmentally sensitive wetland and conservation areas that will likely require additional

⁷ *Id.* at ¶ 8.

⁸ *Id.* at ¶ 10.

environmental reviews and directional boring.⁹

7. Attached as Exhibit B to the Lee Affidavit is a map showing the location of the United Development, MERC's existing natural gas infrastructure in the area and the planned location of Xcel's new pipeline extension to serve the United Development.¹⁰ The green lines on the map show the duplicative facilities Xcel has already constructed to serve the Vikings Development. The blue lines on the map show the anticipated location of Xcel's proposed duplicative extension from the Vikings Development to the United Development along Ames Crossing Road. The purple lines show the location of MERC's existing pipeline infrastructure, including a main that runs the length of Ames Crossing Road to the United Development. The black line shows one potential route for Xcel to extend to Prime via private easement. It is noteworthy that MERC's existing pipelines completely encircle the United Development.

8. Because MERC currently has existing gas distribution facilities in the Ames Crossing Road right-of-way and serves the other customers along the road, on September 22, 2017, the City of Eagan denied a permit to Xcel to construct another pipeline in the same right-of-way. In denying the permit, the City cited "public safety concern due to what would be a non-standard practice for there to be two gas mains installed within the same public right-of-way."¹¹ According to the City, "[t]here is no apparent need for Xcel Energy to install this segment of gas line for system operation purposes as it would be a dead end line, solely for the purpose of providing service to Prime Therapeutics."¹² Finally, the City noted that "*duplicative* installations of utility product lines limit the opportunity for future installations for the

⁹ *Id.* at ¶ 11.

¹⁰ *Id.* at ¶ 12.

¹¹ The City's September 22, 2017 denial of Xcel's permit is attached as Exhibit C to the Lee Affidavit.

¹² *Id.*

transporting of new or upgraded utility products.”¹³

9. Subsequently, the City of Eagan Public Works Director provided a summary to the City entitled “Director’s Reasons for Denial” further noting that MERC “currently has a natural gas distribution line on the west side of Ames Crossing Road from O’Neill Road to Lone Oak Road that is sufficient to supply natural gas to the Prime Therapeutics site, just as it presently serves MISO and the other properties adjacent to 2900 Ames Crossing Road.”¹⁴ The Director further noted that “[t]he extent of Ames Crossing Road included within the permit request is anticipated to have *no further development or need for natural gas services other than the Prime Therapeutics site. . . .* The practical extent of the requested gas line installation would serve only as a service line, not as a main or lateral.”¹⁵

10. Xcel appealed the City’s permit denial and on October 17, 2017, the City referred the appeal to an independent hearing officer. A hearing was held before an independent hearing officer on October 31, 2017. At the hearing, an Xcel representative testified that the company planned to include the proposed gas line in a looping connection to other Xcel lines, but did not provide any information concerning this plan.¹⁶ In a written report, the hearing officer recommended that the City Council table Xcel’s appeal to (1) allow Xcel to submit information to the Public Works Director regarding its looping plan; (2) allow the Public Works Director to prepare an estimate for the reasonably anticipated use of the Ames Crossing Road right-of-way for other utilities due to increased development in the surrounding areas; and (3) allow the Public

¹³ *Id.* (emphasis added).

¹⁴ The “Director’s Reasons for Denial” of Xcel’s permit is attached as Exhibit D to the Lee Affidavit.

¹⁵ *Id.* at p. 3 (emphasis added).

¹⁶ See Exhibit E to the Lee Affidavit at p. 3, which is the Hearing Officer’s November 3, 2017 Report and Recommendation.

Works Director to re-evaluate the denial of the Right-of-Way Permit based upon this additional information.¹⁷

11. The City Council adopted the hearing officer's recommendation on November 6, 2017, and tabled the appeal until the Council's meeting on December 5, 2017.¹⁸

12. Because the hearing officer's recommendation misstates the facts in the record and does not address the City's safety concerns and because MERC believes Xcel is misstating the City's police power authority to control its public rights-of-way, MERC submitted a letter to the City requesting that the hearing record be corrected and further developed before the City reevaluates its permit denial.¹⁹

13. Because Xcel was not able to provide timely service to the United Development, United reinitiated discussions with MERC and on October 2, 2017, it requested information on the length of time MERC would need to install facilities necessary to provide natural gas service to the United Development. United indicated it needed natural gas service on site beginning October 15, 2017, to maintain its construction schedule.²⁰

14. On October 18, 2017, MERC and United executed a Distribution Facilities Installation Agreement pursuant to which MERC agreed to install the facilities necessary to provide natural gas service to the United Development. United began taking service from MERC on October 25, 2017.²¹

15. In providing service to United, MERC applied its Commission-approved

¹⁷ *See id.*

¹⁸ Lee Affidavit at ¶ 16.

¹⁹ MERC's November 8, 2017 Letter to the City of Eagan is attached to the Lee Affidavit as Exhibit F.

²⁰ Lee Affidavit at ¶ 18.

²¹ Lee Affidavit at ¶ 19.

Customer Extension Model²² to determine if United would be required to make a contribution in aid of construction (“CIAC”) to contribute to the costs of extending service to the United Development. Generally, under MERC’s Tariff a CIAC will be charged to a customer if the discounted lifetime cost of extending service to that customer exceeds the discounted lifetime retail revenue (not including revenues from the sale of natural gas) from that customer.

16. Because MERC had sufficient, nearby existing gas distribution facilities in place to serve the United Development, the infrastructure costs to extend and install its facilities to United totaled approximately \$40,000, including the installation of the meter set and approximately 500 feet of main. United was not required to provide a CIAC under MERC’s extension Tariff.²³ In contrast, if Xcel is ultimately permitted to co-locate its facilities along Ames Crossing Road, it would need to install approximately 4,000 feet of main piping at an estimated cost of approximately \$175,000.²⁴

17. Further, MERC understands that Xcel may also explore extending service to the United Development over private easements from its existing pipeline along Argenta Trail through land owned by Cole Properties as shown in Exhibit G to the Lee Affidavit.²⁵ However, doing so would require Xcel to directionally bore under wetlands located in between Xcel’s existing line and the United Development.²⁶

18. In addition to the newly installed facilities to serve United, MERC has sufficient

²² See generally, *In the Matter of a Petition by Minnesota Energy Resources Corporation for Approval to Modify Its Main and Service Extension Model and Amend Its Extension Tariffs*, Order Approving Customer Extension Model, Docket No. G011/M-15-165 (July 13, 2015).

²³ Lee Affidavit at ¶ 21.

²⁴ *Id.* at ¶ 22.

²⁵ *Id.* at ¶ 23.

²⁶ *Id.*

facilities in Eagan such that no upstream distribution or capacity upgrades are required to provide service to the United Development. The Town Border Station (“TBS”) used to service the development has adequate capacity, and MERC could avoid any additional cost resulting from the necessary incremental capacity by reallocating a portion of its Rochester capacity to the TBS under a pre-existing agreement approved by the Commission.²⁷

19. Xcel also has infrastructure within the vicinity of the United Development, but with the exception of the piping installed in 2017 to serve the Vikings Development all of the existing infrastructure Xcel would use to support service to the United Development is located within the City of Inver Grove Heights, just east of the United Development.²⁸

20. Historically, with little dispute until 2017, Xcel has served the City of Inver Grove Heights and MERC has served the City of Eagan as a result of an Agreement between Xcel and MERC’s predecessor, Peoples Natural Gas/UtiliCorp (“Peoples”), dated October 2, 1974.²⁹ In relevant part, Peoples acquired customers and facilities in Eagan and Xcel acquired customers and facilities in Inver Grove Heights. In a letter to the City of Eagan, attached to the Lee Affidavit as Exhibit H, Peoples stated that “this exchange of customers and facilities [reflected in the MOU] will assure a more efficient and reliable natural gas service to both of these areas with only one utility rather than two operating within the same market area.”

21. MERC has quantified the economic impact on MERC and its customers if Xcel is permitted to serve the United Development by duplicating MERC’s existing gas infrastructure. MERC examined both direct and indirect or lost opportunity costs to determine this impact. With respect to direct costs, MERC has incurred approximately \$40,000 associated with

²⁷ *Id.* at ¶ 24.

²⁸ *Id.* at ¶ 25.

²⁹ *Id.* at ¶ 26.

providing service to United. These costs included the costs of the main and service lines and meter set that were installed specifically to serve United and which would be stranded if Xcel subsequently provides service to United and MERC is required to abandon or remove such facilities. Under MERC's standard extension practices, these stranded costs would be borne by MERC's other customers and the United Development would have no further obligation to pay for them.³⁰

22. With respect to indirect or lost opportunity costs, MERC evaluated the anticipated demand of the planned United Development based upon the stated load in the Competitive Agreement of 19,520 cubic feet per hour ("CFH") of natural gas. Absent Xcel's duplication of its facilities, MERC would receive over \$30,000 in margin revenues annually from service to the United Development.³¹ Revenue from the United Development would contribute to the recovery of MERC's investment in the newly installed facilities and existing facilities, thereby reducing the costs allocated to existing customers by over \$1 million over the life of the assets.³² This projected revenue does not include the growth that could occur adjacent or ancillary to the United Development that may be served by MERC, nor does it include the revenue that would be lost if Xcel is allowed to continue to extend its system to customers currently on MERC's system.³³

³⁰ *Id.* at ¶ 27.

³¹ *Id.* at ¶¶ 27-28.

³² *Id.* at ¶ 29.

³³ *Id.*

IV. COMPLAINT

A. The Commission Should Suspend Xcel's Unlawful Use of Promotional Incentives Pending Completion of its Investigation.

MERC appreciates that the Commission has opened an investigation to address concerns regarding competition among natural gas utilities, but immediate Commission action is required to put a stop to Xcel's use of and reliance on its unlawful Competitive Agreement to sign up customers in areas already served by other natural gas public utilities. In accordance with Minnesota law, a natural gas public utility may use a promotional incentive like Xcel's Competitive Agreement only in the face of "effective competition" from an unregulated supplier. Unless the Commission suspends the Xcel Competitive Agreement, the only way to address the un-level playing field created by Xcel's unlawful discounting of rates in competition with other natural gas public utilities during the pendency of the generic proceeding would be to file complaints such as this one. Otherwise, by the time the generic investigation is completed, it will be difficult, if not impossible, for the Commission to unwind the damage caused to MERC's customers. Xcel's duplicative distribution facilities will already be in the ground and requiring Xcel to terminate service will create additional customer confusion and frustration. Thus, MERC and its customers will have suffered irreparable harm.

For these reasons, MERC requests that the Commission immediately suspend Xcel's unlawful use of a promotional incentive to compete with other natural gas public utilities, pending completion of the generic investigation. A suspension will place all natural gas public utilities on a level competitive playing field while the Commission completes its investigation. A suspension is also warranted here because such incentives violate Minnesota law.

1. A natural gas public utility may not discount rates in competition with another natural gas public utility.

Minnesota law prohibits a natural gas public utility from providing discounts from its tariffed rates to new customers in competition with another natural gas public utility. Minn. Stat. § 216B.163 sets forth the narrow circumstances under which a utility may provide discounted rates to customers in the face of “effective competition.” It provides that, “[n]otwithstanding section 216B.03, 216B.05, 216B.06, 216B.07, or 216B.16, the commission may approve a flexible tariff for any class of customers of a gas utility when provision of service, including the sale or transportation of gas, to any customers within the class is *subject to effective competition.*” (emphasis added). Subdivision 1 defines “effective competition” as:

a customer of a gas utility who either receives interruptible service or whose daily requirement exceeds 50,000 cubic feet maintains or plans on acquiring the capability to switch to the same, equivalent or substitutable energy supplies or service, except indigenous biomass energy supplies composed of wood products, grain, biowaste, and cellulosic materials, at comparable prices *from a supplier not regulated by the commission.* [emphasis added.]³⁴

In addition to specifically prohibiting one gas utility from flexing rates to compete with another *regulated* gas utility, the statute establishes a narrowly defined exception to the requirements set forth in Minn. Stat. §§ 216B.03, 216B.05, 216B.06, 216B.07, or 216B.16, which require that all rates be on file with the Commission, that utilities comply with the Filed Rate doctrine³⁵ and that utility rates be just, reasonable and non-discriminatory.

³⁴ This definition is consistent with the flexible rate statute for electric service. See Minn. Stat. § 216B.162, subd. 1(b)(2) (defining “effective competition” as “a market situation in which an electric utility serves a customer that: (1) is located within the electric utility’s assigned service area . . . ; and (2) has the ability to obtain its energy from an energy supplier *that is not regulated by the commission* under section 216B.16”) (emphasis added).

³⁵ The filed rate doctrine “forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate . . . regulatory authority.” *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981). See also Minn. Stat. § 216B.05, subd. 1 (“Every public utility shall file with the commission schedules showing all rates, tolls, tariffs, and charges which it has established and which are in force at the time for any service performed by it within the state”).

Under the well-established maxim of statutory interpretation, “exclusion of one is the exclusion of another”³⁶ by enacting Minn. Stat. § 216B.163, the Legislature carefully defined the circumstances under which a utility may flex or discount its tariffed rates “notwithstanding section 216B.03, 216B.05, 216B.06, 216B.07, or 216B.16” – thereby excluding all other exceptions. As Minn. Stat. § 645.19 instructs, “exceptions expressed in a law shall be construed to exclude all others.” Thus, under Minn. Stat. § 216B.163, no gas utility—whether Xcel, MERC or any other gas utility—can flex or discount a lawfully tariffed rate to compete with another *regulated* utility. Unlike Minn. Stat. § 216B.163’s specific exception from the requirements of Minn. Stat. §§ 216B.03, 216B.05, 216B.06, 216B.07, and 216B.16 requiring that all rates be on file with the Commission and that such rates are just, reasonable and non-discriminatory, there are no lawful exceptions from these statutory requirements applicable here. Each of these statutes prohibits Xcel’s discounted rates in its Competitive Agreements, which have neither been reviewed by the Commission nor which are available to other customers.

2. A natural gas public utility may not discriminate among similarly situated customers.

Minnesota law enshrines, through numerous statutes, the fundamental concept that utility rates must be non-discriminatory. For example, Minn. Stat. § 216B.03 requires that “[r]ates shall not be *unreasonably preferential*, unreasonably prejudicial, or discriminatory, but shall be sufficient, equitable, and consistent in application to a class of consumers.” (emphasis added). Minn. Stat. § 216B.05, subd. 1, provides that “[e]very public utility shall *file with the commission* schedules showing all rates, tolls, tariffs, and charges which it has established and *which are in force at the time for any service* performed by it within the state. . . .” (emphasis added). Minn. Stat. § 216B.06, specifically prohibits a utility from providing, and a customer

³⁶ This translates to “the inclusion of one is the exclusion of another.”

from accepting, a rate less than what is set forth in the utility's tariff.³⁷

Finally, Minn. Stat. § 216B.07 provides that no utility “shall, as to rates or service, make or grant any *unreasonable preference or advantage* to any person or subject any person to any unreasonable prejudice or disadvantage.” Through the Competitive Agreement, Xcel discounts its tariff rates for a new customer simply to take them away from another natural gas public utility. The discount is not available to other customers. Xcel's offering of a discount to United in order to take United away from MERC constitutes an unlawful preference under Minnesota law.

3. Xcel's discounted rates under its Competitive Agreement are arbitrary and contrary to Minnesota law.

Even if a natural gas public utility could offer discounts from its tariffed rates in competition with another natural gas public utility, the Commission is statutorily bound to ensure that the discounted rates are just, reasonable, and non-discriminatory. Xcel's Competitive Agreement is unlawful precisely because it allows Xcel to provide any discount it chooses, regardless of the impact to competition or competitors (and their customers).

By analogy, Minn. Stat. § 216B.163 directs the Commission to establish a minimum and maximum rate charged under a flexible rate tariff.³⁸ “Flexible tariff” is defined as “a rate schedule under which a gas utility may set or change the price for its service to an individual customer or group of customers *without prior approval of the commission within a range of*

³⁷ Minn. Stat. § 216B.06 provides that “[n]o public utility shall directly or indirectly, by any device whatsoever, or in any manner, charge, demand, collect, or receive from any person a *greater or less compensation for any service rendered or to be rendered by the utility than that prescribed in the schedules of rates of the public utility* applicable thereto when filed in the manner provided in Laws 1974, chapter 429, *nor shall any person knowingly receive or accept any service from a public utility for a compensation greater or less than that prescribed in the schedules*, provided that all rates being charged and collected by a public utility upon January 1, 1975, may be continued until schedules are filed.” (emphasis added).

³⁸ Minn. Stat. § 216B.163, subd. 4 provides that “[w]henver the commission authorizes a flexible tariff, it shall set the terms, and conditions of service for that tariff, including: (1) the minimum rate for the tariff, which must recover at least the incremental cost of providing the service; (2) the maximum rate for the tariff . . .”

plees determined by the commission to be just and reasonable.”³⁹ These protections are also applicable in the electric context where the Commission is also statutorily bound to ensure prior review and approval of special contracts, which are defined as a Commission-approved “contract for electric service entered into between a public utility and one of its customers, in which the public utility and the customer agree to customer-specific rates, terms, or service conditions not already contained in the approved schedules, tariffs, or rules of the utility.”⁴⁰

With the Xcel Competitive Agreement, the Commission never has any opportunity to review the rate discounts provided until after an agreement is executed and filed. Xcel need not provide any basis for the discounts or analysis of impacts on competition and competitors. In short, Xcel can do whatever it deems necessary to take a customer away from another natural gas public utility. A more arbitrary and discriminatory approach to rate making can hardly be imagined.

Indeed, consider the situation if all Minnesota natural gas public utilities had the unfettered ability to discount their rates in competition with other natural gas public utilities. It would be a race to the bottom, with each utility offering lower and lower rates to new and attractive customers. Meanwhile, the utilities’ other customers continue to pay tariffed rates simply because they have the misfortune of not being the subject of a bidding war between utilities. The Commission should not countenance, much less endorse, such an arbitrary “system” of establishing rates for *public utility* service.

³⁹ Minn. Stat. § 216B.163, subd. 1(c). (emphasis added). Consistently, Xcel’s flexible rate tariff specifically provides that “the agreed upon distribution and customer charges must be within the Rate ranges stated above.” See Xcel Negotiated Transportation Service Rate set forth in its Minnesota Gas Rate Book at Section 5, 1st Revised Sheet No. 23.

⁴⁰ See Minn. Stat. § 216B.05, Subd. 2a, which provides that a “contract for electric service entered into between a public utility and one of its customers, in which the public utility and the customer agree to customer-specific rates, terms, or service conditions not already contained in the approved schedules, tariffs, or rules of the utility, must *be filed for approval by the commission* pursuant to the commission’s rules of practice. . . .” (emphasis added).

4. The use of discounted rates is contrary to the Commission-approved Customer Extension Models.

Following the Commission's March 31, 1995 order in *The Inquiry into Competition between Gas Utilities in Minnesota*, the Commission determined that (1) natural gas utilities must apply their tariffs correctly and consistently, (2) service extensions must be appropriately cost and load justified, and (3) wasteful additions to plant and facilities will not be allowed in rate base.⁴¹ One outgrowth of the Commission's Order is that each natural gas utility has developed a Customer Extension Model set forth in their respective tariff, which prescribes how main and service extension are provided and priced.⁴² The use of Competitive Agreement by Xcel thwarts the Commission-approved extension policies through arbitrary discounts that run counter the intent of Commission-approved Customer Extension Models.

For all of these reasons, the Commission should suspend Xcel's ability to continue to offer a non-tariffed, non-public rate to attract new customers in areas already served by another gas distribution utility regulated by the Commission until it has had the opportunity to more fully consider the use of promotional incentives in the generic docket. Absent such interim relief, MERC and its customers will be irreparably harmed.

B. The Commission Must Intervene to Prevent Unnecessary Duplication of Facilities Which Increases MERC's Cost of Service to its Customers.

The Commission addresses disputes between utilities arising out of duplication of facilities under Minn. Stat. § 216B.01 on a "case-by-case basis."⁴³ Minn. Stat. § 216B.01 provides:

⁴¹ *The Inquiry Into Competition between Gas Utilities in Minnesota*, Docket No. G-999/CI-90-563 at p. 7 (Mar. 31, 1995) ("1995 Competition Order").

⁴² See, for example, *MERC Tariff Sheet 9.02 et seq.* and *Xcel Tariff Sheet Section 6, sheets 17, 17.1, 17.2.*

⁴³ July 12 Order at p. 5.

It is hereby declared to be in the public interest that public utilities be regulated as hereinafter provided in order to provide the retail customers 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 the 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.]

Although the Commission declined to grant relief in response to MERC's Vikings Complaint, Commission intervention is warranted here based on the unique facts of this case. By further encroaching upon MERC's areas of historic operation, its facilities and its customers and unnecessarily duplicating MERC's existing facilities to the detriment of MERC's customers, Xcel is in clear violation of Minnesota statutes and Commission policy governing competition among natural gas utilities.

As recognized by the Commission, competition between natural gas utilities has its disadvantages, including the potential for "wasteful duplication of service and higher per customer costs[,]" as well as the potential for utilities "to 'waive' certain tariffed charges for new customers to the detriment of their current customers."⁴⁴ Competition can also be advantageous, however, because "providing access to natural gas for a greater number of people and, hence, reducing these customers' heating costs may, on balance, outweigh the concern that the competition may result in provision of service somewhat above the lowest possible cost."⁴⁵ Ultimately, to determine whether intervention is warranted, the Commission stated in its July 12 Order that it will evaluate "disputes on a case-by-case basis, balancing the interests of the

⁴⁴ 1995 Competition Order at p. 3.

⁴⁵ *Id.*

utilities, competed-for customers, and current customers.”⁴⁶ Here, a balancing of the interests warrants intervention in favor of MERC.

As discussed below, Xcel’s planned duplication of MERC’s existing facilities in order to serve the United Development offers none of the above-recognized benefits of competition. MERC is currently providing natural gas to the customer, so competition will not cause a new customer to receive natural gas when it otherwise would not have. In contrast, Xcel’s proposed extension will result in significant duplication of facilities and will severely impact MERC and its existing customers. As shown below, the negative consequences associated with Xcel’s extension are more pronounced than in the Vikings Complaint proceeding. Accordingly, after weighing the competing interests of MERC, Xcel, existing customers, and the new customer, the Commission should intervene and prohibit Xcel from providing natural gas service to the United Development.

1. Xcel’s service to United will result in an unnecessary duplication of facilities.

As explained in greater detail in the attached Lee Affidavit, Xcel’s extension of natural gas service to the United Development will cause unnecessary duplication of natural gas facilities. On October 18, 2017, MERC and United executed a Distribution Facilities Installation Agreement pursuant to which MERC agreed to install the facilities necessary to provide natural gas service to the United Development. United began taking service from MERC on October 25, 2017.⁴⁷

In providing service to United, MERC applied its Commission-approved Customer

⁴⁶ July 12 Order at p. 5.

⁴⁷ Lee Affidavit at ¶ 19.

Extension Model⁴⁸ to determine if United would be required to make a CIAC to contribute to the costs of extending service to the United Development. Because MERC had sufficient, nearby existing gas distribution facilities in place to serve the United Development, the total infrastructure costs to extend and install its facilities to United totaled approximately \$40,000, including the installation of the meter set and approximately 500 feet of main.⁴⁹ United was not required to provide a CIAC under MERC's extension Tariff.

In contrast, Xcel does not have facilities located in the immediate vicinity. Instead, to serve the United Development, Xcel intends to run a pipeline from the Vikings Development to the United Development, utilizing the public right-of-way along Ames Crossing Road. This new line would run parallel to MERC pipe already installed in the right-of-way.⁵⁰ Because of MERC's existing facilities in the Ames Crossing Road right-of-way, the City of Eagan denied a permit to Xcel to site another pipeline in the same right-of-way.

In denying the permit, the City cited "public safety concern due to what would be a non-standard practice for there to be two gas mains installed within the same public right-of-way."⁵¹ According to the City, "there is no apparent need for Xcel Energy to install this segment of gas line for system operation purposes as it would be a dead end line, solely for the purpose of providing service to Prime Therapeutics."⁵² The City further concluded that MERC "currently has a natural gas distribution line on the west side of Ames Crossing Road from O'Neill Road to

⁴⁸ See generally, *In the Matter of a Petition by Minnesota Energy Resources Corporation for Approval to Modify Its Main and Service Extension Model and Amend Its Extension Tariffs*, Order Approving Customer Extension Model, Docket No. G011/M-15-165 (July 13, 2015).

⁴⁹ Lee Affidavit at ¶ 21.

⁵⁰ *Id.* at ¶ 12 & Ex. B.

⁵¹ The City's September 22, 2017 denial of Xcel's permit is attached as Exhibit C to the Lee Affidavit.

⁵² *Id.*

Lone Oak Road that is sufficient to supply natural gas to the Prime Therapeutics site, just as it presently serves MISO and the other properties adjacent to 2900 Ames Crossing Road.”⁵³ This is further evidence that Xcel’s planned service to United constitutes an unnecessary duplication of facilities that the City is rightfully trying to prevent.

Even if the City ultimately grants Xcel the necessary permit to utilize the public right-of-way, MERC anticipates that Xcel’s cost to construct the necessary pipeline would be approximately \$175,000.⁵⁴

If the City upholds its denial of the permit, MERC understands that Xcel may approach the United Development from its pipeline to the east, located along Argenta Trail. However, doing so would require Xcel to obtain private easements and directionally bore under wetlands located in between Xcel’s existing line and the United Development likely at an expense in excess of \$175,000, perhaps as much as \$350,000 or more.⁵⁵ This is because Xcel would need to acquire a private easement and because the route traverses environmentally sensitive areas that would require additional environmental reviews and specialized installation procedures.⁵⁶ Both of these costs greatly exceed the \$40,000 expended by MERC to provide service to United.

Furthermore, MERC’s infrastructure is sufficiently sized to accommodate the required increase in capacity to serve the United Development. The Eagan TBS has available capacity to serve the incremental load MERC projects for the United Development. MERC would not incur any additional cost to secure this additional capacity because it can reallocate a portion of its Rochester capacity to the Eagan TBS on a secondary basis under MERC’s Purchase Agreement

⁵³ The “Director’s Reasons for Denial” of Xcel’s permit is attached as Exhibit D to the Lee Affidavit.

⁵⁴ Lee Affidavit at ¶ 22.

⁵⁵ *Id.* at ¶ 23.

⁵⁶ *Id.*.

with Northern Natural Gas, which the Commission approved on May 5, 2017, in Docket No. G011/M-15-895.

Finally, Xcel's conduct cannot be considered in a vacuum. Previously, MERC warned that if Xcel were allowed to serve the proposed Vikings complex, its footprint in the area would continue to grow as it encroached further into MERC's territory, resulting in more unnecessary duplication of facilities. That prediction has materialized, and MERC expects Xcel will continue this conduct – which, if allowed to continue unchecked, will cause more existing MERC assets to be underutilized in the future, and will cause the cost of those underutilized assets to be borne by remaining MERC customers.

2. Economic Impact to MERC and its Customers

MERC and its customers will incur significant costs if Xcel is allowed to serve the United Development by duplicating MERC's facilities. As set forth in the Lee Affidavit, MERC has quantified both the direct and indirect, or lost opportunity, costs of allowing Xcel to duplicate its facilities. MERC has also quantified the economic impact on MERC and its customers if Xcel is permitted to serve the United Development by duplicating MERC's existing gas infrastructure. With respect to direct costs, MERC has incurred approximately \$40,000 associated with providing service to United. These costs included the costs of the main and service lines and meter set which were installed specifically to serve United and would be stranded if Xcel subsequently provides service to United and MERC is required to abandon or remove such facilities.⁵⁷ Under MERC's standard extension practices, these stranded costs would be borne by MERC's other customers and the United Development would have no further obligation to pay for them.

⁵⁷ Lee Affidavit at ¶ 27.

As a regulated utility, MERC is obligated to “furnish safe, adequate, efficient, and reasonable service” to its customers.⁵⁸ When customers leave the system, the fixed costs associated with the existing infrastructure necessary to provide such service are borne by the remaining customers. This is a result of the statutes governing the ratemaking process. In particular, the Commission is authorized to set rates, based in part, on “the need of the public utility for revenue sufficient to enable it to meet the cost of furnishing the service, including adequate provision for the depreciation of its utility property used and useful in rendering service to the public, and to earn a fair and reasonable return upon the investment in such property.”⁵⁹ Thus, MERC is authorized to recover prudently incurred costs of providing service to its existing customers—even though the composition of such customers and/or usage changes over time.

With respect to indirect or lost opportunity costs, MERC has projected the United Development to add an incremental load of 19,520 CFH, which is nearly half the load anticipated for the Vikings training facilities. This equals approximately .6 percent of MERC’s existing annual load served within the City. Further, MERC anticipates that it would receive over \$30,000 in revenues annually, or over \$1 million over the life of the asset, from service to the United Development. This projected revenue does not include any growth that would occur ancillary to the United Development, nor does it include the revenue that would be lost if the Commission continues to allow Xcel to extend its system to customers currently on MERC’s system. Again, MERC incurred little cost in connecting the United Development to its existing adjacent system.⁶⁰

In contrast, because Xcel does not have existing infrastructure in place, there would be no

⁵⁸ Minn. Stat. § 216B.04.

⁵⁹ Minn. Stat. § 216B.16, Subd. 6

⁶⁰ Lee Affidavit at ¶ 21.

impact to Xcel's customers if it is not allowed to serve the United Development, because there would be no stranded assets. Indeed, it would be inappropriate to characterize loss of revenues to Xcel as a harm that must be weighed against the harm to MERC, because the Commission would be attributing benefits to Xcel that it is not entitled to receive under Minn. Stat. § 216B.01. Because a utility always benefits from additional customers, the adoption of a balancing test without an evaluation of whether the infrastructure costs are duplicative would never result in a situation warranting Commission intervention.

3. Disruption of the City of Eagan's permitting process

Notably, Xcel has also put into question the City of Eagan's ability to control its own rights-of-way for public safety and convenience. As noted above, Xcel has appealed the City's permit denial and on October 17, 2017, the City referred the appeal to an independent hearing officer. A hearing was held before an independent hearing officer on October 31, 2017. At the hearing, an Xcel representative testified that the company planned to include the proposed gas line in a looping connection to other Xcel lines, but did not provide any information concerning this plan.⁶¹ To "alleviate the potential for expensive, distracting, and protracted litigation,"⁶² the hearing officer recommended that the City Council table Xcel's appeal to (1) allow Xcel to submit information to the Public Works Director regarding its looping plan; (2) allow the Public Works Director to prepare an estimate for the reasonably anticipated use of the Ames Crossing Road right-of-way for other utilities due to increased development in the surrounding areas; and (3) allow the Public Works Director to re-evaluate the denial of the Right-of-Way Permit based

⁶¹ See the Hearing Officer's Report and Recommendation at p. 3, which is appended to the Lee Affidavit as Exhibit E.

⁶² *Id.* at p. 7.

upon this additional information.⁶³ The City Council adopted the hearing officer's recommendation on November 6, 2017, and tabled the appeal until the Council's meeting on December 5, 2017.⁶⁴

As is apparent, the use of promotional incentives by Xcel has led to additional legal burdens upon the City of Eagan, which was forced to step in and prevent unnecessary duplication of facilities and maintain safety in its rights-of-way – a role the Commission indicated was appropriate in its deliberations on the Vikings Complaint.⁶⁵ At that time, no party considered that Xcel would also challenge a City's exercise of its rights to police its rights-of-way.

C. A Contested Case is Warranted

Minn. Stat. § 216B.17 allows for a contested case process for formal complaints. Specifically, “[i]f 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 . . . the commission shall order that a contested case proceeding be conducted under [the Minnesota Administrative Procedure Act].”⁶⁶ MERC believes that balancing competing interests requires the development of a robust record to inform any Commission decision in this case. Accordingly, MERC requests that the Commission refer this Complaint to the OAH for a contested case hearing to address disputed issues of fact. Such disputed issues of fact include, but are not limited, to the following issues:

⁶³ *Id.*

⁶⁴ Lee Affidavit at ¶ 16.

⁶⁵ *In the Matter of the Formal Complaint and Petition for Relief by Minnesota Energy Resources Corporation against North States Power Company/ d/b/a Xcel Energy for Violations of Stat. § 216B.01 and Commission Policy* Docket No. G-011, G-002/C-17-305, June 8, 2017, Transcript at 117-24.

⁶⁶ *See also* Minn. R. 7829.1000 (providing that “if the commission finds that all significant issues have not been resolved to its satisfaction, the commission shall refer the matter to the Office of Administrative Hearings for contested case proceedings”).

- (1). Whether Xcel's proposed service to the United Development would constitute an "unnecessary duplication" of MERC's existing facilities?
 - (a). What infrastructure would Xcel need to construct to provide service to the United Development?
 - (b). What MERC infrastructure is already in place to provide service to the United Development?
 - (c). What is MERC's cost to serve United? Is a CIAC required?
 - (c). What is Xcel's cost to serve United? Is a CIAC required? Is Xcel applying its extension tariff correctly?
 - (d). The weight the Commission should give to the fact that the City of Eagan administratively denied Xcel a permit needed to serve the United Development on the basis that:
 - (i) MERC "currently has a natural gas distribution line on the west side of Ames Crossing Road from O'Neill Road to Lone Oak Road that is sufficient to supply natural gas to the Prime Therapeutics site, just as it presently serves MISO and the other properties adjacent to 2900 Ames Crossing Road."
 - (ii) "There is no apparent need for Xcel Energy to install this segment of gas line for system operation purposes as it would be a dead end line, solely for the purpose of providing service to Prime Therapeutics."
- (2). Whether Xcel's "unnecessary duplication" of MERC's existing facilities to serve the United Development would increase the cost of service to consumers?
 - (a). What is the harm to MERC and its customers if Xcel is permitted to serve the United Development?
 - (b). How do you properly value or balance the benefit and harm to respective customers?
- (3). Whether the incentives agreed to by Xcel in the "Natural Gas Competitive Agreement" with United are lawful and non-discriminatory?
 - (a). How was the incentive amount determined?
 - (b). Does Xcel have an internal written policy that it follows in determining the nature or amount of incentives? Did Xcel follow its policy?

- (c). Are the incentives Xcel is providing to United available to all similarly situated customers?
- (d). What is the basis for Xcel's conclusion in Exhibit B to the Natural Gas Competitive Agreement that the value of the incentives Xcel is providing to United "may exceed \$67,500?"
- (e). Because Exhibit B to the Natural Gas Competitive Agreement is not included in Xcel's tariff, does it constitute a lawful tariffed rate?

As is apparent, a contested case hearing is necessary to fully develop the record in this proceeding based on the facts presented by this case.

Moreover, as evidenced by the Vikings Complaint proceedings, much of the record was developed after the Complaint was filed through MERC issuing discovery to Xcel. This effort was truncated, however, due to the expedited nature of the proceeding. Ultimately, the lack of a contested case resulted in the Commission being compelled to rely on incomplete information on economic impacts. This was acknowledged by the Department of Commerce, which in its Reply Comments in that proceeding⁶⁷ made multiple statements regarding the qualified nature of its economic analysis, including the following: (1) "The Department reviewed these estimated savings to the extent practicable given the timing of this proceeding;"⁶⁸ (2) "As for the EDA Conservation Rebate amount, the Department did not have adequate time to verify the claimed dollar value;"⁶⁹ and (3) "Time constraints associated with these Reply Comments kept the Department from attempting to reconcile those assumptions and to develop a consistent revenue estimate. This is an exercise the Department or Commission staff could complete if the

⁶⁷ See Public Reply Comments of the Minnesota Department of Commerce, Docket No. G-011, G-002/C-17-305 (May 16, 2017).

⁶⁸ *Id.* at 7.

⁶⁹ *Id.*

Commission believes it would be helpful.”⁷⁰ Accordingly, MERC believes that the allegations included in this Complaint and supporting affidavit warrant a contested case hearing to ensure that a full record is developed.

**V.
REQUEST FOR RELIEF**

Accordingly, for the reasons set forth above, MERC respectfully requests that the Commission: (1) immediately suspend Xcel’s unlawful use of its Competitive Agreement pending completion of the generic docket, where the Commission will consider the propriety of promotional incentives; and (2) refer this Complaint to OAH for a contested case hearing to address disputed issues of fact and to fully develop the record.

MERC reserves the right to timely modify or expand its request for relief herein (*i.e.*, through an amended complaint) as supported by, *inter alia*, additional relevant information that becomes known to MERC after the filing of this Complaint with the Commission.

Respectfully Submitted,

Dated: November 9, 2017

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⁷⁰ *Id.* at 9.

**STATE OF MINNESOTA
BEFORE THE
PUBLIC UTILITIES COMMISSION**

<i>Formal Complaint and Petition for Relief by Minnesota Energy Resources Corporation Against Northern States Power Company d/b/a Xcel Energy</i>)	MPUC Docket No. _____
)	
)	
	)	COMPLAINT, REQUEST FOR
	)	SUSPENSION OF NATURAL GAS
	)	COMPETITIVE AGREEMENTS AND
	)	REQUEST FOR A CONTESTED CASE
	)	HEARING OF MINNESOTA ENERGY
	)	RESOURCES CORPORATION
)	

**AFFIDAVIT OF
AMBER LEE**

-
1. My name is Amber Lee. I am the Regulatory and Legislative Affairs Manager of Minnesota Energy Resources Corporation. My business address is 2665 245th Street West, Rosemount, Minnesota 55068.

 2. I submit this affidavit in support of MERC’s November 9, 2017 Complaint against Northern States Power Company d/b/a Xcel Energy (“Xcel”). In particular, my affidavit (1) provides background information related to MERC’s provision of natural gas service in Eagan, Minnesota; (2) explains why MERC is uniquely situated to continue to provide gas service to United Properties’ “Boulder Lakes” Development (“United Development”) based on MERC’s existing infrastructure in the area; and (3) quantifies, to the extent possible, the potential economic impact on MERC and its customers if Xcel is allowed to displace MERC as the gas provider to the United Development.

 3. My affidavit includes several exhibits that were prepared by me or under my supervision or which are otherwise publicly available.

MERC

4. MERC is a public utility subsidiary of WEC Energy Group, Inc., a utility holding company headquartered in Milwaukee, Wisconsin. MERC is organized under the laws of the State of Delaware and is authorized to do business in Minnesota, with its principal office located in Eagan, Minnesota. MERC serves natural gas to approximately 230,000 customers in 184 communities in Minnesota.

SERVICE TO CITY OF EAGAN AND THE UNITED DEVELOPMENT

5. MERC and its predecessors have provided natural gas service to customers in the City of Eagan since the 1950s, and MERC currently serves approximately 23,000 customers within the City.
6. The United Development consists of a 30-acre site being developed for Prime Therapeutics, which intends to consolidate its information technology and operations teams into a 400,000 square foot facility at 2900 Ames Crossing Rad in Eagan, Minnesota. The campus will consist of two large office buildings, joined by a centralized, connecting hub and will initially house approximately 2,000 employees, with flexible space to accommodate future growth.¹
7. During July and August 2017, MERC representatives engaged in discussions with United regarding MERC's ability to serve Prime's natural gas needs. In these discussions, United and MERC never discussed whether other utilities had facilities proximate to the area and MERC assured Prime that because MERC had facilities along the United Development perimeter, MERC could initiate service to United within a few days of a turn-on request.

¹ See *Prime Therapeutics*, United Properties, <https://www.uproperties.com/properties/prime-therapeutics/> (last visited November 9, 2017).

8. Until United informed MERC that it had signed a Competitive Agreement with Xcel, MERC was unaware that Xcel had engaged United and offered monetary incentives if United agreed to take natural gas service from Xcel.
9. On August 15, 2017, Xcel entered into a Natural Gas Competitive Agreement (“Competitive Agreement”) to provide natural gas service to the United Development. Through the Agreement, Xcel offered a \$25,000 promotional “incentive” to provide service to the United Development and, in Exhibit B to the Agreement, Xcel identified other alleged “Competitive Incentives” and savings. Exhibit B is not included in Xcel’s Tariff. The Agreement was filed in Docket No. G999/CI-17-499 on August 18, 2017. It is attached as Exhibit A.
10. To provide natural gas service to the United Development via the public right-of-way, Xcel proposes to extend service from the Vikings Development by constructing a new gas distribution pipeline to the United Development along Ames Crossing Road. Xcel’s pipeline would duplicate entirely MERC’s existing gas distribution facilities, which already occupy the right-of-way along Ames Crossing Road and are adjacent to the west side of the street from the United Development parcel.
11. It is also possible for Xcel to extend service to the United Development via private easement, although routes via private easements could be burdensome to secure and therefore could result in lengthy delays (and unknown costs) to initiate natural gas service to the United Development. Xcel’s proposed route via private easement also runs through environmentally sensitive wetland and conservation areas that will likely require additional environmental reviews and directional boring.
12. Attached as Exhibit B is a map showing the location of the United Development,

MERC's existing natural gas infrastructure in the area and the planned location of Xcel's new pipeline extension to serve the United Development. The green lines on the map show the duplicative facilities Xcel has already constructed to serve the Vikings Development. The blue lines on the map show the anticipated location of Xcel's proposed duplicative extension from the Vikings Development to the United Development along Ames Crossing Road. The purple lines show the location of MERC's existing pipeline infrastructure, including a main that runs the length of Ames Crossing Road to the United Development. The black line shows one potential route for Xcel to extend to Prime via private easement.

13. Because MERC currently has existing gas distribution facilities in the Ames Crossing Road right-of-way and serves the other customers along the road, on September 22, 2017, the City of Eagan denied a permit to Xcel to construct another pipeline in the same right-of-way. The City's September 22, 2017 denial of Xcel's permit is attached as Exhibit C.
14. After the City denied the permit, its Public Works Director provided a summary to the City entitled "Director's Reasons for Denial." This document is attached as Exhibit D.
15. Xcel appealed the City's permit denial and on October 17, 2017, the City referred the appeal to an independent hearing officer. The Hearing Officer's November 3, 2017 Report and Recommendation on Xcel's appeal is attached as Exhibit E.
16. The City Council adopted the hearing officer's recommendation on November 6, 2017, and tabled the appeal until the Council's meeting on December 5, 2017.
17. MERC submitted a letter to the City on November 8, 2017 requesting that the hearing record be corrected and further developed before the City reevaluates its permit denial. A copy of that letter is attached as Exhibit F.

18. Because Xcel was not able to provide timely service to the United Development, United reinitiated discussions with MERC and on October 2, 2017, it requested information on the length of time MERC would need to install facilities necessary to provide natural gas service to the United Development. United indicated it needed natural gas service on site beginning October 15, 2017, to maintain its construction schedule.
19. On October 18, 2017, MERC and United executed a Distribution Facilities Installation Agreement pursuant to which MERC agreed to install the facilities necessary to provide natural gas service to the United Development. United began taking service from MERC on October 25, 2017.
20. In providing service to United, MERC applied its Commission-approved Customer Extension Model to determine if United would be required to make a contribution in aid of construction (“CIAC”) to contribute to the costs of extending service to the United Development. Generally, under MERC’s Tariff a CIAC will be charged to a customer if the discounted lifetime cost of the extending service to that customer exceeds the discounted lifetime retail revenue (not including revenues from the sale of natural gas) from that customer.
21. Because MERC had sufficient, nearby existing gas distribution facilities in place to serve the United Development, the infrastructure costs to extend and install its facilities to United totaled approximately \$40,000, including the installation of the meter set and approximately 500 feet of main. United was not required to provide a CIAC under MERC’s extension Tariff.
22. In contrast, if Xcel is ultimately permitted to co-locate its facilities along Ames Crossing Road, it would need to install approximately 4,000 feet of main piping at an estimated

cost of approximately \$175,000.

23. Further, MERC understands that Xcel may also explore extending service to the United Development over private easements from its existing pipeline along Argentina Trail through land owned by Cole Properties, as shown in the map attached here as Exhibit G. However, doing so would require Xcel to directionally bore under wetlands located in between Xcel's existing line and the United Development. This would likely cost in excess of \$175,000, and perhaps as much as \$350,000 or more. This is because Xcel would need to acquire a private easement and because the route traverses environmentally sensitive areas that would require additional environmental reviews and specialized installation procedures.
24. In addition to the newly installed facilities to serve United, MERC has sufficient facilities in Eagan such that no upstream distribution or capacity upgrades are required to provide service to the United Development. For instance, the Town Border Station ("TBS") used to service the development has adequate capacity, and MERC could avoid any additional cost resulting from the necessary incremental capacity by reallocating a portion of its Rochester capacity to the TBS under a pre-existing agreement approved by the Commission.
25. Xcel also has infrastructure within the vicinity of the United Development, but with the exception of the piping installed in 2017 to serve the Vikings Development all of the existing infrastructure Xcel would use to support service to the United Development is located within the City of Inver Grove Heights, just east of the United Development.
26. With little dispute until 2017, Xcel has served the City of Inver Grove Heights and MERC has served the City of Eagan as a result of a Memorandum of Agreement between

Xcel and MERC's predecessor, Peoples Natural Gas/UtiliCorp ("Peoples"), dated October 2, 1974. Under the Agreement, Peoples acquired customers and facilities in Eagan and Xcel acquired customers and facilities in Inver Grove Heights. In a December 26, 1974 letter to the City of Eagan, Peoples stated that "this exchange of customers and facilities [reflected in the MOU] will assure a more efficient and reliable natural gas service to both of these areas with only one utility rather than two operating within the same market area." The letter and Agreement is attached as Exhibit H.

27. MERC has also quantified the economic impact on MERC and its customers if Xcel is permitted to serve the United Development by duplicating MERC's existing gas infrastructure. MERC examined both direct and indirect or lost opportunity costs to determine this impact. With respect to direct costs, MERC has incurred approximately \$40,000 associated with providing service to United. These costs included the costs of the main and service lines and meter set which were installed specifically to serve United and would be stranded if Xcel subsequently provides service to United and MERC is required to abandon or remove such facilities. Under MERC's standard extension practices, these stranded costs would be borne by MERC's other customers and the United Development would have no further obligation to pay for them.
28. With respect to indirect or lost opportunity costs, MERC evaluated the anticipated demand of the planned United Development based upon the stated load in the Competitive Agreement of 19,520 cubic feet per hour ("CFH") of natural gas. Absent Xcel's duplication of its facilities, MERC would receive over \$30,000 in revenue annually from service to the United Development.
29. Revenue from the United Development would contribute to the recovery of MERC's

investment in the newly installed facilities and existing facilities, thereby reducing the costs allocated to existing customers by over \$1 million over the life of the assets. This projected revenue does not include the growth that could occur adjacent or ancillary to the United Development that may be served by MERC, nor does it include the revenue that would be lost if Xcel is allowed to continue to extend its system to customers currently on MERC's system.

This concludes my affidavit.

**STATE OF MINNESOTA
BEFORE THE
MINNESOTA PUBLIC UTILITIES COMMISSION**

*Formal Complaint and Petition for
Relief by Minnesota Energy
Resources Corporation Against
Northern States Power Company
d/b/a Xcel Energy*

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MPUC Docket No. _____

**COMPLAINT, REQUEST FOR SUSPENSION
OF NATURAL GAS COMPETITIVE
AGREEMENTS AND REQUEST FOR A
CONTESTED CASE HEARING OF
MINNESOTA ENERGY RESOURCES
CORPORATION**

Exhibit A

Natural Gas Competitive Agreement



NATURAL GAS COMPETITIVE AGREEMENT

This Natural Gas Competitive Agreement made this 15th day of August 2017 between Northern States Power Company, a Minnesota corporation ("Xcel Energy"), 414 Nicollet Mall, Minneapolis, Minnesota 55401, and its successors, and United Properties a Minnesota Company (the "Owner/Developer") (collectively, the "Parties"). This agreement is only valid if signed within 90 days from the date above.

The Owner/Developer owns and is developing property located in Eagan, in the County of Dakota, State of MN, and desires to have Xcel Energy install natural gas main and services to serve the property (the "Project") which is described more specifically on the map or plat attached hereto as Attachment A, and incorporated herein by reference. Xcel Energy is a natural gas public utility and desires to provide service to this property. Therefore, the Parties agree as follows:

1. Xcel Energy agrees to install natural gas main and services to serve the Project. The Owner/Developer represents and warrants to Xcel Energy that it is the owner, or authorized agent of the same, of the property utilized for the Project. Therefore, in consideration of Xcel Energy's agreement to design and install the natural gas service for the Project, the Owner/Developer grants Xcel Energy the exclusive right to transport natural gas to all residential, commercial and industrial structures of any kind within the Project. If another entity transports natural gas to any Structure within the Project, then the Owner/Developer will reimburse Xcel Energy for its costs in the design and installation of its natural gas main and services.
2. All natural gas mains and/or services installed by Xcel Energy shall be and shall remain the property of Xcel Energy, and neither the Owner/Developer nor any contractor of Owner/Developer shall acquire any right, title or interest in any gas main and/or services installed under this Agreement. The Owner/Developer will grant to Xcel Energy all easements necessary for the installation and operation of all natural gas mains and other facilities, as requested by Xcel Energy.
3. It is understood that any incentives offered to the Owner/Developer by Xcel Energy are contingent upon the number and type of customers and respective loads the Owner/Developer has represented to Xcel Energy will exist in the Project. For the Project, the Owner/Developer represents the associated customers and loads are as follows: 19520 CFH. All structures in the Project will utilize natural gas for space heating, unless specified herein: N/A Any change in the customer count or type may constitute a revised offer to the Owner/Developer from Xcel Energy.
4. The Owner/Developer warrants that it has full right, power and authority, and has received all required approvals to enter into this Agreement, to construct the Project and to perform fully its obligation hereunder.
5. The Owner/Developer may not assign this Agreement. This is the complete Agreement between the Owner/Developer and Xcel Energy and it may not be changed except in writing and signed by both parties. The laws of the state where the Project is located govern the terms of this Agreement.
6. Xcel Energy agrees to maintain in good standing all government licenses, permits and other authorizations granted by any governmental agency or department which are necessary for it to fulfill its obligation hereunder. Xcel Energy will provide services in accordance with all applicable laws, ordinances, codes and regulations. Xcel Energy shall also, at its expense, maintain all natural gas mains it installs and services it provides.



7. Additional terms, if any, are included in Attachment B, which is incorporated herein by reference.

- Natural Gas Promotion Allowance** - Xcel Energy agrees to allocate \$ 25,000 towards the cost of natural gas equipment or other promotional costs associated with Boulder Lakes and approved by Xcel Energy.

(**Promotional dollars should be used for programs that would be mutually beneficial to United Properties, their partners and Xcel Energy.)

Owner/Developer

BILL JUNDT
(NAME)

United Properties
(COMPANY)
651 NICOLLET MALL #450
3600 American Blvd W
(ADDRESS)

Minneapolis, MN, 55434 55402
(CITY, STATE, ZIP CODE)

SIGNATURE: [Signature]
PRINT FULL NAME: WILLIAM JUNDT
DATE: 08-17-17

Form 17-1906

**Northern States Power Company,
a Minnesota corporation ("Xcel Energy")**

Christopher W. Conrad
Director, Large Account Management
825 Rice Street
St. Paul, Minnesota 55117

SIGNATURE: [Signature]
PRINT FULL NAME: Christopher W. Conrad
DATE: 15-Aug-17



825 Rice Street
Saint Paul, MN 55117-5485

Attachment B

Natural Gas Marketing Proposal, United Properties: Boulder Lakes

To: United Properties: Boulder Lakes
From: Xcel Energy: Torre Heiland; Gas Business Development
CC: Xcel Energy: Scott Hults, Gas Business Development; Chris Conrad, Account Management
Date: 8/15/17
Re: Proposal: United Properties – Boulder Lakes

Xcel Energy is excited to partner with the United Properties on your project to develop the Boulder Lakes office site off of Ames Crossing Road in Eagan. Xcel Energy's proposed partnership plan for the Eagan Site is listed below for your review and consideration. When creating this proposal, our goal is to provide you with information on how natural gas from Xcel Energy will be your most cost effective resource.

2017 Competitive Incentive

\$25,000 Promotional Incentive	\$12,500 Annual gas rate savings
\$ 7,500 Potential tax reduction	
<u>\$ 22,500 Conservation Rebate (estimate – EDA conservation program)</u>	
\$55,000 in 1X Incentive benefits	\$12,500 ongoing annual savings

We recognize new projects have start-up costs. Xcel Energy will provide United Properties the following:

Promotional Incentive = \$25,000, \$12,500 initial promotional incentive upon receipt of signed Competitive Agreement for Xcel Energy to provide natural gas to the Boulder Lakes office development, and \$12,500 promotional incentive after consumption of 100,000 therms of natural gas usage from Xcel Energy in any of the development phases for Boulder Lakes office site (it's anticipated that United Properties would consume this amount of natural gas in 1 year and the 2nd incentive payment would be made as soon as this threshold was met).

**Attachment B - Natural Gas Marketing Proposal, United Properties:
Boulder Lake Eagan Site (Continued)
page 2**

Considerations and Benefits

Total anticipated value to United Properties from choosing Xcel Energy natural gas may exceed \$67,500 as follows:

- \$25,000 in promotional incentive that can be paid directly to United Properties or used for promotional signage, or events that benefit United Properties and Xcel Energy upon consumption of 100,000 therms by the Boulder Lakes office development
- \$12,500 in estimated annual rate savings with Xcel Energy natural gas vs. other natural gas distribution company options.
- Natural gas conservation rebates from Xcel Energy through Energy Design Assistance
Assuming a greater than 5% reduction in natural gas usage through EDA Bundle choices
– a rebate estimate for each bundle option is:
 - Bundle 1 - \$17,800
 - Bundle 2 - \$16,250
 - Bundle 3 - \$22,500(based on EDA report of Gas Savings for each Bundle from March 2017)
- Single monthly bill for natural gas and electric
- Account manager assigned to assist with energy management, customer service
- Joint trench gas and electric utility installation of mains & service, including waiver of one utility fee during winter joint construction conditions
- Xcel Energy logo to be incorporated with project signage as appropriate and agreed to by both parties

To accept this proposal, please refer to the enclosed Competitive Agreement. Once the agreement is signed and received, Xcel Energy will do the following:

- Issue a check to United Properties in the amount of \$12,500 or credit towards utility facilities.
- Confirm conservation rebate estimates and provide further detail on natural gas conservation programs
- Follow up on additional \$12,500 (issue a check or credit towards utility facilities) once 100,000 therms is consumed by the office development.

**STATE OF MINNESOTA
BEFORE THE
MINNESOTA PUBLIC UTILITIES COMMISSION**

*Formal Complaint and Petition for
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d/b/a Xcel Energy*

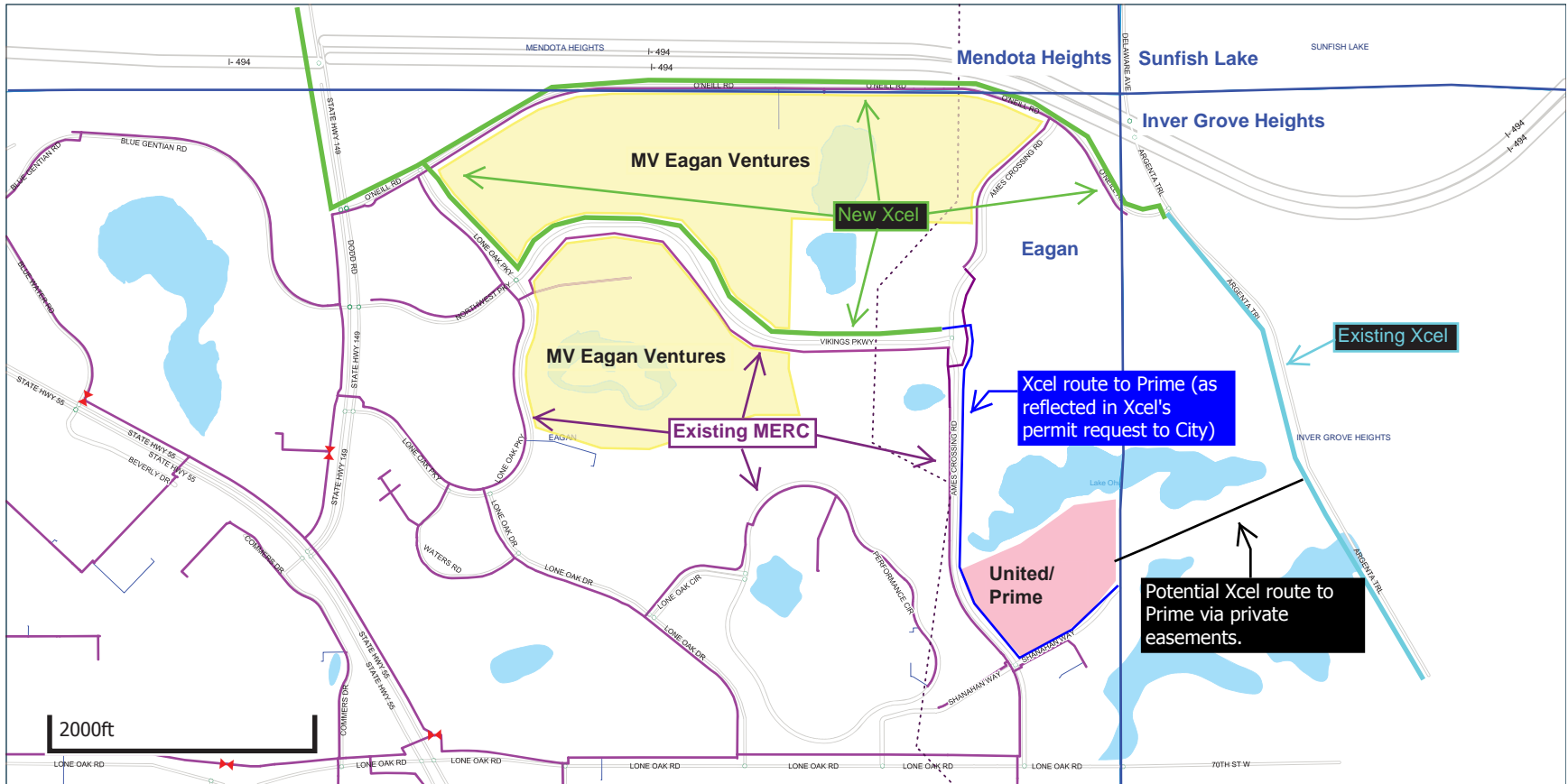
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CORPORATION**

Exhibit B

Map Showing MERC and Xcel Facilities



WARNING: Facility locations shown are for reference purposes only and must be verified. Call before you dig. Not intended to be a survey product.

**STATE OF MINNESOTA
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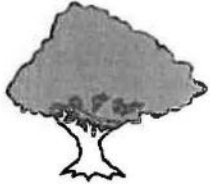
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CORPORATION**

Exhibit C

City's Denial



City of Eagan

September 22, 2017

Mike Maguire
Mayor

RE: Utility Right-of-Way Permit ID #18478, Xcel Energy

Paul Bakken
Cyndee Fields
Gary Hansen
Meg Tilley
Council Members

Dear Bill Lynaugh:

Dave Osberg
City Administrator

Xcel Energy has submitted a permit application to install a natural gas line within the east side of Ames Crossing Road for the purpose of supplying gas to Prime Therapeutics. MERC currently has a natural gas distribution line on the west side of Ames Crossing Road from O'Neill Road to Lone Oak Road that is sufficient to supply natural gas to Prime Therapeutics, just as it presently serves MISO and the other properties adjacent to the Prime Therapeutics site.

Eagan City Code § 7.06, subd. 5(C) states that "the City may deny a permit for any reasons:

* * *

7. The proposed project is adverse to the public health, safety and welfare, by interfering with the safety and convenience of ordinary travel or the public right of way, or endangers the public right-of-way and its users based on one or more of the following factors:

- (a) the extent of public right-of-way available;
- (b) the competing demands for the particular proposed area space in the public right-of-way . . .

The City has a public safety concern due to what would be a non-standard practice for there to be two gas mains installed within the same public right-of-way. The placement of two natural gas mains within the same public right-of-way is unexpected in Eagan and throughout Dakota County. Utility contractors do not expect said situation, so there is a higher likelihood that one of the two gas mains may be damaged during any subsurface activity in the area.

The public right-of-way is a limited space for the benefit of the public. Public access to such right-of-way provides for ingress and egress for the adjacent property owners, as well as the transporting of goods to and from private property. The placement of utilities within the right-of-way places a hold on a four foot wide strip (two feet on either side of the installed utility line) of the right-of-way that is unavailable for any future use by other providers for the benefit of the public. Duplicative installations of utility product lines limit the opportunity for future installations for the transporting of new or upgraded utility products. The City has numerous existing right-of-way corridors where the space for utility lines within the right-of-way is already maximized. Any future installations on such alignments will require the utility provider to acquire easements, which is both expensive for the provider and limiting for the right-of-way authority if future expansion of the right-of-way is needed.

There is no apparent need for Xcel Energy to install this segment of gas line for system operation purposes as it would be a dead end line, solely for the purpose of providing service to Prime Therapeutics.

Municipal Center
3830 Pilot Knob Road
Eagan, MN 55122-1810
651.675.5000 phone
651.675.5012 fax
651.454.8535 TDD

Maintenance Facility
3501 Coachman Point
Eagan, MN 55122
651.675.5300 phone
651.675.5360 fax
651.454.8535 TDD

www.cityofeagan.com

The Lone Oak Tree
The symbol of
strength and growth
in our community.

For the reasons stated above addressing both the protection of public safety and the current and future use of the public right-of-way, the Xcel Energy Gas right-of-way permit application on Ames Crossing Road, south of Vikings Parkway, is hereby denied. Please contact me with any questions.

Sincerely,

A handwritten signature in cursive script that reads "Russ Matthys".

Russ Matthys, P.E.
Director
Public Works Department

C: Dave Osberg, City Administrator
Bob Bauer, City Attorney
John Gorder, City Engineer
Dave Westermayer, Engineering Technician
Patrick Cline, Xcel Energy
Jake Sedlacek, Xcel Energy

**STATE OF MINNESOTA
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Exhibit D

Director's Reasons for Denial

**APPEAL OF AN ADMINISTRATIVE DENIAL OF THE APPLICATION
FOR RIGHT OF WAY PERMIT NO. 18478 BY XCEL ENERGY**

Director's Reasons for Denial

- On July 31, 2017, the City Council approved an Ordinance Amendment granting a Natural Gas Franchise to Northern States Power Co. d/b/a Xcel Energy.
- On August 23, 2017, a right-of-way permit application was submitted by Xcel Energy for the installation of a natural gas distribution line on the east side of Ames Crossing Road between Vikings Parkway and Shanahan Way. The understood desire of the permit application is for the purpose of supplying gas to 2900 Ames Crossing Road, the Prime Therapeutics site.
- Eagan City Code 7.06 Public right-of-way regulations, Subdivision 5(C) states that "the City may deny a permit for any reasons:
 7. The proposed project is adverse to the public health, safety and welfare, by interfering with the safety and convenience of ordinary travel or the public right-of-way, or endangers the public right-of-way and its users based on one or more of the following factors:
 - a. The extent of public right-of-way available;
 - b. The competing demands for the particular proposed area space in the public right-of-way..."
- On September 22, the Xcel Energy right-of-way permit application on Ames Crossing Road, south of Vikings Parkway, was administratively denied by the City for reasons addressing both the protection of public safety and the current and future use of the public right-of-way.
- Minnesota Energy Resources (MERC) currently has a natural gas distribution line on the west side of Ames Crossing Road from O'Neill Road to Lone Oak Road that is sufficient to supply natural gas to the Prime Therapeutics site, just as it presently serves MISO and the other properties adjacent to 2900 Ames Crossing Road.
- The public right-of-way is a limited space for the benefit of the public. Public access to such right-of-way provides for ingress and egress for the adjacent property owners, as well as the transporting of goods to and from private property. The placement of utilities within the right-of-way places a hold on a four foot wide strip (two feet on either side of the installed utility line) of the right-of-way that is unavailable for any future use by other providers for the benefit of the public. Duplicative installations of utility product lines limit the opportunity for future installations for the transporting of new or upgraded utility products. The City has numerous existing right-of-way corridors where the space for utility lines within the right-of-way is already maximized. Any future installations on such alignments will require the utility provider to acquire easements, which is both expensive for the provider and limiting for the right-of-way authority if future expansion of the right-of-way is needed.
- The City also has a public safety concern due to what would be a non-standard practice for there to be two gas mains installed within the same public right-of-way. The placement of two natural gas mains within the same public right-of-way is unexpected in Eagan and numerous locations throughout Dakota County. Utility contractors do not

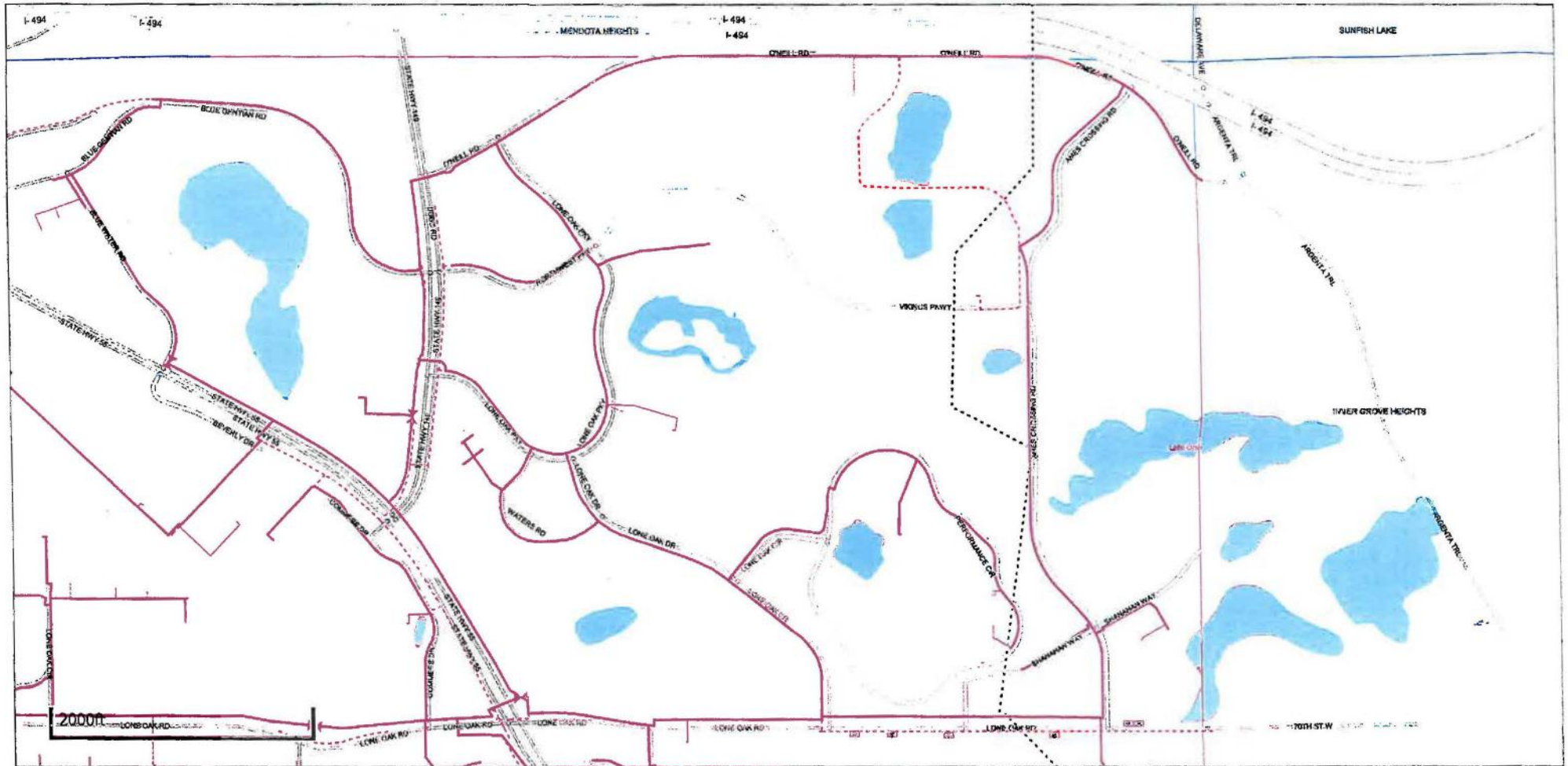
expect said situation, so there is a higher likelihood that one of the two gas mains may be damaged during any subsurface activity in the area.

- There is no apparent need for Xcel Energy to install the segment of gas line referenced in the permit application for system operation purposes as it would be a dead end line. It appears the installation would be solely for the purpose of providing service to 2900 Ames Crossing Road/Prime Therapeutics.
- In accordance with the franchise agreement between the City and Xcel Energy (Gas), "For these purposes, Company (Xcel Energy) may construct, operate, repair and maintain gas facilities in, on, over, under and across the public right of ways, subject to the provisions of this ordinance and the public right-of-way regulations as applicable to utility services as set forth in the City Code. The Company (Xcel Energy) may do all reasonable things necessary or customary to accomplish these purposes, subject however, to such reasonable regulations as may be imposed by the City pursuant to ordinance or permit requirements and to the further provisions of this franchise agreement."

Director's Additional Comments to Xcel's Memorandum

- As noted above, Xcel has a franchise and it agreed to be ". . . subject to the provisions of this Ordinance and public regulations as applicable to utility services as set forth in the City Code."
- The reference in Xcel's brief to Minn. Stat. § 237.163 is not controlling—this statute deals with telecommunications, and not transmission of gas.
- The construction of two facilities in Vikings Parkway is distinguishable. First, MERC had existing lines that service the area and we approved the installation of their facility within Vikings Parkway to allow them to maintain a "looped" system. Additionally, MERC had filed a complaint against Xcel with the Minnesota Public Utilities Commission ("MPUC"). Duplication of facilities in right-of-way was discussed by the MPUC and it indicated it would generate a new docket to review and investigate the parameters of inter-gas-utility competition involving the duplication of existing facilities. See MPUC Order dated July 12, 2017.
- With regard to the right-of-way corridor and the congestion within Ames Crossing Road, it is important to note that Vikings Parkway is a 110 feet wide right-of-way and Ames Crossing Road is only an 80 feet wide right-of-way.
- The City anticipates that there will be significant requests for right-of-way use within Ames Crossing Road and the installation of a second gas line facility could place significant constraints for future right-of-way users. The City has been working cooperatively with Inver Grove Heights and Dakota County for the past 20 years on the potential development and related transportation needs in this area (NE Eagan/NW IGH) with multiple studies being completed. Studies by all three agencies recommend that a new interchange be constructed on I-494 for Argenta Trail. Such an interchange would result in significant development of the area and further development of the local transportation system. Such development would likely be more intense in nature with high demands for technology services provided by utilities by way of the public right-of-way. Lone Oak Road, based upon existing fiber optic facilities, and Ames Crossing Road would be the expected route for delivery of said services to this area.

- The extent of Ames Crossing Road included within the permit request is anticipated to have no further development or need for natural gas services other than the Prime Therapeutics site. The existing “undeveloped” parcels have been identified as future City park and County conservation easement. The significant portion of the remainder of this segment of Ames Crossing Road that is not currently developed is adjacent to a lake and wetlands. The practical extent of the requested gas line installation would serve only as a service line, not as a main or lateral. The attached map indicates existing MERC gas lines within this area.



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WARNING: Facility locations shown are for reference purposes only and must be verified. Call before you dig. Not intended to be a survey product.

**STATE OF MINNESOTA
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*Formal Complaint and Petition for
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Exhibit E

Hearing Officer Report and Recommendation

In Re: City of Eagan

Denial of Xcel Energy Right-of-Way Permit ID 18478

REPORT AND RECOMMENDATION

I. INTRODUCTION

This Report and Recommendation concerns the appeal of Xcel Energy (Xcel) from a denial by the City of Eagan (City) of Xcel's application for a right-of-way permit for Ames Crossing Road, Permit ID 18478 (Permit).

The City denied the Permit on September 22, 2017.

The City directed that a hearing on the matter be held before a Hearing Officer, who would make a Report and Recommendation to the City Council as part of its consideration of Xcel's appeal.

The hearing was held on October 31, 2017. Xcel called one witness: Nathan Chilson, Xcel Energy, Manager Distribution Reconstruction Design. The City called one witness: Russ Matthys, Director of Public Works for the City. Both witnesses testified under oath and were subject to cross-examination. A court reporter transcribed the hearing. The hearing was conducted in accordance with Rule 1400.7800 of the Minnesota Rules.

Xcel entered into evidence Exhibits 1 through 8. The City entered into evidence its Record as Exhibit 9. Exhibits 1 through 9 were received and reviewed and form the basis of this Report and Recommendation, along with the testimony at the hearing.

II. FINDINGS OF FACT

1. On July 31, 2017, the City Council approved an Ordinance Amendment granting a Natural Gas Franchise to Northern States Power Co. d/b/a Xcel Energy. Ex. 5.
2. On August 23, 2017, Xcel submitted an application for a right-of-way permit for installation of a natural gas distribution line on the east side of Ames Crossing Road between Vikings Parkway and Shanahan Way. Ex. 2.
3. Xcel's stated purpose for the Permit was to supply gas to 2900 Ames Crossing Road, for the Prime Therapeutics site. Exs. 1 and 2
4. On September 22, 2017, Russ Matthys, City Public Works Director administratively denied the Permit on the grounds of public safety, the availability of space within the right-of-way, and the current and future use of the public right-of-way. Ex. 4.
5. Minnesota Energy Resources (MERC) has a natural gas distribution line on the west side of Ames Crossing Road from O'Neil Road to Lone Oak Road, which is of sufficient capacity to serve the Prime Therapeutics site. Ex. 7.
6. Nathan Chilson is the Xcel Manager for Gas Distribution Reconstruction Design, and has worked in that position for 12 years in the Twin Cities East Metro area. He is a registered engineer in North Dakota. Mr. Chilson submitted the Xcel Permit application.

7. Russ Matthys is the Director of Public Works for the City. He is a registered engineer in Minnesota. He has worked for the City as its Engineer for 15 years and as its Director of Public Works for 5 years. He has over 27 years of experience in managing utility right-of-way. Mr. Matthys issued the denial of the Xcel application for the Permit.
8. Mr. Chilson testified that the routing of the gas line on Ames Crossing Road was proposed because other routes were more expensive due to the need to obtain private easements and presented scheduling problems in meeting the demand of Prime Therapeutics for the supply of gas. Mr. Chilson did not testify about the amount of the increased costs, the extent of the potential delay, or the feasibility of alternate routes. Mr. Chilson testified that Xcel had plans to include this gas line in a looping connection to other Xcel lines, but did not provide any information concerning the timing of the plan and admitted that such information was not included in the application or subsequent submissions, even though the City requested the proposed looping information.
9. Mr. Matthys testified that up to 19 separate utility lines could be placed in the Ames Crossing Road under current codes and practices, and that the MERC gas line, an Xcel electrical line, a telephone line, and maybe a fiber optic line were the only utility lines currently in the right-of-way.
10. Mr. Matthys testified about the future development in this part of the City that will require substantial utilities and that the Ames Crossing

Road would be the most likely route for utilities to connect to the development area. The City has provided preliminary approval for 200 acres of development, which will have substantial need for utilities, particularly fiber optic lines. The City is charged with responsibility and authority of managing its public right-of-way to insure adequate provision of utilities. Mr. Matthys concluded that the denial of the Permit would be in furtherance of the goal of providing utility service to the development area.

III. LEGAL CONCLUSIONS

1. Minnesota Statutes § 237.163 authorizes local governmental management of public rights-of-way, but limits such authority and requires that local governments exercise right-of-way management on a reasonable and competitively neutral basis. It specifically requires that local governments manage fees and other right-of-way obligations on a competitively neutral basis. Xcel failed to establish that this portion of Minn. Stat. § 237.163 applies to this application because it neither involves fees nor other right-of-way obligations. Even if § 237.163 does apply, Xcel failed to establish that the City failed to act in a competitively neutral basis in its denial. Minn. Stat. § 237.163.subd. 4(b) does authorize the City to deny an application for a right-of-way permit to protect the health, safety, and welfare or when necessary to protect the public right-of-way

and its current use. As stated below, the City failed to establish a factual basis to support denial on grounds of protecting public health, safety, and welfare, or its current use.

2. City Code § 7.06 is the City's Right-of-Way Ordinance and applies to excavations and obstructions with public right-of-way for public utilities. The City may deny a permit for the reasons stated in § 7.06, subd. 5(C), which includes, among other reasons, the following: (1) Protection of the public health, safety, and welfare; the extent of public right-of-way area available; and the competing demands for the particular proposed area space in the public right-of-way. The Director relied upon these grounds in § 7.06, subd. 5(C)(7)(a)(b) for denial of the Permit:

- a. The Director's stated concern for public safety in his letter of denial and Director's Reasons for Denial was not established by facts in the record as he conceded that the up to 19 lines could be placed in the Ames Crossing Road right-of-way under existing codes and practices, and that the only utilities in the right-of-way were the MERC gas line on the west side of the road, an Xcel electrical line, a telephone line, and maybe a fiber optic line. Since the Xcel gas line was proposed to be installed on the east side and would be separated by at least 44 feet from the MERC gas line, there is no factually supported threat to the public health, safety, and welfare from installation of the Xcel gas line.
- b. Regarding the applicability of § 7.06, subd. 5(C)(7)(a), the Public Works Director admitted that under current codes and standards up to 19 separate utility lines could be placed in the Ames Crossing Road right-of-way and that the only existing lines were the MERC gas line on the west side of the road, and three other utilities. Thus, there is no factual support in the record to support denial under this factor.
- c. Regarding the applicability of § 7.06, subd. 5(C)(7)(b), the Director may deny a permit if there is a reasonable basis to

conclude that competing demands for the particular proposed area space in the public right of way may be affected. The Director described his concerns on this point in Exhibits 4 and 7 and his testimony. Xcel did not present any evidence at the time of the application of any looping plan for its gas line, even though the City requested that information. Mr. Chilson testified that Xcel did intend to connect the line to the south of the Prime Therapeutics location as part of a looping plan, but did not provide any documentation or testimony as to the timing of such a plan. The Director's denial of the Permit on this ground is reasonable and established by evidence in the record and his judgment as to the competing demands for space in this right-of-way based upon his 27 years of experience as a municipal engineer and Director of Public Works. The Director did, however, testify that a looping plan by Xcel might change his opinion and decision on this factor.

3. Minnesota Statutes § 15.99 requires that certain government agencies must act on a written request relating to zoning within 60 days of the request, or it is deemed approved. Section 15.99 does not apply to this appeal as Xcel failed to establish that its right-of-way application related to zoning. Xcel's counsel acknowledged that they are unaware of any court decision supporting such its position.

IV. RECOMMENDATION

Based upon the foregoing, it is my recommendation the City Council table the appeal of Xcel and refer the matter to the Public Works Director to allow: (1) Xcel to submit information for its current looping plans for the proposed gas line to connect to its other lines in the area; (2) the Public Works Director to prepare an estimate for the

reasonably anticipated use of the Ames Crossing Road right-of-way for other utilities due to increased development in the surrounding areas; and (3) the Public Works Director to re-evaluate the denial of the Permit based upon this additional information. This option could allieviate the potential for expensive, distracting, and protracted litigation, and produce a mutually beneficial decision for both the City and Xcel.

In the alternative, I recommend that the City Council deny the appeal and affirm the Director's denial of Permit ID 18478 as reasonable and supported by credible evidence in the record.

Dated: November 3, 2017

FELHABER LARSON

By: /s/Thomas J. Radio
Thomas J. Radio, # 137029
220 South 6th Street, Suite 2200
Minneapolis, MN 55402
Telephone: 612-373-8559
tradio@felhaber.com

**STATE OF MINNESOTA
BEFORE THE
MINNESOTA PUBLIC UTILITIES COMMISSION**

*Formal Complaint and Petition for
Relief by Minnesota Energy
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MPUC Docket No. _____

**COMPLAINT, REQUEST FOR SUSPENSION
OF NATURAL GAS COMPETITIVE
AGREEMENTS AND REQUEST FOR A
CONTESTED CASE HEARING OF
MINNESOTA ENERGY RESOURCES
CORPORATION**

Exhibit F

Letter from Amber Lee to Mayor Maguire



Minnesota Energy Resources Corporation
Suite 200
1995 Rahnclyff Court
Eagan, MN 55122
www.minnesotaenergyresources.com

Via Email and Personal Delivery

November 8, 2017

Mayor Mike Maguire
City of Eagan
3830 Pilot Knob Road
Eagan, MN 55112

Re: City of Eagan Denial of Xcel Energy Right-of-Way Permit ID 18478

Dear Mayor Maguire:

Minnesota Energy Resources Corporation (“MERC”) submits this letter to identify errors in the hearing officer’s recommendation in this matter and to request that the City accept additional evidence into the record before it reevaluates or reverses the Public Works Director’s permit denial.

By way of background, MERC has kept informed of the application by Northern States Power Company d/b/a Xcel Energy (“Xcel”) to install natural gas facilities in the Ames Crossing Road public right-of-way. I understand that at its November 6 meeting, the City Council adopted the independent hearing officer’s recommendation to table Xcel’s appeal of the permit denial so that Xcel and the City can supplement the record with evidence of Xcel’s need for looping and the City’s anticipated use of the Ames Crossing right-of-way. MERC appreciates the City’s desire to make a fully informed decision on this appeal. In the interest of having a complete record on which to reevaluate the permit denial, I write to identify errors in the hearing officer’s recommendation and to provide you and Mr. Matthys with MERC’s concerns regarding Xcel’s planned service to the United Properties development. I request that the City and Mr. Matthys consider these concerns when reevaluating the denial.

Of foremost importance to MERC is the hearing officer’s dismissal of Mr. Matthys’ public safety concerns. The hearing officer stated:

The Director’s stated concern for public safety in his letter of denial and Director’s Reasons for Denial was not established by facts in this record as he conceded that the up to 19 lines could be placed in the Ames Crossing Road right-of-way under existing codes and practices, and that the only utilities in the right-of-way were the MERC gas line on the west side of the road, an Xcel electrical line, a telephone line, and maybe a fiber optic line. Since the Xcel gas line was proposed to be installed on the east side and would be separated by at least 44 feet from the MERC gas line, there is no factually supported threat to the public health, safety, and welfare from installation of the Xcel gas line.

Hearing Officer Report & Recommendation at 5. Not only did the hearing officer substitute his own judgment for Mr. Matthys’ significant professional experience and judgment, he factually

erred in concluding that Xcel's proposed line would be separated by 44 feet from MERC's existing line. As shown by the maps that Xcel submitted in its appeal, Xcel would need to cross MERC's existing natural gas line at the intersection of Vikings Parkway and Ames Crossing. Immediately thereafter, Xcel would need to parallel MERC's existing line within the Ames Crossing and Vikings Parkway roundabout, for approximately 500 feet. The right-of-way in the roundabout is significantly narrower than the right-of-way along Ames Crossing. As Mr. Matthys noted, the crossing of live gas lines within the City of Eagan poses a significant safety hazard and a departure from the right-of-way requests typically submitted to the City. The hearing officer erred in concluding (1) the proposed line would be separated from MERC's gas lines; and (2) that the City failed to establish a threat to the health, safety and welfare from installation of the Xcel line.

Because of the safety implications for this instant permit application, and because MERC is concerned that safety issues will be summarily dismissed in future Xcel applications submitted to the City, MERC requests the City remand the record to the hearing officer for correction and further development regarding the safety implications caused by the collocation of multiple lines within the same right-of-way. MERC has direct experience with the safety, integrity and reliability issues caused by the intermingling of gas lines, and we have been working with other municipalities to make sure that cities are aware of these risks before issuing permits. We request the opportunity to present this experience and evidence to the hearing examiner to fully develop the record before further evaluation is given to Xcel's request.

Furthermore, MERC is concerned that Xcel is attempting to severely undermine the City's authority to police its own rights-of-way. In a recent proceeding before the Minnesota Public Utilities Commission ("PUC") regarding the provision of natural gas service to the nearby Minnesota Vikings development, the Minnesota PUC reaffirmed that municipalities have broad authority to police their public rights-of-way. Commissioner Tuma noted that in many instances the PUC need not address safety issues concerning the siting of natural gas facilities, because those issues should be addressed by municipalities during the permitting process.

Consistent with this recognized authority, and with Eagan Code § 7.06, subd. 5(C), Mr. Matthys denied Xcel's application on the grounds that MERC had sufficient natural gas facilities along Ames Crossing Road to serve the United Properties development, and that the "placement of two natural gas mains within the same public right-of-way is unexpected in Eagan and throughout Dakota County." Because Xcel's proposal involved a "dead-end line" with no purpose other than to serve the United Properties development, Mr. Matthys determined that the proposed facilities would unnecessarily limit the opportunity for future installations and development within the right-of-way. He noted that the City anticipates a significant increase in requests for use of the right-of-way in light of projected development. He also concluded that the presence of two natural gas lines within the right-of-way would cause significant safety concerns.

MERC agrees entirely with Mr. Matthys' initial analysis. Xcel's proposed facilities will unnecessarily restrict the City's future use of the Ames Crossing Road right-of-way, and will cause significant safety concerns without any apparent benefit to the City. Because MERC is currently serving the United Development and has sufficient capacity to serve its future projected

load, there can be no question that Xcel's proposed facilities are unnecessarily duplicative. In addition, it is MERC's practice to avoid having competing natural gas lines within the same right-of-way, for the safety reasons identified by Mr. Matthys in his initial decision. MERC appreciates the City's shared commitment to the safety of the public and MERC's customers.

Despite the administrative denial, Xcel proceeded to engage in behavior that MERC believes unduly interferes with and restricts the City's broad authority to police its rights-of-way, as recognized by the PUC. For example, Xcel argued on appeal that Mr. Matthys' stated reasons for the denial were set in stone and precluded the City from considering any other relevant criteria under Eagan City Code § 7.06, subd. 5(C). Xcel also took issue with Mr. Matthys' very real safety concerns. These arguments stand in stark contrast to the PUC's recent recognition that the City has broad authority to police its rights-of-way through the permitting process. Taking Xcel's legal arguments as a whole, it is hard to find a legitimate basis for the City to ever deny Xcel a right-of-way permit. Xcel states that the proximity of gas lines does not constitute a safety hazard and claims the City has no discretion to consider the need for facilities, or whether the facilities are duplicative of existing lines. Xcel also asserts that the denial of the permit unnecessarily favors one competitor over another. Granting a permit to Xcel in this instance would establish a precedent that would make it difficult for the City to deny Xcel a permit for any right-of-way in which MERC currently has existing infrastructure.

Ironically, even though Xcel argued the City was bound by Mr. Matthys' stated reasons for denial, Xcel put forth a post-hoc rationalization for why its application should be granted; namely, because it intends to loop the proposed line with existing facilities. This proposal is clear pretext for Xcel's initial stated reason for the line—to serve the United Properties development. Xcel did not include a looping proposal in its initial application. Indeed, in subsequent discussions, the City invited Xcel to introduce evidence to demonstrate its looping need but Xcel only submitted information regarding the proposal after the October 31 hearing, and upon the recommendation of the independent hearing officer.

It is easy to conclude from these circumstances that Xcel invented a need to loop its system so that it can be awarded a permit to serve the United Properties development. In doing so, it has tied up City resources and impeded the City's ability to efficiently manage its rights-of-way.¹ If Xcel truly wishes to loop its system, it can submit an official proposal to the City explaining why such looping is warranted and consistent with Eagan City Code § 7.06.

In sum, MERC agrees entirely with Mr. Matthys' initial reasoning for denying the permit, and believes that Xcel's actions following the initial denial, and its stated reasons for reversal, interfere with the City's broad authority to police its rights-of-way. MERC asks that the City and Mr. Matthys consider this letter when reevaluating the permit denial, and reaffirm the decision to deny the permit. Please do not hesitate to contact me if you have any questions or if you wish to discuss these issues further.

¹ MERC is also concerned with Xcel's assertion that, because of the delay caused by this post-hoc rationalization, its permit application is approved as a matter of law pursuant to the 60-day deadline under Minn. Stat. § 15.99. MERC agrees with the independent hearing officer that this statute does not apply to these proceedings.

Mayor Mike Maguire
November 8, 2017
Page 4

Via Email and Personal Delivery

Sincerely yours,

/s/ Amber S. Lee

Amber S. Lee
Regulatory and Legislative Affairs Manager
Minnesota Energy Resources Corporation

cc: Russ Matthys, Director, City of Eagan Public Works Department

**STATE OF MINNESOTA
BEFORE THE
MINNESOTA PUBLIC UTILITIES COMMISSION**

*Formal Complaint and Petition for
Relief by Minnesota Energy
Resources Corporation Against
Northern States Power Company
d/b/a Xcel Energy*

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AGREEMENTS AND REQUEST FOR A
CONTESTED CASE HEARING OF
MINNESOTA ENERGY RESOURCES
CORPORATION**

Exhibit G

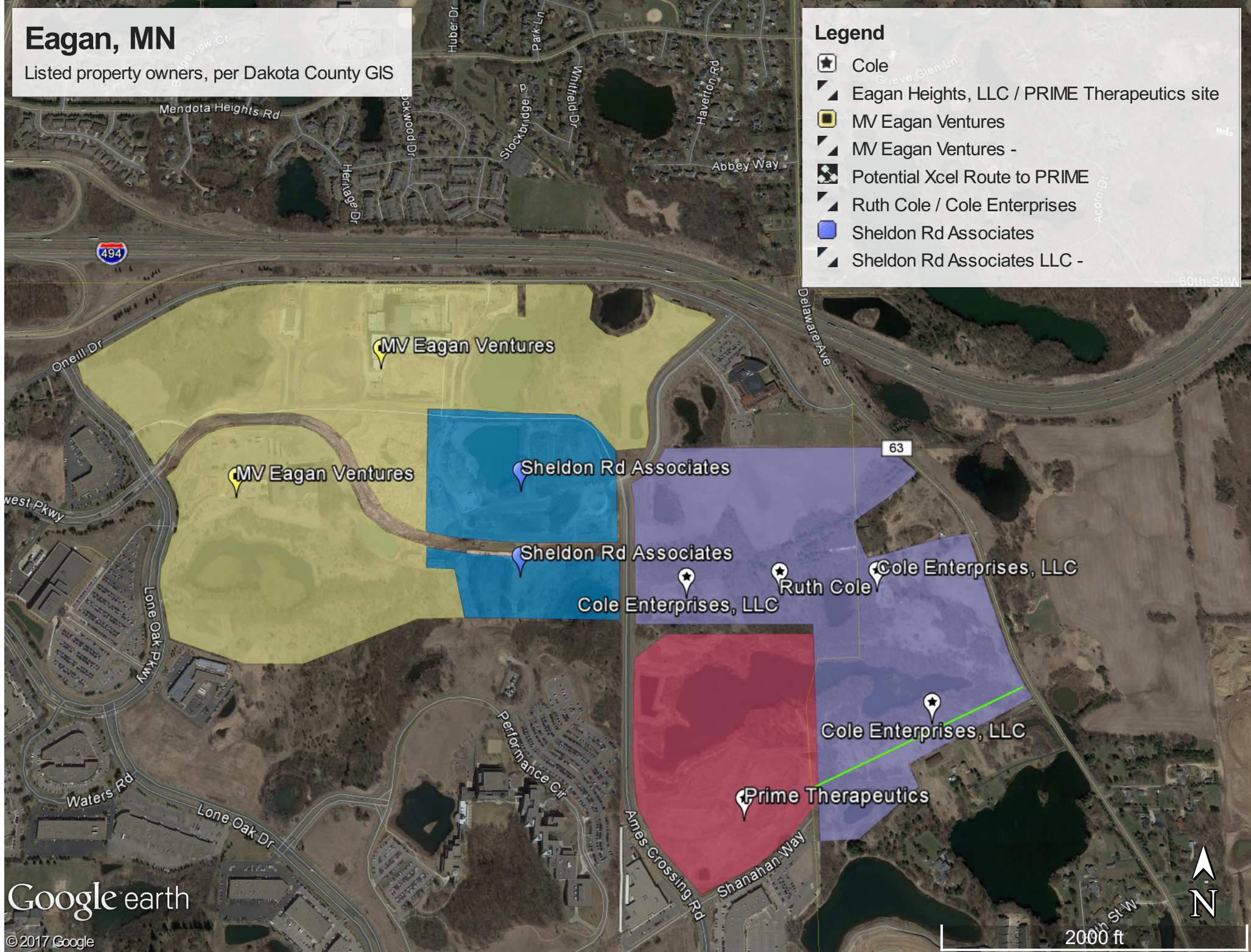
Map Showing Property Ownership

Eagan, MN

Listed property owners, per Dakota County GIS

Legend

- ★ Cole
- ▣ Eagan Heights, LLC / PRIME Therapeutics site
- MV Eagan Ventures
- ▣ MV Eagan Ventures -
- ▣ Potential Xcel Route to PRIME
- ▣ Ruth Cole / Cole Enterprises
- Sheldon Rd Associates
- ▣ Sheldon Rd Associates LLC -



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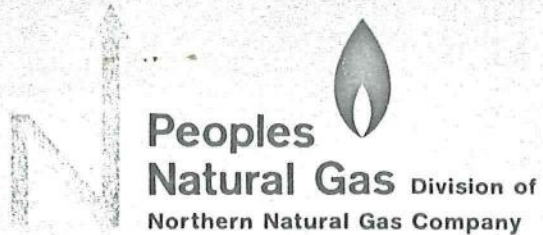
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CORPORATION**

Exhibit H

1974 Letter and Memorandum of Agreement

P.O. Box 6538
Rochester, Minn. 55901



December 26, 1974

Mayor and City Council
City of Eagan
Eagan, Minnesota

Attention: City Clerk

Gentlemen:

This letter will serve as official notification of the exchange of facilities and customers between Northern States Power and Peoples Natural Gas within the Eagan and Inver Grove Heights areas. Under this agreement, NSP will acquire customers and facilities from Peoples in the Inver Grove Heights area and Peoples will acquire customers and facilities from NSP in the Eagan area.

We are confident that this exchange of customers and facilities will assure a more efficient and reliable natural gas service to both of these areas with only one utility rather than two operating within the same market area.

The exchange of customers and facilities will be effective December 27, 1974 and all customers involved will receive a notification from NSP and Peoples. Also, we want to assure you that at no time during the transfer will the natural gas service to any customer be interrupted.

Thank you very much for your understanding and cooperation. Should you have any questions regarding this matter please contact our district office at Eagan or the undersigned.

Sincerely,

PEOPLES NATURAL GAS
Northern Region Office

S. W. Jervis
Vice President and Regional Manager

SWJ:sg

STATE OF MINNESOTA
BEFORE THE
MINNESOTA PUBLIC UTILITIES COMMISSION

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Portion of Exhibit H

**THE 1974 MEMORANDUM OF AGREEMENT
CONTAINS TRADE SECRET INFORMATION.
IT IS OMITTED FROM THE PUBLIC VERSION
OF THE FILING BUT INCLUDED IN THE
NONPUBLIC VERSION IN ITS ENTIRETY**

**STATE OF MINNESOTA
BEFORE THE
MINNESOTA PUBLIC UTILITIES COMMISSION**

*Formal Complaint and Petition for
Relief by Minnesota Energy Resources
Corporation Against Northern States
Power Company d/b/a Xcel Energy*

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**CERTIFICATE OF SERVICE
BY U.S. MAIL**

Pursuant to Minn. R. 7829.1700, subp. 2, the undersigned hereby certifies that on November 9, 2017, she served the **Complaint, Request for Suspension of Natural Gas Competitive Agreements and Request for a Contested Case Hearing of Minnesota Energy Resources Corporation** upon counsel for Northern States Power Company, d/b/a Xcel Energy, by mailing a true and correct copy thereof, enclosed in an envelope, postage prepaid, and by depositing the same in the U.S. Mail at Minneapolis, Minnesota:

Scott Wilensky
Executive Vice President and General Counsel
Northern States Power Company, d/b/a Xcel Energy
414 Nicollet Mall
Minneapolis, MN 55401

/s/ Tammy J. Krause
Tammy J. Krause