MINNESOTA
PUBLIC UTILITIES COMMISSION

Staff Briefing Papers

Meeting Date	December 14, 2017	Agenda Item **4
Company	Minnesota Power	
Docket No.	E-015/M-16-564 In the Matter of Minnesota Power's Revised Petition for a Competitive Rate for Energy-Intensive Trade-Exposed (EITE) Customers and an EITE Cost Recovery Rider E-015/GR-16-664 In the Matter of the Application of Minnesota Power for Authority to Increase Rates for Electric Service in Minnesota	
Issues	1. Should the Commission reconsider or reopen its *Cost Recovery Orders*? 2. If so, should the *Cost Recovery Orders* be modified? The commission shall decide a petition for rehearing, amendment, vacation, reconsideration, or reargument with or without a hearing or oral argument. The commission may vacate or stay the order, or part of the order, that is the subject of the petition, pending action on the petition. (Minn. Rules 7829.3000, subp. 6)	
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✓ **Relevant Documents**	**Date**
Order Approving EITE Rate, Establishing Cost Recovery Proceeding, and Requiring Additional Filings (*Discount Approval Order*)	December 21, 2016
Order Authorizing Cost Recovery with Conditions (*Cost Recovery I*)	April 20, 2017
Tariff Suspension: Minnesota Power	September 29, 2017
Order Excluding Rider Revenue from 2016 Baseline Calculation and Setting Parameters to Identify Exempt Customers (*Cost Recovery II*)	October 13, 2017
Petition for Reconsideration: Minnesota Power	November 2, 2017
Petition for Reconsideration: Large Power Intervenors	November 2, 2017
Response to Petitions: MN Office of the Attorney General	November 13, 2017
Response to Petitions: MN Department of Commerce	November 13, 2017

I. Statement of the Issues

1. Should the Commission reconsider or reopen its *Cost Recovery Orders*?

2. If so, should the *Cost Recovery Orders* be modified?

II. Background

The Commission issued three orders addressing Minnesota Power's (MP's) June 30, 2016 revised petition to establish a competitive rate for energy-intensive trade-exposed (EITE) customers pursuant to Minn. Stat. § 216B.1696. (The revised petition addressed shortcomings in an earlier petition filed by MP (Docket 15-984)).

(1) On December 21, 2016, the Commission acted on MP's revised petition, issuing an *Order Approving EITE Rate, Establishing Cost Recovery Proceeding, and Requiring Additional Filings* (***Discount Approval Order***). The Commission found that MP's proposed EITE rate schedule could be expected to yield a net benefit to the utility and therefore approved the rate schedule under Minn. Stat. § 216B.1696, subd. 2.

The Commission also ordered MP to file rate-design proposals to recover the cost of the credits provided to EITE customers. And it directed MP to file a revised communications plan addressing how MP planned to notify ratepayers and local governing authorities of the surcharge it planned to impose on non-EITE and other non-exempt customers.

(2) On April 20, 2017, the Commission issued an *Order Authorizing Cost Recovery with Conditions* (***Cost Recovery I***). That order allowed MP to collect a surcharge from non-EITE, non-exempt customers, and it included directions and clarifications regarding refunds of revenue increases associated with the rate schedules, including requirements for (i) a compliance filing setting forth the surcharge and refund mechanisms in detail, (ii) additional information about efforts to identify LIHEAP-eligible customers, and (iii) an insert in all customer bills explaining the EITE rate and surcharge.

(3) On October 13, 2017, the Commission issued its *Order Excluding Rider Revenue from 2016 Baseline Calculation and Setting Parameters to Identify Exempt Customers* (***Cost Recovery II***). *Cost Recovery II* addressed questions raised in the compliance filing required by *Cost Recovery I* (see above). In *Cost Recovery II* the Commission (i) approved MP's proposal to exclude rider revenue from its 2016 baseline calculation, (ii) reiterated that MP shall use the actual 2016 calendar-year EITE-customer revenue as the baseline for calculating the extent of any refundable increases, (iii) determined that MP shall use revenues (as opposed to kWh sales) to determine the refund, and (iv) required MP to address issues regarding tracking and identification of EITE exempt customers.

On November 2, 2017, MP and the Large Power Intervenors (LPI) filed petitions for reconsideration. On November 13, 2017, the Commission received comments from the

Minnesota Department of Commerce (DOC) and the Minnesota Office of the Attorney General – Residential Utilities and Antitrust Division (OAG).

The requests for reconsideration focus on the latter two orders, that is, *Cost Recovery I* and *Cost Recovery II*.

Note that MP began offering the EITE discount to the EITE customers on February 1, 2017. However, on September 29, 2017 MP informed the Commission that it suspended offering the discount, effective immediately.

III. Petitions for Reconsideration

Commission rules make provision for reconsideration of an order (see also MS § 216B.27):

> The commission shall decide a petition for rehearing, amendment, vacation, reconsideration, or reargument with or without a hearing or oral argument. The commission may vacate or stay the order, or part of the order, that is the subject of the petition, pending action on the petition. (Minn. Rules 7829.3000, subp. 6).

And, Commission policy guides the motion to reconsider:

> Any action of the Commission may be reconsidered. However, only a Commissioner voting on the prevailing side may move to reconsider. If the motion to reconsider passes, then the matter is before the Commission. The Commission may then alter, amend, rescind, or uphold its previous decision. The same question cannot be reconsidered a second time. However, the Commission may at any time, on its own motion or upon motion of an interested party, upon notice, reopen any case after issuing an order. (Minnesota Public Utilities Commission, Operating Procedures and Policy, Meeting Procedures, issued February 1, 1995, Amended and Adopted September 18, 2014)

All five current Commissioners supported the motions codified in *Cost Recovery I* and *Cost Recovery II* and, as such, any one of them may offer a motion to reconsider.

IV. Positions of the Parties

A. Minnesota Power Petition

MP asks the Commission to reconsider both *Cost Recovery I* and *Cost Recovery II*. MP's central assertion is that the Commission erred by violating the revenue neutrality standard set forth in Minn. Stat. § 216B.1696, subd. 2(d). Specifically, MP argues, the Commission's decision to retroactively consider use of 2016 actual revenues as the baseline in determining EITE refunds to non-EITE customers results in MP not being able to utilize a tracker account as authorized by the Commission's *Discount Approval Order*. Further, MP argues, the Commission's decision

eliminates the fundamental legislative basis under which MP went forward with implementing the EITE discount effective February 1, 2017, due to the fact that revenue neutrality cannot be realized without proper use of the tracker. MP argues that the *Cost Recovery Orders* prevent MP from collecting that tracker amount, as well as the costs of providing the EITE rate, by establishing a baseline and by retroactively setting that baseline as 2016 actual revenue.

MP focuses its concern on the decision of US Steel to restart its Keetac operation after the issuance of the *Discount Approval Order* and before the Commission hearing in March, and before the issuance of *Cost Recovery I* in April. MP asserts that this event had the result of unfavorably impacting the deliberation and review of the EITE cost recovery mechanism. The EITE rate schedule was not implemented until February 1, 2017, which MP considers to be the earliest possible effective date following receipt of the *Discount Approval Order*. MP believes this is an extremely relevant point that was overlooked by the Commission because when the *Discount Approval Order* was issued there was no "difference in revenue" as defined by statute before Keetac reopened. The difference in revenue recorded in the tracker account only began when the EITE discount became effective. In other words, the Commission is comparing the applicable standard tariff for all EITE customers as of December 31, 2016 to that of February 1, 2017 when the EITE discount took effect. This is not the difference that MP has recorded in its tracker account. The result is that EITE customers, to date, have paid almost $9 million less to MP through the EITE discount than they would have paid under the applicable standard tariff.

MP is concerned that the Commission's actions of adopting and affirming a refund mechanism with a 2016 baseline under conditions that existed prior to establishment of the tracker, and prior to the effective date of the EITE discount, created a tracker balance that MP will likely never be able to collect from non-EITE customers.

B. Large Power Intervenors' Petition

LPI seeks reconsideration of *Cost Recovery I* and *Cost Recovery II* to the extent that those orders establish a cost recovery mechanism that incorporates a refund to non-EITE and non-LIHEAP customers. LPI offers two main arguments. First, LPI argues, the Commission directs a reading of the EITE statute that fails to tie cost recovery to the tracker mandated by the EITE statute and specifically approved by the Commission. The result of this interpretation is that MP may either receive a windfall or under-recover costs associated with offering the EITE rate, contrary to the EITE statute. Second, LPI argues, the Commission's decision effectively causes the EITE customers to pay for the cost of the EITE credit the Commission approved, in direct contradiction to the EITE statute.

LPI argues that the refund orders ignore the first sentence of subsection 2(d), which creates a mandatory tracker "to track the difference in revenue between what would have been collected under the electric utility's applicable standard tariff and the EITE rate schedule." The tracker sets forth a simple equation: the difference between revenue that would have been collected under the standard tariff (e.g., MP's Large Power tariff) and revenue collected under the EITE rate schedule. Revenue means "gross income or gross receipts," which in the case of the sale of power means simply the purchaser's energy consumption multiplied by applicable tariff rate over a given time period. The Legislature did not empower the Commission to create

a "baseline year," from which rates, credits, and cost recovery over multiple time periods would be evaluated. And it would be unreasonable for the Commission to interpret the EITE statute in such a manner. The only reasonable interpretation is application of the simple equation set forth above.

Using the tracker, the costs and refunds are measured by the difference in revenue between what "would have been collected" under the electric utility's applicable standard tariff and the EITE rate schedule. The language used by the Legislature demonstrates that it intended a comparison of revenue based on actual consumption, not historical usage. The Legislature chose conditional language—would have been collected—to describe the baseline against which costs or savings are measured. The amount that "would have been collected" in 2017 under the standard tariff rate can only be determined by multiplying usage (including Keetac) by the standard tariff rate. It is not possible to calculate the amount that "would have been collected" in 2017 by ignoring Keetac's operations and simply repeating 2016 revenue. The Legislature did not instruct the utility to compare the amount "collected before the EITE rate schedule" or "in a prior year." By creating an unlegislated "baseline year" the Commission created a false comparison between revenue in 2016 (a year when Keetac was idled) and 2017 when Keetac resumed operations. In so doing, the Commission is forcing an apples-to-oranges comparison, not the apples-to-apples tracker that the Legislature mandated. As a result, the EITE Rider Calculation Order is in clear error and contrary to the statute.

LPI argues that the EITE Rider Calculation Order has an impermissible effect of causing EITE customers to pay for the costs of the very EITE rate schedules that the Legislature enacted to bolster those customers' competitiveness through cost savings. As noted in its August 11, 2017, comment in this docket, Minnesota Power previously reduced its rate case revenue deficiency by $16.4 million to account for increased sales levels and revenues. If all or a majority of that revenue is passed through to non-low-income, non-EITE customers in this docket, that will necessarily result in an increased revenue deficiency in the rate case (i.e., a reversal of the reduction previously applied) to avoid double counting. In other words, sales revenue to MP that, because a rate case is currently pending, should flow to the benefit of all of MP's customers, is now under the EITE Rider Calculation Order flowing through to the exclusive benefit of non-low-income non-EITE customers. Therefore, the credit that EITE customers are receiving in this docket is at least partially offset by the revenue deficiency increase in the rate case docket.

C. Office of the Attorney General Response

OAG argues that the Commission should deny the petitions for reconsideration as untimely challenges to decisions the Commission made in April. In the alternative, the OAG requests that the Commission deny the petitions for reconsideration because they fail on the merits. *Cost Recovery I* established a refund mechanism, a central component being that MP was to use 2016 calendar-year EITE customer revenue as a baseline for calculating the extent of any refundable increases. No party requested reconsideration and MP continued to offer the EITE discount that it had initiated in February. In subsequent comments in a compliance filing neither MP nor LPI argue that the Commission's order was flawed or that the Commission was not authorized to establish a baseline. In other words, not only did petitioners not challenge

Cost Recovery I, they affirmatively accepted it. MP and LPI do not raise new issues, point to new evidence, or expose errors or ambiguities in either *Cost Recovery I* or *Cost Recovery II*. Rather, both petitioners simply repackage the same arguments that they previously made to the Commission, arguments that were already rejected.

With respect to the principle of cost neutrality, OAG's states that its previous filings have explained why the petitioners' interpretation of the statute is wrong. The plain language of the EITE statute requires the utility to consider increased revenues from higher sales in its cost recovery mechanism to ensure revenue neutrality. For its part, MP shifts between arguing for "cost neutrality" and arguing for "revenue neutrality." This reflects the fact that, while MP appears to recognize that the statute requires revenue neutrality – which would include higher sales – what the utility actually requests in this docket is cost neutrality that ignores the possibility of increased revenue from higher sales. This is not consistent with the statute's provision that "the commission shall allow the utility to recover any costs, including reduced revenues, or refund any savings, including increased revenues, associated with providing service to a customer under an EITE rate schedule." By confusing the concept of revenue neutrality with cost neutrality, MP attempts to show that its proposal is consistent with the statute.

MP and LPI argue that the cost recovery mechanism approved by the Commission should be reconsidered because both MP and LPI have or will be unfairly harmed. MP argues that it has already lost approximately $9 million in revenue that it would have otherwise collected from EITE customers. LPI argues that the cost recovery mechanism, combined with the presumed outcome of MP's pending rate case, will harm EITE customers by making them pay for a portion of their own discount. These arguments ignore the benefits that MP and the EITE customers received from the EITE rate; rely on speculative, hypothetical scenarios; and, in the case of MP, ignore the utility's opportunity to mitigate any "harm" it claims to have suffered. These arguments do not provide a sufficient reason for the Commission to reconsider its decision for several reasons. First, the petitioners have not pointed to any new information that was not part of the record and, second, the petitioners overstate the level of harm that they would face, while understating the potential benefits. While the restart of Keetac is a clear benefit to MP, the utility's argument here would actually cast the Keetac restart as a detriment that contributed to the $9 million in lost revenue.

The EITE customers' argument that they will pay for the cost of their own discount should also be rejected because it ignores the clear benefits they are receiving, and relies on a speculative side-by-side comparison of two hypothetical rate case outcomes. Essentially, the EITE customers argue that, if the Commission increases the revenue deficiency in the rate case to account for the EITE discount, it might also authorize a higher rate increase for the EITE customers than it would have otherwise. At this time, the EITE customers' argument is moot because MP has suspended the EITE rider and the only place for the increased sales to be reflected is the rate case.

Even if that were not the case, the argument fails because it relies on the premise that the Commission might do something in this rate case that is different than what the Commission might do in another rate case with another cost recovery mechanism. The argument is pure speculation that compares the future results of MP's pending rate case to the future results of a

different hypothetical rate case. OAG reasons that this is impossible to seriously evaluate, and does not sufficiently justify any reconsideration of the Commission's decisions. The EITE customers benefited from the EITE discount, and their argument ignores this simple fact. These benefits are separate from the Commission's unrelated decisions in the company's pending rate case. The EITE customers' attempts to conflate these dockets should be rejected.

D. Department of Commerce Response

DOC argues that the petitions for reconsideration are not timely.

DOC disagrees with MP's contention of a violation of revenue neutrality arguing that, so long as the increase in revenues due to Keetac's 2017 sales (over 2016 actual revenues from Keetac) are counted once, but only once, in either the rate case or in the EITE Rider, revenue neutrality should be preserved for both MP and ratepayers (DOC also makes this argument in the MP rate case docket). *Cost Recovery I* indicates that offsets to the EITE surcharge will be capped at the amount of the surcharge. Therefore, sales revenue increases moved from the rate case to the EITE Rider should not exceed the EITE cost.

DOC also disagrees with MP's claim that the Commission's use of 2016 actual revenues as a baseline for determining EITE refunds prevents MP from using the tracker account. The purpose of the EITE tracker is to determine the impact that the EITE discount has on utility revenues, and to allow the utility to recover the cost of the discount net of any increases in revenues. Capturing the actual historical base revenues, in this case 2016 actual revenues, and comparing those base revenues to the 2017 revenue increases after implementation of the EITE tariff is logical.

DOC states that MP's claim that EITE customers are paying for their own discount is not supported because the costs of the rate discounts are charged only to non-EITE customers (except low-income customers). However, it appears that EITE customers may not receive additional benefits of the higher revenues due to Keetac, assuming that those revenues are counted only in the EITE Rider and not in the rate case.

V. Staff Analysis

The Commission's decisions in the *Cost Recovery Orders* comprise the EITE Cost Recovery Rider. Staff agrees with DOC that the Commission may account for revenue increases associated with the EITE Discount in either the EITE Cost Recovery Rider or in the MP Rate Case, but not both. Staff also agrees with DOC and OAG that the petitions for reconsideration were untimely filed. That said, arguments on the merits beg analysis.

Much of the discussion focuses on Subdivision 2(d) of the EITE statute:

> Upon approval of any EITE rate schedule, the utility shall create a separate account to track the difference in revenue between what would have been collected under the electric utility's applicable standard tariff and the EITE rate schedule. In its next

> general rate case or through an EITE cost recovery rate rider between general rate cases, the commission shall allow the utility to recover any costs, including reduced revenues, or refund any savings, including increased revenues, associated with providing service to a customer under an EITE rate schedule. The utility shall not recover any costs or refund any savings under this section from any energy-intensive trade-exposed customer or any low-income residential ratepayers as defined in Minnesota Statutes, section 216B.16, subdivision 15.

MP appears to argue that it cannot use the tracker under the terms of the *Cost Recovery Orders* and, therefore, those orders violate the statute establishing the tracker. Presumably MP believes that it can use the tracker if the Commission does not allow a refund, that only a non-refund cost recovery mechanism could meet the statutory requirements. However, these arguments do not prevent the use of the tracker, but only affect the sums being tracked. The tracker is only a record of EITE discounts (compared to related information as determined by the Commission). MP's argument goes to its disagreement with the content of the tracker.

LPI has argued that the EITE statute does not authorize the Commission to establish a baseline. However, this argument may boil down to the Commission's choice of a particular baseline. LPI appears to have been content with the choice of the 2016 baseline in April (*Cost Recovery I*). It's not clear to Staff that LPI is content with a 2017 baseline. If it is content with a 2017 baseline its argument would run afoul of its own logic that a baseline is not permitted. If LPI opposes the choice of any baseline then there is no method to determine MP's revenues or costs as contemplated by the statute. That is, there would be no way to establish revenue neutrality, which begs the question: if MP cannot be assured of revenue neutrality should it continue to suspend offering the discount. Or more fundamentally: if revenue neutrality cannot be guaranteed, does this flaw render the entire statute inoperable?

The general theme underlying LPI's argument appears to proceed as follows: the Legislature required the Commission to approve a discount; the Commission approved a discount; now, the Commission, without violating statute, can take no other action in any other docket that could be conceived of as being adverse to LPI's interests.

The Commission authorized MP to offer a discount to its EITE customers, a discount with the estimated maximum value of approximately $77 million ($19.2 million annually for four years). LPI's argument that the refund mechanism requires the EITE customers to pay for their own discount appears to be based on an assumption that the EITE customers have a legitimate claim to more than the $77 million that its members could draw from other ratepayers in MP's service area. However, the refund mechanism only addresses MP's revenue neutrality, and not the value of the discount to the EITE customers. The EITE customers' discount is not diminished by the refund mechanism established by the Commission. What LPI characterizes as a statutory prohibition on making its members pay for their own discount is in effect an argument that the increased Keetac revenues should be accounted for in the rate case where the EITE customers can obtain a share of the benefits of that revenue increase, effectively increasing their discount above the $77 million. Note that the Commission authorized the $77 million discount pursuant to a statute that explicitly directed the Commission to **not** apply the standard ratemaking principles of fairness, reasonableness and nondiscrimination (§ 216B. 1696, Subd. 2(b)). LPI's reasoning would allow the EITE customers to tap into the benefit of the increased Keetac

revenues via the rate case where it could now appeal to those same ratemaking principles that were unavailable to the Commission when it established the discount initially.

LPI has made much of statutory interpretation arguing that the terms of the EITE statute are clear and unambiguous, that the Legislature directed utilities and the Commission to address increasingly uncompetitive electric rates for EITE customers. Staff believes that here LPI misdirects its arguments. First, the Legislature made no statement as to whether electric rates were "increasingly" uncompetitive. Second, the only criterion established by the Legislature is that of the "net benefit" of a discount proposed by a utility. The Commission made no explicit finding as to the competitiveness of electric rates, either the then-existing rates or the discounted rates. Third, the question of the competitiveness of electric rates is hampered by an ambiguity that provides much grist for equivocation. That is, are competitive rates those rates that are in line with rates paid by similarly-situated customers, or are they rates that allow the customer to remain competitive in the global market? The answer to the former question is bounded by the rates of other utilities. The answer to the latter question is bounded at the lower end by a rate of zero. That is, a utility could seek to offer a 100% discount if it allowed its customers to remain competitive in the market place. The statute did not address the distinction and neither did the Commission.

As argued by DOC the Commission may choose to address MP's increasing revenues in the MP rate case. The Commission has not done so to date and Staff believes that the Commission's *Cost Recovery Orders* are sound.

VI. Decision Options

Issue 1: Should the Commission reconsider or reopen its *Cost Recovery Orders*?

1.a Grant the petitions for reconsideration filed by Minnesota Power and the Large Power Interveners.

1.b Deny the petitions for reconsideration

Note: if the Commission denies the petitions it need not address Issue 2.

Issue 2: Should the *Cost Recovery Orders* be modified?

2.a Make no modification to the *Cost Recovery Orders.*

2.b Modify the *Cost Recovery Orders* to establish actual 2017 revenues as the basis for determining refunds.

2.c Modify the *Cost Recovery Orders* to abolish the refund mechanism (and by implication address revenue issues in the Rate Case)

2.d Take other action.