STATE OF MINNESOTA
BEFORE THE PUBLIC UTILITIES COMMISSION

Nancy Lange	Chair
Dan Lipschultz	Vice Chair
Matt Schuerger	Commissioner
Katie Sieben	Commissioner
John Tuma	Commissioner

In the Matter of Minnesota Power's Renewable Resources Rider and 2015 Renewable Factor

DOCKET NO. E015/M-14-962

COMMENTS OF THE OFFICE OF THE ATTORNEY GENERAL

I. INTRODUCTION

The Office of the Attorney General–Residential Utilities and Antitrust Division ("OAG") respectfully submits these Comments in response to the Notice of Comment Period issued by the Public Utilities Commission ("Commission").

On November 30, 2016, the Commission issued its *Order Determining Treatment of North Dakota Investment Tax Credits (ND ITCs) for Bison Wind Projects* ("Order"). In that Order, the Commission ordered the Company to reflect all investment tax credits related to the Bison Wind Projects ("Bison ITCs") in its revenue requirement.[1] On February 14, 2017, the Commission granted reconsideration to consider the merits of the Order.[2] The purpose of these Comments is to demonstrate that the Order assigns both risks and benefits to Minnesota ratepayers, is consistent with Commission and Supreme Court precedent, and, when read in conjunction with that precedent, results in symmetrical treatment of tax benefits for ratepayers and utility companies.

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[1] Order at 10.
[2] Order Denying Minnesota Power's Petition for Reconsideration and Granting Reconsideration for Further Proceedings at 2.

II. FACTUAL BACKGROUND

Minnesota Power ("MP" or "Company") will earn approximately $113.0 million from the non-transferable, non-refundable Bison ITCs.[3] These are first expected to be used in 2020, when it is estimated that $22 million of those credits will be used in the Company's parent's consolidated tax return.[4] The Company estimates that its benefit would be $10.7 million if it filed a separate tax return.[5] The instant controversy arises out of the Commission's Order to count the remaining $11.3 million towards the Company's revenue requirement.[6]

III. THE COMMISSION'S ORDER ASSIGNS RATEPAYERS BOTH RISKS AND BENEFITS ASSOCIATED WITH THE INVESTMENT TAX CREDITS.

In the Order, the Commission ruled that the Company's revenue requirement should reflect all Bison ITCs "actually realized in tax-return filings, or monetized through other permissible means."[7] The Company asserts that this is inequitable, because the regulated ratepayers get to reap the benefits of the consolidated tax return while bearing none of the risks.[8] This characterization could not be more divorced from reality. Under the Commission's ruling, ratepayers are reaping the tax benefits that exist only because of investments made by MP's regulated operations.[9] Conversely, the Commission's order dictates that ratepayers would face higher rates in the event that the consolidated tax return caused a reduction in the amount of tax benefit available due to the Bison ITCs.[10] Under such an arrangement, ratepayers will receive the value of the tax credits actually monetized, thus bearing the risk of the consolidated return

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[3] Staff Briefing Papers at 1 (Oct. 7, 2016).
[4] Staff Briefing Papers at 1 (Oct. 7, 2016).
[5] Staff Briefing Papers at 1 (Oct. 7, 2016).
[6] Order at 10.
[7] Order at 10.
[8] Minnesota Power's Petition for Reconsideration at 3–4 [hereinafter "Petition"].
[9] Letter of the Minnesota Department of Commerce, Division of Energy Resources at 2 (Dec. 30, 2016) [hereinafter "Response"].
[10] Order at 10.

arrangement diminishing the value of those tax credits, as well as the benefit of the consolidated return arrangement when it enhances the value of those credits.

While the Company's argument about the sharing of risks and benefits is flawed in this instance, the Commission should exercise caution before it affirms a decision that prescribes an outcome to hypothetical circumstances not present here. As parties anticipate a benefit from the consolidated return in this case, the question that the Commission is grappling with is whether or not the ratepayers who created the tax credits should receive the full benefits of those credits. Resolution of this question does not require a determination of who should bear the risk in the event that the consolidated return reduces the benefit that can be realized. Perhaps, in that situation, a mismatch of risks and benefits would be appropriate. The nuances of tax law are such that it is impossible to predict every possible outcome from the consolidated tax return. That said, one can imagine a set of circumstances where, if the Company were told that it would not need to reimburse ratepayers if actions of its unregulated affiliate reduced the tax benefit that could be realized from their tax credits, then the Company would be incented to take actions that might increase other tax benefits available to it at the expense of the Bison ITCs. It would be an unjust outcome for the Company to be able to reap such benefits while ratepayers see the value of their investment diminish due to unilateral actions by the Company.

The Commission should reserve the issue of what to do in the event the consolidated tax return reduces the amount of tax credits that can be used for a situation where those specific facts actually exist and can be explored through discovery and comments. Alternatively, the Commission should adopt the Department's original recommendation that the Company would credit ratepayers with the higher of the Bison ITCs that would be realized on a stand-alone basis

and the value of the Bison ITCs actually utilized.[11] Such a result would ensure that ratepayers receive the full benefit of tax credits created by ratepayers, while removing the incentive for the Company to take actions that would increase its unregulated profits while diminishing the value of the Bison ITCs.

IV. ALLOWING THE BENEFITS OF THE TAX CREDITS TO FLOW TO THE RATEPAYERS THAT CREATED THEM IS CONSISTENT WITH COMMISSION PRECEDENT.

The Commission addressed a related issue in the 2005 Xcel Energy Electric Rate Case.[12] In that proceeding, the Commission was faced with a situation where Xcel Energy's ("Xcel") tax liability was "offset by tax deductions for an approximately $3 billion loss sustained by an unregulated affiliate."[13] In that case, the Commission found that the tax benefit from the loss sustained by the unregulated affiliate should remain with that affiliate.[14] Ratepayers were not allowed to reap the benefit of a tax deduction that "they had nothing to do with creating."[15] The Commission's Order in the instant proceeding reaches precisely the same outcome: an affiliated entity should not receive a windfall from tax benefits stemming from investments made by a different affiliate simply because they share a consolidated tax return.

Minnesota law provides that, when making rates, "[a]ny doubt as to reasonableness shall be resolved in favor of the consumer."[16] When considered in conjunction with the 2005 rate case, the Company's proposal in this case would turn that burden on its head. The Company's position is effectively that tax benefits stemming from investments by the unregulated affiliate

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[11] Response Comments of the Minnesota Department of Commerce, Division of Energy Resources at 7–8.
[12] Docket No. E-002GR-05-1428.
[13] *In the Matter of the Application of Northern States Power Company d/b/a Xcel Energy for Authority to Increase Rates for Electric Service in Minnesota*, MPUC Docket No. E-002/GR-05-1428, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER; ORDER OPENING INVESTIGATION at 21 (Sep. 1, 2006).
[14] *Id.* at 23.
[15] *Id.*
[16] Minn. Stat. § 216B.03 (2016).

belong to that affiliate, and so do tax benefits stemming from investments by ratepayers. The Commission should decline the Company's invitation to resolve all doubt in favor of the utility, and instead allow ratepayers to keep the tax benefits they created, just as Xcel's unregulated affiliate was allowed to keep the tax benefits that it created in 2005.

V. SUPREME COURT PRECEDENT DOES NOT MANDATE GIVING MP THE BENEFITS OF TAX CREDITS CREATED BY ITS REGULATED ACTIVITIES.

In its Petition, the Company states that the conclusion reached in the Commission's Order "is very inconsistent with the Minnesota Supreme Court's holding regarding nonregulated company good will in *Minnegasco*."[17] This assertion reflects a misreading of *Minnegasco*.

In *Minnegasco*, the Supreme Court held that the Commission could not require the utility to impute revenue to its regulated operations for the value of good will used by its unregulated affiliate.[18] In reaching that decision, the Court found that the Commission lacked the authority to impute revenue for good will because good will is not a "cost of furnishing utility service."[19] That is not the case here.

It is indubitable that, when setting rates, the Commission has the authority to consider the "need of the public utility for revenue sufficient to enable it to meet the cost of furnishing the service."[20] While good will is not a cost of furnishing utility service, the same cannot be said of taxes. On the contrary, the Supreme Court found that "[t]he cost of furnishing utility service typically includes: labor, materials and supplies, *taxes*, insurance, and depreciation."[21] That list explicitly includes taxes. As taxes are a cost of utility service, it would be appropriate for the Commission to consider both tax liabilities and tax benefits created by the Company's regulated

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[17] Petition at 10 (citing *Minnegasco v. Minn. Pub. Utils. Comm'n*, 549 N.W.2 904, 909 (Minn. 1996)).
[18] *Minnegasco*, 549 N.W.2d at 909.
[19] *Minnegasco*, 549 N.W.2d at 909 (internal quotations omitted).
[20] Minn. Stat. § 216B.16, subd. 6 (2016).
[21] *Minnegasco*, 549 N.W.2d at 909 (internal quotations omitted) (emphasis added).

operations when setting its revenue requirement, and the Company is wrong to state that the Supreme Court has held otherwise.

VI. TO THE EXTENT THAT "SYMMETRY" IS RELEVANT TO THE COMMISSION'S DECISION, THE COMPANY'S PROPOSAL IS ASYMMETRICAL.

In its Petition, the Company asserts that its treatment of risks and benefits of the Bison ITCs "must be symmetrical,"[22] and in the Notice of Comment Period, the Commission asked for clarification of whether its Order did result in symmetrical sharing, for parties to define "symmetrical sharing," and for parties to explain whether or not symmetrical sharing matters.

The questions of what symmetrical sharing is and why it matters are difficult to answer, because the party that raised the issue has failed to provide a definition or to provide any citations explicitly referring to the issue of "symmetry." That said, while the Company faults the Commission for not symmetrically sharing risks and benefits, the Company is the party advocating for the most asymmetrical treatment of tax benefits in this proceeding. As shown earlier in these Comments, the Commission has found that it is inappropriate to reward ratepayers for tax benefits created by unregulated affiliates.[23] In light of that doctrine, it would be asymmetrical for the Commission to now turn around and allow the Company's parent company to enjoy windfall profits from tax credits created entirely by ratepayers and the Company's regulated operations.

The Commission's Order seems to treat the risks and benefits of the consolidated tax return's impact on tax credits symmetrically. Ratepayers receive an added benefit of the

[22] Petition at 8.
[23] *Infra.* Section IV.

consolidated return enhancing the value of their tax credits, and also bear the risk of that return diminishing the value of those credits.

The OAG urges the Commission to leave open consideration of what happens when the value of tax credits are diminished by a consolidated return for a proceeding where those facts are actually before the Commission, so that the reasons for the reduced value can be explored by the Commission and the Commission can ensure that ratepayers are not victims of some sort of gamesmanship on the part of the Company. That said, lack of symmetry is not a valid criticism of the Commission's existing Order, and is certainly not a reason for the Commission to take the asymmetrical action urged by the Company.

VII. CONCLUSION

The Commission should preserve its Order to the extent that it attributes any tax benefits from the Bison ITCs to the Company's revenue requirement. The Commission should also

exercise caution before it establishes a policy broader than is necessary to resolve the question before it.

Dated: May 30, 2017

Respectfully submitted,

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s/ **Joseph C. Meyer**
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May 30, 2017

Mr. Daniel Wolf, Executive Secretary
Minnesota Public Utilities Commission
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St. Paul, MN 55101-2147

Re: ***In the Matter of Minnesota Power's Renewable Resources Rider and 2015 Renewable Factor***
MPUC Docket No. E015/M-14-962

Dear Mr. Wolf:

Enclosed and e-filed in the above-referenced matter please find Comments of the Minnesota Office of the Attorney General – Residential Utilities and Antitrust Division.

By copy of this letter all parties have been served. An Affidavit of Service is also enclosed.

Sincerely,

s/ Joseph C. Meyer

JOSEPH C. MEYER
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Enclosure

AFFIDAVIT OF SERVICE

Re: ***In the Matter of Minnesota Power's Renewable Resources Rider and 2015 Renewable Factor***
MPUC Docket No. E015/M-14-962

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

I hereby state that on 30th day of May, 2017, I filed with eDockets ***Comments of the Office of the Attorney General – Residential Utilities and Antitrust Division*** and served the same upon all parties listed on the attached service list by email, and/or United States Mail with postage prepaid, and deposited the same in a U.S. Post Office mail receptacle in the City of St. Paul, Minnesota.

s/ Judy Sigal
Judy Sigal

Subscribed and sworn to before me
this 30th day of January, 2017

s/ Ruth M. Busch
Notary Public

My Commission expires: January 31, 2020.

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