STATE OF MINNESOTA
BEFORE THE PUBLIC UTILITIES COMMISSION

Beverly Jones Heydinger	Chair
Nancy Lange	Commissioner
Dan Lipschultz	Commissioner
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In the Matter of the Application of Northern States Power Company for Authority to Increase Rates for Electric Service in the State of Minnesota

DOCKET NO. E-002/ GR-13-868

PETITION FOR RECONSIDERATION OF THE OFFICE OF THE ATTORNEY GENERAL

Pursuant to Minnesota Statutes section 216B.27 and Minnesota Rules part 7829.7300, the Office of the Attorney General – Residential Utilities and Antitrust Division ("OAG") files this Petition for Reconsideration of the Minnesota Public Utilities Commission's ("Commission") Order Reopening, Clarifying, and Supplementing May 8, 2015 Order ("August 31 Order"). The Commission should reconsider its decision related to the interim rate surcharge period because the Commission did not follow statutory requirements, and, by departing from the law, has exceeded the authority it was granted by the legislature in Minnesota Statutes section 216B.16, subdivision 3(c) ("the Interim Rate Refund Statute").

I. BACKGROUND.

In its August 31 Order, the Commission authorized Xcel to surcharge customers for the difference between interim rates and final rates beginning on March 3, 2015, extending the surcharge period permitted by Minnesota law by several months. The following procedural background provides a useful summary of the filings and events relevant to the Commission's decision on interim rates.

On November 4, 2013, Northern States Power Company ("Xcel" or "the Company") filed a petition to collect interim rates during its rate case.[1] In its initial Order, the Commission established a schedule that would require final rates to be implemented by March 3, 2015.[2] On February 7, 2014, Xcel filed a letter stating that it would waive its statutory right to have a final determination by March 3, 2015 and extend the deadline to March 24, 2015.[3] In its waiver, Xcel stated that it "affirmatively commit[ed]" to conduct the interim rate refund "in accordance with [the Interim Rate Refund Statute]," including any changes "during the additional time interim rates may be in effect due to the Company's commitment to waive the statutory time constraints."[4] On October 24, 2014, eight days after the Company had a private meeting with several members of Commission staff on October 16, 2014,[5] Xcel filed another letter waiving the statutory deadline and extending the date of final determination to May 8, 2015.[6] And, once again, Xcel committed that it would conduct its interim rate refund "in accordance with [the Interim Rate Statute]" and acknowledged that there could be changes to the refund "due to the Company's commitment to waive the statutory time constraints."[7] There does not appear to be any indication in the record that the Commission contacted Xcel to request either waiver.[8]

On November 13, 2014, Xcel filed a Proposal Related to Interim Rates, requesting that it be permitted to reduce interim rate over-collections from 2014 with projected under-collections

[1] Notice of Change in Rates and Interim Rate Petition, Doc. I.D. 201311-93261-01 (Nov. 4, 2013).
[2] Notice and Order for Hearing, Doc. I.D. 20141-95049-01, at 5 (Jan. 2, 2014).
[3] Waiver of Statutory Deadline, Doc. I.D. 20142-96267-01 (Feb. 7, 2014).
[4] *Id.*
[5] October 16, 2014 Ex Parte Communication Report, Doc. I.D. 201410-104183-01 (Oct. 28, 2014). While the ex parte communication report provides some documents that were apparently discussed at the meeting, there is no description of any oral communication that took place between Xcel and staff.
[6] Waiver of Statutory Deadline, Doc. I.D. 21410-104113-01 (Oct. 24, 2014).
[7] *Id.*
[8] If the Commission had contacted Xcel to request a waiver, such a communication would fall under Minnesota Rules parts 7845.7000–.7900.

from 2015.[9] In its filing, Xcel indicated that it had considered requesting a "change to the timing of the effective date of a possible surcharge," but had decided not to do so "at [the] time."[10] On January 13 and 16, 2015, the OAG and the Department of Commerce filed comments opposing Xcel's proposal.[11] The OAG indicated that the Commission could not modify the time period that Xcel could surcharge customers for interim rate under-collections, because that period was clearly defined in the Interim Rate Refund Statute. Commission staff thoroughly briefed the issue of interim rates in briefing papers filed on March 12, 2015,[12] but the Commission declined to take action on the interim rate issue at its hearing on March 26, 2015.

On April 30, 2015, Xcel made a Compliance Filing Related to Interim Rate Refund, requesting permission to net 2015 under-collections against 2014 over-collections, which would effectively implement final rates on January 1, 2015.[13] In the alternative, Xcel requested permission to begin surcharging customers on March 3, 2015.[14] The OAG, Department of Commerce, and AARP filed comments on May 28, 2015, opposing Xcel's request.[15] Commission staff summarized the issues in another set of briefing papers filed on July 2, 2015.[16] At a hearing on July 9, 2015, memorialized in the August 31 Order, the Commission ruled that Xcel could retroactively surcharge its customers beginning on March 3, 2015. That decision is inconsistent with the legal authority the Commission was granted by the legislature.

[9] Proposal Related to Interim Rates, Doc. I.D. 201411-104627-01 (Nov. 13, 2014).
[10] *Id.* at 1.
[11] OAG Comments, Doc. I.D. 20151-106131-01 (Jan. 13, 2015); Department Comments, Doc. I.D. 20151-106119-01 (Jan. 16, 2015).
[12] Briefing Papers Volume VII – Financial, Doc. I.D. 20153-108147-01, at 84-89 (March 12, 2015).
[13] Compliance Filing Related to Interim Rate Refund, Doc. I.D. (Apr. 30, 2015).
[14] *Id.*
[15] OAG Comments, Doc. I.D. 20155-110830-01 (May 28, 2015); Department Comments, Doc. I.D. 20155-110884-01 (May 28, 2015); AARP Comments, Doc. I.D. 20155-110869-02 (May 28, 2015).
[16] Briefing Papers Volume I – Introduction & Interim Rate Refund Plan, Doc. I.D. 20157-112048-01, at 6 – 19 (July 1, 2015).

II. ANALYSIS.

The Commission should reconsider its decision to authorize Xcel to surcharge ratepayers for under-collected interim rates beginning on March 3, 2015. The Commission's powers, including its powers related to interim rate refunds, are limited to the powers that it is granted by the legislature. In the Interim Rate Refund Statute, the legislature clearly defined when the Commission could permit utilities to surcharge customers for interim rate under-collections. By authorizing a surcharge period different than the one defined by law, the Commission has exceeded its authority. While the Commission raised several arguments in defense of its action, they do not justify departing from the refund process defined by statute. If the Commission does not limit the surcharge to the period defined by statute, it will be in violation of Minnesota law and subject to possible legal action to recover additional refunds on behalf of ratepayers.

A. THE INTERIM RATE REFUND STATUTE PROVIDES THAT UTILITIES MAY ONLY SURCHARGE RATEPAYERS FROM THE DATE OF THE COMMISSION'S FINAL DETERMINATION TO THE DATE THAT RATES BECOME EFFECTIVE.

The legislature defined how to proceed when interim rates are different from final rates in the Interim Rate Refund Statute.[17] In particular the Interim Rate Refund Statute defines the period in which the Commission can allow a utility to surcharge ratepayers to the period after its "final determination" in the case. The statute provides, "If, at the time of its final determination, the commission finds that the interim rates are less than the rates in the final determination, the commission *shall* prescribe a method by which the utility will recover the difference in revenues *between the date of the final determination and the date the new rate schedules are put into effect*."[18] The Interim Rate Refund Statute provides no exceptions to this limitation other than for

[17] A copy of the Interim Rate Refund Statute is provided in Attachment A for the convenience of the Commission and other parties.
[18] Minn. Stat. § 216B.16, subd. 3(c) (emphasis added).

settlement discussions, which was not one of the purposes Xcel stated for its waivers in this case.[19] The Minnesota Public Utilities Act defines the "final determination" as "the initial decision of the commission and not any order which may be entered by the commission in response to a petition for rehearing or other further relief."[20] The Commission has further clarified that the date of the final determination is the date of the "original order on the merits."[21] While the Commission verbally indicated that its August 31 Order would be the final determination in this case,[22] in any event the final determination could be no earlier than the Commission's Findings of Fact, Conclusions, and Order issued on May 8, 2015.

The plain language of the Interim Rate Refund Statute requires the Commission to authorize Xcel to recover under-collected interim rates from the date of the Final Determination, until final rates are implemented. In contrast, the Commission authorized Xcel to recover under-collected interim rates beginning on March 3, 2015, more than two months before its May 8 Findings of Fact, Conclusions, and Order, and nearly six months before the August 31 Order that some Commissioners acknowledged would be the final determination.[23] By doing so, the Commission exceeded the authority it was granted by the legislature.

B. THE COMMISSION DOES NOT HAVE THE AUTHORITY TO MODIFY THE SURCHARGE PERIOD THAT IS DEFINED BY THE INTERIM RATE REFUND STATUTE.

The Commission does not have the authority to do whatever it wishes. Its decisions about interim rate surcharge periods, like its decisions on every other issue, must be made within

[19] Waiver of Statutory Deadline, Doc. I.D. 20142-96267-01 (Feb. 7, 2014); Waiver of Statutory Deadline, Doc. I.D. 21410-104113-01 (Oct. 24, 2014).
[20] Minn. Stat. § 216B.16, subd. 2(g).
[21] Order Authorizing Implementation of New Rate Schedules, Approving Surcharge Plan, and Clarifying Order, *In the Matter of the Application of Minnesota Power for Authority to Increase Rates for Electric Service in Minnesota*, Docket No. E-015/GR-09-1151, at 2 (May 24, 2011).
[22] The Commission discussed the issue throughout its deliberation on July 9, 2015, and particularly at approximately 4:13:00 in the recording of the Commission's deliberation that is available at the Commission's website, www.mn.gov/puc/.
[23] *Id.*

the confines of what the Commission is permitted to do under Minnesota law. The Minnesota Supreme Court has repeatedly stated that administrative agencies, like the Commission, are creatures of statute and have only those powers given to them by the legislature.[24] In addition, the Supreme Court has also made clear that the legislature not only defines what an administrative agency has the authority to do, but also "how it is to do it."[25] Administrative agencies have only the authority that is "expressly stated" by the legislature, or that can be "implied from the express powers."[26] Powers will only be implied when it is clear that the "legislature intended, without saying so, to confer [the] power."[27] But "any enlargement of powers by implication must be 'fairly drawn and fairly evident from the agency's objectives and [the] powers expressly given by the legislature.'"[28] And when it reviews whether an agency has express or implied authority to act, the Supreme Court applies a "strict analysis."[29]

The Supreme Court's precedent provides that the Commission may only act if the legislature has expressly given it the authority to do so, or if it appears that the legislature intended to give the authority even though it did not say so in a statute. It is also clear that the Commission is not entitled to any deference when interpreting the extent of its powers.[30] The question is not one of procedural practicality—it is one of strict statutory construction. And applying this strict statutory construction to the interim rate refund statutes shows that the

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[24] *In re Hubbard*, 778 N.W.2d 313, 318 (Minn. 2010); *In re Qwest's Wholesale Service Quality Standards*, 702 N.W.2d 246, 259 (Minn. 2005); *Peoples Natural Gas Co., a Division of Inter-North, Inc. v. Minnesota Public Utilities Commission*, 369 N.W.2d 530, 534 (Minn. 1985); Great *Northern Railroad Co. v. Public Service Commission of Minnesota*, 169 N.W.2d 732, 735 (Minn. 1969).

[25] *Peoples Natural Gas Co., a Division of Inter-North, Inc. v. Minnesota Public Utilities Commission*, 369 N.W.2d 530, 534 (Minn. 1985).

[26] *Id.*

[27] *Id.*

[28] *In re Hubbard*, 778 N.W.2d 313, 321 (Minn. 2010) (*quoting Peoples Natural Gas Co., a Division of Inter-North, Inc. v. Minnesota Public Utilities Commission*, 369 N.W.2d 530, 534 (Minn. 1985)).

[29] *Siewert v. Northern States Power Co.*, 793 N.W.2d 272, 282 n.2 (Minn. 2011).

[30] *Id.* The Minnesota Supreme Court has repeatedly held that questions about whether an administrative agency has acted within its statutory authority is a question of law that will be reviewed *de novo*. *In re Hubbard*, 788 N.W.2d 313, 318 (Minn. 2010).

legislature did not grant the Commission either express or implied authority to modify the time period that Xcel may surcharge its customers during interim rates.

1. The Interim Rate Refund Statute Does Not Grant the Commission Express Authority To Modify The Surcharge Period.

The Interim Rate Refund Statute is clear and straightforward. If final rates are higher than interim rates, the Interim Rate Refund Statute states that "the commission shall prescribe a method by which the utility will recover the difference in revenues *between the date of the final determination and the date the new rate schedules are put into effect*."[31] There is no ambiguity in the Interim Rate Refund Statute: when final rates are higher than interim rates, the Commission has the authority and, in fact, the duty, to allow the utility to recover the difference from the date of its order on the merits and the date when final rates go into effect. The Commission can do no more, and the Commission can do no less. The legislature defined a specific system for the Commission to apply, and made it mandatory by indicating the use of the word "shall."[32] The Interim Rate Refund Statute does not grant the Commission the authority to extend or modify the time period for interim rate surcharges, and neither does any other part of the Minnesota Public Utilities Act. As a result, the Commission could only have the authority to do so if it is clear that the legislature intended to confer the authority even though the language of the statute indicates otherwise.

2. The Legislature Did Not Intend to Grant the Commission Implied Authority to Modify the Surcharge Period.

Because the Interim Rate Refund Statute does not expressly grant the authority to extend or modify the time period to recover under-collections, the Commission could only have the authority to do so if it is implied from its express powers. The Minnesota Supreme Court held

[31] Minn. Stat. § 216B.16, subd. 3(c).
[32] Minn. Stat. § 645.44, subd. 16 ("'Shall' is mandatory.").

that the primary inquiry in analyzing implied authority is "whether the legislature *intended*, without saying so, to confer a refund power on the Commission."[33] The Supreme Court has also made clear that implied authority should not be assumed lightly: "[A]ny enlargement of express powers by implication must be fairly drawn and fairly evident from the agency objectives and powers expressly given by the legislature. 'Neither agencies nor courts may under the guise of statutory interpretation enlarge the agency's powers beyond that which was contemplated by the legislative body.'"[34] The language of the interim rate refund statute and the structure of the Minnesota Public Utilities Act make clear that the legislature did not intend to grant the Commission authority in this instance.

a. The Clarity of the Legislature's Mandatory Instruction Indicates that it Did Not Intend to Grant the Commission Implied Authority to Modify the Surcharge Period.

The clarity of the Interim Rate Refund Statute indicates that the legislature did not intend to give the Commission the authority to determine the time period for interim rate surcharges. The Interim Rate Refund Statute defines the time period that the legislature authorized the Commission to permit interim rate surcharges with unambiguous language: "between the date of the final determination and the date the new rate schedules are put into effect."[35] If the legislature had intended to grant the Commission the discretion to set whatever time period it preferred, it would not have stated a clearly defined time period in the statute. As Commission staff noted in their briefing papers, "Minn. Stat. § [2]16, subd. 2 is very clear about the definition of the date of the final determination being the date of the Commission's initial decision and not the date that the Commission could [have] made its decision absent other circumstances. . . . The

[33] *Peoples Natural Gas Co., a Division of Inter-North, Inc. v. Minnesota Public Utilities Commission*, 369 N.W.2d 530, 534 (Minn. 1985).
[34] *Id.* (*quoting Waller v. Powers Department Store*, 343 N.W.2d 655, 657 (Minn. 1984)).
[35] Minn. Stat. § 216B.16, subd. 3(c).

interim rate refund statute is clearly and intentionally asymmetrical in its choice of effective dates for the interim refund obligation and the final rates if higher than interim rates."[36] The clarity of the legislature's language is a signal that it did not intend to give the Commission the authority to modify the surcharge period that is permitted by the law.

b. The Legislature's Decision to Include Only a Single Exception to the Interim Rate Refund Statute Indicates That it Did Not Intend to Grant the Commission Implied Authority to Modify the Surcharge Period.

Other language in the Interim Rate Refund Statute also supports the position that the legislature did not intend to grant the Commission additional authority in this situation. The Interim Rate Refund Statute includes a single exception: "In addition, when an extension is granted for settlement discussions under subdivision 1a, the commission shall allow the utility to also recover the difference in revenues for a length of time equal to the length of the extension."[37] That exception does not apply here, because Xcel's waivers were not made under subdivision 1a, which permits the deadline to be extended for the purposes of settlement discussions. In fact, the existence of this single exception indicates that the Commission does not have authority to create other exceptions to the Interim Rate Refund Statutes for at least two reasons.

First, it indicates that the legislature considered exceptions to the Interim Rate Refund Statute, and declined to include a general exception or other exception that would be applicable here. In fact, the legislature specifically considered whether there should be exceptions when the date of final determination is extended, and created a single exception extending the period for surcharges *only* for *settlement discussions*—a situation that does not apply in this case. The legislature reviewed what should happen when the final determination of a case is extended, and

[36] Briefing Papers Volume VII – Financial, Doc. I.D. 20153-108147-01, at 84-89 (March 12, 2015).
[37] Minn. Stat. § 216B.16, subd. 3(c).

decided that only a single exception was appropriate. That consideration is an indication that that the legislature did not intend to give the Commission the power to create new exceptions that the legislature declined to adopt.

Second, the fact that the legislature included an exception at all indicates that the legislature viewed the Commission's authority as bounded by the language crafted by the legislature. If the legislature had intended the Commission to have broad authority to change the time period for surcharges, it would not have been necessary to create the specific exception that exists. The fact that the legislature felt it was necessary to write the existing exception into the statute indicates that the Commission does not have the authority to change the surcharge period without an explicit exception. In other words, the legislature would not have created the exception that exists if it had intended to give the Commission the authority to create its own exceptions. This understanding, in combination with the legislature's decision to include only a single exception, indicates that the legislature did not intend to grant the Commission the power to modify the surcharge date that is clearly defined in the Interim Rate Refund Statute.

c. The Legislature Did Not Intend to Grant the Commission Implied Authority to Change the Surcharge Period During a Multi-Year Rate Plan.

The larger context of the Minnesota Public Utilities Act also indicates that the legislature did not intend to grant the Commission the power to modify the surcharge period. In its August 31 Order, the Commission points to perceived ambiguity about the interaction between the Interim Rate Refund Statute and the multi-year rate plan statute, Minnesota Statutes section 216B.16, subdivision 19.[38] But a review of the multi-year rate plan statute shows that the interaction between the two statutes is straightforward. Any possible ambiguity was cured

[38] August 31 Order, at 11.

because the legislature explained what the Commission is to do with interim rate refunds during multi-year rate plans: "If the commission approves the request, *interim rates shall be implemented in the same manner as allowed under [the Interim Rate Refund Statute]*."[39] The legislature could not have spoken with more clarity. The legislature anticipated the possibility for confusion, and stated that interim rate refunds are to be conducted the same way under multi-year rate plans as they are in standard rate cases—including the time period for surcharging interim rate refunds. That prescription is a clear indication that the legislature did not intend to grant the Commission the authority to change the surcharge period simply because there are multiple years included in a rate case. Any other interpretation would be incompatible with the clear language employed by the legislature.

d. The Commission Does Not Have Express Or Implied Authority To Modify The Surcharge Period Defined By Minnesota Law.

The Commission's powers are limited to the powers that are granted expressly by the legislature, or to powers that the legislature intended to grant even though it declined to express its intention through statutory language. Neither the Interim Rate Refund Statute nor the remainder of the Minnesota Public Utilities Act grant the Commission the power to change the surcharge period that is clearly defined by Minnesota law. And every indication shows that, rather than giving the Commission broad authority, the legislature intended for the Commission to permit only the surcharge period that it created and wrote into the Interim Rate Refund Statute. The Commission lacks legal authority to allow Xcel to extend the surcharge period, because it was not granted the power to do so by the legislature..

[39] Minn. Stat. § 216B.16, subd. 19(b).

C. THE COMMISSION HAS NO JUSTIFICATION FOR DECLINING TO FOLLOW STATUTORY INSTRUCTION AND EXCEEDING THE AUTHORITY IT WAS GRANTED BY THE LEGISLATURE.

The Commission attempts to justify its actions in several ways, but none of its explanations can support extending the Commission's authority beyond the powers set out in the Interim Rate Refund Statute. First, the Commission's claim that it is equitable to allow Xcel to surcharge for a longer period of time is unreasonable because the legislature has already determined the proper balance between utilities and ratepayers, and because Xcel explicitly agreed to accept that balance when it filed its voluntary waivers. Second, the Commission's reliance on exigent circumstances to justify its action is based on a mis-reading of the statutory text. Third, the Commission's dismissal of concerns regarding its authority is based on an incorrect understanding of the law.

1. The Legislature Has Already Decided The Proper Balance Between Ratepayers and the Utility, and Xcel Accepted That Balance When It Filed Its Waivers.

In its August 31 Order, the Commission stated that one of the factors impacting its decision was the fact that Xcel had agreed to extend the deadline of this case.[40] Similarly, during their discussion of the matter, several Commissioners stated that they did not believe that it would be fair to require Xcel to refund more dollars as a result of agreeing to extend the deadline in this case.[41] While issues of equity have a place in many Commission decisions, they are not relevant in this case because the legislature has already decided the balance between utilities and ratepayers as a matter of policy. It is clear that the legislature considered equitable concerns in creating the Interim Rate Refund Statute, because, as Commission staff noted, the statute is

[40] August 31 Order, at 10.
[41] The relevant discussion begins at approximately 4:11:00 in the recording of the Commission's deliberation on July 9, 2015.

obviously designed to be asymmetrical.[42] As such, the legislature has already determined the proper balance between Xcel and ratepayers. That balance is a surcharge period that begins on the date of the Commission's final determination.[43]

Even if it were legal for the Commission to upset the balance that the legislature had established, it would be entirely unreasonable to do so in this case because Xcel agreed to accept the interim rate consequences of waiving the statutory deadline when it filed its waivers. In both of its waiver filings, Xcel stated,

> The Company affirmatively commits to refund any amounts collected in interim rates . . . in accordance with [the Interim Rate Refund Statute], including those interim rates collected during the additional time interim rates may be in effect due to the Company's commitment to waive the statutory time constraints.[44]

At the time that it made its waivers, Xcel knew that extending the time period would change the way that interim rates were refunded, and Xcel "affirmatively commit[ed]" to conducting the refund in accordance with the Interim Rate Refund Statute, which clearly states that the time period for surcharging is limited to the time after the Commission's final determination. Xcel agreed to accept the balance established by the legislature, and allowing Xcel to retroactively recover rates that it had previously agreed it would not seek to collect would be inherently unreasonable. And, regardless of all other factors, allowing Xcel to go back on its earlier guarantee at this point would be prejudicial to ratepayers and open the door to similar deal-breaking in the future.

Furthermore, it would be unreasonable to decrease the interim rate refund for ratepayers in favor of Xcel because Xcel's waivers were voluntary. The Commission's Order indicates that

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[42] *See* Briefing Papers Volume VII – Financial, Doc. I.D. 20153-108147-01, at 84-89 (March 12, 2015).
[43] Minn. Stat. § 216B.16, subd. 3(c).
[44] Waiver of Statutory Deadline, Doc. I.D. 20142-96267-01 (Feb. 7, 2014); Waiver of Statutory Deadline, Doc. I.D. 21410-104113-01 (Oct. 24, 2014).

Xcel waived its deadline because of "Commission-initiated requests to extend deadlines."[45] But no party has identified anywhere in the record where the Commission requested that Xcel extend the deadline.[46] And, even if that had taken place, Xcel's waiver was still voluntary. The Commission should not reduce a refund to ratepayers because of a utility's limited voluntary waiver. Moreover, even absent those facts, nothing in this circumstance justifies diverging from the clear statutory direction in the Minnesota Public Utilities Act. Even if the Commission did ask for more time and Xcel agreed, that would not make it reasonable to punish ratepayers by reducing the interim rate refund they should receive according to the laws created by the legislature.

The legislature considered the matter and wrote its decision into statute, and Xcel agreed to accept the legislature's direction when it filed its waivers. The Commission may not second-guess the legislatures policy decision just because of the unusual circumstances in this case, especially since the legislature anticipated the possibility of interim rate refund problems in multi-year cases and specifically wrote a statute clarifying that multi-year refunds should be conducted in the same manner as single year refunds.[47]

2. The Commission's Reliance On Exigent Circumstances Is Based on a Misreading of Statute.

In the August 31 Order, the Commission stated that, "Exigent circumstances warrant an interim rate over- and under-collection calculation that reflects the unique circumstances of this case."[48] This defense is based on a misreading of Minnesota law.

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[45] August 31 Order, at 10.
[46] And the Commission could not communicate a request to extend the deadline outside of a hearing or Order without violating several ex parte communication rules. *See* Minn. Stat. § 216A.037; Minnesota Rules part 7845.7400.
[47] Minn. Stat. § 216B.16, subd. 19(b).
[48] August 31 Order, at 10.

In relying on the existence of "exigent circumstances," the Commission has conflated two different statutory sections. The words "exigent circumstances" cannot be found anywhere in the Interim Rate Refund Statute, which controls the issue at hand. Instead, that concept is limited to a different part of the Minnesota Public Utilities Act—the sub-section that determines the level of interim rates to be set while a rate case is pending.[49] While the both statutory provisions deal with interim rates, the legislature also clearly separated the procedures for setting interim rates from the procedures for making interim rate refunds by placing them in different sub-sections. One procedure, for setting interim rates, allows the Commission to make modifications in the case of "exigent circumstances."[50] The other, for making interim rate refunds, does not.

The existence of "exigent circumstances" has no bearing on the analysis of this issue because "exigent circumstances" are not a part of the law applicable here. To make its argument, the Commission would take language from one part of a statute and move it into another. But the "exigent circumstances" language is confined to a part of the statute that does not apply in this situation. The Interim Rate Refund Statute, which governs the time period for surcharging interim rate under-collections, does not contain any references to "exigent circumstances." The Commission cannot justify exceeding its authority by hanging its hat on statutory language that simply does not exist.

Moreover, even if "exigent circumstances" were relevant to the interim rate refund (which they are clearly not), "exigent circumstances" do not exist in this case. The Minnesota Supreme Court has clarified that "exigent circumstances" requires more than unusual facts—

[49] Minn. Stat. § 216B.16, subd. 3(b).
[50] The Commission should be familiar with this statutory language, as it was the subject of protracted litigation in the Minnesota Supreme Court only a few years ago. *In re Application of Minnesota Power for Authority to Increase Rates for Electric Service in Minnesota*, 838 N.W.2d 747 (Minn. 2013).

instead, there must be some "urgency or emergency" that "would justify abandoning the statutory plan for interim rates and taking extraordinary action."[51] While Xcel's shareholders would likely prefer a longer surcharge period, no party could seriously argue that the situation is "urgent" or that there is some kind of "emergency."

3. The Commission's Interpretation of its Authority Would Give It A Blank Check To Take Actions that the Legislature Did Not Specifically Prohibit.

In making its decision, the Commission attempted to dismiss concerns about its authority to change the surcharge period by stating that, "[N]othing in [the Interim Rate Refund Statute] prohibits the Commission from authorizing recovery for under-collection between March 3 and May 8 where doing so is just and reasonable under the statute."[52] The Commission's line of argument is a misapplication of the law.

In effect, the Commission argues that it has the authority to modify the surcharge date because, even though the legislature clearly defined the surcharge period in statute, the legislature did not also include a specific statutory provision prohibiting the Commission from modifying it. That argument would allow for an incredible expansion of the Commission's authority. Taken to its logical conclusion, the Commission's argument would allow the Commission to do anything it wanted that the legislature had not specifically prohibited. Such a result would be absurd, and would upend decades of precedent ruling that the Commission's authority, like every other administrative agency, is limited to the powers granted by the legislature.[53] The Commission does not have the authority to do everything that the legislature

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[51] *Application of Peoples Natural Gas Co.*, 389 N.W.2d 903, 907 (Minn. 1986).
[52] August 31 Order, at 11.
[53] *In re Hubbard*, 778 N.W.2d 313, 318 (Minn. 2010); *In re Qwest's Wholesale Service Quality Standards*, 702 N.W.2d 246, 259 (Minn. 2005); *Peoples Natural Gas Co., a Division of Inter-North, Inc. v. Minnesota Public Utilities Commission*, 369 N.W.2d 530, 534 (Minn. 1985); Great *Northern Railroad Co. v. Public Service Commission of Minnesota*, 169 N.W.2d 732, 735 (Minn. 1969).

has not prohibited. In fact, Minnesota law is exactly the opposite: the Commission only has the authority that the legislature has *affirmatively granted*.[54]

Moreover, the Commission should not modify statutory definitions based on the particular circumstances of a case. The legislature clearly defined a surcharge period in the Interim Rate Refund Statute—it is the time period between the Commission's final determination and when final rates are put into effect. The meaning of that statutory language could not change because a utility voluntarily waived a deadline, or because of any other circumstance that could arise in a case. The Commission has the obligation to apply the letter of the law regardless of circumstances, and it is without discretion to invent a new system to accomplish its objective.

The Commission does not somehow gain authority just because the legislature has not barred it and the Commission believes its action is reasonable. Where the legislature has defined what the Commission has the authority to do, like in the Interim Rate Refund Statute, the Commission cannot justify departing from statute by claiming it has additional authority when it believes its actions are reasonable under the circumstances.

III. CONCLUSION.

The Commission should reconsider its decision to permit Xcel to surcharge ratepayers for under-collected interim rates before the date of the Commission's final determination. The Commission's powers are limited to only those powers that are granted by the legislature, and the legislature created a statute that clearly defines the time period that utilities may surcharge ratepayers. Because the Interim Rate Refund Statute clearly limits interim rate surcharges to the period between the final determination and when final rates become effective, the Commission

[54] *In re Hubbard*, 778 N.W.2d 313, 318 (Minn. 2010); *In re Qwest's Wholesale Service Quality Standards*, 702 N.W.2d 246, 259 (Minn. 2005); *Peoples Natural Gas Co., a Division of Inter-North, Inc. v. Minnesota Public Utilities Commission*, 369 N.W.2d 530, 534 (Minn. 1985); Great *Northern Railroad Co. v. Public Service Commission of Minnesota*, 169 N.W.2d 732, 735 (Minn. 1969).

exceeded its authority by permitting Xcel to extend the surcharge period before the final determination.

Dated: September 21, 2015

Respectfully submitted,

LORI SWANSON
Attorney General
State of Minnesota

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

445 Minnesota Street, Suite 1400
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(651) 757-1473 (Voice)
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ATTORNEYS FOR OFFICE OF THE
ATTORNEY GENERAL-RESIDENTIAL
UTILITIES AND ANTITRUST DIVISION

216B.16 RATE CHANGE; PROCEDURE; HEARING.

§ Subd. 3. **Interim rate.**

(c) If, at the time of its final determination, the commission finds that the interim rates are in excess of the rates in the final determination, the commission shall order the utility to refund the excess amount collected under the interim rate schedule, including interest on it which shall be at the rate of interest determined by the commission. The utility shall commence distribution of the refund to its customers within 120 days of the final order, not subject to rehearing or appeal. If, at the time of its final determination, the commission finds that the interim rates are less than the rates in the final determination, the commission shall prescribe a method by which the utility will recover the difference in revenues between the date of the final determination and the date the new rate schedules are put into effect. In addition, when an extension is granted for settlement discussions under subdivision 1a, the commission shall allow the utility to also recover the difference in revenues for a length of time equal to the length of the extension.

Attachment A

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

SUITE 1400
445 MINNESOTA STREET
ST. PAUL, MN 55101-2131
TELEPHONE: (651) 296-7575

LORI SWANSON
ATTORNEY GENERAL

September 21, 2015

Daniel Wolf
Executive Secretary
Minnesota Public Utilities Commission
121 7th Place East, Suite 350
St. Paul, MN 55101

RE: In the Matter of the Application of Northern States Power Company for Authority to Increase Rates for Electric Service in the State of Minnesota
Docket No. E-002/GR-13-868

Dear Mr. Wolf:

Enclosed and e-filed in the above-referenced matter please find Petition for Reconsideration of the Office of the Attorney General.

By copy of this letter all parties have been served. An affidavit of service is enclosed.

Sincerely,

s/Ryan P. Barlow

RYAN P. BARLOW
Assistant Attorney General

(651) 757-1473 (Voice)
(651) 296-9663 (Fax)

Enclosures

AFFIDAVIT OF SERVICE

RE: In the Matter of the Application of Northern States Power Company for Authority to Increase Rates for Electric Service in the State of Minnesota
Docket No. E-002/GR-13-868

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

I, Deanna Donnelly, hereby state that on the 21st day of September, 2015, I efiled with eDockets **Petition for Reconsideration of the Office of the Attorney General** and served the same upon all parties listed on the attached service list via electronic submission 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.

See Attached Service List

s/ Deanna Donnelly
Deanna Donnelly

Subscribed and sworn to before me
this 21st day of September, 2015.

s/ Patricia Jotblad
Notary Public
My Commission expires: January 31, 2020.

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Julia	Anderson	Julia.Anderson@ag.state.mn.us	Office of the Attorney General-DOC	1800 BRM Tower 445 Minnesota St St. Paul, MN 551012134	Electronic Service	Yes	OFF_SL_13-868_Official
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