STATE OF MINNESOTA
BEFORE THE PUBLIC UTILITIES COMMISSION

Beverly Jones Heydinger	Chair
Dr. David C. Boyd	Commissioner
Nancy Lange	Commissioner
Dan Lipschultz	Commissioner
Betsy Wergin	Commissioner

In the Matter of a Request for Approval of the Asset Purchase & Sale Agreement Between Interstate Power and Light Company and Minnesota Energy Resources Corporation.	DOCKET NO. G-001, G-011/PA-14-107 **REPLY OF THE OFFICE OF THE ATTORNEY GENERAL - ANTITRUST AND UTILITIES DIVISION TO PETITIONERS' RESPONSIVE COMMENTS**

The Office of the Attorney General - Antitrust and Utilities Division ("OAG") submits the following Reply to Petitioners' Responsive Comments in response to the submissions of the Petitioners. On June 30, 2014, the Commission issued an Order Requiring Additional Record Development. The Commission stated:

> The Commission cannot resolve all issues in this case on the basis of the current record. Two issues in particular—the rates that will be charged to transferred customers and the allocation of environmental remediation costs—require further development.
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> At this point it is not clear whether these or other issues turn on contested material facts. If they do, the Commission will refer the case to the Office of Administrative Hearings for contested case proceedings; if they do not, the Commission will take final action on the case without formal evidentiary development by the OAH.
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> The Commission will therefore require additional substantive comments on these and related issues, under time frames designed to permit a prompt decision on whether contested-case procedures are necessary. The Commission will delegate to the Executive Secretary the authority to manage this additional comment process, as set forth below.[1]

[1] Order Requiring Additional Record Development, Docket No. 14-107, at 2–3 (June 30, 2014).

On July 7, 2014, the Commission and the OAG submitted additional questions to the Petitioners in order to further develop the record. The Petitioners responded to the Commission's questions on July 25, 2014, and responded to the OAG's questions on August 4, 2014. In this Reply, the OAG will address the Commission's primary concerns about whether there are contested material facts on the issues of environmental remediation costs or the rates that would be charged to transferred customers, and whether a contested case is required to decide this matter.

I. THERE ARE NO MATERIAL FACTS IN DISPUTE REGARDING FORMER MANUFACTURED GAS PLANT COSTS.

IPL currently has the obligation to conduct environmental remediation at six former manufactured gas plant ("FMGP") sites in its service area: Albert Lea, Fairmont, New Ulm, Owatonna, Rochester, and Austin.[2] According to the Joint Petition ("Petition"), MERC will take liability for the Austin site, which is estimated as requiring between $2.6 and $4.1 million in additional remediation costs. MERC's ratepayers will pay $3 million plus half of any additional costs for remediation costs of the Austin FMGP site, and IPL will pay for the remaining costs. IPL will also retain responsibility for the remaining sites, which is estimated as $1.8 million as of December 31, 2012.[3] Finally, MERC would pay IPL $2.6 million for previously incurred FMGP costs.[4]

In response to the Commission's questions, the Petitioners introduced a significant amendment to the Petition that was originally filed in this case.[5] The OAG understands that

[2] Petition, at 18.
[3] Petition, at 19. The Petitioners indicated that the estimate for the other FMGP sites had increased significantly from 2012 to 2013, but did not provide any information supporting the increased estimate. *See* Response to Commission Additional Questions for Joint Petitioners, Docket No. 14-107, at 4 (July 25, 2014) (hereinafter "Response to Commission").
[4] Petition, at 18.
[5] Response to Commission, Attachment A.

pursuant to the amendment, MERC will purchase IPL's existing regulatory asset for FMGP remediation costs. In return, MERC will provide IPL with a promissory note to repay IPL for the regulatory asset from ratepayers funds that MERC will request in its next rate case. Before directing ratepayer funds to IPL, MERC will use the funds to recover the costs it will incur to remediate the Austin FMGP site.

The amendment clarifies several issues regarding FMGP costs. First, the Amendment formalizes the mechanism by which IPL would recover $2.6 million in unrecovered remediation costs. Second, the Petitioners' response indicates that MERC will not seek recovery of remediation costs for Austin or for IPL's unrecovered costs until its next rate case.[6] Finally, the Petitioners also clarified that IPL will not seek to recover any future costs for the other five sites from Minnesota ratepayers.[7]

The OAG will not restate all of the reasoning presented in its previous filings in this Reply, but following the amendment the OAG is still concerned that the Petitioners' FMGP proposal is not consistent with the public interest. The OAG's primary concern is that it would be inequitable to require MERC's ratepayers, many of whom live a significant distance from the FMGP plants, to pay for remediation when no ratepayers in their area obtained any benefit from the FMGP plants while they were in operation.[8] In contrast, IPL owned the plants at the time they were operating, ratepayers in IPL's service area were near the FMGP plants and obtained some benefit before they were shut down.[9] Furthermore, the OAG identified that it would be unreasonable for IPL to recover funds from MERC's ratepayers for unrecovered environmental

[6] Response to Commission, at 3.
[7] Response to Commission, at 4.
[8] OAG Supplemental Comments, at 4–5.
[9] OAG Comments, Attachment A.

costs that are related to plants for which IPL has retained liability.[10] For that reason, the OAG believes that it is inconsistent with the public interest to transfer liability for FMGP costs to MERC.

The OAG still believes that some aspects of the FMGP proposal are not consistent with the public interest. But the OAG does not believe that any of the facts related to the FMGP proposal are in dispute, and does not believe that a contested case is necessary for the Commission to reach a reasoned decision on the matter of FMGP remediation costs.

II. THERE ARE MATERIAL FACTS IN DISPUTE REGARDING THE RATES THAT WOULD BE CHARGED TO TRANSFERRED CUSTOMERS.

A. THERE ARE DISPUTED MATERIAL FACTS BECAUSE IPL'S CURRENT REVENUE REQUIREMENT IS UNSUBSTANTIATED.

In addition to the environmental remediation costs, the Commission identified concerns about whether there are disputed material facts about the rates that would be charged to customers transferred from IPL to MERC.[11] The OAG's primary concern with the Petitioners' proposal is that it would result in a dramatic rate increase for the IPL customers immediately following the close of the transaction. The OAG demonstrated the impact of transferring the IPL customers to MERC's proposed rates in its previous filings: residential customers' distribution service rates would be increased by 52%; small C&I customers would be increased by 41%; large C&I customers would be increased by 22%; small volume interruptible would be increased by 275%; and large volume interruptible would be increased by 95%.[12] It would be unreasonable to increase rates for the IPL customers to this extent without requiring their utility, whether it is IPL or MERC, to substantiate its revenue requirement by filing a general rate case.

[10] OAG Supplemental Comments, at 2–3.
[11] Order Requiring Additional Record Development, Docket No. 14-107, at 2–3 (June 30, 2014).
[12] OAG Reply Comments, Attachments A & B.

The Petitioners and the Department both agree that the transaction would lead to increased rates for the IPL customers.[13] The Department, however, prefers to analyze the transaction by comparing MERC's rates to the hypothetical rates that would result if IPL filed a rate case. According to the Department, it is unreasonable to compare IPL's current rates to MERC's rates because IPL claims that its current rates are not sustainable.[14] The OAG agrees with the Department in principle on several points: if IPL is not currently recovering its cost of service, then it would be entitled to increase rates by establishing its revenue requirement. Additionally, it would be reasonable to compare IPL's cost of service to the cost for MERC to provide natural gas service to the IPL customers *if the parties had perfect information about IPL's revenue requirement*. Based on that analysis, the Commission could make an informed decision about whether IPL could provide a lower cost of service to its customers than MERC, and, if not, whether the efficiencies gained by transferring the customers to MERC would be sufficient to offset any detriments of the transfer.[15]

But the parties *do not have perfect information* about IPL's revenue requirement because IPL has not filed a general rate case. Instead, in conducting its analysis the Department used a projected 2014 revenue requirement that IPL provided in an information request.[16] But, as the OAG pointed out in its Reply Supplemental Comments, the Department did not conduct any analysis of whether IPL's proposed revenue requirement was reasonable. Given that the Department conducted significant analysis and recommended reductions to the revenue increase

[13] Initial Petition, Attachment F at 1; Department Supplemental Comments, at 7.
[14] Department Supplemental Reply Comments, at 5.
[15] For example, the OAG has identified that the proposed transaction would eliminate several million dollars in deferred tax assets currently held by IPL. OAG Initial Supplemental Brief, at 6–7. The deferred tax assets are taxes that were prepaid by the IPL ratepayers and are not yet due to the federal government. The deferred tax assets currently benefit the IPL customers because they are used to reduce rate base; if the transaction is approved as it is currently proposed, the deferred tax assets would all be lost. *Id.*
[16] *Id.*

in the MERC,[17] CenterPoint Energy,[18] and Xcel Energy rate cases in the last year,[19] the OAG believes that it is unreasonable for the Department to reach conclusions without performing similar analysis in this case. Additionally, a review of all of the rate cases filed in recent years indicates that Commission has not granted a utility its entire requested revenue increase in any rate case filed since 2010. [20] For that reason, it is very unlikely that IPL would be awarded all of its requested increase after a contested rate. The record in this case does not provide accurate information about what IPL's revenue requirement is, and for that reason the Department's method is not based on reasonable analysis.

In order to mitigate this lack of information, the OAG asked the Petitioners to produce all financial information necessary to substantiate a new IPL rate. Specifically, the OAG asked the Petitioners to provide:

> a. All financial information referenced in Minnesota Rules part 7825.3900–4400, including, but not limited to proposed rate base, operating income, overall rate of return, and the calculation of income requirements, income deficiency, and revenue requirements for a test year selected by the Petitioners;
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> b. A class cost of service study which classifies, functionalizes, and allocates all costs that will be recovered through rates. In preparing the class cost of service study, please classify IPL's natural gas distribution main system by using a zero-intercept study to determine the customer costs associated with a zero-inch diameter main;
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> c. A proposed rate structure for IPL customers based upon the costs identified in the class cost of service study, including the deferred tax assets currently held by IPL;

[17] Docket No. 13-617.
[18] Docket No. 13-316.
[19] Docket No. 13-868.
[20] *See* Docket No. 10-239 (Otter Tail Power awarded 47% of initial request); Docket No. 10-276 (Interstate Power & Light awarded 51% of initial request); Docket No. 10-971 (Xcel Energy awarded 66% of initial request); Docket No. 12-961 (Xcel Energy awarded 36% of initial request); Docket No. 13-316 (CenterPoint Energy awarded 76% of initial request).

> d. Travel and entertainment expense itemization as required by Minnesota Statutes section 216B.16; and,
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> e. All additional financial documentation that would be filed with a rate case in order to comply with any statute, rule, Commission order, or any other reason.[21]

Rather than providing the OAG with the information that it requested, the Petitioners responded by recreating incomplete financial information that had already been provided in information requests. Not only was the information insufficient when compared to the breadth and depth of information that would be produced for a rate case,[22] but the Petitioners failed to even restate the entirety of the OAG's questions in providing their response.[23]

It is not possible to properly analyze whether MERC can provide a lower cost of service to IPL's customers without determining IPL's current revenue requirement. And the method for determining the revenue requirement for a utility in Minnesota is to file a general rate case.[24] Until either IPL or MERC files a rate case to establish the cost of service for the IPL customers, there are material facts in dispute about how much it costs to provide service to the IPL customers.

B. A CONTESTED CASE PROCEEDING IN THIS DOCKET WOULD NOT BE AN APPROPRIATE REPLACEMENT FOR A RATE CASE.

There are disputed material facts in this case, but the OAG does not believe that a contested case proceeding in this docket could resolve them. The purpose of a contested case proceeding in this case would be to determine IPL's revenue requirement, but the proper method

[21] Questions of the OAG, at 1–2.
[22] For example, the Petitioners did not provide any expert opinions supporting their financial statements as is required by Minnesota Rules 7825.3700.
[23] *Compare* Response to OAG, at 2, *with* Questions of the OAG, at 1–2.
[24] Minnesota Rules part 7825.3100, subp. 6 ("'General rate change' means an overall change in rates for which the determination of the utility's gross revenue requirements is necessary in assessing the appropriateness of the change in rates.").

to determine a revenue requirement is to file a general rate case as described in Minnesota Statutes section 216B.16.

It is unlikely that IPL would be able to file a fully formed rate case in the accelerated time frame that the Petitioners are requesting in this case, and in fact, requiring IPL to file a rate case within this docket would likely lead to errors and inaccuracy because IPL is unprepared to file a rate case. As IPL indicated in its Response to the OAG's questions, "IPL does not currently have information available to calculate revenue requirements for the IPL-Minnesota Gas jurisdiction for a 2014 projected test year or the information necessary to perform a class cost of service study."[25] And even if IPL had all of the information necessary to file a rate case on hand at this time, it is unlikely that IPL could assemble the information and produce the expert testimony necessary to substantiate it without a significant delay.

Given the fact that IPL is unable to file the rate case necessary to determine its revenue requirement, it is unclear what purpose a contested case in this matter would serve. One thing that is certain is that a contested case in this matter would not provide a reasonable replacement for a rate case. The rate case procedures set out in Minnesota Rules and Statutes provide the regulatory framework that is necessary to ensure that the Commission has all of the information and analysis necessary to reach a reasoned decision in establishing a utility's revenue requirement. It also provides robust mechanisms for the public, public agencies, and intervenors to participate in the case and provide further analysis for the Commission's review. These procedures are set out in rule and statute, and utilizing some alternative procedure would not provide an appropriate replacement.

[25] Response to OAG, at 2.

C. THE OAG RECOMMENDS THAT THE IPL CUSTOMERS BE KEPT AT THEIR CURRENT RATES UNTIL THEIR UTILITY ESTABLISHES ITS REVENUE REQUIREMENT IN A GENERAL RATE CASE.

If the Commission determines that the proposed transaction is consistent with the public interest despite the concerns raised about environmental remediation costs and the loss of deferred tax assets, the OAG believes that it would be inequitable and unreasonable to change rates for the IPL ratepayers because IPL has not established its cost of service.

The record in this case is insufficient to demonstrate IPL's revenue requirement because a revenue requirement must be established by a general rate case. Additionally, a contested case in this proceeding would not be an appropriate replacement for a general rate case because it would not provide similar procedural protections and IPL agrees that it does not have the information necessary to file a rate case at this time.

If the Commission determines that the transaction is consistent with the public interest, despite concerns about the loss of deferred tax assets and environmental remediation costs, the OAG recommends that the IPL customers be maintained at their current rates after being transferred to MERC. Maintaining the IPL customers at their current rates would eliminate the need for a contested case proceeding at this time because IPL's revenue requirement is only a material fact if the IPL customers would have their rates changed. If the IPL customers are transferred at their current rates, MERC will be able to determine their revenue requirement in its next rate case. Given that MERC provided testimony indicating that "it would likely file a rate case in 2015,"[26] it is possible that MERC could be collecting interim rates from current IPL customers within a few months.

[26] Findings of Fact, Summary of Public Testimony, Conclusions of Law and Recommendation of ALJ, *In the Matter of a Petition by Minnesota Energy Resources Corporation for Authority to Increase Natural Gas Rates in Minnesota*, Docket No. GR-13-617, at 66 (August 12, 2014).

The Petitioners have claimed that MERC does not have the capability to maintain separate billing systems or that the cost of doing so would be too high.[27] But MERC operated separate billing systems just a few years ago, until it consolidated two divisions purchased from Aquila, Inc. in the course of its 2010 rate case. The same method should be used in this purchase: if the IPL customers are transferred, they should be maintained at their current rates until they can be consolidated during a rate case.

The Petitioners may also protest that transferring the IPL customers to MERC at their current rates would lead to an under-recovery for the utility. It is possible that this could be the case, but it is also irrelevant. The IPL customers are currently charged the tariffed rates that were established in IPL's last rate case, and the only way to modify those rates is for IPL to establish its current cost of service by filing a rate case. The IPL ratepayers are entitled to be charged rates that are based on a revenue requirement established by a rate case, just like the other customers of all other regulated utilities in Minnesota. If IPL is not currently earning its full cost of service, it is the result of a decision made by the company, not the fault of ratepayers. Increasing rates during the course of a property acquisition docket, and justifying the increase on the basis that IPL claims it is not earning its full cost of service, would be unreasonable and unfair for the IPL customers. Furthermore, if MERC files a rate case in 2015 as it has indicated it intends to do, MERC could begin to collect interim rates in the near future and minimize any loss related to the cost of serving the IPL customers.

The Petitioners' current proposal asks the Commission for permission to increase rates for the IPL customers immediately, without filing a rate case, because IPL is no longer recovering its full cost of service. But the fact that IPL may not be recovering its cost of service

[27] *See* Petitioners' Reply Comments, at 21–22.

is the very reason that a utility would file a rate case, and is not a reasonable excuse to ignore the requirement to do so. The IPL customers are entitled to be treated the same as all other ratepayers and have their revenue requirement determined in a rate case, regardless of whether it is an IPL rate case or a MERC rate case. The OAG recommends that, if the Commission determines the transaction is consistent with the public interest, the IPL customers be maintained at their current rates after they are transferred to MERC.

III. THE COMMISSION SHOULD SCHEDULE PUBLIC HEARINGS IN THIS MATTER.

In its Initial Comments, the OAG recommended that the Commission schedule public hearings so that ratepayers would have the opportunity to comment on the concerns raised by the OAG and the other parties in this proceeding.[28] The Petitioners noted in their Reply Comments that they had no objection to a public hearing in this matter.[29] When the Commission scheduled a hearing in this matter on June 19, 2014, the Notice of Commission Meeting and the Commission's briefing papers indicated that the purpose of the hearing was to determine whether the Commission should hold public hearings. At the hearing the Commission determined that the record required further development and established new procedures to determine whether any material facts were in dispute. At the June 19 hearing, the Commission unanimously selected decision option B, which provided, that the Commission would "Determine not to hold public hearings in this case at this time."[30] During the hearing, the Chair clarified that the purpose of decision option B was not to reach a decision on scheduling public hearings during the agenda meeting.[31]

[28] OAG Comments, at 21.
[29] Petitioners' Reply, at 32.
[30] Minutes of June 19, 2014 Agenda Meeting.
[31] June 19, 2014 Agenda Meeting Webcast, at 1:17:15.

In its *Order Requiring Additional Record Development*, however, the Commission indicated that in reaching its decision the Commission had concluded that public hearings are expensive, "nearly always sparsely attended," and that holding hearings would not "meaningfully increase public awareness, understanding, or involvement in this case."[32] Additionally, Commission staff noted during the June 19 hearing that it was an awkward time to discuss holding public hearings because the public comment period was still open and the parties in the matter were still in the process of filing additional comments. Given that the Commission did not provide an opportunity for the OAG to present its reasoning in support of public hearings, and that Commission staff's concerns about the schedule no longer present a concern, the OAG believes that it is now proper to reconsider whether to schedule public hearings.

While the public comment process does provide consumers the chance to file their written comments, public hearings represent the only occasion for ratepayers to ask the utility questions in person. Public hearings also represent as occasion for the OAG and other parties to meet ratepayers face-to-face in a formal setting and describe the concerns that have been raised with the proposed transaction. Furthermore, the OAG continues to believe that the rate increases that would result from the proposed transaction are improper outside of a rate case. The normal context for significant rate increases is a general rate case, and a general rate case requires a public hearing.[33]

[32] Order Requiring Additional Record Development, Docket No. 14-107, at 2 (June 30, 2014).

[33] Minn. Stat. § 216B.16, subd. 2(b) ("If the commission finds that all significant issues raised have not been resolved to its satisfaction . . . it shall refer the matter to the Office of Administrative Hearings with instructions for a public hearing . . . .").

In its Order, the Commission indicated that one reason public hearings were not necessary was that public hearings are "nearly always sparsely attended."[34] While it is true that consumers do not always attend public hearings in large numbers, IPL has had significant attendance at public hearings in the recent past. In IPL's last rate case, which was for its electric utility, each of the three public hearings was well attended. In fact, the hearing at Albert Lea was attended by more than 200 ratepayers.[35] Additionally, public hearing attendance has been increasing generally in recent years because of the increasing frequency of rate cases, and increasing public concern about utility rates. Hundreds of consumers appeared at public hearings scheduled in Xcel Energy's pending rate case.[36] In those cases, the public hearings provided a meaningful chance for the public to learn about and participate in the process, and the public should be afforded the same opportunity in this case. Furthermore, the OAG believes that measuring the attendance at public hearings in other cases is not a valid method for determining whether to hold public hearings in this case. Any number of ratepayers could attend a hearing in any particular case, but counting up the raw number of individuals who attended a public hearing is not the proper way to measure the value of holding hearings. The value of public hearings is that it provides ratepayers an additional avenue to participate if they wish to do so.

The OAG recommends that the Commission schedule public hearings in this matter, but the OAG is also sensitive to the Commission's concern that public hearings will increase the expense of this proceeding. In order to limit the expense of holding public hearings, the OAG suggests that it may be possible to hold joint hearings along with the sale of IPL's electric assets

[34] Order Requiring Additional Record Development, Docket No. 14-107, at 2 (June 30, 2014).
[35] Response to OAG, at 8.
[36] Docket No. 13-868.

in Docket Number 14-322. In this way, the expense of public hearings can be limited while still allowing meaningful participation.

Dated: September 3, 2014

Respectfully submitted,

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