

Staff Briefing Papers

Meeting Date February 22, 2018

Agenda Item #3**

Company **Minnesota Energy Resources Corporation**
Northern States Power Company d/b/a Xcel Energy

Docket No. **Docket No. G-011,002/C-17-802**

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

- Issues
- Does the Commission have jurisdiction over MERC's complaint?
 - If yes, would a Commission investigation into MERC's allegations against Xcel be in the public interest?
 - If no, should the Commission dismiss and close this docket?
 - If the Commission chooses to investigate the complaint, how should the Commission proceed? Should the Commission send this Complaint to the Office of Administrative Hearings as a contested case? Alternatively, should the Commission make its decision based on available information at this Agenda Meeting?
 - Should the Commission stop Xcel from using its Natural Gas Competitive Agreement until the Commission resolves the legal questions raised by MERC in this docket or in the Commission's generic investigation into the use of incentives by natural gas utilities to compete with one another for customers, in Docket No. 17-499?

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| Staff | Bob Brill | bob.brill@state.mn.us | 651-201-2242 |
| | Jason Bonnett | Jason.bonnett@state.mn.us | 651-201-2235 |



Relevant Documents

Date

| | |
|--|-------------------|
| MERC - Initial Petition (Trade Secret) | November 9, 2017 |
| Xcel – Response Comments to Complaint (Trade Secret) | November 29, 2017 |
| MERC – Reply Comments | December 11, 2017 |
| Office of the Attorney General (OAG) – Reply Letter (Trade Secret) | December 11, 2017 |
| Department of Commerce (Department) – Reply Comments | December 11, 2017 |
| MERC – Response to Reply Comments | December 19, 2017 |
| MERC – Public Version of Initial Petition, Exhibit H Previously Marked as “Trade Secret” | January 4, 2018 |
| MERC – Motion to Adopt Protective Order and Proposed Order | January 16, 2018 |
| Minnesota Representative Garofalo Letter | January 18, 2018 |
| Xcel – Response to MERC’s Motion to Adopt Protective Order | January 29, 2018 |

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The attached materials are work papers of the Commission Staff. They are intended for use by the Public Utilities Commission and are based upon information already in the record unless noted otherwise.

I. Statement of the Issues

- Does the Commission have jurisdiction over MERC's complaint?
 - If yes, would a Commission investigation into MERC's allegations against Xcel be in the public interest?
 - If no, should the Commission dismiss and close this docket?
- If the Commission chooses to investigate the complaint, how should the Commission proceed? Should the Commission send this Complaint to the Office of Administrative Hearings as a contested case? Alternatively, should the Commission make its decision based on available information at this Agenda Meeting?
- Should the Commission stop Xcel from using its Natural Gas Competitive Agreement until the Commission resolves the legal questions raised by MERC in this docket or in the Commission's generic investigation into the use of incentives by natural gas utilities to compete with one another for customers, in Docket No. 17-499?

II. Summary of Party Positions

a. MERC

On November 9, 2017, MERC filed its Complaint alleging that Xcel plans to extend natural gas service to United Properties (United), with Prime Therapeutics (Prime) occupying the buildings.¹ MERC claims that Xcel's actions are inconsistent with the provisions of Minn. Stat. § 216B.01 and existing Commission policies. MERC asked the Commission to suspend Xcel's authority to use its Natural Gas Competitive Agreement and to refer this matter to the Office of Administrative Hearings for a contested case proceeding.

b. Xcel

Xcel and United negotiated a Natural Gas Competitive Agreement (Agreement) where Xcel will provide natural gas service to the United property, which will receive monetary considerations (promotional incentives). Xcel believes that its Agreement clearly reflects that United chose Xcel over MERC to be the preferred natural gas provider, selected through a competitive bidding process. Xcel is also providing electric service to United at tariff rates.²

Xcel believed that MERC's complaint should be dismissed because there is no reason to depart from previous Commission decisions in prior dockets.³

¹ United Properties is the land developer for Prime Therapeutics (Prime), which will consolidate its technology and operations team at this location. The location will consist of two large office buildings housing approximately 2,000 employees with flexible future growth space. See A. Lee Affidavit, pp. 2-4, paragraphs 5-13.

² Xcel claims it is not flexing (discounting) its natural gas service rates in order to provide the service.

³ *In the Matter of a Complaint of Peoples Natural Gas against Northern States Power Company regarding its Construction of Distribution Facilities*, Docket No. G-11/C-96/1062, ORDER DISMISSING COMPLAINT

c. Department

The Department argues that: 1) Xcel's Competitive Agreement is not unlawful; 2) Xcel's Agreement does not provide Xcel with an unlawful mechanism to discount its tariffed rates in competition with other natural gas utilities; 3) the Commission could determine there are reasonable grounds to initiate an investigation if it wants to include a complaint-specific cost/benefit analysis as part of the review; and 4) a contested case hearing is unnecessary.⁴

d. OAG

The Office of the Attorney General Residential Utilities Division (OAG) did not take a position on MERC's Complaint, but noted that the Commission should consider the ratepayer impact when making its decision in Docket No. 17-802.⁵

III. Procedural Background

On November 9, 2017, MERC filed its complaint against Xcel.

On November 15, 2017, the Commission issued its Notice of Comment Period requesting that Xcel file its response to the complaint by November 29, 2017 (15 days) and that Reply Comments were due on December 11, 2017.⁶

On November 29, 2017, Xcel filed its response to MERC's complaint.

On December 11, 2017, both the Department and the OAG filed their response to MERC's complaint and Xcel's comments.

On January 4, 2018, MERC resubmitted its Initial Petition's Exhibit H as a Public Document. The document was originally filed as "Trade Secret."

On January 16, 2018, MERC filed its Motion to Adopt Protective Order and its Nondisclosure Agreement.

On January 19, 2018, Minnesota Representative Pat Garofalo submitted a letter to the Commission recommending the Commission review the Minnesota Legislature's intent set forth in Minn. Stat. § 216B.01-unnecessary duplication of facilities and the rate regulated utilities' use of unauthorized promotional incentives. Further, he did not take any position on the merits of MERC's pending complaint against Xcel.

(Oct. 21, 1996) (hereinafter Peoples Complaint).

⁴ See Department's December 11th Reply Comments, p. 16.

⁵ The OAG notes that it is a participate in Docket No. 17-499, where the Commission has requested comments on promotional incentives and if standards and procedures should be developed to govern disputes such as this complaint to protect the Minnesota ratepayers.

⁶ The Reply Comment period was 10 days, but because December 9th fell on a Saturday, the time was extended to Monday (December 11, 2017).

On January 29, 2018, Xcel filed its Response to MERC's Motion to Adopt Protective Order.

The Commission did not receive any public comments in this docket.

IV. Minnesota Statutes and Rules

Applicable statutes and rules can be found in Attachment A.

V. Parties' Comments

A. Minnesota Energy Resources Corporation (MERC)⁷

1. November 9, 2017 Initial Complaint

According to MERC, the Commission has the jurisdiction to hear this matter, make findings of facts, and order appropriate relief under Minn. Statutes §§ 216A.05, 216B.01, 216B.03, 216B.05, 216B.06, 216B.07, 216B.09 and 216B.17, and Minn. R. Chapter 7829.⁸ In this docket, MERC alleged that Xcel infringed on its service territory, would construct unnecessary duplicative facilities, and was using unlawful discounts (promotional incentives) to "win" the customer's business.

Procedurally, MERC expressed concern that the Commission's ongoing investigation in Docket No. 17-499 would not be completed in an adequate time-frame to prevent financial harm to MERC's customers. Thus, pursuant to Minn. Stat. § 216B.17, MERC filed its Complaint against Xcel on November 9, 2017 asking the Commission to resolve which natural gas utility should provide service to United.⁹ In this complaint, MERC requested that the Commission:

- Immediately suspend Xcel's use of its Natural Gas Competitive Agreement (Agreement). MERC asserts that under Minnesota Law a promotional incentive should only be used in the case of "effective competition" from an un-regulated supplier, such as an interstate pipeline.
- Send this complaint to the OAH as a contested case. MERC claims that a contested case is necessary to fully develop this record for the Commission to make an informed decision.

⁷ MERC is a public utility under Minn. Stat. § 216B.02, subd. 4 and is a wholly-owned subsidiary of WEC Energy Group, Inc. MERC delivers natural gas to more than 232,000 customers in communities across Minnesota. MERC provides natural gas service to residential, commercial, and industrial customers in the City of Eagan (Eagan), Minnesota.

⁸ See MERC Initial Complaint, pp. 16-17.

⁹ And Minn. R. 7829.1700.

MERC believes that a contested case could address these types of questions:¹⁰

- Whether Xcel's proposed service to United would constitute an "unnecessary duplication" of MERC's existing facilities?
- Whether Xcel's "unnecessary duplication" of MERC's existing facilities to serve United would increase the cost of service to consumers?
- Whether the incentives agreed to by Xcel in the "Natural Gas Competitive Agreement" with United are lawful and non-discriminatory?

To further support its position, MERC filed an affidavit from MERC Witness Ms. Amber Lee supporting the Complaint.¹¹

2. December 11, 2017 Reply Comments

MERC believes that Xcel's November 29th Comments used certain statements to support its position of dismissing the Complaint. MERC believes that these statements are unsupported by the record.

According to MERC:

- Xcel claims that Minnesota law authorizes natural gas utilities to discount rates in order to take customers away from other natural gas utilities. In support, Xcel suggests that because it and two other natural gas utilities in the state already engage in such practice, it must be lawful. MERC believes that the Commission should reject Xcel's claims.¹²
- Xcel's claims that there are no material differences between the complaint in the 17-305 docket and the complaint in this docket. MERC believes that differences between the dockets exist and should be addressed by the Commission on a case-by-case basis. MERC believes that the Xcel facilities required by the United development will duplicate existing facilities, which violates Minn. Stat. § 216B.01.¹³
- Xcel argued that a contested case is not necessary, while at the same time Xcel submitted certain information and analysis that confirmed disputed issues of material fact exist within this docket. Further, Xcel's Comments ignored numerous disputed issues of facts.¹⁴ MERC believes that this docket should be sent to the Office of Administrative Hearings (OAH) as a contested case.¹⁵

¹⁰ For a full list of MERC's disputed issues see MERC's Initial Petition, pp. 27-29.

¹¹ See MERC Initial Petition, directly behind the Complaint, pp. 1-8.

¹² See MERC December 11th Reply Comments, pp. 2-3.

¹³ See MERC December 11th Reply Comments, pp. 3-4.

¹⁴ For MERC's disputed issues that need to be resolved, see MERC Initial Petition, pp. 27-29.

¹⁵ See MERC December 11th Reply Comments, pp. 4-6.

MERC continues to support its initial request that the Commission immediately suspend Xcel's unlawful use of its Agreement (promotional incentives) and to refer this docket to the OAH as a contested case.

3. January 4, 2018 Public Version of MERC's Initial Petition, Exhibit H

In its Initial Petition, MERC submitted Exhibit H which was marked as Trade Secret. MERC's Exhibit H is an agreement between Peoples (MERC's predecessor) and Northern States Power Company (Xcel). MERC later filed this Agreement as a public document in the 17-802 docket's record.

4. January 16, 2018 Motion for Protective Order and Nondisclosure Agreement

Pursuant to Minn. R. 7829.0410, MERC submitted a motion requesting that the Commission issue a Protective Order in this docket to facilitate the disclosure Trade Secret Information or Nonpublic Data documents and information during the course of these proceedings. MERC stated that it and Xcel have responded to information requests from the Department and the OAG that included sensitive information. MERC believes that parties (MERC and Xcel) should have an opportunity to review each other's Trade Secret Information. MERC intends for the Proposed Protective Order to govern the disclosure of documents and information in this proceeding and any subsequent investigation or appeal. MERC proposed a Protective Order for Commission consideration (see Exhibit A).

For additional MERC discussion, see PUC Staff Analysis.

B. Northern States Power Company d/b/a Xcel Energy (Xcel)

1. November 29, 2017 Comments

Xcel claims that MERC's complaint (Docket 17-802) is not materially different from the complaint MERC filed against Xcel in April 2017 related to new Minnesota Vikings corporate headquarters (Docket No. 17-305), in that:¹⁶

- The customer at issue considered MERC but ultimately chose Xcel as its natural gas provider (customer choice);
- Xcel offered the customer a promotional incentive consistent with its tariff and Minnesota industry practice;
- The customer will pay Xcel's tariffed rate for service and will not receive any discount to that rate; and
- United is located in Eagan adjacent to the new Vikings facility.

Xcel believes that MERC's Complaint in this docket (Docket No. 17-802) should be dismissed - like MERC's complaint in Docket No. 17-305. According to Xcel, natural gas utilities have long competed for new customers, and Commission precedent has consistently supported customer

¹⁶ See Xcel's November 29, 2017 Response Comments, pp. 1-2.

choice.¹⁷ If the Commission wishes to depart from its longstanding practices, it should do so on a going-forward basis after careful consideration and input from all affected gas utilities in the generic docket (17-499).

Xcel believes the Commission should dismiss MERC's Complaint in this docket as it did in the 17-305 docket and let the promotional incentive and customer choice issues be resolved in the Commission's generic docket, 17-499.

2. January 29, 2018 Xcel's Response to MERC's Motion to Adopt Protective Order

Xcel believes that MERC's Motion to Adopt Protective Order is premature because the Commission has not made the required threshold determination on whether MERC's complaint merits further investigation. Further, MERC's Motion is unnecessary because the Department, OAG, and the Commission staff have access to the parties' confidential information and can conduct the same analyses that supported the Commission's decision on MERC's prior complaint.

Xcel claims that MERC has not provided a credible reason for why this docket should proceed differently from MERC's prior complaint in the 17-305 docket. If the Commission decides to investigate MERC's complaint (Docket No. 17-802), Xcel believes any Protective Order issued should be negotiated between the parties to be narrowly tailored to the issues the Commission determines to be in dispute in the investigation.

Staff agrees with Xcel that it is too early in the process to issue a Protective Order. If the Commission sends the Complaint to OAH as a contested case, the parties can negotiate with each other to develop an appropriate Protective Order.

For additional Xcel discussion, see PUC Staff Analysis.

C. Department of Commerce (Department)

The Department recommended that the Commission should dismiss the MERC Complaint. Further, its analysis found no reasonable basis to reverse the Commission's prior determinations regarding "new" natural gas load. The competition between Xcel and MERC for the new United facility produced results that support dismissal of the complaint – and cost savings for the customer (United in this instance) without causing undue harm to MERC's ratepayers.

For the balance of the Department's Comments, see the discussion below.

¹⁷ See Xcel November 29th Response Comments, pp. 7-8; Xcel believes that the Commission's July 12th Order reaffirmed this when it denied MERC's Complaint in Docket No. 17-305.

1. Department Recommendations

The Department concluded that

- Xcel's Agreement is not unlawful in that United pays the same tariffed rates as other system customers receiving service under the Large Demand Billed tariff, the Agreement was approved by the Commission, and Xcel filed the Agreement in Docket No. 17-499 as directed by the Commission;
- Xcel's Agreement does not provide it with an unlawful mechanism to discount its tariffed rates in competition with other natural gas utilities;
- The Commission could determine there are reasonable grounds to initiate an investigation if it wants to include a complaint-specific cost/benefit analysis as part of its review of this matter; and
- A contested case hearing is unnecessary.

D. OAG

The OAG noted that MERC's initial petition estimated its additional (incremental) infrastructure costs to provide United's natural gas service to be \$40,000, while estimating Xcel's infrastructure costs to be \$175,000 to provide the same service. If MERC's estimates are correct, the OAG believes Minnesota ratepayers would face a rate base increase more than four times as much to have Xcel provide the United development with natural gas service. The OAG states that the Commission should consider the ratepayer impact when making its decision in this MERC complaint (Docket No. 17-802).¹⁸

VI. Staff Analysis

Xcel and United signed an Agreement on August 15, 2017, where Xcel committed to pay United a promotional incentive of \$25,000. On November 9, 2017, MERC (the Complainant) filed a complaint against Xcel alleging that Xcel is violating Minnesota Statutes and Rules pursuant to Minn. Stat. § 216B.17, subd. 1.

*Complaint Investigation and Hearing, a public utility may submit a Complaint against another public utility with respect to any furnishing of natural gas service that it believes is unreasonable, insufficient, or unjustly discriminatory practices.*¹⁹ [Emphasis Added]

In Docket No. 17-305, MERC filed a similar Complaint against Xcel alleging that Xcel was constructing duplicate facilities, invading its service territory, and was using unlawful promotional incentives to acquire new customers. In its July 12, 2017 Order *Dismissing*

¹⁸ The OAG notes that it is a participate in Docket No. 17-499, where the Commission has requested comments on promotional incentives and if standards and procedures should be developed to govern disputes such as this complaint to protect the Minnesota ratepayers. Docket No. 17-499 has not been resolved.

¹⁹ Also, see Minn. Stat. § 216B.17, subd. 2 and subd. 3.

Complaint, Requiring Filings, and Opening Investigation, the Commission dismissed MERC's Complaint, but opened a generic docket (Docket No. 17-499) to investigate (1) the parameters of inter-gas-utility competition involving the duplication of existing facilities, and (2) the use of promotional incentives and other non-tariffed payments provided by utilities to their existing customers and potential future customers.²⁰

MERC argues that the 17-499 investigation will not address the immediate financial harm caused by Xcel's continued use of unlawful discounts (promotional incentives) to obtain new customers while creating duplicative facilities. MERC requested that the Commission suspend Xcel's use of promotional incentives with its Agreement and further requested the Commission to send the docket to the OAH for a contested case.²¹

Xcel argues that MERC did not develop any new arguments that support a different determination in this proceeding from Docket No. 17-305. Further, that MERC should not be allowed to bypass the Commission's Docket No. 17-499 process for determining any changes to the appropriate parameters for competition among natural gas utilities by filing this Complaint.²² The Department and Xcel recommended that the Commission dismiss MERC's Docket No. 17-802 Complaint.

MERC stated that United needed natural gas service by October 15, 2017 to maintain its planned construction schedule. Xcel was not able accommodate United's timeline because the City of Eagan initially denied Xcel request for a right-of-way permit – because Eagan had public safety concerns.²³ This led to MERC and United executing a Distribution Facilities Installation Agreement on October 18, 2017. MERC constructed the necessary facilities and started providing natural gas service on October 25, 2017, at a facilities cost of \$40,000.²⁴

Eventually, Xcel was able to obtain the necessary right-of-way permits from the City of Eagan and staff believes that Xcel has completed the necessary construction to provide United natural gas service pursuant to its signed Agreement. As of January 29, 2018, MERC continues as the natural gas service provider to United. MERC believes this Complaint is necessary to prevent Xcel from: (1) seeking to enforce its Agreement with United; and/or (2) offering additional incentives to entice United to disconnect from MERC.

Because MERC is currently providing natural gas services to United, the Commission may want to consider MERC's Complaint differently from MERC's Complaint in the 17-305 docket. The

²⁰ See the Commission's July 12, 2017 Order, p. 5 and Ordering Point 4, p. 8.

²¹ MERC believes Xcel's facilities construction will result in facilities duplication to MERC's existing facilities.

²² In accordance with the Commission's July 12th Order (July 12th Order) in Docket No. 17-305, Xcel filed its Agreement in Docket No. 17-499 on August 18, 2017.

²³ On October 31, 2017 a hearing was held in Xcel's appeal of the denial of the permit. On November 3, 2017 the hearing examiner issued recommended alternatives to the City Council of Eagan. On November 6, 2017, the City Council adopted the hearing officer's recommendation, and tabled the appeal until the Council's meeting on December 5, 2017. See MERC Initial Petition, Exhibits C, D, E, and F.

²⁴ See MERC's Initial Petition, pp. 10-12, A. Lee Affidavit, pp. 4-5, paragraphs 14-20.

Commission could determine that this Complaint has “*special circumstances*” due to MERC already serving the natural gas load to United. Such information should be considered by the Commission in determining whether the Complaint should be dismissed or accepted.

The Commission issued its Notice of Comment Period, providing for an initial comment period and reply comment period. The Commission’s Notice asked the following questions:

- Does the Commission have jurisdiction over the subject matter of this complaint?
- Is it in the public interest for the Commission to investigate these allegations? and
- If the Commission chooses to investigate the complaint, what procedures should be used to do so?

A. Does the Commission have jurisdiction over the subject matter of this Complaint?

Xcel acknowledged the Commission has jurisdiction over the Complaint, but believes MERC’s complaint should be dismissed on the basis of prior Commission precedent, sound policy and decades of industry practice.²⁵

Xcel’s November 29, 2017 response noted that the Commission reviews formal complaints using a two-step process. The first step of the process involves two questions:

- Does the Commission have jurisdiction over the complaint?
- Are there reasonable grounds to open an investigation?

If the answer is no to either of the questions, the Commission must dismiss the Complaint without further investigation. Xcel believes that Minn. R. 7829.1800, subp. 1 supports its dismissal position:

The commission shall review a formal complaint as soon as practicable to determine whether the commission has jurisdiction over the matter and to determine whether there are reasonable grounds to investigate the allegation. *On concluding it lacks jurisdiction or that there is no reasonable basis to investigate the matter, the commission shall dismiss the complaint.* [Emphasis added]

The Department states that the Commission has jurisdiction to address MERC’s Complaint as the Commission deems necessary.²⁶

All parties (MERC, Xcel, and the Department) believe that the Commission has jurisdiction over MERC’s Complaint based on the language from Minn. Stat. § 216B.01.

²⁵ See Xcel November 29th Response Comments, p. 3.

²⁶ See Department December 11th Reply Comments, pp. 6-11.

PUC staff agrees with the parties.²⁷

B. Is it in the public interest for the Commission to investigate these allegations?

a. MERC

MERC believes that a Commission investigation of its Complaint is in the public interest because the Commission's decision could impact Xcel's continued use of promotional incentives to attract new customers while duplicating existing facilities to provide the service. MERC acknowledged that competition among natural gas utilities for new customers is a longstanding practice.²⁸ MERC asserts that Minn. Stat. § 216B.01 provides guidance to the Commission regarding the siting of Minnesota natural gas facilities and the need to avoid duplication of such facilities.

Minn. Stat. § 216B.01 states:

It is hereby declared to be in the public interest that public utilities be regulated as hereinafter provided in order to provide the retail consumers of natural gas and electric service in this state with adequate and reliable services at reasonable rates, consistent with the financial and economic requirements of public utilities and their need to construct facilities to provide such services or to otherwise obtain energy supplies, to avoid unnecessary duplication of facilities which increase the cost of service to the consumer and to minimize disputes between public utilities which may result in inconvenience or diminish efficiency in service to the consumers. [Emphasis added]

b. Xcel

Xcel believes that a Commission investigation of MERC's Complaint is not in the public interest. The Commission should reach the same conclusion as in prior complaints and dismiss this docket because MERC failed to provide any "new" facts that would support a different result. The Commission should not be persuaded by MERC's arguments regarding duplicate facilities and safety issues. Xcel believes that MERC's concerns will be addressed in the Commission's generic docket, Docket No. 17-499.

c. Department

The Department concluded that this docket's facts were similar to the facts from previous dockets, and cited Commission precedent used by both MERC and Xcel. The Department provided the Commission its analysis of those previous dockets in its December 11, 2017 Reply

²⁷ Pursuant to Minn. Stat. § 216B.01 and Minn. Stat. § 216B.17.

²⁸ Ibid; 1974 MN Legislature enacted the MPUA, but did not establish exclusive natural gas service territories for natural gas utilities.

Comments and believed that an investigation would not be in the public interest based on its analysis of Commission precedent.²⁹

d. PUC Staff

The Commission will need to decide whether to accept MERC's Complaint against Xcel for further investigation based on its merits or dismiss the Complaint because it does not have merit and further investigation would not be in the public interest.

C. If the Commission chooses to investigate this Complaint, what procedures should be used?

a. MERC

MERC believes that Minn. Stat. § 216B.17 authorizes the Commission to hold a hearing on any complaint made by a public utility against another public utility. MERC believes the Commission should send this docket to the OAH for a contested case proceeding, to investigate this dockets' issues.

b. Xcel

Xcel believes that the Complaint should be dismissed.

c. Department

The Department recommends that the Commission dismiss this Complaint. But, if the Commission decides to investigate MERC's Complaint, the Department proposed various cost/benefit analyzes from various perspectives that could be used to analyze the financial effects of the complaint, such as from the perspective of:

- The new customer whose load will be served;
- The preferred utility's shareholders;
- The non-preferred utility's shareholders;
- The preferred utility's ratepayers; and
- The non-preferred utility's ratepayers.

The Department noted that if the Commission decides to pursue this issue further, it would complete the suggested analysis for this docket and file it with the Commission in subsequent comments.

²⁹ See the Department December 11th Reply Comments, pp. 6-11 and Attachments A-D.

d. PUC Staff

If it accepts MERC's Complaint, the Commission will need to decide how to conduct its investigation.

Commission guidance is provided by Minn. Stat. § 216B.17, subd. 1, which in-part states:

....the commission shall proceed, with notice, to make such investigation as it may deem necessary.

Minn. Stat. § 216B.17, subd.8, paragraph 2, states:

If after making an investigation under subdivision 1 and holding a hearing under this section, the commission finds that all significant factual issues raised have not been resolved to its satisfaction: ...

(2) for investigations of other matters, the commission shall order that a contested case proceeding be conducted under chapter 14.

Further, Minn. R. 7829.1900 states:

The commission shall deal with a formal complaint through a contested case proceeding, informal proceeding, or expedited proceeding.

If the Commission accepts MERC's Complaint, the following options are available:

- Refer this matter to the Office of Administrative Hearings (OAH) for an investigation (as directed by the Commission) and ask the OAH to render its Report by a specific date;
- Direct its staff to issue a Notice to solicit comments from interested parties;
- Make a determination from the record that has been provided thus far; or
- Develop some other methodology to determine who should provide natural gas service to the United facility.

In the alternative, the Commission could decide that Docket No. 17-499 is the appropriate place for deciding this Complaint.

The Commission may wish to consider the following discussion before making its decision:

D. Commission Precedent

The Department and Xcel reference Commission precedent concerning MERC's Complaint and used the precedent to develop their respective recommendation that the Commission should dismiss MERC's Complaint based on the docket's merits. MERC did not use Commission

precedent in developing its recommendation to the Commission, but still believes Xcel is violating Minnesota Statutes and Rules.

1. Docket No. G-999/CI-90-563³⁰

This docket addressed certain Commission concerns regarding competition between natural gas utilities in the State of Minnesota. As a result of a previous Order,³¹ the Commission initiated a study group to investigate the impact on current natural customers of certain practices the utilities were engaging in to compete with other utilities for the same customers. In the 90-563 docket, the study group reviewed the following concerns regarding natural gas competition:³²

- Service to areas not currently served;
- Commission response to multiple service providers in an area; and
- Review of Local Distribution Companies (LDC) service extension contracts.

On March 31, 1995, the Commission issued its Order summarizing the conclusions of the study group and terminating the investigation. The Order stated that there were both economic advantages and disadvantages to the provision of gas service by multiple providers in the same general area. The Commission recognized benefits to customers such as providing access to natural gas for a greater number of people and, hence, reducing these customers' heating costs. The Commission also recognized that competition may cause a detriment to customers such as wasteful duplication of service and higher per customer costs, and that utilities may be tempted to waive certain tariffed charges for new customers to the detriment of existing customers.

The Commission noted that Minnesota Statutes do not establish exclusive gas services areas or require that gas utilities get certificates of authority before piping into a new area, even one already served by another utility. In its 90-563 Order, the Commission stated that it must balance the interests of the utilities, competed-for customers, and current customers on a case by case basis.³³

*No ultimate judgment on this subject is required. First, while recognizing the negative potential cited above, the fact remains that there is no statutory prohibition against competition by two or more gas providers in the same territory. Moreover, it appears that the Commission has the capacity to balance the interests of the utilities, competed-for customers, and current customers on a case by case basis.*³⁴

³⁰ In the Matter of an Inquiry into Competition between Gas Utilities in Minnesota.

³¹ Docket No. G-010/CI-90-148, In the Matter of Midwest Gas Service Extension Complaints Dated April 1, 1991; and Commission Order INITIATING STUDY GROUP dated April 4, 1991.

³² See Docket No. G-999/CI-90-563, 1995 WL 594725 (Minn. P.U.C. Mar. 31, 1995), *In the Matter of an Inquiry into Competition Between Gas Utilities in Minnesota*, pp. 3-7; Department Reply Comments, Attachment C.

³³ See Docket No. G-999/CI-90-563, 1995 WL 594725 (Minn. P.U.C. Mar. 31, 1995), *In the Matter of an Inquiry into Competition Between Gas Utilities in Minnesota*.

³⁴ *Ibid*, p. 5; Department Reply Comments, p. 6, Attachment C (the Commission Order in this docket).

2. Docket No. G-004, 011/C-91-731

Great Plains filed a complaint against Peoples for violating several provisions of Minnesota law and People's own tariff. This docket addressed two natural gas utilities operating in the same area, but did not specifically address the question of facilities duplication. The Commission dismissed Great Plains complaint because the load to be served by Peoples was not an existing natural gas load for Great Plains, but was a new load open to competition from other natural gas utilities.³⁵ The Commission Order addressed the non-exclusive nature of natural gas service territories by stating:

Presumably, there would be no issue at all, since gas utilities do not have exclusive service territories and generally can serve *any new load their distribution facilities can reach*.....³⁶ [Emphasis added]

3. Docket No. G-011/C-96-1062

Peoples filed a complaint against Northern States Power Company Gas (NSP). Peoples alleged that NSP violated Minn. Stat. § 216B.01, by constructing facilities to serve customers in two areas which Peoples was willing and able to serve, Eagandale Corporate Center and Casselberry Ponds. Both of these areas did not currently have natural gas services.

Peoples claimed that these areas were contiguous to its existing system, but not contiguous to any NSP facilities. Peoples argued that NSP customers would pay higher rates than if Peoples provided service, and that NSP's facilities possibly cause safety concerns by crossing over existing Peoples facilities. NSP countered by stating that the Office of Pipeline Safety will oversee the facilities' construction, thus there should be no consideration given to Peoples' safety concerns. NSP also that it would be providing service under its existing tariff and that economic concerns should be addressed in NSP's next general rate case.

In its Order, the Commission saw no reason to change its policy developed in the 90-563 docket, that the proper place to analyze the economic consequences of redundant piping is in a general rate case proceeding. In a rate proceeding, the Commission can examine the prudence of utility construction to determine if costs may be placed into rate base. The Commission can also determine if rates resulting from the service addition are just and reasonable. The Commission determined that the complainant (Peoples) did not raise any economic issue which warranted further investigation at that time. The Commission denied People's Motion to

³⁵ Great Plains was serving the existing Minnesota Corn Producers (MCP) load primarily providing heat to its corporate office and MCP's decision to convert an ethanol plant located elsewhere on its premises (from coal to natural gas) was considered by the Commission to be a new load. MERC competed for the new load and was awarded the contract to provide gas service to MCP's converted ethanol plant.

³⁶ *In the Matter of the Complaint of Great Plains Natural Gas Company Against Peoples Natural Gas Company and UtiliCorp United, Inc.*, ORDER DISMISSING COMPLAINT at 4 (December 20, 1991); see Department Reply Comments and Attachment A (Commission's Order in this docket).

Expedite Consideration of the Complaint and Request for an Interim Cease and Desist Order, and dismissed the complaint.³⁷

4. Docket No. 17-305

Further, in the 17-305 docket, the Commission concluded:³⁸

that “[w]hile MERC has incurred certain costs which it anticipated being able to offset through revenues from the development, the Commission cannot say, on this record, that this expectation outweighs the harm to the Vikings, Xcel, and Xcel ratepayers if Xcel is forced to rescind its Competitive Agreement with the Vikings and allow MERC to serve the development.”

5. Xcel Comment on Commission Precedent

Xcel claims that MERC’s Complaint does not provide credible justification based on its review of Commission precedent and Minnesota Statutes and Rules. The Commission has consistently demonstrated a commitment to respect the customer’s decision in selecting its natural gas service provider. In support, Xcel points to the Commission’s decisions in Docket Nos. 91-731³⁹ and 96-1062⁴⁰. In these dockets, the Commission dismissed the complaints without opening an investigation because *special circumstances* did not exist to warrant further investigation of the complaints.

According to Xcel, MERC failed to provide any “new” facts that would support a change in Commission precedent that supports customer choice, therefore, the Complaint should be dismissed.

6. Department Comment on Commission Precedent

The Department reviewed the past Commission complaint decisions against other natural gas utilities regarding competitive issues in accordance with Minnesota law and policies. The Department believes that the Commission:

- reserved the right to review complaints on a case-by-case basis;
- did not find unnecessary duplication of facilities or safety issues to be threshold decision criterion for pursuing or denying a specific complaint;
- did not [a] find Xcel’s Competitive Agreement to be unlawful, or [b] prohibit Xcel from using it for negotiating with would-be customers.

³⁷ Department Reply Comments and Attachment B (Commission’s Order in this docket).

³⁸ Docket No. G-011,002/C-17-305, July 12, 2017 Order, p. 6.

³⁹ *In the Matter of the Complaint of Great Plains Natural Gas Company Against Peoples Natural Gas Company and UtiliCorp United, Inc.*, Docket No. G-004,-011/G-91-731, ORDER DISMISSING COMPLAINT (Dec. 20, 1991) (hereinafter Great Plains Complaint).

⁴⁰ *In the Matter of a Complaint of Peoples Natural Gas against Northern States Power Company regarding its Construction of Distribution Facilities*, Docket No. G-011/C-96/1062, ORDER DISMISSING COMPLAINT (Oct. 21, 1996) (hereinafter Peoples Complaint).

7. PUC Staff

The distinguishing factor in this docket is that United and MERC negotiated a transaction for natural gas services when Xcel was not able to provide such services because of delays caused by the City of Eagan permitting process. MERC constructed the appropriate facilities at a cost of \$40,000. As the Department noted, the Commission's previous decisions reserve the right to review complaints on a case-by-case basis. The Commission will need to decide whether MERC's Complaint meets the *special circumstances* requirement, as discussed above, before making its decision and whether the proposed Xcel's facilities are duplicative to MERC's existing facilities.

If the Commission decides that the facilities are duplicative, it will need to decide whether the duplicative facilities issue should be resolved in this docket (17-802), or in the generic docket (17-499), or in Xcel's next rate case (as previous Commission decisions have indicated).

E. Proposed Rate Structures

a. MERC

MERC proposed to provide service to the United development through its firm sales service applicable to the projected load, at tariffed rates. MERC did not require United to provide a Contribution In Aid of Construction (CIAC) for the necessary facilities to provide service (in accordance with its main and service line extension tariff). MERC's last general rate case was Docket No. 15-736. Since then, MERC has filed another case, in Docket No. 16-653 which is pending.

b. Xcel

Xcel states that it will provide firm natural gas service under its Large Demand Billed Service tariff that will not be discounted from the maximum tariff rates for this service. Xcel's last general rate case was Docket No. 09-1153.

c. PUC Staff

It appears to Staff that the proposed revenue generated from the United development will create a revenue surplus when compared to the investment costs of either utility, therefore, the project will not require a CIAC. Further, it appears that both MERC and Xcel are offering natural gas service to United in accordance with their respective tariffs. It does not appear United is eligible for any kind of flexible, market-rate, negotiable or discounted pricing under either MERC's or Xcel's tariffs.

In addition, Xcel stated that it will save United an annual sum through charging lower rates than MERC. From staff's initial review, it appears that some inconsistencies may exist in how the annual savings were calculated. Because Xcel did not provide its revenue calculations, the Commission may wish to further investigate before rendering its decision to see if the customer benefits were accurately calculated.

F. Promotional Incentives

a. MERC

In this docket, Xcel agreed to contribute \$25,000 (amount of United's promotional incentive) towards the cost of natural gas equipment or other promotional costs associated with the development.⁴¹ MERC objects to Xcel's continued use of its Competitive Agreement, where Xcel can provide limited shareholder funds to new customers through promotional incentives.⁴² MERC argues that the Commission's approval of Xcel's Competitive Agreement (the use of promotional incentives) is inconsistent with Minnesota Statutes and Rules, in particular Minn. Statutes §§ 216B.03, 216B.05, 216B.06, 216B.07, 216B.09. MERC believes that a natural gas public utility may use a promotional incentive like Xcel's Competitive Agreement only in the face of "effective competition" from an unregulated provider.⁴³

Further, MERC claims that the \$25,000 payment constitutes an unlawful discount, pursuant to Minn. Stat. § 216B.163. This statute prohibits a natural gas public utility from discounting its tariffed rates when in competition with other natural gas public utilities.⁴⁴ MERC further alleges that Xcel's Agreement gives an impermissible discriminatory preference to new customers at the expense of existing customers. According to MERC, Xcel's actions undermine the "Filed Rate Doctrine" and the Commission's customer extension policies – which are intended to facilitate the orderly and economic extension of natural gas service to new customers.

b. Xcel

Xcel stated that it offered United a stimulus package consisting of promotional incentives, potential tax savings, and conservation rebates for signing its Natural Gas Competitive Agreement. Xcel offered a \$25,000 promotional incentive to United.⁴⁵ Xcel asserts that the promotional incentive offered to United will be paid by its shareholders, and will not seek to recover any portion of the promotional incentive in rates.⁴⁶

⁴¹ See MERC Initial Petition, Exhibit A; upon signing the Agreement, United received \$12,500 and will receive another \$12,500 when certain usage levels are achieved. Further, Conservation Improvement Program (CIP) rebates were offered to enhance the arrangement.

⁴² The transaction must meet all of Xcel's tariff requirements.

⁴³ See MERC Initial Petition, p. 14.

⁴⁴ See MERC Initial Petition, pp. 14-16, pp. 17-19; MERC believes that such discounts also undermine fair and transparent competition between rate regulated gas utilities and result in inefficient duplication of natural gas facilities.

⁴⁵ Xcel points out that this promotional incentive is far less than the promotional incentive offered to the Vikings in the 17-305 docket.

⁴⁶ In the Commission's generic docket on inter-gas utility competition and promotional incentives, Docket No. G999/CI-17-499, Xcel, CenterPoint Energy, and Greater Minnesota Gas explained that they offer promotional incentives to customers in certain situations. That only MERC and Great Plains Natural Gas Company do not offer promotional incentives.

Xcel claims that the promotional incentive issue was litigated in the 17-305 docket when the Commission discussed the issue before dismissing the MERC Complaint. Xcel states that the Department (in Docket No. 17-305) agreed with Xcel that the use of promotion incentives was consistent with Xcel's tariff and Minnesota law. Further, Xcel reviewed the filed comments in Docket No. 17-499 and concluded that the majority of Minnesota natural gas utilities, mainly itself, CenterPoint Energy, and Greater Minnesota Gas use incentives to attract new customers to their respective systems. MERC has taken a minority position when it argues that using promotional incentives violates Minnesota law.⁴⁷

Xcel believes that the Commission should continue its investigation in Docket No. 17-499, which will fully vet the promotional incentive issue. Xcel does not believe MERC should be allowed to short-circuit the generic docket (Docket No. 17-499) with this Complaint (Docket No. 17-802), nor should the Commission suspend Xcel's use of promotional incentives.⁴⁸

c. Department

According to the Department, MERC's discussion appears to rest on the concept that Xcel's provision of a financial incentive to a customer effectively lowers that customer's tariffed rates, in this case, Xcel's Large Demand Billed Service tariff rates. The Department does not believe that Xcel's use of promotional incentives results in discounted rates, since United Properties is paying the same tariffed rates as any other customer taking service under the rate schedule. Moreover, the Competitive Agreement approved by the Commission authorizes Xcel to provide shareholder funds to customers like United Properties. The fact that Xcel decided to provide United Properties with a financial incentive that was provided with shareholder funds and will not be recovered via Xcel's rates does not affect the tariffed rates that United pays to Xcel in the future.

d. PUC Staff

Xcel's Natural Gas Competitive Agreement (Agreement) is located in Xcel Minnesota Rate Book No. 2, Section No. 7, 1st Revised Sheet No. 37, and was last reviewed by the Commission in Docket No. 09-1153, Xcel's last general rate case. The Agreement was originally approved in Xcel's 2006 rate case. The approved agreement includes the following language:

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

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

Pursuant to the Commission's July 12th Order (Docket No. 17-305), Xcel filed all of its Natural Gas Competitive Agreements in Docket No. 17-499 to make these arrangement more transparent. Staff reviewed all the Agreements and noticed that the dollar amount of the

⁴⁷ See Xcel's November 29th Response Comments, pp. 7-9.

⁴⁸ See Xcel's November 29th Response Comments, pp. 7-9.

promotional incentives from customer to customer varied. Xcel's tariff does not include tariff language that states and/or explains the dollar amounts given to the customer or the circumstances for when promotional incentives are given, see Table 1:

Table 1: Summary of Xcel's Promotional Incentives Given to Customers

| Customer | Amount of Promotional Incentive | Date Contract was Filed |
|--------------------------------------|---------------------------------|-------------------------|
| Oak Meadows Land Holding LLC | \$1,500 | 7/14/2017 |
| MV Eagan Ventures, LLC | \$75,000 | 7/24/2017 |
| D.R. Horton, Inc. - Minnesota | \$120,000 | 8/3/2017 |
| Various-Agreement could not be found | | |
| Baldinger Bakery | \$20,000 | 8/11/2017 |
| North Branch Chevrolet | \$3,500 | 8/11/2017 |
| North Branch Fairview Clinic | \$2,000 | 8/11/2017 |
| Woodbury Plaza | \$1,000 | 8/11/2017 |
| United Properties | \$25,000 | 8/18/2017 |
| Aspen Garden Holding, LLC | \$1,000 | 8/25/2017 |

As Table 1 illustrates, certain Xcel customers received promotional incentives ranging from \$1,000 to \$120,000. Staff's concern is that Xcel determines who receives and how much a customer receives through a promotional incentive without the regulatory guidance through its approved tariff. Xcel's tariff is void of discussion on how Xcel determines which customers receive and which do not receive a promotional incentive. Further, Xcel's tariff is void of discussion as to how it determines the dollar amount to be given as a promotional incentive. Staff believes that because Xcel's tariff is void of any conditions, the opportunity exists for Xcel to give discriminatory preference to certain new customers.

In addition, staff questions whether Xcel's Agreement is in violation of Minn. Stats. §§ 216B.03, 216B.05, and 216B.07.

Minn. Stat. § 216B.03 states:

Every rate made, demanded, or received by any public utility, or by any two or more public utilities jointly, shall be just and reasonable. Rates shall not be unreasonably preferential, unreasonably prejudicial, or discriminatory, but shall be sufficient, equitable, and consistent in application to a class of consumers. [Emphasis Added]

From this record, staff cannot determine whether the promotional incentives given by Xcel are just and reasonable, or in the alternative unduly preferential or discriminatory.

Minn. Stat. § 216B.05, subd. 1 states:

Every public utility shall file with the commission schedules showing all rates, tolls, tariffs, and charges which it has established and which are in force at the time for any service performed by it within the state, or for any service in connection therewith or performed by any public utility controlled or operated by it. [Emphasis Added]

As previously discussed, the Commission did approve Xcel's tariff sheet reflecting the Natural Gas Competitive Agreement, but Xcel has not filed with the Commission any schedules reflecting the dollar amounts associated with promotional incentives.

Minn. Stat. § 216B.07 states:

No public utility shall, as to rates or service, make or grant any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage. [Emphasis Added]

Staff believes that the opportunity exists for Xcel to give undue preference to one customer over another customer.

However, staff believes this record may not be sufficient for the Commission to make an informed decision and that the Commission may wish to consider these tariff issues before rendering its decision in this docket.⁴⁹

If the Commission sends this docket to the OAH for a contested case, staff believes this could help develop a full record on promotional incentives. Alternatively, if the Commission dismisses MERC's Complaint, the Commission may still want to suspend Xcel's Natural Gas Competitive Agreement until it reviews the promotional incentive issue in Docket No. 17-499.

G. Duplicate Facilities

a. MERC

MERC asserts that Xcel's Agreement with United will lead to unnecessary duplicative facilities and further infringe on MERC's service territory.⁵⁰ Xcel facilities will extend the existing distribution line that serves the Vikings Development (Docket No. 17-305) and will run parallel to existing MERC facilities to serve United.⁵¹

⁴⁹ In the 17-305 docket, the Commission discussed promotional incentives in great detail and ultimately dismissed MERC's Complaint. Staff does not believe the Commission's previous decisions set precedent for future complaints, but that the Commission has the ability to review MERC's Complaint on a case-by-case basis.

⁵⁰ See MERC's Complaint, pp. 8-10, pp. 19-26; Exhibit B – MERC's map of the proposed facilities.

⁵¹ See MERC's Complaint, p. 3.

b. Xcel

Xcel states that MERC claimed that the Vikings Development (Docket No. 17-305) was in violation of Minn. Stat. § 216B.01 because Xcel would be constructing duplicative facilities to MERC's existing infrastructure. Xcel believes that MERC is again claiming that Xcel is in violation of Minn. Stat. § 216B.01 because Xcel facilities would be duplicative to MERC's existing infrastructure in the 17-802 docket. Xcel asserts the Commission explicitly concluded in the 1996 Peoples case (Docket No. 96-1062) that these concerns belong in a rate case proceeding rather than a complaint proceeding.

Xcel believes that the Commission should reject MERC's arguments regarding duplication of facilities.

c. Department

The Department did not directly address the facilities duplication concern in its Reply Comments.

d. PUC Staff

The Department noted in its December 11, 2017 Reply Comments that the Commission's findings in the Great Plains v. Peoples docket (91-731) developed reasonable guidelines for evaluating complaints. For example, the Commission's decision suggests that Minnesota natural gas utilities may compete on equal footing for new load if the results of that competition would not result in *unnecessary duplication of facilities* or undue harm to existing ratepayers.⁵²

It appears to staff (from reviewing the system maps presented by both MERC and Xcel) that Xcel's facilities duplicate some of MERC's existing facilities.⁵³ For Commissioner convenience, staff included Xcel's map as Attachment B. Minn. Stat. § 216B.01 provides useful information, but the statute does not provide a definition for unnecessary duplication of facilities. Staff believes this void in the statute requires the Commission to use its judgement when determining whether unnecessary facilities duplication has occurred.

If the Commission determines that the facilities are duplicative, it will need to determine the course of action going forward, whether to send the docket (17-802) to the OAH as a contested case, or defer its decision to the generic docket (17-499), or make a determination from available information already filed (in Docket No. 17-802). If the Commission determines that the facilities are not duplicative, the Commission may wish to dismiss MERC's Complaint.

⁵² See Department Reply Comments, p. 7.

⁵³ See MERC Initial Petition, Exhibit B (reflects both MERC and Xcel facilities) and Xcel November 29th Response Comments, p. 4.

H. Economic Impacts

a. MERC

MERC asserts that its natural gas system is better situated to provide United with natural gas service because of the location of its existing natural gas distribution facilities. MERC claims that Xcel's facilities would duplicate MERC's making Xcel's facilities inefficient and costly to all of Xcel customers. As previously discussed, MERC's infrastructure costs to provide United with natural gas service was approximately \$40,000 (500 feet of main and meter set) compared to Xcel's costs of approximately \$175,000 (4,000 feet of main and meter set).⁵⁴

Further, MERC states that its existing customers would benefit from the project's annual margin revenue of approximately \$30,000. MERC claims the project's margin revenue would contribute to the recovery of MERC's investment in the newly installed facilities. Further, MERC's existing customers would benefit by increasing revenues with little offsetting costs saving its customers approximately \$1 million over the life of the assets.⁵⁵

b. Xcel

Xcel claims that it provided United with a rate comparison, comparing Xcel to MERC's proposed rate structure and estimated that it would annually save the customer approximately \$12,500 (Xcel did not provide its calculation). Xcel's proposes to provide service under its Large Demand Billed Service Tariff (Rate Code 103), while MERC proposes to provide service under its firm commercial service tariffs (MERC did not define its rate schedule).

Further, in the 17-305 docket, Xcel noted that MERC argued that it had suffered economic harm by allowing Xcel to serve the Vikings Development. The Commission considered and rejected the economic harm arguments in the Vikings dispute, finding that MERC's costs and expectation of offsetting them through revenues from the development did not outweigh the harm to the Vikings, Xcel, and Xcel's ratepayer if Xcel is forced to rescind its Competitive Agreement with the Vikings and allow MERC to serve the development.⁵⁶ In the 17-802 docket, MERC again argues that if Xcel is allowed to serve United, it will suffer unfair economic harm.

c. PUC Staff

Staff is of the opinion that either MERC or Xcel could suffer economic harm if they are excluded from providing natural gas service to United. In its evaluation of whether either party has been harmed the Commission may want to consider whether either utility had an obligation or duty to serve United, and, if so, the extent to which that duty began and when it started to include investing in facilities to be able to serve United. Consideration of economic harm is a fact question that could be considered in a further investigation by the Commission or in MERC's pending rate case if the Commission dismisses MERC's Complaint in this docket.

⁵⁴ See MERC's Complaint, pp. 11-12, pp. 21-23, A. Lee Affidavit, pp. 5-6, paragraphs 20-24.

⁵⁵ See MERC's Complaint, pp. 12-13, A. Lee Affidavit, pp 7-8, paragraphs 27-29.

⁵⁶ Docket No. 17-305, July 12, 2017 Order, p. 6.

I. Contribution-In-Aid-of-Construction (CIAC)

a. MERC

In providing service to United, MERC applied its Commission-approved Customer Extension Model to determine if United would be required to make a contribution-in aid of construction (CIAC) to contribute to the costs of extending service to the United Development.⁵⁷ Generally, under MERC's Tariff a CIAC will be charged to a customer if the discounted lifetime cost of extending service to that customer exceeds the discounted lifetime retail revenue (not including revenues from the sale of natural gas) from that customer.

Because MERC had sufficient, nearby existing gas distribution facilities in place to serve the United Development, the infrastructure costs to extend and install its facilities to United totaled approximately \$40,000, including the installation of the meter set and approximately 500 feet of main. United was not required to provide a CIAC under MERC's extension Tariff.⁵⁸

b. Xcel

Xcel states that it did not waive any CIAC that may need to be collected if unusual or unanticipated conditions emerge during the course of construction. If conditions warranted a CIAC, United could elect to pay a CIAC or draw from the shareholder-funded Promotional Incentive described in the Agreement.

c. PUC Staff

Both MERC and Xcel have main and service line extension tariffs. It appears to staff that both companies are in compliance with their service extension tariffs, that neither company would be required to charge United a CIAC for natural gas services. The companies have tariff provisions that require a calculation to determine if CIAC is required, especially if the project produces a revenue deficiency. After reviewing parties' comments, staff is of the opinion that the United development will generate sufficient revenues that exceed the costs to provide service. Both companies would benefit their existing customers and their shareholders by providing service to United because of the excess revenues over projected costs.

⁵⁷ See generally, *In the Matter of a Petition by Minnesota Energy Resources Corporation for Approval to Modify Its Main and Service Extension Model and Amend Its Extension Tariffs*, Order Approving Customer Extension Model, Docket No. G011/M-15-165 (July 13, 2015).

⁵⁸ Lee Affidavit at ¶ 21.

J. Demand entitlement costs

a. PUC staff

MERC stated in its Initial Petition that the Commission recently approved its Rochester Expansion Project (15-895), and as a result MERC has excess NNG capacity with the ability to use 20 percent of this capacity at secondary delivery points. MERC believed that it could use this NNG capacity to supply natural gas to the United development.

The other parties did not address the demand entitlement cost issue.

PUC staff agrees with MERC that the Rochester Project's excess capacity could be used and that MERC has the ability to use secondary points at no additional cost to customers. Staff believes this benefits MERC's existing customers by providing a use for already approved contract capacity. Staff understands that NNG will begin providing additional capacity to MERC on or about November 1, 2018. MERC will not need to purchase additional capacity, which would raise demand entitlement costs to all system customers. Staff does not know if Xcel will need to purchase additional demand entitlement capacity to serve this load. But, if Xcel does purchase capacity, Xcel's customers could see an increase in their rates.

K. Policy Issues

1. Service Territories

a. MERC

MERC recognizes it does not have exclusive service rights to any territory. However, MERC believes Xcel's proposal violates MERC's understood service territory boundaries by introducing another natural gas utility to the area. To support its position, MERC submitted a signed Memorandum of Agreement between Northern States Power (Xcel) and Peoples (MERC's predecessor), dated October 2, 1974 (the 1974 Agreement).⁵⁹

MERC claims that the 1974 Agreement in essence establishes service territories for Xcel and MERC – where Xcel serves the City of Inver Grove Heights and MERC serves the City of Eagan. MERC states that until 2017, MERC and Xcel had little dispute over their territorial boundaries. Under the Agreement, Peoples acquired Xcel's customers and facilities in Eagan and Xcel acquired People's customers and facilities in Inver Grove Heights. In a December 26, 1974 cover letter to the Agreement sent to the City of Eagan, Peoples stated that "this exchange of customers and facilities will assure a more efficient and reliable natural gas service to both of these areas with only one utility rather than two operating within the same market area."⁶⁰ The 1974 Agreement was not part of the record or discussed in the Commission

⁵⁹ The 1974 Agreement was originally filed as "*Trade Secret*," but on January 4, 2018, MERC reclassified the filing status of the document by re-filing the Agreement as a public document.

⁶⁰ See MERC Initial Petition, Exhibit H and MERC's January 4th filing of Exhibit H as a public document.

proceeding on MERC's complaint against Xcel for entering into a contract with the Minnesota Vikings to provide gas service to their new complex in Eagan (Docket No. 17-305).⁶¹

b. Xcel

Xcel believes that MERC's arguments are contrary to established Commission precedent. For example, MERC argues that Xcel is encroaching on MERC's natural service territory, and that it would make it unsafe and inefficient for Xcel to install facilities near existing MERC facilities. Xcel believes that the Eagan area is open for competition where competitive bidding process among natural gas service providers for new customers is encouraged. Xcel did not address the 1974 Agreement.

c. Department

The Department supported the parties' statements that natural gas utilities do not have exclusive rights to any customer or group of customers because the utilities do not have exclusive service territories. The Department believes previous Commission dockets provide helpful insight. For example, the 91-731 docket involved a natural gas utility (Great Plains) providing natural gas service to a customer prior to another utility (Peoples) proposing to provide service to a new load that the Great Plains customer was developing. The Commission Order stated:

....gas utilities do not have exclusive service territories and generally can serve any new load their distribution facilities can reach. [T]he complaint rests entirely on the contention that Great Plains has an exclusive right to serve this load. This contention has no basis in law or policy. Minnesota does not have assigned service areas for gas utilities. It does have assigned service areas for electric utilities, which suggests that the Legislature intentionally treated these two types of utilities differently. Peoples, then, is free to serve this new load, in the absence of special circumstances, such as unnecessary duplication of facilities or harm to existing ratepayers, requiring Commission intervention.

The Department summarized its position by stating that the Commission reviewed past complaints concerning Minnesota law and policies involving service territory disputes, and chose to review these types of disputes on a case-by-case basis. The Department did not address the 1974 Agreement.

d. PUC staff

Staff agrees with the parties that natural gas utilities do not have exclusive service areas similar to electric utilities exclusive service territories. For electric utilities, the Legislature established a system of exclusive (assigned) service territories. For natural gas utilities, the Commission resolves service territory disputes between gas utilities based on the Legislature's directive in Minn. Stat. § 216B.01 "to avoid unnecessary duplication of facilities which increase the cost of service to consumers and to minimize disputes . . . which may result in inconvenience or diminish efficiency in service to the consumers."

⁶¹ See MERC's Petition, p. 12.

Staff believes that the 1974 Agreement represents a sale of customers and facilities between Peoples (MERC's predecessor) and Northern States Power (Xcel), resulting in Peoples serving the Eagan Township (now the City of Eagan) and Northern States Power serving the Inver Grove Heights Township (now the City of Inver Grove Heights). But staff questions whether the 1974 Agreement establishes separate exclusive service territories for each company.

While the 1974 Agreement provides that Peoples will serve all existing gas customers in Eagan and that Northern States Power will serve all existing gas customers in Inver Grove Heights, the Agreement is void of language that establishes exclusive service territories for each company. The Commission will need to determine whether or not the 1974 Agreement binds both companies to provide exclusive service in the two areas that are the subject of the Agreement.

Staff does not believe the Commission needs to render its decision in this docket based solely on the fact that natural gas utilities do not have exclusive service area rights. The Commission can consider other factors, too. It has been approximately 20 years since the Commission last reviewed its natural gas competition policies. Staff believes that the Commission may wish to consider the issues raised in this case in light of the dynamics of today's competitive natural gas market, not just its previous decisions regarding natural gas utility service complaints.

The Commission may wish to consider whether this docket's facts are distinguishable from the 91-731 docket facts; that is, whether Xcel's provision of service to United could qualify as a "special circumstance" as referenced in the above quote from the Commission's 91-731 Order.

2. Safety Concerns

a. MERC

MERC stated that Xcel's encroachment into its service area could lead to an unsafe facilities configuration. Xcel's facilities would run parallel to MERC's existing facilities within the same right-of-way.

b. Xcel-Gas

Xcel believes that the Office of Pipeline Safety will assure that it properly constructs its proposed facilities alleviating MERC's safety concerns.

c. Department

The Department believes that the Commission should make a similar determination in this docket that was made by the Commission in previous dockets - that the Office of Pipeline Safety is responsible for safety.

d. PUC staff

Staff believes that the Office of Pipeline Safety would review facilities constructed to ensure both utilities operate safely, and that MERC's argument on this issue does not support its Complaint. PUC staff agrees with Xcel and the Department.

VII. Decision Options

Does the Commission have jurisdiction?

1. Find that the Commission has jurisdiction (MERC, Xcel, Department), or
2. Find that the Commission does not have jurisdiction

Does the Commission have sufficient information to make a decision?

3. Yes (Xcel, Department), or
4. No (MERC)

If the Commission decides there is sufficient information to make a decision, then:

5. Find that MERC has the exclusive right to provide natural gas service to the proposed United development. (MERC), and/or
 - a. Determine that Xcel's facilities would be duplicative to MERC's existing facilities, and/or
 - b. Determine that 1974 Agreement binds both companies to provide exclusive service in Eagan and Inver Grove Heights areas, and/or
 - c. Determine that Xcel's tariff is void of certain language and suspend Xcel's use of its Natural Gas Competitive Agreement until promotional incentive issue is resolved in Docket No. 17-499.

or
6. Dismiss MERC's complaint without further investigation (Xcel, Department), and/or
 - a. Does not make a determination whether Xcel's facilities are duplicative, and/or
 - b. Determine that 1974 Agreement does not bind both companies to provide exclusive service in Eagan and Inver Grove Heights areas, and/or
 - c. Determine that Xcel's Natural Gas Competitive Agreement is lawful and does not represent a discount from Xcel's tariffed rates - Large Demand Billed tariff, or
 - d. Determine that Xcel's tariff is void of certain language and suspend Xcel's use of its Natural Gas Competitive Agreement until promotional incentive issue is resolved in Docket No. 17-499.

If the Commission decides it needs additional information, then:

7. Refer this matter to the Office of Administrative Hearings (OAH) for additional investigation and a contested case proceeding. Ask the OAH to render its Report by a specific date; (MERC) or
8. Direct Commission staff to issue a Notice to solicit comments from interested parties, and
 - a. Direct Commission staff to develop a list of questions for further investigation, and
 - b. Delegate authority to the Commission's Executive Secretary to issue notices and vary time periods for the duration of the investigation, or
 - c. Request the Department to prepare its suggested specific cost/benefit analyzes and submit the result in subsequent comments in this docket (Docket No. 17-499), or
 - d. Develop some other methodology to determine who should provide natural gas service to the United facility.

or
9. Defer making a decision in this docket until the Commission completes its investigation in the generic promotional incentives docket (Docket No. 17-499).

Minnesota Statutes and Rules

Minn. Stat. § 216A.05 COMMISSION FUNCTIONS AND POWERS.

Subd. 1. Legislative and quasi-judicial functions. The functions of the commission shall be legislative and quasi-judicial in nature. It may make such investigations and determinations, hold such hearings, prescribe such rules, and issue such orders with respect to the control and conduct of the businesses coming within its jurisdiction as the legislature itself might make but only as it shall from time to time authorize. It may adjudicate all proceedings brought before it in which the violation of any law or rule administered by the Department of Commerce is alleged.

Minn. Stat. § 216B.01 LEGISLATIVE FINDINGS.

It is hereby declared to be in the public interest that public utilities be regulated as hereinafter provided in order to provide the retail consumers of natural gas and electric service in this state with adequate and reliable services at reasonable rates, consistent with the financial and economic requirements of public utilities and their need to construct facilities to provide such services or to otherwise obtain energy supplies, to avoid unnecessary duplication of facilities which increase the cost of service to the consumer and to minimize disputes between public utilities which may result in inconvenience or diminish efficiency in service to the consumers. Because municipal utilities are presently effectively regulated by the residents of the municipalities which own and operate them, and cooperative electric associations are presently effectively regulated and controlled by the membership under the provisions of chapter 308A, it is deemed unnecessary to subject such utilities to regulation under this chapter except as specifically provided herein.

Minn. Stat. § 216B.02 DEFINITIONS.

Subd. 4 Public Utility. "Public utility" means persons, corporations, or other legal entities, their lessees, trustees, and receivers, now or hereafter operating, maintaining, or controlling in this state equipment or facilities for furnishing at retail natural, manufactured, or mixed gas or electric service to or for the public or engaged in the production and retail sale thereof but does not include (1) a municipality or a cooperative electric association, organized under the provisions of chapter 308A, producing or furnishing natural, manufactured, or mixed gas or electric service; (2) a retail seller of compressed natural gas used as a vehicular fuel which purchases the gas from a public utility; or (3) a retail seller of electricity used to recharge a battery that powers an electric vehicle.....

Minn. Stat. § 216B.03 REASONABLE RATE.

Every rate made, demanded, or received by any public utility, or by any two or more public utilities jointly, shall be just and reasonable. Rates shall not be unreasonably preferential, unreasonably prejudicial, or discriminatory, but shall be sufficient, equitable, and consistent in application to a class of consumers. To the maximum reasonable extent, the commission shall set rates to encourage energy conservation and renewable energy use and to further the goals of sections 216B.164, 216B.241, and 216C.05. Any doubt as to reasonableness should be resolved in favor of the consumer. For rate-making purposes a public utility may treat two or more municipalities served by it as a single class wherever the populations are comparable in size or the conditions of service are similar.

Minn. Stat. § 216B.05 FILING SCHEDULES, RULES, AND SERVICE AGREEMENTS.

Subd. 1. Public rate filing. Every public utility shall file with the commission schedules showing all rates, tolls, tariffs, and charges which it has established and which are in force at the time for any service performed by it within the state, or for any service in connection therewith or performed by any public utility controlled or operated by it.

Minn. Stat. § 216B.06 RECEIVING DIFFERENT COMPENSATION.

No public utility shall directly or indirectly, by any device whatsoever, or in any manner, charge, demand, collect, or receive from any person a greater or less compensation for any service rendered or to be rendered by the utility than that prescribed in the schedules of rates of the public utility applicable thereto when filed in the manner provided in Laws 1974, chapter 429, nor shall any person knowingly receive or accept any service from a public utility for a compensation greater or less than that prescribed in the schedules, provided that all rates being charged and collected by a public utility upon January 1, 1975, may be continued until schedules are filed.

Minn. Stat. § 216B.07 RATE PREFERENCE PROHIBITED.

No public utility shall, as to rates or service, make or grant any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage.

Minn. Stat. § 216B.09 STANDARDS; CLASSIFICATIONS; RULES; PRACTICES.

Subdivision 1. Commission authority, generally. The commission, on its own motion or upon complaint and after reasonable notice and hearing, may ascertain and fix just and reasonable standards, classifications, rules, or practices to be observed and followed by any or all public utilities with respect to the service to be furnished.

Minn. Stat. § 216B.163 FLEXIBLE TARIFF

Subd. 1 Definitions. (a) For the purposes of this section, the terms defined in this subdivision have the meanings given them.

(b) "Effective competition" means that a customer of a gas utility who either receives interruptible service or whose daily requirement exceeds 50,000 cubic feet maintains or

plans on acquiring the capability to switch to the same, equivalent or substitutable energy supplies or service, except indigenous biomass energy supplies composed of wood products, grain, biowaste, and cellulosic materials, at comparable prices from a supplier not regulated by the commission.

(c) "Flexible tariff" means a rate schedule under which a gas utility may set or change the price for its service to an individual customer or group of customers without prior approval of the commission within a range of prices determined by the commission to be just and reasonable.

Minn. Stat. § 216B.17 COMPLAINT INVESTIGATION AND HEARING.

Subd. 1 Investigation. On its own motion or upon a complaint made against any public utility, by the governing body of any political subdivision, by another public utility, by the department, or by any 50 consumers of the particular utility that any of the rates, tolls, tariffs, charges, or schedules or any joint rate or any regulation, measurement, practice, act, or omission affecting or relating to the production, transmission, delivery, or furnishing of natural gas or electricity or any service in connection therewith is in any respect unreasonable, insufficient, or unjustly discriminatory, or that any service is inadequate or cannot be obtained, the commission shall proceed, with notice, to make such investigation as it may deem necessary. The commission may dismiss any complaint without a hearing if in its opinion a hearing is not in the public interest.

m Staff Briefing Papers for Docket No. G-011, G-002/C-17-802

