STATE OF MINNESOTA
BEFORE THE PUBLIC UTILITIES COMMISSION

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

In the Matter of the Application of Minnesota Energy Resources Corporation for Authority to Increase Rates for Natural Gas Service in Minnesota

DOCKET NO. G-011/GR-17-563

PETITION FOR RECONSIDERATION OF THE OFFICE OF THE ATTORNEY GENERAL

Pursuant to Minnesota Statutes section 216B.27 and Minnesota Rules part 7829.7300, the Office of the Attorney General—Residential Utilities and Antitrust Division ("OAG") files this Petition for Reconsideration of the Minnesota Public Utilities Commission's ("Commission") Findings of Fact, Conclusions, and Order ("Order") in this matter. The OAG requests that the Commission reconsider its decision to set the return on equity ("ROE") for Minnesota Energy Resources Corporation ("MERC" or the "Company") at 9.7 percent. The Commission should reconsider this decision because it unlawfully and unreasonably relied on testimony that should not have been admitted into the record, and because the testimony was admitted only as a demonstrative exhibit and not for evidentiary weight. In addition, the Commission impermissibly considered a series of factors that are not allowed by Minnesota law. Accordingly, the Commission should reconsider its ROE decision and grant MERC a return that is informed by the record evidence and Minnesota legal standards.

I. BACKGROUND

On October 13, 2017, MERC filed a request with the Commission for authority to increase natural gas rates in Minnesota by approximately $12.6 million.[1] The Commission issued a series of Orders on December 5, 2017, setting interim rates[2] and referring the matter to the Office of Administrative Hearings ("OAH") for a contested case proceeding.[3]

On December 22, 2017, the Administrative Law Judge ("ALJ") presiding over the contested case issued his First Prehearing Order. The order outlined procedures for party intervention, deadlines for submitting pre-filed testimony, and other matters. The order further stated that "Pre-filed testimony that is not offered into the record, or stricken portions of pre-filed testimony, shall be considered withdrawn and no witness shall be cross-examined concerning the withdrawn testimony."[4]

Pursuant to the deadlines contained in this order, witnesses for the OAG, the Company, and the Department of Commerce ("Department") filed testimony regarding the appropriate ROE for MERC. Specifically, the OAG filed testimony provided by Mr. Brian Lebens; MERC filed testimony provided by Ms. Ann Bulkley; and the Department filed testimony provided by Dr. Eilon Amit.

On July 6, 2018, the Department sent a letter to the ALJ stating that it "must withdraw certain pre-filed testimony of Dr. Eilon Amit" and that "Dr. Amit is unfortunately not available for cross-examination" at the upcoming evidentiary hearing.[5] The Department further stated that a different expert, Mr. Craig Addonizio, was available to adopt Dr. Amit's direct testimony, "but

[1] Notice of Change in Rates, at 1. On February 28, 2018, MERC reduced this initial requested increase to approximately $7.3 million due to changes from the Tax Cuts and Jobs Act that was signed into law on December 22, 2017. *See* Ex. MERC-38 (DeMerritt Supp. Direct).
[2] Order Setting Interim Rates, at 4.
[3] Notice of and Order for Hearing, at 5.
[4] First Prehearing Order at 6.
[5] Ltr. of Peter Madsen to Hon. Eric L. Lipman at 1 (July 6, 2018).

will not offer Dr. Amit's rebuttal and surrebuttal testimony for submission into the record because the Department is unable at this time to confirm certain calculations in those testimonies without Dr. Amit's assistance."[6]

On July 9, 2018, MERC filed a letter with the ALJ objecting to the Department's proposal to withdraw Dr. Amit's rebuttal and surrebuttal testimonies.[7] That same day, the ALJ held a prehearing conference where the matter was discussed. During the conference, the ALJ ordered that Mr. Addonizio could support Dr. Amit's direct testimony, and that MERC would be allowed to "designate the rebuttal and surrebuttal testimony of Dr. Amit as demonstrative Exhibit 41 and 42 . . . *just for the purpose of clarifying the record about what . . . either Ms. Bulkley or other did in response*."[8] The OAG objected to the admission of Dr. Amit's rebuttal and surrebuttal testimony, and has continued to object to its admission for any purpose, or use in setting rates in this case.[9]

Following the evidentiary hearing and the ALJ's Recommended Findings of Fact, the Commission set MERC's ROE at 9.7 percent, explicitly basing its decision on Dr. Amit's rebuttal and surrebuttal testimonies. In doing so, the Commission disregarded the ALJ's evidentiary rulings, and placed significant weight on testimony that was not offered as substantive evidence or subject to cross-examination. The Commission also considered several other factors related to MERC's operational performance and customer service when it established MERC's ROE.

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[6] *Id.*
[7] *See* Ltr. of Elizabeth Brama to Hon. Eric L. Lipman at 1 (July 9, 2018).
[8] Tr. at 29 (July 9, 2018).
[9] *See id.*at 28-29; Tr. at 15 (July 10, 2018)

II. LEGAL STANDARD

Any party to a proceeding, or any person who is "aggrieved" and directly "affected" by a Commission order, may file a petition for rehearing or reconsideration within 20 days of the order.[10] The Commission may reverse or change its original decision if it appears that the "original decision, order, or determination is in any respect unlawful or unreasonable."[11] In determining whether to take up reconsideration, the Commission traditionally considers whether the requests "raise new issues," "point to new and relevant evidence," or "expose errors or ambiguities" in the Commission's decisions.[12] In this instance, the Commission should reconsider because this Petition exposes decisions that were erroneous and unlawful.

III. ANALYSIS

The Commission should reconsider its decision to set MERC's ROE at 9.7 percent because it erred in at least three ways. First, the Commission unlawfully and unreasonably relied on the analysis of a witness who did not appear at the hearing, was not available for cross examination, and whose testimony was not offered by any party—or admitted by the ALJ—for its substantive weight.[13] Second, the Commission compounded this error by substantively relying on Dr. Amit's testimony, almost to the exclusion of any of the testimony actually offered, in order to provide the foundation of its ROE decision. This went beyond even the ALJ's flawed decision to admit Dr. Amit's testimony for the limited purpose of providing "context" for

[10] Minn. Stat. § 216B.27; Minn. Rules part 7829.3000, subp. 1.
[11] Minn. Stat. § 216B.27, subd. 2.
[12] *See, e.g.*, *In the Matter of the Petition of Northern States Power Company, d/b/a Xcel Energy, for Approval of a Gas Utility Infrastructure Cost Rider*, Docket No. 14-336, ORDER DENYING RECONSIDERATION (Apr. 10, 2015); *In the Matter of the Petition by Minnesota Energy Resources Corporation for Authority to Increase Natural Gas Rates in Minnesota*, Docket No. 13-617, ORDER DENYING RECONSIDERATION (Dec. 22, 2014).
[13] At the evidentiary hearing, parties generally stipulated to the admission of witnesses pre-filed testimony to avoid the time-consuming process of having each witness formally swear to their pre-filed testimony. The OAG, however, did not stipulate to the admission of Dr. Amit's Rebuttal and Surrebuttal Testimonies, and formally objected to their admission. Tr. at 29 (July 9, 2018); Tr. at 15 (July 10, 2018).

understanding other witnesses' testimony. Finally, the Commission erred by unlawfully considering several subjective non-cost factors to increase MERC's ROE.

A. THE UNSWORN REBUTTAL AND SURREBUTTAL TESTIMONIES OF DR. AMIT WERE IMPROPERLY ADMITTED.

The first reason that the Commission should reconsider its ROE decision is that it was informed heavily by testimony that should not have been admitted. The ALJ's decision to admit Dr. Amit's unsworn testimony was unlawful because it violated the Minnesota Administrative Procedures Act ("APA")[14] and the ALJ's own prehearing order. Accordingly, the Commission should not have considered this testimony in determining MERC's authorized ROE.

1. The ALJ's Decision To Admit Dr. Amit's Unsworn Testimony Violated The APA.

The APA provides two evidentiary standards at issue in this case. First, every party or agency to a contested case proceeding "shall have the right of cross-examination of witnesses who testify" in that proceeding.[15] Second, evidence may only be admitted if it "possesses probative value commonly accepted by reasonable prudent persons in the conduct of their affairs."[16] Both of these standards provide an independent justification for the exclusion of Dr. Amit's unsworn rebuttal and surrebuttal testimonies.

Parties did not have the opportunity to cross examine Dr. Amit or any other witness regarding his rebuttal or surrebuttal testimonies. Dr. Amit did not appear at the hearing and was not personally available for cross examination. In addition, the Department did not offer another witness who was available to defend Dr. Amit's rebuttal and surrebuttal testimonies on cross examination. In its letter notifying parties that this testimony would not be offered,

[14] *See gen.* Minn. Stat. §§ 14.01-.70 (2018).
[15] Minn. Stat. §14.60 Subd. 3 (2018).
[16] *Id.* at Subd. 1.

the Department stated that Mr. Addonizio "will adopt *and be able to answer questions about Dr. Amit's direct testimony* at the evidentiary hearing."[17] Accordingly, the decision to admit Dr. Amit's rebuttal and surrebuttal testimonies, despite the Department's attempt to withdraw them, violated the APA's requirement that all parties have the right of cross-examination of witnesses who testify in that proceeding.

Dr. Amit's unsworn testimony should also have been excluded because it does not possess probative value commonly accepted by reasonable prudent persons in the conduct of their affairs. In this case, three separate experts testified regarding MERC's ROE—Ms. Bulkley for MERC, Mr. Lebens for the OAG, and Mr. Addonizio for the Department. None of these witnesses agreed with the recommendation provided in Dr. Amit's rebuttal or surrebuttal testimonies or adopted his analysis. Mr. Lebens testified that two growth rates that Dr. Amit used in his analysis should not have been included in the two-growth DCF model.[18] Mr. Addonizio for the Department was "unable . . . to confirm certain calculations in [Dr. Amit's] testimonies."[19]

Moreover, since he was not able to testify, it is unclear how Dr. Amit himself would have responded to the issues raised by Mr. Lebens. The main dispute between Mr. Lebens' and Dr. Amit's analysis was whether to include updated growth rates for two companies—NiSource and Northwest Natural Gas—in the parties' final recommended ROEs.[20] These issues were not raised until the parties filed their surrebuttal testimonies. Because Dr. Amit was not available at the evidentiary hearing, it is not known whether Dr. Amit himself would

[17] Ltr. of Peter Madsen to Hon. Eric L. Lipman at 1 (July 6, 2018). (Emphasis added).
[18] *See* Ex. OAG-4 at 8 (Lebens Surrebuttal); Ex. MERC-42 at 3, attachment 1 (Amit Surrebuttal).
[19] Ltr. of Peter Madsen to Hon. Eric L. Lipman at 1 (July 6, 2018).
[20] *See* Ex. OAG-4 at 8 (Lebens Surrebuttal) ; Ex. MERC-42 at 3, attachment 1 (Amit Surrebuttal).

have maintained his recommendation after reviewing the concerns raised in Mr. Lebens' surrebuttal testimony. It is possible that Dr. Amit would have amended his analysis and conclusion based on Mr. Lebens' surrebuttal testimony, but because he did not take the stand, the Commission cannot know. It is also unreasonable to rely on Dr. Amit's unsworn testimony because the Department attempted to withdraw it, explicitly stated that its replacement witness could not verify the calculations in the testimony, and then stated that it did not recommend the rate of return that Dr. Amit provided. In its letter notifying the ALJ and the parties that Dr. Amit's rebuttal and surrebuttal testimonies would be withdrawn, the Department stated that it "does not recommend that Your Honor or the Commission adopt the Department's recommended rate of return in Dr. Amit's direct testimony."[21] The Department then provided two potential revenue requirements, one with the OAG's recommended ROE and one with MERC's. A reasonable person would not rely on Dr. Amit's rebuttal or surrebuttal testimonies given these facts, so the testimony should not have been entered into evidence for any purpose.

In sum, the three experts who testified on MERC's ROE did not agree with Dr. Amit's analysis, the party that filed (and attempted to withdraw) Dr. Amit's testimony recommended that the Commission **not** accept his final recommendation, and Dr. Amit was not available to defend his analysis or respond to other parties critiques of his analysis. For these reasons, the ALJ's decision to admit Dr. Amit's rebuttal and surrebuttal testimonies was not consistent with the APA and the Commission's decision to base MERC's ROE on Dr. Amit's was unlawful. The Commission should not have relied on Dr. Amit's rebuttal

[21] Ltr. of Peter Madsen to Hon. Eric L. Lipman at 1 (July 6, 2018).

and surrebuttal testimonies because they should not have been admitted at all. To do so was an error that should be reconsidered.

2. The ALJ Ignored His Own Prehearing Order By Denying The Department's Withdrawal Of Dr. Amit's Rebuttal And Surrebuttal Testimonies.

The ALJ's decision to admit Dr. Amit's rebuttal and surrebuttal testimonies was also unlawful because it conflicted with his own order. The ALJ's First Prehearing Order made clear that parties were not required to offer their pre-filed testimonies at the evidentiary hearing, and that any pre-filed testimony that was not offered at the evidentiary hearing would not be considered. When the Department notified the parties that it would not offer portions of Dr. Amit's testimony, however, the ALJ did not follow his prehearing order. Instead, the ALJ admitted Dr. Amit's unsworn testimony, despite the fact that no testifying witness and no party to the proceeding supported either Dr. Amit's analysis or his conclusions.

The ALJ's prehearing order stated unambiguously that a party could withdraw any prefiled testimony before the evidentiary hearing: "[p]re-filed testimony *that is not offered into the record***,** or stricken portions of pre-filed testimony, shall be considered withdrawn and no witness shall be cross-examined concerning the withdrawn testimony."[22] This order made several points clear. First, *parties* were given the right to admit or not admit *their own* pre-filed testimony. The prehearing order made no suggestion that ALJ would overrule a party's decision to not offer pre-filed testimony, or that one party could force the admission of testimony that another party chose to withdraw—but this is precisely what happed when the ALJ "allowed"

[22] First Prehearing Order at 6. (Emphasis added).

MERC to file Dr. Amit's testimony as an exhibit after the Department said it would be withdrawn. Second, parties were informed that they could withdraw a witness's entire testimony or portions of pre-filed testimony. There was no suggestion that withdrawing a witness's entire testimony would be scrutinized any more or less closely than withdrawing only a portion of a witness's testimony. It was also not suggested that withdrawing testimony on one topic would be treated differently than withdrawing testimony on another, or that the ALJ might decide that a party's decision to withdraw pre-filed testimony was too "disruptive" to the process. Regardless, the ALJ effectively prohibited the Department from withdrawing this testimony when Dr. Amit was not available to testify and the Department could not defend it.

For these reasons, the Commission should reconsider its ROE decision because the ALJ unlawfully allowed Dr. Amit's rebuttal and surrebuttal testimony to be part of the record. Specifically, the Commission should adopt an ROE without consideration of Dr. Amit's testimony.

B. THE COMMISSION GAVE EXCESSIVE WEIGHT TO THE UNSWORN REBUTTAL AND SURREBUTTAL TESTIMONIES OF DR. AMIT.

The second reason that the Commission erred in setting MERC's ROE is that it gave excessive weight to Dr. Amit's unsworn testimony. While the ALJ should not have admitted Dr. Amit's unsworn testimony at all, it was admitted for only a limited purpose: "just for the purpose of clarifying the record about what . . . either Ms. Bulkley or others did in response."[23] In other words, the ALJ did not admit Dr. Amit's rebuttal or surrebuttal testimonies for their substantive weight, since the Department did not have a witness who was willing to defend these

[23] *See* Tr. at 29 (July 29, 2018).

documents.[24] The Commission's finding violated the ALJ's limited admission and unlawfully considered Dr. Amit's unsworn testimony as substantive evidence. The Commission further compounded the error by relying primarily on Dr. Amit's unsworn testimony rather than the rest of the record.

The Commission's decision to set MERC's ROE at 9.7 percent disregarded the evidentiary limitations that the ALJ placed on Dr. Amit's testimony. During its deliberations, the Commission focused heavily on the reputation of Dr. Amit and the Commission's reliance on his analysis in previous cases. Not only did the Commission consider Dr. Amit's testimony for substantive purposes, but it used modeling results included in Dr. Amit's surrebuttal testimony as the starting point for its discussions. This is reflected in a handout published by the Commission after the evidentiary hearing, and reviewed during its deliberations, that shows "Dr. Amit's 2-Growth DCF [Surrebuttal] Range."[25] The handout provides Dr. Amit's Low, Mean, Midpoint Mean/High, and High outputs from the 2-Growth DCF model included in his surrebuttal testimony. The handout does not include any modeling outputs from the other witnesses whose testimony was actually in the record for substantive purposes or their ROE recommendations. The document further states that "[t]he Commission set Otter Tail Power's ROE at 9.41% at this midpoint between the Department's DCF Mean and High."[26] This statement suggests that the Commission would set MERC's ROE between the DCF Mean of 9.62 percent and High of 10.69 percent from Dr. Amit's surrebuttal testimony. This turned out to be accurate. The Commission's oral deliberations reflect that it did, in fact, use the Mean and High DCF outputs

[24] The OAG objected to the admission of Dr. Amit's testimony as a demonstrative exhibit, and maintains that objection here.
[25] Handout – Commission Hearing Exhibit to 11-8-2018 Commission Meeting (filed on Nov. 14, 2018).
[26] *Id.*

from Dr. Amit's surrebuttal testimony to set a range of ROE options. The Commission did not discuss the analysis of the ROE witnesses who testified or the results of their models.

The Commission's Order confirms that it relied heavily, if not exclusively, on the surrebuttal testimony of Dr. Amit to set MERC's ROE at 9.7 percent. The Commission's Order states that its authorized ROE of 9.7 percent "is within a few basis points of Dr. Amit's updated mean-growth-rate two-growth DCF calculations and ROE recommendation."[27] The Commission also noted that its ROE finding was "appropriate based on the two-growth modeling done by the parties *and by Dr. Amit*."[28] Since Dr. Amit's surrebuttal testimony was not admitted for substantive purposes—and should not have been admitted at all—the Commission's decision to consider his modeling outputs was unlawful.

C. THE COMMISSION UNLAWFULLY ADJUSTED DR. AMIT'S MODELING OUTPUT UPWARDS BY CONSIDERING IMPROPER FACTORS.

The third reason that the Commission's ROE was unlawful is that it relied on a series of factors that are not allowed by Minnesota law. Specifically, the Commission unlawfully considered a series of factors during its deliberations related to MERC's past performance and customer service.

Minnesota law requires that the Commission set utility rates based on the cost of providing service. In setting utility rates, the Commission must "give due consideration to the public need for adequate, efficient, and reasonable service and to the need of the public utility for

[27] Order at 27. While the Commission noted that its result also fell between some of the modeling outputs of the OAG and MERC, it did not say whether it considered either of these analyses credible, or if one analysis was more credible than the other. This is important, since the OAG and MERC vociferously disputed many aspects of the proper ROE analysis, which the Commission did not address. Regardless, the Commission's decision to set an ROE that happened to be between some of modeling outputs from the OAG and MERC does not change the fact that it relied heavily on the surrebuttal testimony of Dr. Amit.
[28] *Id.*

revenue *sufficient to enable it to meet the cost* of furnishing the service . . . ."[29] The Commission is required to provide a utility with a "fair and reasonable return upon the investment" in utility property.[30] The Minnesota Supreme Court has held that the Commission's task in setting an appropriate return is "to establish a fair rate of return which will provide earnings to investors comparable to those realized in other businesses which are attended by similar risks, will allow the company to attract new capital as required, and will maintain the company's financial integrity."[31]

Rate of return analysis in Minnesota has consistently followed the parameters of two U.S. Supreme Court cases: *Bluefield Water Works* and *Hope Natural Gas Co*. In *Bluefield*, the Supreme Court established a lower bound for utility returns, holding that "[t]he return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise money necessary for the proper discharge of its public duties."[32] In *Hope*, the Court established an upper bound, holding that the return "should be commensurate with returns on investments in other enterprises having corresponding risks."[33] There is no legal authority in Minnesota for the Commission to deviate from these standards in order to punish a particularly poor performing utility or reward a particularly high performing utility—with the possible exception of utilities who have filed a multi-year rate plan, which MERC has not done.

In this case, the Commission explicitly deviated from the standards outlined by the Minnesota Supreme Court and the U.S. Supreme Court for establishing an appropriate ROE.

[29] Minn. Stat. 216B.16 Subd. 6. (Emphasis added).
[30] *Id.*
[31] Northwestern Bell Telephone Co. v. State of Minn., 216 N.W.2d 841, 846 (1974).
[32] Bluefield Waterworks & Improvement Co. v. Pub. Service Comm'n of W. Va., 262 U.S. 679, 693 (1923).
[33] Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944).

The handout reviewed by the Commission during its oral deliberations noted that the Commission had previously considered several non-cost factors in Otter Tail's most recent rate case, such as utility's "high customer service and customer satisfaction metrics," as well as its "highly effective cost-management" to "settle on a ROE higher than the mean" of parties' DCF results.[34] The decisions that were made in another rate case, including decisions made by parties about whether to challenge the Commission's Order, do not change what the law says. Minnesota law and the Minnesota Supreme Court have provided that the utility returns should be based on the utility's financial soundness, need to raise money to discharge its services, and whether an ROE is commensurate with returns on similar investments. The performance-related factors that the Commission considered during this case, which are reflected on the handout circulated during deliberation, are not permissible. Nonetheless, during deliberations in this case the Commission again considered these factors in raising MERC's ROE above the mean of Dr. Amit's Two-growth DCF analysis. The Commission's decision to consider these non-cost factors was unlawful, and should be reconsidered.

CONCLUSION

For the reasons set forth above, the Commission should reconsider its decision to grant MERC an ROE of 9.7 percent. The Commission relied on the unsworn testimony of Dr. Amit that should not have been admitted to the record. The Commission compounded this error by giving excessive weight to Dr. Amit's testimony that went beyond the ALJ's limited admission. Finally, the Commission considered a series of non-cost factors that are not allowed by Minnesota law to increase MERC's ROE. The Commission should establish an ROE that is informed by the record evidence and consistent with Minnesota law.

[34] Handout – Commission Hearing Exhibit to 11-8-2018 Commission Meeting (filed on Nov. 14, 2018).

Dated: January 15, 2019

Respectfully submitted,

KEITH ELLISON
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s/ **Ian Dobson**

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January 15, 2019

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

Re: ***In the Matter of the Application of Minnesota Energy Resources Corporation for Authority to Increase Rates for Natural Gas Service in Minnesota***
MPUC Docket No. G-011/GR-17-563

Dear Mr. Wolf:

Enclosed and e-filed in the above-referenced matter please find the Petition for Reconsideration of the Minnesota Office of the Attorney General—Residential Utilities and Antitrust Division.

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

Sincerely,

s/ **Ian Dobson**
IAN DOBSON
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Enclosure

AFFIDAVIT OF SERVICE

Re: ***In the Matter of the Application of Minnesota Energy Resources Corporation for Authority to Increase Rates for Natural Gas Service in Minnesota***
MPUC Docket No. G-011/GR-17-563

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

I hereby state that on 15th day of January, 2019, I filed with eDockets ***the Petition for Reconsideration of the Minnesota Office of the Attorney General—Residential Utilities and Antitrust Division*** and served the same upon all parties listed on the attached service list by e-mail, and/or United States Mail with postage prepaid, and deposited the same in a U.S. Post Office mail receptacle in the City of St. Paul, Minnesota.

s/ Judy Sigal
Judy Sigal

Subscribed and sworn to before me
this 15th day of January, 2019

s/ Patricia Jotblad
Notary Public

My Commission expires: January 31, 2020.

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