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August 21, 2007

Dr. Burl Haar
Executive Secretary
Minnesota Public Utilities Commission
121 Seventh Place East, Suite 350
St. Paul, MN 55101-2147

Re: *In the Matter of Northern States Power d/b/a Xcel Energy's Petition for Approval
of a Fixed Bill Option and Rule Variance, Docket No. G-002/M-05-393*

*In the Matter of a Commission Investigation into Xcel Energy's Fixed Monthly
Payment Pilot Program, Docket No. G-002/CI-07-541*

Dear Dr. Haar:

Enclosed for filing in the above-captioned matter, please find COMMENTS OF THE OFFICE OF THE ATTORNEY GENERAL OBJECTING TO XCEL ENERGY'S PROPOSED RESOLUTION OF INVESTIGATION ("PROPOSAL"). The Attachments referenced in the document (Public and Non-Public) will not be e-filed and will be sent with the hard-copy mailed due to their size. A certificate of service is also enclosed.

Sincerely,

/s/ STEVEN H. ALPERT
STEVEN H. ALPERT
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Enclosure(s)

cc: Service List

STATE OF MINNESOTA
BEFORE THE PUBLIC UTILITIES COMMISSION

| | |
|-------------------|--------------|
| LeRoy Koppendraye | Chair |
| Marshall Johnson | Commissioner |
| Thomas Pugh | Commissioner |
| Phyllis A. Reha | Commissioner |
| David Boyd | Commissioner |

In the Matter of Northern States Power d/b/a
Xcel Energy's Petition for Approval of a Fixed
Bill Option and Rule Variance

Docket No. G-002/M-05-393

In the Matter of a Commission Investigation
into Xcel Energy's Fixed Monthly Payment
Pilot Program

Docket No. G-002/CI-07-541

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2007, I caused the following documents:

1. Comments of the Office of the Attorney General Objecting to Xcel Energy's Proposed Resolution of Investigation ("Proposal"); and
2. Certificate of Service.

to be filed electronically with the Minnesota Public Utilities Commission at www.edockets.state.mn.us through ECF.

I also certify that a copy of the documents, with Attachments (Public Version), will be mailed by first class mail, postage paid, to the parties on the attached service list.

Dated: August 21, 2007

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In the Matter of the Petition of Northern States Power Company d/b/a Xcel Energy for Approval of a Fixed-Bill Option Tariff and Rule Variance; In the Matter of a commission Investigation into Xcel Energy's Fixed Monthly Payment Pilot Program
MPUC Docket Nos. G-002/M-05-393; G-002/CI-07-541

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STATE OF MINNESOTA
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Docket No. G-002/M-05-393

In the Matter of a Commission Investigation
into Xcel Energy's Fixed Monthly Payment
Pilot Program

Docket No. G-002/CI-07-541

**COMMENTS OF THE OFFICE
OF THE ATTORNEY GENERAL
OBJECTING TO XCEL ENERGY'S
PROPOSED RESOLUTION OF
INVESTIGATION ("PROPOSAL")**

I. INTRODUCTION.

The Minnesota Office of Attorney General ("OAG") submits these Initial Comments in response to the Minnesota Public Utilities Commission's (the "Commission") REQUEST FOR COMMENTS (July 13, 2007) related to XCEL'S *PROPOSAL TO RESOLVE THE OFFICE OF THE ATTORNEY GENERAL'S INVESTIGATION INTO XCEL ENERGY'S FIXED MONTHLY GAS PAYMENT PROGRAM DOCKET NO. G002/M-05-393, G002/CI-07-541* ("Proposal"), a Proposal unilaterally filed by Xcel Energy ("Xcel") on July 6, 2007.¹

¹ The Commission's investigation is ongoing and the OAG is aiding in the investigation pursuant to Minn. Stat. § 216B.64. The OAG did not agree with the procedural nature of Xcel's filing. *See* Transcript of Hearing of July 3 at 8-9. However, the Commission subsequently ordered that Xcel may submit a proposal.

The OAG objects to the Commission closing its investigation into Xcel's Fixed Monthly Gas Payment Program ("Program") based upon Xcel's unilateral Proposal. As set forth in greater detail below, contrary to Xcel's self-serving comments, Xcel's Proposal is insufficient to resolve the Commission's investigation and is contrary to the public interest. In fact, Xcel's Proposal goes little further than the Commission's Order of July 16, 2007 ordering that Xcel's Program be indefinitely suspended and that all Low Income Heating and Energy Assistance Program ("LIHEAP") funding participants be allowed to "opt out" of the Program.²

To date as well as in its Proposal, Xcel attempts to deflect blame away from itself and on to other parties, while refusing to cooperate with the OAG in the ongoing investigation.³ While Xcel on the one hand vouches for WeatherWise and its calculations, Xcel readily admits that it has absolutely no understanding of what WeatherWise does. During the investigation, Xcel has acknowledged its inability to provide information to the OAG regarding WeatherWise so that the OAG can investigate the Program. As displayed by its current actions in this investigation, Xcel cares more about its bottom line and its contract with WeatherWise than its Regulatory Contract with its ratepayers and this Commission.

² See ORDER MODIFYING PRIOR ORDERS, SUSPENDING AUTHORITY TO OFFER FIXED BILL PROGRAMS, ALLOWING LIHEAP CUSTOMERS TO IMMEDIATELY OPT OUT OF FIXED BILL PROGRAMS, AND OTHER RELIEF, *In the Matter of a Commission Investigation into Xcel Energy's Fixed Monthly Payment Pilot Program*, Docket No. G-002/CI-07-541; *In the Matter of the Petition of Northern States Power Company d/b/a Xcel Energy for Approval of a Fixed Bill Option Tariff and Rule Variance*, Docket No. G-002/M-05-393; *In the Matter of a Commission Investigation into CenterPoint Energy's No Surprise Bill Program*, Docket No. G-008/CI-07-542; *In the Matter of the Petition of CenterPoint Energy for Approval to Continue the No Surprise Bill and Revise the No Surprise Bill Tariff to Allow for the Inclusion of Planned Rate Increases in the Bill*, Docket No. G-008/M-05-602 (July 16, 2007).

³ See discussion at p. 14.

Despite obtaining approval from the Commission for its Program by promising “revenue neutrality” and assuring the Commission that the general ratepayers would not be burdened by the costs of the Program, Xcel has not been able to prove that these promises were kept. In fact, Xcel has presented several different calculations which are simply not reconcilable and that support the investigation concerns that Xcel did not accurately represent its Program. In its Proposal, Xcel seeks to recover what it calls “stranded costs” from ratepayers rather than offsetting these “stranded costs” from its Program revenues. The end result is that Xcel is attempting to increase the profit from what was promised to be a “revenue neutral” Program and instead shift the costs, and thus the burden, of its failed Program to other ratepayers who never wanted to participate in the Program, let alone those that may have been misled into participating in the Program.

The OAG recommends and requests that the Commission reject Xcel’s unilateral Proposal. It is the OAG’s position that the OAG should continue this investigation into Xcel’s Program as ordered by the Commission and that any costs associated with the ending of the Program not be shifted to ratepayers. It is contrary to the public interest to allow Xcel to fail in its negotiations to settle with Program with the OAG, refuse to cooperate in the investigation, and then be allowed to end the investigation by submitting this settlement proposal.

II. PROCEDURAL HISTORY.

On February 15, 2007, the OAG filed a *Complaint and Request of the Minnesota Attorney General for a Summary Investigation, Interim Relief, and an Expedited Hearing*, against Northern States Power Company d/b/a Xcel Energy (“Xcel”) and CenterPoint Energy

Minnesota Gas (“CPE”).⁴ In its complaint, the OAG requested that the Commission open a new docket to investigate problems uncovered by the OAG associated with Xcel’s and CPE’s Programs, to determine whether the Programs should be changed or disallowed entirely as not in the public interest, and to provide Program participants the opportunity to exit the Program and avoid the hardship of the extraordinary costs that many of these program participants would eventually suffer as a result of being involved in the Program.

On February 20, 2007, the Commission issued a request for comments. Xcel, CPE, the Department of Commerce (“DOC”), Energy CENTS Coalition (“ECC”), and WeatherWise USA, Inc.¹ (“WeatherWise”) all filed comments.⁵ In addition, Xcel, CPE, ECC, and the OAG all filed reply comments.

On April 19, 2007, the Commission met to consider the matter. The parties reached agreement to request the Commission to temporarily defer action on the OAG’s request for interim relief to give the companies an opportunity to provide information regarding potential stranded costs should relief be granted in the form requested by the OAG. By Order of April 27, 2007, the Commission opened investigations into Xcel’s and CPE’s Programs.

At the commission meeting of May 24, 2007, the parties informed the Commission that they had reached a settlement in principle with Xcel that would include terminating Xcel’s pilot program at the end of the current program year, but that details needed to be worked out.⁶ Xcel

⁴ Because CPE’s program is not *directly* impacted by Xcel’s Proposal, the OAG will refer to CPE’s program herein only as necessary.

⁵ Counsel for WeatherWise indicated in a letter that it was submitting “preliminary comment,” and conceded that “WeatherWise does understand that it is the only party in possession of a key subset of salient information that would facilitate any inquiry by the OAG and the Commission of the merits of the programs.” *See* Letter from Robert S. Lee (March 2, 2007).

⁶ *See generally* Transcript of Hearing of May 24, 2007 at 8-16.

and the OAG both requested additional time to reduce the agreement to writing for filing and comment.

On June 7, 2007, a pretrial hearing before the Lead Commissioner occurred to address, in part, a request by ECC for a protective order in order to obtain data from Xcel and CPE as well as WeatherWise.⁷ The Lead Commissioner deferred those proceedings until June 21, 2007 in order to give the parties additional time to continue discussions.

On June 21, 2007, the parties again came before the Lead Commissioner. Because agreement had not been reached, the primary issue addressed by the Commission was ECC's request for a protective order in order for it to obtain data from WeatherWise, Xcel, and CPE. WeatherWise was represented by counsel who participated at the hearing. Because the OAG was involved in ongoing settlement discussions with both companies, the OAG reiterated that it had temporarily suspended the WeatherWise aspect of its investigation while it pursued settlement discussions.

On July 3, 2007, Xcel advised the Commission that agreement had not been reached with the OAG and that Xcel "will file with you on Friday [July 6] either a settlement with the Attorney General's Office, or the company will put forth a unilateral proposal for resolution of the investigation of Xcel Energy."^{8 9} The OAG and Xcel were unable to reach a settlement

⁷ Commissioner Pugh had been designated as Lead Commissioner to oversee, in part, pre-hearing and discovery-type issues. *See generally* Order of April 27, 2007.

⁸ Transcript of Hearing of July 3, 2007.

⁹ Incredibly, *eight days later* (July 11, 2007), the president for WeatherWise wrote directly to Commissioner Pugh claiming, "It has come to my attention that WeatherWise's methods and modeling have become lightning rods..." WeatherWise further complained that the OAG had not contacted them for more information "for close to a month."

WeatherWise has been represented by local counsel at least since March 2, 2007, and has had access to all filings. WeatherWise and its counsel have been part of the ongoing dispute regarding access to WeatherWise information and related delays by WeatherWise, including (Footnote Continued on Next Page)

agreement. Accordingly, the OAG continued the investigation into Xcel's Program but has since been met with continued road blocks by Xcel in obtaining necessary information.

On July 6, 2007, Xcel filed its unilateral Proposal. The Commission requested Comments on the Proposal by August 13, 2007. On August 10, 2007, upon the request of ECC, the Commission extended the comment period deadline to August 21, 2007 and the deadline for reply comments to September 4, 2007.

III. XCEL'S PROPOSAL.

Xcel asks this Commission to close the OAG's investigation based upon its unilateral Proposal after Xcel was unable to reach a settlement with the OAG. Xcel's unilateral Proposal is not in the public interest and is an attempt to derail further inquiry into the conduct of Xcel and its agents, including WeatherWise, in the implementation of Xcel's Program. As set forth below, various components of Xcel's unilateral Proposal and the costs that Xcel intends to shift to all ratepayers for its flawed Program do not serve the public interest.

A. Program Termination.

In its unilateral Proposal, Xcel proposes permanent termination of its Program effective at the end of the current program year.¹⁰ In its Complaint, the OAG requested that the Program be terminated in its entirety or, alternatively, if the Program was to continue, that potential

(Footnote Continued From Previous Page)

information that was publicly presented to the Commission at its May 24 Hearing. WeatherWise attorney Mr. Lee was present in the Hearing Room on May 24 and the undersigned specifically told counsel that given the settlement discussions and ECC's request for access to WeatherWise data, the OAG would hold off its review of additional WeatherWise information. The OAG's position was repeated on the record at the subsequent Lead Commissioner Hearing on June 21, where another member of WeatherWise's legal team appeared. WeatherWise knew full well that it has always been and continues to be a focus of the investigation, a major reason for delay, and that the OAG would be in contact with WeatherWise to receive more data.

¹⁰ See Proposal at 3.

customers be provided sufficient information to make an informed decision about the benefits---to the customer---for participating. While the permanent end to Xcel's Program is appropriate, it is insufficient reason alone to close the investigation.

B. Exit of LIHEAP Customers.

In its unilateral Proposal, Xcel "offers" to provide an opportunity for approximately 590 LIHEAP participants to exit the Program. Of course, this "offer" is nothing more than what the Commission already ordered Xcel to do at its meeting of July 3, 2007. Offering to do that which Xcel is already required to do by the Commission's Order adds little to Xcel's Proposal, nor does it provide sufficient justification to end the investigation into Xcel's Program.

As an alternative, Xcel offers in its unilateral Proposal that LIHEAP customers would have the ability to automatically exit the Program with the ability to opt back in.¹¹ While this alternative would be less expensive to accomplish, easier to administer, and would assure protection of these limited public funds, it still provides that other ratepayers who opted not to be part of the Program would bear the costs of the flawed Program, something which is not in the public interest.

C. Exit of Reduced-Usage Customers.

Xcel's Proposal provides an option for approximately 400 customers to exit the Program, referring to this group as reduced-usage customers (defined as customers as those whose annual usage estimated from WeatherWise is 20% higher than their estimated actual natural gas usage).¹² Again, while this Proposal provides some interim relief as the OAG requested, it is

¹¹ Xcel has failed to identify how many LIHEAP customers Xcel might reasonably expect to request to opt back in.

¹² See Proposal at 7-9.

insufficient to justify closing the investigation while allowing Xcel and WeatherWise to be made whole to the detriment of other ratepayers.

The list of reduced-usage customers demonstrates who would be left without any remedy.¹³ For example, one customer¹⁴ who is estimated to use more than 20% less than WeatherWise projected will end up paying \$53 dollars more under the program than standard billing.¹⁵ Compare that to the fixed bill customers that are *not* entitled to exit and who are projected to pay, for example, 60% (\$1,430), 63% (\$1311), and 64% (\$1287) more than standard billing.¹⁶ While the Program apparently allows ratepayers to exit the Program if the customer experiences a “hardship,” Xcel’s Proposal provides no ability for these ratepayers to demonstrate that they have experienced a “hardship” and the term itself is limited only by Xcel’s subjective interpretation.

It is the OAG’s position that there should be a mechanism for additional ratepayers to justify that enrollment in the Program constituted a “hardship” which allows them to exit the Program. This Commission has the authority to determine what constitutes a hardship, and each customer should have the opportunity to make their case absent a settlement that provides broader relief.

In its attempt to convince the Commission that this is a good deal Xcel states:

If the FMGP program continued into its third year, changes in the customer’s gas usage would have factored into the customer’s FMGP quote for that third year, reducing the amount. Because the Company has proposed to terminate the FMGP program, these customers will not be participating in the FMGP program for

¹³ See Xcel Trade Secret Response to OAG IR# 39 (Attachment A).

¹⁴ *Id.* at p. 7

¹⁵ After the exit fee this customer will receive little, if anything, from exiting.

¹⁶ *See id.* at pp.636-7.

another year. The Company's proposal recognizes this fact, and provides the customer with an [sic] immediate relief.¹⁷

Xcel's justification for its Proposal makes little sense for several reasons. First, Xcel admits that it has no basis for determining why the usage was less than WeatherWise expected, which is not surprising since Xcel readily admits it has no information as to how WeatherWise made the calculations provided to ratepayers by Xcel. Because Xcel has no idea how WeatherWise calculates the expected usage portion of the fixed bill quote, it is certainly as likely that part of the reduced usage is attributable to the expected usage being too high to begin with as calculated by WeatherWise and implemented by Xcel.¹⁸ Next, because the price of gas is not broken out in the quote to the customers and because there has been a drastic decrease in price from the \$1.44 used this year, even a customer who used more gas than expected might also see a decrease in their quote. No customer could ever be assured that their reduced usage and excessive payments were properly factored into the WeatherWise calculations and resulting quote. And, as Xcel has stated time and time again, this is not the budget plan and there is no true-up, annually or into a third, fourth, or fifth year. To claim otherwise is misleading at best.

While the OAG welcomes the permanent termination of this Program and the opportunity for Xcel's customers to exit it, the trade-off for closing this investigation -- where Xcel transfers all the cost to other ratepayers and where there is no option for other ratepayers to even be

¹⁷ Proposal at p. 8, fn 5.

¹⁸ Xcel raises more questions than it answers in Xcel Response to ECC IR#2, when it states that 69% of decreased natural gas usage has "no readily identifiable reason" or that 8% of usage reduction was due to inaccurate or variance in natural gas meter reads or dead meters. Moreover, 6% of the 402 customers that it proposes to allow to exit have already cancelled the program. *See also*, Xcel Trade Secret Response to OAG IR# 26 (Attachment A) (showing customer paying \$2268 for an estimated usage of 1486 therms, but also showing no usage.

allowed to exit the Program under any circumstance -- is insufficient to justify ending the investigation.

D. Recovery of Costs and Revenue Losses.

Finally and most disturbing to the public interest, Xcel seeks to recover what Xcel refers to as “stranded costs” resulting from the cash-out of LIHEAP and reduced-usage customers through the Purchase Gas Adjustment true-up (“PGA true-up”) mechanism for natural gas costs and as well as use of a deferred account for recovery of claimed stranded non-gas costs in Xcel’s next natural gas rate case.¹⁹

This Program was presented and approved by the Commission to be “revenue neutral.” Now that promise by Xcel also appears to be false. *Compare* Xcel Trade Secret Response to ECC IR# 5 and 10 in this docket with the Commission’s Order Granting Petition With Modifications and Reporting Requirements, *In the Matter of the Application of Northern States Power Company, dba Xcel energy for Approval of a Fixed-Bill Option Tariff and Rule Variance*, Docket No. G-002/M-05-393 (September 6, 2005) *See also*, related Staff Briefing Papers dated August 18, 2005). *Also compare*, Xcel Trade Secret Response to DOC IR# 144 and Xcel Response to DOC IR# 157 from, *In the Matter of the Application of Northern States Power Company, a Minnesota Corporation and Wholly-Owned Subsidiary of Xcel Energy, Inc., for Authority to Increase Rates for Natural Gas Service in Minnesota*, MPUC Docket No. G-002/GR-06-1429.

¹⁹ *See* Proposal at 9-12. Commissioner Reha raised the OAG’s present concern when she inquired, “The question I had is do you have any concerns, because these stranded costs will be placed on all ratepayers, all residential ratepayers, probably, whether -- or I don't know, all classes of ratepayers, or how is that stranded cost going to be spread out among your customers?” Transcript of Hearing of May 24, 2007 at 11-12.

The Commission should prohibit Xcel from shifting any costs associated with terminating this Program to other ratepayers. To the extent the Commission allows Xcel to shift the costs, the Commission should review the serious discrepancies between the revenue and expense information provided by Xcel in this Proposal as compared to, for example, the information provided the DOC by Xcel in Xcel's current gas rate case. Xcel has no basis to even consider requesting the ability to recover any costs as being "stranded," including gas, so-called start-up costs, and other administrative costs, until, at a minimum all revenues have been offset.²⁰

Xcel further should not be allowed to recover any amounts until its conduct and that of its primary agent, WeatherWise, is fully analyzed. In any event, *any* cost recovery determinations must be deferred, at a minimum, until after the company's Annual Report detailing the revenues and expenses from the 2006-2007 Program year and after Xcel's Annual Automatic Adjustment Report is fully reviewed, including whether the purchase of gas for this program was even prudent.

IV. THE INVESTIGATION SHOULD CONTINUE.

Xcel's Proposal fails to provide a sufficient basis under which the current investigation should be terminated. For the most part, Xcel adds little to its earlier arguments for not opening the investigation in the first place.²¹ Xcel now boldly claims:

Over 80 percent of the difference between FMGP program payments and bills under standard rates is due to the higher cost of natural gas for the Program as compared to lower-than-expected actual natural gas costs for standard customers. The remaining difference is attributable to usage differences and the Commission authorized charges for the FMGP program, which are normal risks for the

²⁰ If all LIHEAP and reduced-usage customers actually exit the program, Xcel estimates stranded costs to be \$288,668 in natural gas costs and \$439,383 in non-gas costs under this Proposal. At a bare minimum, Xcel should also be required to offset any expenses saved that otherwise would have been spent if the program had ended at the end of the three year pilot.

²¹ See Response to Commission Notice, (March 2, 2007).

Program. *Given that the payment differences stem from these issues rather than WeatherWise's processes, there is no need for further investigation.*²²

The highlighted portion of the statement is made even more incredible in that Xcel itself conceded just a few months ago:

MS. HERTZLER: Mr. Chair, we -- we entered into a contract with WeatherWise to provide a program that we thought provided value to our customers. We are not aware of any fraud, certainly the Attorney General has been looking into whether there is any concern with regard to the WeatherWise methodology, we don't have that methodology and we can't tell you what is involved in how they do this. They've taken very, very lengthy steps to make sure that we don't have the methodology so that we can't replace them with our own program. We -- we're not aware of there being any fraud, but we also don't have the means to investigate that.²³

To the extent Xcel admits its gas price has caused the majority of problems, this statement only further supports the fact that prior to the start of this year's Program, Xcel *knew* that the statement that "you could end up paying more or less for natural gas with this program than you would under standard rates..." was false when made to thousands of consumers who were considering the program.²⁴ Xcel intentionally withheld material information, and its failure to make those facts available made the representation tantamount to fraud. Xcel had the responsibility to seek modification of its marketing materials when it had knowledge that the approved statement was no longer true.²⁵

²² Proposal at 4 (emphasis added).

²³ Transcript of Hearing of May 24 at 26-7.

²⁴ See e.g., Xcel Trade Secret Response to OAG IR# 30 (Attachments A-F). These invoices demonstrate that Xcel knew that the premium paid by program participants was far more than "something in the nature of insurance against weather-driven increases in natural gas consumption and market-driven spikes in natural gas costs." Proposal at 13. At the same time Xcel was touting price certainty and that the program customer was just as likely to pay more. Xcel knew its shareholders were assured to come out way ahead.

²⁵ See generally, , *Richfield Bank & Trust Co. v. Sjogren*, 309 Minn. 362, 365, 244 N.W.2d 648, 650 (Minn.1976) (one who speaks must say enough to prevent his words from misleading the other party.); *Newell v. Randall* 32 Minn. 171, 173, 19 N.W. 972, 973 (Minn. 1884). (determining that to tell half a truth only is to conceal the other half). See also, *Klein v. First* (Footnote Continued on Next Page)

The OAG continues to investigate whether Xcel was following its tariff in operating its Program. For example, Xcel's tariff states that a customer "shall become ineligible for Fixed Bill service, and be removed from this Rider, if the customer does not have a current payment status with Company's utility bill." See Attachment A to Xcel response to OAG IR#1. However, almost 2300 fixed bill customers were in arrears during the 2006-7 program year. Failure to remove any of those customers from the program is a violation of its tariff. See spreadsheet attached to Xcel Trade Secret Response to OAG #38. This is also significant because the tariff goes on to provide that customers removed from this rider before completion of the 12-month term may be subject to a Cash Out (the amount that would have been paid had the customer taken service under the standard tariff minus the amount paid during the current program year) and an Exit Fee (\$30 unless receiving Cold Weather Rule protection). While additional review is needed, it appears that Xcel's own tariff may provide relief to numerous more customers. Interestingly, Xcel refuses to disclose who these individuals are, which may preclude these customers from exercising their rights under the tariff and the filed rate doctrine. See Xcel Trade Secret Response to OAG IR# 38 (claiming that a uniquely created identification number is necessary to protect the identities of these customers from the OAG).

By prematurely shutting down this investigation, the Commission may be precluding thousands of other program participants from exercising their rights.²⁶ While the OAG certainly

(Footnote Continued From Previous Page)

Edina National Bank, 293 Minn. 418, 421, 196 N.W.2d 619, 622 (Minn. 1972) (those who speak must say enough to prevent their words from misleading the other party and those who have special knowledge of material facts to which the other party does not have access may have a duty to disclose these facts to the other party).

²⁶ See generally, *Schermer v. State Farm Fire and Casualty Co.*, 721 N.W.2d 307 (Minn.2006) (filed rate doctrine may require regulatory agency to declare tariff unreasonable before customers may pursue civil claims); See also, Arbitration Award, *New Access, et al. v. Qwest*, MPUC (Footnote Continued on Next Page)

agrees that the 400 customers should be allowed to exit, the OAG believes that the other ratepayers should not be required to pick up the costs for Xcel's flawed Program or under circumstances where Xcel was violating the terms of its tariff.

As previously discussed, the OAG investigation into WeatherWise methodologies was temporarily suspended while settlement discussions took place and while ECC worked to get a Protective Order and access to the information.²⁷ Based on Xcel and CPE's failure to reach a settlement, the OAG has reinstated its investigation into WeatherWise's practices. The OAG also informed the Commission and the companies that it would be reviewing recordings of calls made to each company and its third party calling center.²⁸ Xcel has now refused to give access to even these third party call center recordings. Xcel raises several objections that have never been raised before (even in earlier discovery in this case) and it appears clear that Xcel is buttressing its attempt in its Proposal to cut off this investigation.²⁹ While discussions are ongoing, the OAG may be required to bring a motion to compel with the Lead Commissioner to resolve this issue.

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Docket No. P421-CI-02-582 (rejecting claim that filed rate doctrine precluded recovery of proceeds and benefits of tariff declared to be unreasonably discriminatory and anti-competitive by the MPUC).

²⁷ See footnote 11, *infra*. The OAG has been informed that ECC now has a separate agreement with WeatherWise that precludes ECC's access to some data the OAG may receive. The OAG's investigation will continue separately.

²⁸ See *generally* Transcript of Hearing of May 24, 2007 at 37-42. It appears that the third party calling center for Xcel was operated by WeatherWise or its agents.

²⁹ One such claim is that "a review of these recorded conversations is unlikely to lead to the discovery of admissible evidence." In support, Xcel claims that "call center personnel were given a script previously filed ...and subsequently approved for discussions with customers...." Xcel response to OAG IR# 29. The absurdity of the response speaks for itself.

V. CONCLUSION.

For the reasons set forth above, Xcel's Proposal falls short of being in the public interest. Under Xcel's unilateral Proposal, thousands of other Xcel program participants will suffer from costs much higher than could have reasonably been expected by anyone, other than by Xcel itself. The Commission should reject Xcel's Proposal and allow the investigation to continue under the Commission's full authority and support. The Commission should declare the current tariff unjust and unreasonable and protect the right of all program participants to seek relief.

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Respectfully submitted,

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