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Minn. Stat. § 480A.08, subd. 3 (2018).

STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1785
A20-0116

In the Matter of Xcel Energy's Petition for Approval of
Electric Vehicle Pilot Programs (A19-1785),

and

In the Matter of Xcel Energy's Petition for Approval of a
Residential EV Subscription Service Pilot Program (A20-0116).

Filed September 21, 2020
Affirmed
Smith, Tracy M., Judge

Minnesota Public Utilities Commission
File Nos. E-200/M-18-643, E-200/M-19-186

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Considered and decided by Worke, Presiding Judge; Connolly, Judge; and Smith, Tracy M., Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

In these consolidated certiorari appeals, relator Xcel Large Industrials (XLI) challenges decisions by respondent Minnesota Public Utility Commission (MPUC) approving three electric-vehicle (EV) charging pilot programs proposed by respondent Northern States Power Company, d/b/a Xcel Energy (Xcel). XLI argues that the MPUC exceeded its authority when it approved the pilot programs because Minnesota law does not authorize the MPUC to regulate public-utility investments "behind the customer meter." In the alternative, XLI argues that the MPUC acted arbitrarily and capriciously when it granted three components of Xcel's cost-recovery requests. Because the MPUC acted within its statutory authority and did not act arbitrarily or capriciously, we affirm.

FACTS

Xcel, a utility company headquartered in Minneapolis, proposed the three pilot programs at issue to the MPUC as part of its ongoing development of EV initiatives. The pilot programs are designed to advance electrification of the transportation sector in Minnesota by testing and studying how public utilities can help overcome barriers to EV adoption.

XLI is a consortium of entities, including USG Interiors Inc., a gypsum-products manufacturer, and two oil refineries, Flint Hills Resources Pine Bend LLC and Marathon Petroleum Corporation. These entities are all large industrial customers of Xcel. XLI

opposed the pilots throughout the MPUC evaluation process, arguing, among other things, that the proposals would require ratepayers to subsidize EV-charging investments that should instead be made by private businesses.

To understand the specific pilot programs at issue, it is useful to first review several recent EV-related actions by the Minnesota Legislature and the MPUC.

Background

In 2014, the Minnesota Legislature enacted a statute directing public utilities[1] selling electricity at retail to file a tariff with the MPUC "that allows a customer to purchase electricity solely for the purpose of recharging an electric vehicle." Minn. Stat. § 216B.1614, subd. 2 (2018); 2014 Minn. Laws ch. 254, § 10, at 880. The tariff must allow residential customers to purchase electricity to charge EVs at a discounted rate during off-peak energy usage hours, when electricity is relatively less expensive for the utility to generate. *See id.* The tariff must also include "a mechanism to allow the [utility's] recovery of costs reasonably necessary to comply" with the tariff requirements, including costs for educating customers "about the financial, energy conservation, and environmental benefits of electric vehicles." Minn. Stat. § 216B.1614, subd. 2(c)(2). The statute authorizes the MPUC to approve, modify, or reject utility-proposed tariffs. Minn. Stat. § 216B.1614, subd. 2(c).

Following the enactment of the EV-charging tariff statute, the MPUC evaluated multiple matters involving EVs. In 2015, the MPUC granted Xcel's petition for approval

[1] The term "public utility" is defined by statute and includes investor-owned utilities but not municipal or cooperative-association utilities. *See* Minn. Stat. § 216B.02, subd. 4 (2018).

of a residential EV-charging tariff permitting residential customers to charge EVs at home using time-of-day rates.[2] Later, after customers reported that the significant upfront costs for charging equipment and for wiring a second electrical meter—necessary to track time-of-day use—deterred their participation in the program, Xcel proposed and the MPUC approved the Residential Service Pilot.[3] Xcel designed the Residential Service Pilot to facilitate at-home EV charging by providing a charger to pilot participants, which participants can pay for over time, and by equipping the charger to transmit metering data to Xcel over a wireless network, thereby eliminating the need for a second meter.

In 2017, the MPUC initiated a general inquiry into EV charging and infrastructure in Minnesota, with the purpose of gathering information to better understand:

> 1. The possible impacts of EVs on the electric system, utilities, and utility customers, including the potential electric system benefits;
> 2. The degree to which utilities and utility regulatory policy can impact the extent and pace of EV penetration in Minnesota; and
> 3. Possible EV tariff options to facilitate wide availability of EV charging infrastructure.[4]

The inquiry garnered wide-ranging stakeholder participation, including through a public workshop, and many comments. As a result, the MPUC found that facilitating electricity-powered transportation in Minnesota is in the public interest but that there are significant

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[2] *In re Xcel Energy's Petition for Approval of a Residential Electric Vehicle Charging Tariff*, MPUC Docket No. E-002/M-15-111 (June 22, 2015).

[3] *In re Xcel Energy's Petition for Approval of a Residential Electric-Vehicle Service Pilot Program*, MPUC Docket No. E-002/M-17-817 (May 9, 2018).

[4] *In re Commission Inquiry into Electric Vehicle Charging and Infrastructure*, MPUC Docket No. E-999/CI-17-879 (Feb. 1, 2019).

impediments, including a lack of charging infrastructure, hindering transportation-electrification efforts.

To address the impediments, the MPUC directed Minnesota's investor-owned public utilities to "take steps to encourage the cost-effective adoption and integration of EVs." It also instructed the investor-owned utilities to submit various filings, including transportation electrification plans, by specified dates. It is against this backdrop that Xcel petitioned for approval of the three pilot programs at issue.

The three EV charging pilot programs

The first of the two consolidated appeals, A19-1785, regards Xcel's October 2018 petition requesting that the MPUC approve two new EV pilot programs: the Fleet EV Service Pilot (fleet pilot) and the Public Charging Pilot. The second of the two consolidated appeals, A20-0116, regards Xcel's February 2019 petition requesting approval of another residential pilot called the Residential EV Subscription Service Pilot (second residential pilot). Xcel proposed all of these initiatives as pilots in order to test key assumptions about its programs on a small scale before making them broadly available.

(1) The fleet pilot

The fleet pilot proposes that Xcel "install, own, and maintain EV infrastructure for fleet operators in order to reduce these customers' upfront costs for EV adoption." Xcel's petition estimates that the fleet pilot will facilitate installation of over 700 charging ports, serving charging needs for light-duty vehicles and buses. It states that fleet customers expected to participate in the pilot include Metro Transit, the Minnesota Department of Administration, and the City of Minneapolis.

The "make-ready" infrastructure that Xcel proposes to own under this pilot consists of both (1) service-connection infrastructure on the utility's traditional side of the meter and (2) EV-supply infrastructure—specifically, new panels, conduit, and wiring up to the charger—on the customer's traditional side of the meter. Pilot participants have the choice to either purchase EV chargers from Xcel or supply their own.

The rate structure for the fleet pilot, like that of Xcel's other EV-charging pilots, promotes off-peak charging of EVs. Xcel asserts that increased off-peak charging places downward pressure on all ratepayers' electrical rates.

In order to recover costs related to the fleet pilot, Xcel requested that it be permitted to record its capital investments in infrastructure as utility plant assets, "for which cost recovery [will] begin via inclusion of these investments in rate base in [its] next rate case"; to waive service policy provisions governing contributions in aid of construction (CIAC) that would otherwise require pilot participants to bear a portion of the costs for service connection installation; and to defer some pilot operational and depreciation expenses to be recovered in its next rate case.

(2) The public charging pilot

The public charging pilot aims to facilitate public access to EV charging through "community hubs" and fast-charging stations along high-traffic corridors. Participation in the public charging pilot is available to operators "who invest in deploying fast-charging stations along corridors in [Xcel's] service territory."[5] The Cities of St. Paul and

[5] Xcel's petition notes that the program will "specifically target[] applicants seeking funds from Minnesota's Diesel Replacement Program funded by the Volkswagen Environmental

Minneapolis plan to partner with Xcel to install the community mobility hubs, and HOURCAR plans to be an "anchor tenant." Two key purposes of public charging are to support longer-distance EV driving by reducing "range anxiety"—the fear that an EV battery will deplete and there will be no nearby charging station—and to provide charging solutions for those unable to charge EVs at home.

Like the fleet pilot, the public charging pilot involves Xcel's investment in make-ready infrastructure. But, unlike the fleet pilot, the public charging pilot does not entail Xcel owning or maintaining any EV chargers. "Instead, the charging equipment will be installed, owned, and maintained by site hosts and third-party charging developers."

Participants in the public charging pilot also pay time-of-use rates for on-peak versus off-peak charging, in addition to monthly minimum charges based on EV charging connections. Xcel's October 2018 petition requested the same cost-recovery mechanisms for the public charging pilot as for the fleet pilot.

(3) The second residential pilot

The second residential pilot builds upon Xcel's first residential pilot and is intended to address another customer barrier to EV adoption: difficulty projecting EV-charging costs under the time-of-use rate structure. To address this barrier, the second residential pilot offers participants a flat monthly subscription fee for "off-peak" electricity usage, with separate pricing for on-peak charging in excess of a specified energy allotment. Xcel installs and maintains the charging equipment and the customer can either prepay the cost

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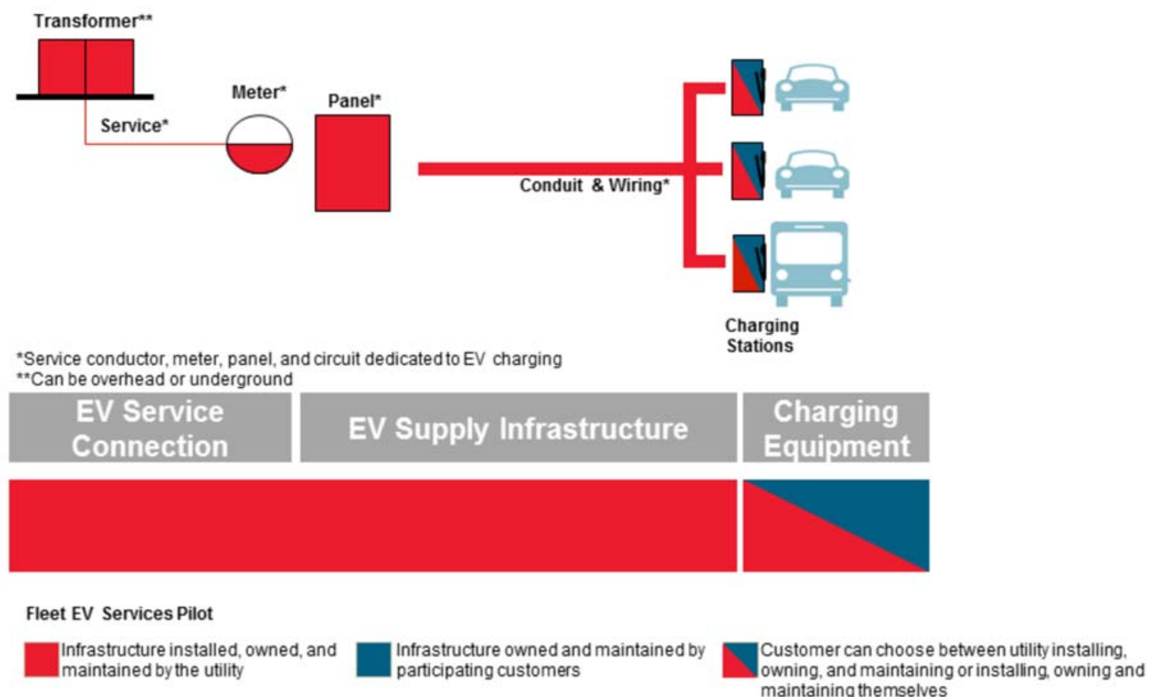
Mitigation Settlement (VW Settlement) and administered by the Minnesota Pollution Control Agency (MPCA)."

of the provision and installation of the charging equipment or pay it in monthly installments as part of a "bundled" service charge.

Because the cost of the charging equipment installed by Xcel for this pilot is recovered from the participants, Xcel did not request the same cost-recovery mechanisms described above that it did for the fleet and public charging pilots.

All three of the pilots involve Xcel owning and managing some level of infrastructure and equipment that is located on customer premises beyond the point at which electricity has passed from the grid and through the customer's meter—in other words, "behind the meter." The specific infrastructure and equipment "behind the meter" consists of panels, conduit and wiring, and EV-charging equipment. As an example, the following figure from the record illustrates the EV charging infrastructure components for the fleet pilot, which is the pilot where Xcel's involvement is most extensive:



The MPUC's decisions

On July 17, 2019, the MPUC approved the fleet pilot and the public charging pilot, with several modifications based on stakeholder input. It found that both pilots "advance the legislative goal of transportation electrification in a manner that reasonably limits potential rate impacts, while presenting an opportunity for ratepayers and the public to benefit." It granted Xcel's requests to waive CIAC provisions, treat capital investments in make-ready infrastructure as cost items in Federal Energy Regulatory Commission distribution accounts, and defer some pilot operational and depreciation expenses to be recovered in its next rate case. XLI petitioned for reconsideration, and the MPUC denied the petition on October 7, 2019. On the same day, the MPUC also approved the petition for the second residential charging pilot. The MPUC determined that there was a "compelling public interest in a short-term, limited program to explore one possible cost-effective means to promote electric vehicles." XLI petitioned for reconsideration of this order as well, and MPUC denied the petition.

These appeals follow.

D E C I S I O N

Our review of the MPUC's decisions is governed by the Minnesota Administrative Procedure Act (MAPA). Minn. Stat. § 216B.52, subd. 1 (2018). Under MAPA, we may reverse, remand, or modify an agency decision only if the agency's actions were:

> (a) in violation of constitutional provisions; or
> (b) in excess of the statutory authority or jurisdiction of the agency; or
> (c) made upon unlawful procedure; or
> (d) affected by other error of law; or

(e) unsupported by substantial evidence in view of the entire record as submitted; or
(f) arbitrary or capricious.

Minn. Stat. § 14.69 (2018). XLI's first challenge to the MPUC's decisions regards subpart (b), whether the MPUC acted in excess of its authority or jurisdiction. Its second regards subpart (f), whether the MPUC's approval of components of Xcel's cost-recovery request was arbitrary or capricious. We address each issue in turn.

I. The MPUC did not exceed its statutory authority by regulating public-utility investments "behind the customer meter."

Whether the MPUC "has acted within its statutory authority is a question of law that [appellate courts] review de novo." *In re Otter Tail Power Co.*, 942 N.W.2d 175, 179 (Minn. 2020) (quotation omitted).[6] "The MPUC, as a creature of statute, only has the authority given it by the legislature." *Minnegasco v. Minn. Pub. Utils. Comm'n*, 549 N.W.2d 904, 907 (Minn. 1996) (quotation omitted). The MPUC's regulatory authority can be either express or implied from powers expressly granted by the legislature. *Otter Tail*

[6] Respondents argue that, because XLI's argument regarding the scope of the MPUC's authority turns on the statutory definition of "service," and because that analysis depends on the interpretation of technical words or phrases within the agency's area of expertise, the MPUC's decision as to its authority is entitled to deference. *See In re N. States Power Co.*, 775 N.W.2d 652, 656 (Minn. App. 2009). But the Minnesota Supreme Court rejected a similar argument in *In re Hubbard*, explaining that when an appellate court is "confronted with the threshold question of whether the legislature has granted an agency the authority to take the action at issue," the "suggestion of deference is . . . misplaced." 778 N.W.2d 313, 318 n.4 (Minn. 2010). Moreover, "[a]ppellate courts retain the authority to review de novo errors of law which arise when an agency decision is based upon the meaning of words in a statute." *In re Claim for Benefits by Meuleners*, 725 N.W.2d 121, 123 (Minn. App. 2006) (quotation omitted). Because XLI challenges the MPUC's authority, and because the arguments largely turn on the interpretation of Minn. Stat. § 216B.02, subd. 6 (2018), we apply de novo review.

Power Co., 942 N.W.2d at 179. "Express authority exists only where a statute unambiguously grants the MPUC such authority." *Id.* "[E]xpress statutory authority need not be given a cramped reading." *Peoples Nat. Gas Co. v. Minn. Pub. Utils. Comm'n*, 369 N.W.2d 530, 534 (Minn. 1985). As to implied authority, though, "any enlargement of express powers by implication must be fairly drawn and fairly evident from the agency objectives and powers expressly given by the legislature." *Id.* XLI argues that the MPUC had neither express nor implied authority to regulate Xcel's behind-the-meter activity in the EV pilot programs. We begin with the question of express authority.

Minnesota law vests the MPUC with "the powers, rights, functions, and jurisdiction to regulate in accordance with the provisions of Laws 1974, chapter 429 every public utility." Minn. Stat. § 216B.08 (2018). The MPUC "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.09, subd. 1 (2018). "Service," in turn, is statutorily defined as "natural, manufactured, or mixed gas and electricity; the installation, removal, or repair of equipment or facilities for delivering or measuring such gas and electricity." Minn. Stat. § 216B.02, subd. 6 (2018).

XLI's primary argument turns on the above definition of "service." XLI contends that the definition of "service" in section 216B.02, subdivision 6, constrains the scope of the equipment and facilities that a public utility may own and operate. Correspondingly, it argues, the MPUC has no authority to regulate equipment and facilities operated by a public

utility that fall outside the definition of "service."[7] XLI contends that any panels, conduit and wiring, and EV chargers "behind the meter" to be owned and managed by Xcel in the pilots fall outside of the "service" definition. XLI argues that these items cannot constitute equipment or facilities for delivering or measuring electricity because the delivery and measurement of electricity contemplated by the statute is "complete at the customer meter."

The MPUC disagreed with XLI and determined that the language of Minn. Stat. § 216B.02, subd. 6, expressly allows it to regulate the conduit, wiring, and chargers at issue in the pilots because these items fall squarely within "equipment or facilities for delivering or measuring . . . electricity." The MPUC determined that neither the statutory definition of "service" nor any other statute imposes a regulatory limitation related to the customer meter.

To interpret a statute, courts must first "determine whether the statute's language, on its face, is ambiguous." *State v. Thonesavanh*, 904 N.W.2d 432, 435 (Minn. 2017). Only if the statute is ambiguous will courts proceed to apply the canons of construction for resolving ambiguity. *Id.* We accordingly begin with whether Minn. Stat. § 216B.02, subd. 6, is ambiguous.

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[7] XLI clarifies in its reply brief—in response to Xcel's assertion that there is no dispute that public utilities can own and offer the equipment at issue and that the only dispute is whether the MPUC can regulate it—that it indeed disputes Xcel's ownership of the EV-charging infrastructure. (XLI explains: "[T]he fact that XLI is arguing that the [MPUC] exceeded its authority in authorizing Xcel's ownership of infrastructure that falls outside the definition of service is no different than arguing Xcel cannot own and offer such equipment or facilities—the arguments are opposite sides of the same coin.") XLI submits that, instead of owning the EV-charging infrastructure itself, "Xcel's alternative is to operate the programs through an unregulated affiliate." In any event, we resolve both issues here by deciding whether "service" may include owning and maintaining the EV-charging infrastructure.

A. Plain meaning of Minn. Stat. § 216B.02, subd. 6

The language of a statute is ambiguous "only if it is susceptible to more than one reasonable interpretation." *500, LLC v. City of Minneapolis*, 837 N.W.2d 287, 290 (Minn. 2013). Again, the statute defines "service" to include electricity and "the installation, removal, or repair of equipment or facilities for delivering or measuring . . . electricity." Minn. Stat. § 216B.02, subd. 6.

All parties contend that Minn. Stat. § 216B.02, subd. 6, is unambiguous. XLI contends that the statute is unambiguous because "delivering" and "measuring" of electricity are necessarily completed at the customer meter. Xcel and the MPUC, on the other hand, contend that "equipment or facilities for delivering or measuring . . . electricity" unambiguously encompasses the EV-charging infrastructure. Conduits, wiring, and EV chargers all deliver electricity to the electric vehicle for ultimate consumption. In addition, the MPUC notes that many modern EV chargers are capable of measuring the amount of electricity used to charge a vehicle.

The dispute primarily turns on the definitions of "delivering" and "measuring." As for "delivering," XLI contends that delivering electricity only means delivering electricity to the customer *at the meter*, while Xcel and the MPUC interpret "delivering" to also include delivering electricity to an EV at the charging station. Similarly, XLI believes measuring necessarily occurs at the meter, while respondents assert that measuring may occur beyond it.

Absent a technical definition or special meaning, words in a statute are to be construed "according to their common and approved usage."[8] Minn. Stat. § 645.08 (2018). "Plain meaning embodies ordinary use of the language in the context of the whole-act structure, applying the usual conventions of grammar and syntax." *First Nat. Bank of the N. v. Auto. Fin. Corp.*, 661 N.W.2d 668, 670 (Minn. App. 2003). When the words of a statute are plain in their application to a particular case, the court applies that plain meaning. *ILHC of Eagan, LLC v. County of Dakota*, 693 N.W.2d 412, 419 (Minn. 2005); *see* Minn. Stat. § 645.16 ("When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.")

The American Heritage Dictionary most applicably defines "deliver" as "To bring or transport to the proper place or recipient; distribute." *The American Heritage Dictionary of the English Language* 480 (5th ed. 2018). It defines "measure" as "To ascertain the dimensions, quantity, or capacity of," or "To allot or distribute as if by measuring" *Id.* at 1089. The administrative record reflects that the conduits, wiring, and chargers all transport electricity to the EV for ultimate consumption. The MPUC also found that many modern EV chargers are capable of measuring electricity. The record supports this finding in that

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[8] Xcel contends that the MPUC set forth a technical definition in this case when it decided that the EV charging infrastructure qualifies as "equipment or facilities for delivering or measuring electricity." Xcel argues that, because XLI offered no contrary technical definition here, this court should accept the MPUC's "definition." But the MPUC's order does not set out any established definition of "deliver" or "measure." It merely applies the "service" definition to the facts of this case and determines that the EV-charging infrastructure qualifies. Accordingly, in the absence of technical definitions from any of the parties, we apply the common and ordinary definitions of the words in the statute.

Xcel's chargers for the residential pilot programs are specifically designed to measure electricity in order to eliminate the need for a second meter.

We note that, as Xcel acknowledges, its involvement with delivering and measuring electricity typically ends at the customer meter. However, the fact that public utilities traditionally deliver electricity to that point does not mean that they may only deliver electricity to that point; nothing in the plain language of Minn. Stat. § 216B.02, subd. 6, restricts delivery to the meter. If a statute omits words, courts may not read them into "an unambiguous statute under the guise of statutory interpretation." *328 Barry Ave., LLC v. Nolan Props. Grp., LLC*, 871 N.W.2d 745, 750 (Minn. 2015).

Xcel and the MPUC urge that analyzing "service" by applying the "whole-statute" canon further demonstrates that the legislature did not intend to limit a public utility's involvement based on the location of the meter. The "whole-statute canon" is a "pre-ambiguity canon." *State v. Scovel*, 916 N.W.2d 550, 555 (Minn. 2018). Under this canon, the court must read the statute "as a whole and interpret each section in light of the surrounding sections in an effort to avoid conflicting interpretations." *Id.* (quotations and citation omitted). Statutory "words and sentences are to be understood in light of their context and are not to be viewed in isolation." *Schwanke v. Minn. Dep't of Admin.*, 851 N.W.2d 591, 597 (Minn. 2014) (quotation omitted). Xcel points to five surrounding statutory sections that it argues show that the legislature did not intend "delivering and measuring" to carry a definition limited by the customer meter.

The first is Minn. Stat. § 216B.022 (2018), which provides that the MPUC and public utilities may not limit the availability of submetering to building occupants. If the

legislature meant to prohibit the MPUC and utilities from all action behind customer meters, it argues, there would be no need for this specific behind-the-meter limitation.

The second is Minn. Stat. § 216B.1614, subd. 2, which, as previously described, requires that public utilities offer a tariff for purchasing electricity "solely for the purpose of recharging an electric vehicle" and instructs that the MPUC regulate the tariffs. The statute directs that tariffs must incorporate the cost of "metering or submetering within the rate charged to the customer." Minn. Stat. § 216B.1614, subd. 2(c)(4). Xcel argues that this directive shows that, specifically in the EV context, the MPUC's authority over public utility "service" includes equipment (submeters) installed on the customer's side of the meter.

Third, Xcel points to Minn. Stat. § 216B.241, subd. 3 (2018), which discusses energy conservation improvements. Subdivision 3 states that "an energy conservation improvement made to or installed in a building in accordance with this section, except systems owned by the utility and designed to turn off, limit, or vary the delivery of energy, are the exclusive property of the owner of the building . . . ." Minn. Stat. § 216B.241, subd. 3. Xcel argues that this statute similarly shows that the legislature contemplated utility investment on the customer side of the meter, and it provides one example that utilities have been using for over thirty years called a "Savers Switch."

Fourth, Xcel points to Minn. Stat. § 216A.05, subd. 2(2) (2018), which gives the MPUC authority to "review and ascertain the reasonableness of tariffs of rates, fares, and charges, or any part or classification thereof." "Rate," in the context of public utilities, "means every compensation, charge, fare, toll, tariff, *rental*, and classification, or any of

them, demanded, observed, charged, or collected by any public utility for any service . . . ." Minn. Stat. § 216B.02, subd. 5 (2018) (emphasis added). Xcel argues that the inclusion of "rental" in the statute shows that the legislature expected that Xcel would own equipment and facilities to rent out to customers, such as the EV chargers here.[9]

These statutes surrounding the statutory section at issue do not directly allow utility ownership of the EV-charging infrastructure. But we agree with Xcel that, applying the whole-statute canon, they do lend support to the common-usage interpretation of the statute that the "service" that a public utility may provide is not statutorily limited based on the location of the meter.

To be ambiguous, a statute must be "susceptible to more than one reasonable interpretation." *500, LLC*, 837 N.W.2d at 290. XLI asks the court to find that a reasonable interpretation of "the installation, removal, or repair of equipment or facilities for delivering or measuring . . . gas and electricity" in Minn. Stat. § 216B.02, subd. 6, excludes equipment or facilities behind the customer meter, but that assertion is not supported by the common meaning of the words in the statute or by the statutory scheme. We accordingly hold that Minn. Stat. § 216B.02, subd. 6, is unambiguous in that it does not impose a limitation on the MPUC's regulatory authority based on the location of the customer meter.

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[9] Xcel also points to Minn. Stat. § 325F.185 (2018), which requires that all "[e]lectric vehicle infrastructure installed in this state must . . . be capable of providing bidirectional charging, once electrical utilities achieve a cost-effective capability to draw electricity from electric vehicles connected to the utility grid." Xcel argues that a public utility drawing electricity from an electric vehicle is "optimally achieved" through the utility's ownership and control over the EV-charging infrastructure, further demonstrating that the meter is not a hard boundary for utility ownership.

B. Prior decisions

XLI argues that the MPUC's decision here departs from three prior decisions—two by the MPUC and one by this court—that, XLI claims, imposed a meter-based limitation on the MPUC's jurisdiction. XLI argues that the MPUC recognized the meter as the "point of delivery" in *In re Complaint by Lake Country Power Against Minn. Power Alleging Violation of Its Exclusive Serv. Area by Providing Serv. To Canadian Nat. Ry. Co. Facilities Near Hoyt Lakes*, MPUC Docket No. E-015, 106/SA-17-893, at 5 (Mar. 5, 2019) (*Lake Country Power*), and also interpreted "service" in general as ending at the meter in *In re Application of the Minn. Gas Co. for Auth. to Change its Schedule of Rates for Gas Util. Serv. in Minn.*, MPUC Docket No. G-008/GR-80-630 (Nov. 25, 1981) (*Minnegasco*) and in *In re Implementation of Util. Energy Conservation Improvement Programs*, 368 N.W.2d 308 (Minn. App. 1985) (*In re CIP*). We examine each case in turn.

In *Lake Country Power*, the MPUC examined whether Minnesota Power was providing service outside its service area and into Lake Country's exclusive area. *Lake Country Power*, MPUC Docket No. E-015, 106/SA-17-893, at 1. A railroad that passed through both utilities' service areas had purchased electricity from Minnesota Power and constructed "signal bungalows" at intervals along the track. *Id.* at 3. It had then endeavored to use its own private distribution line to power bungalows located in Lake Country's territory. *Id.* The MPUC rejected Lake Country's claim that Minnesota Power was providing service outside its area, explaining:

> Because a utility has no control over where a customer ultimately uses electricity once delivered under its statutory and tariff obligations, the point of delivery (i.e., the meter) is the appropriate focus in cases of service-area straddling.

> Absent gerrymandering, prior agreement to the contrary, or some overriding public-interest consideration, as long as a utility delivers power within the utility's own service territory, a customer may transfer that same power over its own private distribution network into another utility's service area for its own use.

Id. at 5.

XLI contends that, in this decision, the MPUC established the meter as the sole "point of delivery." But *Lake Country Power* did not involve a public utility's actions beyond the customer meter; it involved a customer's transfer of electricity beyond that point and into another utility's service area. The MPUC determined that delivery of electricity to the meter was the "appropriate focus in *cases of service-area straddling*." *Id.* (emphasis added). It did not decide whether public utilities can take actions beyond the meter generally.

XLI also relies heavily on the *Minnegasco* matter to urge a meter-based limitation. In *Minnegasco*, the MPUC evaluated whether a utility could permissibly include costs of a "customer appliance service program," in which the utility performed maintenance on gas-consuming customer appliances, in its rate base and operating expenses. MPUC Docket No. G-008/GR-80-630, at 1. The MPUC determined that maintenance on customer appliances fell outside the scope of the definition of "service" in Minn. Stat. § 216B.02, subd. 6. *Id.* at 6. It explained, "The servicing of customer appliances which consume gas is clearly outside the scope of delivery or measurement at the customer's meter. The 'adequate, efficient, and reasonable service' requirement of [Minn. Stat.] § 216B.04 established standards for the utility's system, not for the customer's property." *Id.* at 7.

In the same decision, though, the MPUC permitted the utility to provide "leak investigations in customer-owned piping, equipment and appliances," as it determined that this "safety-related portion of the program" was a utility service. *Id.* at 2, 7. The Minnesota Supreme Court agreed that responding to gas leaks in customer lines, equipment, or appliances was part of utility services and held that the "costs necessarily incurred when responding to gas leaks . . . are to be included in the rate as if incurred directly by the gas utility in furnishing utility service." *Minnegasco*, 549 N.W.2d at 910.

As Xcel and the MPUC point out, neither the supreme court's nor the MPUC's *Minnegasco* decision definitively interpreted "service" as constrained by the meter; in fact, both permitted utility action inspecting customer-owned piping, equipment, and appliances behind the meter. *See id.*; MPUC Docket No. G-008/GR-80-630, at 2, 7. As respondents also observe, the case at hand involves electricity—not gas—and involves infrastructure that delivers and measures electricity (the conduit, wiring, and chargers)—not the ultimate power-consuming items (appliances). The EV-charging infrastructure here serves the specific purpose of delivering electricity. We thus reject XLI's argument that the *Minnegasco* case compels a meter-based limitation on the MPUC's regulatory authority.

In the third case that XLI relies on, *In re CIP*, this court addressed, among other issues, whether the MPUC was required to hold a contested-case hearing before approving a utility's conservation improvement program. 368 N.W.2d at 312-13. The MPUC's authority to evaluate a utility's conservation improvement program came from Minn. Stat. § 216B.214 (1984), and the legislature imposed informal proceedings rather than formal contested-case proceedings in that statute. *In re CIP*, 368 N.W.2d at 312. But the large

industrial customer requesting a contested-case hearing argued that Minn. Stat. § 216B.09 (1984) required one because that section required the MPUC to hold a contested-case hearing before ascertaining and fixing standards for public utilities "*with respect to the service* to be furnished." *Id.* at 312-13. We rejected that argument. We concluded that the "service" referred to in section 216B.09 was defined in Minn. Stat. § 216B.02, subd. 6, and that an "energy conservation improvement" was not "service" under section 216B.02, subdivision 6. Instead, an "energy conservation improvement" was separately and explicitly defined in Minn. Stat. § 216B.241, subd. 1(b) (1984), as the purchase or installation "of any device, method or material that increases the efficiency in the use of electricity or natural gas," *id.* at 313, and no contested-case hearing was required for an energy conservation improvement program.

XLI argues that, like the energy conservation improvements in *In re CIP*, the infrastructure behind the meter owned by Xcel in the EV pilots does "not qualify under Minn. Stat. § 216B.02, subd. 6, as 'delivering or measuring electricity.'" But we did not analyze in that case whether particular equipment and facilities "deliver[ed] or measur[ed] electricity." Rather, we determined that "energy conservation improvements" do not fall within the statutory definition of "service" because they have their own statutory definition and were accordingly governed by different statutory subsections that did not require a contested-case hearing. *In re CIP* does not advance XLI's argument for a meter-based limitation.

C. XLI's arguments regarding absurdity and monopoly expansion

XLI also argues that interpreting Minn. Stat. § 216B.02, subd. 6, to include the EV-charging infrastructure would create an absurd result and would expand public utilities' monopoly powers onto customer premises.

As to absurdity, XLI contends that "extending" the definition of service beyond the meter would lead to an absurd result in which utilities could own and rate-base all the wiring in customers' homes or businesses, along with all types of electronic charging devices.

When interpreting a statute, courts assume that the legislature did not intend an absurd or unreasonable result. Minn. Stat. § 645.17 (2018). "This rule of construction applies when the words of the statute are ambiguous." *Schatz v. Interfaith Care Ctr.*, 811 N.W.2d 643, 651 (Minn. 2012). "It is not available to override the plain language of a clear and unambiguous statute, except in an exceedingly rare case in which the plain meaning of the statute 'utterly confounds' the clear legislative purpose of the statute." *Id.*

Because Minn. Stat. § 216B.02, subd. 6, is unambiguous, we examine whether its plain meaning "utterly confounds" the legislative purpose. *See id.* As the MPUC argues, XLI's concern about utilities profiting from all wiring, extension cords, smartphone chargers, and outlets seems to ignore the regulatory role of the MPUC. The MPUC points out that "any future request by a utility to own and seek a return on capital investments, regardless of whether those investments are located in front of or behind the customer's meter, will be scrutinized by the MPUC to ensure the investments are reasonable, prudent, used and useful in providing service, and in the public interest." *See* Minn. Stat.

§§ 216B.03, .16, subd. 6 (2018) (requiring just and reasonable public-utility rates and describing the factors considered by MPUC in assessing whether rates are just and reasonable). Especially in light of the MPUC's review of all rate-basing requests, the absence of a meter-based limitation for "service" does not meet the high threshold for absurdity.

XLI also contends that "the result of the [MPUC's] orders is an unreasonable expansion of electric utilities' service-territory monopolies." It argues that allowing utility investment beyond the meter intrudes into "non-monopoly space" and gives public utilities the exclusive right to provide EV-charging infrastructure to the exclusion of private companies. For support, XLI cites Minn. Stat. §§ 216B.38, subd. 4a, and 216B.40 (2018).

Minnesota Statutes sections 216B.37 to 216B.43 govern the division of the state into geographic service areas within which specific electric utilities may operate. Section 216B.38, subdivision 4a, defines "electric service" as "electric service furnished to a customer at retail for ultimate consumption." Section 216B.40 provides that "each electric utility shall have the exclusive right to provide electric service at retail to each and every present and future customer in its assigned service area and no electric utility shall render or extend electric service at retail within the assigned service area of another electric utility" unless an exception applies. Minn. Stat. § 216B.40.

XLI argues that the definition of "electric service" in section 216B.38, subdivision 4a, which applies only to sections 216B.37 to 216B.44, necessarily includes the definition of "service" in section 216B.02, subdivision 6, which applies to the entire chapter. Thus, it argues, if the EV-charging infrastructure Xcel offers here is "service,"

section 216B.40 gives Xcel the exclusive right to offer that infrastructure within its service area.

The MPUC argues that "electric service" in section 216B.38, subdivision 4a, and "service" in section 216B.02, subdivision 6, are separately and distinctly defined and should not be conflated. Xcel agrees and also contends that, even assuming that "electric service" in section 216B.38, subdivision 4a, encompasses the service definition in section 216B.02, subdivision 6, no statute precludes non-utilities from offering the EV-charging infrastructure. The restriction in section 216B.40 only discusses utility's exclusive rights *as to other utilities*. At most, the statute states that public utilities may not enter each other's exclusive service areas to provide the service at issue here.

We need not decide the meaning of "electric service" in section 216B.38, subdivision 4a, or resolve the question of whether or how section 216B.40 would apply here, because Xcel does not seek to exclude any competitors from providing the same EV-charging infrastructure that it will provide under the pilots. Xcel seeks to make EV-charging infrastructure more accessible, and EV adoption thus more affordable, to a limited number of pilot participants in order to test assumptions about EV usage on a small scale. We discern no violation of monopoly-regulation principles that would compel us to ignore the plain language of section 216B.02, subdivision 6, to limit the MPUC's regulatory authority here.

In sum, the MPUC has the express authority to regulate the pilot programs at issue because Xcel's installation and maintenance of the conduits, wiring, and chargers in the EV-charging pilot programs falls within the definition of "service" in Minn. Stat.

§ 216B.02, subd. 6. Because we conclude that MPUC has express statutory authority, we need not address the question of implied authority.

II. The MPUC did not act arbitrarily or capriciously when it granted three components of Xcel's cost-recovery request.

XLI also argues, in the alternative, that if the MPUC did have jurisdiction to regulate the EV-charging pilot programs, the MPUC's approval of three components of Xcel's cost-recovery request was arbitrary and capricious. An appellate court may find an agency's order arbitrary or capricious if the agency:

> (a) relied on factors not intended by the legislature; (b) entirely failed to consider an important aspect of the problem; (c) offered an explanation that runs counter to the evidence; or (d) the decision is so implausible that it could not be explained as a difference in view or the result of the agency's expertise.

Citizens Advocating Responsible Dev. v. Kandiyohi Cty. Bd. of Comm'rs, 713 N.W.2d 817, 832 (Minn. 2006). "[I]f there is room for two opinions on a matter, the [MPUC]'s decision is not arbitrary and capricious, even though the court may believe that an erroneous conclusion was reached." *N. States Power Co.*, 775 N.W.2d at 658 (quotation omitted). If the agency "departs from its prior norms and decisions, the agency must set forth a reasoned analysis for the departure that is not arbitrary and capricious." *In re Review of 2005 Annual Automatic Adjustment of Charges for All Elec. & Gas Utils.*, 768 N.W.2d 112, 120 (Minn. 2009).[10]

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[10] Xcel asserts that, because the MPUC was acting in a legislative capacity, and because XLI does not challenge the MPUC's "authority or fact finding," XLI's challenge must fail because it has not proven that the MPUC's decision was "illegal by clear and convincing evidence." But XLI's challenge specifically asserts a departure from previous agency norms, and the supreme court has specified that when an agency so departs, it must "set forth a reasoned analysis for the departure that is not arbitrary and capricious." *In re Review*

XLI argues that the MPUC deviated from its prior decisions without providing an explanation by ignoring cost-causation principles in granting Xcel's accounting-classification request and waiving applicable CIAC provisions, and by approving Xcel's deferred-accounting request.

A. Accounting-classification and CIAC waiver

XLI asserts that cost-causation is a "bedrock regulatory principle." Cost-causation refers to the principle that, in order to be just and reasonable, utility rates should take into consideration the costs that specific classes of customers cause the public utility to incur. To demonstrate that cost-causation is an established norm, XLI refers to the "regulatory compact" and to Minn. R. 7825.4300 (2019).

The "regulatory compact" refers to the arrangement that allows utilities to hold monopolies within delineated service areas but obligates them to provide service to all customers in those areas at rates that are just and reasonable. *See* Minn. Stat. § 216B.03. As part of obtaining MPUC approval of significant rate changes, utilities must submit studies that include details about the cost of service by class of customers. *See* Minn. R. 7825.4300.

XLI argues that the MPUC departed from cost-causation principles both by granting Xcel's accounting-classification requests and by approving a CIAC waiver. As to the accounting-classification requests, Xcel proposed to classify its investments in make-ready

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of 2005 Annual Automatic Adjustment, 768 N.W.2d at 120. XLI clarifies in its reply brief that its challenge is "a process challenge under *In re Review of 2005 Annual Automatic Adjustment*." We are thus properly tasked with evaluating whether XLI has shown that the MPUC departed from a norm, and, if so, whether the MPUC gave reasons for doing so that were not arbitrary or capricious. *See id.*

infrastructure for the first two pilots as "utility distribution plant" in its Federal Energy Regulatory Commission distribution accounts. This accounting classification allows Xcel to seek to include the investment amounts in base rates in its next general rate case. After reviewing the comments from all interested parties, the MPUC approved this request with modifications. It explained:

> One key purpose of the pilots is to investigate the extent to which socializing the costs of this EV-related infrastructure will encourage EV adoption, and to measure the benefit that increased EV adoption provides to ratepayers. This purpose would be unattainable if Xcel were not allowed to classify these infrastructure investments as utility distribution plant. Therefore, Xcel's proposal to install, maintain, and own infrastructure is an essential and necessary part of these pilots. As a result, it is therefore reasonable under these circumstance[s] to authorize Xcel to classify its make-ready infrastructure as requested. More specifically, these proposed infrastructure investments in the context of these pilots will help the Commission and stakeholders evaluate the extent to which these investments will benefit the public.

Contrary to XLI's arguments, the above-quoted language suggests that the MPUC indeed considered cost-causation principles—in doing so, it simply reached a decision that XLI disagrees with. The MPUC's reasoning recognizes that the pilot programs are just that—pilots—and are designed to test an up-and-coming area of electricity provision to EVs. With this recognition, it distinguishes the request in the pilot proposals to classify investments as utility distribution plant from past requests. And notably, XLI has not pointed to any prior MPUC decisions or caselaw that the pilot decisions depart from. Because there is "room for two opinions" on the matter, any departure regarding the accounting classification was not arbitrary or capricious. *See N. States Power Co.*, 775 N.W.2d at 658.

Similarly, the MPUC gave a reasoned explanation for approving the requested CIAC waivers. A CIAC, as explained in a public comment on Xcel's petition by the Minnesota Department of Commerce, Division of Energy Resources, is "a monetary contribution by a customer to reduce the capital costs of connecting to or expanding service from the system, to ensure that ratepayers pay for the costs to connect to the system, net of the revenues they will provide." Calculation of a CIAC involves taking the expected revenue generated by a new customer and comparing it to the costs of adding that customer. The MPUC explained that it would allow waiver of this typical charge to the customer for pilot participants for several reasons:

> The limited terms of the pilots and their reasonable budgets ultimately limit the impact to ratepayers. In the event pilot budgets are reached prior to the end of the three-year term, Xcel will not accept additional participants; the Company has committed to staying within the budgets proposed. Further, Xcel has made a persuasive argument that the customer's CIAC contribution cannot be accurately calculated without knowledge of EV charging and revenues.
>
> The Commission recognizes that the existing CIAC policies were developed to protect ratepayers from excessive and unreasonable costs. But to foster growth of EVs for the purpose of transportation electrification requires a forward-thinking approach. Utilities are at the forefront of this effort. Although the pilots could ultimately lead to an understanding that advancing EVs requires no refinement of the traditional cost-causation approach, such an outcome is merely one possibility and is an issue the pilots are intended to study. Facilitating expansion of EVs necessarily requires the installation of equipment not typically installed. This is a new arena, and as Xcel aptly pointed out, it warrants a limited departure from ordinary practices.

The MPUC provided compelling reasons for its departure from the standard CIAC approach. These reasons are consistent with the overall approval of the pilot programs,

which are designed to investigate the impact of EV adoption when upfront costs to customers are mitigated. It is reasonable that, to further this investigation, CIAC provisions—which assign costs to the customer—be waived. The MPUC's decision was not arbitrary or capricious.

B. Deferred accounting

Deferred accounting, as the MPUC explained in its order, is "a regulatory tool used primarily to hold utilities harmless when they incur out-of-test-year expenses that, because they are unforeseen, unusual, and large enough to have a significant impact on the utility's financial condition, should be eligible for possible rate recovery in the next rate case." Deferred accounting "has also been permitted when utilities have incurred sizeable expenses to meet important public policy mandates." Minn. R. 7825.0300, subp. 4 (2019), instructs that the MPUC may grant a public utility's petition for "approval of an exception to a provision of the system of accounts" if "good cause" is shown.

Xcel petitioned for an exception to the standard accounting treatment of operations and maintenance expenses and depreciation expenses related to its capital investments in the pilots. It represented that it would request recovery of the costs in its next general rate case, and in the meantime would track the costs in an EV tracker account established in a separate docket.

After reviewing stakeholder input, the MPUC found that good cause existed to grant Xcel's deferred-accounting request. It reasoned that the "investments for which deferred accounting is sought in this case are clearly intended to serve important public policy objectives" because both the legislature and the MPUC had "indicated that transportation

electrification is an important public policy goal." The legislature expressed this goal with the enactment of Minn. Stat. § 216B.1614, and the MPUC further prodded utilities to bring forth proposals that would encourage EV use following its general inquiry into EV charging and infrastructure in Minnesota.

The MPUC also reasoned that the pilots at issue are "targeted to produce maximum public and ratepayer benefit, while having a limited rate impact." It went on to note that allowing some costs to qualify for deferred accounting did not guarantee the recovery of those costs in the next general rate case; rather, the MPUC will later consider whether they were reasonable and prudent and thus recoverable. It also elected to limit the timeframe during which the costs may qualify for deferred accounting up to January 1, 2020.

XLI argues that the MPUC granted the deferred-accounting request arbitrarily and capriciously because its decision does not comport with a "four-part test" previously applied by the MPUC and because no public policy "mandate" supports the expenses incurred.

As to the "four-part test" argument, XLI references the MPUC's decision in *In re Petition by the Minn. Energy Res. Corp. for Approval of Farm Tap Customer-Owned Fuel Line Replacement Plan, Tariff Amendments, & Deferred Accounting*, MPUC Docket No. G-011/M-17-409 (Nov. 30, 2017) (*MERC Petition*). There, the MPUC granted a deferred-accounting request both because it found that the proposal at issue served "an important policy goal," and because it found that the costs sought to be deferred were: "(1) Related to utility operations for which ratepayers have incurred costs or received benefits; (2) Significant in amount; (3) Unforeseen, unusual, or extraordinary; and

(4) Subject to review for reasonableness and prudence." *MERC Petition*, MPUC Docket No. G-011/M-17-409, at 9-10. The MPUC did not, however, suggest that these four criteria must always be met before a deferred-accounting request may be granted. Moreover, in the present case, the MPUC explicitly stated in its order that it was not granting Xcel's request for deferred accounting based on a demonstration that the "costs are unforeseen, unusual, and significant in size," but instead based on the policy-goal justification and the specific facts of the case. We accordingly evaluate whether the justification actually relied upon by the MPUC evidences arbitrary or capricious decision-making.

XLI acknowledges that the MPUC has historically found "good cause" to grant deferred-accounting requests when utilities incur sizeable expenses to meet important public-policy mandates. XLI argues, though, that (1) Xcel's expenses are not "sizeable" and (2) no public-policy *mandate*, but merely a public-policy *objective*, supports the pilot programs.

XLI argues that the expenses will not be sizeable because the cost of the fleet and public-charging pilots will account for only one-quarter of one percent of Xcel's total revenue. The MPUC responds that no precedent suggests that comparison to overall revenue is the proper measure of "sizeable," as "[n]o expense, not even the construction of a large generation facility, could possibly meet this standard." Because XLI points to no precedent supporting its view of "sizeable," we defer to the agency's discretion that the expenses at issue qualify as such. *See St. Otto's Home v. Minn. Dep't of Human Servs.*, 437 N.W.2d 35, 40 (Minn. 1989) ("When the agency's construction of its own regulation is at

issue, . . . considerable deference is given to the agency interpretation, especially when the relevant language is unclear or susceptible to different interpretations.”).

As to a public-policy mandate versus objective, XLI similarly has not shown that the agency’s decision was arbitrary or capricious. In fact, in one of the decisions cited by XLI, the MPUC referred to the proposal at issue as serving “an important policy *goal*” rather than “mandate.” *MERC Petition*, Docket No. G-011/M-17-409 at 9 (emphasis added). And, most importantly, the overarching question for granting deferred accounting is whether there is “good cause” to do so; the distinction XLI relies on is of little consequence in light of this flexible standard. We accordingly hold that XLI has not shown that the MPUC acted arbitrarily or capriciously in granting, with modifications, Xcel’s request for deferred accounting.

Affirmed.