

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Ellen Anderson
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Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of a Petition by Xcel Energy for
Approval of a Credit Mechanism for a
Department of Energy Settlement Payment
With Deferred Accounting

ISSUE DATE: December 16, 2011

DOCKET NO. E-002/M-11-807

ORDER ESTABLISHING REFUND
PLAN

PROCEDURAL HISTORY

On August 5, 2011, Northern States Power Company (Xcel Energy, or the Company) disclosed to the Commission that it had settled a claim, pending since 1998, with the United States Department of Energy (DOE) regarding the costs of the disposal of spent nuclear fuel from 1998 to 2008.¹ The settlement also provides a mechanism for the Company to recover its spent fuel damages from January 1, 2009 through the end of 2013 without pursuit of further litigation. Xcel submitted its proposal to refund the settlement money to ratepayers, minus its proposed related legal fees, via a one-time bill credit to ratepayers. To implement its proposal, Xcel also asked for authority to defer accounting for the settlement funds.

On September 15, and October 13, 2011, the Minnesota Department of Commerce (the Department) filed comments, agreeing in significant part with Xcel's proposal, but disagreeing with the Company's request for the recovery of outside legal costs. On September 15, 2011, the Residential and Small Business Utilities Division of the Office of the Attorney General (RUD-OAG), and two large Xcel industrial customers -- Flint Hills Resources, LP, and USG Interiors, Inc. -- filed comments.

On September 30, and November 1, 2011, Xcel filed reply comments.

On November 10, 2011, the Commission met to consider the matter. All commenting parties appeared, as well as Energy CENTS, which appeared in support of a proposal to distribute a portion of the settlement funds to the most low-income of Xcel's electric customers.

¹ Xcel submitted a corrected version of the document on August 12, 2011.

FINDINGS AND CONCLUSIONS

I. History of the Case

The federal Nuclear Waste Policy Act² established a framework for the permanent disposal of high-level radioactive waste. Under the Act and subsequent regulations, utilities are required to enter into standard contracts for disposal of spent nuclear fuel. In exchange for the DOE's commitment to dispose of the spent nuclear fuel, utilities contribute 1.0 mil to the Nuclear Waste Fund for every kilowatt-hour of electricity generated by their nuclear power plants. Pursuant to the standard contracts, the DOE was required to take title to, transport, and dispose of the spent nuclear fuel beginning no later than January 31, 1998. To date, the DOE has not accepted any spent nuclear fuel.

Xcel filed suit against the DOE in 1998, seeking to recover damages through 2004 stemming from the DOE's partial breach of the standard contracts.³ Xcel subsequently filed a second lawsuit for damages through 2008.⁴ The United States Court of Claims allowed the majority of the Company's claims.⁵ The DOE appealed that decision.⁶

II. Settlement Provisions

Under the settlement reached with Xcel in 2011, the DOE agreed to reimburse the following fuel storage costs incurred by the Company, and collected through rates from customers, as a result of DOE's failure to remove the spent nuclear fuel and high-level radioactive waste from Prairie Island and Monticello by January 31, 1998: a) any additional pool storage and other plant modifications; b) dry cask storage and costs directly related to such storage (e.g. internal labor, and overhead, operation and maintenance, training and security); and c) additional property taxes resulting from the on-site dry cask storage or other plant modifications.

Under the terms of the settlement, on August 1, 2011 Xcel received \$99,966,841 on a total Company basis, or approximately \$74.349 million on a Minnesota jurisdictional basis, for damages incurred through December 31, 2008. The Company placed the funds into a separate interest bearing escrow account and stated that it will include the interest received in calculating the amount of the credit to ratepayers. Xcel also requested permission to net litigation expenses of \$1,908,090 incurred through 2005 against the Minnesota jurisdictional amount, and the use of deferred accounting treatment for the settlement funds.

² Nuclear Waste Policy Act of 1982, Pub. L. 97-425 (96 Stat. 2201) enacted on Jan. 7, 1983, and subsequent amendments.

³ In *Maine Yankee Atomic Power Co. v. United States*, 225 F.3d 1336, 1343 (3rd Cir. 2000), the Third Circuit determined that DOE was in partial breach, leaving the need to determine damages.

⁴ Xcel's lawsuits were among 74 filed by utilities alleging a partial breach by the DOE.

⁵ *Northern States Power Co. v. United States*, 78 Fed. Cl. 449 (2007).

⁶ Court of Appeals for the Federal Circuit Docket Nos. 2008-5037, 2008-5041.

The settlement also provides a mechanism for the Company to recover its nuclear spent fuel storage damages from January 1, 2009 through December 31, 2013, without the need to resort to further litigation. Based on current estimates, Xcel believes that the additional damage payments will total some \$98 million on a total Company basis, with approximately \$72.5 million on a Minnesota retail jurisdictional basis. The first supplemental payment, recovering damages incurred during 2009 and 2010, is expected to be received in the first quarter of 2012, with subsequent damages anticipated by year end of 2012, 2013, and 2014.

III. Xcel's Proposal

A. Alternative Refund Methodologies

Xcel evaluated three potential mechanisms for crediting the settlement funds to current customers. These included: 1) a one-time bill credit; 2) a per kWh credit calculated similar to fuel clause adjustments; and 3) an offset to the Company's revenue requirement in a future rate case. Each of the methods proposed has been used by the Commission at some other time to distribute refunds to customers.

Xcel stated that under the one-time bill credit method, customers will receive a bill credit for the first payment made by the DOE (made in August 2011), with additional payments anticipated in 2012, 2013, and 2014. Xcel recommended the one-time bill credit methodology as the most straight-forward and easiest to administer of the three considered, as well as being the method that would provide customers the benefit of the credit as quickly as possible. Xcel stated that with use of this method, it could provide refund payments to customers within 90 days of the Commission's order, as well as within 90 days of receipt of future settlement payments.

While recommending this methodology, the Company noted that certain inequities might be perceived as to the refund of monies to current customers based on the most recent 12 months of actual usage. Xcel recognized that customers no longer on its system might seek a credit for amounts related to their contribution to these costs between 1998 and 2008. However, the Company stated that determining the amount of each customer class's contribution to the costs during the period covered by the settlement (1998 – 2008) would be extremely difficult, and determining each individual customer's share of the costs would not be possible, since the Company no longer has complete individual billing records before 2006. Therefore, the Company proposed that future settlement amounts received from the DOE be used to fund payment of any individual claims related to past contribution, upon receipt of documentation from a requesting customer.

Xcel proposed to allocate the settlement funds between its operating jurisdictions (NSP – Minnesota and NSP – Wisconsin) consistent with how the funds were collected. The NSP – Minnesota portion will be further allocated by jurisdiction (Minnesota, North Dakota and South Dakota and wholesale) and then to customer classes and finally credited to individuals. Xcel stated that the allocation system will remain the same regardless of the credit mechanism chosen.

B. Litigation Expenses, Interest on Settlement Funds, and Deferred Accounting

Xcel proposed to reduce the overall amount of the settlement amount available for distribution by \$1,908,090. Xcel explained that this amount represents the Minnesota jurisdictional share of outside legal fees and other litigation expenses incurred from 1998 to 2005 to obtain the settlement. Xcel stated that prior to 2005, litigation expenses for the DOE litigation had not been included in base rates.⁷ Thus, the Company asserted that it merely seeks to recover its litigation expenses for those years in which the legal budgets and rates set did not include an amount attributed to this case. Xcel stated that it is appropriate and consistent with prior Commission actions to net the outside legal fees with the settlement agreement proceeds, and to return the resulting amounts to customers. Xcel stated that allowance of the Company's full litigation expenses also provides the proper incentive for utilities to pursue such litigation for the benefit of its customers.

Xcel further stated that, given the magnitude of the amount of the settlement award, it placed the settlement funds in a separate interest-bearing sweep account. This account will keep the settlement funds quickly available for distribution, and prevents them from becoming taxable by state or federal authorities. Xcel stated that it considered several alternatives for maintaining the funds, and concluded that use of the separate interest-bearing account would provide the greatest transparency and the least amount of risk for customers and the Company. Further, Xcel stated that use of the sweep account would ensure that funds are accurately accounted for pending the actual refund. Finally, Xcel stated that the sweep account chosen earns 0.25 percent annually and interest is posted daily.

Finally, Xcel requested that the Commission issue an order in this matter by December 31, 2011, granting deferred accounting with respect to the settlement proceeds. Xcel stated that 2011 is the test year in its ongoing rate case, and the ability to use deferred accounting will avoid recognition of book income and concurrent tax effects in 2011, thus preserving the entire net proceeds for return to customers. Xcel stated that its request for deferred accounting treatment is justified, as the revenues received are significant and unusual, of significant public policy importance, and related to utility operations, for which customers have incurred costs or received benefits.

IV. Positions of the Parties

A. The Department

After review of the settlement agreement, the Department agreed with Xcel that the settlement is in the public interest. After review of the three proposed refund mechanisms, the Department also agreed with Xcel in recommending the one-time refund mechanism as the most suitable and straightforward method by which to return the settlement amount to customers. The Department found that using the one-time bill credit method based on the currently approved CCOSS would return the refunds to customers as soon as possible and result in the best match between how the funds were collected from customs and how they are returned.

⁷ Outside litigation expenses budgeted for the DOE litigation after 2005 have been included in the Company's base rates. See Docket No. E-002/GR/05-1428.

Further, the Department supported the use of future DOE payments to Xcel from the nuclear waste settlement to fund payment of individual claims related to past cost contribution, upon receipt of documentation from a requesting customer. Finally, the Department agreed with Xcel regarding its proposal to use an interest bearing sweep account and deferred accounting.

The Department disagreed with Xcel as to two aspects of the settlement proposal -- the recovery of litigation expenses for the DOE lawsuit and timing of the refund. First, the Department disagreed with Xcel's request to recover \$1,908,090 in litigation expenses for the Minnesota jurisdiction for the period 1998-2005. While the Department agreed that Xcel should receive fair compensation for its legal costs, it disagreed that Xcel was entitled to the amount requested. The Department argued that a representative amount of legal costs are always built into rates. Thus, the fact that the DOE litigation costs were not anticipated or specifically included in the Company's 1992 rate case should not determine the issue.

Further, the Department asserted that during the period 2000-2005, the Company was in a rate freeze,⁸ and granting retroactive recovery of legal expenses by reducing the refund for customers would be in violation of the rate freeze. Finally, the Department asserted that if the Commission does allow recovery of legal costs, that recovery should be limited to the incremental amount of outside legal costs consistent with the Department's calculations in other dockets, a figure that Xcel calculated to be \$565,287.

With respect to the timing of the refund, the Department recommended that the Commission require the Company to make refunds to customers within 60 days of the Commission's order, rather than the 90 days requested by Xcel. The Department asserted that a 60-day period is more reasonable, coupled with the one-time bill credit. In addition, the Company's use of an interest-bearing sweep account should assist in expediting the refund.

B. The RUD-OAG

The RUD-OAG raised several concerns with Xcel's proposals regarding the DOE settlement, including: 1) the purported lack of time-appropriate customer records to support an equitable refund plan; 2) the request for legal fees; 3) the use of deferred accounting; and 4) the placement of the funds in escrow at an interest rate of 0.25 percent.

The RUD-OAG criticized Xcel's proposed credit mechanisms, noting that none attempt to identify or calculate the amounts individual ratepayers paid during the 1998-2008 period. RUD-OAG recommended that the Commission order Xcel to develop an equitable refund plan whereby refunds are provided to the ratepayers on the system during the relevant timeframe. The agency asserted that Xcel should have maintained, or put a legal hold on individual customer data that it should have known would be necessary to fairly compensate ratepayers should the law suit prove to be successful. Finally, the agency reasoned that, at the least, the settlement money to be distributed from the 1998-2008 time period should not be distributed to customers who were not in Xcel's system in 2008.

⁸ *In the Matter of the Application of Northern States Power Company for Approval to Merge with New Century Energies, Inc.* Docket No. E,G-002/PA-99-1031, Order Approving Merger, As Conditioned (June 12, 2000).

The RUD-OAG also opposed the Company's request for legal fees, asserting that the request should be prohibited as single-issue, retroactive ratemaking. The agency argued that no claim can be substantiated that current ratepayers should pay legal fees incurred between 1998 and 2008, and that if the fees were ever recoverable, recovery should have been sought when they were incurred. RUD-OAG also opposed the Company's request for deferred accounting, claiming that the settlement funds belong to ratepayers, and should be recorded the same as customer deposits or other customer-supplied funds.

Finally, the RUD-OAG argued that the Company should have sought approval to place the settlement funds in escrow pending disbursal. The agency asserted that the interest rate on the settlement funds held in escrow should be commensurate with the cost of capital set in Xcel's last rate case – 8.83 percent, and not the 0.25 percent proposed by Xcel.

C. Xcel Large Industrials

Flint Hills Resources, LP, and USG Interiors, Inc. filed a letter supporting Xcel's proposed one-time bill credit, and requested that it be issued within 60 days of the Commission order.

D. Reply Comments

1. Xcel

Xcel addressed the RUD-OAG's concern that current customers are not necessarily the customers who paid the costs, and that Xcel should take appropriate measures to identify and compensate the customers who were in Xcel's system during the relevant time period. Xcel explained that it could not implement the agency's proposal in a manner that would produce reasonable results. Xcel identified some of the impediments it would face in trying to track prior customers as: customer moves; customer name changes; the change in the Company's billing system in 2005; and the Company's incomplete mapping of customers currently taking service to archived pre-2002 data.

Xcel also urged the Commission not to adopt the RUD-OAG's recommendation that no credit be issued to an account that did not exist in 2008, arguing that the arbitrary use of 2008 as one year out of ten years covered by the initial settlement to determine customer eligibility provided no advantage over using current customers. Xcel noted that over 350,000 customers in 2008 no longer appear to be on Xcel's current system. Xcel estimated, based on its experience in issuing credits in the past and the length of time at issue here, that up to 50 percent of checks issued would be returned due to customer moves without a forwarding address.

Xcel disagreed with the RUD-OAG's assertion that a legal hold should have been implemented on customer data during the relevant time period. Xcel explained that the purpose of such a hold would be to preserve information relevant to the litigation, and here, individual customer accounts had no relevance to the Company's lawsuit against the DOE. As the litigation damages were not tied to customer usage, Xcel stated that it had no reason to preserve such customer identification data.

Xcel also addressed the Department's and the RUD-OAG's claim that litigation expenses should not be included, or should be included at a significantly lower amount. Xcel stated that the Commission has in the past identified several policies that support its request in this matter to net the litigation expenses from the funds obtained on customers' behalf. Xcel argued that it is appropriate to recover such legal costs when, as here, the utility has pursued a remedy on behalf of its customer; the benefits resulting from those legal expenses will be passed on to customers; and permitting cost recovery provides an incentive to utilities to take aggressive action on behalf of its customers.

Xcel also responded to the Department's assertion that recovery should be limited to the incremental amount of outside legal costs, or \$565,287. Xcel argued that if the Commission were to adopt the Department's proposed incremental methodology, the incremental analysis should include all the years covered by the litigation and allow the Company to net \$2,601,316 from the settlement amount.

In addition, Xcel continued to request that it be allowed to use its proposed time period of 90 days to issue the credit, stating that it would take some time to gather the customer usage data needed to calculate individual credits. Xcel explained that it also has numerous changes to its billing system scheduled for year end, and that to ensure accuracy and appropriate testing, the full 90 days would be necessary.

Finally, Xcel included a proposed bill message to customers describing the credit.

2. The Department

The Department confirmed that the only issues with which it continues to disagree with Xcel are the timing of the one-time refund and recovery of litigation expenses. The Department claimed that as Xcel, the two Xcel large industrial customers, and the Department all support the one-time bill credit method, there is no reason to believe that it would take longer than the 60 days recommended by the Department and the Large Industrials. The Department also asserted that while it does not support recovery of the outside legal fees requested by the Company, that if the Commission does authorize recovery, it should limit the amount to that of the incremental legal costs from 1998 to 2005 (\$565,287), consistent with the Department's calculations in prior dockets.

V. Commission Action

Having examined the issues involved, the Commission finds that the settlement reached by Xcel and the U. S. Department of Energy is reasonable and in the public interest. Xcel has appropriately pursued and obtained a remedy on behalf of its ratepayers. This settlement, which covers the time period 1998–2008, allows Xcel to distribute to Minnesota ratepayers some \$74.349 million on a Minnesota jurisdictional basis, for damages for nuclear spent fuel storage costs.

The Commission further finds that Xcel's proposed allocation method to Northern States Power-Minnesota, and the Minnesota retail jurisdiction, is reasonable. Xcel proposed to allocate

the settlement funds between its jurisdictions consistent with how the funds were collected.⁹ Once the allocation to Northern States Power-Minnesota is made, Xcel will allocate the settlement funds between its retail and wholesale jurisdictions through the average 12 month coincident peak over the same time period. The Commission finds that Xcel's proposed allocation is reasonable, and will require Xcel to file a compliance filing within 30 days of making its initial refund to ratepayers, showing the final amount of this settlement payment and the interest actually refunded.

A. The Refund Plan

After consideration of the various refund methods proposed by Xcel, the Commission agrees with the Company, the Department and the Xcel Large Industrials that a one-time bill credit, based on a customer's most recent twelve months of usage, is the most reasonable. While the Commission appreciates the RUD-OAG's concern that individual customers should be compensated based on actual usage over the time period at issue, it is very clear that there is no method available to the Company that could be implemented to identify and locate such customers and provide reasonable results. For example, the Company stated that over 350,000 customers in 2008 appear to no longer be on the Xcel system. The Commission therefore must agree with the Company that the one-time bill credit methodology is the most straight-forward, the easiest to administer, and is the method that will provide customers the benefit of the credit as quickly as possible.

The Commission respects the concerns raised by the RUD-OAG regarding inter-generational equity. At the same time, it is clear that there is no feasible way to pro-rate and distribute these refunds – which will average about \$20 per residential customer – to everyone who received service from Xcel at any time during a ten-year period that ended nearly four years ago. Since there are equitable issues with including these customers' refunds in the amounts distributed to current customers, the best that can be done at this point is to isolate a portion of the refund approximating the amount of the un-distributable refunds and to use that fund for a public interest purpose.

The Commission will therefore require the Company to set aside \$2,000,000 of the initial settlement funds to provide energy assistance for low-income residential customers via Xcel's POWER ON program.¹⁰ Energy CENTS, which administers Xcel's POWER ON program, stated that the POWER ON program currently has a significant waiting list for enrollment, and, due to funding issues has been unable to accept additional applications. With the additional \$2 million in funding, the POWER ON program will be able to add and sustain a significant number of additional customers on this program.

⁹ Nuclear plant production is shared by NSP-Minnesota and NSP-Wisconsin through an interexchange agreement approved by the Federal Energy Regulatory Commission. Xcel proposed to use the average interexchange agreement demand charge ratio over the 11 year period covered by the initial settlement payment (1998-2008).

¹⁰ Xcel's POWER ON program is designed to assist the lowest of Xcel's low-income electric customers. The program makes utility bills more affordable, encourages customers to make consistent payments, and lowers the costs associated with the utility's attempts to collect payments from customers with limited resources. Before customers can enroll in the POWER ON program, they must have applied for and receive funds from the Energy Assistance Program (EAP).

This treatment is consistent with legislative directives mandating special consideration of the needs of low-income ratepayers – for example, Minn. Stat. §216B.16, subd. 15, which directs the Commission to consider ability to pay in setting rates, and Minn. Stat. Stat. §216B.16, subd. 14, which directs the Commission to require utilities to establish discount programs for low-income ratepayers. Further, this treatment benefits all ratepayers by reducing the bad debt levels and collection expenses they ultimately bear, as well as incrementally reducing the need for other public and private funds to meet the utility needs of struggling households.

The Commission will therefore require Xcel to set aside \$2 million of this initial settlement amount, and add it to its POWER ON program within 30 days of the Commission’s Order in this docket. Further, Xcel shall make a compliance filing indicating that it has taken such action and the current funding available in the POWER ON fund.

B. Litigation Expenses

After careful consideration of Xcel’s request and justification for legal fees and expenses, and having heard the positions of the parties, the Commission will authorize Xcel to recover its fees and expenses in the amount of \$1,908,090 -- the Minnesota jurisdictional share incurred to obtain the settlement. Xcel pursued this litigation at its own initiative and on behalf of its ratepayers over the course of some 13 years. The settlement obtained is significant, and the amount requested for legal fees is but a small percentage of the total award.

The Commission finds that Xcel has proposed the appropriate means by which to both recover its own costs and refund the balance to ratepayers. Under the circumstances, it is reasonable and appropriate to allow the Company to recover its costs in obtaining this remedy. Certainly, the economic benefits to be passed on to customers resulting from this settlement are significant. Further, by allowing full recovery of these fees and expenses, the Commission will help to provide an appropriate signal to Xcel and other utilities by encouraging them to bring actions on behalf of customers. Pursuit of such litigation is generally both risky and costly, including significant expenditures of time and resources. If the Company had not incurred the \$1,908,090 in unfunded litigation costs through 2005, and been successful in achieving the settlement amount of nearly \$100 million for the initial period, Xcel’s customers would have been deprived of a significant remedy.

C. Other Action

The Commission finds that Xcel’s request for approval of its use of an interest-bearing sweep account is reasonable. Use of a sweep account will safely preserve and maintain the funds for the sole benefit of ratepayers, without subjecting them to the risk of market losses or taxation by state or federal authorities, were they to be considered general corporate income. The Company has demonstrated that it has never exercised dominion or control over the funds, and that the funds are preserved entirely for credit to customers. The Commission will direct the Company to refund all interest accruing in the account to ratepayers at such time as the Company issues the bill credit arising from the DOE settlement.

The Commission will also authorize the Company to use deferred accounting as an appropriate means for timely implementing the refund proposal. Use of deferred accounting will allow the Company to avoid the recognition and reporting of book income in 2011, with concurrent tax effects, that will be returned to customers in early 2012. The Company has demonstrated, and the Department concurs, that deferred accounting will safely preserve the funds for customers. The Commission finds deferred accounting will provide an appropriate means for the timely implementation of Xcel's refund proposal.

In addition, the Commission will require the Company to commence making refunds to customers within 60 days of the Commission's Order, rather than the 90 days initially requested by Xcel. Further, following the timely submission of appropriate documentation verifying future DOE payments to the Company, Xcel shall begin implementation of the refund of the subsequent amounts of the DOE payments to customers within 60 days of the Department's written confirmation.

Finally, the Commission approves the customer notice filed by Xcel in its reply comments in this docket.

ORDER

1. The Commission finds that the settlement reached by Xcel and the U. S. Department of Energy on July 5, 2011, in litigation seeking to recover damages associated with storage of spent nuclear fuel at Prairie Island and Monticello nuclear generating plants, is in the public interest.
2. The Commission finds that Xcel's proposed allocation method to NSP-MN, and to the Minnesota retail jurisdiction, is reasonable.
3. Xcel shall provide all Department of Energy settlement payments subject to this docket in the form of a one-time bill credit, based on the customers' most recent twelve months of usage, as set forth herein.
4. Xcel shall file a compliance filing within 30 days of making its initial refund showing the amount of the settlement payment and interest actually refunded.
5. Prior to issuing the one-time bill credits (referenced in Ordering paragraph 3) to current customers, Xcel shall set aside \$2 million of its initial Department of Energy settlement payment and add that \$2 million to its POWER ON program within 30 days of this Order.
6. Within 30 days of providing the \$2 million in funding to POWER ON, Xcel shall make a compliance filing in this docket indicating that it has done so and the current funding available in the POWER ON fund.
7. Xcel shall begin implementation of the initial one-time bill credit arising from its August 1, 2011 Department of Energy settlement payment within 60 days of this Order.

8. The Commission approves Xcel's use of an interest-bearing sweep account as reasonable. Xcel shall refund all interest accruing in such account to ratepayers at the time the bill credit is disbursed.
9. The Commission authorizes Xcel to reduce its initial bill credit to customers by the amount of litigation expenses listed in Xcel's initial petition (\$1,908,090).
10. The Commission authorizes Xcel to use deferred accounting for all Department of Energy payments provided to Xcel under this settlement.
11. Within 30 days of receipt from the Department of Energy, Xcel shall provide the same form of documentation of all future payments as the Company provided for the initial payment in this docket. Upon receipt from the Department of Commerce of written confirmation that the documentation Xcel has submitted is in order, Xcel shall begin implementation of the refund of the subsequent amounts of the Department of Energy payments to customers within 60 days of the Department's written confirmation.
12. The Commission approves the customer notice filed by Xcel in its reply comments.
13. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary



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