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February 6, 2012

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Re: *Minnesota Break the Bonds Campaign, et al., v. Minnesota State Board of Investment*
Court File No. 62-CV-11-10079; Judge Margaret M. Marrinan

Dear Counsel:

Enclosed and served upon you by facsimile and United States mail, please find:

1. Memorandum of Defendant Minnesota State Board of Investment ("SBI") In Support of Motion to Dismiss with attached cases; and

2. Proposed Order.

Sincerely,

KRISTYN ANDERSON
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Enclosures
AG: #2953439-v1

STATE OF MINNESOTA

COUNTY OF RAMSEY

DISTRICT COURT

SECOND JUDICIAL DISTRICT

Court File No. 62-CV-11-10079
Judge Margaret M. Marrinan

Minnesota Break the Bonds Campaign, Bil'in Popular Committee Against the Wall and Settlements, Women Against Military Madness-Middle East Committee, Lucia Wilkes Smith, Margaret Sarfchjooy, Catharine Abbott, Barbara Hill, Polly Mann, Leona Ross, Sylvia Schwarz, Nadim Shamat, Sarah Martin, Robert Kosuth, Mary Eoloff, Nick Eoloff, Vern Simula, Cynthia Arnold, Newland F. Smith, III, Ronnie Barkan, Ofer Neiman, David Nir, Lehee Rothschild, Renen Raz, Dorothy Naor, Gal Lugassi, Boycott From Within and David Boehnke,

Plaintiffs,

vs.

Minnesota State Board of Investment,

Defendant.

**MEMORANDUM OF DEFENDANT MINNESOTA STATE BOARD OF INVESTMENT ("SBI") IN SUPPORT OF MOTION TO DISMISS**

## INTRODUCTION

Plaintiffs seek to interfere with the SBI's investment of State funds. The SBI has the clear legal authority and discretion to invest in bonds of foreign countries. As a result, this Court should dismiss Plaintiffs' Complaint in its entirety, with prejudice.

## FACTS

### A. The State Board of Investment.

The SBI was created by the Minnesota Constitution, Minn. Const. art. XI, § 8. The Constitution provides that "[a] board of investment," composed of Minnesota's four elected executive officers—the governor, the state auditor, the secretary of state and the attorney general—"is constituted for the purpose of administering and directing the investment of all state

funds." *Id.* The SBI's authority also extends to administering and directing the investment of all state pension funds. Minn. Stat. § 11A.02, subd. 2. As of September 30, 2011, the SBI managed approximately $53.7 billion in assets of various retirement funds, trust funds, and cash accounts. *About The Minnesota State Board of Investment*, http://www.sbi.state.mn.us/index.html (last visited on February 6, 2012).[1]

Minnesota Statutes Section 11A.24 contains a specific list of asset classes in which the SBI is authorized to invest. These include common stocks, bonds, short term securities, real estate, private equity, and resource funds. Minn. Stat. § 11A.24, subds. 1-6. In 1988, Section 11A.24 was amended to specifically include "international securities" among the SBI's authorized investments. Minn. Laws 1988, ch. 453, § 8; Minn. Stat. § 11A.24, subd. 6(a)(5).

As of December 31, 2011, the SBI holds investments in government bonds of the following foreign countries pursuant to its Section 11A.24, subd. 6(a)(5) authority: Aruba, Norway (Eksportfinans), Denmark, Japan, Russia, Columbia, Italy, Mexico, France (SFEF) and Israel, as well as the European Investment Bank and the Nordic Investment Bank. *Minnesota State Board of Investment Alphabetical Asset Listing As Of December 31, 2011*, http://www.sbi.state.mn.us/publications/detailedassetreportdec2011.pdf, pp. 76, 79, 84, 96, 98, 99, 100, 104, 106, 108 (last visited on February 6, 2012).

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[1] Courts may properly consider on a motion to dismiss public records and matters subject to judicial notice. *Papasan v. Allain*, 478 U.S. 265, 269 n.1 (1986); *Levi v. Ohl*, 477 F.3d 988, 991 (8th Cir. 2007). This includes information publicly available on a governmental agency's website. *See Kladek, Inc. v. American Bank of St. Paul*, No. A09-948, 2010 WL 935378, at *4 (Minn. Ct. App. Mar. 16, 2010) (taking judicial notice of information on U.S. Post Office website for motion to dismiss for failure to state a claim) (attached); *Minnesota Majority v. Mansky*, 789 F. Supp 2d 1112, 1123, n.8 (D. Minn. 2011) (taking judicial notice of publically available voting-age population statistics taken from Virginia Division of Legislative Services website on a motion to dismiss pursuant to 12(b)(6)).

**B. The Plaintiffs.**

Plaintiffs are comprised of four organizations and twenty-three individuals. (Compl. ¶¶ 2-13.) They allege moral opposition to the SBI's investment in Israel bonds. (*See, e.g.*, Compl. ¶¶ 6- 8, 10, 13.) Five of the individual Plaintiffs allege that they are beneficiaries of plans with funds invested by the SBI. (Compl. ¶¶ 5, 6, 7, 9, 13.) Ten of the Plaintiffs are neither fund beneficiaries nor Minnesota citizens. (Compl. ¶¶ 3, 4, 11, 12.)

**C. Plaintiffs' Claims.**

Plaintiffs brought suit on November 29, 2011, seeking in Count I a declaratory judgment that the SBI is not authorized to purchase bonds issued by foreign governments. Counts II and III request a declaration that the SBI may not invest in Israel bonds because in doing so the SBI aids and abets Israel's alleged violation of the Fourth Geneva Convention and exposes the State to tort liability.

Defendant brings this Motion to dismiss all of Plaintiffs' claims with prejudice.

## ARGUMENT

### I. STANDARD OF REVIEW.

Minnesota Rule of Civil Procedure 12.02(a) provides for dismissal where the court lacks jurisdiction over the subject matter of a complaint. Subject matter jurisdiction, including plaintiffs' standing, is a question of law for the court to decide. *Id.*; *Shaw v. Bd. of Regents of Univ. of Minn.*, 594 N.W.2d 187, 190 (Minn. Ct. App. 1999), *rev. denied* (Minn. July 28, 1999). "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Minn. R. Civ. P. 12.08(c).

Minnesota Rule of Civil Procedure 12.02(e) provides that a complaint may be dismissed "for failure to state a claim upon which relief can be granted." Dismissal of a claim is

appropriate where it is clear from the face of the complaint that the claim is legally deficient. *N. States Power Co. v Franklin*, 122 N.W.2d 26, 29 (Minn. 1963). Legal conclusions in the complaint are not binding on the court. Indeed, "[a] plaintiff must provide more than labels and conclusions." *Bahr v. Capella University*, 788 N.W.2d 76, 80 (Minn. 2010) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

## II. PLAINTIFFS DO NOT HAVE STANDING TO CONTEST THE SBI'S PURCHASE OF ISRAEL BONDS.

Standing exists if (1) the plaintiff has suffered an "injury-in-fact" or (2) the legislature has conferred standing by statute. *State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 493 (Minn. 1996) (citing *Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972)). To establish the necessary injury-in-fact, the litigant must demonstrate a harm that is both "concrete" and "actual or imminent, not conjectural or hypothetical." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (quotation and citation omitted); *Twin Ports Convalescent, Inc. v. Minnesota State Bd. of Health*, 257 N.W.2d 343, 346 (Minn. 1977).

Plaintiffs' complaint voices disagreement with the investment decisions of the SBI. To establish standing, however, the complaining party must demonstrate an injury beyond "mere differences of opinion." *St. Louis County Bd. of Educ. v. Borgen*, 257 N.W. 92, 95 (Minn. 1934) (noting that such differences do not present a justiciable controversy). Policy disagreements simply do not confer standing. *See St. Paul Area Chamber of Commerce v. Marzitelli*, 258 N.W.2d 585, 589-90 (Minn. 1977) (citizen with policy dispute "must take its case to the legislature"); *Conant v. Robbins, Kaplan, Miller & Ciresi, L.L.P.*, 603 N.W.2d 143, 146 (Minn. Ct. App. 1999) (finding no standing and reasoning that plaintiffs' claims were "based only on their disagreement with policy or the exercise of discretion by those responsible for executing the law."). *See also Jones v. Baskin, Flaherty, Elliot & Mannino, P.C.*, 738 F. Supp. 937, 942 (W.D.

Penn. 1989) (finding that the plaintiff's "personal feelings about investments in Israel bonds do not render the fiduciary's actions unreasonable.").

In addition, the legislature has not conferred standing upon Plaintiffs. Although a plaintiff may have standing if his or her injuries fall within the zone of interests protected by a statutory provision, *see, e.g., Hanson v. Woolston*, 701 N.W.2d 257, 262 (Minn. Ct. App. 2005), Plaintiffs' alleged injury does not fall within the zone of interest of the SBI's enabling legislation. Indeed, the purpose of Minnesota Statutes Chapters 11A and 356A relates to the economic decisions of the SBI, not international policy interests.

## III. THE SBI IS AUTHORIZED TO PURCHASE "INTERNATIONAL SECURITIES" PURSUANT TO MINNESOTA STATUTES SECTION 11A.24, WHICH INCLUDES ISRAEL BONDS.

Even if Plaintiffs could establish standing, their claim that the SBI cannot purchase bonds of a foreign country (Count I) is without merit. The SBI is specifically authorized to invest in such bonds under the plain language of Minn. Stat. § 11A.24.

Subdivision 1 of Section 11A.24 states that the SBI "shall have the authority to purchase, sell, lend or exchange the following securities for funds or accounts specifically made subject to this section. . . ." Minn. Stat. § 11A.24, subd. 1. The statute then sets forth a number of permissible investments, including "other investments" set forth in Subdivision 6, which reads as follows:

> **Other investments.** (a) *In addition to the investments authorized in subdivisions 1 to 5*, and subject to the provisions in paragraph (b), the state board may invest funds in:
>
> *******
>
> (5) international securities.

Minn. Stat. § 11A.24, subd. 6 (a)(5) (emphasis added).

"International securities" clearly includes foreign government bonds. The word "international" is used to mean something other than U.S. domestic securities. *See, e.g., Webster's Ninth New Collegiate Dictionary*, p. 632 (1988) (defining "international" to mean "reaching beyond national boundaries."). The term "securities" plainly includes bonds. Indeed, Subdivision 1 of Section 11A.24 refers to the "securities" described in subdivisions 2 to 6, which specifically include "*bonds*, notes, bills mortgages, and other evidences of indebtedness," *see* subd. 2, and "*bonds*, notes, [and] debentures," *see* subd. 3. (Emphasis added.) Several other Minnesota statutes similarly use the term "security" to include bonds. *See, e.g.*, Minn. Stat. §§ 50.14, subd. 2(c) ("authorized securities" includes "bonds or other interest bearing securities"); 51A.35 (authorizing associations to invest in "securities" including "bonds"), 126C.72, subd. 4 (bonds issued by commissioner of management and budget deemed "authorized securities"), 136D.281, subd. 7 (intermediate school board bonds deemed "tax-exempt securities").

Additionally, Minn. Stat. § 645.08 requires that statutory words and phrases be given their "common" usage. Minn. Stat. § 645.08(1). "Securities" is commonly understood in the industry to mean "[a]n investment instrument, other than an insurance policy or fixed annuity, issued by a corporation, government, or other organization which offers evidence of debt or equity." Definition of "Security," *InvestorWords*, http://www.investorwords.com/4446/security (last visited on February 6, 2012). The Securities and Exchange Act of 1934 also defines "security" to include bonds. *See* 15 U.S.C. § 78C(a)(10). Moreover, the SBI's interpretation is entitled to deference even if the language is ambiguous. *See In re Minnesota Power*, __ N.W.2d __, No. A11–352, 2011 WL 6015354, *3 (Minn. Ct. App. Dec. 5, 2011) (finding that "'judicial deference, rooted in the separation of powers doctrine, is extended to an agency decision-maker

in the interpretation of statutes that the agency is charged with administering and enforcing.'") (citations omitted) (attached).

Since the SBI's purchase of Israel government bonds is clearly within its statutory authority to invest in "international securities," Count I of Plaintiffs' Complaint should be dismissed.

## IV. COUNTS II AND III ARE NOT JUSTICIABLE AND, IN ANY EVENT, THEY FAIL TO STATE A CLAIM.

Plaintiffs appear to argue in Counts II and III that the SBI's investment in Israel bonds is unreasonable and violates the "prudent person" standard, because the SBI is aiding and abetting a violation of the Fourth Geneva Convention, and the State would be liable in tort for its purchase of Israel bonds. In addition to the reasons stated *supra* at pp. 4-5, the Court does not have jurisdiction to decide whether the SBI, let alone Israel, has violated the Fourth Geneva Convention. Moreover, as a matter of law, the SBI has no potential tort or other liability for allegedly aiding and abetting any purported violations of the Convention. As a result, Counts II and III must also be dismissed.

### A. There Is No Justiciable Controversy Based On The Political Question And Act Of State Doctrines.

The Court may not adjudicate alleged violations of the Fourth Geneva Convention. The United States Supreme Court long ago described the effect of an international treaty upon domestic court jurisdiction:

> A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress.

*Edye v. Robertson*, 112 U.S. 580, 598 (1884).

Thus, two doctrines have developed that preclude courts from adjudicating cases of the kind now before the Court. The political question doctrine precludes claims which are impossible to decide "'without an initial policy determination of a kind clearly for non-judicial discretion.'" *Alperin v. Vatican Bank*, 410 F.3d 532, 561 (9th Cir. 2005), *cert. denied*, 546 U.S. 1137 (2006) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)) (holding that unjust enrichment claim against bank for profits derived from conduct of foreign government was non-justiciable political question, and stating that "[i]t is not our place to speak for the U.S. Government by declaring that a foreign government is at fault for [its conduct] during World War II. Any such policy condemning [a foreign government] must first emanate from the political branches.").

The Act of State doctrine bars claims in which the relief sought would require a court in the United States to declare invalid a foreign sovereign's official acts. *W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 404-406 (1990). *See also, e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (Act of State doctrine reflects "the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder" the conduct of foreign affairs); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302-304 (1918) (stating that Act of State doctrine is premised on policy of international comity and amicable relations between governments, foreclosing adjudication of legality of acts of foreign states).

The political question and Act of State doctrines preclude the Court from adjudicating this matter. *See, e.g., Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 984 (9th Cir. 2007) (deciding political question doctrine precluded claim against Caterpillar for allegedly aiding and abetting Israel); *Corrie v. Caterpillar, Inc.*, 403 F. Supp.2d 1019, 1032 (W.D. Wash. 2005), *aff'd*, 503 F.3d 974 (9th Cir. 2007) (finding Act of State doctrine barred claim that Caterpillar allegedly

aided and abetted Israel, and stating that "[t]his lawsuit challenges the official acts of an existing government in a region where diplomacy is delicate and U.S. interests are great.").

**B. Counts II and III Should Also Be Dismissed Because The SBI's Mere Investment In Sovereign Bonds Cannot Impose Liability On The SBI.**

To state a valid claim for aiding and abetting alleged international law violations, "a claimant must show that the defendant provided substantial assistance with the purpose of facilitating the alleged offenses." *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 247 (2nd Cir. 2009), *cert. denied*, 131 S. Ct. 79 & 131 S. Ct. 122 (2010). In other words, it must be shown that the SBI acted with the purpose of assisting violations of customary international law, and that it has the right and ability to control the country's alleged conduct. *Id.* at 261, 263.

First, since the SBI is merely a purchaser of bonds, it lacks the requisite purpose to aid and abet any alleged international law violations, as a matter of law. *See, e.g., Corrie v. Caterpillar*, 403 F. Supp.2d at 1024, 1027 (finding that as a matter of law, a seller lacks specific intent necessary to aid and abet actions of buyer, and stating that "where a seller merely acts as a seller, he cannot be an aider and abettor"). *See also Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1951-2 (2009) (holding that to survive motion to dismiss, complaint must allege facts sufficient to plausibly suggest defendant's state of mind, and holding that court is not bound by conclusory assertions of knowledge or intent).

Second, as a matter of law, Plaintiffs cannot establish a causal link between the SBI's investment and any alleged violation of international norms. *See, e.g., Presbyterian Church of Sudan*, 582 F.3d at 264 (dismissing claim that corporation which did business with foreign country aided and abetted violations of international law, and stating that such matters "are not the province of private parties but are, instead, properly reserved to governments and

multinational organizations."); *Rothstein v. UBS AG*, 647 F. Supp.2d 292 (S.D. N.Y. 2009) (granting motion to dismiss aiding and abetting claim against international bank and reasoning that bank loans were not significant source of funds to government, and the money could be used for multiple legitimate uses); *In re South African Apartheid Litig.*, 617 F. Supp.2d 228, 257-258, 269 (S.D. N.Y. 2009) (dismissing aiding and abetting claims and stating that "simply doing business with a state or individual" does not create liability under international law).

Just as in *Corrie v. Caterpillar, Inc.*, 403 F. Supp.2d at 1024, and similar to the above cases, the purchase of government bonds does not make the SBI "a participant in that government's alleged international law violations." Counts II and III should therefore be dismissed.

## CONCLUSION

For all of the reasons discussed above, Defendant respectfully requests the Court to dismiss Plaintiffs' Complaint in its entirety and with prejudice.

Dated: February 6, 2012

Respectfully submitted,

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AG: #2932034-v1

Not Reported in N.W.2d, 2010 WL 935378 (Minn.App.)
**(Cite as: 2010 WL 935378 (Minn.App.))**

**H**
Only the Westlaw citation is currently available.

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.
KLADEK, INC., Appellant,
v.
AMERICAN BANK OF ST. PAUL, Respondent.

No. A09-948.
March 16, 2010.

West KeySummary**Bills and Notes 56 ⚿129(2)**

56 Bills and Notes
56II Construction and Operation
56k129 Time of Maturity
56k129(2) k. Maturity on Nonpayment of Installment of Interest or Principal. Most Cited Cases
A lender gave a debtor sufficient notice of its default by depositing a default notice in the United States mail as first-class mail. The language of the promissory note and loan agreement's notice provision stated that the lender's notice was effective when deposited in the mail, and the debtor's allegation that actual notice was required would render that contract provision meaningless. Therefore the lender did not breach the agreement by raising the debtor's interest rate without sufficient notice upon the debtor's default.

Ramsey County District Court, File No. 62-CV-09-978.
Jack E. Pierce, Tracy Halliday, Pierce Law Firm, P.A., Minneapolis, MN, for appellant.

Mitchel C. Chargo, Norman I. Taple, Gurstel, Staloch & Chargo, P.A., Golden Valley, MN, for respondent.

Considered and decided by HUDSON, Presiding Judge; CONNOLLY, Judge; and CRIPPEN, Judge.[FN*]

FN* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

## UNPUBLISHED OPINION

HUDSON, Judge.

*1 Appellant challenges the district court's dismissal of its breach-of-contract action against respondent bank, alleging that the district court erred by interpreting the parties' loan agreement to allow notice of default to take effect when deposited in the United States mail as first-class mail, which was not registered or certified mail. Because the district court did not err by concluding that the unambiguous language of the agreement allowed respondent to provide notice by depositing the notice in the mail as first class, and respondent followed that procedure in notifying appellant of its default, summary judgment in favor of respondent was proper as a matter of law, and we affirm.

## FACTS

In February 2005, appellant Kladek, Inc., by its president, Lawrence F. Kladek (Kladek), borrowed $1,949,900 from respondent American Bank of St. Paul, under the terms of a promissory note and business loan agreement. Kladek also signed a personal guaranty, guaranteeing appellant's obligation on the note.

The note had a stated interest rate of 6.5%, but provided that in the event of appellant's default, respondent was entitled to increase the interest rate by four percentage points. The note defined default as failure to make payment when due, or failure to comply with any "term, obligation, covenant or condition" contained in the note or related documents. The loan agreement required that appellant furnish respondent with tax returns as soon as they were available, but no later than 30 days after the end of the applicable filing date for the end of the tax-reporting period. It also provided that if a default, other than a default on indebtedness, was curable, and the borrower had not been given notice of a similar default within the previous 12 months, the borrower could cure the default "after receiving written notice from Lender demanding cure." The loan agreement stated:

Any notice required to be given under this Agreement shall be given in writing, and shall be effective when actually delivered, when actually received by telefacsimile (unless otherwise required by law), when deposited with a nationally recognized overnight courier, *or, if mailed, when deposited in the United States mail, as first class, certified or registered mail postage prepaid,* directed to the addresses shown near the beginning of this Agreement.

(Emphasis added.)

Respondent did not receive appellant's corporate tax returns for the years 2003, 2004, and 2005, or Kladek's personal tax returns for 2004 and 2005. On July 5, 2006, December 15, 2006, and December 29, 2006, respondent deposited in the United States mail, first class, three successive letters to Kladek at the address stated on the loan documents. The letters, taken together, informed Kladek that the tax returns were needed as required by the loan agreement and that failure to immediately comply could result in having the default rate imposed. Respondent did not send the letters by certified or registered mail. Respondent followed its internal mailing policies in mailing the letters and did not receive them back as returned to sender.

*2 By January 2007, appellant had not cured its default, and respondent raised the interest rate on the note four percentage points, to 10.5%. In about October 2007, appellant cured its default by providing the tax returns, and the original interest rate was reinstated.

In February 2009, appellant filed a complaint in Ramsey County District Court, alleging that respondent breached its contract by charging increased interest on the note when respondent did not provide notice of default that was actually delivered to appellant. Respondent moved to dismiss the action under Minn. R. Civ. P. 12.02(e), alleging that the complaint failed to state a claim under which relief could be granted because respondent provided proper notice of appellant's default by first-class mail and increased the interest rate when appellant failed to cure its default. Respondent submitted affidavits of two bank employees stating that they had discussed appellant's default with Kladek, who was aware of the default. Appellant submitted Kladek's affidavit; Kladek contended that he never received the letters notifying appellant of the default.

The district court granted respondent's motion, concluding that the unambiguous language of the loan agreement did not require actual delivery of notices to appellant, but that the notices were effective if, among other options, they were mailed either by (1) first class, (2) certified, or (3) registered mail, postage prepaid. The court concluded that respondent provided three proper notices of default to appellant by depositing them in the United States mail, first class. The court concluded that the action was dismissed as a matter of law and granted respondent attorneys' fees, costs and expenses as provided by the loan agreement. This appeal follows.

## DECISION

### I

On a motion to dismiss for failure to state a claim upon which relief can be granted under Minn. R. Civ. P. 12.02(e), the district court may generally consider only the complaint and the documents referenced in the complaint. *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 739 n. 7 (Minn.2000). If the parties present, and the district court does not exclude, matters outside the pleading, the motion is treated as one for summary judgment. Minn. R. Civ. P. 12.02; *see N. States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 491 (Minn.2004) (applying summary-judgment standard on review after concluding that district court erred by failing to analyze rule 12.02(e) motion as motion for summary judgment when it considered affidavits from both parties). "[W]hen the complaint refers to the contract and the contract is central to the claims alleged," the district court may consider the entire written contract. *In re Hennepin County 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 497 (Minn.1995) (permitting consideration of contract provisions other than those cited in complaint in rule 12.02(e) motion).

Here, the complaint referred to the "loan documents." Appellant submitted the note as an exhibit to the complaint; respondent submitted the loan agreement and the guaranty as exhibits supporting its motion to dismiss. Because these loan documents were referenced in the complaint and relate directly to appellant's claim for relief, the district court properly reviewed them in considering respondent's motion to

dismiss.

*3 But respondent also submitted to the district court two affidavits from bank employees referring to discussions with Kladek to support respondent's argument that Kladek received notice of default. Appellant also submitted Kladek's affidavit, which stated that he did not receive respondent's letters of default. The district court did not exclude these documents. Because the district court received this additional evidence beyond the complaint and the materials referenced in the complaint, the district court erred by ruling on respondent's motion as a motion to dismiss, rather than a motion for summary judgment, and we review the matter as an appeal taken from summary judgment.

II

In reviewing a ruling on summary judgment, this court determines whether a genuine issue of material fact exists and whether the district court erred in applying the law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76 (Minn.2002). Absent ambiguity, contract interpretation presents a question of law, which is subject to de novo review. *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn.1998).

"Unambiguous contract language must be given its plain and ordinary meaning...." *Minneapolis Pub. Hous. Auth. v. Lor*, 591 N.W.2d 700, 704 (Minn.1999). "[W]hen a contract is unambiguous, a court gives effect to the parties' intentions as expressed in the four corners of the instrument, and clear, plain and unambiguous terms are conclusive of that intent." *Knudsen v. Transp. Leasing/Contract, Inc.*, 672 N.W.2d 221, 223 (Minn.App.2003), *review denied* (Minn. Feb. 25, 2004). Contract language should be construed as a whole, with all clauses interpreted to be meaningful. *Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 525-26 (Minn.1990).

The district court concluded that the loan agreement unambiguously provided that notice of default was effective when, among other options, it was "(i) deposited in the United States Mail, as first class; (ii) certified; or (iii) registered mail postage prepaid." Thus, the district court concluded that notice of default is effective if respondent deposits the notice in the mail, sent by first class mail, or, *in the alternative,* certified or registered mail. Appellant argues that the district court erred in its interpretation and that the notice provision means instead that "registered or certified mail" is a *subset* of first-class mail, so that first-class mail must also be sent either as registered or certified mail for notice to be effective on mailing.

In reviewing a contract, we may examine its meaning according to the rules of grammar. *See Mattson v. Flynn*, 216 Minn. 354, 359, 13 N.W.2d 11, 14 (1944) (stating that statutes are construed in accordance with the rules of grammar unless contrary to legislature's intent). Appellant urges an interpretation of the loan agreement that relies on the grammatical rule that if a sentence lists more than two items in a series, the last item must be preceded by a comma. *See Heaslip v. Freeman*, 511 N.W.2d 21, 23 (Minn.App.1994) (describing rule), *review denied* (Minn. Feb. 24, 1994). But this rule is not universally applied. *Id.* Therefore, it does not dictate our analysis. *See id.* (declining to apply rules of comma usage to interpret statute). A stronger factor in our plain reading analysis is that the words "first class" directly follow the words "when deposited in the United States mail, as...." This immediate pairing of the words "as" and "first class," which are then followed by the words "certified or registered mail," supports the district court's determination that first-class mail is one of three parallel options for giving notice.

*4 Appellant also argues that the provisions of the documents must be read together; that the loan agreement and note both allow appellant to cure a default after receiving written notice; and that the notice provision, if defined to include registered or certified mail, but not first-class mail, ensures that appellant would actually receive notice of the default. But this reading is inconsistent with the plain language of the agreement's notice provision, which states that notice is effective when actually delivered; when actually received by telefascimile; when deposited with a nationally recognized overnight courier; or, in certain cases, when deposited in United States mail. Appellant's interpretation would render meaningless the portion of the agreement stating that notice may be effective in certain cases when sent by courier or deposited in the United States mail. *See Chergosky*, 463 N.W.2d at 526 (stating that courts attempt to avoid interpretation of contract that would render a provision meaningless).

Further, even if we were to determine that the agreement was ambiguous, we would reach the same result. To aid in our reading of the agreement, we may take judicial notice of the United States Post Office's regulations. *See* *Eischen Cabinet Co. v. Hildebrandt*, 683 N.W.2d 813, 816 (Minn.2004) (citing postal service website). The United States Post Office website indicates that both certified and registered mail may be used with either priority mail or first-class mail.[FN1] Appellant's interpretation of the language in the agreement would unreasonably exclude priority mail, which may also be sent certified or registered, and which would presumably be more reliable in reaching the borrower. And in other contexts, when service by mail is permitted, it is generally effective when mailed. *See, e.g.*, Minn. R. Civ. P. 5.02 (stating that under rules of civil procedure, service of notice by mail on a party or a party's attorney is "complete upon mailing"). Therefore, the district court did not err in determining that depositing notice of default in the first-class mail, postage prepaid, is an acceptable form of giving notice under the agreement, and respondent adequately notified appellant of its default. We conclude that summary judgment was proper in favor of respondent.

> FN1. *See* usps.com/send/waystosendmail/extraservices/certifiedmailservice.htm; usps.com/send/waystosendmail/extraservices/registeredmailservice.htm (last visited Feb. 26, 2009).

**Affirmed.**

Minn.App.,2010.
Kladek, Inc. v. American Bank of St. Paul
Not Reported in N.W.2d, 2010 WL 935378 (Minn.App.)

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Westlaw.



--- N.W.2d ----, 2011 WL 6015354 (Minn.App.), Util. L. Rep. P 27,176
**(Cite as: 2011 WL 6015354 (Minn.App.))**

**H**
Only the Westlaw citation is currently available.

Court of Appeals of Minnesota.
In the Matter of the Application of MINNESOTA POWER for Authority to Increase Rates for Electric Service in Minnesota.

No. A11–352.
Dec. 5, 2011.

**Background:** Public electric utility sought review of decision of Public Utilities Commission, 2010 WL 4390260, setting interim rates. Commission subsequently clarified its denial of motion for reconsideration, 2011 WL 457709 and 2011 WL 2433541. Utility appealed.

**Holdings:** The Court of Appeals, Collins, J., held that:
(1) statutory formula for determining interim rates did not apply when exigent circumstances were found;
(2) exigent circumstances existed; and
(3) Commission did not act arbitrarily and capriciously.

Affirmed.

West Headnotes

**[1] Administrative Law and Procedure 15A 749**

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General
15Ak749 k. Presumptions. Most Cited Cases

**Administrative Law and Procedure 15A 750**

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General
15Ak750 k. Burden of Showing Error. Most Cited Cases

Administrative decisions enjoy a presumption of correctness, and thus the burden is on the challenging party to show agency error. M.S.A. § 14.69.

**[2] Appeal and Error 30 893(1)**

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases

Issues of statutory interpretation are generally subject to de novo review by the Court of Appeals.

**[3] Statutes 361 219(1)**

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(1) k. In General. Most Cited Cases

Judicial deference is extended to an agency decision-maker in the interpretation of statutes that the agency is charged with administering and enforcing.

**[4] Electricity 145 11.3(5)**

145 Electricity
145k11.3 Regulation of Charges
145k11.3(5) k. Reasonableness of Charges. Most Cited Cases

Statutory formula for determining interim electric utility rates, following suspension of rate increase, did not apply when Public Utilities Commis-

sion found exigent circumstances, and therefore Commission had discretion to determine reasonable interim rates consistent with general rate-making policies; the initial phrase "unless the Commission finds that exigent circumstances exist" modified the entire remainder of the sentence, and thus the statutory formula had no application when the Commission found exigent circumstances. M.S.A. § 216B.16, subd. 3(b).

**[5] Public Utilities 317A 129**

317A Public Utilities
317AII Regulation
317Ak119 Regulation of Charges
317Ak129 k. Rate of Return. Most Cited Cases

In order to establish just and reasonable retail rates, the Public Utilities Commission must consider the right of the utility and its investors to a reasonable return, while at the same time establishing a rate for consumers which reflects the cost of service rendered plus a reasonable profit for the utility. M.S.A. § 216B.16, subd. 6.

**[6] Electricity 145 11.3(5)**

145 Electricity
145k11.3 Regulation of Charges
145k11.3(5) k. Reasonableness of Charges. Most Cited Cases

Combination of the economic conditions in public electric utility's service area, the unprecedented size of the rate-increase request, and the recency of utility's last rate case constituted exigent circumstances that permitted Public Utilities Commission to deviate from statutory formula when setting interim rates following suspension of rate increase; it was not required that the exigent circumstances relate to the items in the statutory formula. M.S.A. § 216B.16, subd. 3(b).

**[7] Electricity 145 11.3(6)**

145 Electricity
145k11.3 Regulation of Charges
145k11.3(6) k. Proceedings Before Commissions. Most Cited Cases

Public Utilities Commission did not act arbitrarily and capriciously in applying a 40% reduction to public electric utility's interim-rate request following suspension of rate increase, where the Commission carefully considered and articulated its basis for the reduction to the request. M.S.A. § 216B.16.

**[8] Administrative Law and Procedure 15A 763**

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General
15Ak763 k. Arbitrary, Unreasonable or Capricious Action; Illegality. Most Cited Cases

An agency's determination is arbitrary and capricious when it represents the agency's will and not its judgment.

*Syllabus by the Court*

*1 The Minnesota Public Utilities Commission is required to set interim rates whenever it suspends the effective date of new rates noticed by a utility. The calculation of interim rates is governed by the formula set forth in Minn.Stat. § 216B.16, subd. 3(b) (2010), unless the commission finds that there are exigent circumstances. If the commission makes an exigent-circumstances finding, the statutory formula does not apply, and the commission exercises discretion to set reasonable interim rates consistent with general rate-making principles.

Minnesota Public Utilities Commission, File No. E-015-GR-09-1151.Christopher D. Anderson, Allete, Inc. d/b/a Minnesota Power, Duluth, MN; and Sam Hanson, Thomas E. Bailey, Elizabeth M. Brama, Briggs and Morgan, P.A., Minneapolis, MN, for relator Allete, Inc.

Jeanne M. Cochran, Assistant Attorney General, St. Paul, MN, for respondent Minnesota Public Utilities Commisison.

Lori Swanson, Attorney General, Karen D. Olson, Deputy Attorney General, Ronald M. Giteck and Ian Marc Dobson, Assistant Attorneys General, St. Paul, MN, for respondent Residential and Small Business

Utilities Division of the Office of the Attorney General.

Andrew P. Moratzka, Robert S. Lee, Mackall, Crounse & Moore, PLC, Minneapolis, MN, for respondent ArcelorMittal USA, Inc.

Considered and decided by PETERSON, Presiding Judge; LARKIN, Judge; and COLLINS, Judge.

**OPINION**

COLLINS, Judge.[FN*]

In this certiorari appeal from a final rate order, relator ALLETE Inc. d/b/a Minnesota Power, challenges an order by respondent Minnesota Public Utilities Commission setting interim rates pursuant to Minn.Stat. § 216B.16, subd. 3(b). We affirm.

**FACTS**

On November 2, 2009, Minnesota Power filed with the commission a notice of change in rates seeking approval of an $81 million rate increase. On the same day, Minnesota Power filed a petition requesting approval to collect $73.3 million in interim rates.

Each of the non-commission respondents—Large Power Intervenors (LPI), Boise Cascade Inc., and the Office of the Attorney General–Residential Utilities Division (OAG)—filed comments with the commission objecting to the proposed amount of interim rates. The non-commission respondents argued that exigent circumstances, particularly the economic conditions in Minnesota Power's service area, warranted a lesser interim rate. LPI requested that any increase in interim rates be capped at five percent. Boise requested no interim rate increase be imposed on it or other large power customers and that any interim rate increase for other customer classes be capped at five percent. OAG advocated for no interim rate increase for residential and small business customer classes.

The commission's staff completed briefing papers, in which they evaluated both the interim rates proposed by Minnesota Power and the objections raised by the non-commission respondents. Staff advised that the proposed interim rates generally complied with Minnesota statutes and rules, and questioned whether there was an adequate basis for limiting a rate increase to five percent or less. Staff suggested, however, that the commission might be able to limit the rate increase based on Minnesota Power's rate-filing history, which reflected that the commission generally approved between 45 and 58% of Minnesota Power's rate-increase requests.

*2 On December 15, 2009, the commission conducted proceedings to consider the completeness of Minnesota Power's rate-increase notice as well as the appropriate level of interim rates. The commission heard from Minnesota Power and each of the non-commission respondents during the proceedings. The commission also heard from Energy CENTS, which provided additional background on the state of the economy in the 24 counties within Minnesota Power's service area. The commission deliberated and determined to reduce the proposed interim rate by 40% to $48.5 million.

On December 30, 2009, the commission issued an order setting interim rates. In that order, the commission justified the 40% reduction in the proposed interim rate:

> Three extraordinary circumstances combine to create exigent circumstances in this case: the unprecedented size of the proposed rate increase (nearly twice the size of any other increase requested by [Minnesota Power] in the past 22 years); the extremely short window (one day) between the effective date of [Minnesota Power's] last rate increase and this rate increase request; and the worst economic downturn in the past 60 years. Together, these factors clearly carry serious potential for rate shock—and even outright hardship—for [Minnesota Power's] customers.

The commission acknowledged that the impact on ratepayers was "only one side of the exigent circumstances equation"; that Minnesota Power "has made its rate request in good faith with careful documentation and detailed explanation"; and that Minnesota Power "is generally entitled to recover its cost of service and is entitled to earn a fair rate of return." The commission recognized, however, that "[a]s a practical matter ... in each of [Minnesota Power's] rate cases over the past 22 years, the revenue amount ultimately authorized by the Commission has been far less than the amount requested by [Minnesota Power], never exceeding 56% of its initial rate increase request."

Although the Minnesota Statutes provide for refund of interim rates paid in excess of the ultimately approved final rate, the commission concluded that, because of the condition of the economy, refunds "may not make some ratepayers whole." The commission concluded that a 40% reduction in the proposed interim rate reflected the best balancing of these various interests:

> This action protects [Minnesota Power] by recognizing its stated need for additional revenues. It protects ratepayers by substantially limiting immediate rate increases. And it protects the public interest by honoring the twin principles that rates approved by the [c]ommission in the last rate case are assumed to be just and reasonable and that utilities are normally entitled to begin collecting some portion of their claimed new, increased revenue requirements while rate cases are pending.

On November 2, 2010, following contested-case proceedings, the commission issued an order authorizing a $53.5 million annual rate increase-$27.3 million less than Minnesota Power had requested, but $5 million more than the approved interim rates. Minnesota Power petitioned for reconsideration of issues including the interim rates. On January 20, 2011, the commission denied reconsideration of the interim-rates issue. This appeal followed.

**ISSUE**

*3 Did the commission err in setting interim rates?

**ANALYSIS**

[1] This court's review of the commission's order is governed by the Administrative Procedure Act (APA), Minn.Stat. §§ 14.63-.69 (2010). Minn.Stat. § 216B.52 (2010). Under the APA, this court can

> affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:
>
> (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. Administrative decisions enjoy a "presumption of correctness," and thus the burden is on the challenging party to show agency error. *In re Excelsior Energy, Inc.*, 782 N.W.2d 282, 289 (Minn.App.2010).

[2][3] This appeal turns on statutory interpretation, which generally is subject to de novo review by this court. *See, e.g.*, *Minnesgasco v. Minn. Pub. Utils. Comm'n*, 549 N.W.2d 904, 907 (Minn.1996) (holding that "[t]he determination of whether the [commission] has the statutory authority to act ... raises [a] question[ ] of law which [is] subject to de novo review"). But "judicial deference, rooted in the separation of powers doctrine, is extended to an agency decision-maker in the interpretation of statutes that the agency is charged with administering and enforcing." *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn.2001). And we have explained that

> [d]espite this court's authority to conduct de novo review of an agency's statutory interpretation, this court recently noted that when an agency reasonably interprets a statute, it is the role of the legislature or the supreme court, and not the role of this court, to overrule that interpretation.

*In re Application of N. States Power Co. for Approval of its 1998 Res. Plan*, 604 N.W.2d 386, 390 (Minn.App.2000), *review denied* (Minn. Mar. 28, 2000) (NSP).

Minn.Stat. § 216B.16 (2010) provides the procedure for a public utility seeking to increase rates charged to consumers. Under that section, a utility is required to give 60 days' notice to the commission before raising rates. *Id.*, subd. 1. The commission may then suspend the effective date of the new rates

for a period of up to ten months from the date that the notice is filed, during which time the commission must resolve all issues regarding the reasonableness of the rates. *Id.*, subd. 2. If the commission suspends the proposed new rate, however, it must also "order an interim rate schedule into effect not later than 60 days after the initial filing date." *Id.*, subd. 3(a). With respect to the calculation of interim rates, section 216B.16, subd. 3(b) provides:

> *4 Unless the commission finds that exigent circumstances exist, the interim rate schedule shall be calculated using the proposed test year cost of capital, rate base, and expenses, except that it shall include: (1) a rate of return on common equity for the utility equal to that authorized by the commission in the utility's most recent rate proceeding; (2) rate base or expense items the same in nature and kind as those allowed by a currently effective order of the commission in the utility's most recent rate proceeding; and (3) no change in the existing rate design.

Minnesota Power challenges (1) the commission's determination that the statutory formula does not apply when it finds exigent circumstances; (2) the finding of exigent circumstances in this case; and (3) the amount of interim rates set by the commission.[FN1] We address each challenge in turn.

I.

[4] Minnesota Power's first challenge centers on a dispute over whether and to what extent the statutory interim-rates formula applies when the commission makes a finding of exigent circumstances. The commission asserts that the initial phrase—"[u]nless the commission finds that exigent circumstances exist"—modifies the entire remainder of the sentence, and thus that the statutory formula has no application when it finds exigent circumstances. Minnesota Power asserts that the initial phrase modifies only the language directly following it—"the interim rate schedule shall be calculated using the proposed test year cost of capital, rate base, and expenses"—and that the rest of the sentence applies regardless of an exigent-circumstances finding. In other words, Minnesota Power contends that the interim-rate calculation must in any circumstance incorporate the rate of return, rate base or expense items and rate design last approved by the commission.

We agree with the commission that, under the plain language of the statute, the statutory formula does not apply when the commission finds that exigent circumstances exist. *See In re Otter Tail Power Co.*, 417 N.W.2d 677, 680 (Minn.App.1988), *review denied* (Minn. Mar. 23, 1998) ("The legislature has provided that 'unless the [c]ommission finds that exigent circumstances exist,' the [c]ommission should calculate an interim rate schedule in accordance with procedures set forth in the statute."). This is not a circumstance in which a statute creates an exception to an exception, as Minnesota Power's argument suggests. Rather, the "except" clause is part of the statutory formula, which applies in the absence of exigent circumstances. Thus, we conclude that when, as in this case, the commission finds the existence of exigent circumstances, it has discretion to determine reasonable interim rates consistent with general rate-making policies. *Cf. NSP*, 604 N.W.2d at 390 (explaining that, because environmental statute was "couched in general terms," the agency was left "the duty of determining precisely what standards will fulfill the environmental policy enunciated by the legislature" (quotation omitted)).

*5 [5] In so concluding, we note that, even when not constrained by the statutory interim-rates formula, the commission is not afforded unfettered discretion. The commission is obligated to set interim rates in any case when it suspends the effective date of new rates, Minn.Stat. § 216B.16, subd. 3(a), and all rates set by the commission must be "just and reasonable." Minn.Stat. § 216B.03 (2010). "In order to establish just and reasonable retail rates, the [commission] must consider the right of the utility and its investors to a reasonable return, while at the same time establishing a rate for consumers which reflects the cost of service rendered plus a reasonable profit for the utility." *Minnesgasco*, 549 N.W.2d at 908; *see also* Minn.Stat. § 216B .16, subd. 6 (providing that commission, in setting just and reasonable rates, "shall give due consideration to the public need for adequate, efficient, and reasonable service and to the need of the public utility for revenue sufficient to enable it to meet the cost of furnishing the service, including adequate provision for depreciation of its utility property used and useful in rendering service to the public, and to earn a fair and reasonable return upon the investment in such property"). These general principles governing all ratemaking compel the commission to employ reasoned judgment in setting interim rates, even when the statutory formula does

not apply.

**II.**

[6] Minnesota Power next challenges the commission's exigent-circumstances finding. The commission found exigent circumstances based on the combination of the economic conditions in Minnesota Power's service area; the unprecedented size of the rate-increase request; and the recency of Minnesota Power's last rate case. Minnesota Power asserts that (1) exigent circumstances must relate to the items encompassed in the statutory formula for interim rates, and (2) because both the timing and amount of the rate increase request were permitted by statute, they cannot constitute exigent circumstances.

The interim-rate statute does not define exigent circumstances, and the Minnesota caselaw has characterized it only generally, stating that "the term 'exigent' bespeaks urgency or emergency." *In re Application of People's Natural Gas Co.*, 389 N.W.2d 903, 907 (Minn.1986). Black's Law Dictionary defines exigent circumstances as "[a] situation that demands unusual or immediate action and that may allow people to circumvent usual procedures, as when a neighbor breaks through a window of a burning house to save someone inside." *Black's Law Dictionary* 277 (9th ed.2009). Although the more common application of the term in the criminal context has limited relevance here, we note that in that context, exigent circumstances may be found based on certain single factors or under "a totality of the circumstances test." *State v. Shriner*, 751 N.W.2d 538, 541–42 (Minn.2008).

Applying these understandings of "exigent circumstances," we conclude that the legislature intended to confer upon the commission the flexibility to deal with unusual situations in which it may be inappropriate to apply the statutory interim-rates formula. And we reject, as contrary to the broad language of the statute, Minnesota Power's assertions that exigent circumstances must relate to the items in the statutory formula or cannot be found when the rate-increase otherwise complies with the statute. The statute does not so limit the commission's discretion to find exigent circumstances, and we are precluded from adding to a statute words that the legislature omits. *Hutchinson Tech., Inc. v. Comm'r of Revenue*, 698 N.W.2d 1, 12 (Minn.2005). Thus, we cannot conclude that the commission erred in finding exigent circumstances in this case.

**III.**

***6** [7][8] Finally, Minnesota Power argues that the commission acted arbitrarily by applying an across-the-board reduction to the interim-rate request, rather than reducing particular elements of the rate under the statutory formula. "An agency's determination is arbitrary and capricious when it represents the agency's will and not its judgment." *Otter Tail*, 417 N.W.2d at 680. The record shows that the commission carefully considered and articulated its basis for applying a 40% reduction to the interim-rate request. *Id.* at 680 (rejecting argument that commission acted arbitrarily because the commission's final order "demonstrate[d] an independent and lengthy examination and explanation" of the challenged issue). Accordingly, we reject Minnesota Power's argument that the commission acted arbitrarily in setting interim rates.

**DECISION**

Because the commission did not err in finding exigent circumstances, and then properly exercised its discretion to set interim rates, we affirm.

**Affirmed.**

FN* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

FN1. Minnesota Power also asserts that the commission exceeded its statutory authority by considering comments from the non-commission respondents because interim rates are to be set "ex parte without a public hearing." Minn.Stat. § 216B.16, subd. 3(a). We agree with the commission that Minnesota Power waived this argument by failing to raise it in its petition for reconsideration. *See* Minn.Stat. § 216B.27, subd. 2 (precluding party from arguing issue to court that was not raised in petition for rehearing). Moreover, we note that, read contextually, the requirement that interim rates be set "ex parte without a public hearing" appears to have been intended to differentiate between the streamlined interim-rates procedure and the contested-case proceeding generally ap-

> plicable to rate c ises, rather than to exclude interested parties from the interim-rates proceedings altogether. *Compare* Minn.Stat. § 216B.16, subd. 2(b) (providing that disputes over the reasonableness of rates generally must be referred "to the Office of Administrative Hearings with instructions for a public hearing as a contested case pursuant to chapter 14") *with* Minn.Stat. § 216B.16, subd. 3(a) (providing that "[t]he commission shall order the interim rate schedule ex parte *without a public hearing* " (emphasis added)).

Minn.App.,2011.
In re Minnesota Power
--- N.W.2d ----, 2011 WL 6015354 (Minn.App.), Util. L. Rep. P 27,176

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STATE OF MINNESOTA

COUNTY OF RAMSEY

DISTRICT COURT

SECOND JUDICIAL DISTRICT

Court File No. 62-CV-11-10079
Judge Margaret M. Marrinan

Minnesota Break the Bonds Campaign, Bil'in Popular Committee Against the Wall and Settlements, Women Against Military Madness-Middle East Committee, Lucia Wilkes Smith, Margaret Sarfehjooy, Catharine Abbott, Barbara Hill, Polly Mann, Leona Ross, Sylvia Schwarz, Nadim Shamat, Sarah Martin, Robert Kosuth, Mary Eoloff, Nick Eoloff, Vern Simula, Cynthia Arnold, Newland F. Smith, III, Ronnie Barkan, Ofer Neiman, David Nir, Lehee Rothschild, Renen Raz, Dorothy Naor, Gal Lugassi, Boycott From Within and David Boehnke,

Plaintiffs,

vs.

Minnesota State Board of Investment,

Defendant.

**[Proposed] ORDER IN SUPPORT OF MOTION TO DISMISS**

On March 5, 2012 at 2:30 p.m. the above-captioned matter came before the Honorable Judge Margaret M. Marrinan, Judge of Ramsey County District Court, in Courtroom 1430, of the Ramsey County Courthouse, City of St. Paul, State of Minnesota, pursuant to Defendant's Notice of Motion and Motion to Dismiss.

Kristyn Anderson, Esq., Assistant Attorney General for the State of Minnesota, appeared as counsel on behalf of Defendant in support of its motion to dismiss. Jordan S. Kushner, Esq., Bruce D. Nestor, Esq. and Peter J. Nickitas, Esq. appeared on behalf of Plaintiffs.

Based upon all the files and proceedings herein,

IT IS HEREBY ORDERED that Defendant's motion to dismiss is granted, and Plaintiffs' Complaint is hereby dismissed, with prejudice.

Let Judgment be entered accordingly.

BY THE COURT:

Dated: _____

_____
MARGARET M. MARRINAN
Judge of District Court