

STATE OF MINNESOTA
BEFORE THE
MINNESOTA PUBLIC UTILITIES COMMISSION

In the Matter of Minnesota Power’s Petition for
Interpretation of Terms and Conditions of Service
to Verso Minnesota Wisconsin LLC

Docket No. E-015/M-21-593

VERSO MINNESOTA WISCONSIN LLC’S INITIAL COMMENTS

INTRODUCTION

Pursuant to the Minnesota Public Utilities Commission’s (the “Commission”) Notice of Comment Period issued August 4, 2021, Verso Minnesota Wisconsin LLC (“Verso”) provides the following comments on Minnesota Power’s (“MP”) petition for an order interpreting the Electric Service Agreement as amended (“ESA”) between MP and Verso (the “Petition”).

With its Petition, Minnesota Power asks the Commission for a ruling that it has no duty to mitigate its damages under the ESA, even though such a ruling would allow Minnesota Power to unfairly double-recover from two customers, Verso, which used to own the Duluth Mills, and ST Paper, which now owns and operates those mills. The Commission should decline MP’s usurious request.¹

MP’s request not only *directly contravenes* a prior Commission order regarding the *exact* ESA provision at issue, such a ruling would also violate Minnesota law and lead to an unjust and

¹ By making this filing, Verso is in no way conceding that the Commission has jurisdiction over Verso or this dispute. Indeed, MP’s Petition appears to recognize that the Commission cannot determine damages under the ESA or otherwise order Verso to pay anything under the ESA. *In the Matter of Minnesota Power’s Petition of Terms and Conditions of Service to Verso Minnesota Wisconsin LLC*, Docket No. E-015/M-21-593, Petition at 2 (Aug. 2, 2021) (the “Petition”). Only a court can do that. In fact, it is Verso’s understanding that the Commission usually does not weigh in on contract disputes. *Schlumbergersema v. Northern States Power Co.*, No. E-002/C-02-1169, 2002 WL 31954523 (Dec. 23, 2002). However, because the Commission does have jurisdiction over MP, and given MP’s egregious behavior to date, Verso is hoping that the Commission will weigh in here and order MP to mitigate its damages, so that the parties can avoid future litigation regarding this matter.

unreasonable result that unfairly penalizes Verso and would set a precedent that would unfairly penalize future utility consumers.

As noted in the preceding paragraph, the Commission has already ruled on the precise question Minnesota Power now raises. Back in 2012, when it approved amendments to the ESA, the Commission affirmed MP's duty to mitigate its damages under the exact ESA language at issue now.² As part of those 2012 amendments, the parties added the provision at issue, which allowed Verso to shut-down the Duluth Mills and reduce its Minimum Firm Demand to zero effective two years after the date of such notice.³ In approving that amendment to the ESA, the Commission adopted the findings and recommendations of the Minnesota Department of Commerce, which concluded that "the two-year advance notice is a sufficient time period to allow [Minnesota Power] *to take any necessary steps to mitigate the impact of losing significant load on its system.*" In other words, Minnesota Power's 68-page petition can be readily resolved in Verso's favor with this one sentence in the Commission's 2012 Order, which clearly requires Minnesota Power to mitigate its damages.

Moreover, and consistent with the 2012 Order and the intent of the parties, Minnesota Power has, in fact, already fully mitigated its damages by securing another customer for the Duluth Mills.⁴ Ordering that Minnesota Power has no duty to mitigate its damages would allow Minnesota Power to collect *twice* for the same infrastructure at the Duluth Mills: once from Verso during the two-year notice period under the ESA, and at the same time from ST Paper under a new electric service agreement.

² *In the Matter of Minnesota Power's Petition for Approval of an Amendment to and Electric Service Agreement with NewPage Wisconsin System, Inc.*, Docket No. E-015/M-12-1025, Order at 5 (Dec. 10, 2012) (the "2012 Amendment Order").

³ *Id.*

⁴ Verso in fact brought that customer, ST Paper, to Minnesota Power by virtue of Verso's sale of the Duluth Mills.

Not only would a ruling in favor of Minnesota Power be contrary to the Commission's 2012 Order referenced above, but such a ruling would reward Minnesota Power for its own unfair behavior. That is, Minnesota Power could have prevented this result by offering a basic level of cooperation to Verso during Verso's negotiations with ST Paper for the sale of the Duluth Mills. But MP did not do so. Instead, Minnesota Power refused Verso's request for consent to the assignment of the ESA to ST Paper, negotiating an entirely new electric service agreement with ST Paper in hopes of charging fees for electric service to both Verso and ST Paper. Such conduct runs afoul of Minnesota Power's implied covenant of good faith and fair dealing, and regardless, the Commission should not condone or otherwise encourage such behavior by a public utility.

Finally, in addition to contravening the Commission's prior 2012 Order, Minnesota Power's unreasonable interpretation of the ESA would render the ESA wholly invalid. Minnesota Power repeatedly asserts that the ESA is a "typical take or pay contract" akin to liquidated damages with no duty to mitigate. But to be enforceable, liquidated damages must reflect a reasonable approximation of actual damages. Minnesota Power has put forward no evidence demonstrating its actual damages, only offering vague assertions about its electric service agreement with ST Paper. Rather than put forth such evidence, Minnesota Power simply seeks to double-collect from both Verso and ST Paper without offsetting Verso's obligations under the ESA. This amounts to an unenforceable penalty on Verso for simply exercising its contractual right to reduce its firm demand. Affirming (again) Minnesota Power's duty to mitigate its damages would preserve the enforceability and validity of the ESA.

In the end, Minnesota Power has turned what should have been considered an economic development success story—a new customer at the Duluth Mills, facilitated by Verso—into a grievance that attempts to revisit a prior Commission order and unnecessarily consumes the

Commission's valuable time and resources. Minnesota Power has acquired a new customer and new electric service agreement that, based on what Verso knows of the ST Paper agreement with MP, will allow MP to collect *more* than it would have otherwise collected from Verso under the remaining four-year term of the ESA.⁵ MP has therefore fully mitigated its damages.

The Commission should therefore affirm Minnesota Power's duty to mitigate its damages, and, as a matter of law and sound public policy, prevent Minnesota Power from double-recovering its fixed costs from both Verso and ST Paper for service at the Duluth Mills.

ARGUMENT

I. The Commission has already ordered that Minnesota Power has a duty to mitigate its damages in the event that Verso shuts down the Duluth Mills

Minnesota Power's staunch denial of its duty to mitigate its damages (if any) from Verso's termination of the ESA runs directly counter to the Commission's order approving the 2012 Amendment to the ESA.

On page 16 of the Petition, Minnesota Power confidently—and incorrectly—states that “[n]either the ESA nor the Commission's Orders approving it and subsequent amendments contain any obligation for Minnesota Power to mitigate damages or find additional customers in the event that Verso provides notice of its reduction of Minimum Firm Demand.”⁶

Minnesota Power is simply wrong. A 2012 amendment to the ESA included a new provision, Paragraph 3.N, which provided an orderly process in the event of a permanent cessation of operations at the Duluth Mills.⁷

In the event of a permanent cessation of operations at the Customer's Duluth Paper Mill and Duluth Recycled Pulp Mill, Customer may notify the Company in writing at least two years in advance that Customer is invoking its right to reduce the Minimum Firm Demand to 0 kW which reduction shall become effective on the

⁵ Notwithstanding the two-year shutdown provision at issue, the ESA had four years remaining on its term.

⁶ Petition at 16.

⁷ See 2012 Amendment Order.

second anniversary of such notice. In no event shall the provision of this paragraph be effective prior to two years after the date of such notification. Customer's recission or modification of such notice shall be permitted only at the sole discretion of the Company.⁸

In its Order approving this amendment, the Commission noted that Paragraph 3.N was included to recognize the economic environment of the paper industry by providing the customer (then NewPage, now Verso) "the right to reduce its Minimum Firm Demand to 0 kW" upon at least two years advance notice.⁹ The Commission concluded that "the two-year advance notice is a sufficient time period to allow MP *to take any necessary steps to mitigate the impact of losing significant load on its system.*"¹⁰ The Commission further found that Verso's shutdown of the Duluth Mills would not, contrary to Minnesota Power's repeated and empty assertions,¹¹ "negatively impact [Minnesota Power's] other ratepayers."¹²

Accordingly, the Commission has already answered Minnesota Power's Petition in favor of Verso: Minnesota Power does, in fact, have a clear duty to mitigate its damages under Paragraph 3.N of the ESA, consistent with the intent of the parties and the Commission.

Minnesota Power does not dispute that Verso invoked Paragraph 3.N by providing written notice on January 29, 2021 that it was planning to cease operations at the Duluth Mills.¹³ Consistent with the Commission's 2012 Order, Verso stated that it would "continue to be responsible for the payment of minimum Contract Demand charges on [redacted] until the second anniversary of the date of this notice; *provided, however,* that Verso expects that Minnesota Power

⁸ See Petition Exhibit C at 2-3.

⁹ 2012 Amendment Order at 5.

¹⁰ *Id.* (emphasis added).

¹¹ Petition at 8.

¹² See 2012 Amendment Order at 6.

¹³ Petition Exhibit E ("Therefore, in accordance with paragraph 3.N. of the Electric Service Agreement, Verso hereby elects to reduce the Minimum Firm Demand from [redacted] per month (paragraph 3.E(vi) of the Electric Service Agreement) to 0 kW per month, effective as of the second anniversary of the date of this notice.")

will use good faith efforts to mitigate damages under the Electric Service Agreement.”¹⁴ Verso continued making payments under the ESA until it sold the Duluth Mills to a new buyer, ST Paper, and Minnesota Power and ST Paper entered into a new electric service agreement that mitigates any damages sustained by Minnesota Power under Verso’s election under Paragraph 3.N. Yet Minnesota Power now seeks full payment from *both* Verso under the ESA *and* from ST Paper, thereby double-recovering its fixed costs from two different customers for the same infrastructure.

Interpreting the ESA to allow Minnesota Power to double recover its fixed costs under multiple electric service agreements would produce a grossly unfair result under the circumstances here. In March of 2021, Verso was in active negotiations to assign the ESA to ST Paper as part of the sale of the Duluth Mills. When Verso requested Minnesota Power’s consent to assign the ESA to ST Paper, Minnesota Power unreasonably (and, in fact, without providing any reason) refused.¹⁵ MP further refused to allow Verso to rescind its election to reduce its Minimum Firm Demand to zero in accordance with Paragraph 3.N of the ESA. This is all despite the fact that an assignment of the ESA to ST Paper would have mitigated Minnesota Power’s damages from Verso’s termination of the ESA. Minnesota Power alleges in the Petition that “ST Paper never indicated any interest in taking assignment of the ESA even if Minnesota Power consented to Verso’s rescission.”¹⁶ This assertion is directly contrary to Verso’s communications with ST Paper, which are memorialized in Verso’s March 25, 2021 request to rescind the termination notice and restart the Duluth Mills.¹⁷

¹⁴ *Id.*

¹⁵ Petition Exhibit B at 17, Paragraph 4.C (prohibiting a party from unreasonably withholding its consent to an assignment of the ESA).

¹⁶ Petition at 17.

¹⁷ *See* Petition Exhibit F.

Minnesota Power’s refusal to consent to the assignment of the ESA to ST Paper—or even to offer a basic level of cooperation to Verso—would be confounding to any reasonable observer if not for one simple fact: Minnesota Power sought to negotiate a new, potentially more lucrative electric service agreement with ST Paper as Verso was negotiating with ST Paper for the sale of the Duluth Mills. In essence, Minnesota Power unreasonably refused to consent to the assignment of the ESA to ST Paper so that Minnesota Power could collect from ST Paper under a new electric service agreement, while also collecting from Verso under the remaining term of the ESA. Minnesota Power’s refusal to cooperate and facilitate a smooth transition from Verso to ST Paper for the Duluth Mills added unnecessary risk to the sale from Verso to ST Paper. If Verso had not been able to sell the Duluth Mills to ST Paper, it is likely that its only alternative would have been to permanently close the Duluth Mills, resulting in lost jobs and revenue for the State of Minnesota. Rather than act fairly and in good faith, Minnesota Power chose to roll the dice and attempt to double-dip from two different customers, Verso and ST Paper, under two different contracts covering the same fixed costs. A reasonable utility would have recognized the obligation, let alone the opportunity, to ensure continuing jobs and revenue for the State of Minnesota and at the same time mitigate its damages. Clearly, Minnesota Power should not be rewarded for its actions.

Finally, it is worth taking note of the totality of Minnesota Power’s conduct over these past several months. Under Minnesota law, “every contract includes an implied covenant of good faith and fair dealing requiring that one party not ‘unjustifiably hinder’ the other party’s performance of the contract.”¹⁸ That includes, of course, the ESA. In addition, tariffs under the Commission’s jurisdiction must be just and reasonable and not unreasonably preferential, unreasonably

¹⁸ *In re Hennepin Cty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 502–03 (Minn. 1995).

prejudicial, or discriminatory.¹⁹ Any doubt as to reasonableness should be resolved in favor of the customer, here, Verso.²⁰

Since early 2021, Minnesota Power has unreasonably refused to consent to assignment of the ESA to ST Paper, has unreasonably refused to cooperate with Verso to ensure an orderly transition of the ESA to ST Paper, and has undermined Verso’s negotiations with ST Paper by negotiating a separate electric service agreement with ST Paper, all while arguing that it has no duty to mitigate damages in direct contravention of the Commission’s 2012 order. There are many words to describe Minnesota Power’s conduct here, but “good faith and fair dealing” are not among them (nor are “just and reasonable”). Minnesota Power’s interpretation of the ESA, its Petition, and its conduct these past several months violates the Commission’s prior order approving the 2012 ESA Amendment, violates Minnesota Power’s implied covenant of good faith and fair dealing toward Verso, and violates Minnesota Power’s obligation to ensure that its rates are just and reasonable. The Commission should not condone such conduct by a utility. Instead, the Commission should issue an order affirming Minnesota Power’s duty to mitigate any damages it claims to have sustained from Verso’s election under Paragraph 3.N of the ESA.

II. The ESA should not be construed as a “typical” take or pay contract in light of the Commission’s 2012 Order.

Minnesota Power strenuously and repeatedly asserts that the ESA is a “typical” take or pay contract, hoping to convince the Commission that Minnesota Power has no duty to mitigate its damages. Minnesota Power’s repeated characterization of the ESA as a take or pay contract should be taken for what it is: a sleight of hand. MP repeatedly uses the phrase “take or pay” to suggest

¹⁹ Minn. Stat. § 216B.03.

²⁰ *Id.*

that it has no duty to mitigate its damages and that the remaining ESA payments under Paragraph 3.N are merely a “liquidated damage.”

Minnesota Power is wrong. The ESA is *not* a “typical ‘take or pay’ arrangement”²¹ in which Minnesota Power has no duty to mitigate its damages. As an initial matter, there is only one usage of the phrase “take or pay” in the entire agreement—a tangential reference related to the Corporate Guarantee.²² There is no provision or clause titled “Take or Pay” in the ESA. The term “liquidated damage” is also nowhere to be found in the ESA. By contrast, the Commission has expressly acknowledged that the purpose of Paragraph 3.N., which Verso invoked in its January 29, 2021 letter, is to allow Minnesota Power time (up to two years) to “mitigate the impact of losing significant load on its system,”²³ thus imposing a duty on Minnesota Power to mitigate its damages in the event of Verso’s election under Paragraph 3.N. In fact, Minnesota Power has done just that: it has executed an electric service agreement with ST Paper consistent with the Commission’s Order and the purpose of Paragraph 3.N of the ESA. As was intended by the ESA, the Commission should order that amounts collected (or to be collected) from ST Paper should be used to mitigate Minnesota Power’s damages under Verso’s election under Paragraph 3.N. Moreover, the mere fact that MP refused to let Verso assign its ESA to ST Paper and instead entered into a new agreement with ST Paper demonstrates, or at least strongly implies, that MP thought its new agreement with ST Paper was better than Verso’s ESA, and therefore fully mitigated any damages under Verso’s ESA.

Even to the extent the ESA is ambiguous with respect to whether Minnesota Power has a duty to mitigate its damages, Verso’s interpretation of the ESA is more consistent with the

²¹ Petition at 14.

²² Petition Exhibit D at 2.

²³ 2012 Amendment Order at 5.

Commission’s 2012 Order, is just and reasonable, and achieves an equitable result under the circumstances. Under Minnesota law, if there is a question as to the interpretation of a contract, “the court should endeavor to adopt the construction which is most equitable to the parties and will not give to one of them an unreasonable advantage over the other.”²⁴ Further, “where a contract is capable of an interpretation in accordance with justice and fair dealing the court will adopt such construction.”²⁵ The Eighth Circuit has similarly emphasized the importance of finding a construction that is “more in accordance with justice and fair dealing” when it is possible without doing violence to the terms of the contract.²⁶ Here, given the underlying purpose of Paragraph 3.N and the Commission’s prior interpretation of the provision, the Commission should adopt an interpretation of the ESA that preserves the intent of Paragraph 3.N, is just and reasonable, and affirms Minnesota Power’s duty to mitigate its damages under the ESA.

III. Absent the duty to mitigate, requiring full payment from Verso under the ESA would amount to an unenforceable penalty.

Minnesota Power characterizes the ESA as a take or pay contract that is akin to a liquidated damages provision. Even putting aside the Commission’s 2012 Order finding a duty to mitigate, any take or pay “liquidated damage” in the ESA under the circumstances presented here amounts to an unenforceable penalty on Verso for validly electing to reduce its firm demand under Paragraph 3.N.

The enforceability of a take or pay clause depends on whether it offers: (i) two viable performance options (take or pay); or (ii) one performance option coupled with a payment penalty

²⁴ *Northern Pac. Ry. Co. v. United States*, 70 F. Supp. 836, 862 (D. Minn. 1946), aff’d, 188 F.2d 277 (8th Cir. 1951).

²⁵ *Id.*

²⁶ *Bayne v. United States*, 195 F. 236, 241 (8th Cir. 1912).

in disguise.²⁷ Courts consider “whether, at the time of contracting, it appears that the parties intended that the ‘pay’ present a relatively equivalent (and thus desirable) mode of performance - and not ... a measure to coerce compliance with the ‘take’ option.”²⁸ In other words, an enforceable take or pay contract will couple a primary obligation (taking and paying for a product) with provision for the payment of liquidated damages to ensure a steady revenue stream for the seller (as though the buyer had taken the product delivered). An *unenforceable* take or pay clause uses the payment obligation simply as a penalty, disproportionate to seller’s actual damages, for not taking the product.²⁹

Without a duty on Minnesota Power to mitigate its damages, the ESA payment obligation fails the enforceability test under the circumstances here.³⁰ Verso does not have two equivalent modes of performance under the ESA. It does not own the Duluth Mills anymore; it cannot elect to either take the power or pay Minnesota Power. Verso must simply pay “a lot of money for nothing in return,” rendering the payment obligation an unenforceable penalty.³¹ By contrast, Minnesota Power will receive revenues from ST Paper that presumably will cover Minnesota Power’s fixed costs of serving ST Paper at the Duluth Mills. Alternatively, Minnesota Power could have received the revenues under the ESA by consenting to the assignment of the ESA from Verso

²⁷ *Hemlock Semiconductor Corp. v. Kyocera Corp.*, 747 F. App’x 285, 288 (6th Cir. 2018). Minnesota Courts have previously looked to other jurisdictions to determine the validity of alternate performance agreements such as take or pay contracts. *St. Jude Med., Inc. v. Medtronic, Inc.*, 536 N.W.2d 24, 28 (Minn. Ct. App. 1995).

²⁸ *Hemlock Semiconductor Corp.*, 747 F. App’x at 288.

²⁹ *Superfos Invs. Ltd. v. FirstMiss Fertilizer, Inc.*, 821 F. Supp. 432, 433 (S.D. Miss. 1993).

³⁰ See, e.g., *Prenalta Corp.*, 944 F.2d 677, 15 U.C.C. Rep. Serv. 2d 854 (10th Cir. 1991) (The court found the take-or-pay contract to be “clearly an alternative contract” under which the pipeline could either “purchase the contract quantity or ... pay the value of the contract quantity” in exchange for the producer’s tender of the makeup gas at a later time).

³¹ See e.g. *Hemlock Semiconductor Corp.*, 747 F. App’x at 289 (“we are left with the common-sense conclusion that paying a lot of money for nothing in return is not a real performance option under a contract.”); see also *Goodyear Tire & Rubber Co., Inc. v. Daimler Trucks N. Am. LLC.*, No. 5:16CV1959, 2018 WL 4680552, at *3 (N.D. Ohio Sept. 28, 2018) (in alleged take or pay tire contract, Goodyear was able to present evidence that storing tires is expensive and could provide a viable alternative to take, but the court concluded that this factor “was not considered when the take-or-pay provision was negotiated”).

to ST Paper. Any additional amounts from Verso under the ESA, beyond what Minnesota will receive (or would have received) from ST Paper under either scenario, are simply an unenforceable penalty on Verso for terminating the ESA under Paragraph 3.N.³²

Moreover, in addition to reflecting an invalid take or pay clause, Verso's continued payments under the ESA would not pass muster as liquidated damages under Minnesota's Uniform Commercial Code (UCC), assuming solely for the sake of argument that the sale of electricity is subject to the UCC. Damages for breach by either party may be liquidated "but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy."³³ In addition, "[a] term fixing unreasonably large liquidated damages is void as a penalty."³⁴ Importantly, "if the payment obligation is a penalty, it is unenforceable—regardless of what the parties' contract labels it."³⁵

Requiring Verso's full payment under the ESA under the circumstances here would be an unenforceable penalty under Minnesota law. First, proof of loss under the ESA is not difficult; it is simply the fixed costs of the infrastructure needed to serve the Duluth Mills, previously recovered under the ESA and now to be recovered under the electric service agreement with ST Paper. Second, it is clearly not inconvenient or infeasible to obtain an adequate remedy; Minnesota Power has already found a new customer in ST Paper (thanks to Verso and despite the risk that Minnesota Power added to the sale process of the Duluth Mills by its unwillingness to facilitate a smooth transition of the ESA itself). Finally, the amount of liquidated damages must consider the anticipated or actual harm caused by the termination. Here, Minnesota Power ignores (or

³² *Hemlock Semiconductor Corp.*, 747 F. App'x at 290.

³³ Minn. Stat. § 336.2-718.

³⁴ *Id.*

³⁵ *Hemlock Semiconductor Corp.*, 747 F. App'x at 288.

obfuscates) any actual harm and instead attempts to double-collect from both Verso and ST Paper under two different agreements for the same fixed costs covering the same infrastructure. Verso's payment under the ESA is not a liquidated damage under these circumstances; it is an unenforceable penalty on Verso for exercising its contractual right to reduce its firm demand.

Minnesota courts have distinguished between liquidated damages and penalties based on the "guiding principle that the injured party is entitled to receive a fair equivalent for *the actual damages* necessarily resulting from failure to perform the contract and no more."³⁶ Minnesota Power offers no evidence of actual damages. And MP cannot ignore, nor should the Commission, that Minnesota Power's actual damages would be greater but for Verso's sale of the Duluth Mills to ST Paper, providing Minnesota Power with a new customer and continued source of revenue. Therefore, Minnesota Power's *actual damages* are (or will be) offset by the revenues it will receive from ST Paper. Any other interpretation of the ESA requiring additional payments from Verso, in addition to those received from ST Paper, would be an unfair and unenforceable penalty.

CONCLUSION

For the above-mentioned reasons, the Commission should affirm its prior 2012 Order that the purpose of Paragraph 3.N is to require Minnesota Power to mitigate its damages in the event of permanent cessation of operations at the Duluth Mills. The Commission should further affirmatively order that the ESA imposes a duty on Minnesota Power to mitigate damages as a result of Verso's election under Paragraph 3.N to reduce its firm demand, and that absent such duty to mitigate, Verso's continued full payment under the ESA is an unenforceable penalty that is void as a matter of law.

³⁶ *Gorco Const. Co. v. Stein*, 256 Minn. 476, 482, 99 N.W.2d 69, 74 (1959) (liquidated damages provision unenforceable where amount does not reflect harm so as to be punitive, not compensatory).

Dated: August 30, 2021

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