

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Beverly Jones Heydinger
David C. Boyd
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J. Dennis O'Brien
Betsy Wergin

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of the Petition of Northern States
Power Company d/b/a Xcel Energy for
Approval of Competitive Resource Acquisition
Proposal and Certificate of Need

ISSUE DATE: June 21, 2013

DOCKET NO. E-002/CN-12-1240

NOTICE AND ORDER FOR HEARING

PROCEDURAL HISTORY

On March 15, 2011, Northern States Power Company d/b/a Xcel Energy (Xcel) filed a petition for a Certificate of Need to renovate and increase the capacity of its Black Dog Generating Plant. Xcel justified its proposal by arguing that the demand for power in its service area would exceed Xcel's capacities by 2014. Consistent with Commission orders, Xcel proposed soliciting proposals from project developers for alternative means to meet Xcel's anticipated power needs. The Commission assigned the matter to Docket No. E-002/CN-11-184.¹

On December 7, 2011, Xcel asked to withdraw its Certificate of Need application, arguing that recent events and new data demonstrated that no new generating capacity would be needed by 2014.² Xcel continued to argue that it would need new capacity eventually, and continued to propose soliciting proposals from project developers. But given the significant changes in the record, Xcel argued that the Commission should re-establish the amount of power to be acquired, and the schedule for acquiring it.³

On November 21, 2012, the Commission issued an order largely adopting Xcel's proposal. The Commission agreed with the need to cancel the Black Dog project, and the need to solicit proposals from project developers based on a revised assessment of Xcel's power needs. Given the degree of change, however, the Commission elected to re-start this solicitation process within the context of a new docket. Consequently the Commission initiated the current docket, but took administrative

¹ *In the Matter of the Application of Northern States Power Company d/b/a Xcel Energy for a Certificate of Need for Approximately 450MW of Incremental Capacity for the Black Dog Generating Plant Repowering Project*, Docket No. E-002/CN-11-184, Xcel Petition (March 15, 2011).

² *Id.*, Xcel Motion to Withdraw Application (December 7, 2011).

³ *Id.*, Xcel Reply Comments (September 6, 2012).

notice of the record in Docket No. E-002/CN-11-184.⁴ And the Commission established a procedural schedule, including the expectation that if the Commission referred this matter to the Office of Administrative Hearings for contested case proceedings, that office would return a report and recommendation by October 2013.

On January 30, 2013, the Commission issued its Order Approving Notice Plan, directing Xcel to begin soliciting new proposals from developers.

On March 5, 2013, in a separate docket, the Commission issued an order declaring that Xcel had demonstrated the need for an additional 150 megawatts (MW) by 2017, increasing up to 500 MW by 2019.⁵ And in the current docket, the Commission issued an order designating April 15, 2013, as the deadline for developers to file proposals to meet some or all of Xcel's need.⁶

On April 15, 2013, the Commission received proposals from --

- Calpine Corporation (Calpine),
- Geronimo Energy, LLC (Geronimo),
- Great River Energy (GRE),
- Invenergy Thermal Development, LLC (Invenergy), and
- Xcel.

By May 28, 2013, the Commission had received comments and supplemental filings from --

- project developers,
- the Izaak Walton League -- Midwest Office, Fresh Energy, the Sierra Club, and the Minnesota Center of Environmental Advocacy (collectively, the Environmental Intervenors), and
- the Minnesota Department of Commerce (the Department).

On June 3, 2013, Ecos Energy, LLC (Ecos Energy), petitioned for permission to submit a generation proposal, notwithstanding the passage of the April 15 deadline.

On June 5, 2013, the Department proposed procedures to facilitate environmental review of the various proposals consistent with a timeline compressed to ensure that any project(s) selected by the Commission could begin operations by 2017. The Department noted that adopting these procedures would require varying the Commission's rules.

On June 6, 2013, the Commission met to consider the matter. At that time the Commission received comments from all parties.

⁴ This docket and Docket No. E-002/CN-11-184, Order Closing Docket, Establishing New Docket, and Schedule for Competitive Resource Acquisition Process (November 21, 2012).

⁵ See *In the Matter of Xcel Energy's 2011-2025 Integrated Resource Plan*, Docket No. E-002/RP-10-825, Order Approving Plan, Finding Need, Establishing Filing Requirements, and Closing Docket (March 5, 2013).

⁶ This docket, Order Extending Bidding Deadline and Refining Procedural Framework (March 5, 2013).

FINDINGS AND CONCLUSIONS

I. Background

The Commission has established a competitive resource acquisition process under Minn. Stat. § 216B.2422, subd. 5.⁷ The Department has summarized the operational details of this process,⁸ and the Commission's January 30, 2013 Order Approving Notice Plan provides additional guidance. In general, however, the process includes the following steps:

- Under Commission direction, Xcel publicizes the amount of capacity it needs and the timeframe in which Xcel needs it, and solicits proposals for meeting that need.
- Project developers – including Xcel, if it wishes -- file proposals for meeting some or all of Xcel's need.
- The Commission determines which proposals to accept as substantially complete and suitable for evaluation.
- If there are material facts in dispute, the Commission refers the matter to the Office of Administrative Hearings (OAH) for a contested case before an Administrative Law Judge. The judge conducts evidentiary hearings and prepares a report recommending a course of action.⁹
- The Commission reviews the record of the case, including the Administrative Law Judge's report. The Commission then identifies the resources that are best supported by the record.

While Minn. Stat. § 216B.243 generally directs a developer to secure a Certificate of Need before proceeding to build a large energy facility in Minnesota, the developer of a project chosen through a Commission-approved competitive resource acquisition process is exempt from that requirement.¹⁰

In the current case, the parties have discussed but not agreed upon terms of a nondisclosure agreement to permit limited exchange of protected information that may be needed to evaluate the alternatives.

⁷ See *In the Matter of Northern States Power Company d/b/a/ Xcel Energy's Application for Approval of its 2004 Resource Plan, Order Establishing Resource Acquisition Process, Establishing Bidding Process Under Minn. Stat. § 216B.2422, subd. 5, and Requiring Compliance Filing*, Docket No. E-002/ RP-04-1752, Order Establishing Resource Acquisition Process, Establishing Bidding Process Under Minn. Stat. § 216B.2422, Subd. 5 and Requiring Compliance Filing (May 31, 2006).

⁸ *Id.*, Docket No. E-002/RP-04-1752, Department reply comments (January 30, 2006).

⁹ The Administrative Law Judge in this case has authority to seek the assistance of an independent evaluator. This docket, March 5, 2013 order at 2-3.

¹⁰ Minn. Stat. § 216B.2422 subd. 5(b).

II. Ecos Energy's Filing

Ecos Energy seeks Commission authorization to submit a proposal more than two months after the date established for project submissions.

The other applicants and the Department ask the Commission to deny Ecos Energy's request. They argue that accepting a new proposal at this late date would provide Ecos Energy with an unfair advantage, because Ecos Energy would develop its proposals with the benefit of knowing what the other developers had proposed. They argue that permitting a new proposal at this date would cause delays in an already compressed process. And they argue that accepting this late-filed proposal would "open the floodgates" to other late-filed proposals from other developers, triggering still further delays.

Xcel forecasts a need for additional resources to meet customer demand starting in 2017. To provide sufficient time to site and build one or more new generators, the Commission must evaluate the parties' proposals promptly. The other applicants and the Department argue that they have already begun the process of evaluating the proposals, and adding one or more additional proposals at this late date would necessarily delay the process of selecting and building the new project.

Under the circumstances of this case, the Commission finds that granting Ecos Energy's request to submit its proposal more than two months after the deadline would unduly delay the process. Consequently the request will be denied.

III. Proposals Accepted as Substantially Complete

Having examined the record and reviewed the proposals for compliance with the requirements of the competitive resource acquisition process, the Commission finds that each proposal filed by a party is now substantially complete. Again, these parties are:

- Calpine Corporation
- Geronimo Energy, LLC
- Great River Energy
- Invenergy Thermal Development, LLC
- Northern States Power Company d/b/a Xcel Energy.

IV. Jurisdiction and Referral for Contested Case Procedures

The Commission has jurisdiction over the competitive resource acquisition process under Minn. Stat. § 216B.2422, subd. 5, as interpreted by previous orders, and over the Certificate of Need process under Minn. Stat. § 216B.243 and Minn. R. Chapters 7849 and 7829.

The Commission finds that it cannot satisfactorily resolve all questions regarding the prudence of the various competitive proposals in this docket on the basis of the current filings. The Commission will therefore refer the matter to the Office of Administrative Hearings for contested case proceedings.

V. Issues to be Addressed

The ultimate issue in this case is the identification of resource proposal or proposals that will provide the most reasonable and prudent strategy for Xcel to meet the needs of its service area. That issue depends, in turn, on numerous sub-issues that can be best developed in formal evidentiary proceedings. The parties may also raise and address other issues relevant to that determination.

As noted above, a developer of a selected project need not obtain a Certificate of Need before beginning construction. But when Xcel seeks to offer its own proposal into the competitive resource acquisition process, this process tracks the framework of the Certificate of Need process under Minn. Stat. § 216B.243.¹¹

VI. Procedural Outline

A. Administrative Law Judge

The Administrative Law Judge assigned to this case is Eric L. Lipman. His address and telephone number are as follows: Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota 55101; (651) 361-7842. The mailing address of the Office of Administrative Hearings is P.O. Box 64620, St. Paul, Minnesota 55164-0620.

B. Hearing Procedure

- *Controlling Statutes and Rules*

Hearings in this matter will be conducted in accordance with the Administrative Procedure Act, Minn. Stat. §§ 14.57-14.62; the rules of the Office of Administrative Hearings, Minn. R. 1400.5100 to 1400.8400; and, to the extent that they are not superseded by those rules, the Commission's Rules of Practice and Procedure, Minn. R. 7829.0100 to 7829.3200.

Copies of these rules and statutes may be purchased from the Print Communications Division of the Department of Administration, 660 Olive Street, St. Paul, Minnesota 55155; (651) 297-3000. These rules and statutes also appear on the State of Minnesota's website at www.revisor.mn.gov/pubs.

The Office of Administrative Hearings conducts contested case proceedings in accordance with the Minnesota Rules of Professional Conduct and the Professionalism Aspirations adopted by the Minnesota State Bar Association.

- *Right to Counsel and to Present Evidence*

In these proceedings, parties may be represented by counsel, may appear on their own behalf, or may be represented by another person of their choice, unless otherwise prohibited as the unauthorized practice of law. They have the right to present evidence, conduct cross-examination,

¹¹ *In the Matter of Northern States Power Company d/b/a/ Xcel Energy's Application for Approval of its 2004 Resource Plan, Order Establishing Resource Acquisition Process, Establishing Bidding Process Under Minn. Stat. § 216B.2422, subd. 5, and Requiring Compliance Filing*, Docket No. E-002/ RP-04-1752, Order Establishing Resource Acquisition Process, Establishing Bidding Process Under Minn. Stat. § 216B.2422, Subd. 5 and Requiring Compliance Filing (May 31, 2006).

and make written and oral argument. Under Minn. R. 1400.7000, they may obtain subpoenas to compel the attendance of witnesses and the production of documents.

Parties should bring to the hearing all documents, records, and witnesses necessary to support their positions.

- *Discovery and Informal Disposition*

Any questions regarding discovery under Minn. R. 1400.6700 to 1400.6800 or informal disposition under Minn. R. 1400.5900 should be directed to Tricia DeBleekere, Energy Facilities Planner, Minnesota Public Utilities Commission, 121 7th Place East, Suite 350, St. Paul, Minnesota 55101-2147, (651) 201-2254, by fax at (651) 297-7073, and by email at tricia.debleekere@state.mn.us; or Gary Cunningham, Assistant Attorney General, 1100 Bremer Tower, 445 Minnesota Street, St. Paul, Minnesota 55101, (651) 757-1427.

- *Protecting Not-Public Data*

State agencies are required by law to keep some data not public. Parties must advise the Administrative Law Judge if not-public data is offered into the record. They should take note that any not-public data admitted into evidence may become public unless a party objects and requests relief under Minn. Stat. § 14.60, subd. 2.

Parties that did not execute a nondisclosure agreement by June 20, 2013, may file a proposed agreement with the Administrative Law Judge, who may then issue a protective order.

- *Accommodations for Disabilities; Interpreter Services*

At the request of any individual, this agency will make accommodations to ensure that the hearing in this case is accessible. The agency will appoint a qualified interpreter if necessary. Persons must promptly notify the Administrative Law Judge if an interpreter is needed.

- *Scheduling Issues*

The times, dates, and places of public and evidentiary hearings in this matter will be set by order of the Administrative Law Judge after consultation with the Commission and intervening parties. The Commission hereby revises the timeframes set out in its orders of November 21, 2012 and March 5, 2013, and requests that the Administrative Law Judge provide a report and recommendation to the Commission by January 1, 2014.

- *Notice of Appearance*

Any party intending to appear at the hearing must file a notice of appearance (Attachment A) with the Administrative Law Judge within 20 days of the date of this Notice and Order for Hearing.

- *Sanctions for Non-compliance*

Failure to appear at a prehearing conference, a settlement conference, or the hearing, or failure to comply with any order of the Administrative Law Judge, may result in facts or issues being resolved against the party who fails to appear or comply.

C. Parties and Intervention

The current parties to this case are the applicants – Calpine, Geronimo, GRE, Invenergy, and Xcel – as well as the Department and the Environmental Intervenors. Other persons wishing to become formal parties shall promptly file petitions to intervene with the Administrative Law Judge. They shall serve copies of such petitions on all current parties and on the Commission. Minn. R. 1400.6200.

D. Prehearing Conference

A prehearing conference will be held on July 1, 2013, at 1:30 p.m., in the Large Hearing Room at the offices of the Public Utilities Commission, 121 Seventh Place East, Suite 350, St. Paul, Minnesota 55101-2147.

Parties and persons intending to intervene in the matter should participate in the conference, prepared to discuss time frames and scheduling. Other matters which may be discussed include the locations and dates of hearings, discovery procedures, settlement prospects and similar issues. Potential parties are invited to attend the pre-hearing conference and to file their petitions to intervene as soon as possible.

VII. Application of Ethics in Government Act

The Ethics in Government Act, Minn. Stat. §§ 10A.01 *et seq.*, require people qualifying as lobbyists to register and file reports. All persons appearing in this case are urged to refer to the Act and to contact the Campaign Finance and Public Disclosure Board, telephone number (651) 296-5148, with any questions.

VIII. Ex Parte Communications

Restrictions on *ex parte* communications with Commissioners and reporting requirements regarding such communications with Commission staff apply to this proceeding from the date of this Order. Those restrictions and reporting requirements are set forth at Minn. R. 7845.7300-7845.7400, which all parties are urged to consult.

IX. Environmental Report Requested

A. Environmental Report Rules

When a developer seeks to demonstrate that a new large generator is needed, Minn. R. 7849.1400 and .1500 direct the Department to prepare an Environmental Report considering alternative ways that the need might be met, and the environmental consequences of each alternative.¹² For example,

¹² Minn. R. 7849.1200.

the rules direct the Department to consider the consequences of delaying or cancelling a proposed facility (the “no-build” alternative).¹³

To reduce the chance that a relevant alternative or factor is overlooked, Minn. R. 7849.1400, subp. 1 through 6, and 7849.1500, subp. 1 and 2 list types of alternatives to be considered and environmental factors to be considered. Also, these rules provide for convening a public meeting for soliciting additional alternative proposals and environmental factors for consideration.

B. Variance

While the Department’s Energy Facilities Permitting Unit has initiated the development of an Environmental Report, it argues that the Commission’s rules do not fit the current circumstances. Unlike a typical docket assessing the need for a proposed large energy facility, here the Commission has already determined the need for new generation, and already has a list of alternative proposals. Moreover, given the desire to reach a decision in time to permit parties to build a generator by 2017, the Department argues that there is not sufficient time to organize public meetings before it begins its analysis of alternatives.

Consequently the Department recommends that the Commission vary its rules and authorize substitute procedures that are more appropriate to this proceeding. The Department does not propose weakening the analysis it would perform on the currently proposed alternatives as set forth in Minn. R. 7849.1500, subp. 2. But the Department does propose varying Minn. R. 7849.1400, subp. 1 through 6, and 7849.1500, subp. 1.B., in two ways:

First, the Department recommends restricting the scope of its environmental review to analyzing only the proposals accepted by the Commission, as well as a no-build alternative for each proposal. Second, while the Department still proposes to solicit public input regarding the environmental factors to be considered, it proposes to solicit that input via a notice and comment procedure rather than via a public meeting. No party objected to the Department’s proposal.

The Commission may vary its rules when --

- enforcement of the rule would impose an excessive burden upon the applicant or others affected by the rule;
- granting the variance would not adversely affect the public interest; and
- granting the variance would not conflict with standards imposed by law.¹⁴

Regarding the first criterion, the Commission finds that enforcement of its rules would impose an excessive burden upon the Department and, by extension, the public, because it would delay the resolution of this docket – and may impair the supply of power available to Xcel in 2017 and beyond.

¹³ Minn. R. 7849.0300.

¹⁴ Minn. R. 7829.3200.

Regarding the second criterion, the Commission finds that granting the variance would not adversely affect the public interest, but rather would promote the public interest in securing a reliable supply of electricity in a timely fashion. The Department's proposal to conduct its environmental analysis using the traditional list of environmental factors set forth at Minn. R. 7849.1500, subpart 2, and to solicit public input for additional factors, ensures that the Department will continue to conduct a rigorous analysis, and that the public will retain its opportunity to participate in this process. To further safeguard public participation, the Commission will direct that notice be provided both by sending it directly to the docket's service list, and via publication. Furthermore, the Commission will direct its Executive Secretary to review the scope of the notice.

Regarding the third criterion, because the requirements of Minn. R. 7849.1400, subp. 1 through 6, and 7849.1500, subp. 1.B., were established by rule, not by statute or otherwise, the Commission finds that varying these provisions would not conflict with standards imposed by law.

Consequently the Commission will grant the Department's request and vary Minn. R. 7849.1400, subp. 1 through 6, and 7849.1500, subp. 1.B., subject to the notice provisions set forth above.

C. Specific Proposals

Finally, the parties raised questions regarding how to conduct an environmental review of two of the proposals.

First, Geronimo proposes to build solar arrays at up to 31 distinct sites. For purposes of environmental review, the Commission asks the Department to review Geronimo's proposal cumulatively.

Second, GRE proposes to sell to Xcel a portion of GRE's existing generation capacity as accredited by the Midcontinent Independent System Operator, Inc. (MISO), the regional transmission operator regulating the transmission grid throughout Xcel's Minnesota service area. The Environmental Intervenors argue that GRE's proposal should be understood to reflect the environmental consequences of operating the generators that GRE owns or has under contract. But GRE's proposal is not tied to specific generators, and GRE proposes to provide only capacity, not energy. The Commission concludes that the Department should design its environmental review of GRE's proposal with these facts in mind.

These instructions should provide guidance to aid the Department's preparation of the Environmental Report.

ORDER

1. The Commission accepts proposals from the following parties as substantially complete:
 - Xcel Energy's Certificate of Need Application
 - Calpine Corporation
 - Invenergy Thermal Development, LLC
 - Geronimo Energy, LLC
 - Great River Energy

2. The Commission hereby refers this matter to the Office of Administrative Hearings for contested case proceedings, as set forth above.
3. Regarding the Environmental Report to be prepared by the Department of Commerce's Energy Facilities Permitting Unit, the Commission does the following:
 - A. Grants the Department's request to vary Minn. R. 7849.1400, subparts 1 through 6, and Minn. R. 7849.1500, subpart 1.B., and authorizes the Department to focus its analysis on the substantially complete alternatives, and on a no-build alternative for each of these alternatives.
 - B. Requests that the Department prepare an environmental report sufficient to meet the requirements outlined in Minn. R. Chap. 7849, as varied, for all of the substantially complete alternatives.
 - C. Requests that the Department review Geronimo's solar proposal(s) cumulatively for the up to 31 sites.
 - D. Requests that the Department treats the GRE capacity credit proposal as capacity only.
4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary



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BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
600 North Robert Street
St. Paul, Minnesota 55101

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION
121 Seventh Place East Suite 350
St. Paul, Minnesota 55101-2147

In the Matter of the Petition of Northern States MPUC Docket No. E-002/CN-12-1240
Power Company d/b/a Xcel Energy for
Approval of Competitive Resource Acquisition OAH Docket No.
Proposal and Certificate of Need

NOTICE OF APPEARANCE

Name, Address and Telephone Number of Administrative Law Judge:

Eric L. Lipman, Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota 55101;
Mailing Address: Box 64620, St. Paul, Minnesota 55164-0620; Telephone Number: (651) 361-7842.

TO THE ADMINISTRATIVE LAW JUDGE:

You are advised that the party named below will appear at the above hearing.

NAME OF PARTY:

ADDRESS:

TELEPHONE NUMBER:

PARTY'S ATTORNEY OR OTHER REPRESENTATIVE:

OFFICE ADDRESS:

TELEPHONE NUMBER:

SIGNATURE OF PARTY OR ATTORNEY: _____