STATE OF MINNESOTA
BEFORE THE
PUBLIC UTILITIES COMMISSION

Beverly J. Heydinger	Chair
Nancy Lange	Commissioner
Dan Lipschultz	Commissioner
John Tuma	Commissioner
Betsy L. Wergin	Commissioner

In the Matter of the Petition of Northern States Power Company for Approval of Cost Recovery of the Aurora PPA Pursuant to Minn. Stat. § 216B.1645

Docket No. E002/M-15-330

COMMENTS

I. INTRODUCTION

Aurora Distributed Solar, LLC ("Aurora") respectfully submits these comments to the Minnesota Public Utilities Commission ("Commission") in support of the Petition of Northern States Power Company d/b/a Xcel Energy ("Xcel's Petition") for recovery of the North Dakota portion of the costs of the Aurora Distributed Solar power purchase agreement (the "Aurora PPA").

II. PROCEDURAL HISTORY

The procedural history related to the Aurora Distributed Solar Project (the "Aurora Project") and the Aurora PPA is extensive. Relevant portions of the history are summarized here to provide context for these comments.

On March 5, 2013, in Xcel's 2011-2025 Integrated Resource Plan docket, the Commission found that Xcel demonstrated the need for an additional 150 MW of capacity by

2017, increasing up to 500 MW by 2019.[1] Subsequently, the Commission solicited proposals to meet some or all of Xcel's needs.[2]

On April 15, 2013, the Commission received competitive resource proposals from five bidders, including Calpine Corporation ("Calpine"), Geronimo Wind Energy, LLC d/b/a Geronimo Energy ("Geronimo"), Great River Energy ("GRE"), Invenergy Thermal Development, LLC ("Invenergy") and Xcel. The competitive resource proposals consisted of multiple proposals: four non-renewable resource proposals from Calpine, GRE, Invenergy, and Xcel, and one renewable resource solar proposal from Geronimo.

On March 25 and 27, 2014, the Commission met to consider the matter, and on May 23, 2014, the Commission issued its Order. The Commission found as follows:

- Geronimo's proposal provides an appropriate choice for meeting a portion of Xcel's reliability and adequacy needs, and to fulfill the state's energy policies; and
- Calpine's proposal, Invenergy's Cannon Falls proposal, and Xcel's Black Dog proposal may also provide appropriate choices for Xcel to meet a portion of its reliability and adequacy needs and to fulfill the state's policies.

Accordingly, the Commission ordered, in relevant part, as follows:

- Xcel shall negotiate a draft power purchase agreement with Geronimo and submit the agreement for Commission review to ensure that the negotiated terms are consistent with the public interest.
- Xcel shall negotiate draft power purchase agreements with Calpine and Invenergy and shall develop price terms for Black Dog Unit 6. Xcel shall then submit the agreements for Commission review to determine which project(s), if any, best addresses Xcel's overall system needs identified in this record.
- Calpine, Geronimo, Invenergy, and Xcel shall be held to the prices and terms used to evaluate each bid. If actual costs are lower than the bid, the bidders are allowed to keep those savings.

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[1] *See* Docket No. E-002/RP-10-825.

[2] *See* Docket No. E-002/CN-12-1240.

On September 23, 2014, Xcel submitted a compliance filing that included an updated resource need assessment; draft PPAs with Calpine, Invenergy and Geronimo; and Xcel's Black Dog Unit 6 pricing. Xcel's compliance filing did not request approval of the Aurora PPA, as Aurora had anticipated based on the Commission's May 23, 2014 Order. Similarly, Xcel's filing did not include the cost recovery approval language typically included as part of a request for PPA approval.

In response, on October 23, 2014, Geronimo filed comments seeking approval for the Aurora PPA, as consistent with the public interest, and asked the Commission to approve cost recovery for Xcel such that the condition precedent in Section 6.1 of the Aurora PPA would be satisfied. As articulated in Aurora's October and December comments, cost recovery approval was a critical element to provide Aurora with the contractual certainty it needed to continue to advance the Project, particularly given the time pressures imposed by the expiring federal investment tax credit ("ITC") and the regulatory hurdles expected in North Dakota.[3]

On February 5, 2015, the Commission issued an Order Approving Power Purchase Agreement with Calpine, Approving Power Purchase Agreement with Geronimo and Approving Pricing Terms with Xcel in Docket Nos. E-002/CN-12-1240 and E-002/M-14-788 (the "PPA Order"). In relevant part, the Commission affirmed its selection of the Geronimo proposal, finding that the Geronimo proposal "fits squarely within the criteria of Xcel's request for proposal and deserves to be considered alongside other proposals" in the present docket.[4] In addition, the Commission found that the terms of the Aurora PPA, as revised during the

[3] Geronimo Energy's Comments and Request for Approval of and Cost Recovery for the Aurora PPA, *In the Matter of the Petition of Northern States Power Company d/b/a Xcel Energy for Approval of Competitive Resource Acquisition Proposal*, Docket No. E-002/CN-12-1240, and *In the Matter of a Draft Power Purchase Agreement with Geronimo Wind Energy, LLC d/b/a Geronimo Energy*, Docket No. E-002/M-14-788 (October 23, 2014).

[4] PPA Order at 17.

proceedings, "promote the interest of Minnesota ratepayers by enhancing the likelihood that Xcel will recover the cost of the Geronimo project from ratepayers through Xcel's operations, and from the tax credit."[5] The Commission also found that the Aurora PPA is consistent with Geronimo's initial proposal, does not put ratepayers at undue risk, and is consistent with the public interest.[6] The Commission then ordered Xcel to execute the Aurora PPA within 10 days of the PPA Order.[7]

On the issue of cost recovery, the PPA Order discussed the parties' positions on the issue, but the Commission was silent with respect to Geronimo's cost recovery request.[8] Staff Briefing Papers leading up to the PPA Order noted that "In the present case---if [the Company] did not receive approval of recovery in other states and could demonstrate this to the Commission in a manner similar to its June 6, 2011 Order, the Commission would then be in a better position to support a finding to reallocate 100% of the costs to Minnesota ratepayers."[9]

On February 13, 2015, Xcel filed with the North Dakota Public Service Commission ("NDPSC") a request for an advanced determination of prudence ("ADP") for the Aurora PPA and recovery of the North Dakota portion of the associated costs.[10]

On April 3, 2015, Xcel filed its Petition for Aurora PPA Cost Recovery in the present docket, asking the Commission to determine that the Aurora PPA is a reasonable and prudent

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[5] PPA Order at 19.

[6] PPA Order at 19.

[7] PPA Order at 24.

[8] PPA Order at 11.

[9] Staff Briefing Papers, Docket Nos. E002/CN-12-1240, M-14-788, M-14-789 (December 1, 2014), at 27.

[10] NDPSC Case No. PU 15-095.

approach to meeting its obligations under Minnesota's Solar Energy Standard as provided in Minn. Stat. §216B.1645, and that the Commission approve its Minnesota-jurisdictional costs incurred under the PPA. Xcel sought to recover the costs incurred over the duration of the approved contract through a rate schedule using an automatic adjustment of the charges. The Minnesota portion will be recovered through the fuel clause adjustment mechanism of Xcel's Minnesota Electric Rate Book once the facilities begin to produce power. Xcel's Minnesota fuel clause revenues and expenses will increase by the amount of purchases delivered under the Aurora PPA.

On May 4, 2015, Aurora filed comments asking the Commission to approve Xcel's petition for cost recovery, again stressing that it was a critical step to ensuring the Aurora PPA is fully enforceable and financeable. Section 6.1 of the Aurora PPA contains a condition precedent whereby either Xcel or Aurora can terminate the PPA if the Commission and the NDPSC, either separately or in the aggregate, have not approved recovery of all costs incurred under the Aurora PPA. Aurora stated that the ongoing existence of the termination right continued to present financing risk to Aurora, as Aurora had already made significant financial commitments, and had to continue to do so, to keep the Project on track to meet the December 2016 in-service date requirements of the expiring ITC.

On August 20, 2015, the Commission issued its Order Approving Power Purchase Agreement Under Minn. Stat. 216B.1645, subd. 1, Authorizing Cost Recovery Under Minn. Stat. 216B.1645, subd. 2, and Requiring Compliance Filing (the "MN Cost Recovery Order"). The MN Cost Recovery Order stated:

> It is clear that the Aurora project is a reasonable and prudent part of Xcel's plan to meet its obligations under the solar energy standard. While that standard was not the driving force behind the contract, the contract fits squarely within the statutory parameters of the standard and will help satisfy the standard.

> The fact that this solar-generation project prevailed in a competitive bidding proceeding does not disqualify it from approval under Minn. Stat. § 216B.1645, subd. 1; the statute does not require that projects be uneconomic to qualify for approval. Nor does the statute require that the utility's only motive in acquiring the qualifying resource be to satisfy the renewable energy standard. Nor does it require a utility to demonstrate need beyond its intention to use the resource to meet the renewable energy standard.[11]

On September 16, 2015, the NDPSC declined to issue an ADP for the Aurora Project, concluding that it was not a prudent resource addition. In its Findings of Fact, Conclusions of Law and Order, the NDPSC stated that Xcel brought forward "the [Aurora] PPA to meet Minnesota requirements and it is not the least-cost project" under North Dakota's resource planning criteria. Further, the NDPSC noted that its staff recommended that the "costs and benefits of the [Aurora] PPA should not be allocated to the North Dakota jurisdiction."[12]

On October 20, 2015, Xcel filed its Petition with the Commission seeking to recover the North Dakota-jurisdictional costs related to the Aurora PPA from Minnesota ratepayers. A Notice of Comment Period followed on October 27, 2015.

III. COMMENTS

Minnesota law allows Commission approval of the North Dakota-jurisdictional costs related to the Aurora PPA and recovery of the utility's costs from ratepayers pursuant to Minn. Stat. 216B.1645, subd. 2. Further, the unique benefits of the Aurora Project and the long, thorough administrative record and procedural history of this case also support approval of Xcel's Petition.

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[11] *Id.*, at 3.

[12] NDPSC Case No. PU-15-095 Order (Sept. 16, 2015) at 3.

A. Minnesota Law Supports Approval of Xcel's Petition.

Minn. Stat.§ 216B.1645, subd. 2 provides, in relevant part, that:

> The expenses incurred by the utility over the duration of the approved contract…shall be recoverable from the ratepayers of the utility, to the extent they are not offset by utility revenues attributable to the contracts, investments, or expenditures. Upon petition by a public utility, the commission shall approve or approve as modified a rate schedule providing for the automatic adjustment of charges to recover the expenses or costs approved by the commission under subdivision 1...The commission may not approve recovery of the costs for that portion of the power generated from sources governed by this section that the utility sells into the wholesale market.

While traditionally multi-state jurisdictional allocations have been utilized, the statute does not require it. Just as the Commission did in the case of the legislatively-mandated Renewable Development Fund ("RDF") allocation, the Commission has discretion, where appropriate, to allocate costs to Minnesota ratepayers that would have otherwise been borne by North Dakota ratepayers, particularly when, as here, the measure fulfills Minnesota statutory and policy objectives and there is unique benefit to Minnesota ratepayers in doing so.[13]

There are numerous similarities between the Commission's decision to allow recovery of the RDF Rate Rider from Minnesota ratepayers and the present Aurora PPA cost recovery decision. Like the RDF Rate Rider, the costs of the Aurora PPA have a unique connection to Minnesota. The Aurora PPA was selected as a reasonable and prudent resource during the Commission's required competitive resource acquisition process. While the Aurora Project was selected for several reasons, it was clear throughout the proceeding that the Project met numerous Minnesota energy policy requirements, as a solar energy resource, a distributed energy resource, and a low-carbon resource. Here, if the Commission approves Xcel's Petition, the

[13] Order After Reconsideration Modifying March 17, 2011 Order and Reallocating Expenses, *In the Matter of a Petition by Northern States Power d/b/a Xcel Energy for Approval of a 2011 Renewable Development Fund Rate Rider Factor,* Docket No. E-002/M-10-1054 (June 6, 2011) (the "RDF Rate Rider").

Solar Renewable Energy Credits ("S-RECs") otherwise allocated to North Dakota will be retained by Minnesota. This will assist with meeting Minnesota's Solar Energy Standards and goals, as well as it carbon reduction goals. If the Commission denies Xcel's Petition, Aurora will instead retain the S-RECs. In addition, like the RDF Rate Rider, denying Xcel's Petition would create troubling precedent that would make it more difficult, and expensive, for renewable energy developers to develop and build projects in Minnesota due to the uncertainty created and risks of PPA termination. Both utilities and developers face significant challenges if a utility's reasonable and prudent costs related to a resource selected by the Commission through a competitive resource acquisition process are ultimately denied recovery.

The Commission's *Notice* requested comments on the final sentence under Minn. Stat. § 216B.1645, subd. 2, which reads: "[t]he Commission may not approve recovery of the costs for that portion of the power generated from sources governed by this section that the utility sells into the wholesale market." This sentence has no applicability in this case. None of the power purchased by Xcel under the Aurora PPA will be sold into the wholesale market. Aurora's sale of energy to Xcel is a wholesale transaction, but the power is being delivered via the distribution system to serve Xcel's retail customers. Therefore, this sentence from the *Notice* is not applicable to the Commission's consideration of Xcel's Petition.

B. An Extensive Record Supports Approval of Xcel's Petition in this Case.

Approval of recovery of the costs otherwise allocated to North Dakota is well-supported based on the lengthy record in this proceeding and is consistent with other Commission decisions.

The Commission carefully deliberated its initial resource selection before approving the Aurora Project as a reasonable and prudent approach to meeting Xcel's need for additional

capacity resources.[14] It then made separate findings that the terms of the PPA were reasonable and consistent with the bidding process.[15] Then, the Commission found that costs of the Aurora PPA were recoverable under Minn. Stat. § 216B.1645, subd. 1, and approved cost recovery of the Minnesota-jurisdictional costs of the Aurora PPA through Xcel's fuel clause rider under Minn. Stat. 216B.1645, subd. 2.[16] Each of those Orders is well-supported by the Commission's administrative record.

The issue now before the Commission is whether Xcel should also be allowed to recover the North Dakota-jurisdictional costs from Minnesota ratepayers. The issue of cost recovery for the Aurora PPA should come as no surprise to the Commission, since Aurora flagged the issue in its initial comments on Xcel's compliance filing related to the Aurora PPA in October 2014 and, since that time, Aurora has regularly kept the Commission informed of the potential cost recovery issues in North Dakota.

Following the Commission's earlier deferral of this issue, Aurora understood that it was necessary for Xcel to seek cost recovery in North Dakota before presenting this request to the Commission.[17] Xcel has now taken this step, and cost recovery in North Dakota has been denied.

Since the time of the Commission's initial selection as part of the competitive bidding process, Aurora has incurred millions of dollars in expenses to preserve its regulatory positions, meet its contractual obligations, and keep the Project on track. Aurora obtained its site permit

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[14] PPA Order at 23.

[15] PPA Order at 23.

[16] PPA Order at 23.

[17] Staff Briefing Papers, Docket No. E-002/M-14-788 (December 1, 2014).

from the Commission, completed financing, and acquired equipment and is currently in the process of commencing construction on several sites in order to bring the Project into service by the end of 2016 in order to qualify for the ITC.

Unfortunately, in August of this year, Aurora found itself in a very precarious position. North Dakota denied Xcel's ADP request, triggering the real possibility that Xcel would terminate the PPA under Section 6.1. Aurora and Xcel discussed possible solutions and the Commission's prior cost recovery orders. Negotiation and execution of the side letter (filed as Exhibit A to Xcel's Petition) was the only agreeable solution and is another example of the extraordinary steps Aurora has had to take to preserve its contractual and regulatory positions and preserve the Project's value to Minnesota ratepayers. Without the side letter, Aurora had no assurance that Xcel would not exercise its termination rights under Section 6.1 of the Aurora PPA. In addition, without the side letter and a valid PPA, Aurora had no mechanism to recover the millions of dollars it has spent to fulfill its obligations under the Aurora PPA.

Xcel is correct to note that such a letter is an extraordinary step by a developer and one the Commission is unlikely to see again. Aurora urges the Commission to view the side letter, not as a reason to deny recovery, but as evidence of Aurora's ongoing good-faith effort to fulfill its contractual obligations and build the Project by the end of 2016. Aurora executed the side letter because, without it, Aurora could not complete financing over Xcel's looming termination right, and missing the financing deadline would have meant that equipment could not have been ordered in time to facilitate an end of 2016 in-service date. Minnesota law and Commission precedent strongly favor cost recovery approval of the North Dakota-jurisdictional costs, but Aurora needed to find a commercial solution to allow enough time for the matter to come before the Commission.

The Commission set clear expectations that all parties were to be held to the terms of the initial competitive bids, particularly price terms submitted in 2013. Aurora expects that the Commission, too, will honor the initial price terms submitted by the parties and approved by the Commission. Aurora's initial bid did not contemplate that, as a bidder, it would bear the costs of Xcel's regulatory disallowances; and the issues of cost recovery, particularly in other states, are completely outside Aurora's control. Aurora has made this position very clear throughout the course of these proceedings.

The Commission must also consider the procedural precedent that would be created if it denies Xcel's Petition. The competitive resource acquisition process is unique to Minnesota. It requires bidders to undertake the remarkable and difficult steps of participating in a lengthy, expensive regulatory process, to share sensitive business information with its competitors, and to risk protracted contractual negotiations with a utility that is also competing against the developer. As Aurora and other bidders have outlined, this is already a high hurdle for participation. If the Commission were to layer on top of that hurdle the risk that portions of the reasonable and prudent expenses approved through this process may be denied rate recovery and be borne by either the utility or the developer, again the Commission would be creating an untenable risk that could eliminate further developer participation in future proceedings. Here, the Commission should be mindful of its expectation that all parties were to be held accountable to the bid terms, and, consistent with that expectation, the Commission should not shift new, unanticipated costs to the utility or developer.

IV. CONCLUSION

Aurora respectfully requests that the Commission approve Xcel's request for approval of the North Dakota portion of the costs of the Aurora PPA in recognition of the benefits of the

Project to Minnesota ratepayers and the unique procedural history of this case. Here, the facts, procedural history, and law strongly support approval.

Dated: December 4, 2015

Respectfully submitted,

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