

Staff Briefing Papers

Meeting Date December 19, 2019 Agenda Item 8**

Company Minnesota Power, Otter Tail Power, Xcel Energy

Docket No. **E999/PR-19-9**

In the Matter of Trade Secret Designation of 2019 Cogeneration and Small Power Production Reports

Issues What, if any, of the trade secret designated information in Minnesota Power, Otter Tail Power, and Xcel Energy’s Annual Cogeneration and Small Power Production reports should be filed as public?

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 **Relevant Documents**

Date

Minnesota Power, Compliance Filing	Sept. 10, 2019
Otter Tail Power, Compliance Filing	Sept. 10, 2019
Xcel Energy, Compliance Filing	Sept. 10, 2019
Department of Commerce – Division of Energy Resources, Initial	Sept. 30, 2019
Minnesota Power, Initial	Oct. 14, 2019
Otter Tail Power, Initial	Oct. 14, 2019
Xcel Energy, Initial	Oct. 14, 2019

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The attached materials are work papers of the Commission Staff. They are intended for use by the Public Utilities Commission and are based upon information already in the record unless noted otherwise.

✓ Relevant Documents

	Date
Environmental Law & Policy Center and Institute for Local Self-Reliance, Initial	Oct. 14, 2019
Department of Commerce-Division of Energy Resources, Reply	Oct. 24, 2019
Minnesota Power, Reply	Oct. 24, 2019
Otter Tail Power, Reply	Oct. 24, 2019
Xcel Energy, Reply	Oct. 24, 2019
Environmental Law & Policy Center and Institute for Local Self-Reliance, Reply	Oct. 24, 2019

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I. Statement of the Issues

What, if any, of the trade secret designated information in Minnesota Power, Otter Tail Power, and Xcel Energy's Annual Cogeneration and Small Power Production reports (Annual Filings) should be filed as public?

II. Background

At the August 22, 2019 Agenda Meeting, the Commission requested a supplemental comment period in the current docket to address the following:

- a. Minnesota Power, Otter Tail Power, and Xcel Energy revised 2019 annual cogeneration and small power production filings (Annual Filings) with the data each utility has proposed to make public and the rationale for these changes to trade secret designation **(Utility Compliance Filings)**
- b. Further explanation of how the specific information claimed to be trade secret does or does not qualify as trade secret under the Data Practices Act, Minnesota Statute Chapter 13 **(Specific Trade Secret Designations)**
- c. Any specific, trade secret-designated information required by Minnesota rules under part 7835.0500 (Schedule A); part 7835.0600 (Schedule B); and part 7835.1000 (Schedule G) not required by PURPA **(Minn. Rules' Requirements Compared to PURPA)**
- d. Further discussion of the 'public inspection' requirement under PURPA and Minn. Rules 7835.1200 and whether that can be satisfied by granting developers interested in providing generation as qualifying facilities (QFs), and their consultants and advisors access to the data required by the rules under a Commission-approved nondisclosure agreement. **(Public Inspection and Non-Disclosure Agreements)**

On August 30, 2019, the Commission issued a Supplemental Notice of Comment on the topics identified at the August 22, 2019 Agenda Meeting.

On September 10, 2019, Minnesota Power, Otter Tail Power and Xcel Energy provided compliance filings revising previously Trade Secret designated data each utility would make public in the 2019 and future annual cogeneration and small power production filings.

By October 14, 2019, Department of Commerce ("Department"), Environmental Law and Policy Center and Institute for Local Self Reliance ("Joint Commenters"), Minnesota Power, Otter Tail Power, Xcel Energy filed supplemental initial comments.

By October 24, 2019, the same parties filed supplemental reply comments.

In January of each year, utilities file their annual cogeneration and small power production reports in the -9 docket; including filing requirements outlined in Minn. Rules Chapter 7835 which result in annual updates to compensation rates for qualifying distributed generation facilities.

III. Parties' Supplemental Comments

The parties largely maintain their positions and legal arguments as outlined in the initial round of comments.¹ The Department and Utilities maintain the trade secret designations, as revised in the compliance filings, are appropriate. Trade secret designations protect third party agreements; as well as, the utility and its customers from higher costs from potential abuse in resource bids and competition in the wholesale market if the information was publicly available. These parties cite Minn. Stat. Ch. 13 (Data Practices Act) and the federal Defend Trade Secrets Act in support of their claims.

Alternatively, the Joint Commenters maintain all of the information in the Annual Filings is required to be public. The utilities have not adequately demonstrated how the information under dispute would undermine resource bidding or wholesale market competition, and the public should have the opportunity to make a judgment to the reasonableness and understand the avoided cost information underlying possible compensation as sellers of energy. These parties cite Minn. Rule 7835.1200 and PURPA to defend their claims.

The information under dispute pertains to a utility's avoided costs associated with: 1) estimated system average incremental energy; and 2) capacity for planned generating unit additions or firm capacity purchases into the future. Utilities present this information in Annual Filings to the Commission under Schedules A (5 years of estimated marginal energy costs) and B (10 years of planned capacity costs), and show all computations in Schedule G. The details of what to include in these Schedules are outlined in Minn. Rules. Ch. 7835.²

These supplemental briefing papers will not repeat arguments from the initial comment period reoffered by parties in supplemental comments.

A. Utility Compliance Filings

As requested, the three utilities filed revised 2019 Annual Filings offering some previously trade secret designated information as public. Staff summarizes the status of designated data in the Utilities' revised Annual Filings:

Table 1 Utility's Revised Designations

	<u>Minnesota Power</u>	<u>Otter Tail Power</u>	<u>Xcel Energy</u>
Schedule A (Estimated Marginal Energy Costs (\$/MWh))	Current year's costs are now public. Years 2-5 costs remain designated trade secret.		
Schedule B; Subp. 2, Items A – D, (Unit name, nameplate rating, fuel type, in-service date)	Public	Trade secret	Public

¹ See Staff Briefing Papers (Aug 22, 2019) for the summary of initial comments. Staff cites the papers throughout these papers when the parties re-offered arguments in the supplemental round of comments.

² Minn. Rule 7835.0500 (Schedule A); Minn. Rule 7835.0600 (Schedule B); and Minn. Rule 7835.1000 (Schedule G)

	<u>Minnesota Power</u>	<u>Otter Tail Power</u>	<u>Xcel Energy</u>
Schedule B, Subp. 2, Items E-H (Planned utility generating facility additions)	Trade secret	Trade secret	Trade secret
Schedule B; Subp. 2, Item I (Average annual fuel savings)	Trade secret	Trade secret	N/A
Schedule B; Subp. 3 (Planned firm capacity purchases)	N/A	Trade secret	N/A
Schedule B; Subp. 4 (line losses)	Public	Now Public	Public
Schedule B; Subp. 5 (Net annual avoided capacity cost (\$/kWh). Calculation in Schedule G.	Net annual avoided capacity cost averaged for both on-peak and all hours is now public.(Calculation and some inputs remain trade secret) ³	Unclear. In Response, the hours not the costs are publicly provided. ⁴	Net annual avoided capacity cost averaged for both on-peak and all hours is now public. Some of the calculation is now public. (Some of the calculation and inputs remain trade secret.)

Minnesota Power's compliance filing did not summarize the changes; however, staff highlights the previously designated trade secret information which was made public:

- 1) Schedule A – current year's estimated marginal energy costs (\$/MWh) and annual number of hours for the current and forecasted year
- 2) Schedule B; Subp. 5 net annual avoided costs (\$/kWh) averaged for on-peak hours and over all hours
- 3) Schedule G; Items H and I: result of calculations for net annual avoided costs (\$/kWh) averaged for on-peak hours and over all hours

Otter Tail Power explains they have made the following, previously trade secret-designated data public in the revised filing⁵:

- 1) Schedule A – current year's estimated marginal energy costs (\$/MWh) and annual number of hours for the current and forecasted year.
- 2) Schedule B – overall average percentage of line losses (Subp. 4).⁶

Otter Tail Power maintains the remainder of their annual filing is trade secret information as defined in the Data Practices Act at Minn. Stat. 13.37; Subd.1(b).

³ Minnesota Power Compliance Filing (Sept. 10, 2019), Schedule G, pp. 7-8.

⁴ OTP Compliance Filing (Sept 10, 2019), Schedule B, Subp. 5. Staff notes the filing includes new public information on the number of peak and all hours in a year; rather than, the net annual avoided costs averaged for both the on-peak hours and over all hours, pdf pg. 5

⁵ OTP Compliance Filing (Sept 10, 2019, pp. 1-2

⁶ See footnote 2.

Xcel Energy provided code keys⁷ designating the rationale for making public some of the information in the filing that was previously designated as trade secret; as well as, maintaining trade secret designation (code key E) for O&M inputs in the calculation of net annual avoided capacity costs:

Code Rationale

- (A) Publicly available data (Tariffed Rate).
- (B) Can be calculated or approximated using publicly available data.
- (C) This type of data is publicly available in other dockets.
- (D) Weighted After-tax Cost of Capital from Rate Case (Docket No. E002/GR-15-826).
- (E) Actual unit cost, proprietary due to competition risk.

Staff highlights the areas of Xcel Energy’s revised filing where previously designated trade secret information was made public using the Code Keys identified by the Company:

Table 2 Xcel Energy Rationale for Designations in Revised Annual Filing

Xcel Revised Annual Filing	Code Key
Schedule A – current year’s estimated marginal energy costs (\$/MWh)	A,B
Schedule G – marginal energy costs	B
Schedule G – adjusted marginal energy costs	A,B
Schedule G – some inputs used to calculate net annual avoided capacity costs	B,C,D,E

B. Specific Trade Secret Designations

The utilities repeated or referred to the explanations for trade secret designation of information in the Annual Filings previously provided.⁸ Xcel Energy expands on previous trade secret designation rationale tied to the definition in Minn. Stat. 13.37; Subp.1(b) by noting cost and related information on specific operating plants (in Schedule B and/or G) and the forward-looking estimated marginal energy costs in Schedule A are based on third-party protected information.⁹

The Department agrees with the Utilities’ trade secret designations summarizing¹⁰:

The record as a whole demonstrates how and why knowledge of the designated trade secret information could harm ratepayers and the utility: bidders and suppliers could use the information designated trade secret to offer bids that are higher than they may otherwise have offered had they not possessed the trade secret information.

⁷ Xcel Energy Compliance Filing (Sept 10, 2019), Att. A, p. 1

⁸ Staff Briefing Papers (Aug 22, 2019) at pp. 7-9

⁹ Xcel Energy Compliance Filing (Sept 10, 2019), p. 2

¹⁰ Department Supplemental Reply, p. 3

The Joint Commenters and Utilities re-offered legal arguments from the last round of comments in defense of their preferred designation of the information.¹¹ Additionally, Otter Tail Power argues FERC “... has not recognized the need for, and has explicitly rejected, either additional or less restrictive confidentiality protection procedures specifically for [qualifying facility] QF applications and related PURPA-required data.” Otter Tail Power cites FERC Order at Paragraph 61¹²:

While the party requesting privileged treatment must support that claim, none of the material for which confidential treatment is requested will be disclosed unless pursuant to a confidentiality agreement, a protective order, or a finding that material does not warrant confidential treatment.

Joint Commenters counter the FERC order has no bearing, and highlights the “party” referred to in Otter Tail Power’s citation is the QF not the utility and “confidential treatment” is FERC’s existing confidentiality rules.

C. Minn. Rules’ Requirements Compared to PURPA

Joint Commenters provide a table of what information required by Minnesota rules is also required by PURPA’s federal rule and notes the remainder of the Minn. Rules are “... not expressly required by PURPA’s public inspection regulation”¹³:

Table 3 Joint Commenters’ Comparison of Minn. Rules and PURPA

Minn. Rule	Minn. Rule Language	Equivalent Fed. Rule	Fed. Rule language
7835.0500	Schedule A must contain the estimated system average incremental energy costs by seasonal peak and off-peak periods for each of the next five years.	18 C.F.R. § 292.302(b) (1)	The estimated avoided cost on the electric utility’s system, solely with respect to the energy component... The avoided costs shall be stated on a cents per kilowatt-hour basis, during daily and seasonal peak and off-peak periods, by year, for the current calendar year and each of the next 5 years
7835.0600, Subp. 2(E)	Schedule B must contain a description of all planned utility generating facility additions anticipated during the next ten years, including: ...	18 C.F.R. § 292.302(b) (2)-(3)	(2) The electric utility’s plan... for purchases of firm energy and capacity... for each year during the succeeding 10 years... (3) The estimated capacity costs at completion of the planned capacity additions and planned capacity firm

¹¹ Staff Briefing Papers (Aug. 22, 2019), pp. 11-12

¹² Otter Tail Power Supplemental Initial, p. 7

¹³ ELPC & ILSR Supplemental Initial, pp. 2-4. Staff altered the table to make it more concise.

Minn. Rule	Minn. Rule Language	Equivalent Fed. Rule	Fed. Rule language
	E. anticipated completed cost in dollars per kilowatt in the year in which the plant is expected to be put in service, including allowance for funds used during construction		purchases, on the basis of dollars per kilowatt, and the associated energy costs of each unit, expressed in cents per kilowatt hour. These costs shall be expressed in terms... of individual planned firm purchases.
7835.0600, Subp. 2(F)	... F. anticipated average annual fixed operating and maintenance costs in dollars per kilowatt	18 C.F.R. § 292.302(b) (2)-(3)	Same as above.
7835.0600, Subp. 2(G)	... G. energy costs associated with the unit, including fuel costs and variable operating and maintenance costs	18 C.F.R. § 292.302(b) (2)-(3)	Same as above.
7835.0600, Subp. 3(D)	... D. capacity cost in dollars per kilowatt	18 C.F.R. § 292.302(b) (2)-(3)	Same as above.
7835.0600, Subp. 3(E)	... E. associated energy cost in cents per kilowatt-hour	18 C.F.R. § 292.302(b) (2)-(3)	Same as above.

Xcel Energy highlights the Joint Commenters' table correlates some, but not all, of Schedules A and B in Minn. Rules to the federal PURPA rule, but does not tie Schedule G in Minn. Rules to the federal PURPA rule.¹⁴ The Department notes¹⁵:

... [N]one of the parties explicitly answered the question of what, if any, additional information is required by Minnesota Rules, but not PURPA.

Joint Commenters argue, if different, Minnesota's annual filing requirements would be in addition to - not a replacement for - the filing available for public inspection required¹⁶:

In the event the Commission determines that Minnesota rules require different information than 18 C.F.R. § 292.302(b), the Commission should require the utilities to file, on a biannual basis, the information required by 18 C.F.R. § 292.302(b).

¹⁴ Xcel Energy Supplemental Reply, p. 4

¹⁵ Department Supplemental Reply, p. 4

¹⁶ Joint Commenters Supplemental Initial, pp. 6-7

The utilities oppose a new biannual filing. Otter Tail Power and Xcel Energy argue the Joint Commenters did not provide any clear or tangible public interest benefits to such a filing.¹⁷ Further, the utilities argue the federal rule that applies is not 18 CFR 292.302(b), as the Joint Commenters' claim; but rather, 18 CFR 292.302(d) which allows the Commission to establish an alternative method for calculating PURPA's avoided costs with no specific filing requirement.¹⁸ Parties exchange comments on the requirements of 18 CFR 292.302(d), and what remains is whether or not the Commission notified FERC of an election to substitute the alternative method under 18 CFR 292.302(d) for the avoided cost filing requirements under 18 CFR 292.302(b) in 1983 or subsequently. Utilities argue this is irrelevant because PURPA only makes the Commission's notice of comment, not the notice to FERC, a condition of the state's authority under the "substitution of alternate method."¹⁹

Staff Analysis

Staff finds no evidence in the Commission's March 7, 1983 Order Adopting Rules or the earlier Statement of Need and Reasonableness (SONAR)²⁰ to suggest the Commission intended to develop an alternative method to PURPA's avoided costs; rather, the SONAR has analysis of how the rules align with PURPA, Minn. Stat. 216B.164, and the record established in the docket. Neither the Order nor the SONAR reference the alternative method allowed under 18 CFR 292.302(d). That said, as the Department notes, none of the parties explicitly claim that the information required in Minn. Rules. Ch. 7835 is additional to that required under PURPA. Further, the Joint Commenters' suggestion for a separate, public biannual filing only applies if the information required under Minn. Rules and PURPA differ.

D. Public Inspection and Non-Disclosure Agreements

The following Minn. Rule applies to the Annual Filings:

7835.1200 AVAILABILITY OF FILINGS.

All filings required by parts [7835.0300](#) to [7835.1100](#) must be filed in the commission's electronic filing system and be maintained at the utility's general office and any other offices of the utility where rate case filings are kept. These filings must be available for public inspection at the commission and at the utility offices during normal business hours.

¹⁷ Otter Tail Power Supplemental Reply, p. 4; Xcel Energy Supplemental Reply, p. 8

¹⁸ Xcel Energy Supplemental Reply, p. 4; Minnesota Power Supplemental Reply, p. 2; Otter Tail Power Supplemental Initial, p. 6

¹⁹ Xcel Energy Supplemental Reply, pp. 8-9 citing 18 CFR 292.302(d)(1-2) and cite FERC's description of the intent "... to permit a State regulatory authority or nonregulated utility to adopt a substitute method for the provision of system cost data without prior Commission approval." (45 FR 12232, February 25, 1980)

²⁰ Docket No. E999/R-80-560. According to the March 7, 1983 Order, the MN PUC filed the SONAR with the hearing examiner on August 12, 1982; however, the document (Document ID# [370596](#)) has an e-docket's received date of 12/30/1950 and no date on scanned document.

Joint Commenters claim the Commission interpreting the “plain language” in Minn. Rules 7835.1200 to require a non-disclosure agreement (NDA) would constitute impermissible rulemaking.²¹ Xcel takes issue with both the Joint Commenters’ interpretation of Minn. Rule 7835.1200 as requiring all information in the filings to be made public and the position that anything else would require rulemaking. Xcel outlines a possible rationale for varying Minn. Rule 7835.1200 if the Commission chooses.²²

No party advocates for the use of an NDA; however, all parties responded to the Commission’s request for comment on the issue. The Joint Commenters suggest the Commission require the following if a NDA is required²³:

1. Standardized NDA for all utilities;
2. NDA available on utility website and by request;
3. Utility generic email address or online form for interested parties to submit a signed NDA; and,
4. No restriction on who has access to the NDA and annual filings.

The utilities argue, if the Commission proceeds with a standardized NDA, flexibility is needed to allow language to be added or removed as appropriate in a particular situation.²⁴ Xcel Energy notes the NDA would need to acknowledge and protect third-party information. Otter Tail notes the process for requesting a NDA should include protections to ensure the information will not be misused.²⁵ To that end, Xcel Energy suggests the following restriction²⁶:

No such employee [or consultant or advisor] who has access to this data for a period of five years should be able to 1.) prepare or assist in preparing a bid on a RFP issued by the Company, 2.) selling or assist in selling directly into the MISO market, or 3.) engage or assist in engaging in market trading of energy or capacity.

The Department does not oppose the use of a Commission-approved NDA, but suggests it may need to be utility specific. Further the Department recommends Xcel Energy address why the appropriate timeframe for the proposed non-compete language is five years and how such a restriction would be enforced; including by whom.²⁷ Joint Commenters argue the effect of such restriction is no one who could potentially develop a qualifying facility can access the information.²⁸

²¹ Joint Commenters Supplemental Initial, p. 5

²² Xcel Energy Supplemental Reply, p. 7 and these briefing papers at 11.

²³ Joint Commenters Supplemental Initial, pp. 7-8

²⁴ Minnesota Power Supplemental Reply, p. 4; Otter Tail Power Supplemental Reply, p. 5; Xcel Energy Supplemental Reply, p. 10

²⁵ IBID

²⁶ Xcel Energy Supplemental Initial, p. 3

²⁷ Department Supplemental Reply, p. 6

²⁸ Joint Commenters Supplemental Reply, p. 3

IV. Staff Analysis

Specific Trade Secret and Public Designations

Minn. Stat. 216B.164, implementing PURPA and underlying Minn. Rules 7835 states, in part:

Subd. 1. Scope and Purpose

This section shall at all times be construed in accordance with its intent to give the maximum possible encouragement to cogeneration and small power production consistent with protection of the ratepayers and the public.

The statute highlights the public interest considerations for the Commission: maximum possible encouragement to cogeneration and small power production consistent with protection of the ratepayers and the public. The Commission should use its core expertise as an economic regulator to determine whether the Utilities' arguments as to harm prevail or the Joint Commenters' arguments for public access is more persuasive for the public interest.

Staff outlines the options from the record for the Commission:

- 1) Continue requiring the filings to be public, but allow specific information within the filings to be designated trade secret subject to the Minnesota Government Data Practices Act. (**Decision Option 1**)
- 2) Clarify additional or all information required in the filings to be made public (**Decision Option 2 or 3**); and/or,
- 3) Use Minn. Rule 7829.3299 to vary Minn. Rule 7835.1200 to require a non-disclosure agreement (**Decision Option 4**)

Public or Trade Secret Designation of Information in Annual Filings

Joint Commenters have not convinced the other parties that a filing "available for public inspection" is the same as requiring all information contained in the filing be made public. Similarly, the Utilities have not convinced the Joint Commenters that the avoided cost information and calculations required by Minn. Rules and PURPA pose a specific risk of harm to ratepayers or utilities. The Department's concludes the Utilities' trade secret designations are reasonable, and that Joint Commenters have not made clear how the public would be protected or benefit if the information was made public.

Joint Commenters highlight language from the Commission's 1983 Order to argue the Commission's original intent was to allow any interested party access to the information in the Annual Filings. The Commission's language is similar to a broader description offered by FERC in adopting the final PURPA rules in 1980.²⁹ Staff notes MISO was established over 15 years later

²⁹ "As the Commission [FERC] observed in the Notice of Proposed Rulemaking, in order to be able to evaluate the financial feasibility of a cogeneration or small power production facility, an investor needs to be able to estimate, with a reasonable certainty, the expected return on a potential investment before construction of a facility. This return will be determined in part by the price at which the

(in 1998). Utilities argue providing the avoided cost information publicly would harm ratepayers by undermining the utility in resource bids and the wholesale market. It is for the Commission to decide if this warrants trade secret designation of some of the information in the Annual Filings.

If the Commission is persuaded by the Joint Commenters that PURPA requires specific information in the Utilities' Annual Filings to be made public, staff offers this summary of the party positions related to currently trade secret designated information the Joint Commenters claim PURPA explicitly requires:

Table 4 Staff Comparison of Party Positions on Designations

Dec. Option	Minn. Rules 7835³⁰	Joint Commenters	Utilities & Dept
3.a	Schedule A (Estimated Marginal Energy Costs (\$/MWh) over 5 years)	Public pursuant to 18 C.F.R. § 292.302(b)(1)	Year 1 is public. Years 2-5 is trade secret based on 3 rd party NDA and competitive disadvantage in resource bidding and wholesale market.
3.b	Schedule B, Subp. 2, Items E-G (Planned utility generating facility additions)	Public pursuant to 18 C.F.R. § 292.302(b)(2)-(3)	Trade secret due to operating characteristics of 3 rd party plants, competitive disadvantage in resource bidding and wholesale market.
3.c	Schedule B; Subp. 3, Items D-E (Planned firm capacity purchases' capacity costs in \$/kWh & associated energy costs)	18 C.F.R. § 292.302(b)(2)-(3)	Trade secret due to 3 rd party contracts, competitive disadvantage in resource bidding and wholesale market.

Staff notes there is trade secret-designated information in the Annual Filings beyond the scope of Table 4 above; however, with the exception of Xcel Energy's code key approach in the Company's September 10, 2019 compliance filing, parties did not address the specific data in Schedule G or the inputs³¹ that go into the resulting Net Annual Avoided Capacity Costs in Schedule B, Subp. 5. The exception is Otter Tail Power's trade secret designations or lack of inclusion of information the other utilities file as public. **(Decision Options 3.d and 3.e)**

qualifying facility can sell its electric output. Under § 292.304 of these rules, the rate at which a utility must purchase that output is based on the utility's avoided costs, taking into account the factors set forth in paragraph (e) of that section. Section 292.302 of these rules is intended by the Commission to assist those needing data from which avoided costs can be derived. It requires electric utilities to make available to cogenerators and small power producers data concerning the present and anticipated future costs of energy and capacity on the utility's system." Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978, 45 Fed. Reg. 12214, 12218 (Feb. 25, 1980).

³⁰ Minn. Rules 7835.0500 (Schedule A) and Minn. Rules 7835.0600 (Schedule B)

³¹ Minn. Rules 7835.0600; Subp. 5, Items A-I

If the Commission determines all of the avoided cost information should be public, the Commission should inquire about the implications of requiring the utilities that currently use third party, protected data for the filing to develop avoided cost information for the filings that is not subject to those restrictions.

If the Commission determines some of the avoided cost information is appropriately designated as trade secret, the Joint Commenters ask how the information is checked for reasonableness. The Utilities suggest the Commission, Department of Commerce and Office of Attorney General are the appropriate entities to review the full content of the Annual Filings. This is not the current practice of the Commission which reviews and approves by Notice the tariff page filings (which include annual rate adjustments), but does not approve the calculations or inputs used. Commission staff use a compliance matrix based on Minn. Rules Ch. 7835 to review the Annual Filings, but currently do not verify the appropriateness of the inputs. The Commission could direct staff or request the Department or OAG to review the inputs, assumptions and calculations for reasonableness for future Annual Filings (e.g. Docket No. 20-9 filings are due in January.) Another option is the Joint Commenters could petition to open a proceeding to review the reasonableness of the avoided cost information used in said filing.

Public Inspection and Non-Disclosure Agreement

Staff cautions the Commission with regard to resolving this dispute by allowing access to trade secret designated information by an NDA. This approach requires the following consideration:

1. **Joint Commenters argue an NDA does not resolve their argument that PURPA requires public inspection of the information, and suggest such a decision would be impermissible rulemaking.**

As outlined by Xcel Energy, the Commission has authority to vary a rule. To use a rule variance, the Commission must determine that the following requirements are met³²:

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

Unless otherwise specified by the Commission's Order, a variance automatically expires after one year.³³

2. **A decision to require an NDA does not resolve the Parties disagreement, and Commission practice is for parties to negotiate NDAs directly.**

Staff reviewed NDAs used in Commission dockets for possible guidance. The common practice has been for parties to negotiate NDAs directly when access to the information is between the

³² Minn. Rule 7829.3200

³³ Minn. Rule 7829.3200; Subp. 3

parties (e.g. NDAs for information request or other sharing of protected data.) In a contested case, the Administrative Law Judge issues a Protective Order. Staff could not find examples of a Commission-approved standard NDA that applied for all utilities.

Staff recognizes the issue before the Commission in this docket may be a unique situation that requires another course of action. The Joint Commenters are advocating on behalf of potential parties to an NDA – parties who may not have their own counsel at the time of requesting access to the trade secret information. This only complicates the issue. The parties in this docket, which are not necessarily the parties who will sign NDAs, are not in agreement and have asked the Commission to address the following:

- a) The level of flexibility to remove or add language to a standardized NDA;
- b) Whether to restrict who is entitled to sign an NDA (e.g. potential QF developer/customer, consultants, advisors);
- c) Establishing a restriction on an accessing party (e.g. no participation in RFP bids, MISO sales, or market trading of energy or capacity for 5 years);
- d) Availability and transparency of the NDA (e.g. on utility website, generic email address or online form submission);
- e) Commission procedure related to the NDA (e.g. approval of a utility's standard NDA).

Staff recommends the Commission avoid piecemeal construction of an NDA through additional detail in decision options. Staff also suggests clarity on how to proceed is needed given the parties have not shown a willingness to work together to resolve their differences in the docket to-date. Two possible courses of action:

- 1) Encourage the parties to discuss language and ask each utility to file an NDA template in a miscellaneous filing subject to notice and comment and Commission approval or acceptance.³⁴
- 2) Encourage the parties to discuss language and ask each utility to make publicly available an NDA template (on their webpage and/or by a compliance filing). The Commission via a Formal Complaint or its Consumer Affairs Office via an Informal Complaint maintains authority to mediate disputes.³⁵

³⁴ Minn. rules 7829.1300-.1400

³⁵ Minn. Rules 7829.1500-.1900

V. Decision Options

1. Minnesota Power, Otter Tail Power, and Xcel Energy's trade secret designations in the annual cogeneration and small power production filings as modified by the September 10, 2019 compliance filings are appropriately classified. (*Utilities; Department*)

OR

2. Require Minnesota Power, Otter Tail Power, and Xcel Energy to file the annual cogeneration and small power production filings with all information previously designated trade secret as public. (*Joint Commenters*)

OR

3. Accept Minnesota Power, Otter Tail Power, and Xcel Energy's modified trade secret designations from the September 10, 2019 compliance filings. Further require the following information to be filed as public in the annual cogeneration and small power production filings: (*Staff*)
 - a) Schedule A, (Estimated Marginal Energy Costs (years 2-5))
 - b) Schedule B, Subp. 2, Items E-G (Planned utility generating facility additions)
 - c) Schedule B; Subp. 3, Items D-E (Planned firm capacity purchases)
 - ...
 - d) Schedule B; Subp. 2, Items A – D, I (Unit name, nameplate rating, fuel type, in-service date, average annual fuel savings)
 - e) Schedule B; Subp. 5 (Net annual avoided capacity cost – *results, not all inputs*)

[Staff note: 3a-c impact all three utilities current trade secret designations. 3d-e only impact the current trade secret designations of Otter Tail Power (unless the Commission means to make public all inputs used to determine the avoided capacity cost in Schedule B; Subp. 5.) Minnesota Power and Xcel Energy treat this data as public, and the Joint Commenters' do not include this data in their chart of public information explicitly required by PURPA.]

AND/OR

4. Vary Minn. Rule 7835.1200 to require a non-disclosure agreement for individuals associated with potential qualifying facilities to access trade secret-designated information in the filings. [*Consider duration of variance and any additional Commission procedural guidance.*]