



85 7th Place East, Suite 500
St. Paul, Minnesota 55101-2198
mn.gov/commerce/
651.539.1500 FAX 651.539.1547
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May 9, 2014

Burl W. Haar
Executive Secretary
Minnesota Public Utilities Commission
121 7th Place East, Suite 350
St. Paul, Minnesota 55101-2147

RE: **Comments of the Minnesota Department of Commerce, Division of Energy Resources**
Docket No. E-001, E-115, E-140, E-105, E-139, E-124, E-126, E-145, E-132, E-114, E-6521, E-142, E-135/PA-14-322

Dear Dr. Haar:

Attached are the procedural and scoping comments of the Minnesota Department of Commerce, Division of Energy Resources (Department) in the following matter:

Joint request of Interstate Power and Light (IPL) and Southern Minnesota Energy Cooperative (SMEC) for approval of the sale of IPL's Minnesota electric distribution system and assets, and transfer of service rights and obligations in Minnesota pursuant to an Asset Purchase and Sale Agreement dated September 3, 2013 and First Amendment to Asset Purchase and Sale Agreement dated October 28, 2013.

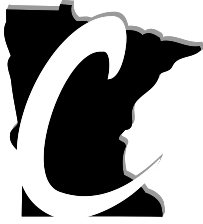
The petition was filed on April 15, 2014. On April 22, 2014 the Minnesota Public Utilities Commission (Commission) issued a "Notice of Schedule for Filing Procedural Comments." The following comments constitute the Department's replies to the questions posited in the Commission's notice.

The Department recommends that **the Commission refer this docket to the Office of Administrative Hearings for a contested case proceeding**, and is available to answer any questions the Commission may have.

Sincerely,

/s/ JOHN KUNDERT
Financial Analyst

JK/lt
Attachment



BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

COMMENTS OF THE
MINNESOTA DEPARTMENT OF COMMERCE

DOCKET NO. E-001, E-115, E-140, E-105, E-139, E-124, E-126, E-145, E-132, E-114, E-6521, E-142, E-135/PA-14-322

I. BACKGROUND

On April 15, 2014, Interstate Power and Light Company (IPL) and the Southern Minnesota Energy Cooperative (SMEC) filed a joint petition (Petition) requesting approval of the sale of IPL's Minnesota electric distribution system and assets, and transfer of service rights and obligations in Minnesota pursuant to an Asset Purchase and Sale Agreement dated September 3, 2013 and First Amendment to Asset Purchase and Sale Agreement dated October 28, 2013 (Transaction).

On April 22, 2014, the Minnesota Public Utilities Commission (Commission) issued a "Notice of Schedule for Filing Procedural Comments" in Docket No. E001, *et. al./PA-14-322*. The Commission's notice requested comments on the following six topics:

- 1) Does IPL and SMEC's petition comply with relevant Minnesota Statutes and Commission Rules?
- 2) Are there material facts in dispute?
- 3) Should this matter be referred to the Office of Administrative Hearings for a contested case proceeding?
- 4) If not, what schedule should the Commission establish for parties to comment on IPL and SMEC's request?
- 5) Should the Commission ask the Office of Administrative Hearings to conduct public hearings on IPL's and SMEC's request regardless of whether this matter is set for contested case, and, if so, how many public hearings should there be and in which locations?

- 6) Are there any issues or concerns that were not addressed or not sufficiently developed by IPL and SMEC in their petition that the Commission should ask IPL, SMEC, and parties to address or develop further for the record in this matter?

The Minnesota Department of Commerce, Division of Energy Resources (Department) responds to the Commission's questions in order.

II. ANALYSIS

A. *DOES IPL AND SMEC'S PETITION COMPLY WITH RELEVANT MINNESOTA STATUTES AND COMMISSION RULES?*

Response:

The Department is unable to determine at this time whether the Petition complies with Minnesota Statutes and Commission Rules both as to structure of the proposed Transaction and the terms of sale. The proposed Transaction is complex and unusual. Presently, IPL is a public utility that is legally obligated to serve its Minnesota retail ratepayers at just and reasonable rates. The sale would transfer IPL's distribution assets to SMEC, an "electric cooperative association organized under Minn. Stat. § 308A.01, et seq."¹ SMEC would then transfer those distribution assets to its respective Member Cooperatives during the subsequent three years following the conclusion of the Transaction. What could be considered unusual about the Transaction is:

- SMEC would not provide electric service at retail. It states that it will contract with its Member Cooperatives to perform those functions;
- SMEC intends to finance the Transaction entirely with debt;
- SMEC's Member Cooperatives would provide the collateral necessary to secure the loan; and,
- IPL ratepayers would be solely responsible for financing the purchase², at least in the near term.

As a result, the appropriate level of regulatory oversight of the proposed Transaction and of SMEC after the Transaction is not self-evident.

A key concern post-closing is that the Joint Petition does not affirmatively define SMEC as a public utility that is subject to Commission authority for determining either rates or reliability even though the Petition states that the Commission will have some rate authority, apparently,

¹ Joint Petition at 9.

² Joint Petition at 18

over SMEC for a five-year transition period. Specifically, the Petition identifies the Commission's direct role as that of approving the sale/transfer of IPL distribution assets to SMEC. Post-closing, the Petition defines the Commission's authority as follows: "The Commission will retain authority and jurisdiction to require SMEC and each SMEC Member Cooperative to perform the applicable terms and conditions set forth during the Three-Year Initial Period and Two-Year Transition Period".³ The full meaning of the quoted language, as it relates to Commission authority to ensure that current IPL ratepayers continue to be provided reliable electric service at just and reasonable rates, is unclear.

The Commission presently has rate-setting authority over IPL by reason of IPL's status as a public utility. Thus, if the Transaction were to allow the Commission to "retain" authority and jurisdiction over SMEC it would be reasonable to expect that SMEC either would be a public utility immediately post-sale under Minnesota law for a period of time or would submit to the Commission's jurisdiction as if it were a public utility for that period of time. The proposed sale does neither.

The proposed Transaction is complex. Consequently, it is possible to arrive at different legal interpretations regarding the Commission's authority *vis-à-vis* SMEC. Minn. Stat. §216B.02, subd. 4 defines a public utility as follows:

"Public utility" means persons, corporations, or other legal entities, their lessees, trustees, and receivers, now or hereafter operating, maintaining, or controlling in this state equipment or facilities for furnishing at retail natural, manufactured, or mixed gas or electric service to or for the public or engaged in the production and retail sale thereof, but does not include (1) a municipality or cooperative electric association, organized under the provisions of chapter 308A, producing or furnishing natural, manufactured, or mixed gas or electric services . . . Except as otherwise provided, the provisions of this chapter shall not be applicable to any sale of natural manufactured, or mixed gas or electricity by a public utility to another public utility for resale.

The Petition infers that SMEC would not be a public utility subject to Commission oversight immediately post-sale. Rather, it appears to suggest that SMEC and its Member Cooperatives are choosing to subject that portion of their business attributable to the proposed Transaction to limited Commission authority during the Transition period.

The regulatory status of SMEC is an issue that may merit further Commission review. Specifically, SMEC proposes to control equipment and facilities for furnishing electric service at

³ Petition at 26.

retail, according to the Petition,⁴ even though it appears that SMEC's Member Cooperatives would be the entities providing retail service. While it is legally structured as a cooperative association, the proposed Transaction does not appear to describe SMEC in a manner that may qualify it for the exemption from being a "public utility" in Minn. Stat. §216B.02, subd. 4(1) in that SMEC does not produce or furnish electric service. Rather SMEC appears to be structured as an intermediary between its wholesale electric provider (IPL) and its Member Cooperatives. It is these Member Cooperatives who actually furnish distribution service to their customer members.

Turning to the phrase further on in the statute that addresses another exemption "Except as otherwise provided, the provisions of this chapter shall not be applicable to any sale of . . . electricity by a public utility to another public utility for resale" – this language doesn't appear to provide an exemption either. A Transaction between SMEC and one of its Member Cooperatives would be a sale between a public utility and a cooperative, the latter being clearly exempted from being defined as a public utility.

Consequently, the legal structure the Joint Petitioners developed to facilitate the Transaction appears to have resulted in a situation where SMEC could be defined as a public utility. It is not defined as such in the Petition, nor is this topic discussed. Thus, it is unclear whether SMEC has the option to submit to Commission authority or whether it is simply subject to Commission authority including rate-regulation for as long as it controls some portion of IPL's distribution assets.

B. ARE THERE MATERIAL FACTS IN DISPUTE?

There likely will be material facts in dispute as there often are when rates change. The fact that the Petitioners are relying on a level of review that assumes "consistency with public interest does not require affirmative benefits⁵" suggests that the economics behind the transaction are not as robust as one might hope. There also could be questions as to the reasonableness of the terms of sale and the Wholesale Power Supply Agreement with respect to current IPL retail ratepayers and the extent of Commission authority post-sale referenced earlier.

C. SHOULD THIS MATTER BE REFERRED TO THE OFFICE OF ADMINISTRATIVE HEARINGS FOR A CONTESTED CASE PROCEEDING?

While the Commission could choose to rely on comments if it chooses to do so, a contested case would allow for the development of a complete and thorough record in this proceeding as a foundation for the Commission's decision in this complex matter. It would also provide a clear foundation for any subsequent filings initiated by SMEC regarding the former IPL ratepayers or

⁴ Petition at 17.

⁵ Petition at 34.

IPL regarding necessary rate increases if the Transaction is not executed⁶. If however, the Commission would prefer a direct review of this matter, the Department would support that decision as well. In any case, it would be helpful for the Commission to hold public hearings on this proposal, since numerous IPL's ratepayers participated in IPL's prior electric rate case (Docket No. E001/GR-10-276)

D. IF NOT, WHAT SCHEDULE SHOULD THE COMMISSION ESTABLISH FOR PARTIES TO COMMENT ON IPL AND SMEC'S REQUEST?

The Department urges the Commission to ensure that parties are allowed adequate time for review and discovery, and does not recommend that a specific deadline for Commission decision be established at this time.

E. SHOULD THE COMMISSION ASK THE OFFICE OF ADMINISTRATIVE HEARINGS TO CONDUCT PUBLIC HEARINGS ON IPL AND SMEC'S REQUEST REGARDLESS OF WHETHER THIS MATTER IS SET FOR CONTESTED CASE, AND, IF SO, HOW MANY PUBLIC HEARINGS SHOULD THERE BE AND IN WHICH LOCATIONS?

Yes, the Commission should ask the Office of Administrative Hearings to conduct public hearings. A public hearing should be held in the same locations as in IPL's current service territory and possibly in each of the SMEC Member Cooperative's service territories.

F. ARE THERE ANY ISSUES OR CONCERNS THAT WERE NOT ADDRESSED OR WERE NOT SUFFICIENTLY DEVELOPED BY IPL AND SMEC IN THEIR PETITION THAT THE COMMISSION SHOULD ASK IPL, SMEC AND PARTIES TO ADDRESS OR DEVELOP FURTHER FOR THE RECORD IN THIS MATTER?

After a brief, initial review of the Petition, the Department has identified 3 issues or concerns that would benefit from additional information. These issues are listed below; however, the Department expects that further issues may be identified as our analysis continues.

1. Wholesale Power Supply Agreement

The Department recommends that the Commission require the Petitioners to address whether the proposed Wholesale Power Supply Agreement (WPSA) between IPL and SMEC is an affiliated interest agreement under Minnesota Statutes. The Department provides justification for this second recommendation below.

⁶ The Petition suggests at page 37 that current Minnesota IPL customers' rates will increase in the near future whether the Commission approves the Transaction or not.

The Petition contains two agreements. The first agreement is the Asset Sale and Purchase Agreement (APA). IPL and SMEC (the Petitioners) correctly identified Minnesota Statute §216B.50 and Minnesota Rules 7825.1800 as the statute and rules that pertain to the APA.

The second agreement is the Wholesale Power Supply Agreement (WPSA) that would govern IPL and SMEC's relationship for the 10-year period following the sale/purchase of IPL's Minnesota distribution assets, (assuming the Petition is approved). IPL and SMEC have not identified any Minnesota Statute or Commission Rule as germane to the WPSA. The Petitioners have not asked for Commission approval of the WPSA.

Minnesota Statutes §216B.48 Subd. 1 (6) defines affiliated interests with a public utility as:

(6) every corporation or person which the commission may determine as a matter of fact after investigation and hearing is actually exercising any substantial influence over the policies and actions of the public utility even though the influence is not based upon stockholding, stockholders, directors or officers to the extent specified in this section;

After reviewing the Petition, the Department believes that statutory language in (6) describes IPL's relationship with SMEC. Specifically,

- 1) SMEC was organized by the SMEC Member Cooperatives for the following purposes: (i) to create a single counterparty to IPL to effect the Transaction; (ii) to own, operate, and maintain the electric facilities purchased from IPL for up to three years until transfer to the individual SMEC Member Cooperatives . . . , and to establish initial rates and terms of service which will be provided to current IPL customers . . . ; (iii) to enter into the subsequent sale Transactions with the SMEC Member Cooperatives to distribute IPL assets down to the SMEC Member Cooperatives; and (iv) to perform and administer the power supply contracts both with IPL and with the SMEC Member Cooperatives during the terms of those power supply contracts.⁷
- 2) IPL and SMEC will enter into a Wholesale Power Supply Agreement under which IPL will provide to SMEC all of the electricity required to provide service to customers located within the areas in Minnesota that will be acquired from IPL, subject to the terms and conditions of that agreement.

⁷ Petition at 8.

- 3) SMEC, will in turn, provide all needed electricity to the SMEC Member Cooperatives for those customers in the areas of Minnesota acquired from IPL.⁸ ;
- 4) Transmission services needed to provide such electricity will be obtained from Transmission service providers. . . . under the Transmission providers' applicable tariffs, in the same manner that IPL currently obtains service. To the extent that IPL acts on behalf of SMEC or SMEC Member Cooperatives with the Mid-continent Independent System Operator (MISO), all charges billed to IPL by MISO will be billed by IPL to SMEC on a pass-through basis.⁹
- 5) The Wholesale Power Supply Agreement limits its scope to customers in the areas that will be acquired from IPL. Accordingly, the Wholesale Power Supply Agreement does not include the supply of electricity by IPL to the SMEC Member Cooperatives for their existing areas or customers. Thus, the power supply arrangements with generation and transmission providers for the existing areas and customers of the SMEC Member Cooperatives will not be altered by the Transaction or Wholesale Power Agreement. IPL rates for power supply under the Wholesale Power Agreement and transmission rates . . . are subject to regulation by the Federal Energy Regulatory Commission (FERC). IPL has authority to act on behalf of SMEC and SMEC Member Cooperatives in regards to MISO and MISO charges for transmission services provided for the benefit of SMEC and SMEC Member Cooperatives. All MISO transmission and MISO-related charges billed to IPL will be billed to SMEC on a pass-through basis by delivery and interconnection point.¹⁰
- 6) The Wholesale Power Agreement will have no impact on IPL's integrated resource plan (IRP) for the term of the agreement because IPL's total load will not be changed as a result of the Transaction; IPL will continue to provide power to the same Minnesota customers and areas in Minnesota before and after the Transaction.¹¹

⁸ Petition at 2.

⁹ Petition at 2.

¹⁰ Petition at 16.

¹¹ Petition at 16.

SMEC appears to exist solely to act as an intermediary between IPL and the SMEC Member Cooperatives in this specific Transaction. If this Transaction is approved, SMEC's functions would be restricted to legal and accounting activities related to ratepayers located in former IPL service territories. IPL would provide all generation and transmission services for its former customers. SMEC would contract with its members for the distribution-related services that will be required to maintain service in those former IPL service territories. Therefore, it appears that SMEC exists only as a legal "sleeve" for IPL until the WPSA is terminated or lapses. Consequently, it appears at this point that the WPSA between SMEC and IPL is an affiliated Transaction under Minnesota Statutes. Because the Petitioners did not identify the WPSA as an affiliated interest agreement, the Department recommends that the Commission require the Petitioners' to fully address in this proceeding the applicability of MN Stat. §216B.48 to the proposed WPSA.

2. Financial Impacts to SMEC Member Cooperatives

An additional issue the Department would like the Commission to ask the Petitioners to address is the likelihood of SMEC's Member Cooperatives receiving reasonable terms relative to financing the purchase of the former IPL assets from SMEC. It is necessary to address this issue to address the ability to provide reliable service in the future (once IPL is no longer providing this service.) Two SMEC Member Cooperatives are of particular interest. Freeborn-Mower is the first. According to Freeborn-Mower's Minnesota Electric Utility Annual Report¹² the cooperative had 5,962 members in 2012. According to the Petition, the number of IPL customers that would obtain service from Freeborn-Mower is 15,180¹³. That estimate would represent a 250% increase in the number of customers for that distribution cooperative. On its face, the acquisition of that number of customers and the distribution plant to serve them would appear to represent a significant increase in financial and operational risk for the entity. As another example, Redwood Electric Cooperative's customer count would increase by 85% if the Petition were approved. The Department concludes that further information regarding the financial impacts of providing reliable service on cooperatives intending to effectuate a disproportionately large acquisition should be provided.

3. Energy Usage Credit

The Department would also appreciate a discussion of the basis of the \$0.002/kWh credit to energy usage the Petition discussed on page 23 of the filing.

/lt

¹² Provided to the Department pursuant to MN Rules Chapter 7610.

¹³ Petition at 9.

CERTIFICATE OF SERVICE

I, Sharon Ferguson, hereby certify that I have this day, served copies of the following document on the attached list of persons by electronic filing, certified mail, e-mail, or by depositing a true and correct copy thereof properly enveloped with postage paid in the United States Mail at St. Paul, Minnesota.

**Minnesota Department of Commerce
Comments**

Docket No. E001,115,140,105,139,124,126,145,132,114,6521,142,135/PA-14-322

Dated this 12th day of May 2014

/s/Sharon Ferguson

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Ross	Abbey	abbey@fresh-energy.org	Fresh Energy	408 Saint Peter St Ste 220 St. Paul, MN 55102-1125	Electronic Service	No	OFF_SL_14-322_Official
Bobby	Adam	bobby.adam@conagrafoods.com	ConAgra	Suite 5022 11 ConAgra Drive Omaha, NE 68102	Electronic Service	No	OFF_SL_14-322_Official
Michael	Allen	michael.allen@allenergysolar.com	All Energy Solar	721 W 26th st Suite 211 Minneapolis, Minnesota 55405	Electronic Service	No	OFF_SL_14-322_Official
Christopher	Anderson	canderson@allete.com	Minnesota Power	30 W Superior St Duluth, MN 558022191	Electronic Service	No	OFF_SL_14-322_Official
Julia	Anderson	Julia.Anderson@ag.state.mn.us	Office of the Attorney General-DOC	1800 BRM Tower 445 Minnesota St St. Paul, MN 551012134	Electronic Service	Yes	OFF_SL_14-322_Official
John	Aune	johna@bluehorizonsolar.com	Blue Horizon Energy	7246 Washington Ave S Eden Prairie, MN 55344	Paper Service	No	OFF_SL_14-322_Official
Rebecca J.	Baldwin		Spiegel & McDiarmid	1333 New Hampshire Avenue NW Washington, DC 20036	Paper Service	No	OFF_SL_14-322_Official
Rick	Bartz	rbartz@ibewlocal949.org	IBEW Local Union 949	12908 Nicollet Avenue South Burnsville, MN 55337	Electronic Service	No	OFF_SL_14-322_Official
Peter	Beithon	pbeithon@otpc.com	Otter Tail Power Company	P.O. Box 496 215 South Cascade Street Fergus Falls, MN 565380496	Electronic Service	No	OFF_SL_14-322_Official
Sara	Bergan	sebergan@stoel.com	Stoel Rives LLP	33 South Sixth Street Suite 4200 Minneapolis, MN 55402	Electronic Service	No	OFF_SL_14-322_Official

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Kathryn J.	Bergstrom		Gray Plant Mooty	500 IDS Center 80 South Eighth Street Minneapolis, MN 550423796	Paper Service	No	OFF_SL_14-322_Official
James J.	Bertrand	james.bertrand@leonard.com	Leonard Street & Deinard	150 South Fifth Street, Suite 2300 Minneapolis, MN 55402	Electronic Service	No	OFF_SL_14-322_Official
William	Black	bblack@mmua.org	MMUA	Suite 400 3025 Harbor Lane North Plymouth, MN 554475142	Electronic Service	No	OFF_SL_14-322_Official
William A.	Blazar	bblazar@mncchamber.com	Minnesota Chamber Of Commerce	Suite 1500 400 Robert Street North St. Paul, MN 55101	Electronic Service	No	OFF_SL_14-322_Official
Michael	Bradley	mike.bradley@lawmoss.com	Moss & Barnett	Suite 4800 90 S 7th St Minneapolis, MN 55402-4129	Electronic Service	No	OFF_SL_14-322_Official
B. Andrew	Brown	brown.andrew@dorsey.com	Dorsey & Whitney LLP	Suite 1500 50 South Sixth Street Minneapolis, MN 554021498	Electronic Service	No	OFF_SL_14-322_Official
Michael J.	Bull	N/A	Center for Energy and Environment	212 Third Avenue North, Suite 560 Minneapolis, MN 55401	Paper Service	No	OFF_SL_14-322_Official
Joel	Cannon	jcannon@tenksolar.com	Tenk Solar, Inc.	9549 Penn Avenue S Bloomington, MN 55431	Electronic Service	No	OFF_SL_14-322_Official
John J.	Carroll	jcarroll@newportpartners.com	Newport Partners, LLC	9 Cushing, Suite 200 Irvine, California 92618	Electronic Service	No	OFF_SL_14-322_Official
Steve W.	Chriss	Stephen.chriss@wal-mart.com	Wal-Mart	2001 Southeast 10th St. Bentonville, AZ 72716-5530	Paper Service	No	OFF_SL_14-322_Official

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
City	Clerk	sschulte@ci.albertlea.org	City of Albert Lea	221 E Clark St Albert Lea, MN 56007	Electronic Service	No	OFF_SL_14-322_Official
Steve	Coleman	scoleman@appliedenergyinnovations.org	Applied Energy Innovations	4000 Minnehaha Ave S Minneapolis, MN 55406	Electronic Service	No	OFF_SL_14-322_Official
Joan	Conrad	N/A	Iowa Utilities Board	1375 E. Court Avenue, Room 69 Des Moines, IA 50319-0069	Paper Service	No	OFF_SL_14-322_Official
Lisa	Crum	lisa.crum@ag.state.mn.us	Office of the Attorney General-PUC	445 Minnesota Street, 1100 BRM Saint Paul, MN 55101	Electronic Service	No	OFF_SL_14-322_Official
Lisa	Daniels	lisadaniels@windustry.org	Windustry	201 Ridgewood Avenue Minneapolis, MN 55403	Paper Service	No	OFF_SL_14-322_Official
Dustin	Denison	dustin@appliedenergyinnovations.org	Applied Energy Innovations	4000 Minnehaha Ave S Minneapolis, MN 55406	Electronic Service	No	OFF_SL_14-322_Official
Executive	Director		League Of MN Cities	145 University Avenue West St Paul, MN 551032044	Paper Service	No	OFF_SL_14-322_Official
Ian	Dobson	ian.dobson@ag.state.mn.us	Office of the Attorney General-RUD	Antitrust and Utilities Division 445 Minnesota Street, BRM Tower St. Paul, MN 55101	Electronic Service 1400	No	OFF_SL_14-322_Official
Dan	Donkers	N/A	Saint Paul - Ramsey County Public Health	Environmental Health Section 2785 White Bear Ave. Suite 350 Maplewood, MN 55109	Paper Service	No	OFF_SL_14-322_Official

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Steve	Downer	sdowner@mmua.org	MMUA	3025 Harbor Ln N Ste 400 Plymouth, MN 554475142	Electronic Service	No	OFF_SL_14-322_Official
Bill	Droessler	N/A	Izaak Walton League of America-MWO	1619 Dayton Ave Ste 202 Saint Paul, MN 55104	Paper Service	No	OFF_SL_14-322_Official
Betsy	Engelking	betsy@geronimoenergy.com	Geronimo Energy	7650 Edinborough Way Suite 725 Edina, MN 55435	Electronic Service	No	OFF_SL_14-322_Official
Sharon	Ferguson	sharon.ferguson@state.mn.us	Department of Commerce	85 7th Place E Ste 500 Saint Paul, MN 551012198	Electronic Service	No	OFF_SL_14-322_Official
Nathan	Franzen	nathan@geronimoenergy.com	Geronimo Energy	7650 Edinborough Way Suite 725 Edina, MN 55435	Electronic Service	No	OFF_SL_14-322_Official
Doug	Franzen	djf@franzen-mn.com	Franzen & Associates, LLC	1675 Highland Pkwy St. Paul, MN 55116	Paper Service	No	OFF_SL_14-322_Official
Benjamin	Gerber	bgerber@mnchamber.com	Minnesota Chamber of Commerce	400 Robert Street North Suite 1500 St. Paul, Minnesota 55101	Electronic Service	No	OFF_SL_14-322_Official
Bruce	Gerhardson	bgerhardson@otpc.com	Otter Tail Power Company	PO Box 496 215 S Cascade St Fergus Falls, MN 565380496	Electronic Service	No	OFF_SL_14-322_Official
Elizabeth	Goodpaster	bgoodpaster@mncenter.org	MN Center for Environmental Advocacy	Suite 206 26 East Exchange Street St. Paul, MN 551011667	Electronic Service	Yes	OFF_SL_14-322_Official
Bill	Grant	Bill.Grant@state.mn.us	Minnesota Department of Commerce	85 7th Place East, Suite 500 St. Paul, MN 55101	Electronic Service	No	OFF_SL_14-322_Official

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Lloyd	Grooms	lgrooms@winthrop.com	Winthrop and Weinstine	Suite 3500 225 South Sixth Street Minneapolis, MN 554024629	Electronic Service	No	OFF_SL_14-322_Official
David	Grover	dgrover@itctransco.com	ITC Midwest	901 Marquette Avenue Suite 1950 Minneapolis, MN 55402	Electronic Service	No	OFF_SL_14-322_Official
Burl W.	Haar	burl.haar@state.mn.us	Public Utilities Commission	Suite 350 121 7th Place East St. Paul, MN 551012147	Electronic Service	Yes	OFF_SL_14-322_Official
Tony	Hainault	anthony.hainault@co.hennepin.mn.us	Hennepin County DES	701 4th Ave S Ste 700 Minneapolis, MN 55415-1842	Electronic Service	No	OFF_SL_14-322_Official
J Drake	Hamilton	hamilton@fresh-energy.org	Fresh Energy	408 St Peter St Saint Paul, MN 55101	Electronic Service	No	OFF_SL_14-322_Official
Samuel	Hanson	N/A	Briggs And Morgan, P.A.	2200 IDS Center E 80 South Eighth Street Minneapolis, MN 55402	Paper Service	No	OFF_SL_14-322_Official
Jack	Hays	jack.hays@westwoodps.com	Westwood Professional Services	7699 Anagram Drive Eden Prairie, MN 55344	Electronic Service	No	OFF_SL_14-322_Official
Brandon	Heath	bheath@misoenergy.org	MISO Energy	1125 Energy Park Drive St. Paul, MN 55108-5001	Electronic Service	No	OFF_SL_14-322_Official
Annete	Henkel	mui@mnutilityinvestors.org	Minnesota Utility Investors	413 Wacouta Street #230 St. Paul, MN 55101	Electronic Service	No	OFF_SL_14-322_Official
Richard J.	Hettwer	rj.hettwer@smmpa.org	SMMPA	500 First Avenue, SW Rochester, MN 559023303	Electronic Service	No	OFF_SL_14-322_Official

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Lynn	Hinkle	lhinkle@mnseia.org	Minnesota Solar Energy Industries Association	2512 33rd Ave South #2 Minneapolis, MN 55406	Electronic Service	No	OFF_SL_14-322_Official
Holly	Hinman	holly.r.hinman@xcelenergy.com	Xcel Energy	414 Nicollet Mall, 6th Floor Minneapolis, MN 55401	Electronic Service	No	OFF_SL_14-322_Official
Margaret	Hodnik	mhodnik@mpower.com	Minnesota Power	30 West Superior Street Duluth, MN 55802	Electronic Service	No	OFF_SL_14-322_Official
Anne	Hunt	anne.hunt@ci.stpaul.mn.us	City of Saint Paul	390 City Hall 15 West Kellogg Boulevard Saint Paul, MN 55102	Electronic Service	No	OFF_SL_14-322_Official
Ralph	Jacobson	N/A	Innovative Power Systems, Inc.	1413 Hunting Valley Rd Ste 1 Saint Paul, MN 55109-1555	Paper Service	No	OFF_SL_14-322_Official
Dwight	Jelle	dkjelle@gmail.com	Best Power International, LLC	P.O. 5126 Hopkins, MN 55343	Electronic Service	No	OFF_SL_14-322_Official
Alan	Jenkins	aj@jenkinsatlaw.com	Jenkins at Law	2265 Roswell Road Suite 100 Marietta, GA 30062	Electronic Service	No	OFF_SL_14-322_Official
Linda	Jensen	linda.s.jensen@ag.state.mn.us	Office of the Attorney General-DOC	1800 BRM Tower 445 Minnesota Street St. Paul, MN 551012134	Electronic Service	No	OFF_SL_14-322_Official
Paula	Johnson	paulajohnson@alliantenergy.com	Alliant Energy-Interstate Power and Light Company	P.O. Box 351 200 First Street, SE Cedar Rapids, IA 524060351	Electronic Service	No	OFF_SL_14-322_Official

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Richard	Johnson	Rick.Johnson@lawmoss.com	Moss & Barnett	90 South 7th Street Suite #4800 Minneapolis, MN 554024129	Electronic Service	No	OFF_SL_14-322_Official
Elizabeth M.	Jones	elizabeth.jones@ag.state.mn.us	Office of the Attorney General-PUC	445 Minnesota Street Suite 1100 Bremer Tower St. Paul, MN 55101	Electronic Service	No	OFF_SL_14-322_Official
Mara	Koeller	mara.n.koeller@xcelenergy.com	Xcel Energy	414 Nicollet Mall 5th Floor Minneapolis, MN 55401	Electronic Service	No	OFF_SL_14-322_Official
Brian	Krambeer	bkrամbeer@tec.coop	Tri-County Electric Cooperative	PO Box 626 31110 Cooperative Way Rushford, MN 55971	Electronic Service	No	OFF_SL_14-322_Official
Jon	Kramer	jk2surf@aol.com	Sundial Solar	4708 york ave. S Minneapolis, MN 55410	Electronic Service	No	OFF_SL_14-322_Official
Jim	Krueger	jkruenger@fmcs.coop	Freeborn-Mower Cooperative Services	Box 611 Albert Lea, MN 56007	Electronic Service	No	OFF_SL_14-322_Official
Allen	Krug	allen.krug@xcelenergy.com	Xcel Energy	414 Nicollet Mall-7th fl Minneapolis, MN 55401	Electronic Service	No	OFF_SL_14-322_Official
Jeffrey L.	Landsman	jlandsman@wheelerlaw.com	Wheeler, Van Sickle & Anderson, S.C.	Suite 801 25 West Main Street Madison, WI 537033398	Electronic Service	No	OFF_SL_14-322_Official
Harold	LeVander, Jr.	hlevander@felhaber.com	Felhaber, Larson, Fenton & Vogt, P.A.	Suite 2100 444 Cedar Street St. Paul, MN 551012136	Electronic Service	No	OFF_SL_14-322_Official
John	Lindell	agorud.ecf@ag.state.mn.us	Office of the Attorney General-RUD	1400 BRM Tower 445 Minnesota St St. Paul, MN 551012130	Electronic Service	Yes	OFF_SL_14-322_Official

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Bob	Long	rlong@larkinhoffman.com	Larkin Hoffman (Silicon Energy)	1500 Wells Fargo Plaza 7900 Xerxes Ave S Bloomington, MN 55431	Paper Service	No	OFF_SL_14-322_Official
Rebecca	Lundberg	rebecca.lundberg@powerfullygreen.com	Powerfully Green	11451 Oregon Ave N Champlin, MN 55316	Electronic Service	No	OFF_SL_14-322_Official
Casey	MacCallum	casey@appliedenergyinnovations.org	Applied Energy Innovations	4000 Minnehaha Ave S Minneapolis, MN 55406	Electronic Service	No	OFF_SL_14-322_Official
Paula	Maccabee	Pmaccabee@justchangelaw.com	Just Change Law Offices	1961 Selby Avenue St. Paul, MN 55104	Paper Service	No	OFF_SL_14-322_Official
Erik	Madsen	ErikMadsen@alliantenergy.com	Alliant Energy	200 First St SE Cedar Rapid, IA 52401	Electronic Service	No	OFF_SL_14-322_Official
Kavita	Maini	kmairi@wi.rr.com	KM Energy Consulting LLC	961 N Lost Woods Rd Oconomowoc, WI 53066	Electronic Service	No	OFF_SL_14-322_Official
Pam	Marshall	pam@energycents.org	Energy CENTS Coalition	823 7th St E St. Paul, MN 55106	Electronic Service	No	OFF_SL_14-322_Official
Natalie	McIntire	natalie.mcintire@gmail.com	Wind on the Wires	570 Asbury St Ste 201 St. Paul, MN 55104-1850	Paper Service	No	OFF_SL_14-322_Official
Valerie	Means	valerie.means@lawmoss.com	Moss & Barnett	Suite 4800 90 South Seventh Street Minneapolis, MN 55402	Electronic Service	No	OFF_SL_14-322_Official
Brian	Meloy	brian.meloy@stinsonleonard.com	Stinson, Leonard, Street LLP	150 S 5th St Ste 2300 Minneapolis, MN 55402	Electronic Service	No	OFF_SL_14-322_Official

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Gregory R.	Merz	gregory.merz@gpmlaw.com	Gray, Plant, Mooty	80 S 8th St Ste 500 Minneapolis, MN 55402-5383	Electronic Service	No	OFF_SL_14-322_Official
David	Moeller	dmoeller@allete.com	Minnesota Power	30 W Superior St Duluth, MN 558022093	Electronic Service	No	OFF_SL_14-322_Official
Andrew	Moratzka	apmoratzka@stoel.com	Stoel Rives LLP	33 South Sixth Street Suite 4200 Minneapolis, MN 55402	Electronic Service	No	OFF_SL_14-322_Official
Martin	Morud	mmorud@trunorthsolar.com	Tru North Solar	5115 45th Ave S Minneapolis, MN 55417	Electronic Service	No	OFF_SL_14-322_Official
Carl	Nelson	cnelson@mncee.org	Center for Energy and Environment	212 3rd Ave N Ste 560 Minneapolis, MN 55401	Electronic Service	No	OFF_SL_14-322_Official
Michael	Noble	noble@fresh-energy.org	Fresh Energy	Hamm Bldg., Suite 220 408 St. Peter Street St. Paul, MN 55102	Electronic Service	No	OFF_SL_14-322_Official
Rolf	Nordstrom	rnordstrom@gpisd.net	Great Plains Institute	2801 21ST AVE S STE 220 Minneapolis, MN 55407-1229	Electronic Service	No	OFF_SL_14-322_Official
Samantha	Norris	samanthanorris@alliantenergy.com	Alliant Energy	200 1st Street SE PO Box 351 Cedar Rapids, IA 52406-0351	Electronic Service	No	OFF_SL_14-322_Official
Steven	Nyhus	swnyhus@flaherty-hood.com	Flaherty & Hood PA	525 Park St Ste 470 Saint Paul, MN 55103	Electronic Service	No	OFF_SL_14-322_Official
Priti R.	Patel	pritti.r.patel@xcelenergy.com	Xcel Energy	414 Nicollet Mall MP 800 Minneapolis, MN 55401	Electronic Service	No	OFF_SL_14-322_Official

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Charlie	Pickard	cpickard@aladdinsolar.com	Aladdin Solar	1215 Lilac Lane Excelsior, MN 55331	Electronic Service	No	OFF_SL_14-322_Official
Donna	Pickard	dpickard@aladdinsolar.com	Aladdin Solar	1215 Lilac Lane Excelsior, MN 55331	Electronic Service	No	OFF_SL_14-322_Official
David E.	Pomper		Spiegel & McDiarmid	1333 New Hampshire Avenue NW Washington, DC 20036	Paper Service	No	OFF_SL_14-322_Official
Benjamin L.	Porath		Dairyland Power Cooperative	3200 East Avenue South PO Box 817 La Crosse, WI 546020817	Paper Service	No	OFF_SL_14-322_Official
Gayle	Prest	gayle.prest@minneapolismn.gov	City of Mpls Sustainability	350 South 5th St, #315 Minneapolis, MN 55415	Electronic Service	No	OFF_SL_14-322_Official
Enio	Ricci	ericci@invenergyllc.com	Invenergy LLC	17830 New Hampshire Ave Ste 300 Ashton, MD 20861	Paper Service	No	OFF_SL_14-322_Official
Michelle	Rosier	michelle.rosier@sierraclub.org	Sierra Club	2327 E. Franklin Avenue Minneapolis, MN 554061024	Paper Service	No	OFF_SL_14-322_Official
Dan L.	Sanford	N/A	American Transmission Company LLC	W234 N2000 Ridgeview PkwY Court Waukesha, WI 53188-1022	Paper Service	No	OFF_SL_14-322_Official
Richard	Savelkoul	rsavelkoul@martinsquires.com	Martin & Squires, P.A.	332 Minnesota Street Ste W2750 St. Paul, MN 55101	Electronic Service	No	OFF_SL_14-322_Official

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Kevin	Saville	kevin.saville@ftr.com	Citizens/Frontier Communications	2378 Wilshire Blvd. Mound, MN 55364	Electronic Service	No	OFF_SL_14-322_Official
Larry L.	Schedin	Larry@LLSResources.com	LLS Resources, LLC	12 S 6th St Ste 1137 Minneapolis, MN 55402	Electronic Service	No	OFF_SL_14-322_Official
Matthew J.	Schuenger P.E.	mjsreg@earthlink.net	Energy Systems Consulting Services, LLC	PO Box 16129 St. Paul, MN 55116	Electronic Service	No	OFF_SL_14-322_Official
Janet	Shaddix Elling	jshaddix@janetshaddix.com	Shaddix And Associates	Ste 122 9100 W Bloomington Frwy Bloomington, MN 55431	Paper Service	No	OFF_SL_14-322_Official
Gary	Shaver	N/A	Silicon Energy	3506 124th St NE Marysville, WA 98271	Paper Service	No	OFF_SL_14-322_Official
Erin	Shea	eshea@silicon-energy.com	Silicon Energy	11168 Sumter Circle Bloomington, MN 55438	Electronic Service	No	OFF_SL_14-322_Official
Doug	Shoemaker	dougs@mnRenewables.org	MRES	2928 5th Avenue South Minneapolis, MN 55408	Paper Service	No	OFF_SL_14-322_Official
Chanti	Sourignavong	chantipal.sourignavong@honeywell.com	Honeywell	1985 Douglas Drive North MN10-111A Golden Valley, MN 55422-3992	Paper Service	No	OFF_SL_14-322_Official
Ron	Spangler, Jr.	rlspangler@otpc.com	Otter Tail Power Company	215 So. Cascade St. PO Box 496 Fergus Falls, MN 565380496	Electronic Service	No	OFF_SL_14-322_Official
Kristin	Stastny	stastny.kristin@dorsey.com	Dorsey & Whitney LLP	50 South 6th Street Suite 1500 Minneapolis, MN 55402	Electronic Service	No	OFF_SL_14-322_Official

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Donna	Stephenson	dstephenson@greenergy.com	Great River Energy	12300 Elm Creek Boulevard Maple Grove, MN 55369	Electronic Service	No	OFF_SL_14-322_Official
Erin	Stojan Ruccolo	ruccolo@fresh-energy.org	Fresh Energy	408 Saint Peter St Ste 220 Saint Paul, MN 55102-1125	Electronic Service	No	OFF_SL_14-322_Official
James M.	Strommen	jstrommen@kennedy-graven.com	Kennedy & Graven, Chartered	470 U.S. Bank Plaza 200 South Sixth Street Minneapolis, MN 55402	Electronic Service	No	OFF_SL_14-322_Official
Deb	Sundin	deb.sundin@xcelenergy.com	Xcel Energy	414 Nicollet Mall Minneapolis, MN 55401	Electronic Service	No	OFF_SL_14-322_Official
SaGonna	Thompson	Regulatory.Records@xcelenergy.com	Xcel Energy	414 Nicollet Mall FL 7 Minneapolis, MN 554011993	Electronic Service	No	OFF_SL_14-322_Official
JoAnn	Thompson	jthompson@otpc.com	Otter Tail Power Company	P.O. Box 496 215 South Cascade Street Fergus Falls, MN 565380496	Electronic Service	No	OFF_SL_14-322_Official
Stephen J.	Videto		ITC Holding Corp.	27175 Energy Way, Fifth Floor Novi, MI 48377	Paper Service	No	OFF_SL_14-322_Official
Denis R.	Vogel	vmele@wheelerlaw.com	Wheeler, Van Sickle & Anderson, S.C.	25 W. Main Street Suite 801 Madison, WI 53703	Electronic Service	No	OFF_SL_14-322_Official
Marya	White	mwhite@misoenergy.org	MISO	1125 Energy Park Dr St. Paul, MN 55108	Electronic Service	No	OFF_SL_14-322_Official

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Jason	Willett	jason.willett@metc.state.mn.us	Metropolitan Council	390 Robert St N Saint Paul, MN 55101-1805	Electronic Service	No	OFF_SL_14-322_Official
Daniel	Williams	DanWilliams.mg@gmail.com	Powerfully Green	11451 Oregon Avenue N Champlin, MN 55316	Electronic Service	No	OFF_SL_14-322_Official
Robyn	Woeste	robynwoeste@alliantenergy.com	Interstate Power and Light Company	200 First St SE Cedar Rapids, IA 52401	Electronic Service	No	OFF_SL_14-322_Official