



**ENVIRONMENTAL LAW & POLICY CENTER**  
Protecting the Midwest's Environment and Natural Heritage

October 24, 2019

Daniel P. Wolf  
Executive Secretary  
Minnesota Office of Administrative Hearings  
121 7<sup>th</sup> Place East, Suite 350  
St. Paul, MN 55101

**RE: Comments of the Environmental Law & Policy Center and Institute for Local Self-Reliance**

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

Dear Mr. Wolf,

Please find enclosed the *Reply Comments of the Environmental Law & Policy Center and Institute for Local Self-Reliance*. These documents have been electronically filed and served through the eFiling system.

Please feel free to contact me with any questions you may have regarding this filing.

Respectfully submitted,

/s/ Jeffrey Hammons

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**STATE OF MINNESOTA  
PUBLIC UTILITIES COMMISSION**

Katie Sieben	Chair
Daniel Lipschultz	Commissioner
John Tuma	Commissioner
Matt Schuerger	Commissioner
Valerie Means	Commissioner

**DOCKET NO. PR-19-9**

**REPLY COMMENTS OF THE ENVIRONMENTAL LAW & POLICY CENTER AND  
INSTITUTE FOR LOCAL SELF-RELIANCE**

October 24, 2019

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**REPLY COMMENTS OF THE ENVIRONMENTAL LAW & POLICY CENTER AND  
INSTITUTE FOR LOCAL SELF RELIANCE**

Pursuant to the Commission’s Notice of Supplemental Comment Period issued on August 30, 2019, the Environmental Law & Policy Center (“ELPC”) and the Institute for Local Self Reliance (“ILSR”) (collectively “Joint Commenters”) file these Reply Comments in response to the comments filed on October 14, 2019 in this docket.

**I. Otter Tail Power Company’s Reliance on FERC’s Order in *Revised Regulations Governing Cogeneration and Small Power Production*, 114 FERC 61,102 (2006), is misplaced.**

Otter Tail Power relies on paragraph 44 and 61 of FERC’s order in *Revised Regulations Governing Cogeneration and Small Power Production*, but both paragraphs concerned confidentiality of trade secrets held by qualifying facilities and how to protect them in filings with FERC – neither concerned utility filings under 18 C.F.R. § 292.302(b). 114 FERC 61,102, at ¶ 44, 61 (2006). This FERC order does not involve claimed trade secrets by utilities nor does it concern utilities rights and obligations under 18 C.F.R. § 292.302(b) or Minnesota’s PURPA rules.

FERC’s order in *Revised Regulations Governing Cogeneration and Small Power Production* is not relevant to Joint Commenters’ argument that “public inspection” requires public access. Paragraph 44 of FERC’s order is a summary of the parties’ positions and not even

FERC's opinion. Paragraph 61 merely states that filings with FERC containing qualifying facilities' trade secrets can be protected by existing FERC rules. This FERC order has no bearing on whether utilities can restrict public inspection of their avoided cost filings pursuant to 18 C.F.R. § 302.292(b) and pursuant to Minnesota's rules.

**II. Minnesota's Annual PURPA Avoided Cost Filings Do Not Supplant or Replace the Filings Required by 18 C.F.R. § 292.302(b).**

Both Xcel and Otter Tail Power argue that Minnesota's rules under Part 7835.0500 to 7835.1000 are compliant with 18 C.F.R. § 292.302(d), which allows a state to replace the requirements of 18 C.F.R. § 292.302(b) after following the procedures contained in 18 C.F.R. § 292.302(d). Joint Commenters already argued in our October 14, 2019 Comments that Minnesota's rules do not replace 18 C.F.R. 292.302(b) because the procedures to do so were never followed. *See* Joint Commenters' Comments at 7 (Oct. 14, 2019). Regardless, Joint Commenters find it worth reiterating their comments here.

While 18 C.F.R. § 292.302(d) allows a state to supplant the biannual filing requirement of 18 C.F.R. § 292.302(b), it may only do so after a state-provided public notice of its intent to supplant 18 C.F.R. § 292.302(b) and opportunity for the public to comment. 18 C.F.R. § 292.302(d)(1). After that, the state must notify FERC of the substitution within 30 days of the state's final order in that preceding state docket. 18 C.F.R. § 292.302(d)(2). There is no evidence on the record that either of these requirements was ever met. Therefore, utilities must file avoided cost data required by and consistent with both Minnesota rules and 18 C.F.R. § 292.302(b).

**III. Xcel and Minnesota Power Propose Restricting Access to Nondisclosure Agreement in Conflict with Minn. Stat. § 216.164 and PURPA.**

Xcel and Minnesota Power's proposed limitations of who can and cannot access a

nondisclosure agreement (NDA) would discriminate against some qualifying facility developers, and PURPA prohibits such discrimination. *See* 16 U.S.C. § 824a-3(b)(2). Both utilities believe that any qualifying facility developer who has bid or plans to bid in an RFP issued by the utilities, who has sold or plans to sell into the MISO energy market, or who engages in market trading of energy or capacity should not be able to access the unredacted version of the annual PURPA avoided cost filings. In effect, almost no one who could potentially develop a qualifying facility can access the information under their limitations.

Xcel and Minnesota Power’s comments categorically conflict with the Commission’s finding that restricting access to the filings required by Minnesota’s PURPA rules would conflict with MINN. STAT. § 216.164:

Access to filings will allow interested parties an opportunity to make a judgment as to the reasonableness of all computations and an opportunity to understand their responsibilities as sellers of energy to a utility. **Restricting access to the filed information would serve to frustrate the purpose of M.S. § 216B.164 by discouraging cogeneration and small power production and would be unreasonable.**

*In the Matter of the Proposed Adoption of Rules of the Minnesota Public Utilities Commission Governing Cogeneration and Small Power Production*, Docket No. R-80-560, Order Adopting Rules at 30 (Mar. 7, 1983) (emphasis added).

Xcel and Minnesota Power’s comments also highlight Joint Commenters’ concern raised in our October 14, 2019 comments that utilities should not be in charge of unilaterally determining who may or may not access the NDA necessary to see avoided cost filings. *See* Joint Commenters’ Comments at 8 (Oct. 14, 2019). Rather, should the Commission opt to go the route of requiring an NDA, it should be available to any interested party.

\* \* \*

Thank you for considering our comments.

Dated: October 24, 2019

Respectfully submitted,

/s/ Jeffrey Hammons \_\_\_\_\_

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**CERTIFICATE OF SERVICE**

**Docket No. PR-19-09**

I, Jeffrey Hammons, hereby certify that I have this day, served a true and correct copy of the *Reply Comments of the Environmental Law & Policy Center and Institute for Local Self-Reliance* to all persons at the addresses indicated on the attached service list by electronic filing, electronic mail, or by depositing the same enveloped with postage paid in the United States Mail at Chicago, Illinois.

Date: October 24, 2019

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