

August 30, 2021

PUBLIC DOCUMENT

Daniel P. Wolf
Executive Secretary
Minnesota Public Utilities Commission
121 7th Place East, Suite 350
St. Paul, Minnesota 55101

RE: **PUBLIC Comments of the Minnesota Department of Commerce – Division of Energy Resources**
Docket No. E015/M-21-593

Dear Mr. Wolf:

Attached are the **PUBLIC** comments of the Minnesota Department of Commerce (Department) in the following matter:

Minnesota Power's (MP's) Petition for Interpretation of Terms and Conditions of Service to Verso Minnesota Wisconsin LLC

The Department recommends that the Minnesota Public Utilities Commission (Commission) **agree with MP that Verso is required to continue to pay its take or pay amount through January 29, 2023.** The Department of Commerce is available to answer any questions that the Commission may have.

Sincerely,

/s/ NANCY CAMPBELL
Financial Analyst Coordinator, CPA

NC/ar
Attachment



Before the Minnesota Public Utilities Commission

PUBLIC Comments of the Minnesota Department of Commerce

Division of Energy Resources

I. SUMMARY

On August 2, 2021, Minnesota Power (MP or the Company) filed its *Petition for Interpretation of Terms and Conditions of Service to Verso Minnesota Wisconsin LLC* (Petition). MP requests the Commission resolve the Petition on an expedited basis so that the dispute is resolved prior to the Company's planned November 1, 2021 general rate case filing, and due to the potential acquisition of Verso Minnesota Wisconsin LLC's (Verso) parent company by another entity, which could complicate efforts to recover amounts due.

MP's Petition seeks an order from the Commission interpreting the Electric Service Agreement as amended (ESA) between MP and Verso, finding that Verso has tariff obligations and owes minimum "take or pay" payments during the term of the ESA as approved by the Commission and incorporated in Minnesota Power's tariffs. Specifically, MP requests that the Commission affirm that the provisions of the ESA explicitly set forth Verso's continuing obligations, which remain in full force and effect through the termination date regardless of whether MP enters into an ESA with a wholly separate customer located in the facility Verso idled and eventually sold. MP is not asking the Commission to make factual determinations regarding the amount Verso owes MP or to enforce the ESA. Rather, MP asserts the Commission's interpretation of the ESA is needed because it would have ratemaking impacts due to lost revenues and it would provide clarity regarding whether large power "take or pay" agreements include an implicit duty to mitigate to reduce the minimum payments agreed upon in the ESA and approved by the Commission.

II. BACKGROUND

A. PARTIES

Minnesota Power is an operating division of ALLETE, Inc., a publicly-traded diversified energy company based out of Duluth, Minnesota.

Minnesota Power is a public utility under Minn. Stat. § 216B.02, subd. 4 (2020), and provides regulated electric service to 145,000 residential, commercial and industrial customers across a 26,000-square-mile service area in central and northeastern Minnesota.

Minnesota Power employs over a thousand people in the Duluth-area.

Verso is a local subsidiary of Verso Corporation, a nationwide paper products company headquartered in Ohio.

In 2015, Verso Corporation acquired the NewPage company and its subsidiary, NewPage Wisconsin System, Inc. (“NewPage”),¹ which had operated the paper mill and recycled pulp mill in Duluth, Minnesota (the “Duluth Mills”).

Verso operated the Duluth Mills until selling them in early 2021.

B. THE DULUTH MILLS

In 1985, Minnesota Power, the City of Duluth, and Lake Superior Paper Industries formed a cooperative to develop the Duluth Mills adjacent to the Company’s Hibbard Energy Center in Duluth.

In 2000, the Duluth Mills were sold to Stora Enso North America Corporation (“Stora Enso”), which then sold the Duluth Mills to NewPage in 2007.

Verso acquired the Duluth Mills from NewPage in 2015.

C. CURRENT PETITION

In its Petition, MP asked the Commission to affirm that the provisions of its ESA with Verso explicitly set forth Verso’s continuing obligations which, MP believes, remain in full force and effect through the termination date regardless of whether MP enters an ESA with a wholly separate customer located in the facility Verso idled and eventually sold. MP asked the Commission to resolve the issue prior to its planned November 1, 2021 general rate case filing, and in consideration of the potential acquisition of Verso’s parent company by another entity, which could complicate efforts to recover amounts due.

On August 4, 2021, the Commission issued a *Notice of Comment Period, In the Matter of MP’s Petition for Interpretation of Terms and Conditions of Service to Verso Minnesota Wisconsin LLC*. The Commission’s Notice specifically identified the following issue:

Does Verso have tariff obligations and owe minimum “take or pay” payments to Minnesota Power during the term of their Electric Service Agreement?

The Commission requested initial comments by August 30, 2021 and reply comment by September 9, 2021 on the following topics:

- What are Verso’s obligations to MP pursuant to its ESA?
- Are there other issues or concerns related to this matter?

¹ As noted in footnote 10 of MP’s Petition, “For purposes of clarity, this Petition will not treat Verso and NewPage as separate entities since Verso is the purchaser of, and successor in interest to, NewPage. As a result, use of “Verso” throughout this arbitration demand will refer to both NewPage and Verso.”

III. DEPARTMENT ANALYSIS

A. MP'S SPECIFIC REQUEST FOR RELIEF

The Department notes that on pages 18 to 21 of MP's Petition, MP provided the following information regarding its specific request for relief:

Minnesota Power requests that the Commission interpret the ESA to not require the Company to mitigate its damages because it was not specifically contemplated between the parties, required by the provisions of the ESA, or mandated by any Commission order.

Minnesota Power is not asking the Commission to make a determination of the amount owed under the ESA, but rather seeks only an interpretation of the ESA to ensure that the result intended by the Commission when it approved the ESA is effectuated.

"The primary goal of contract interpretation is to determine and enforce the intent of the parties." *Qwinstar Corp. v. Anthony*, 882 F.3d 748, 754 (8th Cir. 2018), as amended (Feb. 26, 2018).

Here, Minnesota Power and Verso agreed to a take or pay arrangement where the buyer must pay whether or not it takes the product.

In doing so, the parties – each of whom are sophisticated, reputable businesses – specifically allocated the risk of invoking Paragraph 3(N) as set forth above.

Take or pay arrangements are akin to liquidated damages provisions. See *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284, 1292 (7th Cir. 1985). Where the parties have agreed to damages in the event of breach, there is no duty to mitigate. *Ross v. Garner Printing Co.*, 285 F.3d 1106, 1113 (8th Cir. 2002) ("Depending on the jurisdiction, a plaintiff is not ordinarily required to mitigate liquidated damages").

Indeed at least one Court has held outright that there is no duty to mitigate take or pay damages. *World Fuel Servs., Inc. v. John E. Retzner Oil Co., Inc.*, 234 F. Supp. 3d 1234, 1241 (S.D. Fla. 2017) ("Breach of a take or pay agreement entitles the non-breaching party to payments it would have received under the contract with no duty to mitigate damages.").

This principle was applied in *City of Memphis, Tenn., for & on Behalf of Memphis Light, Gas & Water Div. v. Ford Motor Co.*, 304 F.2d 845, 851 (6th Cir. 1962). There, the United States Court of Appeals for the Sixth Circuit

held that Ford Motor Co. owed the power company the full minimum amounts specified in its power agreement despite its cessation of operations and the subsequent sale of the plant to another power customer. *Id.* at 853.

As set forth above, Verso agreed to pay Minnesota Power for the agreed upon Minimum Firm Demand each month whether or not it used the power. This term was to extend for an agreed upon period beyond notice of reduction of Minimum Firm Demand to zero kW pursuant to Paragraph 3(N) of the ESA.

Verso admitted that it owes Minnesota Power payment for Minimum Firm Demand for the period set forth in the ESA.

Because the parties negotiated the risk of “permanent cessation of operations” in Paragraph 3(N) of the ESA and the parties have agreed to invoke that provision, the parties intentions are clear and unambiguous. That section of the ESA clearly states that “in no event” shall Verso’s obligation to pay Minimum Firm Demand be reduced prior to the passing of the agreed upon amount of time after Verso provides written notice.

Had the parties intended to include a duty to mitigate in the event of termination by Verso, such terms would have been included in the ESA.

Furthermore, if the parties intended to require Minnesota Power to forego any further recovery from Verso if it acquired a new customer despite receiving lower levels of revenue from that customer, then such terms would have been included in the ESA.

Minnesota Power requests that the Commission interpret the ESA to require Verso to pay the contracted amounts regardless of any subsequent customers at the Duluth Mills.

If the Commission determines that the ESA requires revenues obtained through a new customer at the Duluth Mills be used to offset Verso’s ESA payment obligations, then Minnesota Power requests that the Commission determine that Verso is responsible under the ESA to pay the difference between the revenues received from ST Paper during the applicable time period and the minimum payments due under the ESA.²

² MP Pet. at 18-21, ¶¶ 66-80 (Aug. 2, 2021).

The Department addresses MP's specific request for relief below.

B. JURISDICTION

The Department notes that on pages 8 to 10 of its Petition, MP provided the following information regarding whether the Commission has jurisdiction over the ESA in question:

- The Commission has continuing, plenary jurisdiction over Large Power ESAs that it has previously approved and are part of Minnesota Power's rate book as filed tariffs.³
- The Commission also on its own motion has the authority to investigate rates, tolls, tariffs, charges, or schedules.⁴
- The Commission has jurisdiction to interpret the ESA as a part of the Company's tariffs under the filed rate and primary jurisdiction doctrines, in that the legislature has vested in the Commission extensive on-going authority to determine and set reasonable rates, tolls, tariffs, and charges, including contracts related to rates and services, in addition to having primary jurisdiction under its ratemaking and regulatory authority to utilize its particular expertise in constructing its tariffs. *See Hoffman v. N. States Power Co.*, 764 N.W.2d 34, 42-52 (Minn. 2009); *Siewart v. N. States Power Co.*, 793 N.W.2d 272, 277-86 (Minn. 2011).
- The ESA and latest amendments were executed by Minnesota Power and Verso, and approved by the Commission most recently on February 12, 2019 in Docket No. E-015/M-18-603, reflecting Verso's operations and potential investment of the Duluth Mill. The original ESA was approved on March 7, 2006.⁵ Its amendments were later approved on December 10, 2012⁶ and February 12, 2019.⁷
- On January 29, 2021, Verso provided Minnesota Power with notice of (1) termination of the ESA, and (2) notice of its reduction of demand to zero kW, both of which would become effective after the period agreed upon in the ESA.

³ Minn. Stat. §§ 216B.03, 216B.04, 216B.05, subd. 2a, 216B.07, 216B.16, and 216B.25; *see also In the Matter of Minnesota Power's Petition in Response to the Minnesota Public Utility Commission's Sept. 5, 2008 Order in Docket No. E-015/M-08-321*, Docket No. E-015/M-08-1344, Order Accepting Petition, Modifying Electric Service Agreement Procedures, and Closing Docket No. E-015/M-08-321 (Feb. 26, 2009).

⁴ *See* Minn. Stat. §§ 216B.17 and 216B.21.

⁵ *In the Matter of a Petition by Minnesota power for Approval of an Amended and Restated Electric Service Agreement with Store Enso North America Corp.*, Docket No. E015/M-05-1989, Order (March 7, 2006).

⁶ *In the Matter of Minnesota Power's Petition for Approval of an Amendment to and Electric Service Agreement with NewPage Wisconsin System, Inc.*, Docket No. E-015/M-12-1025, Order, (Dec. 10 2012).

⁷ *In the Matter of Minnesota Power's Petition for Approval of an Amendment to the Electric Service Agreement Between Verso Minnesota Wisconsin LLC and Minnesota Power*, Docket No. E-015/M-18-603, Order Approving Amendment to Electric Service Agreement (Feb. 12, 2019).

- On July 8, 2021, Verso threatened to file a complaint with the Commission regarding its obligations under its take or pay ESA due to Minnesota Power ostensibly obtaining a new large power customer, as evidenced by correspondence from Verso to Minnesota Power, a true and correct copy of which is attached hereto as Exhibit A.
- As a result, there is a live controversy for Commission resolution because the parties actively dispute Verso's payment obligations based upon differing interpretations of the terms of the ESA.
- Whether "take or pay" ESA obligations are reduced by the addition of a new utility customer may also have an impact on many current and future large power customer agreements within the Commission's jurisdiction and whether customers are allowed to abandon their Commission approved obligations without any recourse.⁸

The Department notes that Minnesota Statutes §§ 216B.05 and 216B.09 (2020) provides support for the Commission's jurisdiction over the ESA addressed in this petition, as follows:

216B.05 FILING SCHEDULES, RULES, AND SERVICE AGREEMENTS.

Subdivision 1. Public rate filing. Every public utility shall file with the commission schedules showing all rates, tolls, tariffs, and charges which it has established and which are in force at the time for any service performed by it within the state, or for any service in connection therewith or performed by any public utility controlled or operated by it.

§Subd. 2. Schedule and rules filing. Every public utility shall file with and as a part of the filings under subdivision 1, all rules that, in the judgment of the commission, in any manner affect the service or product, or the rates charged or to be charged for any service or product, as well as any contracts, agreements, or arrangements relating to the service or product or the rates to be charged for any service or product to which the schedule is applicable as the commission may by general or special order direct; provided that contracts and agreements for electric service must be filed as required by subdivision 2a.

Subd. 2a. Electric service contract. A contract for electric service entered into between a public utility and one of its customers, in which the public utility and the customer agree to customer-specific rates, terms, or service conditions not already contained in the approved schedules, tariffs, or rules of the utility, must be filed for approval by the commission pursuant to the commission's rules of practice. Contracts between public utilities and customers that are necessitated by specific statutes in this chapter

⁸ MP Pet. at 8-10, ¶¶ 10-17.

must be filed for approval under those statutes and any rules adopted by the commission pursuant to those statutes.

§Subd. 3. Public inspection. Every public utility shall keep copies of the filings under subdivisions 1, 2, and 2a open to public inspection under rules as the commission may prescribe.

216B.09 STANDARDS; CLASSIFICATIONS; RULES; PRACTICES.

Subdivision 1. Commission authority, generally. The commission, on its own motion or upon complaint and after reasonable notice and hearing, may ascertain and fix just and reasonable standards, classifications, rules, or practices to be observed and followed by any or all public utilities with respect to the service to be furnished.

The Department has reviewed the above statements made by MP regarding whether the Commission has jurisdiction for the ESA. The Department notes that the Department has reviewed, and the Commission has approved the ESA being addressed in this petition and notes that Minnesota Statutes §§ 216B.05 and 216B.09 provides further support for the Commission's jurisdiction over the ESA.⁹ As a result, the Department agrees with MP that the Commission does have jurisdiction over both the ESA and whether take or pay obligations are reduced by the addition of a new utility customer.

C. DEPARTMENT'S REVIEW OF THE ESA'S AND NOTICE OF TERMINATION

On November 15, 2005, Stora Enso and Minnesota Power executed an Amended and Restated Electric Services Agreement ("2005 ESA"), a copy of which is attached to MP's Petition in Exhibit B.

On July 17, 2012, NewPage, successor in interest to Stora Enso, and Minnesota Power executed an amendment ("2012 ESA Amendment") to the 2005 ESA, a copy of which is attached to MP's Petition in Exhibit C.

On August 23, 2018, Verso and Minnesota Power executed a further amendment ("2018 ESA Amendment") to the 2005 ESA, a copy of which is attached to MP's Petition in Exhibit D.

On January 29, 2021, Verso sent its Notice of Termination Letter to MP, which is attached to MP's Petition in E (portions of the document was marked trade secret).

⁹ See also *Siewert v. N. States Power Co.*, 793 N.W.2d 272, 281 (Minn. 2011) (explaining that while the MPUC has authority to "ascertain and fix just and reasonable standards, classifications, rules, or practices to be observed and followed ... with respect to the service to be furnished," the MPUC does not necessarily have exclusive authority over all claims that involve public utilities and claims for torts or breach of contract). In the Department's view, because MP's petition requests an interpretation of its Commission-approved ESA as it relates to MP's tariffs, the Department believes that the Commission has jurisdiction based on the technical terms of "minimum firm demand" as it relates to the reasonableness of a utility's Commission-approved tariff for electric service. The Department interprets MP's petition as a request for clarification as to its duty in ascertaining MP's tariff obligations—which is within the Commission's jurisdiction.

The Department reviewed information filed in edockets regarding the 2005, 2012 and 2018 ESAs, specifically:

- *In the Matter of a Petition by Minnesota power for Approval of an Amended and Restated Electric Service Agreement with Store Enso North America Corp.*, Docket No. E015/M-05-1989, ORDER (March 7, 2006).
- *In the Matter of Minnesota Power's Petition for Approval of an Amendment to and Electric Service Agreement with NewPage Wisconsin System, Inc.*, Docket No. E-015/M-12-1025, ORDER (December 10, 2012).
- *In the Matter of Minnesota Power's Petition for Approval of an Amendment to the Electric Service Agreement Between Verso Minnesota Wisconsin LLC and Minnesota Power*, Docket No. E-015/M-18-603, ORDER APPROVING AMENDMENT TO ELECTRIC SERVICE AGREEMENT (February 12, 2019).

In the 2012 ESA the Department reviewed the discussed of a new paragraph 3(N) that was added to the ESA, as follows:

4. A new Paragraph 3(N) is added:

N. Decreases in Service Requirement for Permanent Facility Shutdown -

In the event of a permanent cessation of operations at the Customer's Duluth Paper Mill and Duluth Recycled Pulp Mill, Customer may notify the Company in writing at least two years in advance that Customer is invoking its right to reduce the Minimum Firm Demand to 0 kW which reduction shall become effective on the second anniversary of such notice. In no event shall the provision of this Paragraph be effective prior to two years after the date of such notification.

This paragraph 3(N) was discussed by MP on pages 16 and 17 of its Petition.

Additionally, Verso in its January 29, 2021 Notice of Termination Letter, stated:

Verso Minnesota Wisconsin LLC (Verso) is planning to cease operations at the Duluth Paper Mill and Duluth Recycled Pulp Mill permanently as of January 31, 2021. Therefore, in accordance with paragraph 3.N. of the Electric Service Agreement, Verso hereby elects to reduce the Minimum Firm Demand from **[TRADE SECRET DATA HAS BEEN EXCISED]** per month (paragraph 3.E(vi) of the Electric Service Agreement) to 0 kW per month, effective as of the second anniversary of the date of this notice. Verso acknowledges that it will continue to be responsible for the payment of minimum Contract Demand charges on **[TRADE SECRET DATA HAS BEEN EXCISED]** until the second anniversary of the date of this notice; provided, however, that Verso expects that Minnesota Power will use good faith

efforts to mitigate damages under the Electric Service Agreement by selling the firm demand that will not be sold to Verso to other customers of Minnesota Power or in the wholesale capacity markets.

The Department did search for mitigation language in the ESA's and in the three dockets for the ESA's noted above. The Department did not find any specific mitigation language in the ESA's. We did note this discussion regarding paragraph 3(N) in the Department's October 16, 2012 comments in Docket No. E015/M-12-1025 on page 5:

To recognize the economic environment of the paper industry, Paragraph 3.N would allow for the possibility of a complete shutdown of NewPage's Duluth Paper Mill and Duluth Recycled Pulp Mill. Upon at least two years advance notice, in a case of a permanent cessation of operations NewPage would have the right to reduce its Minimum Firm Demand to 0 kW.

Paragraph 3.N simply states that if NewPage anticipates a permanent shutdown of its Duluth operation, then upon two-year advanced notice, at the end of such two-year period NewPage would terminate its electric service from MP. The Department concludes that the two-year advance notice is a sufficient time period to allow MP to take any necessary steps to mitigate the impact of losing significant load on its system.

While the Department did mention mitigation, such mitigation was regarding MP taking necessary steps to mitigate the impact of losing significant load on its system, in other words to protect remaining customers on MP's system. As a utility – MP, is always required to mitigate harm on its system, especially when large power customers leave its system.

The Department concludes based on our review of the ESA's and Verso's Notice of Termination Letter, it is clear that Verso was obligated to pay its minimum take or pay amounts for two years after Verso's January 29, 2021 Notice of Termination Letter, or through January 29, 2023.

D. LEGAL REVIEW – TAKE OR PAY VS GENERAL CONTRACT LAW

The question presented by MP is whether it was required to mitigate its damages under its ESA with Verso. MP Pet. at 2, 18-19, ¶¶ 66-80(Aug. 2, 2021). MP characterizes its ESA as a "take-or-pay" contract, which the Commission has previously recognized. See *In re Pet. by Minn. Power for Approval of an Amended and Restated Elec. Serv. Agreement with Store Enso N. Am. Corp.*, MPUC Docket No. E015/M-05-1989, ORDER (Mar. 7, 2006) (eDocket No. 2903643). Under a take-or-pay contract, the buyer must either "take" the nominated energy or "pay" for the minimum nominated energy even if the buyer does not actually take the energy. See *Klein v. Arkoma Prod. Co.*, 73 F.3d 779, 783 (8th Cir. 1996). The rationale for these contracts can be described as follows: the buyer provides certainty to the seller that it will have an off taker for the energy produced, and the seller provides certainty to the buyer that it

will have a secure source of energy. See *Universal Res. Corp. v. Panhandle E. Pipe Line Co.*, 813 F.2d 77, 80 (5th Cir. 1987). In approving the 2005 ESA, 2012 Amendment, and 2018 Amendment, the Commission has agreed with the Department's analysis that the ESA benefits MP's ratepayers by contributing to MP's fixed costs that lowers the amount that would otherwise be collected from other ratepayers. See *In re Minn. Power's Pet. for Approval of an Amendment to the Elec. Serv. Agreement Between Verso Minn. Wis. LLC and Minn. Power*, MPUC Docket No. E-015/M-18-603, ORDER APPROVING AMENDMENT TO ELECTRIC SERVICE AGREEMENT at 3 (Feb. 12, 2019) (eDocket No. 20192-150207-01).

Under the section E(v) of the 2005 ESA, "in no event shall the Service Requirement and Contract Demand be reduced" below the minimum firm demand. MP Pet. at 13-14, ¶ 39. The 2012 amendment to the ESA provides that under paragraph 3(N) Verso must notify MP at least two years in advance before reducing "Minimum Firm Demand" to 0 kW. MP's Pet., Exhibit C at 2. Verso acknowledged its continuing responsibility for payment of minimum firm demand when exercising its right under 3(N) on January 29, 2021. MP Pet., Ex. E at 1. Accordingly, the parties both acknowledge their respective duties and obligations under the contract.

"Generally, the party alleging a loss because of a tort or breach of contract has a duty to mitigate damages." *Bass v. Equity Residential Holdings, LLC*, 849 N.W.2d 87, 92 (Minn. Ct. App. 2014). But under take-or-pay contracts, when a buyer does not take, it must pay the minimum nominated energy. Upon a buyer's refusal to either take-or-pay, if the seller is required to mitigate its damages, the seller might inadvertently surrender its right to continue to hold the buyer liable for its obligation to "pay."

Some courts have explained that by mitigating, a seller may also forfeit its right to potentially sell the energy twice. The reasoning here is akin to the "lost volume seller" in the context of the Uniform Commercial Code, section 2-708. In this example, the seller would have benefited from the original contract and the resale contract if the buyer did not breach because seller has capacity to sell to more than one party. See *Great Lakes Gas Transmission Ltd. P'ship v. Essar Steel Minnesota, LLC*, No. 09-CV-3037 (SRN/LIB), 2014 WL 12597430, at *14 (D. Minn. Mar. 11, 2014), order clarified, No. 09-CV-3037 SRN/LIB, 2014 WL 1347162 (D. Minn. Apr. 4, 2014). But as the court in *Great Lakes Gas Transmission* explained, a seller is not a "lost volume seller" if it could not have made the sale to another party without the breach by the buyer. *Id.* The Department questions whether MP could have entered into an ESA with ST Paper without Verso selling Duluth Mills to ST Paper. The example, however, illustrates how MP's right to potentially sell electricity "twice" is one right that MP and VERSO may have considered and that MP might surrender by being required to mitigate its damages.¹⁰

Based on the foregoing discussion, the Department believes that because both MP and Verso are sophisticated parties and engaged in an arms-length transaction with equal bargaining power, they were able to negotiate and understand terms ultimately included in the ESA. The Department concludes that both MP and Verso were capable of bargaining in their own best interests and fully understood the terms that were negotiated in the ESA. While the question of mitigation for take-and-

¹⁰ See *Universal Res. Corp. v. Panhandle E. Pipe Line Co.*, 813 F.2d 77, 80 (5th Cir. 1987) (explaining that a seller of energy in a take-or-pay contract might have the opportunity to sell the same energy twice if the buyer who "pays" but does not take the energy within a specified period).

pay contracts is open to interpretation, the Department believes that a reasonable interpretation of the contract requires Verso to continue to pay its take-or-pay obligation under the ESA. Moreover, Verso acknowledged its contractual obligation to pay minimum demand charges for two years. This view is consistent with holding the parties to their bargain. If the parties had anticipated that Verso would stop payment until MP found another buyer, the parties could have included this in the ESA. By executing an electric service agreement ST Paper, MP appears to have mitigated the potential impact on other ratepayers by ensuring revenue stability to maintain affordable rates.

E. ESA WITH NEW CUSTOMER ST PAPER

MP discussed the ESA with ST Paper on pages 17 and 18 of its Petition. MP provided the following information regarding the ESA with ST Paper¹¹:

- Sometime after Verso's July 2020 announcement that it was shuttering the Duluth Mills, it entered into discussions with ST Paper, LLC ("ST Paper") to sell the Duluth Mills to ST Paper.
- As negotiations with ST Paper ramped up, on or about March 25, 2021, Verso sought to rescind the Termination Notice in an effort to assign the ESA to ST Paper, as evidenced by correspondence from Verso to Minnesota Power, a copy is attached to MP's Petition as Exhibit F.
- Upon information and belief, Verso decided to attempt to assign the ESA to ST Paper so ST Paper would assume the take or pay obligations. But Verso chose to terminate the ESA first, meaning there was nothing to assign to ST Paper. Additionally, ST Paper never indicated any interest in taking assignment of the ESA even if Minnesota Power consented to Verso's rescission of its notice to terminate and reduce demand. Therefore, ST Paper is taking service on a wholly new contract that does not change Verso's take or pay obligations under the existing ESA. That ESA remains Verso's, just as the Commission approved it and is part of Minnesota Power's rate book.
- Minnesota Power denied Verso's request for rescission of its Termination Notice, which was at the Company's sole discretion pursuant to the terms of the ESA.
- Verso closed on its sale of the Duluth Mills to ST Paper on or about May 13, 2021.
- On or about May 6, 2021, Minnesota Power and ST Paper entered into a confidential term sheet for electric service to the Duluth Mills.
- Based on the confidential terms with ST Paper, if Verso refuses to satisfy its obligations under the ESA, Minnesota Power will realize millions of dollars less in revenue than it would have under the ESA.

¹¹ MP has not yet filed a petition for approval of its ESA with ST Paper. Accordingly, the Department has not reviewed the terms of the ESA with ST Paper for the purposes of this proceeding.

- As a result, even if the new revenue from ST Paper were to offset Verso's default, Minnesota Power's losses from Verso's default will never be fully mitigated.¹²

MP also noted on page 16 of its Petition:

Paragraph 3(N) granted Verso the operational flexibility to limit its risk related to Minimum Firm Demand in exchange for the certainty provided by Verso's inability to rescind such a notice: "Customer's rescission or modification of such notice shall be permitted only at the sole discretion of the Company."¹³

The Department concludes that in light of Verso's January 29, 2021 Notice of Termination Letter, it appears clear that Verso intended to terminate the ESA. Verso attempted to rescind its Notice of Termination, but the contract language in paragraph 3(N) permits rescission only at the sole discretion of MP—which denied the rescission. Therefore Verso was unable to assign the terminated ESA to ST Paper in March 2021.

If the Commission does not agree with the Department's recommendation that mitigation of Verso's two-year take or pay provision is not required by MP, then the Department recommends the Commission find that the ESA requires Verso to pay the difference between its minimum Contract Demand charges and the revenues from the new ST paper customers ESA.

IV. RECOMMENDATIONS

The Department has reviewed the above statements made by MP regarding whether the Commission has jurisdiction for the ESA. The Department notes that in prior proceedings, the Department has reviewed, and the Commission has approved, the ESA being addressed in this petition and notes that Minnesota Statutes §§ 216B.05 and 216B.09 provides further support for the Commission's jurisdiction over the ESA. As a result, the Department agrees with MP that the Commission does have jurisdiction over both the ESA and whether take or pay obligations are reduced by the addition of a new utility customer.

The Department concludes based on our review of the ESA and Verso's Notice of Termination Letter, it is clear that Verso was obligated to pay its minimum take or pay amounts for two years after Verso's January 29, 2021 Notice of Termination Letter, or through January 29, 2023.

Based on our legal review, the Department believes that because both MP and Verso are sophisticated parties and engaged in an arms-length transaction with equal bargaining power, they were able to negotiate and understand terms ultimately included in the ESA. The Department concludes that both MP and Verso were capable of bargaining in their own best interests and fully understood the terms that were negotiated in the ESA. While the question of mitigation for take-and-pay contracts is open to

¹² MP Pet. at 17-18, ¶¶ 58-65.

¹³ MP Pet. at 16, ¶ 52 (citing to Exhibit C, 2012 ESA Amended at 3).

interpretation, the Department believes that a reasonable interpretation of the contract requires Verso to continue to pay its take-or-pay amount under the ESA. By entering into an ESA with ST Paper, MP appears to have mitigated the potential impact on other ratepayers by ensuring revenue stability to maintain affordable rates.

The Department concludes that in light of Verso's January 29, 2021 Notice of Termination Letter, it appears clear that the Verso's ESA was terminated and therefore Verso was unable to reassign their ESA to ST Paper in March 2021. Additionally, the contract language in paragraph 3(N) as cited by MP appears clear that rescission shall be permitted only at the sole discretion of MP.

If the Commission does not agree with the Department's recommendation that mitigation of Verso's two-year take or pay provision is not required by MP, then the Department recommends the Commission find that the ESA requires Verso to pay the difference between its minimum Contract Demand charges and the revenues from the new ST paper customers ESA.

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
Public Comments**

Docket No. E015/M-21-593

Dated this 30th day of August 2021

/s/Sharon Ferguson

| First Name | Last Name | Email | Company Name | Address | Delivery Method | View Trade Secret | Service List Name |
|----------------|--------------------|-----------------------------------|------------------------------------|--|--------------------|-------------------|------------------------|
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| David | Chura | dchura@mnpower.com | Minnesota Power | 30 West Superior St Duluth, MN 55802 | Electronic Service | No | OFF_SL_21-593_M-21-593 |
| Paul | Ciesielski | Paul.Ciesielski@arcelormittal.com | ArcelorMittal | 3300 Dickey Road East Chicago, IN 46312 | Electronic Service | No | OFF_SL_21-593_M-21-593 |
| Generic Notice | Commerce Attorneys | commerce.attorneys@ag.state.mn.us | Office of the Attorney General-DOC | 445 Minnesota Street Suite 1400 St. Paul, MN 55101 | Electronic Service | Yes | OFF_SL_21-593_M-21-593 |
| Riley | Conlin | riley.conlin@stoel.com | Stoel Rives LLP | 33 S. 6th Street Suite 4200 Minneapolis, MN 55402 | Electronic Service | No | OFF_SL_21-593_M-21-593 |
| Hillary | Creurer | hcreurer@allete.com | Minnesota Power | 30 W Superior St Duluth, MN 55802 | Electronic Service | No | OFF_SL_21-593_M-21-593 |
| Sharon | Ferguson | sharon.ferguson@state.mn.us | Department of Commerce | 85 7th Place E Ste 280 Saint Paul, MN 551012198 | Electronic Service | No | OFF_SL_21-593_M-21-593 |
| Shane | Henriksen | shane.henriksen@enbridge.com | Enbridge Energy Company, Inc. | 1409 Hammond Ave FL 2 Superior, WI 54880 | Electronic Service | No | OFF_SL_21-593_M-21-593 |
| | | | | | | | |

| First Name | Last Name | Email | Company Name | Address | Delivery Method | View Trade Secret | Service List Name |
|------------|------------|-------------------------------------|---|---|--------------------|-------------------|------------------------|
| Lori | Hoyum | lhoyum@mnpower.com | Minnesota Power | 30 West Superior Street Duluth, MN 55802 | Electronic Service | No | OFF_SL_21-593_M-21-593 |
| James | Jarvi | N/A | Minnesota Ore Operations - U S Steel | P O Box 417 Mountain Iron, MN 55768 | Paper Service | No | OFF_SL_21-593_M-21-593 |
| Michael | Krikava | mkrikava@taftlaw.com | Taft Stettinius & Hollister LLP | 2200 IDS Center 80 S 8th St Minneapolis, MN 55402 | Electronic Service | No | OFF_SL_21-593_M-21-593 |
| David | Langmo | david.langmo@sappi.com | Sappi North America | P O Box 511 2201 Avenue B Cloquet, MN 55720 | Electronic Service | No | OFF_SL_21-593_M-21-593 |
| Patrick | Loupin | PatrickLoupin@Packaging Corp.com | Packaging Corporation of America | PO Box 990050 Boise, ID 83799-0050 | Electronic Service | No | OFF_SL_21-593_M-21-593 |
| Sarah | Manchester | sarah.manchester@sappi.com | Sappi North American | 255 State Street Floor 4 Boston, MA 02109-2617 | Electronic Service | No | OFF_SL_21-593_M-21-593 |
| Keith | Matzdorf | keith.matzdorf@sappi.com | Sappi Fine Paper North America | PO Box 511 2201 Avenue B Cloquet, MN 55720 | Electronic Service | No | OFF_SL_21-593_M-21-593 |
| Matthew | McClincy | MMcClincy@usg.com | USG | 35 Arch Street Clouquet, MN 55720 | Electronic Service | No | OFF_SL_21-593_M-21-593 |
| David | Moeller | dmoeller@allete.com | Minnesota Power | 30 W Superior St Duluth, MN 558022093 | Electronic Service | No | OFF_SL_21-593_M-21-593 |
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| First Name | Last Name | Email | Company Name | Address | Delivery Method | View Trade Secret | Service List Name |
|----------------|--------------------------------|--------------------------------------|------------------------------------|---|--------------------|-------------------|------------------------|
| Generic Notice | Residential Utilities Division | residential.utilities@ag.state.mn.us | Office of the Attorney General-RUD | 1400 BRM Tower 445 Minnesota St St. Paul, MN 551012131 | Electronic Service | Yes | OFF_SL_21-593_M-21-593 |
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| Susan | Romans | sromans@allete.com | Minnesota Power | 30 West Superior Street Legal Dept Duluth, MN 55802 | Electronic Service | No | OFF_SL_21-593_M-21-593 |
| Thomas | Scharff | thomas.scharff@versocom.com | Verso Corp | 600 High Street Wisconsin Rapids, WI 54495 | Electronic Service | No | OFF_SL_21-593_M-21-593 |
| Will | Seuffert | Will.Seuffert@state.mn.us | Public Utilities Commission | 121 7th PI E Ste 350 Saint Paul, MN 55101 | Electronic Service | Yes | OFF_SL_21-593_M-21-593 |
| Eric | Swanson | eswanson@winthrop.com | Winthrop & Weinstine | 225 S 6th St Ste 3500 Capella Tower Minneapolis, MN 554024629 | Electronic Service | No | OFF_SL_21-593_M-21-593 |
| Jim | Tieberg | jtieberg@polymetmining.com | PolyMet Mining, Inc. | PO Box 475 County Highway 666 Hoyt Lakes, MN 55750 | Electronic Service | No | OFF_SL_21-593_M-21-593 |
| Karen | Turnboom | karen.turnboom@versocom.com | Verso Corporation | 100 Central Avenue Duluth, MN 55807 | Electronic Service | No | OFF_SL_21-593_M-21-593 |