

## Staff Briefing Papers

Meeting Date	April 19, 2018	Agenda Item *2
Company	Northern States Power Company, doing business as Xcel Energy	
Docket No.	<b>E-002/M-17-851</b> <b>In the Matter of the Petition of Northern States Power Company for Approval of a Master Utility Agreement with the Metropolitan Council for the Southwest Light Rail Transit Project</b>	
Issue	Should the Commission approve Xcel's Master Utility Agreement with the Metropolitan Council?	
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 Relevant Documents	Date
Xcel - Petition	December 4, 2017
Department of Commerce - Comments	February 2, 2018

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

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## I. Statement of the Issues

Should the Commission approve Xcel's Master Utility Agreement with the Metropolitan Council?

## II. Background

On December 4, 2017, Northern States Power Company, doing business as Xcel Energy (Xcel) filed a Master Utility Agreement (MUA) with the Metropolitan Council (Met) governing the removal/relocation of Xcel's utility facilities lying in the path of Southwest Light Rail Transit Project (Project).

The project involves light rail line running from downtown Minneapolis through St. Louis Park, Hopkins, Minnetonka and Eden Prairie.

The MUA addresses how the utility relocation work will be conducted by Xcel and specifies terms for payments by the Met. At present, Xcel estimates the cost of removal/relocation of utility facilities to be \$36 million and Xcel will be reimbursed by the Met in the amount of \$3 million. The Met expects to receive a portion of the \$3 million from the Federal Transit Administration (FTA). The FTA requires a written agreement between the Met and Xcel to set forth the terms and conditions for the design, construction, and payment of any required utility work.

Xcel noted that it was not aware of any prior Commission Order approving a similar MUA.

The Met is said to be still designing the project and, therefore, the total costs of the relocation project are not available at this time. Even so, Xcel is seeking approval of the MUA because "there is work that can begin soon for which the MUA needs to be in place and this Petition supports Council's desire to get the Project underway as soon as possible." Xcel requests that the Commission approve the MUA for the Project because it serves the needs of the Met and further advances the light rail project.<sup>1</sup> The MUA is proposed to continue until December 31, 2021.

Xcel filed the MUA pursuant to Minn. Stat. § 216B.05. Subd. 2a. of this statute requires:

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

On February 2, 2018, the Department of Commerce filed its comments recommending that the Commission approve the MUA in light of prior case law and administrative rules. The

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<sup>1</sup> Xcel Petition, p. 10.

Department's comments contained lengthy excerpts from Xcel's response to the Department's discovery and sheds more light on the current filing.

### **III. Details of Xcel's MUA with the Metropolitan Council**

The MUA establishes a general framework for Xcel to proceed with relocation of facilities and reimbursement by the Met.

Xcel notes that the FTA requires a written agreement between the parties to set forth the terms and conditions for the design, construction, and payment of any required utility work.

However, there is in Xcel's tariff a service addressing this circumstance. This offering is termed "Statement of Work Requested."<sup>2</sup> This tariffed offering is an agreement between Xcel and customer (usually municipality) wherein the customer agrees to pay the entire cost of relocation.

Xcel argues that the relocation addressed in this filing is "unique" and not covered by the tariff – "the standard tariffs are not adequate to address the requirements associated with the Project."

The Department's discovery shows that the unique nature of this project relates to the FTA's requirement that Xcel enter into an MUA with the Metropolitan Council.<sup>3</sup> Xcel noted that it was "informed by the Met Council that the FTA required an MUA rather than the tariffed Statements of Work. Since the Project is receiving federal funds, the FTA required very specific provisions to be included in the MUA, most notably the Buy America provision.<sup>4</sup> Subsequently, the Met Council also determined a need to include additional provisions such as Insurance and Indemnification."<sup>5</sup>

Xcel has presently estimated relocation costs at \$36 million. The Met will reimburse Xcel only about \$3 million. As noted before, the Met will receive a portion of the \$3 million from the FTA.

It is the \$3 million reimbursable costs that are addressed in the MUA.

Xcel indicated in response to a Department interrogatory that in March 2017, the Minnesota Department of Transportation (MDOT) issued its Commissioner's Notice and Orders in support of the Southwest Light Rail Transit project and in consultation with the Met to cause utility facilities removal/relocation within the public right-of-way. Xcel emphasized that MDOT was

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<sup>2</sup> [https://www.xcelenergy.com/company/rates\\_and\\_regulations/rates/rate\\_books](https://www.xcelenergy.com/company/rates_and_regulations/rates/rate_books)

See pages 52, 53, 53.1, 53.2, and 53.3. Also, Attachment A of Xcel's Petition.

<sup>3</sup> Department Comments, p. 4.

<sup>4</sup> "49 U.S.C. Section 5323(j) and 49 C.F.R. Part 661, which provide that federal funds may not be obligated unless steel, iron, and manufactured products used in FTA-funded projects are produced in the United States, unless a waiver has been granted by FTA or the product is subject to a general waiver." See Xcel Petition, Attachment A, page 23 of 32.

<sup>5</sup> Department Comments, pp. 4-5.

“not a customer of Xcel pertaining to the facilities in the public right-of-way as these facilities are in the public right-of-way to serve other Xcel Energy customers.”

Xcel also indicated that “based on prior judicial precedent, Xcel Energy cannot seek reimbursement of its costs from the Met Council or the Minnesota Department of Transportation for the ordered relocations from the public right of way pertaining to light rail transit work. Accordingly, Xcel Energy is precluded from seeking from the Met Council or the Minnesota Department of Transportation the costs associated with relocation work from the public right- of-way.”

Section VIII of the MUA recognizes that specific details of each “Statement of Work” are unknown as of this time but provides that the total costs for utility work done pursuant to this MUA will be capped at \$3 million.<sup>6</sup>

Xcel acknowledges that there will be additional utility work that is not covered by this MUA such as relocation of facilities in a public right-of-way.

Xcel notes that the Met is

still in the planning stages of the project, and we will need to prepare detailed designs and determine the timing of our work in relation to the overall project schedule before we [Xcel] can have a more refined estimate of our expected costs. For context, our current estimate was prepared by extrapolating data from previous light rail project experience. Thus, we are unsure at this point how accurate the current estimate will be. However, we believe there may be a significant portion of the costs necessary to perform this work that will not be recovered from the Council. The Company is currently working to substitute or re-prioritize other projects to make room in our current capital budget and/or alternatives for potential cost recovery, though we acknowledge that these types of costs are the type of risk a utility takes when entering a multi-year settlement. [emphasis added]

Xcel notes that “the Company is responsible for the relocation costs within a public right-of-way.” Xcel indicated to the Department that in common with this project and the Hiawatha Light Rail and the Central Corridor Light Rail projects, Xcel alone is responsible for the relocation costs within a public right-of-way. Xcel added that although an MUA was not required for the Hiawatha and Central Corridor projects, Xcel had about \$26 million in relocation costs for the Hiawatha project and about \$30 million in relocation costs for the Central Corridor project. Such costs were non-reimbursable and added that such costs were dictated by Minn. Stat. 161.45 and Minn. Rules 8810.3300, Subpart 1.

Xcel argued that it is “not able to seek reimbursement from Met Council or the Minnesota Department of Transportation for light rail relocation work unless such work is within a private easement or permit area, or other private, non-public right-of-way property.”<sup>7</sup>

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<sup>6</sup> Xcel’s Petition, Attachment A, page 8 of 21.

<sup>7</sup> Department Comments, Attachment 2, p. 4 of 5.

Xcel cited court cases in which it attempted to recover relocation costs of facilities in the public right of way in the Hiawatha project from MDOT. Various court cases have handed the following judgment:<sup>8</sup>

“[u]nder the traditional common-law rule, utilities have been required to bear the entire cost of relocating from a public right-of-way whenever requested to do so by state or local authorities.”

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no compensation was due to the utility company in light of “the long-held view that a city may regulate a utility without compensation in valid exercise of its police power.”

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The Court is persuaded that the Minnesota legislature expressly granted authority and police power to MnDOT to create the LRT project, and that this authority sufficiently empowered the department to order relocation of the Fifth Street utilities at Xcel’s own expense.

The MUA provides for relocation of facilities where “existing facilities are located within NSP property, a Company easement, or public drainage or other utility easement.” The MUA only applies to utility work for the Project that is reimbursable directly by the Met. The Council shall reimburse the Company for the costs of the utility work where the Company owns a compensable real property interest. Reimbursement shall occur when existing facilities are located within NSP property, a Company easement, or public drainage or other utility easement.

Xcel indicated that in the two previous light rail projects (Hiawatha Corridor and Central Corridor projects), Xcel did not need a Master Utility Agreement and consequently did not submit a regulatory filing for the relocation work. Instead, Xcel noted that it received a Notice and Orders from the Minnesota Department of Transportation to relocate distribution facilities for both projects. Xcel indicated that the relocation work for these projects was included within previous electric rate case capital expenditure budgets.

There is no immediate impact on Xcel’s revenue. The capitalized costs of removing, relocating and installing utility facilities, off-set by the Metropolitan Council reimbursement, will go into the Company’s cost of service in future rate cases.

#### **IV. Department Comments**

The Department indicates that the existing Statement of Work Requested agreements in Xcel’s existing tariffs provide for the Customer’s payment of Xcel’s cost of the performed work, whereas the proposed MUA provides for a maximum Met Council payment of \$3 million out of the expected total \$36 million cost of the Company relocation work. The Department noted that the unique nature of the project prevents the MUA from reflecting the entire relocation cost, excluding the cost of betterment.

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<sup>8</sup> Department Comments, pp. 7-8.

The Department also noted that “the Eighth Circuit Court of Appeals ruled against Xcel’s challenge in federal court of its required relocation of underground facilities in the public right of way at Xcel’s own expense in order to accommodate the Hiawatha project by the Minnesota Department of Transportation.”

The Department recommends that in light of prior case law and administrative rules, the Commission approve the proposed MUA.

#### **V. Staff Comment**

The proposed MUA applies only to relocation work that is reimbursable directly by the Met, and Xcel has indicated that recovery of the non-reimbursable costs “from Xcel Energy ratepayers for light rail projects regardless of whether or not our customers caused such work to be done is a matter of state law.” Xcel has also noted that the relocation costs associated with the Hiawatha Corridor Project (\$26 million) and the Central Corridor Project (\$30 million) were included in previous electric rate case capital expenditure budgets. Xcel has now proposed that the “capitalized costs of removing, relocating and installing utility facilities, offset by Council reimbursement, . . . go into the Company’s cost of service in future rate cases.”

Xcel’s request for approval of the MUA could also be viewed as a request for pre-approval of recovery of the unspecified amount of LRT capital expenditure that is not reimbursed by the Metropolitan Council from the general body of ratepayers. Xcel indicates that unreimbursed costs will be included in its cost of service in a future rate case. This could potentially occur next year if/when Xcel submits its next request for approval of a multi-year rate plan, quite possibly, in November 2019. However, in the meantime, in the current multi-year rate plan, Xcel has a capital projects true-up mechanism that, under some circumstances, may allow Xcel to recover the SWLRT Project’s capital costs projects.

Because Xcel’s petition contains few specifics, and Xcel itself is presently unaware of the Met’s plans, Staff does not believe that Commission approval of the MUA could constitute even implicit pre-approval of the balance of the LRT expenditures associated with moving the facilities subject to the MUA. Staff suggests that the Commission require Xcel to submit a compliance filing that provides:

- a. a more comprehensive picture of the Project’s required work, its timetable, and its estimated cost, and
- b. an explanation of how Xcel proposes to recover the “unreimbursed” part of the cost of this project in its next rate case (including an explanation of how it might be authorized to use the capital projects true-up) for cost recovery.

## **VI. Decision Options**

1. Approve the proposed Master Utility Agreement between Northern States Power Company, doing business as Xcel Energy, and the Metropolitan Council.
2. Order Xcel to submit a compliance filing, as described above, in this docket and in the capital projects true-up docket (i.e. #15-826, Xcel's 2015 multi-year rate plan docket) within 30 days of the completion of the design work for this project.
3. Other action by the Commission.