



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

October 14, 2019

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

RE: Initial 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 *Initial 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,

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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

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

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**INITIAL 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 Comments.

Topic(s) Open for Comment

- 1. Minnesota Power, Otter Tail Power, and Xcel Energy revised 2019 annual cogeneration and small power production filings with the data each utility has proposed to make public and the rationale for these changes to trade secret designation.**

Xcel Energy (“Xcel”). Xcel’s revised filing submitted on September 10, 2019 argues that its trade secret designated information “would undermine the Company’s resource bidding process” but does not explain *how* it would undermine the Company’s resource bidding process. Xcel Revised Filing at 1 (Sept. 10, 2019). Xcel’s revised filing also argues that disclosure of this information “could” result in higher costs of energy for Xcel Energy customers by “allowing potential suppliers to modify their pricing from what they would otherwise bid,” *Id.* at 2. First, “could” is speculative. Second, even if they believed it “would,” Xcel failed to explain how this information would be used by potential suppliers to modify their pricing.

Xcel’s failure to explain how its resource bidding process would be undermined or how potential suppliers could modify their pricing – and whether it would harm customers – fails to

provide the “required specificity in proving harm from disclosure.” *Prairie Island Indian Cmty.*, 658 N.W.2d at 884. (emphasis added). On the topic of required specificity, the Supreme Court of Minnesota has held that “[c]onclusory allegations of harm do not support a finding that data constitutes a trade secret.” *In re Rahr Malting Co.*, 632 N.W.2d 572, 576 (Minn. 2001); see also *Int’l Bus. Mach. Corp. v. Seagate Tech., Inc.*, 941 F.Supp. 98, 101 (D.Minn.1992) (holding injunction will not issue on “mere suspicion or apprehension of injury” from disclosure; interpreting Minnesota Trade Secrets Act).

Minnesota Power and Otter Tail Power Company (“OTP”). In their revised filing, neither Minnesota Power nor OTP provide an explanation for their trade secret designations like Xcel did in its revised filing.

2. Is any of the specific, trade secret-designated information required by Minnesota rules under part 7835.0500 (Schedule A); part 7835.0600 (Schedule B); and part 7835.1000 (Schedule G) not required by PURPA?

Yes. The table below shows what information required by Minnesota rules is also required by PURPA’s public inspection regulation. Thus, everything *not* included in the below table is not expressly required by PURPA’s public inspection regulation.

Minnesota Rule	Minnesota Rule Language	Equivalent Federal Rule	Federal Rule Language
7835.0500	Schedule A must contain the estimated system average incremental energy costs by seasonal peak and off-peak periods for each of the next five years.	18 C.F.R. § 292.302(b)(1)	The estimated avoided cost on the electric utility's system, solely with respect to the energy component... The avoided costs shall be stated on a cents per kilowatt-hour basis, during daily and seasonal peak and off-peak periods, by year, for the current calendar year and each of the next 5 years

7835.0600, Subp. 2(E)	Schedule B must contain a description of all planned utility generating facility additions anticipated during the next ten years, including: ... E. anticipated completed cost in dollars per kilowatt in the year in which the plant is expected to be put in service, including allowance for funds used during construction	18 C.F.R. § 292.302(b)(2)-(3)	(2) The electric utility's plan for the addition of capacity by amount and type... for each year during the succeeding 10 years... (3) The estimated capacity costs at completion of the planned capacity additions... on the basis of dollars per kilowatt... These costs shall be expressed in terms of individual generating units...
7835.0600, Subp. 2(F)	Schedule B must contain a description of all planned utility generating facility additions anticipated during the next ten years, including: ... F. anticipated average annual fixed operating and maintenance costs in dollars per kilowatt	18 C.F.R. § 292.302(b)(2)-(3)	(2) The electric utility's plan for the addition of capacity by amount and type... for each year during the succeeding 10 years... (3) The estimated capacity costs at completion of the planned capacity additions... on the basis of dollars per kilowatt... These costs shall be expressed in terms of individual generating units...
7835.0600, Subp. 2(G)	Schedule B must contain a description of all planned utility generating facility additions anticipated during the next ten years, including: ... G. energy costs associated with the unit, including fuel costs and variable operating and maintenance costs	18 C.F.R. § 292.302(b)(2)-(3)	(2) The electric utility's plan for the addition of capacity by amount and type... for each year during the succeeding 10 years... (3) the associated energy costs of each unit, expressed in cents per kilowatt hour. These costs shall be expressed in terms of individual generating units...
7835.0600, Subp. 3(D)	Schedule B must contain a description of all planned firm capacity purchases, other than from qualifying facilities, during the next ten years, including: ... D. capacity cost in dollars per kilowatt	18 C.F.R. § 292.302(b)(2)-(3)	(2) The electric utility's plan... for purchases of firm energy and capacity... for each year during the succeeding 10 years... (3) The estimated capacity costs at completion of... planned capacity firm purchases, on the basis of dollars per kilowatt... These costs shall be expressed in terms... of individual planned firm purchases.

7835.0600, Subp. 3(E)	Schedule B must contain a description of all planned firm capacity purchases, other than from qualifying facilities, during the next ten years, including: ... E. associated energy cost in cents per kilowatt-hour	18 C.F.R. § 292.302(b)(2)-(3)	(2) The electric utility's plan... for purchases of firm energy and capacity... for each year during the succeeding 10 years... (3) The estimated capacity costs at completion of the planned capacity additions and planned capacity firm purchases, on the basis of dollars per kilowatt, and the associated energy costs of each unit, expressed in cents per kilowatt hour. These costs shall be expressed in terms... of individual planned firm purchases.
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3. Discuss the ‘public inspection’ requirement under PURPA and Minn. Rules 7835.1200 and whether that can be satisfied by granting developers interested in providing generation as qualifying facilities (QFs), and their consultants and advisors, access to the data required by the rules under a Commission-approved nondisclosure agreement.

A. The Plain Language of “Public Inspection” Only Supports One Interpretation Requiring Public Availability and Cannot be Rendered Nonpublic By Requiring Nondisclosure Agreement.

The plain language of Minn. R. 7835.1200 requires “public inspection” of the annual PURPA filings. If the Commission interprets “public inspection” in a way that requires execution of a nondisclosure agreement – thus no longer rendering it “public” – such an interpretation would stand in direct conflict with the definition of “public” and the plain language of Minn. R. 7835.1200. The definition of “public” only has one relevant meaning: “Open or available for all to use, share, or enjoy.” “PUBLIC,” Black's Law Dictionary (11th ed. 2019). “Inspection” means a “careful examination of something, such as goods (to determine their fitness for purchase) or items produced in response to a discovery request (to determine their relevance to a lawsuit).” “INSPECTION,” Black's Law Dictionary (11th ed. 2019). Therefore, “public inspection” can only mean that all interested parties have access to and the ability to examine the full contents of the utility’s annual PURPA filings.

If the Commission interprets “public inspection” in a manner that requires the execution of a nondisclosure agreement, such an interpretation would constitute impermissible rulemaking.

As the Supreme Court of Minnesota has explained:

Generally, if the agency's interpretation of a rule corresponds with its plain meaning, or if the rule is ambiguous and the agency interpretation is a longstanding one, the agency is not deemed to have promulgated a new rule.

Cable Commc'ns Bd. v. Nor-W. Cable Commc'ns P'ship, 356 N.W.2d 658, 667 (Minn. 1984). In other words, if an agency interprets a rule in conflict with its plain meaning, the agency has committed an impermissible rulemaking by failing to follow the procedures required by the Minnesota Administrative Procedures Act (“MAPA”). See *Mapleton Cmty. Home, Inc. v. Minnesota Dep't of Human Servs.*, 391 N.W.2d 798, 802 (Minn. 1986) (finding that agency’s interpretation corresponded to rule’s plain meaning and, therefore, holding that agency did not need to follow MAPA to be valid).

In the present case, the plain meaning of “public inspection” can only support one interpretation: available to the public. If the Commission interprets “public inspection” in any manner that renders it nonpublic and in conflict with its plain meaning, such as by requiring a nondisclosure agreement, then the Commission’s interpretation effectively amends Minn. R. 7835.1200 without following the procedures required under the MAPA. Although the Commission may be concerned with the consequence of the plain language of Minn. R. 7835.1200, the only way to amend the rule and its plain language is through rulemaking and not through interpretation.

Likewise, even though Minn. R. 7835.1200 is not ambiguous, in the event the Commission finds it ambiguous, the Commission still cannot interpret in a way to require a nondisclosure agreement before such an interpretation of “public inspection” is not longstanding.

Cable Commc'ns Bd, 356 N.W.2d at 667 (finding that Board's interpretation of "substantially contested" had not been used before and, therefore, did not represent longstanding interpretation of the rule).

B. FERC's Interpretation of "Public Inspection" Clearly Requires Public Access.

Regardless of how the Commission interprets its "public inspection" rule, FERC's interpretation of its "public inspection" rule, 18 C.F.R. § 292.302(b), makes clear that it envisioned it being available to the public:

Section 292.302, which provides for the availability of electric utility system cost data, **requires electric utilities to** provide state regulatory authorities and **the public** with avoided cost information which is intended to assist QFs in their planning.

In Re Streamlining Elec. Power Regulation, 61 FERC ¶ 61207, 61777 (Nov. 5, 1992) (emphasis added).

Because FERC's interpretation requires public access, the information required by 18 C.F.R. § 292.302(b) must be made available to the public and cannot be rendered nonpublic by requiring a nondisclosure agreement.

C. If Commission Finds that Some Information Required by 18 C.F.R. § 292.302(b) is not Required by Minnesota Rules, Commission Should Require Utilities to File, on a Biannual Basis, the Information Required by 18 C.F.R. § 292.302(b).

In the event the Commission determines that Minnesota rules require different information than 18 C.F.R. § 292.302(b), the Commission should require the utilities to file, on a biannual basis, the information required by 18 C.F.R. § 292.302(b). Joint Commenters are not aware of the utilities filing this information at all in the last few years, as required by 18 C.F.R. § 292.302(b).

Minnesota's annual filing requirements are in addition to 18 C.F.R. § 292.302(b) and do

not replace them. PURPA's regulations allow states to substitute their own avoided cost filing requirements to replace those required by 18 C.F.R. § 292.302(b) but only after the state met the following two requirements required by 18 C.F.R. § 292.302(d):

First, the state must provide public notice and the opportunity to comment. 18 C.F.R. § 292.302(d)(1). Second, the state must notify FERC of the substitution within 30 days of completing the state's notice and comment period and the state's subsequent determination that alternative data is required. 18 C.F.R. 292.302(d)(2).

There is no record that either of those two requirements were met within 30 days of the adoption of Minn. R. 7835.0300 to R. 7835.1200. Therefore, Minnesota's avoided cost information is in addition to that required by 18 C.F.R. § 292.302(b).

D. If the Commission Still Decides to Require Signing a Nondisclosure Agreement, Joint Commenters Recommend the Following Best Practices and Procedures.

While Joint Commenters believe that "public inspection" requires public access and that requiring a nondisclosure agreement only available to certain individuals conflicts with the "public inspection" requirement, Joint Commenters propose the following best practices to govern use of a nondisclosure agreement process, should the Commission so order.

The Commission should require all utilities to use the same standard nondisclosure agreement for purposes of Minn. R. 7835.1200 and for accessing the filings required by Part 7835. This requirement promotes fairness and simplicity.

The Commission should require all utilities to make the nondisclosure agreement available on their website and upon request. Utilities should be required to provide information on their website on how to request the nondisclosure agreement if the Commission does not require that the actual nondisclosure agreement be posted online. This requirement promotes transparency and access.

The Commission should require utilities set up a generic email address for interested parties to submit the signed nondisclosure agreement. In lieu of an email address or in addition to an email address, the Commission should require the utilities to set up an online form on their website for interested parties to submit the nondisclosure agreement. This requirement promotes efficiency and simplicity.

The Commission should not restrict who has access to the nondisclosure agreement and the annual filings because such restriction would conflict with the definition of “public” as it relates to “public inspection” in Minn. R. 7835.1200. Limiting the nondisclosure agreement to “developers interested in providing generation as qualifying facilities (QFs), and their consultants and advisors” would mean organizations like Joint Commenters would never be able to view the annual filings.

Limiting the nondisclosure agreement to “developers interested in providing generation as qualifying facilities (QFs), and their consultants and advisors” finds no support in the plain language of Minn. R. 7835.1200. Anyone can potentially develop or own a qualifying facility because there is no minimum size cap on the definition of a qualifying facility, therefore, restricting access to “developers” allows the utility to unilaterally reject anyone it wants. Even the owner of a home with a 1 kW solar panel could qualify under PURPA, but that person would not ordinarily be considered a “developer.”

Not only would restricting access to the nondisclosure agreement to “developers” conflict with the definition of “public,” but it would also create an unfair balance of power where the utility is provided unfettered discretion to determine who is and who is not allowed to sign the nondisclosure agreement. The Commission should not limit who may view the annual PURPA filings under cover of a signed nondisclosure agreement.

* * *

Thank you for considering our comments.

Dated: October 14, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

Docket No. PR-19-09

I, Adrienne Dunham, hereby certify that I have this day, served a true and correct copy of the *Initial 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 14, 2019

/s/ Adrienne Dunham

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