

December 11, 2017

Via Electronic Filing

Mr. Daniel Wolf
Executive Secretary
Minnesota Public Utilities Commission
121 Seventh Place East, Suite 350
St. Paul, MN 55101-2147

Re: *In the Matter of the Formal Complaint and Petition for Relief by Minnesota Energy Resources Corporation Against Northern States Power Company d/b/a Xcel Energy*

Docket No. G-011, G-002/C-17-802

Dear Mr. Wolf:

Pursuant to the Minnesota Public Utilities Commission's November 15, 2017 Notice of Comment Period, please find enclosed Minnesota Energy Resources Corporation's ("MERC") Reply Comments in the above-referenced matter. Please do not hesitate to contact me with any questions or concerns.

Sincerely,

/s/ Brian Meloy

Brian Meloy

**STATE OF MINNESOTA
BEFORE THE
PUBLIC UTILITIES COMMISSION**

<i>Formal Complaint and Petition for Relief by Minnesota Energy Resources Corporation Against Northern States Power Company d/b/a Xcel Energy</i>))))))	Docket No. G-011, G-002/C-17-802 REPLY COMMENTS OF MINNESOTA ENERGY RESOURCES CORPORATION
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Pursuant to the Minnesota Public Utilities Commission’s (“Commission”) November 15, 2017 Notice of Comment Period, Minnesota Energy Resources Corporation (“MERC”) submits the following Reply Comments to Northern States Power Company d/b/a Xcel Energy’s (“Xcel”) Response to MERC’s Complaint. As discussed below, Xcel offers three arguments in support of its request that the Complaint be dismissed – all of which are unsupported.

First, in spite of plain statutory language to the contrary, Xcel claims that Minnesota law authorizes natural gas public utilities to discount their rates in order to take customers away from other natural gas utilities. In support, Xcel suggests that because it and two other natural gas utilities in the state already engage in such practice, it must be lawful. The Commission should reject the extraordinary claim that past practice by a regulated entity can excuse a utility from adhering to express statutory requirements.

Second, Xcel urges the Commission to dismiss MERC’s Complaint alleging that there is no material difference between this dispute and the prior action involving the Vikings development. Xcel misreads the Commission’s decision on the Vikings development, which recognized that each dispute is to be evaluated on a case-by-case basis. Xcel’s claim is also factually untrue. As demonstrated by Xcel’s own Response, Xcel’s proposed facilities to serve United Properties are even more unnecessary.

Lastly, Xcel argues that a contested case is not necessary, but at the same time (1)

submits information and analyses that confirms there are disputed issues of material fact and (2) ignores the litany of disputed issues of facts MERC raised in the Complaint and the fact that discovery has just commenced. MERC, therefore, renews its request that the Commission immediately suspend Xcel's unlawful Competitive Agreement and refer this matter for a contested case hearing.

I. Xcel's Promotional Incentive to United Properties is Unlawful, Notwithstanding the Recent Use of Such Incentives by Xcel and Other Utilities.

MERC's Complaint describes how Xcel's Competitive Agreement with United Properties and the promotional incentives violate numerous Minnesota statutes that prohibit flexed, discounted, and unreasonably preferential rates. Rather than even address these statutory arguments, Xcel simply observes that other gas distribution companies use promotional incentives of some kind to attract new customers. Relying on this "three wrongs make a right" approach, Xcel does not even try to square its Competitive Agreement against Minn. Stat. § 216B.163, which prohibits the discounting of rates except in the limited circumstance where it can respond to "effective competition" with unregulated suppliers—not to gas distribution utilities regulated by this Commission. Nor does Xcel explain how its promotional incentive is not an unreasonably preferential rate in violation of Minn. Stat. § 216B.07. The Commission should forcefully reject Xcel's position that it can flout plain statutory law.

Xcel also argues that, if the Commission declares its promotional incentive unlawful, the Commission should prohibit other "incentives" that a utility may offer to attract a new customer. Xcel takes specific aim at MERC's recent co-branded sponsorship opportunity that it offered to the Vikings development, through which MERC would have provided up to \$60,000 to the Vikings, or a third-party, over three years, in exchange for advertising opportunities. Despite Xcel's attempt to create a false equivalency, however, there are two key differences between

these scenarios. First, with a co-branded sponsorship opportunity, MERC would offer payment in exchange for services rendered by the Vikings in the form of advertising. In other words, MERC and the Vikings would take part in an arms-length transaction, priced according to the market. In contrast, Xcel's promotional incentive simply provides cash to United Properties.¹

Second, Xcel's promotional incentive is directly tied to its provision of natural gas, a Commission-regulated service, and is offered before a customer has taken natural gas service to entice them to take service from Xcel. As set forth in Exhibit B to the Competitive Agreement and acknowledged by Xcel, United Properties would only be entitled to the second half of the promotional incentive once the development consumed 100,000 therms. In contrast to Xcel's promotional incentive, MERC's offer involved an arms-length transaction in exchange for non-utility related services rendered outside the Commission's regulatory purview and after the Vikings had become MERC's customer.²

II. Xcel's Attempt to Justify the Unnecessary Duplication of MERC's Facilities Based on the Commission's Decision with Respect to the Vikings Development Should be Summarily Rejected.

Xcel's Response includes a map that confirms all of the piping that Xcel plans to install will duplicate existing MERC facilities, which are already present in the Ames Crossing Road and Shanahan Way rights-of-way.³ Thus, there is no question that Xcel's proposed facilities are unnecessary – a determination initially reached by the City of Eagan. The map also shows that,

¹ Xcel assures the Commission that Xcel's shareholders will cover the cost of its promotional incentive. Although MERC expects that Xcel will abide by those assurances, MERC's advertising opportunity is also different because MERC would have been prohibited *by statute* from recovering the cost of its co-branded sponsorship opportunity from ratepayers. See Minn. Stat. § 216B.16, subd. 8 (prohibiting the recovery of certain advertising expenses).

² Of course, MERC's co-branded sponsorship opportunity never materialized, so it is irrelevant to this dispute. Further, MERC has not offered similar opportunities to attract new customers in other scenarios, so Xcel's argument that "other" types of promotional incentives should be held unlawful is purely academic here, and is best left for the generic docket on inter-gas-utility competition in which MERC and Xcel are both currently participating.

³ Xcel will install some new pipe along Lone Oak Road in an area that MERC does not occupy. However, Xcel only offered to install that pipe as part of its pretextual looping proposal.

once Xcel is given one opportunity to encroach into an area long served by another gas distribution utility, it will only continue to do so, regardless of the negative impact its actions will have on the affected utility and their customers.

In response to MERC's admonition in the Viking proceeding that if Xcel were allowed to serve the proposed Vikings complex, its footprint in the area would continue to grow resulting in more unnecessary duplication of facilities, Xcel dismissed the notion and indicated that it did not expect similar duplication to occur in the future.⁴ Of course, Xcel has now contradicted those representations through its own actions, taken only weeks after the Commission dismissed MERC's previous Complaint. Xcel's duplication of MERC's facilities with the Vikings development and the United development has and will have cumulative impacts that cannot be ignored simply because Xcel seeks to minimize the harm to MERC and its customers.

III. A Contested Case is Necessary to Fully Develop the Record.

In its Response, Xcel argues that "the assertion that a contested case is necessary is somewhat puzzling given that MERC's Complaint was accompanied by the sworn affidavit of a MERC employee attesting to many of the facts it alleges in its complaint, along with seven other exhibits supporting its claim."⁵ According to Xcel, the Commission has sufficient information to make a final decision on the Complaint after the Department completes its analysis.

The Commission specifically determined that it would continue to evaluate "disputes between competing natural gas utilities on a case-by-case basis, balancing the interests of the

⁴ See June 8, 2017 Hearing Transcript in Docket No. G011,002/C-17-305 at pp. 137-138 (stating that the "parade of horrors that they, you know, are putting out there, that this is what's going to happen and the proliferation of competition and duplication of facilities, it hasn't been the case. . . . And nothing, looking back from now to then, should lead you to believe that that's going to happen.").

⁵ Xcel Response at p. 12.

utilities, competed-for customers, and current customers.”⁶ MERC finds it troubling that Xcel now seeks to shield its conduct from any review by relying on the Commission’s decision in the Vikings docket. Specific facts and analysis matter in each case. In this case, a contested case is needed to develop a factually and analytically robust record.

First, MERC set forth numerous specific disputed issues of fact that must be developed in a contested case proceeding on pages 27 and 28 of its Complaint. Xcel has not alleged, much less demonstrated, that such issues have been resolved. Second, Xcel’s Response raises additional disputed issues of fact that require further development in a contested case proceeding – including, for instance, the basis for Xcel’s *post hoc* rationalization that running its facilities in parallel with MERC’s existing facilities (even though it does not serve a single customer along Ames Crossing Road) is suddenly necessary to “loop” its system.⁷ Such a need was not mentioned or addressed in the Vikings proceeding and was not included in its original right-of-way permit application to the City of Eagan.

Third, on December 6, 2017, United requested that MERC coordinate with Xcel to remove the gas facilities MERC installed to provide gas service to United on an expedited basis to facilitate United’s construction after the City of Eagan denied Xcel a right-of-way permit. MERC should be allowed an opportunity to conduct discovery on Xcel’s interactions with MERC’s existing customer and the facts and circumstances that precipitated United’s decision.

Fourth, on December 7 and 8, the Department issued significant discovery to both Xcel and MERC, clearly showing the need to develop the factual record. The responses to the

⁶ July 12 Order at p. 5.

⁷ In denying Xcel’s application for a right-of-way permit, the City concluded that “[t]here is no apparent need for Xcel Energy to install this segment of gas line for system operation purposes as it would be a dead end line, solely for the purpose of providing service to Prime Therapeutics.” See the City’s September 22, 2017 denial of Xcel’s permit, which is attached as Exhibit C to the Affidavit of Amber Lee appended to the Complaint.

discovery requests are not due until after the comment period ends on December 11. MERC has a right to review and analyze such responses in the context of a contested case proceeding and to conduct its own discovery.

Finally, unlike the Vikings situation where all the parties agreed that an expedited proceeding was necessary to ensure gas service was available to support the customer's development schedule, United would not be prejudiced if this matter is referred to a contested case proceeding. United is currently receiving gas and can continue to receive such service either from MERC or Xcel. Further, Xcel is not prejudiced by the full development of the record. Unlike the Vikings case where Xcel refrained from displacing MERC as the natural gas provider until the Commission reached a decision on the propriety of Xcel's conduct, Xcel is racing to complete the construction of the unnecessary and duplicative facilities – no doubt recognizing that it would be difficult to unwind this action.⁸

Minn. Stat. § 216B.17 provides that “[i]f after making an investigation under subdivision 1 and holding a hearing under this section, the commission finds that all significant factual issues raised have not been resolved to its satisfaction . . . the commission shall order that a contested case proceeding be conducted under [the Minnesota Administrative Procedure Act].” MERC does not believe that there is any basis to conclude that all significant factual issues can be resolved on the basis of the pleadings submitted this far. A contested case proceeding is warranted.

CONCLUSION

For the reasons set forth above and in MERC's Complaint, MERC respectfully requests that the Commission (1) declare Xcel's Competitive Agreement unlawful, and immediately

⁸ Xcel Response at p. 6 (noting that it commenced construction on November 20).

suspend that agreement; and (2) refer this matter to the Office of Administrative Hearings for a contested case hearing.

Respectfully Submitted,

Dated: December 11, 2017

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the **Minnesota Energy Resources Corporation's Reply Comments** have been served on this day by e-filing/e-serving to the following:

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Dated this 11th day of December, 2017

/s/ Tammy J. Krause

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