


## Staff Briefing Papers

Meeting Date	March 1, 2018	Agenda Item **2
Company	Northern States Power Company d/b/a Xcel Energy	
Docket No.	<b>E002/M-17-532</b>	
	<b>In the Matter of Petition for Approval of an Amendment to the Hennepin Energy Resource Co. (HERC) Power Purchase Agreement (PPA)</b>	
Issues	Should the Commission grant Hennepin County's Request for Reconsideration?	
	Should the Commission grant Neighbors Against the Burner's Request for Reconsideration?	
Staff	Kelly Martone Sean Stalpes	<a href="mailto:kelly.martone@state.mn.us">kelly.martone@state.mn.us</a> 651-201-2245 <a href="mailto:sean.stalpes@state.mn.us">sean.stalpes@state.mn.us</a> 651-201-2252

 Relevant Documents	Date
Commission December 28, 2017 Order	12/28/2017
Hennepin County, Petition for Reconsideration	1/17/2018
Neighbors Against the Burner, Carol A. Overland, and Alan Muller Petition for Reconsideration	1/17/2018
Department of Commerce, Division of Energy Resources, Comments	1/29/2018
<b>Xcel Energy, Letter in Response to Petitions for Reconsideration</b>	2/1/2018

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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.

## Attached Documents

### Attachment A: Relevant Rules and Statutes

#### I. Statement of the Issues

Should the Commission grant Hennepin County's (County) Request for Reconsideration?

Should the Commission grant Neighbors Against the Burner's (NAB) Request for Reconsideration?

#### II. Minnesota Statutes and Commission Rules

Petitions for reconsideration are subject to Minn. Stat. § [216B.27](#) and Minn. Rules part [7829.3000](#).<sup>1</sup> Petitions for reconsideration are denied by operation of law unless the Commission takes action within sixty days of the request.

If the Commission takes no action on either petition, the requests would be considered denied as of March 19, 2018.

The Commission may also take specific action to deny the petition.

If the Commission takes up a party's request for reconsideration, the Commission may:

- (1) reconsider, and
  - (a) affirm,
  - (b) modify or
  - (c) reverse its initial decision, or
- (2) toll the time period to allow additional time for reconsideration, or
- (3) deny the petition for reconsideration and thereby affirm the initial decision.

The Commission may also reconsider or clarify its December 28, 2017 Order on its own motion.

The Commission vote on this matter was 5-0, with Commissioners Lange, Lipschultz, Schuerger, Sieben, and Tuma present.

#### III. Background

On June 30, 2017, Northern States Power, doing business as Xcel Energy (Xcel or the Company), filed its petition for approval of Amendment No. 1 to the Power Purchase Agreement (PPA) with Hennepin County in conjunction with the Hennepin County Energy Recovery Center (HERC).

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<sup>1</sup> Attachment A provides the language of Minn. Stat. § 216B.27 and Minn. Rules part 7829.3000 in full.

On December 28, 2017, following written comments and oral argument, the Commission issued its *Order Rejecting Proposed Amendment to Power Purchase Agreement* (“Order” or “December 2017 Order”).

On January 17, 2018, requests for reconsideration were filed by Hennepin County and NAB. (The NAB request for reconsideration is joint motion by the NAB organization and individuals Carol A. Overland and Alan Muller.)

On January 29, 2018, the Department of Commerce, Division of Energy Resources (DOC or the Department) filed its Answer to the motions for reconsideration.

#### IV. Parties’ Comments

##### A. Neighbors Against the Burner Request for Reconsideration

NAB, along with Carol A. Overland and Alan Muller, filed a joint motion for reconsideration on January 17, 2018. The motion requested to have several details addressed in the December 2017 Order, in part to clarify and assure that parties commenting and participating in this docket receive notice of filings of an interim agreement and/or amendment. Specifically, their concerns are the following:

- NAB has concern over the unreasonably high-priced HERC PPA in effect, which means ratepayers are being overcharged as the PPA remains unchanged. To protect ratepayers, NAB requests the Commission require the parties – Xcel and Hennepin County – to return to the Commission with a new proposal.<sup>2</sup> There must also be a deadline set for filing the proposed amendment since no deadline was determined during the Agenda meeting.<sup>3</sup>
- NAB requests that parties must propose an interim agreement immediately to protect ratepayers from the high-priced HERC PPA. Upon inquiring with Hennepin County, Mr. Alan Muller learned of an interim agreement underway with Xcel that is based off the MISO market price, yet nothing has been filed or approved by the Commission.<sup>4</sup>
- While NAB understands the Commission has no authority over air permits, the Commission may set requirements in the Order requiring an applicant to be permitted from specific agencies, which occurs in other PUC matters including siting permits. NAB would like the Commission to provide a conditional Order that requires Hennepin County to exercise their best effort to secure a renewed air permit and file a notice with the PUC and MPCA once it has done so.<sup>5</sup>

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<sup>2</sup> Petition for Reconsideration by Neighbors Against the Burner, Carol A. Overland, and Alan Muller (January 17, 2018) at page 2.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at page 3.

- Due to “paying excessive rates for HER[C] power for many years,” NAB believes the Commission should “consider reimbursement to ratepayers in a rate true-up for these admittedly excessive costs over the last decade, whether just during this interim period, or going back to when the overcharges were first brought to Commission attention, or going back to the original execution of the PPA.”<sup>6</sup>

## **B. Hennepin County’s Request for Reconsideration**

Hennepin County filed their motion for reconsideration on January 17, 2018 asking the Commission to reconsider several points in the Order and analyses. They are as follows:

- The County asserts that “at least one fundamental premise in the Commission’s Order on fair market value and price negotiated was incorrect and that correcting this error will result in a different outcome.”<sup>7</sup>

“[P]roper pricing analysis must focus not on current pricing, but must be fair market value to NSP at the time it is offered, which are the terms negotiated in 1986 and approved that year by the Commission.”<sup>8</sup> (Emphasis added by commenter.) Further, the Commission should not consider this amendment as a new agreement, but as a seven year extension of an existing, approved agreement, which the County offered in 2014, not 2017.<sup>9</sup>

After referencing Section 7.13 of the HERC PPA,<sup>10</sup> the County asserts this section does not establish fair market value at the time negotiations commence or conclude or at the time negotiations were approved by the Commission. Instead, the County believes “fair market value is determined in Section 7.13 at the time that Hennepin County decided to operate HERC beyond 28 years and offered the electrical output to NSP.”<sup>11</sup>

Therefore, the County believes that any pricing decision should be based on an analysis not of the current fair market value, but the value at the time the electrical output was offered by Hennepin County to NSP.<sup>12</sup> This would be 2014.

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<sup>6</sup> *Id.* at pages 3-4.

<sup>7</sup> Petition for Reconsideration by Hennepin County (January 17, 2018) at page 1.

<sup>8</sup> *Id.* at page 2.

<sup>9</sup> *Id.*

<sup>10</sup> Section 7.13 Term of Agreement. This Agreement shall be effective upon execution and shall continue in effect until 28 years after the Commercial Operation Date. If Seller decides to continue to operate the plant after the first 28 years, NSP will purchase the electrical output offered to NSP by Seller at its fair market value to NSP at the time it is offered, for up to an additional seven years of plant operation.

<sup>11</sup> Petition for Reconsideration by Hennepin County (January 17, 2018) at page 2.

<sup>12</sup> *Id.*

- “If the Commission were to base a determination on the current fair market value, it must not look to the MISO capacity auction price, which is based on a one year forward price of capacity and not valid for longer terms.”<sup>13</sup> Instead, the Department and Commission should consider “other measures of capacity value currently included in NSP’s [Xcel’s] rate structure, such as the embedded capacity value in the CIP program, curtailable rates, solar capacity value, the cost of comparable resources such as combined cycle, and the capacity value used as a basis for the IRP [Integrated Resource Planning] decision.”<sup>14</sup> The County notes this form of analysis was not included in the Department filings.
- The County did not partake in discussions about the value of capacity for the extension period since the method of cost recovery does not have an impact on the County. It “did not play a material role in allocation between capacity and energy in filings.”<sup>15</sup> The County believes an “unintended consequence of NSP’s [Xcel’s] inability to recover capacity costs from the fuel clause adjustment rider resulted in devaluing HERC’s value of capacity.”<sup>16</sup> Consequently, the County believes “[t]he decision in this proceeding must not put economic harm on Hennepin County, which is in conflict with the language and intent of the HERC PPA.”<sup>17</sup>
- HERC’s proxy capacity price was set by the Department at \$5/kW-month. The County generally concurs with the Department’s approach, but the data used was from a 2015 IRP and should have considered the prior IRP since the energy and capacity were offered in 2014.<sup>18</sup>
- The County wishes to be granted an additional sixty days to supplement the record with examples of applicable fair market value analyses supportive of both 2014 pricing and longer-term pricing as further documentation and analysis will demonstrate the reasonableness of the pricing in the proposed PPA Amendment.<sup>19</sup>

### C. Department Answer

The Department filed comments addressing the two reconsideration filings. First, they analyzed NAB’s remarks by summarizing it in four motions.

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<sup>13</sup> *Id.*

<sup>14</sup> Petition for Reconsideration by Hennepin County (January 17, 2018) at page 3.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at page 4.

NAB requested that the Commission protect the ratepayers by setting a deadline for Xcel to return with another Amendment No. 1 for the Commission to review, as it was assumed that the high-priced PPA would be charged to Xcel customers during this interim period. The Department stated that this “concern is misplaced” as the HERC PPA does not include any terms for energy that is delivered during the extension period and the old pricing does not apply after the close of the contract, which was December 31, 2017.<sup>20</sup> The Department also notes there is no basis to charge Xcel’s ratepayers any costs of power from the HERC facility without a Commission-approved price.<sup>21</sup> Furthermore, when a price is determined for the extension period, the burden will be on Xcel to explain why its ratepayers should be charged for any costs of the HERC facility.<sup>22</sup>

The Department responded to NAB’s third item requesting the Commission to require an interim agreement be filed immediately while the amendment to the PPA is pending. “[I]t is up to HERC and Xcel to negotiate a price and seek Commission approval. . . Xcel should not charge its ratepayers for costs of power from the HERC facility after December 31, 2017 since, as noted above, there is no Commission-approved price to be paid by ratepayers.”<sup>23</sup> However, the Department discovered after having discussions with Xcel that the utility is paying HERC the MISO market price under an interim agreement. The Department then recommends that Xcel cease collection of the cost of power from the HERC facility and determine whether HERC is needed to serve the Company’s load.<sup>24</sup> If it is, then it is necessary for Xcel to purchase power to replace the loss of the HERC resource. “[I]t would be reasonable for Xcel to include the costs of the lowest cost replacement power in the FCA [Fuel Clause Adjustment]. As a result, Xcel should refund in its next monthly FCA any differential in the costs of power from HERC compared to the lowest costs of replacement power for the period after December 31, 2017 and demonstrate compliance with this Commission’s requirement in the same monthly FCA.”<sup>25</sup>

The Department does not believe NAB’s request that the HERC PPA amendment be conditioned on an air permit renewal is a new issue. The Department noted this issue was discussed extensively during the proceeding, and therefore NAB has not provided a basis for reconsideration.<sup>26</sup>

Next, the Department focused on NAB’s suggestion to consider a rate true-up and reimburse ratepayers for the overcharges either from the interim period or when the

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<sup>20</sup> Comment by Department of Commerce, Division of Energy Resources (January 29, 2018) at page 3.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at page 4.

overcharges were brought to the Commission or throughout the full PPA term. “The Commission has not granted any deferred accounting to Xcel to recover any such costs at a later time; as a result, there is not a basis for a true-up.”<sup>27</sup>

After concluding its review of NAB’s petition for reconsideration, the Department recommends that the Commission not reconsider the December 2017 Order after determining that NAB “did not raise new, significant issues, point to new and relevant evidence, or expose errors in the 2017 Order.”<sup>28</sup>

Finally, the Department reviewed Hennepin County’s petition for reconsideration. The first of three items examined and compared the pricing set in Amendment No. 1 to the HERC PPA. Hennepin County noted that the December 2017 Order rejected the proposed PPA amendment because the pricing did not reflect “a reasonable approximation of the current fair market value of the HERC’s electrical output.” (Emphasis added by County.) The County asserted that it executed its right to extend the PPA on April 16, 2014 and the pricing and analysis should, instead, be based on when the County offered it to Xcel (in 2014). The County further supported this by referencing Section 7.13 of the HERC PPA:

If Seller decides to continue to operate the plant after the first 28 years, NSP will purchase the electrical output offered to NSP by Seller at its fair market value to NSP at the time it is offered, for up to an additional 7 years of plant operation.

The Department referenced their August 2, 2017 comments where they compared Amendment No. 1 to the last five years of MISO market prices and concluded that the average market price was much lower than the PPA amendment at \$27.43 per MWh.<sup>29</sup> The Department went a step further to adjust their analysis for the years prior – 2009 to 2013 – which provided the average market price of \$30.29 per MWh.<sup>30</sup> Modifying the data set did not alter the Department’s comments and they concluded the County did not provide any new, significant information.<sup>31</sup>

Next, Hennepin County considered HERC’s value and suggested that the Commission “must not look to the MISO capacity auction price,” but “other measures of capacity value currently included in NSP’s rate structure such as the embedded capacity value in the CIP program, curtailable rates, solar capacity value, the cost of comparable resources such as combined cycle, and the capacity value used as a basis for the IRP

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<sup>27</sup> *Id.*

<sup>28</sup> Comment by Department of Commerce, Division of Energy Resources (January 29, 2018) at page 4.

<sup>29</sup> *Id.* at page 5.

<sup>30</sup> This is a difference of \$2.86 per MWh.

<sup>31</sup> Comment by Department of Commerce, Division of Energy Resources (January 29, 2018) at page 5.

decision.”<sup>32</sup> In response, the Department reexamined the terms of the PPA, which stated pricing must reflect “fair market value,” and since the recommendations brought forward by the County are not a reflection of market value, their argument is found to be misplaced.

The last item the Department considered was the County’s concern over Xcel’s inability to recover capacity costs from the FCA, which they believe not only devalues HERC, but also puts “economic harm on Hennepin County, which is in conflict with the language and intent of the HERC PPA.”<sup>33</sup> The Department reminded the County that Xcel’s ability to recover costs through the FCA are the same in any contract that would occur: “Either the Xcel-HC contract would include a market-based capacity price or such a price would be imputed during the Department’s analysis to ensure that Xcel’s ratepayers are charged reasonable rates for electric service from Xcel.”<sup>34</sup> The Department determined this concern is without merit and concluded that Hennepin County “did not raise significant new issues, point to new and relevant evidence, or expose errors in the 2017 Order.”<sup>35</sup> Consequently, it is recommended that the Commission not reconsider its Order.

The Department suggested that the Commission should make a determination on Xcel’s collection of the cost of power from the HERC facility during this interim period.

#### **D. Xcel Letter**

Wishing to address some of the concerns parties stated in their motions for reconsideration, Xcel filed a letter on February 1, 2018.

Xcel explained that following the Commission’s decision during the hearing on November 16, 2017, it was necessary to execute an interim agreement with Hennepin County. This agreement took place on December 27, 2017, four days before the HERC PPA contract was to end.<sup>36</sup> Xcel stated, “We have no option other than to purchase the power from HERC during the extension period under the PPA.”<sup>37</sup>

This interim agreement pricing is summarized as follows:

The Second Amendment provides for interim market based pricing for energy sold to the Company after December 31, 2017, at the day-ahead

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<sup>32</sup> *Id.* and Petition for Reconsideration by Hennepin County (January 17, 2018) at pages 3-4.

<sup>33</sup> Petition for Reconsideration by Hennepin County (January 17, 2018) at page 4.

<sup>34</sup> Comment by Department of Commerce, Division of Energy Resources (January 29, 2018) at page 6.

<sup>35</sup> *Id.*

<sup>36</sup> The interim agreement, which Xcel has named Second Amendment, is filed as Attachment A to their Comments filed February 1, 2018.

<sup>37</sup> Comment by Xcel (February 1, 2018) at page 2.



MISO locational marginal price (LMP), adjusted for any applicable MISO market charges and real-time settlement differences. The interim pricing is subject to retroactive adjustment once permanent pricing is agreed upon by parties and will be subject to regulatory review.<sup>38</sup>

Xcel believes this agreement “fully protects customers” and should not be addressed as part of the HERC reconsideration, but, instead, with their “next monthly fuel clause filing, as a fuel and purchased power cost recovery issue.”<sup>39</sup> Xcel “commits to providing a discussion of the Second Amendment” and “can further address and respond to the concerns of parties, and provide any additional analysis they may request.”<sup>40</sup> The Company recognized that they are at risk for any costs from the interim agreement that the Commission considers excessive.

## **V. Staff Analysis**

### **A. Hennepin County’s February 8 Reply Comments**

On February 8, 2018, Hennepin County filed reply comments on its request for reconsideration under Subpart 5 of Minn. Rule. 7829.3000. (The County cited Minn. Rule. 7829.2900, which staff presumes was inadvertent.)

Subpart 5 of the recon rule clearly states that “Replies are not permitted unless specifically authorized by the commission.”<sup>41</sup> The County stated it “requests authorization” for reply comments, but following their request is a response to the Department’s Answer, which are in essence reply comments filed without authorization. With the County’s reply comments already in the record, the Commission is essentially left with three options:

1. Take more time to allow all parties an opportunity to respond to the County;
2. Take administrative notice of the reply comments, but not consider them; or
3. Consider the County’s comments as part of this proceeding.

The fact that the County disagrees with the Department’s Answer is not a justifiable reason to file reply comments without authorization provided by the Commission. The Commission has every capability to consider all arguments and disagree with the Department’s analysis. NAB may, too, have disputes with the Department’s Answer, but NAB did not follow the County’s course and file unauthorized comments. For these reasons, staff sees no reason why Hennepin County’s reply comments should be considered.

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Comment by Xcel (February 1, 2018) at page 2.

<sup>41</sup> Minn. Rules 7829.300 subp 5. <https://www.revisor.mn.gov/rules/?id=7829.3000>. Also included as Attachment A of the briefing papers.

In the interest of time, staff does not believe another round of comment is necessary, which, staff acknowledges, raises issues of fairness. After all, the County's reply is already in the record, and NAB likely has comments of its own regarding the Department's Answer. The Commission could allow consideration of the County's comments, but, to be fair to NAB and the Department, allow them an opportunity to verbally respond at the hearing, if necessary. Staff believes this would be more than generous to the County since a reply comment period was not opened in the first place.

The Commission could ultimately determine that the underlying reasons for rejecting the pricing terms of Amendment No. 1 have not changed, and therefore whether the Commission acknowledges the County's unauthorized reply comments or not could be moot. In addition, since the County's reply comments are basically an elaboration of its initial request for reconsideration, but with specific responses to arguments from the Department's Answer, the Commission may find that neither filing presents persuasive arguments that warrant reconsideration.

#### **B. Do the parties raise any new issues?**

The Department's Answer provided valuable information and analysis to each of the petitions for reconsideration. Staff agrees with the Department's position on the matters addressed, so staff will not repeat those arguments here.

There are issues, though, that the Commission might wish to address as a separate motion. For example, the Department recommended the Commission not to reconsider its December 2017 Order, but at the same time, the Department recommended the Commission take actions that depend on whether or not HERC is needed to serve the Company's load (see "Department Recommendations" at page 6).

Staff's understanding is that Xcel's February 1, 2018 letter resolves this issue. Xcel informed the Commission in that letter that HERC and Xcel agreed to "interim market based pricing for energy sold to the Company after December 31, 2017, at the day-ahead MISO locational marginal price (LMP), adjusted for any applicable MISO market charges and real-time settlement differences."<sup>42</sup>

Xcel's letter further explains that "[t]he interim pricing is subject to retroactive adjustment once permanent pricing is agreed upon by parties and will be subject to regulatory review."<sup>43</sup>

The basis for the Department's recommendation was that "if HERC is needed to serve the Company's load, it will be necessary for Xcel to purchase power to replace the loss of the HERC resource. Thus, in such a circumstance it would be reasonable for Xcel to

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<sup>42</sup> Comment by Xcel (February 1, 2018) at page 2.

<sup>43</sup> *Id.*

include the costs of the lowest cost replacement power in the FCA.”<sup>44</sup> The Commission may wish to clarify this with the Department, but the interim market based pricing appears to achieve this objective.

As a procedural matter, Xcel noted in its letter that it does not see the need to address the interim pricing agreement at this time, but rather as part of its next monthly fuel clause filing. Staff believes this is a reasonable path forward, but the Commission may wish to clarify with Xcel what exactly the additional analysis will contain and decide whether it will be sufficient.

The second issue the Commission might wish to address is the “at the time it is offered” interpretation of fair market value, which is language from Section 7.13 (Terms of Agreement) of the 1986 PPA. The County believes its April 16, 2014 offering date is the date on which fair market value should be assessed. The Commission’s Order refers to “current fair market value” as follows:

The Commission’s review at this juncture is focused on whether the purchase price under the proposed PPA amendment reflects a reasonable approximation of the **current fair market value** of HERC’s electrical output. The Commission finds that it does not. Therefore, and for the reasons explained below, the Commission will reject the proposed amendment.<sup>45</sup> (Emphasis added by staff.)

Staff agrees with the Department that this is not a new issue and the Commission has already heard the County’s arguments opposing use of the word “current.” The County stated at the Commission hearing that the time of offering was in 2014 and the proposal’s pricing was based on a natural gas combined cycle unit. This argument was repeated in its request for reconsideration.

While the Department responded that basing fair market value on 2014 market prices would not change the information available in a significant way, it did not say in absolute terms whether the Commission should reconsider its use of the word “current” when referring to fair market value. However, the Department’s additional analysis still informs the conclusion that the negotiated price was not in the interest of ratepayers. Maybe replacing the word “current” with “2014” could inform future negotiations, and the Commission could address this on its own motion, but at the same time, it may not change the underlying reasons why the PPA extension price was rejected.

It should be noted that the County did not exactly adhere to its own strict consideration of factors at the time of offering. For example, the County cited the rise in transmission

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<sup>44</sup> Comment by Department of Commerce, Division of Energy Resources (January 29, 2018) at page 3.

<sup>45</sup> ORDER REJECTING PROPOSED AMENDMENT TO POWER PURCHASE AGREEMENT at page 3 (December 28, 2017) (Docket No. 17-532).

costs from 2015-2018<sup>46</sup> as evidence to support the HERC facility's strategic value. The County also referred to the role output from HERC could play in replacement generation at Sherco, which is an action not proposed or approved in April 2014. So the County, in voicing its opposition to basing a decision on an "ever changing analysis," appears to pick and choose when benefits can be considered versus when costs must be considered.

Moreover, the County's time of offering, April 16, 2014, is almost four years prior to the end of the contract term. It seems neither Xcel nor the Commission had any say about why that date was chosen, but it appears the County is implying it can offer a price whenever it wants, and the Commission must assess fair market value at that moment in time. This is quite an advantage in "an ever changing environment," to use the County's words.

Additionally, there might need to be some clarity with regard to when an initial offer was actually made and when negotiations began. According to the County, "Xcel and the County commenced negotiations on an extension on or about May 2015."<sup>47</sup> According to Xcel, "[f]ormal negotiations with HERC began in January 2017 when HERC provided **an initial extension offer** to Xcel."<sup>48</sup> (Emphasis added by staff.)

The County claims in its request for reconsideration that "there is no factual dispute on this date," referring to April 16, 2014, but that is because the County never mentioned this date in either its August 14, 2017 or September 11, 2017 comments. -To the contrary, Xcel provided a date of **January 2017** as the date of offer. But even if the April 16, 2014 date was accepted as an undisputed fact, there is a concerning asymmetry of fairness between the County and ratepayers in the sense that the County claims it can provide an offer almost three years before, in Xcel's words, an "initial extension offer" and claim the Commission must set fair market value at that point in time. Seemingly, Hennepin County's interpretation of Section 7.13 of the PPA is that it affords the County the ability to choose any "peak of the market" date it wants, and the Commission is bound to it.

Finally, the County argued that "similar contracts negotiated in 2014, as well as resource investments subsequently approved by the Commission based on need"<sup>49</sup> should be the basis for fair market value. In other words, the County's view of fair market value – and the price ratepayers should pay for the HERC facility – is that HERC pricing should be based on bids proposed in Xcel's 2013-2014 competitive resource acquisition process, presumably Calpine's (now Southern Company's) Mankato II bid (because this was the only combined cycle bid).

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<sup>46</sup> Reply Comment by Hennepin County (August 14, 2017) at page 3.

<sup>47</sup> Reply Comment by Hennepin County (August 14, 2017) at page 2.

<sup>48</sup> *Petition for Approval of an Amendment to the HERC PPA*, Docket No. 17-532, Initial Filing, Public Version at page 6 (June 30, 2017).

<sup>49</sup> *Petition for Reconsideration by Hennepin County* (January 17, 2018) at page 4.

Staff notes that neither the County's August 14, 2017 comments nor its September 11, 2017 reply comments mention Xcel's 2011 IRP, the Mankato II facility, or Xcel's competitive resource acquisition process. However, the County's request for reconsideration emphatically points to the processes, need, and projects at that time.

The County requests the Commission allow 60 days to supplement the record with examples of "applicable fair market value analysis" supportive of 2014 pricing. As staff understands this request, the County is asking to produce a new analysis that might serve as an alternative to the Department's analysis. Staff believes the County has had ample opportunity to provide this information in either or both its August 14, 2017 or September 11, 2017 comments. Therefore, staff does not support the County's request.

Should the Commission grant Hennepin County the opportunity to supplement the record, which is to say the Commission accepts the County's argument that pricing should be based on the cost of comparable resources, staff suggests the Commission take a more detailed look at the operational characteristics and environmental attributes of the HERC facility. Staff believes there is reason to question the County's claim that a 28-year old waste-to-energy facility is an apples-to-apples comparison to a new, flexible, high efficiency 2x2x1 combined-cycle plant. Thus, the Commission could require, in addition to the County's supplement, the inclusion of further details of the HERC facility, such as: heat rate (efficiency) information, guaranteed availability, fuel supply and management, emission rates, and price. These metrics not only develop the record, but aid in both determining a facility's value and the ability to make fair comparisons.

Staff notes that Hennepin County's arguments as listed above appear to be quite similar to the issues the Commission is addressing in the Red Lake Falls v Otter Tail Power (Docket No. 17-464) two days before it hears this reconsideration request. There, the Commission is addressing:

- 1) The date that a renewable facility created a Legally Enforceable Obligation (that is, the date from which the Commission would determine the pricing for a PPA);
- 2) The interpretation of Minn. Stat. §216B.164 subd. 4 in general, as Minnesota's implementation of the federal Public Utilities Regulatory Policy Act, or PURPA;
- 3) Which of Otter Tail Power's projects should be used to set the price for the Red Lake PPA.

Here, however, many of these arguments are being raised very late in the process, some in its reply to the Department's Answer to reconsideration. The Department first indicated its concern with the PPA price in its August 2, 2017 comments; the County could have used its reply comments to develop the record on fair market value, the competitive bidding process Xcel previously used, the interpretation of Minn. Stat. §216B.164 subd. 4, and how its arguments relate to state law as well as PURPA. But it did not, instead filing six pages of reply comments on statements indicating that HERC is

an important community resource<sup>50</sup>, its location is strategic, and approval of the PPA would not result in double recovery.

Staff also urges caution on Hennepin County's reconsideration request because staff is not entirely clear what legal standard Hennepin County is applying to this docket. Minn. Stat. §216B.164 has been extensively litigated in the Red Lake Falls docket, particularly as to the standard to be used to set a PPA price for a Qualifying Facility, both under state law and FERC regulations. The record in this docket, in contrast, has occasional references to the statute from some of the parties. From the record, it is not clear what legal arguments and standard the County is suggesting be used as part of reconsideration. What is clear and undisputed is that the Commission had the authority to reject the PPA amendment for the reasons it did.

[DECISION OPTIONS ON NEXT PAGE]

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<sup>50</sup> Reply Comments by Hennepin County (August 14, 2017) at page 3.

## VI. Decision Options

1. Grant Neighbors Against the Burner's request for reconsideration. *(NAB)*
2. Deny Neighbors Against the Burner's request for reconsideration. *(Department)*
3. Grant Hennepin County's request for reconsideration. *(Hennepin County)*
  - a. Grant an additional sixty (60) days to supplement the record with examples of applicable fair market value analyses supportive of both 2014 pricing and longer-term pricing as further documentation, and other pertinent factors; and/or
  - b. Require Hennepin County to supplement the record within sixty (60) days with pertinent factors regarding the operational characteristics of the HERC facility that can be evaluated in a capacity expansion model. These will include: the facility's net capacity, heat rate, emission rates, and proposed pricing terms. *(Staff option; staff notes that this option is intended to be considered only in the event the Commission also selects Decision Option 3.a.)*
4. Deny Hennepin County's request for reconsideration. *(Department)*
5. On the Commission's own motion, clarify that fair market should be based on 2014 pricing terms, not "current" pricing terms, as described on page 3 of the Commission's December 28, 2017 Order. *(Staff variation of County recommendation)*
6. On the Commission's own motion, require Xcel to cease collection of the cost of power from the HERC facility. *(Staff variation of Department recommendation. Staff note: After confirming with the Department, Xcel's February 1 letter verifies that HERC payments will have no impact on ratepayers.)*
7. On the Commission's own motion, if HERC is needed to serve the Company's load, Xcel should refund in its next monthly FCA any differential in the costs of power from HERC compared to the lowest costs of replacement power for the period after December 31, 2017 and demonstrate compliance with this Commission's requirement in the same monthly FCA. *(Staff variation of Department recommendation)*
8. For procedural purposes, grant reconsideration for the limited purpose of tolling the 60- day time period to allow additional time for preparation of the Commission's written Order on the merits.

## VII. Attachment A: Relevant Rules and Statutes

### A. Minnesota Statute - 216B.27 REHEARING; CONDITION PRECEDENT TO JUDICIAL REVIEW.

Subdivision 1. **Applying for rehearing.** Within 20 days after the service by the commission of any decision constituting an order or determination, any party to the proceeding and any other person, aggrieved by the decision and directly affected thereby, may apply to the commission for a rehearing in respect to any matters determined in the decision. The commission may grant and hold a rehearing on the matters, or upon any of them as it may specify in the order granting the rehearing, if in its judgment sufficient reason therefor exists.

Subd. 2. **Contents of application; condition precedent for review.** The application for a rehearing shall set forth specifically the grounds on which the applicant contends the decision is unlawful or unreasonable. No cause of action arising out of any decision constituting an order or determination of the commission or any proceeding for the judicial review thereof shall accrue in any court to any person or corporation unless the plaintiff or petitioner in the action or proceeding within 20 days after the service of the decision, shall have made application to the commission for a rehearing in the proceeding in which the decision was made. No person or corporation shall in any court urge or rely on any ground not so set forth in the application for rehearing.

Subd. 3. **Rules; procedural requirements; commission's authority.** Applications for rehearing shall be governed by general rules which the commission may establish. In case a rehearing is granted the proceedings shall conform as nearly as may be to the proceedings in an original hearing, except as the commission may otherwise direct. If in the commission's judgment, after the rehearing, it shall appear that the original decision, order, or determination is in any respect unlawful or unreasonable, the commission may reverse, change, modify, or suspend the original action accordingly. Any decision, order, or determination made after the rehearing reversing, changing, modifying, or suspending the original determination shall have the same force and effect as an original decision, order, or determination. Only one rehearing shall be granted by the commission; but this shall not be construed to prevent any party from filing a new application or complaint. No order of the commission shall become effective while an application for a rehearing or a rehearing is pending and until ten days after the application for a rehearing is either denied, expressly or by implication, or the commission has announced its final determination on rehearing.

Subd. 4. **Deadline to grant application.** Any application for a rehearing not granted within 60 days from the date of filing thereof, shall be deemed denied.

Subd. 5. **Effect of decision on application.** It is hereby declared that the legislative powers of the state, insofar as they are involved in the issuance of orders and decisions by the commission, have not been completely exercised until the commission has acted upon an application for rehearing, as provided for by this section and by the rules of the commission, or until the application for rehearing has been denied by implication, as above provided for.



**B. Minnesota Rule - 7829.3000 PETITION AFTER COMMISSION DECISION.**

Subpart 1. **Time for request.** A party or a person aggrieved and directly affected by a commission decision or order may file a petition for rehearing, amendment, vacation, reconsideration, or reargument within 20 days of the date the decision or order is served by the executive secretary.

Subp. 2. **Content of request.** A petition for rehearing, amendment, vacation, reconsideration, or reargument must set forth specifically the grounds relied upon or errors claimed. A request for amendment must set forth the specific amendments desired and the reasons for the amendments.

Subp. 3. **Service.** A petition for rehearing, amendment, vacation, reconsideration, or reargument, and an answer, reply, or comment, must be served on the parties and participants in the proceeding to which they relate.

Subp. 4. **Answers.** Other parties to the proceeding shall file answers to a petition for rehearing, amendment, vacation, reconsideration, or reargument within ten days of service of the petition.

Subp. 5. **Replies.** Replies are not permitted unless specifically authorized by the commission.

Subp. 6. **Commission action.** The commission shall decide a petition for rehearing, amendment, vacation, reconsideration, or reargument with or without a hearing or oral argument. The commission may vacate or stay the order, or part of the order, that is the subject of the petition, pending action on the petition.

Subp. 7. **Second petition not entertained.** A second petition for rehearing, amendment, vacation, reconsideration, or reargument of a commission decision or order by the same party or parties and upon the same grounds as a former petition that has been considered and denied, will not be entertained.