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**STATE OF MINNESOTA
Before The Public Utilities Commission**

Beverly Jones Heydinger	Chair
Dr. David C. Boyd	Commissioner
Nancy Lange	Commissioner
Dan Lipschultz	Commissioner
Betsy Wergin	Commissioner

DOCKET NO. E999/AA-13-599

In the Matter of the Minnesota Department of Commerce's 2012-2013 Annual Automatic Adjustment Reports Regarding Electric Utilities

**COMMENTS OF THE OFFICE OF THE
ATTORNEY GENERAL - ANTITRUST
AND UTILITIES DIVISION**

The Office of the Attorney General - Antitrust and Utilities Division ("OAG") submits the following comments regarding the Minnesota Department of Commerce's ("Department") September 16, 2014 Review of 2012-2013 (FYE13) Annual Automatic Adjustment Reports for Electric Utilities. The OAG's comments are limited to the narrow issue of future treatment of Northern States Power Company's (doing business as Xcel Energy) ("Xcel Energy") request for recovery of replacement power costs related to the extended plant outage at the Sherburne County Generating Station Unit 3 ("Sherco 3").¹

The Commission should continue to defer action or approval of issues related to Xcel Energy's replacement power costs. Xcel Energy has taken the position that third-parties are liable for those costs due to the circumstances of the Sherco 3 failure. It is engaged in ongoing litigation regarding resolution of those issues and, at the appropriate time, the Commission may

¹ Other than the replacement power costs related to Sherco 3, the OAG takes no position on the Department's review and recommendations or the utilities' requests for recovery.

order modification of Xcel Energy's automatic adjustment of charges as necessary to balance and protect ratepayer interests.² At this time, the Commission does not have all necessary information to make an equitable and informed decision as to the amount of and responsibility for Xcel Energy's replacement power costs that resulted from the Sherco 3 event. At the annual review meeting held in this docket,³ the Commission should notify Xcel Energy of its reservation of this issue for future investigation (and, if appropriate, action), and require that Xcel Energy continue to provide information necessary to thoroughly analyze this issue.

I. BACKGROUND

As the Commission is aware, Sherco 3 suffered a catastrophic failure on November 19, 2011.⁴ As a result, Xcel Energy incurred replacement power costs between November, 2011, and December, 2013.⁵ These charges were passed on to ratepayers through Xcel Energy's fuel clause adjustments. These replacement power costs span multiple annual adjustment dockets, having been at issue in Xcel Energy's 2012 AAA filing,⁶ the current docket, and also in the company's recently-filed 2014 AAA report.⁷ According to the Department's current analysis, Xcel Energy incurred and has charged to ratepayers approximately [TRADE SECRET BEGINS] [REDACTED] [TRADE SECRET ENDS] in total replacement power costs during

² Minn. R. 7825.2920 (2013).

³ Minn. R. 7825.2850 (2013). This recommendation would also apply to the Commission's review of Xcel Energy's FYE14 AAA filing, Docket No. E999/AA-14-579.

⁴ Xcel Energy Annual Automatic Adjustment Report, *In the Matter of 2012-2013 AAA Reports for Electric Utilities*, Docket No. E999/AA-13-599 (Sept. 3, 2013) at Part S, 1.

⁵ Department of Commerce Review of 2012-2013 (FYE13) Annual Automatic Adjustment Reports, *In the Matter of 2012-2013 AAA Reports for Electric Utilities*, Docket No. E999/AA-13-599 (Sept. 16, 2014) at 18.

⁶ *In the Matter of 2011-2012 AAA Reports for Electric Utilities*, Docket No. E999/AA-12-757.

⁷ *In the Matter of 2013-2014 AAA Reports for Electric Utilities*, Docket No. E999/AA-14-579.

that time period.⁸ The automatic provisional approval of the related adjustments to Xcel Energy's fuel charges is subject to discontinuance or modification by the Commission.⁹

Since the Commission's annual review of Xcel Energy's 2012 AAA filing, Xcel Energy filed a lawsuit in state district court, claiming that third-parties are responsible for the Sherco 3 replacement power costs and seeking recovery of the costs as damages, among other things.¹⁰ Specifically, Xcel Energy, Southern Minnesota Municipal Power Agency (the co-owner of Sherco 3), and related insurance companies filed a lawsuit in Sherburne County, claiming that the acts and omissions of the turbine designer, manufacturer, and seller, General Electric Company (and affiliated companies), violated Minnesota's common law.¹¹ Defendants filed an answer to Xcel Energy's Amended Complaint on May 21, 2014, generally denying the claims of

⁸ Department of Commerce Review of 2012-2013 (FYE13) Annual Automatic Adjustment Reports, *In the Matter of 2012-2013 AAA Reports for Electric Utilities*, Docket No. E999/AA-13-599 (Sept. 16, 2014) at 18 & Attach. E6.

⁹ Minn. R. 7825.2920 (2013).

¹⁰ Amended Complaint in *Northern States Power Co. et al. v. Gen. Elec. Co. et al.*, Court File No.71-CV-13-1472 (Sherburne Co., Minn.), available in Department of Commerce Review of 2012-2013 (FYE13) Annual Automatic Adjustment Reports, *In the Matter of 2012-2013 AAA Reports for Electric Utilities*, Docket No. E999/AA-13-599 (Sept. 16, 2014) at Attach. E7, 1-5, 16-17, 19-29. Xcel Energy and its co-plaintiffs included the following claim regarding damages:

The catastrophic failure and resulting damage took Unit 3 out of operation for nearly two years. As a result: (i) to serve customers NSP and SMMPA were forced to *purchase power and energy on the open wholesale electricity market at additional expense*; (ii) NSP and SMMPA were forced to forego revenues from the sale of energy that would have been produced by Unit 3 into the same market; (iii) NSP and SMMPA have incurred and in the future may continue to incur the cost of acquiring replacement capacity to ensure that sufficient electrical power and energy is available to meet peak demand loads; (iv) likewise, in the future, NSP and SMMPA may be assigned a diminished capacity credit compared to Unit 3's historical average, which could result in higher operational costs; and (v) NSP and SMMPA may incur additional costs necessary to manage changes in coal supply requirements, including expenses associated with idling and storing unit train sets.

Id. at Attach. E7, 16-17 (emphasis added). Investigation of the automatic adjustment effects on ratepayers of all of these categories of damages may be appropriate in the future.

¹¹ *Id.* at Attach. E7, 1-5, 16-17, 19-29.

Xcel Energy, claiming to be without knowledge or information to respond to the specific allegations regarding Xcel Energy's claimed damages and replacement power costs, and asserting multiple affirmative defenses to Xcel Energy's claims.¹² The case is currently scheduled for a case management conference on October 2, 2014, and a pre-trial conference is currently scheduled for June 19, 2015.¹³

Last year, in its June, 2013 report regarding Xcel Energy's 2012 AAA filing, the Department recommended "that the Commission preserve the determination of cost recovery related to the replacement power costs related to the Sherco Unit 3 extended plant outage until . . . full information about the cause of the extended plant outage is available and is able to be reviewed by the Department and other interested parties."¹⁴ As explained below, the OAG continues to support this recommendation and takes the position that subsequent events have only served to make it even more clear that "full information about the cause of the extended plant outage" is not yet available and the Commission is not in a position to make a determination on the appropriateness of these costs.

In its current report regarding Xcel Energy's 2013 AAA filing, the Department seemingly takes a different position. The report no longer specifically recommends that the Commission defer action, although it states that "the Commission may want to retain the right to revisit this

¹² Attached as *Exhibit A*.

¹³ MNCIS Register of Actions, Court File No. 71-CV-13-1472, attached as *Exhibit B*.

¹⁴ Department of Commerce Review of 2011-2012 (FYE12) Annual Automatic Adjustment Reports, *In the Matter of 2011-2012 AAA Reports for Electric Utilities*, Docket No. E999/AA-12-757 (June 5, 2013) at 25. At the time the Department made this recommendation, it projected Sherco 3 would return to service in September, 2013, and estimated that total replacement power costs would be approximately \$40 million. Based on these projections, the Department anticipated that deferral of a decision by the Commission until September, 2013, would be sufficient. In reality, Sherco 3 did not return to service without interruption until January, 2014, and total replacement power costs approached [TRADE SECRET BEGINS] [REDACTED] [TRADE SECRET ENDS], according to the Department.

issue if additional facts developed during the legal process contradict the record to date.”¹⁵

Instead, the Department purports to conduct a prudency review on the current (and extremely limited) record by conducting an assessment to determine

whether Xcel Electric’s actions caused the Event and whether Xcel Electric had (or should have had) knowledge about the potential for such an event and learned from past similar “failures” by taking specific preventative steps.¹⁶

The Department answered both of these questions, despite severe limitations on the information available to it. As to the issue of causation, the Department concluded as follows:

Based on the record to date, the Department concludes that the Event was likely caused, not by abnormal operating conditions or maintenance practices, but by the original design of the finger pinned blade attachments.¹⁷

Notably, the Department relied solely on Xcel Energy’s Root Cause Analysis Report and accepts Xcel Energy’s consultant’s conclusions as “the record to date,”¹⁸ without further fact-finding or expert analysis. Similarly, as to the issue of foreseeability, the Department concluded as follows:

Based on the record to date, the Department concludes that GE had specialized knowledge about the risks of SCC-related failure associated with the finger dovetail (areas where turbine blades are inserted into the rotor wheel) in the LP turbine but failed to share information with Xcel Electric and SMMPA.

As stated in the amended complaint, if this special knowledge had been shared with Xcel Electric and SMMPA, proper turbine inspection and maintenance could have prevented the substantial property damage caused by SCC in the LP turbine.

The amended complaint indicates that Xcel Electric was not aware or informed directly or indirectly about the risks associated with SCC in LP turbines.¹⁹

¹⁵ Department of Commerce Review of 2012-2013 (FYE13) Annual Automatic Adjustment Reports, *In the Matter of 2012-2013 AAA Reports for Electric Utilities*, Docket No. E999/AA-13-599 (Sept. 16, 2014) at 23. The Department acknowledged that “[f]urther, during the legal process, additional facts may be developed through either briefs or discovery that are not available to date.” *Id.* This is almost certain to occur since no party other than Xcel Energy has produced information to the Department, the Commission, the OAG, or other parties for analysis.

¹⁶ *Id.* at 18.

¹⁷ *Id.* at 20.

¹⁸ *Id.*

Again, these conclusions appear to have been based solely on Xcel Energy's Root Cause Analysis report and the allegations in Xcel Energy's lawsuit against the turbine manufacturer. No further fact-finding or expert analysis was done by the Department.

II. ANALYSIS

A. THE COMMISSION SHOULD CONTINUE TO DEFER ACTION OR APPROVAL OF ISSUES RELATED TO XCEL ENERGY'S REPLACEMENT POWER COSTS BECAUSE XCEL ENERGY HAS CLAIMED A THIRD-PARTY IS LIABLE FOR THOSE COSTS.

The Commission should continue to defer action or approval of Xcel Energy's replacement power costs related to the event at Sherco 3. Xcel Energy's legal claims against General Electric in state court have not yet been adjudicated. Xcel Energy's action definitively establishes, however, that the company believes its claims are warranted by Minnesota law and that it has evidentiary support for its claims that General Electric and other defendants are responsible for damages under Minnesota law, including damages for replacement power costs.²⁰ Specifically, it seeks recovery for damages because it was "forced to purchase power and energy on the open wholesale electricity market at additional expense."²¹ The Commission should defer action until more information is available regarding the resolution of these legal claims, which directly affect ratepayer interests.

The Department's prudency review is premature and based on an inadequate record to support its conclusions. The only information available at this time is the report commissioned

(Footnote Continued from Previous Page)

¹⁹ *Id.* at 22 (internal citations omitted).

²⁰ *See* Minn. R. Civ. P. 11.02.

²¹ Amended Complaint in *Northern States Power Co. et al. v. Gen. Elec. Co. et al.*, Court File No.71-CV-13-1472 (Sherburne Co., Minn.), available in Department of Commerce Review of 2012-2013 (FYE13) Annual Automatic Adjustment Reports, *In the Matter of 2012-2013 AAA Reports for Electric Utilities*, Docket No. E999/AA-13-599 (Sept. 16, 2014) at Attach. E7, 16-17.

by Xcel Energy to support its claims. That report may be correct, but it is unchallenged at this time because of the early stage of the litigation. General Electric and its co-defendants have denied liability, asserted defenses, and claimed to be without knowledge to respond to the damages claims regarding replacement power costs.²² If the state district court action continues, General Electric and the other defendants may provide expert analysis that differs from Xcel Energy's consultant's report in determining the cause of the event at Sherco 3. Xcel Energy itself may refine or change its position. The court may ultimately make findings and conclusions of law regarding legal liability and assessment of damages. In that context, it is premature to assess "the record to date" and reach conclusions regarding the cause of the failure or its foreseeability based only on Xcel Energy's strategic analysis. Those are the ultimate questions to be answered in the ongoing civil litigation.

The Commission should continue to defer action on the issue of replacement power costs related to Sherco 3 while Xcel Energy's claims for those costs against third-parties are adjudicated. The record currently available does not support conclusions regarding liability for those costs. Alternatively, if the Commission does not want to wait for resolution of the litigation of these questions, it could commence its own investigation and process to answer those questions.²³ In either event, the Commission does not have the necessary information at this time.

²² See *Exhibit A*.

²³ See Minn. R. 7825.2920, Subp. 3 (2013) (allowing initiation of adjustment proceeding by complaint or on the Commission's motion). The Commission should consider, however, that delayed resolution of this issue may cause inequity between current ratepayers and future ratepayers.

B. THE COMMISSION SHOULD DEFER ACTION OR APPROVAL OF XCEL ENERGY'S REPLACEMENT POWER COSTS BECAUSE THE METHOD OF CALCULATION AND TOTAL AMOUNT OF THE REPLACEMENT COSTS ARE DISPUTED.

As noted above, the Department calculated the replacement power costs at issue to be approximately [TRADE SECRET BEGINS] [REDACTED] [TRADE SECRET ENDS]. Xcel Energy's responses to the OAG's information requests demonstrate that various methods can be used to calculate the replacement power costs.²⁴ Because of the trade secret nature of the underlying data and differing methods of calculation, the OAG will not present detailed analysis at this time of the methods or compare the company's analysis to the Department's calculations.²⁵ It is important for the Commission to note, however, that Xcel Energy acknowledges that the methodology used to generate its AAA filings (which were used by the Department to calculate replacement power costs) is different than the methodology being used in the litigation against General Electric and the other defendants.²⁶ For the calculation of replacement power costs as damages in the lawsuit, Xcel Energy describes "four key ways" in which "[t]his damages calculation methodology differs from the way we calculate our outage costs for our AAA filing."²⁷

In addition to the ongoing nature of the claim by Xcel Energy for third-party liability of the replacement power costs, the Commission should also defer action or approval of the

²⁴ Attached as *Exhibit C*. Also, note that the OAG plans to seek supplemental information from Xcel Energy to update its calculations to conform to the time period used by the Department in its September 16, 2014 Review to calculate outage costs in November and December, 2013. (Xcel Energy's calculations stopped in October, 2013.) The OAG will update the Commission by supplemental filing, if necessary.

²⁵ The information is attached as *Exhibit C* so that the Commission can review Xcel Energy's full trade secret response and data.

²⁶ *Exhibit C*, Xcel Energy Response to Information Request No. 1 at 4.

²⁷ *Id.*

replacement power costs until further determinations can be made as to the amount and proper method of calculation of those costs.

C. THE COMMISSION SHOULD NOTIFY XCEL ENERGY OF ITS RESERVATION OF THIS ISSUE FOR FUTURE INVESTIGATION AND ACTION AND REQUIRE THAT XCEL ENERGY CONTINUE TO PROVIDE INFORMATION NECESSARY TO THOROUGHLY ANALYZE THIS ISSUE.

Given the growing complexity of determining a fair and equitable resolution of responsibility for these charges, the Commission should continue to defer action on Xcel Energy's replacement power costs. The Commission should also require Xcel Energy to continue to provide information to the Department and the OAG (and any other interested parties) to allow continued analysis of this issue. In addition, the Commission may wish to consider the question of whether the annual AAA review docket is the only context in which it wants to receive updates on this issue, or if a separate docket to monitor developments in the litigation with General Electric and the other defendants is now appropriate in order to protect ratepayer interests.²⁸

²⁸ See Minn. R. 7825.2920, Subp. 3 (2013) (allowing initiation of adjustment proceeding by complaint or on the Commission's motion).

III. CONCLUSION

The Commission should continue to defer action or approval of Xcel Energy's replacement power costs related to Sherco 3 for the foregoing reasons. The Commission should also notify Xcel Energy of its intention to consider these issues in the future and consider how it wishes to receive updates regarding this important matter.

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Respectfully submitted,

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