

February 16, 2018

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:

Minnesota Energy Resources Corporation (“MERC”) submits this letter to object to the Department of Commerce, Division of Energy Resources’ (“Department”) February 13, 2018 Response Comments. While MERC understands the Department’s desire to provide “additional analysis” to inform the record, the lateness of Department’s Response raises substantive due process concerns and is highly prejudicial to MERC.¹ The Department’s late filing underscores the need for a contested case hearing in this matter. At this point, the “record” includes materials to which neither MERC nor even its outside counsel have access and to which MERC has had no opportunity to evaluate or rebut. Therefore, the Commission should either reject the Department’s Response or accept the filing with the understanding that MERC will be provided with a full and fair opportunity to respond to the Department’s late-filed analysis in the contested case proceeding MERC has shown is required in this case.² Due process demands nothing less.

First, the Response purports to provide detailed quantitative and qualitative analyses supporting the dismissal of MERC’s Complaint approximately one week before the Commission is set to hear the matter on February 22, 2018. The Response comes over two months after the Comment Period ended on December 11, 2017,³ and nearly two months after MERC submitted responses to the Department’s Information Requests on December 18, 2017. There is no explanation for the timing of the Department’s Response. In fact, in its December 11, 2017 Reply Comments at p. 15, the Department

¹ MERC also fundamentally disagrees that the Department’s suggested cost-benefit analysis/protocol is supported by the plain language of Minn. Stat. § 216B.01. The Legislature has already established that “unnecessary duplication” of gas infrastructure raises costs to customers and the statute does not support the view that some unnecessary duplication is acceptable if it does not increase costs to consumers by some undefined amount deemed acceptable by the Commission or the Department.

² MERC also reiterates its request that the Commission suspend Xcel’s use of “promotional incentives” pending the outcome of the Commission’s investigation in Docket No. G-999/CI-17-499.

³ See November 15, 2017 Notice of Comment Period.

specifically indicated that it would provide such an analysis only “[i]f the Commission decides to pursue this issue further.” The timing of the Response precluded it from being included in Commission Staff’s Briefing Papers, which were filed on February 14, 2018.

More importantly, the majority of the analysis set forth in the Response is redacted as Trade Secret. Accordingly, even if there were adequate time to review and analyze the Response, MERC does not have access to the data the Department has redacted as Trade Secret, and therefore has no way to verify or challenge the Department’s analyses. This is the precise reason MERC filed a Motion seeking the adoption of a Protective Order on January 16, 2018, asserting that “MERC and Xcel should have the opportunity to review one another’s Trade Secret Information and Nonpublic Data, and agency analyses incorporating Trade Secret Information and Nonpublic Data, subject to the terms of the attached Proposed Protective Order.”⁴ As MERC’s Motion remains pending before the Commission, the Response places MERC in an untenable position on the eve of the Commission’s February 22 agenda meeting.

Furthermore, absent an opportunity to review and challenge the Department’s analysis through timely access, discovery and cross-examination, MERC is effectively denied due process. As the Commission recently determined, due process requires that affected parties – not simply the agencies – have access to Trade Secret information pertinent to the disposition of a pending matter:

To satisfy the demands of due process, and ensure that all relevant information is provided to all parties and not just to the agency making the decision, Xcel must be provided full access to all relevant information filed as trade secret in this matter before the Commission can proceed to a final determination regarding co-location. To do otherwise would be fundamentally unfair to Xcel.

As set forth below, the Commission will require that the Department and the developers share all such information with Xcel and provide Xcel time to evaluate and respond to the information it has been provided. The Commission will also require Xcel to provide an enforceable nondisclosure agreement to the Commission and the Department committing that it will protect this information under the rules of the Commission.^[5]

Such due process considerations make it even more apparent that the Commission should set the Complaint for a contested case hearing where a full and complete record can be developed. So that Xcel is not allowed to continue its unlawful use of its promotional incentives cherry pick MERC's customers and charge de facto discriminatory rates, the Commission should suspend Xcel's promotional incentive pending resolution of the contested case proceeding.

Thank you for your attention to this matter.

⁴ See MERC’s January 16 Motion at pp. 1-2.

⁵ *In the Matter of the Petition of Northern States Power Company d/b/a Xcel Energy, for Request for Resolution of a Co-Location Dispute*, Docket No. E-002/M-13-867, ORDER REQUIRING DISCLOSURE OF TRADE SECRET INFORMATION at p. 4 (September 6, 2017).

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Sincerely,

/s/ Brian Meloy

Brian Meloy

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

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Petition for Relief by Minnesota Energy
Resources Corporation Against Northern
States Power Company d/b/a Xcel Energy*

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

CERTIFICATE OF SERVICE

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

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Dated this 16th day of February, 2018

/s/ *Tammy J. Krause*

Tammy J. Krause