BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Katie J. Sieben	Chair
Valerie Means	Commissioner
Matthew Schuerger	Commissioner
John A. Tuma	Commissioner

In the Matter of Trade Secret Designations of 2019 Cogeneration and Small Power Production Reports	ISSUE DATE: February 21, 2020 DOCKET NO. E-999/PR-19-9 ORDER ACCEPTING TRADE SECRET DESIGNATIONS AND REQUIRING PUBLIC FILINGS

PROCEDURAL HISTORY

I. Introduction and Background

The federal Public Utility Regulatory Policies Act (PURPA), 16 U.S.C. § 824a-3, encourages cogeneration[1] and small power production by entities other than public utilities as a matter of national energy policy. PURPA and its implementing regulations[2] establish standards that cogenerators and small power producers must meet for their facilities to be designated "qualifying facilities." Once a facility becomes a qualifying facility, public utilities must purchase its energy and capacity under specified circumstances.

The federal statute delegates implementation of PURPA to state regulatory commissions.[3] Minnesota has implemented PURPA by statute and regulation.[4]

Under Minn. R. Chapter 7835, utilities must annually file a cogeneration and small power production tariff and a cogeneration and small power production report. Compensation rates for qualifying cogeneration and small power production facilities 1 megawatt and under are updated annually. Both PURPA and Minnesota Rules require certain information from these filings to be made available for "public inspection."[5]

[1] Cogeneration, also called "combined heat and power," is a process involving the capture and use of excess heat from electricity production.

[2] 18 CFR 292.101–292.601.

[3] 16 USC § 824a-3(f), 18 CFR 292.401–292.403.

[4] Minn. Stat. § 216B.164; Minn. R. 7835.0100–7835.9910.

[5] 18 CFR § 292.302(b); Minn. R. 7835.1200.

II. Procedural History

Between January 2 and January 18, 2019, Minnesota Power, Xcel Energy, and Otter Tail Power filed their cogeneration and small power production tariffs and reports (collectively, the annual filings) for 2019.

On January 29, 2019, the Environmental Law and Policy Center and the Institute for Local Self Reliance (collectively, the Joint Commenters) filed comments objecting to rate-regulated utilities' designation of certain avoided cost information included in the annual filings as trade secret.

On February 6, 2019, the Commission opened a comment period on the issue, requesting that the utilities provide justification of their trade secret designations and seeking public comment on the procedures to be followed and on the Joint Commenters' concerns about trade secret designations.

On February 22, 2019, Otter Tail Power, Minnesota Power, and Xcel filed comments disputing the objections of the Joint Commenters.

On March 6, 2019, Ridge Energy, LLC filed comments.

On March 8, 2019, the Department of Commerce Division of Energy Resources (the Department) filed comments agreeing with the position of the utilities; the Joint Commenters filed additional comments.

On March 18, 2019, Xcel, Minnesota Power, and the Joint Commenters filed reply comments.

On August 22, 2019, the Commission met to consider the Joint Commenters' objections and the party comments. At the meeting, utilities stated that certain information previously deemed trade secret could likely be made public. The Commission determined that a supplemental comment period was necessary in order to address the following topics:

- Further explanation of how the specific information claimed to be trade secret does or does not qualify as trade secret under the Minnesota Government Data Practices Act.[6]
- Any 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.
- Further discussion of the 'public inspection' requirement under PURPA and Minn. Rules 7835.1200 and whether the requirement can be satisfied by granting developers interested in providing generation as qualifying facilities, and their consultants and advisors, access to the data required by the rules under a Commission-approved nondisclosure agreement (NDA).

On August 30, 2019, the Commission issued a Notice of Supplemental Comment Period on the topics identified at the August 22 agenda meeting. The notice also directed Minnesota Power, Otter Tail Power, and Xcel Energy to submit revised annual filings with updated trade secret determinations as discussed at the meeting.

[6] Minn. Stat. Ch. 13.

On September 10, 2019, Minnesota Power, Otter Tail Power, and Xcel Energy provided compliance filings revising trade secret designations and indicating information that each utility would make public in 2019 and future annual filings.

By October 14, 2019, the Department, Joint Commenters, Minnesota Power, Otter Tail, and Xcel filed supplemental initial comments.

By October 24, 2019, the same parties filed supplemental reply comments.

On December 19, 2019, the Commission met to consider the matter.

FINDINGS AND CONCLUSIONS

I. Summary

In this order, the Commission will summarize and discuss the record, including initial and supplemental rounds of party comments and the utilities' revised annual filings; accept the utilities' revised trade secret designations; and direct the utilities to publicly file certain types of information going forward.

II. Initial Comments

A. Joint Commenters (January 29, 2019 Comments)

In their January 29, 2019 comments, the Joint Commenters objected to the utilities' labeling of certain avoided cost information as trade secret, arguing that both state and federal law require the information to be available for public inspection.

First, the Joint Commenters argued that Minn. R. 7835.1200 requires public access to the entirety of each utility's annual filings. The Joint Commenters noted that the rule states that "all filings required by parts 7835.0300 to 7835.1100" — in other words, the annual filings — "must be available for public inspection at the commission and at the utility offices during normal business hours."[7] Therefore, the Joint Commenters argued, none of the information included in the annual filings can be protected by a trade secret designation, because that would make the information unavailable for public inspection.

Furthermore, the Joint Commenters argued that the utilities should have submitted more detailed explanations justifying trade secret protection for each individual piece of information. The Joint Commenters cited the Minnesota Government Data Practices Act (MGDPA),[8] which defines "trade secret information," in part, as government data "that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use."[9]

[7] Minn. R. 7835.1200.

[8] Minn. Stat. Ch. 13.

[9] Minn. Stat. § 13.37, subd. 1(b).

The Joint Commenters argued that the MGDPA should be construed in favor of public access, and therefore, the utilities have the burden of proving that specific information falls under the definition of trade secret. The Joint Commenters stated that each utility had provided only "a conclusory 'catch-all' statement justifying trade secret protection,"[10] which the Joint Commenters believed was not adequate.

Finally, the Joint Commenters argued that even if the Commission determines that state law allows trade secret designation, PURPA preempts state requirements and specifically requires public disclosure of avoided cost data. The Joint Commenters explained that the avoided cost data required to be made publicly available under PURPA is similar to the avoided cost data filed under Minn. R. 7835.0500 and 7835.0600 and argued that for this reason, the PURPA public availability requirement should apply to the information.

Consequently, the Joint Commenters requested that the Commission reject or modify the utilities' annual filings on the basis that the avoided cost information cannot be designated as trade secret information.

B. Response from Utilities

Otter Tail, Minnesota Power, and Xcel filed comments disagreeing with the Joint Commenters' position.

All three utilities disagreed with the Joint Commenters' objection that they had not adequately justified the trade secret designation, and provided additional explanation of the economic rationale for protecting the information. Additionally, all three utilities argued that it is consistent with Commission precedent to allow the information to be designated as trade secret.

Furthermore, Otter Tail and Xcel argued that regardless of whether Minn. R. 7835.1200 would require public inspection of the information, trade secret designation is defined in Minnesota Statutes, and it therefore preempts the administrative rule.

Additionally, Otter Tail and Xcel disputed the Joint Commenters' interpretation of PURPA, arguing that there is not a clear conflict between state and federal law, and even if there were, trade secret protection would also be allowed under federal law.

C. Ridge Energy, LLC

Ridge Energy, LLC (Ridge Energy) also filed comments in response to the Commission's notice. Ridge Energy noted that they are a South Dakota company and have been trying to enter into an avoided cost contract with Xcel for over 12 years. Ridge Energy stated that they have been frustrated by Xcel's refusal to disclose avoided cost information, but they are a small company and do not have the resources to pursue legal action. Finally, Ridge Energy stated that they believe a nondisclosure agreement for companies seeking avoided cost information would be appropriate.

[10] Joint Commenters initial comments, at 7 (January 29, 2019).

D. The Department

The Department filed comments agreeing with the utilities' legal analysis.

Specifically, the Department agreed with the utilities that estimated marginal energy costs and estimated capacity costs meet the definition of trade secret information because making the information public would allow potential suppliers to modify their pricing based on utility costs; the Department asserted that this could lead to increased customer costs and harm to ratepayers. The Department also agreed with utilities that designating such information as trade secret was a long-standing practice in Minnesota.

The Department also responded to the Joint Commenters' preemption claim, stating that Minn. Stat. § 216B.164, the statute implementing PURPA and authorizing Minn. R. chapter 7835, explicitly requires consideration to be given to protection of ratepayer and public interests. The Department appeared to argue that consequently, such consideration is also required when implementing the rules themselves.

Furthermore, the Department agreed with utilities that a state statute prevails over a conflicting state rule; therefore, to the extent that the MGDPA conflicts with Minn. R. 7835.1200, the principles of the MGDPA control. Similarly, the Department noted that a federal statute prevails over a federal administrative rule, and that federal trade secret statutes, including the Defend Trade Secrets Act (DTSA), would also protect the data in this situation.[11]

Based on the foregoing, the Department concluded that each utility demonstrated the reasonableness of their trade secret designations and that the Joint Commenters had not shown that the MGDPA is preempted by federal law.

E. Joint Commenters (March 8, 2019 comments)

The Joint Commenters filed additional comments, responding to arguments made by the utilities.

First, the Joint Commenters disagreed with the utilities' argument that the MGDPA prevails over Minn. R. 7835.1200. The Joint Commenters appeared to argue that the Commission should simply find that the avoided cost information does not fall under the definition of trade secret, thereby making any potential conflict between the statute and rule irrelevant. The Joint Commenters also discussed the interaction between the federal statute and regulation, arguing that Congress did not intend for the federal trade secret law to preempt the public disclosure portion of PURPA.

The Joint Commenters also reiterated and expanded upon their position that, for various reasons, each utility's provided justification for trade secret protection was inadequate and not sufficiently specific.

[11] The DTSA is commonly cited as 18 USC § 1836 et seq., but the parties appear to also refer to other provisions of federal trade secret law in title 18, chapter 90 of the USC, particularly 18 USC §§ 1833–1839.

Finally, the Joint Commenters disagreed with the utilities' assertion that trade secret designation aligns with Commission precedent. The Joint Commenters argued that the current situation is factually unique and any previous proceedings, agreements, or settlements do not apply.

F. Reply Comments

Xcel, Minnesota Power, and the Joint Commenters filed reply comments.

Xcel argued that the Joint Commenters had not established any benefit that would result from public disclosure of the information and reiterated their position that disclosure would risk harm to ratepayers and third parties. Xcel also noted that it had followed the Commission's procedure for filing protected data,[12] and concluded that weighing the risk to ratepayers against the lack of benefits from disclosure supports maintaining the trade secret designation.

Minnesota Power noted that the Department filed comments in support of the utilities' position and further explained its own justification for trade secret protection.

The Joint Commenters responded to initial comments from the Department, arguing that the utilities must make avoided cost information required by Minn. R. 7835.0500–7835.0600 public because it is the same information that PURPA explicitly requires to be made available for public inspection.

III. Revised Compliance Filings

The Commission considered this docket at its agenda meeting on August 22, 2019. At the meeting, the utilities discussed the possibility of making certain pieces of information public that had previously been designated as trade secret. As a result of the discussion, the Commission issued a notice of supplemental comment period and directed the utilities to submit revised annual filings including the data each utility had proposed to make public and the rationale for the changes.

On September 10, 2019, the utilities submitted the revised annual filings. Each utility designated certain information as public that had previously been designated as trade secret.

Minnesota Power designated the following items as public because the information could be deduced from other publicly available information:

- Current year estimated marginal energy costs and annual number of on-peak hours for the current and forecasted years (Schedule A)
- Net annual avoided costs averaged for on-peak hours and over all hours (Schedule B, subpart 5)
- Result of calculations for net annual avoided costs averaged for on-peak hours and over all hours (Schedule G, items H and I)

[12] Minn. R. 7829.0500.

Otter Tail Power designated the following items as public because the information no longer had an actual or potential basis for competitive harm or derived independent economic value:

- Current year estimated marginal energy costs and annual number of hours for the current and forecasted years (Schedule A)
- Overall average percentage of line losses (Schedule B, subpart 4)
- Averaged on peak hours and average over all hours used to calculate the net annual avoided capacity cost (hours only) (Schedule B, subparts 5 and 6)

Xcel Energy designated the following items as public because the information could be publicly accessed in other regulatory filings or derived using publicly available information:

- Current year estimated marginal energy costs and annual number of hours for the current year (Schedule A)
- Marginal energy costs, adjusted marginal energy costs, and some other inputs used to calculate net annual avoided capacity costs (Schedule G)

IV. Supplemental Comments

A. The Department

The Department stated that it had reviewed the revised compliance filings and summarized the utilities' changes, noting that each utility had made public information that could be accessed or derived using other publicly available filings. Additionally, Otter Tail Power made certain information public that Minnesota Power and Xcel had already considered public.

In reply comments, the Department disagreed with the Joint Commenters' argument that the utilities had not adequately justified or explained their trade secret designations and noted that each utility had provided multiple explanations in previous comments. The Department concluded that the utilities' trade secret designations were reasonable but noted that it was not opposed to the potential use of NDAs.

B. Utilities

On October 14, 2019, the three utilities filed supplemental comments. All three again explained their initial and revised trade secret designations, and provided specific additional details as described below.

Otter Tail Power noted that its trade secret designations were different from the other utilities because it is actively pursuing long-term capacity needs and is currently in the negotiation process for certain projects. The company stated that it believed disclosing exact generating facility details could provide a negotiating advantage to certain vendors and may increase customer costs overall.

Minnesota Power and Xcel both pointed out that PURPA provides for substitution of an alternative method of providing data[13] and stated that this is the method currently being used in

[13] 18 CFR § 292.302(d).

Minnesota; therefore, the utilities' trade secret designations are consistent with PURPA. Both utilities also discussed the potential usage of non-disclosure agreements and noted that there are situations where an NDA would be inappropriate.

C. Joint Commenters

The Joint Commenters again stated that the explanations for each utility's trade secret designations were not sufficiently detailed, and provided a summary of the information they argued was required to be made public under both Minnesota Rules and PURPA.

The Joint Commenters also stated that they opposed the use of NDAs because the information is not "public" if an NDA must be executed in order to access it. The Joint Commenters argued that requiring NDAs would be contrary to the plain meaning of the statute; therefore, if the Commission ordered the use of NDAs for release of information, it would constitute impermissible rulemaking.

Finally, the Joint Commenters argued that even if the Commission agrees with the utilities that Minnesota is using an alternative method under 18 CFR § 292.302(d), the state did not meet certain federal notice requirements for using the alternative method, and therefore the Commission should still direct the utilities to file the information required by 18 CFR § 292.302(b) on a biannual basis.

V. Commission Action

Minn. Stat. § 216B.164, the state statute implementing PURPA and underlying Minn. R. chapter 7835, states, in part:

> This section shall at all times be construed in accordance with its intent to give the maximum possible encouragement to cogeneration and small power production consistent with protection of the ratepayers and the public.[14]

This statutory language highlights the crux of the issue — whether prohibiting or allowing certain trade secret designations in the annual filings better serves the ratepayers and the public while also encouraging cogeneration and small power production to the maximum possible extent. In order to make a determination on this issue, the Commission must necessarily engage in a balancing of interests based on the specific facts at hand. Although parties noted that utility regulators in this and other states have previously issued orders involving trade secret issues, the specific decision at hand appears to be an issue of first impression for the Commission.

Based on a thorough review of the voluminous record in this docket, the Commission will accept Minnesota Power's, Otter Tail's, and Xcel's modified trade secret designations from the September 10, 2019 compliance filings and will find that the trade secret designations in those filings are appropriately classified.

The Commission will also direct the utilities to file certain information as public in future annual filings, as described in ordering paragraph 2. Xcel and Minnesota Power already treat this

[14] Minn. Stat. § 216B.164, subd. 1.

information as public; Otter Tail Power classified it as trade secret in their 2019 annual filings. The Commission recognizes that Otter Tail Power has a particular interest in protecting this information for the current report because of ongoing negotiations; however, the Commission believes that in the future, Otter Tail's situation will not be unique, and will direct Otter Tail to treat the information as public in future annual filings.

The Commission agrees with the Department that the remaining trade-secret-designated information appropriately falls under the definition of trade secret in the MGDPA, and that the utilities have adequately and repeatedly justified this designation. Disclosure of the information could allow bidders to modify their pricing based on utility costs, and the Commission agrees with the Department's position that if the avoided cost information is publicly disclosed, it could become a "floor" for bidders, discouraging bidders from making lower bids and thereby increasing costs.

Therefore, it is reasonable to believe that public disclosure of the information could harm ratepayers and the public. Although this harm is not certain, it is also not imagined. The Commission believes that protection of a limited amount of trade secret information best accomplishes the purpose of PURPA and Minn. R. chapter 7835, as stated by the legislature in Minn. Stat. § 216B.164.

Furthermore, Minn. R. 7835.1200 does not require complete public disclosure of all contents of the public filings. The Commission's general rules of practice and procedure explicitly allow for the protection of data[15] and it appears that the utilities in this case have followed the appropriate procedures. However, even if Minn. R. 7835.1200 were interpreted to require public inspection of the entirety of the annual filings, the Commission's administrative rules cannot overrule statutory language allowing for trade secret designation in Minn. Stat. § 13.37, and the foundational principles in Minn. Stat. § 216B.164.

Regarding federal law, the Commission agrees with the Department that the Joint Commenters have not demonstrated that PURPA preempts the MGDPA. The Joint Commenters appear to argue that conflict preemption applies; this occurs when compliance with both federal and state law is impossible, or when the state law thwarts the purpose of the federal law.[16] For the various reasons thoroughly described in the Department's March 8, 2019 comments, the Commission is not persuaded that Minnesota's state law has been preempted by PURPA. In particular, it is not clear that that application of trade secret protections in these filings runs contrary to the purpose of PURPA; rather, as discussed above, trade secret designation furthers the interests of ratepayers and the public while encouraging cogeneration and small power production.

Because the Commission has determined that the MGDPA is not preempted by PURPA, the Commission does not reach the question of the application of additional federal law. However, the Commission appreciates the Department's comments and analysis on this issue.

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[15] Minn. R. 7829.0500, subp. 1 ("Nothing in this chapter requires public disclosure of protected data or any disclosure of privileged data.").

[16] *See, e.g.*, *Keller v. City of Fremont*, 719 F.3d 931, 940 (8th Cir. 2013) (citing *Arizona v. United States*, 567 U.S. 387, 132 (2012)); *Sanchez v. Dahlke Trailer Sales, Inc.*, 897 N.W.2d 267, 276 (Minn. 2017) (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Finally, the Commission will not direct utilities to develop standardized NDAs. At the December 19, 2019 Commission meeting, all three utilities stated that they have procedures in place for the use of standard and modified NDAs and that they assist developers in accessing relevant information when appropriate. The Commission understands that individual developers have been frustrated with specific situations in the past, as indicated by the comments of Ridge Energy; however, given the complexity and variety of different situations in which an NDA could be used, the Commission will not require a standardized approach at this time. However, if the Commission finds that there are widespread problems with the utilities' approach to NDAs in the future, the Commission may revisit this issue.

ORDER

1. The Commission accepts Minnesota Power, Otter Tail Power, and Xcel Energy's modified trade secret designations from the September 10, 2019 compliance filings and finds that the trade secret designations in those filings are appropriately classified for this year and in future years, except as specified in order paragraph 2.
2. Utilities must file the following information as public in the annual cogeneration and small power production filings:
    a. Schedule B; Subp. 2, Items A–D (Unit name, nameplate rating, fuel type, in-service date)
    b. Schedule B; Subp. 5 (Net annual avoided capacity cost – results, not all inputs)
3. This order shall become effective immediately.

BY ORDER OF THE COMMISSION

Will Seuffert
Executive Secretary

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