



414 Nicollet Mall  
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November 30, 2015

—Via Electronic Filing—

Daniel P. Wolf  
Executive Secretary  
Minnesota Public Utilities Commission  
121 7<sup>th</sup> Place East, Suite 350  
St. Paul, MN 55101

RE: JOINT REPLY COMMENTS  
AMENDMENT TO THE 2003 SETTLEMENT AGREEMENT  
DOCKET NO. E002/M-15-922

Dear Mr. Wolf:

Northern States Power Company, doing business as Xcel Energy and the Prairie Island Indian Community submit the attached Joint Reply Comments in response to the Minnesota Department of Commerce's Comments dated November 16, 2015.

Pursuant to Minn. Stat. § 216.17, subd. 3, we have electronically filed this document, and served copies of these Joint Reply Comments on the parties on the attached service list. If you have any questions regarding this filing please contact me at (612) 330-6270 or [allen.krug@xcelenergy.com](mailto:allen.krug@xcelenergy.com).

Sincerely,

/s/

ALLEN D. KRUG  
ASSOCIATE VICE PRESIDENT  
STATE REGULATORY POLICY

Enclosure

c: Service List

Ron Johnson, Prairie Island Indian Community

STATE OF MINNESOTA  
BEFORE THE  
MINNESOTA PUBLIC UTILITIES COMMISSION

Beverly Jones Heydinger	Chair
Nancy Lange	Commissioner
Dan Lipschultz	Commissioner
John Tuma	Commissioner
Betsy Wergin	Commissioner

IN THE MATTER OF THE PETITION OF  
NORTHERN STATES POWER COMPANY FOR  
APPROVAL OF AN AMENDMENT TO THE 2003  
SETTLEMENT AGREEMENT WITH THE  
PRAIRIE ISLAND INDIAN COMMUNITY

DOCKET NO. E-002/M-15-922

**JOINT REPLY COMMENTS OF XCEL  
ENERGY AND THE PRAIRIE ISLAND  
INDIAN COMMUNITY**

Northern States Power Company, doing business as Xcel Energy Inc., (Xcel Energy or the Company) in conjunction with the Prairie Island Indian Community (Tribal Community or the Community) offer the following Reply Comments to the questions posed by the Minnesota Department of Commerce (Department) in its comments of November 16, 2015.

**SUMMARY:**

Xcel Energy and the Tribal Community believe the Minnesota Public Utilities Commission (Commission) has the authority to implement recovery of the proposed amendment costs either through the State Environmental Policy (SEP) rider or by inclusion in Xcel Energy's 2015 electric rate case. As discussed below, the Commission should approve this amendment as being in the public interest. The additional payments can be used to offset the additional costs the Community will incur in continuing to maintain its vigilance, study and advocacy efforts attributable to the changed circumstances facing the Community and the Company in 2015.

**A. Legal analysis of the Commission's authority under Minn. Stat. § 216B.1645 regarding recovery of the Amended Agreement costs through base rates rather than through the renewable development rider:**

1. Authorization to recover Amended Agreement costs:

The legislation that granted rider recovery of the Prairie Island Indian Community Settlement (PI Settlement) contained no limitation or prohibition on the possibility of an amendment. Energy – Radioactive Waste Storage – Modifying Provisions, 2003

Min. Sess. Law Serv. 1st Sp. Sess. Ch. 11 (H.F. 9) (West)(codified in scattered sections of 116C, 216B and 216C) (Session Law). Nor was there a limitation or prohibition on amendments in the Agreement itself. October 15, 2015, Petition: Amendment to 2003 Settlement Agreement, Attachment A, in Docket No. E002/M-15-922. (2003 Agreement or original Agreement) Indeed, the legislative grant of authorization for the recovery of “an amount not to exceed \$2.5 million dollars annually” is evidence that the legislature was providing a modest financial margin for possible future amendments to the Agreement. Minn. Stat. § 216B.1645 subd. 4. The original Agreement, which was in existence at the time of the legislation’s passage and publically shared with the legislature, was signed by the parties on May 19 and May 22, 2003. 2003 Agreement; *see* Minn. Stat. § 216B.1645. This Agreement called for total annual payments in the amount of \$2.25 million dollars. *See* 2003 Agreement at ¶ 1. The original Agreement was negotiated in good faith with consideration by both parties. Specifically, in return for the agreed upon payments and as stated in Section 16 of the original Agreement, the Community agreed not to enforce its rights under Minn. Stat, § 116C.773 as a third party beneficiary in order to limit dry cask storage at the site. The Agreement did not include any provision for automatic increases for inflation of costs of goods and services. Nonetheless, the legislation which was finally enacted into law and effective on May 30, 2003, authorized payments up to \$2.5 million. Session Law, *see also* Minn. Stat. § 216B.1645. If the 2003 legislature intended to codify the precise payment contained in the 2003 Agreement, it had ample opportunity to do so as the 2003 Special Legislative Session ran until May 29<sup>th</sup>.<sup>1</sup>

Additionally, as a general matter of Minnesota contract law, it is a long-standing principle that contracts may always be modified by the mutual assent of the parties. *See Whitney v. Smith*, 22 N.W. 181, 181 (Minn. 1885) (“an executory contract, until fully performed, is subject to such alterations as the parties may agree upon”); *see also Bolander v. Bolander*, 703 N.W.2d 529, 541 (Minn. Ct. App. 2005) (party asserting that a written contract has been modified orally has the burden of demonstrating the modification by clear and convincing evidence); *Krogness v. Best Buy Co.*, 524 N.W.2d 282, 286 (Minn.Ct.App. 1994) (“Parties who have an express contract may leave that agreement behind and so conduct themselves that a new contract must be implied from their behavior”). Thus, general legal principles and the absence of contrary legislative intent indicate that the Community and Xcel Energy should be able to modify their 2003 Agreement, subject only to Commission approval.

## 2. Whether recovery should occur through Base Rates or Rider Recovery:

The 2003 legislation provided clear authority for recovery of the PI settlement costs through the State Energy Policy rider “SEP Rider” authority of Minn. Stat. §

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<sup>1</sup> *See Special Sessions of the Minnesota Legislature and the Minnesota Territorial Legislature, 1857-present at* <http://www.leg.state.mn.us/lrl/histleg/spsess>.

216B.1645. The separate statutory ability of a utility to seek “rider recovery” of expenses confers on the utility and the Commission the option to pursue a more immediate cost recovery mechanism; it does not set forth the exclusive method of cost recovery. Minn. Stat. § 216B.1645 subd. 2a (“a utility *may* petition the commission” and “the commission *may* approve” (emphasis added)).

Over the years the Legislature has granted “rider recovery” for a range of initiatives for which it sought to incentivize implementation by providing the option of more immediate cost recovery through a rider. *See e.g.* Minn. Stat. §§ 216.1635 subd. 4 (gas infrastructure), 216.1645 subd. 2a (renewable facilities), 216.1692 subd. 3 (emissions reductions). The option to recover through a rider exists as an alternative to including the costs in a utility’s next rate case. *See* Minn. Stat. § 216.1692 subd. 3 (utility may petition “outside of a general rate case”). In conjunction with Xcel Energy’s 2013 electric rate case, it was decided that the SEP Rider should be reduced to zero, as the various amounts were either quite modest (in the case of the Reliability Administrator “RA” and the Sustainable Building Guidelines “SBG”) or predictable as is the case with the PI Settlement amounts. December 11, 2013 *Order* in Docket No. E002/M-13-959.

Should the Commission approve the Amended Agreement, the amount to be collected from the PI Settlement will increase by \$1.05 million (or \$250k from original Agreement amount), but remain constant going forward. In this Petition, Xcel Energy proposed to include this cost in its 2015 rate case, rather than reinstitute the SEP Rider (Petition at 6). However, if it is preferable this incremental increase could be collected through reinstituting the rider mechanism with costs eligible for recovery effective January 1, 2016.

**B. “The basis for extending the terms of each of the payments in question:”**

The underlying rationale for both the original 2003 Agreement and the proposed 2015 Amendment is the Federal Government’s failure to fulfill its legal mandate under the Nuclear Waste Policy Act for the US Department of Energy to start taking utilities’ spent fuel by Jan. 31, 1998 and the ongoing and continuing financial burdens and expenses incurred by the Community which are attributable thereto.

It is indisputable that concern for the prompt removal of spent fuel from Prairie Island due to its proximity to the Community was a serious and constant concern that occupied the public and legislative debates in 1994 and 2003.<sup>2</sup> The changed

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<sup>2</sup> For example, the 1994 act required a search for an alternate site in Goodhue County away from the Community. Minn. Stat. § 116C.80. The 2003 the legislation continued to emphasize the removal of spent fuel from the site as soon as feasible. Minn. Stat. § 116C.83 subd.4. Shipments of spent fuel must be moved “immediately” upon availability of another site either in state or out of state Minn. Stat. §§ 116C.775, 116C.777.

circumstances described in Xcel Energy's Petition<sup>3</sup> have materially altered the expectations of the parties when the original Agreement was executed in 2003. The likely timeline by which spent fuel will ultimately be removed from Prairie Island has been greatly extended.

In short, the rationale for extending the expired payment terms and increasing the total amended payment amount to the maximum allowed by law is most appropriately viewed as a collective stream of payments to the Community for recognizing the likelihood that significantly more spent fuel will be stored on site for substantially longer than either the Company or the Community anticipated in 2003.

It bears noting that while the Agreement has locked in a decreasing level of payments to the Community by contract; the Legislature has repeatedly altered the cask storage payment mechanism to maximize significantly larger payments to the Renewable Development Fund.<sup>4</sup>

**C. Are any previously unexpected costs being incurred that the increased payments would offset?**

Yes. For example, the changed circumstances noted above have evolved to make it a certainty that spent fuel will remain at Prairie Island much longer than expected in 2003. The additional funds provided by the Amended Agreement could help cover costs the Tribal Community would incur as a close neighboring community and the Tribal Community's ongoing participation in an analysis of the effects of the significantly longer term storage on neighboring communities.

The Tribal Community suggested such a study in their April 1, 2015 comments on the Triennial Decommissioning Accrual.<sup>5</sup> The costs of this study would not have been

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<sup>3</sup> Xcel Energy noted four main changed circumstances: 1) the Department of Energy's 2009 decision to end the pursuit of its Yucca Mountain license application, which undermines a key mutually held belief that it would become the site of a permanent waste repository in the first quarter of the 21<sup>st</sup> century; 2) Congress not acting on the recommendations of the Blue Ribbon Commission on America's Nuclear Future in spite of the Department of Energy's support of these recommendations; 3) the NRC's finding as part of its Continued Storage (formerly known as "Waste Confidence") rulemaking that nuclear plants could safely store used nuclear fuel for 60 years following plant shutdown; and 4) the Commission's 2012 finding that a 60-year period for spent fuel management for decommissioning accrual purposes should be used, instead of the 36-year period recommended by Xcel Energy. See Petition at 5.

<sup>4</sup> In 1994, the annual per cask payment was \$500,000 beginning in 1999, which would yield \$8.5 million with the 17 casks then permitted. In 2003 the payment was increased to a flat rate of \$16 million per year while the plant was operating. In 2007 Monticello's lessor volume casks were added as RDF contributors at an annual rate of \$350,000 per cask/per year. By 2010 the number of on-site storage casks at Prairie Island had increased so the \$16 million per year payment was scrapped and the annual rate of \$500,000 per cask was reinstituted which raised more revenue for the RDF fund.

<sup>5</sup> April 1, 2015, *Comments of the Prairie Island Indian Community* in Docket No. E002/M-14-761.

incurred but for the unexpected decision by Department of Energy to end its efforts to construct a nuclear waste disposal site at Yucca Mountain.

The Prairie Island Nuclear Generating Plant and its Independent Spent Fuel Storage Installation (“ISFSI”) are located immediately adjacent to the Prairie Island Indian Community Reservation. The Tribal Community is concentrated closer to the PINGP and ISFSI than any other population group and has invested significant financial resources to ensure the safety and security of its members. The Tribal Community’s expenses associated with participation in PINGP-related actions, emergency planning, and steps required in the event of an accident (e.g., educating the public on risks and procedures; maintaining special medical supplies, equipment, and trained professionals) will continue as long as the Plant operates and beyond. However, because those facilities are located outside the boundaries of the Reservation, the Tribal Community receives no tax revenues from the PINGP to fund these activities.

The Tribal Community nevertheless incurs similar costs to those of the tax-funded host communities, including costs associated with emergency planning, emergency response and public safety that directly relate to the operation of the Prairie Island Plant and its ISFSI. Among other things, the Tribal Community established the Prairie Island Indian Community Police Department (“PIPD”) in October 2003, five months after the 2003 Agreement was signed and approved. The PIPD has been maintained and operated since that time as a law enforcement agency, providing police protection, paramedic and emergency assistance on and off the Reservation. PIPD is currently staffed by nine (9) duly appointed peace officers pursuant to Minn. Stat. § 626.93, as well as an emergency planner and receptionist.

The Red Wing Police Department has primary authority in the area of the Plant and has the ability to request additional response resources from other organizations such as the PIPD. As Minnesota licensed peace officers, PIPD officers are recognized as a responding party authorized to provide assistance to a requesting party from the county or city pursuant to the 2004 Cooperative Agreement Regarding Law Enforcement with Goodhue County and the City of Red Wing and the South East Region Counties Mutual Aid Agreement. The August 23, 2004 Mutual Aid Assistance Agreement between the Tribal Community and the City of Red Wing provides that the Tribal Community and City of Red Wing mutually agreed to render “such assistance as they are reasonably able in the event of an emergency situation.” The Mutual Aid Assistance Agreement further provides that “a [Prairie Island Indian] Community Officer acting pursuant to this agreement has the full and complete authority of a City Officer as though appointed by the City.” The PIPD is a first responder to any incident at the Plant due to its geographic proximity to the Plant, and PIPD has been first on the scene to emergencies and other incidents at the Plant. The Tribal Community is responsible for the costs associated with any PIPD-

furnished assistance and does not receive any tax revenues for providing those services.

The Tribal Community appoints a Tribal Emergency Response Committee (TERC) and maintains its own Emergency Operation Center on the Reservation that would be activated for an incident at the Plant.<sup>6</sup> The Tribal Community also sends representatives to the Goodhue County Emergency Operation Center in Red Wing, Minnesota and the State of Minnesota's Emergency Operation Center in Saint Paul, Minnesota. In addition, the Tribal Community actively participates in biennial emergency response drills and exercises at the Plant, and has even hosted exercises on the Reservation. Participants include the Tribal Community, Red Wing Police Department and Fire Department, Goodhue County Sheriff's Department, Minnesota Highway Patrol, Minnesota Department of Public Safety and Homeland Security and Emergency Management, Nuclear Regulatory Commission, Federal Emergency Management Agency, and U.S. Department of Homeland Security. The Tribal Community receives approximately \$20,000 per year from Xcel Energy for emergency preparedness purposes, but is otherwise responsible for all other costs incurred for these emergency planning and preparedness activities.

The Tribal Community also expends considerable financial resources participating in state and federal adjudicatory, legislative, regulatory and rulemaking proceedings related to the licensing and operation of the Plant and ISFSI, the Yucca Mountain Repository, nuclear safety, spent fuel storage and spent fuel transportation. The Tribal Community's previously unexpected costs include, among other things, the costs of:

- Submitting comments, offering testimony, and participating in proceedings before the Commission;
- Submitting comments and offering testimony before the Minnesota Legislature;
- Submitting comments, offering testimony, and participating in proceedings associated with the NRC's Waste Confidence and Continued Storage Rulemaking;
- Petitioning to intervene in the PINGP Units 1 and 2 License Renewal Proceeding before the NRC's Atomic Safety and Licensing Board;
- Working as a Cooperating Agency with the NRC in connection with the Supplemental Environmental Impact Statement for the PINGP Units 1 and 2 License Renewal Application;

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<sup>6</sup> With as many as 16,000 daily visitors and more than 3 million annual visitors, the Prairie Island Reservation would be the largest population concentration in Goodhue County during an actual plant emergency.

- Petitioning to intervene in the PINGP ISFSI License Renewal Proceeding before the NRC's Atomic Safety and Licensing Board;
- Working as a Cooperating Agency with the NRC in connection with the Environmental Assessment for the PINGP ISFSI License Renewal Application;
- Joining the States of New York, New Jersey, Connecticut and Vermont in prosecuting an appeal of the NRC's Waste Confidence Decision and Temporary Storage Rule before the U.S. Court of Appeals for the District of Columbia Circuit;<sup>7</sup>
- Joining the States of New York, Massachusetts, Connecticut and Vermont in prosecuting an appeal of the NRC's Continued Storage Rule before the U.S. Court of Appeals for the District of Columbia Circuit (still pending);
- Petitioning to intervene in the Yucca Mountain license proceedings before the NRC's Atomic Safety and Licensing Board after the U.S. Department of Energy sought to withdraw its application;
- Submitting comments and offering testimony to the Blue Ribbon Commission on America's Nuclear Future;
- Continuing participation (along with the Commission and Xcel Energy) in the Nuclear Waste Strategy Coalition;
- Continuing participation in the U.S. Department of Energy National Transportation Stakeholders Forum (NTSF) and its technical workgroups;<sup>8</sup> and
- Continuing participation with Xcel Energy in the U.S. Department of Energy's Cask Demonstration Project.<sup>9</sup>

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<sup>7</sup> See *New York et al. v. NRC*, 681 F.3d 471 (D.C. Cir. 2012) (vacating the NRC's Waste Confidence Decision and Temporary Storage Rule and remanding for further rulemaking a preparation of an environmental impact statement). It is worth noting that the NRC's Waste Confidence Decision and Temporary Storage Rule (now known as the Continued Storage Rule) arose out of a successful appellate challenge by the State of Minnesota in the 1970s. See *Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979). While the State of Minnesota has declined to participate in the most recent Waste Confidence and Continued Storage appellate challenges before the U.S. Court of Appeals for the District of Columbia Circuit, the Tribal Community is proud of its continued, active involvement in the rulemaking and appeals that will have a direct impact on the long-term storage of spent nuclear fuel on Prairie Island.

<sup>8</sup> The NTSF is the mechanism through which DOE communicates at a national level with states and tribes about the Department's shipments of radioactive waste and materials.

<sup>9</sup> November 4, 2015, Order of the NRC Atomic Safety and Licensing Board In the Matter of

Were it not for the existence of the Plant and ISFSI, the significant funds used by the Tribal Community to participate in these proceedings and initiatives are funds that could be used for other Community purposes.

Continued operation of the Prairie Island Plant is a long-term investment. The Plant is licensed to operate until 2033 and 2034. Even after shut down, spent fuel management and storage will continue on site for decades. Increasing the size and duration of payments in the Amended Settlement is recognition of the changed circumstances that make it a highly likely that more casks will be stored on site for a longer period of time than expected in 2003. The Amended Settlement is an element of the Company's ongoing efforts to maintain a collaborative relationship with the Community. The Amended Agreement also renews the pledge of mutual cooperation between the Community and the Company to work toward efforts to secure long-term and permanent storage of spent fuel away from Prairie Island.

**D. “Whether Xcel treats such instances symmetrically, that is, whether Xcel similarly negotiated payment decreases in contracts when expectations of the future were not met:”**

The facts and circumstances that resulted in the original Settlement and this Amended Settlement Agreement are unique, as is our continuing relationship with the Tribal Community. Thus, it is not reasonable to compare this agreement to other contracts that the Company may have with its numerous vendors or power suppliers. Xcel Energy has no other contracts, symmetrical or not, similar to this contract.

**E. “Why was it considered necessary to remove the ratepayer protections in terms 3, 4 and 5?”**

The Amended Agreement is intended to alter the timeline provisions and limits addressed in items 3, 4, and 5 established in 2003. The original paragraphs were stricken in order to avoid any confusion over the intent and duration of payments contained in the Amended Agreement. It is the intent of the Company and the Community that the payments will cease at such time as when spent nuclear fuel is no longer stored at the Prairie Island facility as stated in paragraph 2 of the Amended Agreement.

**F. “What criteria the Company proposes the Commission to use to judge the 2015 Amendment Agreement?”**

It is expected that the Commission will exercise its independent judgment to determine whether the changed circumstances set forth in the Petition justify an

amendment to the original Agreement and are consistent with the public interest. The Commission has broad authority to apply a variety of factors in its review of the Amendment. In assessing the public interest, the Commission should take several factors into account, including, but not necessarily limited to:

- The importance and uniqueness of the relationship with the Tribal Community. The Company and the Tribal Community have had a long-standing positive working relationship that is evidenced by the work the parties did to come to a mutually acceptable Agreement Amendment;
- The importance of maintaining a close working relationship with the Community is underscored by our joint efforts to ensure that the spent fuel is moved out of state as quickly as possible after plant shutdown. The Company and the Community have worked together on this issue through our participation in the Nuclear Waste Strategy Coalition and in numerous lobbying efforts at the federal level.
- The changed circumstances around nuclear waste storage. The parties' understanding when the original Agreement was signed is significantly different than the current situation;

The totality of the circumstances should therefore be weighed against the proposed \$2.5 million annual payment. In weighing these factors, the Company and the Community believe the amendment is clearly in the public interest.

**G. “How the 2015 Amendment fulfills the Company’s proposed criteria:”**

*See* section F. above.

**H. “Whether any changes to the rate schedule (State Energy Policy Rider) are necessary due to the 2015 Amendment:”**

As noted in the Petition and above, the Company is proposing to address the costs of the Amended Agreement in the 2015 rate case. If it is preferable to instead collect this amount in the SEP Rider, this would be acceptable as well. The Company would then address this in a separate filing to ensure that these costs were properly accounted for in the SEP Rider.

**I. “How the apparently conflicting language in clause 1(i) directing payments ‘during plant operations’ and clause 2 directing payment ‘until...all spent nuclear fuel ...has been removed is to be reconciled:”**

The reference in clause 1(i) was erroneously not stricken when the Amended Agreement was drafted. It is intended that the payments be continued until all the

spent fuel has been removed from the site as noted in paragraph 2 of the Amended Agreement.

**J. “Since the rate schedule providing for the automatic adjustment of charges has not been proposed as the recovery mechanism why a filing under Minn. Stat. § 216B.1645, subd. 4 is appropriate:”**

Minn. Stat. § 216B.1645 subd. 4 contains the provision in state law that specifically allows the Commission to approve a contract with the Community with annual payments “not to exceed \$2,500,000 annually...” As previously noted, if collection of the costs of the Amended Agreement through the SEP Rider is preferred over inclusion of these costs in the 2015 rate case that too would be acceptable.

We look forward to continuing to work with the Commission and the Department in conjunction with the Petition. Please contact the below representatives if you have any questions or would like further information regarding this matter.

Dated: November 30, 2015

Northern States Power Company

Prairie Island Indian Community

/S/\_\_\_\_\_  
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/S/\_\_\_\_\_  
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## CERTIFICATE OF SERVICE

I, Carl J. Cronin, hereby certify that I have this day served copies of the foregoing document on the attached list of persons.

xx by depositing a true and correct copy thereof, properly enveloped with postage paid in the United States mail at Minneapolis, Minnesota; or

xx by electronic filing.

MPUC Docket No: E002/M-15-922

Dated this 30<sup>th</sup> day of November 2015.

/s/

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Carl J. Cronin

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