

Minnesota Public Utilities Commission
Staff Briefing Papers

Meeting Date: **June 17, 2016** **Agenda Item #1 ***

Company: Northern States Power Company d/b/a Xcel Energy (Xcel, the Company)

Docket No. E-002/M-15-922
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

Issue: Should the Commission approve Xcel Energy's proposed amendment to its
Prairie Island Indian Community Agreement?

Staff: Jorge Alonso 651-201-2258

Relevant Documents

Xcel Energy Initial Filing October 15, 2015
Department of Commerce Comments November 16, 2015
Xcel Energy and Prairie Island Indian Community Joint Reply Comments ... November 30, 2015
Department of Commerce Procedural Comments May 12, 2016

The attached materials are workpapers of the Commission Staff. They are intended for use by the Public Utilities Commission and are based upon information already in the record unless otherwise noted.

This document can be made available in alternative formats (i.e., large print or audio) by calling (651) 296-0406 (voice). Persons with hearing or speech disabilities may call us through their preferred Telecommunications Relay Service.

Statement of the Issue

Should the Commission approve Xcel Energy's proposed amendment to its Prairie Island Indian Community (PIIC) Agreement?

Background

As a result of a 2003 Agreement, Xcel has been making annual payments to the PIIC to resolve disputes regarding how the Prairie Island operation should be controlled to limit its effect on the PIIC.¹

Under the 2003 Agreement, Xcel initially paid the PIIC \$2.25 million annually²; however, as the Prairie Island Nuclear Generating Plant (PINGP) operating licenses neared their end³, Xcel's annual payment was reduced to \$1.45 million starting in 2012.

In 2015, due to changes in circumstance regarding the disposal of spent nuclear fuel and the 20-year extensions of the PINGP's licenses, Xcel and the PIIC signed a new agreement (2015 Agreement) that increased the PIIC's annual payment to \$2.5 million.

Xcel has included the \$1.05 million payment increase in its current rate case⁴.

Xcel's Initial Filing

In its initial filing Xcel requested that the Commission approve its 2015 Agreement that, starting in 2016, increases the payments the Company makes to the PIIC from \$1.45 million to \$2.5 million.

Xcel listed the following reasons for the payment increase:

1. The Department of Energy's (DOE's) 2009 decision to end its pursuit to construct a nuclear waste disposal facility at Yucca Mountain which undermined a key mutually held belief that Yucca Mountain was on schedule to eventually become the site of a permanent waste repository in the first quarter of the 21st century. This action means that spent fuel could remain at Prairie Island beyond the time periods anticipated in 2003;
2. Congress' inaction regarding the DOE's 2012 Blue Ribbon Commission on America's Nuclear Future recommendations;
3. The Nuclear Regulatory Commission's (NRC's) finding as part of its Waste Confidence rulemaking that nuclear plants could safely store used nuclear fuel for 60 years following plant shutdown; and

¹ See Minn. Stat. § 216B.1645, Subd. 4.

² A copy of the 2003 Agreement is provided as attachment A under this docket.

³ Original licenses were to expire in 2013 and 2014.

⁴ Docket E-002/GR-15-826.

4. The Commission's 2012 finding that a 60-year period for spent fuel management following plant shutdown for decommissioning accrual purposes should be used instead of the 36-year period recommended by Xcel Energy.

Xcel explained that extra years of safe generation will benefit Xcel Energy customers, the State and Nation by providing affordable, carbon free base load power. Additionally, this Amendment guarantees that the parties will cooperate and work collaboratively on nuclear storage and disposal issues, which, in the long-term, are cost-saving measures that will avoid costly litigation and dispute resolution actions between the parties. The Company added that, should PINGP's extended life occur, this will also increase the volumes of spent fuel stored on the site and, most likely, extend further the time horizon before spent fuel will be transported offsite.

Xcel's request was made pursuant to Minn. Stat. § 216B.1645, Subd. 4 that allows the Company to make payments, not to exceed \$2,500,000 annually, to the PIIC with the funds to be used for, among other purposes, acquiring up to 1,500 contiguous or noncontiguous acres of land in Minnesota within 50 miles of the tribal community's reservation at Prairie Island to be taken into trust by the federal government for the benefit of the tribal community for housing and other residential purposes.

Xcel described the 2015 Amendment as a good faith effort by both parties to recognize the change in circumstances in a manner that is consistent with the terms and intentions of the original 2003 Settlement Agreement.

Department of Commerce Comments

The Department stated that it thought it was unclear whether Minnesota Statutes section 216B.1645, Subd. 4 gave the Commission authority to allow recovery of costs of amendments to the 2003 Settlement Agreement; thus, for clarity, the Department requested that Xcel provide its legal analysis of such authority in its Reply Comments.

The Department noted that the Company cited several examples regarding the uncertainty about how long spent fuel might be stored at the Prairie Island site. For instance, while DOE's decision no doubt added to that uncertainty, there is no need to amend the agreement to address uncertainty since clause 1(ii) of the 2003 Agreement is already written to cover payments during the term of storage and places no limit on how long storage might occur. Thus, the uncertainty cited as a reason for 2015 Amendment was already addressed by the 2003 Agreement; therefore, no amendments driven by uncertainty seem to be necessary.

The Department added that, since the petition does not demonstrate any impact from the 2015 Amendment on the length of operation for the Prairie Island generating station, Xcel's statement that "additional years of safe generation will benefit Xcel Energy customers, the State and Nation by providing affordable, carbon free base load power" needs clarification. The Department concluded that Xcel's petition should:

- Demonstrate that the statutory basis cited by the Company allows for Commission authority to implement the Company's proposed action—approval of an amendment to a contract with recovery to occur through base rates;
- Provide clear criteria by which the petition can be judged;
- Identify the impact of the proposal on the economics of the Company's nuclear units,
- Provide any incremental benefits that would offset the incremental costs; and
- Reconcile internal inconsistencies in the 2015 Agreement.

In addition to the legal analysis, the Department recommended that Xcel also provide the following in its Reply Comments:

- The basis for extending the terms of each of the payments in question;
- Whether any previously unexpected costs are being incurred that the increased payments would offset;
- Further explanation as to how increasing the size and duration of the proposed payments related to Xcel's nuclear facilities is consistent with continued, long-term investment in Xcel's nuclear power fleet (see discussion below);
- Whether Xcel treats such instances symmetrically, that is, whether Xcel similarly negotiated payment decreases in contracts when expectations of the future were not met;
- Why it was considered necessary to remove the ratepayer protections in terms 3, 4, and 5;
- What criteria the Company proposes the Commission to use to judge the 2015 Amendment agreement;
- How the 2015 Amendment fulfills the Company's proposed criteria;
- Whether any changes to the rate schedule (State Energy Policy Rider) are necessary due to the 2015 Amendment;
- 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; and
- Since the rate schedule providing for the automatic adjustment of charges has not been proposed as the recovery mechanism why a filing under Minnesota Statutes section 216B.1645, Subd. 4 is appropriate.
- Any other information that Xcel believes would be helpful for the Commission.

Xcel & Prairie Island Indian Community's Joint Reply Comments

Xcel and PIIC's joint reply to the Department's recommendations is as follows:

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:

Xcel pointed out that recovery of the PIIC Settlement contained no limitation or prohibition on the possibility of an amendment. Furthermore, 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. Xcel also ascertained that, if the 2003 legislature intended to codify the precise payment contained in the 2003 Agreement, it had ample opportunity to do so. 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. Thus, the Company concluded that general legal principles and the absence of contrary legislative intent indicate that Xcel and PIIC should be able to modify their 2003 Agreement, subject only to Commission approval.

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

Xcel stated that 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. § 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.

The reason for recovery through rates is that, in Xcel’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 or predictable as is the case with the PI Settlement amounts.

Xcel explained that, in its 2015 rate case, it proposed to recover the \$1.05 million increase through rates; however, if it is preferable, the 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:”

Xcel stated that, since 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 PIIC for recognizing the likelihood that significantly more spent fuel will be stored on site for substantially longer than either the Company or the PIIC anticipated in 2003.

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

The Company asserted that, since spent fuel will remain at Prairie Island much longer than expected in 2003, the additional funds could help cover costs the PIIC would incur as a close neighboring community and the PIIC’s ongoing participation in an analysis of the effects of the significantly longer term storage on neighboring communities.

Xcel added that the PIIC suggested such a study in their April 1, 2015 comments on the

Triennial Decommissioning Accrual⁵ and that the costs of this study would not have been incurred but for the unexpected decision by Department of Energy to end its efforts to construct a nuclear waste disposal site at Yucca Mountain.

Xcel noted that the PIIC 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 Independent Spent Fuel Storage Installation (ISFSI); however, the PIIC receives no tax funding. These costs include the following:

1. The Prairie Island Indian Community Police Department (“PIPD”) which, due to its proximity to the PINGP plant, is a first responder to any incident at the Plant.
2. The Tribal Emergency Response Committee (TERC) and the PIIC’s emergency Operation Center that would be activated for an incident at the Plant. The PIIC receives approximately \$20,000 per year from Xcel for emergency preparedness purposes, but is otherwise responsible for all other costs incurred for these emergency planning and preparedness activities.
3. Participation in various 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 such as:
 - 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;
 - 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;
 - 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);

⁵ Docket E-002/M-14-761.

- 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 workgroups⁶; and
- Continuing participation with Xcel Energy in the U.S. Department of Energy's Cask Demonstration Project.

Xcel stated that, were it not for the PINGP and ISFSI's existence, the significant funds used by the PIIC to participate in these proceedings and initiatives are funds that could be used for other PIIC purposes.

Xcel described the operation of the Prairie Island Plant as a long-term investment and, even after shut down, spent fuel management and storage will continue on site for decades. Increasing the size and duration of payments 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.

Xcel considers the Amended Settlement to be an element of the Company's ongoing efforts to maintain a collaborative relationship with the PIIC and it renews the pledge of mutual cooperation between the PIIC 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:"

Xcel described the facts and circumstances that resulted in the original Settlement and this Amended Settlement Agreement are unique, as is their continuing relationship with the PIIC Community. Thus, Xcel does not consider it reasonable to compare this agreement to other contracts that the Company may have with its numerous vendors or power suppliers. Xcel Energy stated it 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?"

Xcel explained that 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. The Company and the PIIC intend for the payments to cease at such time

⁶ 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.

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?”

Xcel stated that it expects that the Commission will exercise its independent judgment to determine whether the changed circumstances justify an amendment and are consistent with the public interest. 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 PIIC. Xcel and the PIIC 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 PIIC is underscored by their joint efforts to ensure that the spent fuel is moved out of state as quickly as possible after plant shutdown.
- The changed circumstances around nuclear waste storage.

Xcel explained that 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 PIIC believe the amendment is clearly in the public interest.

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

Xcel addressed this in section F, above.

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

Xcel intends to address the Amended Agreement’s costs in the 2015 rate case; however, if it is preferable to instead collect this amount in the SEP Rider, the Company would find that to be acceptable as well.

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:”

Xcel explained that the reference in clause 1(i) was erroneously not stricken when the Amended Agreement was drafted and, as noted in Amended Agreement’s paragraph 2, that it is intended that the payments will continue until all the spent fuel has been removed from the site.

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:”**

Xcel explained that Minn. Stat. § 216B.1645 subd. 4 contains the provision that specifically allows the Commission to approve a contract with the PIIC with annual payments “not to exceed \$2,500,000 annually...”

Department of Commerce Procedural Comments

In response to Xcel and the PIIC’s reply comments, the Department filed procedural comments on May 12, 2016 and stated that the DOC intends to undertake a more comprehensive review of Prairie Island’s continued operation economics in Xcel’s current rate case. Specifically, the Department highlighted PINGP’s increase in total production expenses since 2004. In real dollars, *after adjusting for inflation*, total production expenses per net kWh increased at a compound rate of 4.9% from 2004 to 2014 and by 8.1% from 2008 to 2014.

Since Xcel’s petition is based upon the presumption that PINGP will continue to operate for the foreseeable future, the DOC’s investigation into the effects of higher costs and other factors requires considerable examination.

To allow the investigation to proceed, and in light of numerous other contested cases, the Department recommended that the Commission allow the proposed amendment to take effect until it can be established whether continued operation of PINGP is in the public interest, and if so, for how long.

Staff Analysis

Xcel’s current \$1.45 million payment to the PIIC went into effect in January 2012 and the proposed \$2.5 million, if approved, would be effective January 2016. The \$1.05 million increase represents a 72%⁷ escalation a scant four years after the payment amount was (downwardly) revised.

Staff agrees that spent fuel will, in all likelihood, be stored longer than what was anticipated in 2003; however, based on this record, neither Xcel nor the PIIC have quantified how have the PIIC’s *annual costs increased* in the last four years.

Regarding Xcel’s assertions, Staff was unable to verify Xcel’s assertion that, as justification for possible increased costs, the PIIC, in Docket 14-761, suggested a study be conducted⁸. The PIIC’s comments in that docket essentially questioned assumptions used as basis to establish the annual nuclear decommissioning funds. Xcel also provided an extensive list of proceedings that the PIIC participates in; however, it is unclear how many of these began post 2012.

⁷ \$1.05 million/\$1.45 million = 72%

⁸ A search for the word “study” in the PIIC’s comments in that docket yielded only two such instances and neither was connected to the performance of a study.

Staff agrees that a longer storage period supports continued payments for a longer timeline; however, other than inflationary costs that are also unquantified, this record does not provide a quantitative basis for the increase.

Finally, if the Amended Agreement is approved, the Commission may want to order the Company to execute a “clean” version of the Agreement that resolves the inconsistency between clause 1(i) and clause 2, as discussed above. This would remove any possible confusion in the future.

Decision Alternatives

1. Approve the proposed amendment to the Xcel/PIIC agreement without conditions. (Xcel)
2. Approve the proposed amendment to the Xcel/PIIC agreement until it can be established whether continued operation of PINGP is in the public interest, and if so, for how long. (DOC)
3. Reject the proposed amendment to the Xcel/PIIC agreement.
4. If the Amended Agreement is approved, order the Company to execute a “clean” version of the Agreement that resolves the inconsistency between clause 1(i) and clause 2 within 60 days of the Commission Order.
5. If the Amended Agreement is approved, order the Company to address recovery in its 2015 rate case.
6. If the Amended Agreement is approved, order the Company to recover these costs in the SEP Rider and to do a separate filing to ensure that these costs were properly accounted for.