

February 22, 2018

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

RE: Answer to Requests for Reconsideration
Docket No. E002/M-17-530

Dear Mr. Wolf:

Attached are the comments of the Minnesota Department of Commerce, Division of Energy Resources (Department) in the following matters:

Minnesota Timber Producers Association's Motion for Reconsideration.

Associated Contract Loggers & Truckers of Minnesota's Petition for Reconsideration.

Benson Power Biomass Suppliers and Haulers' Request for Reconsideration.

Minnesota Turkey Growers Association's Petition to Amend Order.

North American Fertilizer, LLC and Beaver Creek Transport Inc.'s Petition for Reconsideration.

The Petitions were filed on February 6, 2018, February 8, 2018, February 9, 2018, and February 12, 2018 by:

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The Department recommends that the Minnesota Public Utilities Commission **not reconsider its order** and is available to answer any questions the Commission may have.

Sincerely,

/s/ STEVE RAKOW
Analyst Coordinator

SR/lt
Attachment



Before the Minnesota Public Utilities Commission

Comments of the Minnesota Department of Commerce Division of Energy Resources

Docket No. E002/M-17-530

I. INTRODUCTION

On June 30, 2017, Northern States Power Company, doing business as Xcel Energy (Xcel or the Company) filed the Company's *Petition for Approval to Terminate the Power Purchase Agreement With Benson Power, LLC, Acquire the Benson Power Biomass Plant, and Subsequently Close the Facility* pursuant to Minnesota Statutes §§ 216B.50, 216B.2424 subd. 9, and 216B.1645 along with Minnesota Rules 7829.3200 and 7829.1300. Xcel sought Minnesota Public Utilities Commission (Commission) approval of the *Asset Purchase and Sale Agreement between Benson Power, LLC and Northern States Power Company* (Purchase Agreement).

On July 12, 2017, Carlson Timber & Land Clearing, Fletcher Trucking, Dukek Logging, Sawyer Timber Company, Harbo Mulch, Inc., Dick Walsh Forest Products, and Precision Landscape & Tree, Inc. (collectively, Benson Power Biomass Suppliers) filed a petition to intervene.

On July 17, 2017, Huls Bros. Trucking, Inc. (Huls Bros.) filed a petition to intervene.

On July 21, 2017, Pflipsen Trucking, LLC (Pflipsen) filed a petition to intervene.

On July 24, 2017, Enberg Logging, LLC filed a petition to intervene.

On August 2, 2017, the Minnesota Department of Commerce, Division of Energy Resources, Energy Regulation and Planning (Department) filed comments.

On August 4, 2017, Commission Staff issued a *Notice of Comment Period* providing a due date of September 1, 2017 for reply comments and September 15, 2017 for responses to reply comments.

By September 1, 2017, petitions for intervention were filed by:

- Associated Contract Loggers & Truckers of Minnesota (ACLT);
- Beaver Creek Transport, Inc. (BCT);
- Minnesota Timber Producers Association (MTPA);
- Minnesota Turkey Growers Association (MTGA); and
- North American Fertilizer LLC (NAF).

Also by September 1, 2017, the following parties filed comments:

- ACLT;
- Alan Muller;
- Benson Power Biomass Suppliers, Huls Bros., Pflipsen, and D&D Ventures, Inc.;
- Carol A. Overland;
- MTPA;
- MTGA;
- NAF and BCT;
- Pete Rothfork; and
- Xcel.

On September 7, 2017, the Minnesota Department of Natural Resources provided late-filed comments.

By September 15, 2017, the Commission received reply comments from the following:

- Alan Muller;
- the City of Benson;
- Xcel; and
- the Department.

On October 9, 2017, the Benson Power Biomass Suppliers filed supplemental comments requesting clarification of the issues raised in comments.

On November 1, 2017, State Representative Dave Baker contacted the Commission requesting that the Commission delay action until after a separate state agency, the Department of Employment and Economic Development (DEED), studying the economic impact of the plant closure, releases its study.

On November 27, 2017, NAF and BCT filed supplemental comments requesting environmental review.

On November 28, 2017, Michael Frey, owner of a sawmill delivering wood residual to Benson Power, requested that the Commission delay action by at least 120 days to allow time for the sawmill to find alternative equipment.

On November 29, 2017, DEED notified the Commission that it intends to release its economic impact study on the closure of the biomass facilities by February 15, 2018.

On November 29, 2017, State Representative Tim Miller filed a letter requesting that the Commission delay action until after the DEED study is released.¹

On January 18, 2018, the Chair of the St. Louis County Board of Commissioners filed comments.

On January 23, 2018, the Commission issued its *Order Approving Petitions, Approving Cost Recovery Proposals, and Granting Variances* (Order) in Docket Nos. E002/M-17-530 and E002/M-17-551.

On February 6, 2018, MTPA filed MTPA's *Petition for Reconsideration* (MTPA Petition) in Docket Nos. E002/M-17-530 and E002/M-17-551.

On February 8, 2018, ACLT filed ACLT's *Petition for Reconsideration* (ACLT Petition) in Docket Nos. E002/M-17-530 and E002/M-17-551.

On February 9, 2018:

- MTGA filed MTGA's *Petition to Amend Order* (MTGA Petition) in Docket Nos. E002/M-17-530;
- NAF and BCT filed their *Petition for Reconsideration* (NAF-BCT Petition) in Docket Nos. E002/M-17-530.

On February 12, 2018, Benson Power Biomass Suppliers along with Huls Bros. and D&D Ventures Inc. filed their *Petition for Reconsideration* (BPBS Petition)

On February 13, 2018, the Commission issued its *Notice Setting Common Due Date for Answers to Petitions For Rehearing and Reconsideration*, establishing February 22, 2018 as the deadline for filing answers to all petitions for rehearing.

Below is the Department's answer to the petitions for reconsideration.

¹ The Department notes that the DEED study was released recently and is available on DEED's website: [Economic Impact of Closure: Benson Power Biomass Facility](#).

II. DEPARTMENT ANALYSIS

A. RULE BACKGROUND

Minnesota Rules 7829.3000 subpart 2 states that a petition for:

...rehearing, amendment, vacation, reconsideration, or reargument must set forth specifically the grounds relied upon or errors claimed. A request for amendment must set forth the specific amendments desired and the reasons for the amendments.

The Commission's standard for reconsideration is explained in the Commission's May 6, 2009 *Order Denying Reconsideration* in Docket No. E017, ET6131, ET6130, ET6144, ET6135, ET10/CN-05-619:

The Commission finds that the petitions do not raise new issues, do not point to new and relevant evidence, do not expose errors or ambiguities in the original Order, and do not otherwise persuade the Commission that it should rethink its original decision. The Commission concludes that the original decisions are the ones most consistent with the facts, the law, and the public interest, and will therefore deny the petitions for reconsideration.

Thus, the Commission has ruled generally that a petition for reconsideration must:

- raise new issues;
- point to new and relevant evidence; and/or
- expose errors or ambiguities in the original order.

In order for a request for reconsideration to be granted, the result of the new issues, new evidence, or errors must be that the Commission is persuaded that it should rethink its original decision and that a new decision is more consistent with the facts and the law. The Department reviewed various reconsideration petitions to determine if any raised significant new issues, pointed to new and relevant evidence, or exposed errors in the Order.

B. MTPA PETITION

1. Public Interest and Rule Variances

The MTPA Petition argues that the Commission erred in not considering the public interest when it decided to approve Xcel's request for a variance to Minnesota Rules, part 7825.2600.² The MTPA Petition also argues "neither MN Rules 7829.0100 nor MN Statutes provide a definition of 'public interest' for this matter." The Department agrees with MTPA that neither Minnesota Rules 7829.0100, 7829.3200, nor Minnesota Statutes provide a definition of "public interest" in the context of rule variances. However, the Order specifically listed the criteria required to be considered for a rule variance (pursuant to Minnesota Rule 7829.3200), including the requirement that "granting the variance would not adversely affect the public interest." The Order then evaluated the public interest criterion and concluded that the public interest test was met because "granting the variance is consistent with the best interest of Xcel's ratepayers."

First, the MTPA Petition lists evidence regarding whether the transaction is in the public interest from different perspectives. In many instances, MTPA helpfully indicates where in the record the evidence already exists. Thus, MTPA's evidence generally is not new. Second, the Commission determined, in this proceeding, to grant greater weight to ratepayer impacts than other considerations when determining the public interest. While parties may prefer a different interpretation, the MTPA Petition does not identify any errors, identify new issues, or provide new evidence regarding the Order's interpretation of public interest.

In summary, the MTPA Petition is without merit on this issue.

2. Prairie Island Contract

The MTPA Petition argues that the Commission erred in allowing Xcel's biomass capacity to fall below 75 MW. The MTPA Petition claims that this is a critical error because Minnesota Statutes § 116C.773 remains in force and requires "the governor, on behalf of the state, and the public utility operating the Prairie Island nuclear plant enter into an agreement binding the parties to the terms of sections 116C.771 and 116C.772 and the mandate for 200 megawatts of wind power and 75 megawatts of biomass required by December 31, 2002."

² The Department notes that Xcel also requested a variance to Minnesota Rules 7825.2500, but the MTPA Petition does not reference that request.

This issue was thoroughly discussed in the record of the proceeding by the parties³ and those discussions were considered by the Commission.⁴ The MTPA Petition does not identify any errors, identify new issues, or provide new evidence regarding the Order's interpretation and actions regarding Minnesota Statutes § 116C.773.

In summary, the MTPA Petition is without merit on this issue.

B. ACLT Petition

The ACLT Petition argues that the Commission erred in not requiring environmental review. The ACLT Petition helpfully indicates where in the record, including during oral argument, the issues related to environmental review were discussed. Thus, the ACLT Petition does not raise new issues.

As noted during the proceeding, Minnesota Rules 4410.4600 subp. 1 states "Projects within subparts 3 to 25 and 27 are exempt from parts 4410.0200 to 4410.6500..." As discussed during oral argument, Minnesota Rules 4410.4600 subp. 24 provides an exemption for financial transactions:

The following projects are exempt:

- A. Acquisition or disposition of private interests in real property, including leaseholds, easements, right-of-way, or fee interests, is exempt.
- B. Purchase of operating equipment, maintenance equipment, or operating supplies is exempt.

Xcel's proposal involves a financial transaction and, to the extent the Commission is approving the financial transaction, is exempt.

The ACLT Petition indicates that, because Xcel's proposal was sometimes referred to as a "project" rather than a "transaction," the Commission would have been within its authority should it have required environmental review. However, and as indirectly noted in the ACLT Petition,⁵ Minnesota Rules 4410.4600 subp. 21 E provides an exemption for certain construction projects: "Demolition or removal of buildings and related structures is exempt..." The portion of Xcel's proposal that is not a financial transaction involves demolition and removal. Thus, that portion of Xcel's proposal is exempt as well.

³ For examples, see the comments of MTPA dated August 30, 2017, the comments of NAF and BCT dated September 1, 2017, and the reply comments of the Department and Xcel dated September 15, 2017.

⁴ The Commission's Order contains several references to party positions on the relevance of Minnesota Statutes §116C.773.

⁵ The ACLT Petition states, "The 'project' is not solely the demolition of the Benson Power facility, ..." Also, see below for further discussion of Xcel's proposal as a 'project.'

In summary, the ACLT Petition is without merit on this issue.

C. MTGA Petition

First, similar to the MTPA Petition, the MTGA Petition argues that the Commission erred in allowing Xcel's biomass capacity to fall below 75 MW. As a remedy, MTGA requests the "Order be amended to become effective three years from the date of the original Order." As explained above, this issue was thoroughly discussed in the record of the proceeding by the parties and the Commission considered those discussions. The MTGA Petition does not identify any errors, identify new issues, or provide new evidence regarding the Order's interpretation and actions regarding Minnesota Statutes § 116C.773.

Second, the MTGA Petition states "there is nothing in the statute prohibiting the Commission from adopting a delayed effective date." However, Minnesota Statutes § 216B.2424 subd. 9 (c) provides two criteria for the Commission to consider. The second criterion establishes a ratepayer benefit/cost test. Delaying the effective date of the Commission's Order would not pass a ratepayer test because the delay would increase ratepayer costs and decrease ratepayer benefits.

In summary, the MTGA Petition is without merit on this issue.

D. NAF-BCT PETITION

As with the ACLT Petition, the NAF-BCT Petition argues that the Commission made two errors in not requiring environmental review. The first error claimed by the NAF-BCT Petition is that the Commission failed to recognize that Xcel's proposal was a "project" with "the potential for significant environmental effects." The rules implementing the Minnesota Environmental Protection Act (MEPA), define a "project" as "a governmental action, the results of which would cause physical manipulation of the environment, directly or indirectly." However, the purpose of Xcel's Petition is to shut down a power plant; in other words, Xcel's proposal is to cease the physical manipulation of the environment. Therefore, Xcel's proposal is not a "project" under MEPA and the NAF-BCT Petition is without merit on this issue.

The second error claimed by the NAF-BCT Petition is that the Commission appeared to have agreed with Xcel's arguments that, even if the proposal could be considered a "project," that it falls within the exemption provided by Minnesota Rules 4410.4600 subp. 21 E. The NAF-BCT Petition claims that the cited exemption does not apply, and was only intended to exclude minor construction activities that do not have the potential for significant impacts. However, even assuming Xcel's proposal involves a "project" under MEPA, the plain language of the exemption under Minnesota Rules 4410.4600 subp. 21 E is for the demolition or removal of buildings and related structures. Clearly, the language describes the construction aspects of Xcel's Petition. Therefore, the NAF-BCT Petition is without merit on this issue.

A third error claimed by the NAF-BCT Petition is that the Commission appeared to have agreed with Xcel's argument that, even if the proposal could be considered a "project," that it falls within the exemption provided by Minnesota Rules 4410.4600 subp. 24, which exempts financial transactions from environmental review requirements. The NAF-BCT Petition asserts that the subp. 24 exemption was intended only to exempt activities without physical impact on the land. Again, even assuming Xcel's proposal involves a "project" under MEPA, the plain language of the exemption under Minnesota Rules 4410.4600 subp. 24 indicates that the exemption is for purchasing property, equipment, and so forth. Clearly, the language describes the financial aspects of Xcel's Petition. Therefore, the NAF-BCT Petition is without merit on this issue.

A fourth error claimed by the NAF-BCT Petition is that the Order does not consider the environmental impacts across Minnesota of closing the plant. However, the NAF-BCT Petition helpfully indicates where in the record that information is located. Thus, the argument is not new and does not provide a basis for reconsideration. Further, as discussed above, Minnesota Statutes § 216B.2424 subd. 9 (c) establishes a ratepayer test for the Commission to consider when making a determination. Impacts across Minnesota are not relevant to the ratepayer test required by Minnesota Statutes. Therefore, the NAF-BCT Petition is without merit on this issue.

D. BPBS PETITION

First, the BPBS Petition states that the Commission erred in not discussing alternatives. However, Minnesota Statutes § 216B.2424 subd. 9 does not require consideration of alternatives. Second, the Commission's Order considered all of the alternatives offered by the various parties. The fact that parties did not offer alternatives is not an error on the part of the Commission. Therefore, the BPBS Petition is without merit on this issue.

Second, the BPBS Petition states that the Commission did not provide "independent, consistent, professional and comprehensive oversight" of Xcel. In essence, the BPBS Petition asserts that independent oversight would require the Commission to include factors beyond the two factors required by Minnesota Statutes § 216B.2424 subd. 9. As examples, the BPBS Petition includes costs of forest management, reduced fees to non-ratepayers, reduced revenues for certain businesses, and the impact of the rural economy. None of the factors provided by BPBS impact a ratepayer test. Further, the BPBS Petition does not provide a basis for the Commission to consider factors the legislature reserved for itself.⁶ Here, considerations that affect groups other than ratepayers have been excluded from Commission consideration by the legislature. Therefore, the BPBS Petition is without merit on this issue.

⁶ See discussion at pages 12 – 14 of the Commission's Order.

III. DEPARTMENT RECOMMENDATION

The Department recommends that the Commission not reconsider the Order.

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CERTIFICATE OF SERVICE

I, Sharon Ferguson, hereby certify that I have this day, served copies of the following document on the attached list of persons by electronic filing, certified mail, e-mail, or by depositing a true and correct copy thereof properly enveloped with postage paid in the United States Mail at St. Paul, Minnesota.

Minnesota Department of Commerce
Comments

Docket No. E002/M-17-530

Dated this 22nd day of February 2018

/s/Sharon Ferguson

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