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October 22, 2018

**VIA ELECTRONIC EFILING**

Dan Wolf  
Executive Secretary  
Minnesota Public Utilities Commission  
121 7th Place East, Suite 350  
St. Paul, Minnesota 55101-2147

**Re: Honor the Earth Petition for MEPA Review of the Nemadji Trio Energy Center to  
be located in Superior, Wisconsin  
Minnesota Public Utilities Commission Docket No. E015/AI-17-568**

Dear Mr. Wolf:

Minnesota Power (“Minnesota Power” or the “Company”), respectfully submits this letter in response to Honor the Earth’s Petition for Review under the Minnesota Environmental Policy Act (“MEPA”) of the Pending Decision by the Minnesota Public Utilities Commission (“MPUC” or “Commission”) for the proposed Nemadji Trail Energy Center (“NTEC”), which was referred to the Commission by the Environmental Quality Board (“EQB”) on October 16, 2018. Minnesota Power respectfully disagrees with the EQB’s determination that MEPA applies to the MPUC’s decision in the NTEC proceeding.

The EQB’s letter referring the matter to the Commission states that the Petition is complete pursuant to the criteria listed in Minnesota Rule 4410.1100. It further concludes that “[b]ased on a review of the facts that EQB staff were presented in the petition, it [the EQB’s] opinion that [MEPA] appl[ies] to the proposed government action being considered by the PUC.” As the agency responsible for assessing the evidence and making the ultimate determination whether an Environmental Assessment Worksheet (“EAW”) is required under MEPA, the MPUC need not accord any deference to the EQB’s decision to refer the matter after only a cursory review of the Petition and without a full evaluation of the facts. Minn. Admin. R. 4410.1100, subp. 6. The EQB is not allowed to assume authority without a proper statutory basis. Even taking Honor the Earth’s assertions as true, the Petition is not complete because the NTEC financial agreements at issue before the Commission are not “projects” under MEPA, and the actual “proposer” of the NTEC facility is not Minnesota Power, as discussed in more detail below. *See* Minn. Admin. R.

4410.0200 and 4410.1100. Additionally, Honor the Earth's request for preparation of an EAW for the NTEC facility has already been deemed late by the Administrative Law Judge, and seeks to impose Minnesota statutes and regulations on Wisconsin businesses, facilities, and operations in violation of federal law.

By way of background, South Shore Energy ("South Shore"), a Wisconsin affiliate of Minnesota Power, has entered into contracts to jointly develop NTEC with Dairyland Power Cooperative ("Dairyland"), a cooperative based in Lacrosse, Wisconsin. Wisconsin law does not allow Minnesota corporations, including Minnesota Power, to own NTEC. *See* Wis. Stat. § 196.53. NTEC is proposed to be located in Wisconsin and is governed by Wisconsin laws and rules pertaining to siting and environmental considerations. *See* Wis. Stat. § 196.491 and Wis. Admin. Code Chs. Natural Resources (NR) 150, and 405 through 408; 40 C.F.R. Part. 52.21.

On October 24, 2017, Minnesota Power filed a Petition before the Commission for Approval of affiliated interest agreements between the Company and South Shore, which, if approved, would allow Minnesota Power to purchase an approximately 50 percent share of the capacity from the NTEC natural gas power plant to be located in Superior, Wisconsin. In other words, Minnesota Power is not the owner or operator of NTEC, but rather a purchaser of capacity and energy from NTEC. Further, the facility is located in Wisconsin and, as noted in Minnesota Power's Petition to the Commission, is subject to Wisconsin environmental permitting requirements.

In March 2018 public comments filed in the Commission's contested case proceeding, Honor the Earth requested that an Environmental Impact Statement be required before the Commission made a decision on the affiliated interest agreements. Honor the Earth then filed a formal Petition for MEPA Review of NTEC on June 29, 2018. On July 2, 2018, Administrative Law Judge ("ALJ") Jeanne M. Cochran correctly determined that Honor the Earth could have filed a petition to intervene in the proceeding by the November 17, 2017 deadline and requested that the environmental legal issues be addressed during the prehearing process, but chose not to do so. Instead, Honor the Earth raised the environmental issues in comments filed long after the issues for the proceeding had been finalized. July 2, 2018 ALJ Report at 102-03, MPUC Docket No. E-015/AI-17-568. The ALJ ultimately held that the environmental issues were not raised in a timely manner and, as a result, are outside the scope of the contested case proceeding.

Next, Honor the Earth waited three months (until just days before the MPUC hearing on Minnesota Power's Petition) to file a Petition with the EQB seeking the same relief the ALJ had already denied as tardy. The Commission should reject Honor the Earth's attempts to circumvent the ALJ's determination and further delay the proceedings, and deny the request for MEPA review of the NTEC 250 MW purchase.

Additionally, even if Honor the Earth had filed a timely petition, MEPA does not apply to Minnesota Power's NTEC Petition or the NTEC facility for several reasons. First, there is no MEPA "project" in the current proceedings because Minnesota Power's Petition does not request approval to build or operate NTEC. Rather, NTEC will be built and operated by South Shore, a Wisconsin corporation, and Dairyland Power Cooperative, a Wisconsin electric cooperative. Minnesota Power's Petition requests MPUC approval of the affiliated interest agreements under Minn. Stat. § 216B.48 that will allow the Company to purchase a share of the capacity and power from NTEC (like a power purchase agreement ("PPA")). MEPA only applies to a "project,"

which is defined as a “governmental action, the results of which would cause physical manipulation of the environment, directly or indirectly. The determination of whether a project requires environmental documents shall be made by reference to the physical activity to be undertaken and not to the governmental process of approving the project.” Minn. R. 4410.0200, subp. 65. *See also* Docket No. E002/M-17-551 (MPUC denied reconsideration requests related to MEPA for Xcel Energy’s financial transactions). Because Minnesota Power is not requesting approval of any physical activity in Minnesota, but is merely seeking approval of an agreement that would facilitate the purchase of capacity and power from a Wisconsin facility, there is no “project” at issue and MEPA does not apply.

Second, even if the construction and operation of NTEC in Wisconsin could be considered a “project” under the laws of Minnesota and MEPA, the “proposers” would be South Shore and Dairyland, not Minnesota Power. As a result, the Petition is incomplete as it incorrectly lists Minnesota Power as the proposer. *See* Minn. Admin. R. 4410.0200 and 4410.1100.

Third, the NTEC facility will be entirely owned by Wisconsin entities, built in Wisconsin, and operated in Wisconsin. The NTEC facility will be subject to Wisconsin’s siting and environmental regulations and is not subject to the laws of Minnesota that Honor the Earth seeks to improperly invoke.

Fourth, because NTEC will be owned and operated entirely in Wisconsin, it will be subject to robust review by the appropriate Wisconsin agencies. Notably, the Wisconsin Department of Natural Resources (“WDNR”) will conduct environmental review of NTEC pursuant to the requirements of Wisconsin Environmental Policy Act (“WEPA”), Wisconsin’s equivalent of MEPA. Wis. Admin. Code Ch. NR 150. NTEC will also require environmental review from the WDNR and the Public Service Commission of Wisconsin (“PSCW”) when obtaining the certificate of public convenience and necessity that is required to construct the facility. Wis. Stat. § 196.491. When the appropriate agencies are already conducting environmental review of a project, requests for duplicative environmental review should be denied. *See* MPUC Order Dated June 27, 2013 in Docket No. E015/M-12-920 (denying citizen petition request for an EAW for Minnesota Power’s Boswell 4 mercury retrofit project because the Minnesota Pollution Control Agency was already addressing environmental issues). Here, WDNR and the PSCW are clearly the appropriate agencies to conduct any environmental review of the facility that will be located within Wisconsin’s borders, and will ensure that all necessary environmental protections are in place.

Finally, any application of MEPA to a facility fully outside of Minnesota is unprecedented and would violate the dormant Commerce Clause. *See Cotto Waxo Co. v. Williams*, 46 F.3d 790, 793 (8th Cir. 1995) and *North Dakota v. Heydinger*, 15 F.Supp.3d 891, 916-917 (D. Minn. 2014); *aff’d* 825 F.3d 912, 921 (8th Cir. 2016) (striking down a Minnesota statute that would “regulate activity and transactions taking place wholly outside of Minnesota.”). A state statute or regulation “is per se invalid when it has an ‘extraterritorial reach,’ that is, when the statute has the practical effect of controlling conduct beyond the boundaries of the state.” *Cotto Waxo Co.* 46 F.3d at 793 (citing *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989)). “The Commerce Clause precludes application of a state statute to commerce that takes place wholly outside of the state’s borders.” *Id.* The construction, operation, and ownership of the NTEC facility will indisputably

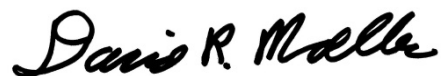
take place solely within Wisconsin. As a result, MEPA may not be used to control the conduct of NTEC in Wisconsin or its Wisconsin owners.

To be clear, Minnesota Power is not asserting that NTEC should be built without first conducting appropriate environmental review. Minnesota Power expects that WDNR and PSCW will conduct fulsome environmental review of the project. The MPUC, however, does not have authority to order an EAW for the NTEC plant because it will be constructed and operated solely in Wisconsin and there is nothing going on in Minnesota that would give the MPUC siting jurisdiction over the generation facility. See Minn. Stat. § 216E.02.

For the reasons set forth above, Minnesota Power requests that the Commission find that Honor the Earth's Petition fails to comply with Minn. R. 4410.1100, subps. 1 and 2 because the request for environmental review has already been denied by the ALJ in the MPUC proceeding and MEPA does not apply to NTEC.

Yours truly,

MINNESOTA POWER

A handwritten signature in black ink that reads "David R. Moeller". The signature is written in a cursive, flowing style.

David R. Moeller  
Senior Attorney

In the Matter of Minnesota Power's Petition  
for Approval of the Energy*Forward* Resource  
Package

MPUC Docket No. E-015/AI-17-568  
OAH Docket No. 68-2500-34672

**CERTIFICATE OF SERVICE**

Jill N. Yeaman certifies that on the 22nd day of October, 2018, she efiled a true and correct copy of a **LETTER** by posting the same on eDockets ([www.edockets.state.mn.us](http://www.edockets.state.mn.us)). Said document is also served via U.S. Mail or email as designated on the attached Service List on file with the Minnesota Public Utilities Commission in the above-referenced docket.

/s/ Jill N. Yeaman

Jill N. Yeaman

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