

**STATE OF MINNESOTA
BEFORE THE PUBLIC UTILITIES COMMISSION**

Katie Sieben	Chair
Dan Lipschultz	Vice Chair
Valerie Means	Commissioner
Matt Schuerger	Commissioner
John Tuma	Commissioner

In the Matter of the Petition by Northern
States Power Company d/b/a Xcel Energy for
Approval of the Acquisition of the Mankato
Energy Center (MEC)

DOCKET NOS. IP-6949, E-002/PA-18-702,
IP-6949/GS-15-620

**SUPPLEMENTAL COMMENTS OF THE
OFFICE OF THE ATTORNEY GENERAL**

INTRODUCTION

The OAG submits these comments and recommendations in response to the Commission’s August 20, 2019 Notice Requesting Supplemental Comments (“Supplemental Notice”).¹ The Supplemental Notice responds to Xcel’s August 1, 2019 letter (“Letter”) notifying the Commission that if it denies the Petition, the Company nevertheless intends to acquire MEC through an affiliated subsidiary (“Merchant Acquisition”). The Supplemental Notice asks two questions. First, “[w]hat legal requirements apply and what actions would Xcel be required to take before an Xcel affiliate could purchase [MEC] and assume the PPA to provide power to Xcel’s regulated operations?” Next, the Commission inquires whether “prior Commission approval of an affiliated interest agreement [is] required?” The OAG interprets the Supplemental Notice as inquiring into the legal and procedural prerequisites imposed on Xcel (and/or its affiliate) to effectuate the Merchant Acquisition, and the legal consequences, if any, resulting from Xcel proceeding with that transaction without Commission approval.

¹ The OAG incorporates by reference all terms and phrases previously defined in its July 26, 2019 filing. Any terms or phrases defined herein are, accordingly, used for the first time in this filing.

SUMMARY OF SUPPLEMENTAL COMMENTS & RECOMMENDATIONS

The OAG's Supplemental Comments and recommendations make two assumptions.

First, the OAG presumes that Xcel has neither sought nor obtained Federal Energy Regulatory Commission ("FERC") approval for an affiliated subsidiary to acquire MEC from Southern Power.² Xcel has, however, obtained FERC approval to proceed with the Petition.³ Accordingly, if the Commission rejects the Petition, the OAG interprets the Letter as contemplating a phased Merchant Acquisition approach whereby the Company intends to: (1) proceed with an unapproved MEC acquisition from Southern Power; (2) seek FERC approval to transfer MEC to an affiliated subsidiary; and (3) use that affiliated subsidiary to continue Southern Power's obligations to Xcel under the MEC PPAs.

Second, the OAG assumes that the Supplemental Notice's second issue—Is prior Commission approval of an affiliated interest agreement required?—inquires whether prior Commission approval is a legal prerequisite for *any* aspect of the Merchant Acquisition. And, if the Company nevertheless proceeds with an unapproved MEC acquisition from Southern Power, the OAG assumes that the Supplemental Notice seeks to better understand any resulting legal effect or consequence flowing from such failure, including potential Commission enforcement options.

² While the OAG uses the terms "Xcel" or "Company" throughout, the OAG understands that both the state and federal filings and transactional documents relevant to this matter all involve "Northern States Power Company, a Minnesota corporation," which the Company sometimes refers to as "NSP-Minnesota," "NSP-M," "NSPM" and the like. See, e.g., Petition at 1; *id.* at Attachment A at 5 (Membership Interest Purchase Agreement); see also *Joint Application for Authorization of Transaction Under Section 203 of the Federal Power Act and Requests for Certain Waivers and Confidential Treatment* at 1, FERC Docket No. EC19-38-000 (December 14, 2018) (hereinafter "Xcel FERC Application"). The OAG further understands that NSP-Minnesota is one of four operating companies wholly owned by the holding company, Xcel Energy Inc.

³ See generally *Order Authorizing Disposition of Jurisdictional Facilities and Acquisition of Existing Generation Facility*, FERC Docket No. EC19-38-000 (May 3, 2019) (hereinafter "FERC Approval Order").

As explained more fully below—and based on the OAG’s assumptions—the Commission has both immediate and ongoing regulatory jurisdiction over Xcel’s Merchant Acquisition, albeit indirectly. The Commission’s jurisdiction over the Merchant Acquisition is derived from the same provisions upon which the Commission is currently reviewing the Petition, including, for example, Minnesota Statutes section 216B.50 and its implementing rules. These same provisions set forth the legal and procedural prerequisites imposed on Xcel to effectuate the Merchant Acquisition. This makes sense if the OAG correctly presumes that the Company intends to proceed with a phased Merchant Acquisition approach whereby Xcel—as opposed to an affiliated subsidiary—first acquires MEC from Southern Power. Additional statutory or regulatory provisions—for example, those governing affiliated interest agreements and securities—may impose additional requirements on Xcel’s Merchant Acquisition.

With regard to the Supplemental Notice’s second issue, the OAG presumes that the Merchant Acquisition does not contemplate any affiliated interest agreements at this time. In any event—and to directly answer the precise question posed by the Supplemental Notice—the Commission’s past decisions have consistently enforced unapproved affiliate agreements by imposing certain regulatory penalties, such as disallowing future rate recovery, without voiding such agreements. If, however, the OAG’s assumptions are correct, and the Commission rejects the Petition as inconsistent with the public interest, Xcel would be legally prohibited from proceeding with its MEC acquisition under the guise of a Merchant Acquisition. In this sense, if Xcel proceeds as anticipated, the Commission may have a basis to void the Merchant Acquisition *ab initio*.

The OAG also respectfully provides several recommendations for the Commission’s consideration. The Commission may wish to require further factual development with regard to

the Merchant Acquisition. Such an inquiry is necessary to understand the full extent of legal and procedural requirements imposed on Xcel (and/or its affiliate) to effectuate the Merchant Acquisition. Moreover, it would provide greater clarity over both the legal consequences and enforcement options available to the Commission should Xcel proceed with its phased Merchant Acquisition approach without Commission approval. Second, the OAG encourages the Commission to maximize the efficacy of its public interest analysis underlying both the Petition and the Merchant Acquisition. To do so, the Commission should order an expedited independent valuation of MEC as contemplated by Minnesota Administrative Rules Part 7825.1700. After all, given the disagreement between the Department and Xcel over the Company's modeling, an independent and unbiased market valuation of MEC is necessary for the Commission to fulfil its statutory obligation under section 216B.50 to "take into consideration the reasonable value of the property" involved in both the Petition and, although indirectly, the Merchant Acquisition.

BACKGROUND

Xcel's Letter contends that the Petition "satisfies the public interest standard from every angle."⁴ The Company contends that the Commission need not "decide[] in detail" any of the Department's "modeling differences" to approve the Petition.⁵ Instead, Xcel explains that "the value of our MEC proposal can be viewed through a simpler lens that allows the Commission to find that the transaction is in the public interest."⁶ Xcel's "simpler lens" analysis suggests the Petition is consistent with the public interest and that \$650 million is a reasonable price for MEC because:

⁴ Letter at 1.

⁵ Letter at 2-3.

⁶ Letter at 3.

By owning MEC, the Company is able to own a combined cycle facility at the same cost as a combustion turbine. As we retire 3,000 MW of coal we will need capacity. Combined cycle resources have better efficiency, and therefore lower energy costs when compared to combustion turbines which benefits customers. (The levelized capacity cost of owning MEC—which includes fixed operations and maintenance and capital revenue requirement—is approximately \$8/kW-month. This is generally equivalent to the Company’s assumption of the cost of a greenfield combustion turbine, and similar to MISO’s calculation of the Cost of New Entry, which is based on the cost of a new combustion turbine).

MEC’s interconnection rights alone are worth between \$100 million and \$370 million on a net present value basis. Securing those rights increases the likelihood that we can avoid adding more expensive greenfield natural gas resources in the future.

When we look to comparable combined cycle proposals and sales in this region, our MEC transaction proves to be quite favorable, particularly compared to the recently approved Nemadji Trail Energy Center, which was priced at \$1,333/kW—nearly 500/kW more than MEC’s cost of \$855 /kW.⁷

Next, Xcel’s Letter responded to the Department’s contention that despite nearly equivalent fixed benefits and costs, the Petition improperly shifts certain risks—including those associated with decommissioning, equipment failures and plant outages, and higher property taxes and O&M expenses—from Southern Power onto the Company and thus ratepayers.⁸ Xcel agreed “to adopt a number of significant customer protections . . . that address the risks identified” by the Department “in order further ensure that customers benefit from this transaction.”⁹ The Company, however, rejected the Department’s proposed halving of Xcel’s acquisition adjustment—totaling approximately \$100 million—and concluded by “equat[ing the Department’s proposal with] a denial of this [P]etition.”¹⁰

⁷ Letter at 2 (footnotes omitted).

⁸ Letter at 2-3.

⁹ Letter at 3.

¹⁰ Letter at 3.

Finally, Xcel’s Letter explains that “[s]hould the Commission ultimately disagree” and reject the Petition—either as inconsistent with the public interest, or if the Commission “determine[s] that \$650 million is not a reasonable purchase price for MEC”—the Company intends to move forward” with its Merchant Acquisition.¹¹ Although the Letter fails to provide an in-depth explanation of the factual details underlying the Merchant Acquisition, Xcel notifies the Commission that “the Company would step into the shoes of Southern Power under the extant PPAs, it would accept all of the risk (and potential upside) associated with the plant’s value beyond the PPA terms, and it would operate the plant consistent with the practices of other independent power producers in Minnesota.”¹²

SUPPLEMENTAL COMMENTS AND RECOMMENDATIONS

I. IDENTICAL LEGAL AND PROCEDURAL REQUIREMENTS GOVERN BOTH THE PETITION, DIRECTLY, AND THE MERCHANT ACQUISITION, INDIRECTLY.

Xcel’s Petition sets forth the various legal and procedural requirements imposed on the Company by the Commission¹³ and other federal, state and local governments.¹⁴ These same requirements apply with equal force to the Merchant Acquisition, albeit indirectly. After all, even if the OAG’s assumptions are incorrect, the Merchant Acquisition would nevertheless necessitate Xcel’s unapproved acquisition of MEC from Southern Power given the Company’s present lack of FERC approval to complete that transaction through an affiliated subsidiary.

¹¹ Letter at 3.

¹² The OAG assumes that Xcel’s Letter intended for the Merchant Acquisition to culminate with one of the Company’s affiliated subsidiaries—and not Xcel itself—assuming Southern Power’s role under the MEC PPAs.

¹³ *See, e.g.*, Petition at 6-8, 42-46.

¹⁴ *See, e.g.*, Petition at 18 (discussing FERC and North Dakota Public Service Commission regulatory approvals); *see also id., e.g.*, at Attachment A, Schedule 1.01(a)(iii) (State Approvals); Schedule 3.03 (Required Regulatory Approvals); Schedule 4.09(b) (MEC I Permits); Schedule 4.09(b) (MEC II Permits).

A. If The Commission Rejects The Petition As Inconsistent With The Public Interest Under Section 216B.50, That Decision Effectively Rejects The Merchant Acquisition.

Minnesota Statutes section 216B.50, subdivision 1 provides:

No public utility shall sell, acquire, lease, or rent any plant as an operating unit or system in this state for a total consideration in excess of \$100,000, or merge or consolidate with another public utility or transmission company operating in this state, *without first being authorized so to do by the commission*. . . . If the commission finds that the proposed action is consistent with the public interest, it shall give its consent and approval by order in writing.¹⁵

Past Commission decisions support the conclusion that section 216B.50 explicitly requires Xcel to first obtain Commission approval before it is legally permitted to move forward with its proposed acquisition of MEC from Southern Power, regardless of whether that acquisition will be added to the rate base.¹⁶ Should the Commission reject the Petition as inconsistent with the public interest, that decision would effectively preclude Xcel from proceeding with its MEC acquisition under the guise of a Merchant Acquisition. Under such a scenario, the Commission would then be confronted with determining the legal effect of Xcel's noncompliance, including the enforcement options available to the Commission.

B. Unlike Its Enforcement Authority Under the Affiliated Interest Agreement Statute, The Commission Has The Power To Void Any Unapproved MEC Acquisition Regardless Of Whether That Transaction Is Styled As A Component Of A Phased Merchant Acquisition.

In the event the Commission rejects the Petition and Xcel nevertheless proceeds with its MEC acquisition from Southern Power, the Commission will still have jurisdiction over the

¹⁵ Minn. Stat. § 216B.50, subd. 1 (emphasis added).

¹⁶ See, e.g., *ITMO the Complaint of NAWO and SOUL Against Minnesota Power Regarding the Arrowhead Transmission Line Project*, Docket No. E-015/C-04-955, Order Dismissing Complaint and Requiring Future Filing at 5 (Sept. 24, 2004) (requiring Minnesota Power to seek Commission approval “under Minn. Stat. § 216B.50 *before* transferring any part of the Arrowhead Project to another entity”) (emphasis added).

Company under a variety of theories,¹⁷ including section 216B.50 and its implementing rules.¹⁸ While the Commission’s enforcement authority related to unapproved affiliate agreements does not permit voiding such agreements—but instead allows the Commission to impose certain regulatory penalties, such as disallowing future rate recovery in lieu of voiding such a transaction¹⁹—the same is not true with regard to unapproved mergers or transfers. Indeed, If Xcel proceeds with acquiring MEC from Southern Power without approval, the Commission has many enforcement tools at its disposal, including, arguably, the authority to void that transaction.²⁰

Furthermore, the scope and extent of the Commission’s enforcement authority related to violations of section 216B.50 must be read in the broader context of Chapter 216B. This Chapter provides the Commission with broad regulatory authority to ensure that the public is provided with adequate natural gas and electric service at reasonable prices.²¹ The Commission could not reasonably accomplish these goals if it lacked the authority to undo unapproved mergers,

¹⁷ The Commission has general jurisdiction over Xcel as a public utility under a variety of statutes, including, without limitation, Minnesota Statutes sections Minn. Stat. §§ 216B.01, 216B.03, and 216B.04.

¹⁸ See Minn. R. 7825.1600-.1800.

¹⁹ See Minn. Stat. § 216B.48, subd. 4.

²⁰ See, e.g., *Application of Nw. Bell Tel. Co.*, 367 N.W.2d 655, 661 (Minn. Ct. App. 1985) (finding that the Commission lacked prior approval authority over transactions between telephone companies and their affiliates—in contrast with the fact that “[p]rior approval power has been granted” to the Commission to regulate transactions involving public utilities and their affiliates—and therefore, unlike in the electric utility context, “did not have the authority to void the transfer”) (hereinafter “*Nw. Bell*”); *accord Mountain States Tel. & Tel. Co. v. Pub. Utils. Comm’n of State of Colo.*, 763 P.2d 1020, 1030, (Colo. 1988) (citing *Nw. Bell* and reasoning that the Colorado Public Utilities Commission had the self-executing authority to correct abuses by utilities that move forward with unapproved transactions, reasoning: “[t]he legislature expected and, indeed, directed substantial PUC involvement in the transfer of utility assets because section 40–5–105 itself permits an assets transfer only on such terms and conditions as are prescribed by the PUC. Pursuant to section 40–3–102, 17 C.R.S. (1984), the PUC is vested with the power to regulate rates of public utilities and to correct abuses by doing all things which are necessary or convenient to the exercise of its regulatory authority. . . . This statutory mandate necessarily includes the power to fashion an appropriate remedy to correct a violation of section 40–5–105, including ordering the reacquisition of assets.”); cf. *ITMO Petition of Otter Tail Power Co. for Auth. to Purchase A Portion of the Big Stone Generating Station*, Docket No. E-017/PA-85-125, 1985 WL 1203593, at *1 (Minn. P.U.C. Oct. 1, 1985) (“Since a principle concern of the Commission is to review such transactions in order to protect ratepayers from unnecessary and unreasonable acquisitions or sale, assertion of jurisdiction in this case is consistent with the purpose of the statute.”).

²¹ See Minn. Stat. § 216B.01.

acquisitions, and transfers in violation of section 216B.50. This is especially true given the Commission's past acknowledgment that it "takes seriously its statutory obligation to review property transfers, mergers, and consolidations" and has found such oversight to be "directly within its expertise."²² In any event, even if the Commission itself lacks the self-executing power to void any unapproved Xcel acquisition of MEC from Southern Power, the Commission could refer that matter for further enforcement to seek to achieve that same outcome.²³

II. THE COMMISSION SHOULD REQUIRE ADDITIONAL FACTUAL DEVELOPMENT IN ORDER TO FURTHER ITS PUBLIC INTEREST ANALYSIS AND CLARIFY THE REQUIREMENTS APPLICABLE TO THE MERCHANT ACQUISITION.

A. The Commission Should Invoke Rule 7825.1700 To Require An Independent Valuation Of MEC To More Fully Inform The Public Interest Analysis Required By Both The Petition And The Merchant Acquisition.

When considering whether Xcel has satisfied its burden to demonstrate that the Petition (or, indirectly, the Merchant Acquisition) is consistent with the public interest, section 216B.50 mandates that the Commission "take into consideration the reasonable value of the property, plant, or securities to be acquired or disposed of, or merged and consolidated."

The Commission is entitled to rely on record evidence to satisfy its obligations under section 216B.50.²⁴ For example, in a 2004 decision, the Commission approved Minnesota

²² See, e.g., *ITMO the Complaint of NAWO and SOUL Against Minnesota Power Regarding the Arrowhead Transmission Line Project*, Docket No. E-015/C-04-955, Order Dismissing Complaint and Requiring Future Filing at 5 (Sept. 24, 2004).

²³ See, e.g., Minn. Stat. § 216B.54.

²⁴ See generally, e.g., *ITMO Petition for Approval of A Redevelopment Agreement for the M.L. Hibbard Units 3 & 4 Boilers & Related Facilities from the City of Duluth & for Approval of Investments & Expenditures at the M.L. Hibbard Energy Ctr. Through Minnesota Power's Renewable Res. Rider Under Minn. Stat. § 216b.1645*, Docket No. E-015/PA-08-928, Order Approving Purchase and Making Findings Relevant to Recovery of Upgrade Expenditures Through the Renewable Energy Rider (Sept. 22, 2009) (approving Minnesota Power's acquisition of property for \$2.5 million under section 216B.50 after considering both "the public agencies' comments," which did not dispute or question the reasonableness of the purchase price, and Commission's "own review" of the "proposed purchase price." The Commission nevertheless conditioned its approval on Minnesota Power's agreement to perform an "accounting treatment" of the property's net book value (\$7,812,567), in order to prevent the company from "earning a rate of return on an amount . . . far in excess of what it actually paid for the facilities, which would constitute an unreasonable windfall.").

Power's petition to transfer assets to an affiliated company under sections 216B.48 and 216B.50.²⁵ Similar to the present case, the utility failed to comply with the Commission's competitive bidding requirements, which the Commission articulated as being "in place to address whether an asset is transferred at the proper value."²⁶ The Commission nevertheless approved the asset transfer and concluded that the utility's competitive bidding requirements "were reasonably satisfied by the Company's explanation that the net-book valuation exceeds the market valuation" because "the transfer is to be at net book value, which is higher than market value, which assures that MP [and its ratepayers] gets the full value of the regulated asset."²⁷

Without objective evidence in the record to establish the reasonable value of property, the Commission may find it difficult to discharge its statutory duties under section 216B.50. For example, in a contentious 1993 Commission proceeding, the majority of commissioners approved the transfer of property under section 216B.50, while a sole commissioner dissented. The dissenting opinion concluded that "the Commission has no sound factual basis on which to determine the reasonable value of the properties exchanged."²⁸ The dissenting commissioner reminded the Commission that "[n]either company filed professional appraisals of any of the properties" and although "a professional appraisal" was commissioned for one of the properties, the party "did not place the appraisal in the record."²⁹ Instead, the dissent found that the "book

²⁵ See *ITMO Minnesota Power's Petition for Approval of an Affiliated Interest Agreement and Aircraft Ownership Transfer Between ALLETTE, Inc. and ADESA, Inc.*, Docket No. E-015/AI-04-735, Order Approving Affiliated Interest Agreement and Aircraft Ownership Transfer (Sept. 29, 2004).

²⁶ *Id.* at 3.

²⁷ *Id.* (suggesting that evidence establishing the "market value" of the property subject to the proposed transfer was submitted into the record).

²⁸ *ITMO the Joint Petition of Minnegasco, a Div. of Arkla, Inc., and Midwest Gas, a Division of Midwest Power Systems, Inc. for Authority to Exchange Assets, Utility Operations and Business*, Docket No. 010/PA-93-92, Dissenting Opinion at 1 (July 29, 1993).

²⁹ *Id.* at 2.

value is the only objective evidence in the record on the value of the properties exchanged.”³⁰ In addition to critiquing the Commission’s sole reliance on the net book values,³¹ the dissent noted that “[c]omparing book values alone would suggest that Minnegasco agreed to pay approximately \$15 million too much.” Based on this evidentiary reasoning and section 216B.50’s mandate to consider “the reasonable value of the property” at issue, the dissenting commissioner concluded that “[g]iven the statutory emphasis on considering the value of the properties exchanged, the Commission should have used the only objective and best available evidence, book value, and disapproved the exchange.”³²

Where the record fails to provide any evidentiary basis supporting an objective and undisputed reasonable value of the property at issue, however, the Commission has the authority under Minnesota Administrative Rules Part 7825.1700 to “require an independent valuation of the property involved in the transaction.” Given the Department’s conclusion that “all four rounds of the Company’s modeling analysis” were “of no value,”³³ the OAG suggests that the Commission may find it necessary to order an independent valuation of the fair market price for MEC prior to ruling on the Petition or Merchant Acquisition. Without any objective information regarding MEC’s reasonable value in the record, the Commission may need an independent auditor to evaluate the reasonableness of Xcel’s proposed acquisition of MEC. This is especially true given Xcel’s intent to pay Southern Power almost \$100 million over and above MEC’s net book value, which was estimated to be \$541 million as of November 2018.³⁴

³⁰ *Id.* at 1.

³¹ *Id.* (discussing that while “[b]ook value (original cost minus accumulated depreciation) is used primarily for ratemaking and income tax purposes” and “tells much about the cost of material, labor, and capital at the time of construction,” that valuation provides the Commission with “little about the cost of securing a workable replacement or functional alternative for the property at issue.”).

³² *Id.* at 2.

³³ Department of Commerce, Supplemental Comments at 40 (July 26, 2019).

³⁴ Petition at 45.

B. Additional Factual Development Will Further Clarify The Legal And Procedural Requirements Applicable To The Merchant Acquisition.

While the Commission may not yet have direct jurisdiction over Xcel's purported Merchant Acquisition under the statutory and regulatory provisions governing affiliated interest agreements (Minn. Stat. § 216B.48; Minn. R. 7825.1900-.2300) and securities (Minn. Stat. § 216B.49; Minn. R. 7825.1000-.1500), the further factual development may alter that analysis.

If the OAG is correct to assume that Xcel intends to move forward with an unapproved acquisition of MEC from Southern Power, the Commission would have no immediate authority over that transaction under section 216B.48. After all, that transaction would not involve any affiliated interest agreement. Said differently, because both the Petition and the Merchant Acquisition only contemplate a transaction involving agreements between Xcel and Southern Power, section 216B.48 would be inapplicable. Instead, the Commission would likely have jurisdiction over an Xcel affiliated interest agreement for the Merchant Acquisition at some future point. For example, in the event Xcel obtains FERC approval for the Merchant Acquisition—which the OAG doubts will happen³⁵—the Company would then be required to

³⁵ See, e.g., FERC Approval Order at 4-5 (finding that the proposed transaction set forth in the Petition “is consistent with the public interest” but requiring Xcel to “inform [FERC] of any material change in circumstances that departs from the facts or representations that [FERC] relied upon . . . within 30 days from the date of the material change in circumstances); see also, e.g., *id.* at 3 (“Applicants explain that the [Petition] will have no adverse effect on regulation and will not affect the ability of [FERC] or state regulators to regulate [MEC].”); *id.* (“Applicants verify that, based on facts and circumstances known to them or that are reasonably foreseeable, the [Petition] will not result in, at the time of the [Petition] or in the future, any cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company, including: (1) any transfer of facilities between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company; (2) any new issuance of securities by a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; (3) any new pledge or encumbrance of assets of a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; or (4) any new affiliate contract between a non-utility associate company and a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and service agreements subject to review under sections 205 and 206 of the FPA.”); see also Xcel FERC Application at 11-21 (affirmatively stating that the Petition would not result (Footnote Continued on Next Page)

seek affiliated interest agreement approval from the Commission with regard to the PPAs governing MEC I and MEC II.³⁶ At that point in time, assuming that Xcel's affiliated subsidiary were to step into Southern Power's shoes under the PPAs, the Commission could then exercise supervisory control over those contracts "so far as necessary to protect and promote the public interest," and has the same jurisdiction over modifications or amendments as it has over the original contracts.

Similarly, to the extent that securities are not involved in the transaction, the Merchant Acquisition does not yet implicate section 216B.49. The Commission, however, may find it has jurisdiction under section 216B.49 at some future point. As discussed above, in the event that Xcel successfully convinces both FERC and the Commission to approve the Merchant Acquisition, the MEC PPAs would be contractual arrangements between Xcel and an affiliated subsidiary. Certain provisions within those PPAs, however, could potentially trigger the applicability of section 216B.49.

For these reasons, the OAG respectfully recommends that the Commission require Xcel to provide further factual and transactional information about the Merchant Acquisition. This information is necessary in order for the OAG, the Department, and the Commission to review whether the Merchant Acquisition requires regulatory approval, and whether any actions are necessary in order to protect Minnesota ratepayers. At a bare minimum, the Commission should require Xcel to provide detailed answers to the following questions:

(Footnote Continued from Previous Page)

in any impermissible cross-subsidization, horizontal or vertical competition, or affect the Commission's regulatory oversight).

³⁶ In such a circumstance, Xcel would be required to comply with the Commission's standing order setting forth the procedural requirements imposed on utilities for all affiliated interest agreement filings. *See generally ITMO Commission Investigation into Procedures for Reviewing Public Utility Affiliated Interest Contracts and Arrangements*, Docket No. G-999/CI-98-651, Order Initiating Repeal of Rule, Granting Generic Variance, and Clarifying Internal Operating Procedures (September 14, 1998).

- If Xcel believes that it does not require regulatory approval from the Commission for the Merchant Acquisition, provide the legal and factual justification for that position;
- Does Xcel require regulatory approval from any other regulatory bodies before proceeding with the Merchant Acquisition? Has Xcel made any such filings? If so, please provide information about those processes and copies of filings;
- What will happen to the MEC PPAs in the event Xcel proceeds with an unapproved acquisition of MEC?;
- Has Xcel notified FERC about any changed circumstances concerning the Petition or Merchant Acquisition?;
- If Xcel believes that an affiliated subsidiary can “step into the shoes” of Southern Power and be obligated under the exact same terms for the PPAs for MEC, provide the legal and factual justifications for how such a contractual relationship between Xcel and its affiliated subsidiary would not present state or federal regulatory concerns with regard to competition, cross-subsidization, pledges, guarantees, etc.;
- Details about the Merchant Acquisition, including at minimum:
 - How will the resulting entities be organized?
 - How will the transaction be completed?
 - Identify and describe the regulated and unregulated subsidiaries of Xcel, and produce copies of credit rating reports about them.
 - How will the transaction be funded, where will the funds be acquired, and what impact will that have on Xcel’s capital structure?
 - Specifically identify all changes for the organization, management, and leadership of Xcel.
 - What benefits will the transaction produce for Xcel’s Minnesota customers?;
- Will Xcel at any time require Commission approval for any affiliated interest agreements? If so, explain; and
- Does Xcel intend to do business with or receive services from any such affiliated entity? If so, explain.

CONCLUSION

The Commission cannot satisfactorily complete its public interest analysis for the Petition without requiring an independent market valuation of MEC. Furthermore, without additional factual and transactional information regarding the Merchant Acquisition, the Commission cannot satisfactorily determine the full extent of legal and procedural requirements imposed on

Xcel (and/or its affiliate), or the legal consequences and enforcement options available to the Commission should Xcel proceed without Commission approval. Requiring one or more independent valuations of MEC and requiring the Company to provide answers to these questions will best position the Commission to decide whether the Petition is consistent with the public interest and, if not, determine the legal consequences resulting from any unapproved Xcel acquisition of MEC.

Dated: August 30, 2019

Respectfully submitted,

KEITH ELLISON
Attorney General
State of Minnesota

s/ **Brian Lebens**

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s/ **Max Kieley**

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RESIDENTIAL UTILITIES AND ANTITRUST
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August 30, 2019

Mr. Daniel Wolf, Executive Secretary
Minnesota Public Utilities Commission
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**Re: In The Matter Of Xcel's Petition For Approval Of The Acquisition Of The
Mankato Energy Center (MEC)
Docket No. IP6949, E-002/PA-18-702, IP-6949/GS-15-620**

Dear Mr. Wolf:

Enclosed and e-filed in the above-referenced matter please find Supplemental Comments of the Office of the Attorney General—Residential Utilities and Antitrust Division.

By copy of this letter all parties have been served. An Affidavit of Service is also enclosed.

Sincerely,

s/ **Max Kieley**

MAX KIELEY

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Enclosures

cc: Service List

AFFIDAVIT OF SERVICE

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

I hereby state that on the 30th day of August, 2019, I e-filed with eDockets ***Supplemental Comments of the Minnesota Office of the Attorney General—Residential Utilities and Antitrust Division***, and served the same upon all parties listed on the attached Service List via electronic submission and/or United States Mail with postage prepaid, and deposited the same in a U.S. Post Office mail receptacle in the City of St. Paul, Minnesota.

Judy Sigal

Notary Public

My Commission expires: January 31, 2020.

[illegible]

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Thomas	Carlson	thomas.carlson@edf-re.com	EDF Renewable Energy	10 2nd St NE Ste. 400 Minneapolis, Minnesota 55413	Electronic Service	No	OFF_SL_18-702_Official Service List
John	Coffman	john@johncoffman.net	AARP	871 Tuxedo Blvd. St. Louis, MO 63119-2044	Electronic Service	No	OFF_SL_18-702_Official Service List
Generic Notice	Commerce Attorneys	commerce.attorneys@ag.state.mn.us	Office of the Attorney General-DOC	445 Minnesota Street Suite 1800 St. Paul, MN 55101	Electronic Service	Yes	OFF_SL_18-702_Official Service List
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First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
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Generic Notice	Residential Utilities Division	residential.utilities@ag.state.mn.us	Office of the Attorney General-RUD	1400 BRM Tower 445 Minnesota St St. Paul, MN 551012131	Electronic Service	Yes	OFF_SL_18-702_Official Service List
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