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March 23, 2020

VIA E-FILING
Will Seuffert
Executive Secretary
Minnesota Public Utilities Commission
121 Seventh Place East, Suite 350
St. Paul, MN 55101-2147

Re: In the Matter of Trade Secret Designations of
2019 Cogeneration and Small Power Production Reports
Docket No. E999/PR-19-09

Dear Mr. Seuffert:

Enclosed for filing in the above-referenced matter, please find Minnesota Power's Answer to the March 12, 2020, Petition for Reconsideration filed by the Environmental Law & Policy Center and the Institute for Local Self Reliance.

If you have any questions regarding this filing, please contact me by email at dmoeller@allete.com or by phone at (218) 723-3963.

Respectfully submitted,

David R. Moeller
Senior Attorney & Director of
Regulatory Compliance

DRM:th
Attach.

Enclosures
cc: Service List

STATE OF MINNESOTA
BEFORE THE
MINNESOTA PUBLIC UTILITIES COMMISSION

In the Matter of Trade Secret Designations of 2019 Cogeneration and Small Power Production Reports	Docket No. E999/PR-19-09 **MINNESOTA POWER'S ANSWER TO ENVIRONMENTAL LAW & POLICY CENTER AND INSTITUTE FOR LOCAL SELF RELIANCE PETITION FOR RECONSIDERATION**

INTRODUCTION

Pursuant to Minn. R. 7829.3000, subp. 4, Minnesota Power (the "Company") respectfully submits this Answer to the March 12, 2020, Petition for Reconsideration filed by the Environmental Law & Policy Center ("ELPC") and the Institute for Local Self Reliance ("ILSR") (collectively, the "Petitioners"). The Petitioners ask the Minnesota Public Utilities Commission (the "Commission") to reconsider its February 21, 2020, Order Accepting Trade Secret Designations and Requiring Public Filings ("Order").[1]

Petitions for reconsideration of Commission orders are governed by Minn. Stat. § 216B.27 and Minn. R. 7829.3000. The Commission generally reviews such petitions to determine whether the petition (1) raises new issues; (2) points to new and relevant evidence; (3) exposes errors or ambiguities in the underlying order; or (4) otherwise persuades the Commission that it should rethink its decision.[2] Here, Petitioners' Petition does not present a basis for reconsideration and has been thoroughly considered by the Commission in the Order. Based on the record in this

[1] *In the Matter of Trade Secret Designations of 2019 Cogeneration and Small Power Production Reports*, Docket No. E999/PR-19-9, ORDER ACCEPTING TRADE SECRET DESIGNATIONS AND REQUIRING PUBLIC FILINGS (Feb. 21, 2020).
[2] *In the Matter of Xcel Energy's Petition for Approval of Elec. Vehicle Pilot Programs*, Docket No. E002/M-18-643, ORDER DENYING RECONSIDERATION, DENYING STAY, AND APPROVING COMPLIANCE FILINGS at 3 (Oct. 7, 2019).

proceeding and for the reasons stated below, Minnesota Power respectfully requests that the Commission deny the Petitioners' Petition for Reconsideration.

ANSWER

At the outset, the extensive nature of this proceeding stemmed from Petitioners' objection, in their January 29, 2019, comments, to the Company's, Otter Tail Power's and Xcel Energy's (collectively, the "electric utilities") labeling of certain avoided cost information as trade secret in the electric utilities' annual cogeneration and small power production filings, arguing that both state and federal law require the information designated as trade secret to be available for public inspection.[3] The electric utilities, as well as the Minnesota Department of Commerce, Division of Energy Resources (the "Department") and Petitioners, themselves, filed numerous comments, reply comments, and supplemental comments in response to the trade secret issue, addressing specific questions related to state and federal public inspection and trade secret protection requirements, federal preemption, justification for designating material as trade secret, and the impact of standardized nondisclosure agreements. This focus on the trade secret issue in this proceeding has resulted in the development of an extensive and comprehensive record addressing the state and federal support for accepting the electric utilities' trade secret designations.

In requesting reconsideration, Petitioners repeat, almost verbatim, the same arguments made at various stages of this proceeding. That is, Petitioners' primary argument continues to be that Minnesota and federal law mandate that the contested data currently designated as trade secret in the electric utilities' filings be available for public inspection, and that the federal Public Utility Regulatory Policies Act ("PURPA") preempts the trade secret provision of the Minnesota Government Data Practices Act ("MGDPA"),[4] requiring the data at issue to be disclosed as public

[3] *See generally* ELPI and ILSR Comments (Jan. 29, 2019).
[4] Minn. Stat. § 13.37.

information. Petitioners continue to misconstrue the law as requiring complete public disclosure of all of the contents of the electric utilities' filings, and fail to demonstrate that the Commission erred in its application of the law to the facts in this situation. Both the Commission's rules[5] and the MGDPA[6] allow for the protection of trade secret data. Further, and as the Commission points out, even if Minn. R. 7835.1200 required the complete public disclosure of all contents of the electric utilities' filings, the statutory MGDPA and Minn. Stat. § 216B.164 trump state rule and allow for the designation of trade secret material. Petitioners' also continue to fail to demonstrate that the MGDPA is preempted by federal law, as the application of trade secret protections under the MGDPA does not create an obstacle[7] or run counter to PURPA. Because Petitioners raise no new issues or point to new evidence with respect to these issues, the Order directly addresses Petitioners' issues, and the Commission correctly interpreted state and federal law in concluding that the electric utilities' trade secret designations are appropriately classified, Petitioners' federal and state law arguments do not merit the Commission's reconsideration of the Order.

Moreover, there is no reason for the Commission to revisit the electric utilities' approach to nondisclosure agreements, as the Petitioners contend.[8] The Petitioners repeat arguments previously made in this proceeding and considered by the Commission in finding that "given the complexity and variety of different situations in which an NDA could be used, the Commission will not require a standardized approach at this time."[9] As discussed by the electric utilities during this proceeding, there are many situations in which sharing information pursuant to a standardized

[5] Minn. R. 7829.0500, subp. 1.
[6] Minn. Stat. § 13.37.
[7] "[S]tate laws are preempted when they conflict with federal law. Conflict preemption occurs when compliance with both federal and state laws is impossible, and when a state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress." *Keller v. City of Fremont*, 719 F.3d 931, 940 (8th Cir. 2013) (citing *Arizona v. United States*, 567 U.S. 387, 132 S. Ct. 2492, 2501 (2012)).
[8] Petition for Reconsideration at 15-17.
[9] Order at 10.

nondisclosure agreement would be inappropriate (e.g., when a developer plans to bid on a Request for Proposals issued by the Company or for developers selling energy and capacity into the MISO market or engaging in market trading of energy or capacity) and could risk harming ratepayers, third-parties, and the electric utilities.[10] Moreover, the availability of a standardized nondisclosure agreement would not change the justifications for keeping competitively-sensitive information protected. The Commission's decision recognizes the inappropriate situations that negate providing information pursuant to a nondisclosure agreement and the harms that could result if these agreements were subject to uniformity for all circumstances.[11]

Notably, the Commission did not completely dispel of the possibility of developing standardized nondisclosure agreements outside of this proceeding, if circumstances arise warranting such an action.[12] This proceeding, however, does not necessitate such a response. The Commission should decline to reconsider its Order on these grounds.

Finally, contrary to Petitioners' argument, the Commission's decision to approve the electric utilities' trade secret designations was not arbitrary and capricious.[13] Petitioners make three claims in this context—(1) the Commission's Order departs from an earlier Commission position favoring public disclosure under Minn. R. 7835.1200 without explanation; (2) the Commission failed to consider "the encouragement of cogeneration and small power production"; and (3) the Order is based on speculative harm and is therefore not supported by substantial evidence. Petitioners' arguments, again, do not justify reconsideration of the Commission's Order.

[10] Minnesota Power Oct. 14 Supplemental Comments at 2; Minnesota Power Oct. 24 Reply Comments at 3-4; Otter Tail Oct. 14 Initial Comments at 7; Otter Tail Oct. 24 Reply Comments at 4-5; Xcel Energy Oct. 14 Initial Comments at 3-4; Xcel Energy Oct. 24 Reply Comments at 10.
[11] Order at 10.
[12] Order at 10 ("[I]f the Commission finds that there are widespread problems with the utilities' approach to NDAs in the future, the Commission may revisit this issue.").
[13] Petition for Reconsideration at 17.

Petitioners' first argue that the Commission arbitrarily departed from a previous position by approving the electric utilities' trade secret designations.[14] But this does not appear to be the case. Petitioners cite the Commission's statement in its 1983 order adopting Minn. Stat. § 216B.164, implementing federal PURPA language, that "[r]estricting access to the filed information would serve to frustrate the purpose of M.S. § 216B.164 by discouraging cogeneration and small power production and would be unreasonable."[15] However, as stated in Minn. Stat. § 216B.164, subd. 1, the purpose of the statute is "to give the maximum possible encouragement to cogeneration and small power production consistent *with protection of the ratepayers and the public*."[16] As such, the Commission fully considered these issues and properly concluded that designating this information as trade secret does not frustrate the purpose of the statute and is, in fact, protective of the ratepayers and the public because such broad disclosure of the avoided cost data would allow potential suppliers to adjust pricing based on these utility costs – resulting in increased costs to ratepayers.

Petitioners' next argument—that the Commission failed to consider encouraging cogeneration and small power production—is inaccurate. In fact, the Commission explicitly stated that the "crux of the issue" in this proceeding is "whether prohibiting or allowing certain trade secret designations in the annual filings better serves the ratepayers and the public *while also encouraging cogeneration and small power production to the maximum possible extent*."[17] The Commission then proceeded to explain that "[i]n order to make a determination on this issue, the Commission must necessarily engage in a balancing of interests based on the specific facts at

[14] Petition for Reconsideration at 18-20.
[15] Petition for Reconsideration at 18 (quoting *In the Matter of the Proposed Adoption of Rules of the Minn. Pub. Utils. Comm'n*, Docket No. E999/R-80-560, ORDER ADOPTING RULES at 34 (Mar. 7, 1983)).
[16] Minn. Stat. § 216B.164 (emphasis added).
[17] Order at 8 (emphasis added).

hand."[18] Further, the Commission's Order states that "trade secret designation furthers the interests of ratepayers and the public *while encouraging cogeneration and small power production*."[19] Encouraging cogeneration and small power production was addressed extensively in Petitioners' comments in this proceeding and those comments are part of the voluminous record here – a record that the Commission, by its own acknowledgment, reviewed thoroughly.

Similarly, it bears noting that Petitioners have never appeared to acknowledge ratepayer or public protections and the harm that could result from making this information public, as discussed more below and throughout this docket. While Minn. Stat. § 216B.164 does state that "[t]his section shall at all times be construed in accordance with its intent to give the maximum possible encouragement to cogeneration and small power production," it goes on to provide that this encouragement must be "consistent with protection of the ratepayers and the public." Based on this statutory language, it appears the Commission engaged in the proper "balancing of interests" in making its determination in this proceeding.

To the last point, that the Commission's determination is based on speculative harm and not supported by substantial evidence, the electric utilities and the Department discussed at length in their respective comments, supplemental comments, and reply comments how forced public disclosure of the information designated as trade secret in this proceeding would harm ratepayers and third parties, providing specific examples of such harm. The Commission noted its "thorough review of the voluminous record in this docket" and, based on that review, determined that public disclosure of the marked information would be detrimental:

> Disclosure of the information could allow bidders to modify their pricing based on utility costs, and the Commission agrees with the Department's position that if the avoided cost information is publicly disclosed, it could

[18] Order at 8.
[19] Order at 9.

> become a "floor" for bidders, discouraging bidders from making lower bids and thereby increasing costs.
>
> Therefore, it is reasonable to believe that public disclosure of the information could harm ratepayers and the public. Although the harm is not certain, it is also not imagined.[20]

Substantial evidence in the record supports that publicizing avoided energy and capacity cost information could cause economic harm to customers, third parties, and the electric utilities, and the Commission's determination demonstrates its comprehensive consideration of that information.

Furthermore, Petitioners speculative harm may be because they are not developers. Because they are not developers they may lack understanding on how the information the electric utilities provide actually facilitates discussions with developers. Therefore, Petitioners lack standing to even bring these claims without demonstrating harm to their organizations or members. The standard for standing as set forth by the Minnesota Supreme Court in *State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 493 (Minn. 1996) is:

> Standing is the requirement that a party has a sufficient stake in a justiciable controversy to seek relief from a court. *Sierra Club v. Morton*, 405 U.S. 727, 731–32 (1972). If a plaintiff lacks standing to bring a suit, the attempt to do so fails. Standing is acquired in two ways: either the plaintiff has suffered some "injury-in-fact" or the plaintiff is the beneficiary of some legislative enactment granting standing. *Snyder's Drug Stores, Inc. v. Minnesota State Bd. of Pharmacy*, 221 N.W.2d 162, 165 (Minn. 1974). The goal of the standing requirement is to ensure that issues before the courts will be "vigorously and adequately presented." *Channel 10, Inc. v. Independent Sch. Dist. No. 709, St. Louis County*, 215 N.W.2d 814, 821 (Minn. 1974); *Twin Ports Convalescent, Inc. v. Minnesota State Bd. of Health*, 257 N.W.2d 343, 346 (Minn. 1977).

Petitioners have failed to demonstrate any "injury-in-fact" nor are they the beneficiary of any legislative enactment granting standing. In addition, Petitioners have not demonstrated even

[20] Order at 9.

"associational standing" "which recognizes that an organization may sue to redress injuries to itself or injuries to its members." *Philip Morris*, 551 N.W.2d at 497–98. The Court went on to explain:

> This court adopted this theory in *No Power Line, Inc. v. Minnesota Envtl. Quality Council*, 250 N.W.2d 158, 160 (Minn. 1976) and *Snyder's Drug Stores, Inc. v. Minnesota State Bd. of Pharmacy*, 221 N.W.2d 162 (Minn. 1974). Our approach is derived from the seminal case of *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977), where the U.S. Supreme Court found standing for a state agency which, in its capacity as representative of the state apple industry, challenged another state's agricultural regulation.

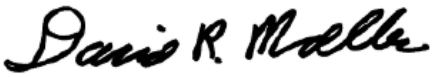
Even under the broader constitutional grounds available through associational standing, Petitioners have failed to cite harm to its members or any cognizable injury in fact.

CONCLUSION

The Commission's Order is consistent with the facts, the law, and the public interest, and Petitioners' Petition presents no basis for the Commission to reconsider the Order. Therefore, Minnesota Power respectfully requests that the Commission deny Petitioners' Petition for Reconsideration.

Dated: March 23, 2020

Respectfully submitted,



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STATE OF MINNESOTA	)	AFFIDAVIT OF SERVICE VIA
	) ss	ELECTRONIC FILING
COUNTY OF ST. LOUIS	)	

Tiana Heger of the City of Duluth, County of St. Louis, State of Minnesota, says that on the 23rd day of March, 2020, she served Minnesota Power's Response in **Docket No. E999/PR-19-09** on the Minnesota Public Utilities Commission and the Energy Resources Division of the Minnesota Department of Commerce via electronic filing. The persons on E-Docket's Official Service List for this Docket were served as requested.

Tiana Heger