MINNESOTA
PUBLIC UTILITIES COMMISSION

Staff Briefing Papers

Meeting Date	April 30, 2020		Agenda Item 1*
Company	Minnesota Power, Otter Tail Power, and Xcel Energy		
Docket No.	**E999/PR-19-9**		
	In the Matter of Trade Secret Designations of 2019 Cogeneration and Small Power Production Reports		
Issues	1. Should the Commission grant the Joint Commenters' Petition for Rehearing or Reconsideration?		
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✓ **Relevant Documents**	**Date**
COMMISSION ORDER ACCEPTING TRADE SECRET DESIGNATIONS AND REQUIRING PUBLIC FILINGS	February 21, 2020
Environmental Law & Policy Center and Institute for Local Self Reliance (Joint Commenters), Petition for Reconsideration	March 12, 2020
Xcel Energy, Answer	March 23, 2020
Minnesota Power, Answer	March 23, 2020
Otter Tail Power, Answer	March 23, 2020

II. Statement of the Issues

Should the Commission grant the Joint Commenters' Petition for Rehearing or Reconsideration?

III. Background

On January 29, 2019, Environmental Law and Policy Center and Institute for Local Self Reliance (Joint Commenters) filed comments (Initial Request) objecting to rate-regulated utilities' use of Trade Secret designation for some of the avoided cost information included in the annual cogeneration and small power production tariff filings.[1]

On February 6, 2019, the Commission issued a notice requesting Minnesota Power, Otter Tail Power, and Xcel Energy provide justification for trade secret designations followed by a comment period on the merits of the Joint Commenters' Initial Request.

On February 22, 2019, the three utilities provided their responses.

By March 8, 2019, the Department of Commerce-Division of Energy Resources (Department); Ridge Energy, LLC; and the Joint Commenters filed initial comments.

On March 18, 2019, Minnesota Power, Xcel Energy, and Joint Commenters filed reply comments.

At the August 22, 2019 Agenda Meeting and the August 30, 2019 Notice of Supplemental Comment, the Commission requested a supplemental comment in the current docket to address the following:

a. Minnesota Power, Otter Tail Power, and Xcel Energy revised 2019 annual cogeneration and small power production filings (Annual Filings) with the data each utility has proposed to make public and the rationale for these changes to trade secret designation;
b. Further explanation of how the specific information claimed to be trade secret does or does not qualify as trade secret under the Minnesota Government Data Practices Act (MGDPA), Minnesota Statute Chapter 13;
c. Any specific, trade secret-designated information required by Minnesota rules under part 7835.0500 (Schedule A); part 7835.0600 (Schedule B); and part 7835.1000 (Schedule G) not required by the federal Public Utilities Regulatory Policies Act (PURPA); and
d. Further discussion of the 'public inspection' requirement under PURPA and Minn. Rules 7835.1200 and whether that can be satisfied by granting developers interested in providing generation as qualifying facilities (QFs), and their consultants and advisors

[1] Joint Commenters, Initial Request – Corrected (January 29, 2019)

> access to the data required by the rules under a Commission-approved nondisclosure agreement. Parties' Comments

On September 10, 2019, Minnesota Power, Otter Tail Power and Xcel Energy provided compliance filings revising previously Trade Secret designated data each utility would make public in the 2019 and future annual cogeneration and small power production filings.

Between October 10 and October 24, 2019, the Department, Joint Commenters, Minnesota Power, Otter Tail Power, Xcel Energy filed supplemental initial and reply comments.

On February 21, 2020, the Commission issued its ORDER ACCEPTING TRADE SECRET DESIGNATIONS AND REQUIRING PUBLIC FILINGS (February 21, 2020 Order). The Commission accepted the revised Trade Secret designations from the three public utilities' September 10, 2019 compliance filings for 2019 and future years with the exception to provide the following as public:

a. Schedule B; Subp. 2, Items A–D (Unit name, nameplate rating, fuel type, in-service date);
b. Schedule B; Subp. 5 (Net annual avoided capacity cost – results, not all inputs)

Further, the Order acknowledged all three utilities have non-disclosure agreement (NDA) processes and declined to require a standardized NDA at this time.[2]

On March 12, 2020, Joint Commenters filed a petition for reconsideration (Petition) requesting the Commission withdraw the February 21, 2020 Order and determine that PURPA and Minnesota's implementing rules require public access to the avoided capacity cost and avoided energy cost data in Schedules A and B of the Utilities' filings.

On March 23, 2020, Xcel Energy, Minnesota Power, and Otter Tail Power (utilities) submitted Answers to the Joint Commenters' Petition requesting the Commission deny the Joint Commenter's request.

IV. Standard of Review

Petitions for reconsideration are governed by Minn. Stat. §216B.27 and Minn. R. 7829.3000. Parties agree on the Commission's standard of review for a petition to reconsideration[3]:

> … determine whether the petition (i) raises new issues, (ii) points to new and relevant evidence, (iii) exposes errors or ambiguities in the underlying order, or (iv) otherwise persuades the Commission that it should rethink its decision.

[2] MN PUC, ORDER ACCEPTING TRADE SECRET DESIGNATIONS AND REQUIRING PUBLIC FILINGS (Feb. 21, 2020), Docket No. E999/PR-19-9 , p. 10

[3] Joint Commenter's Petition, p. 2; Xcel Energy Answer, p. 1; Minnesota Power, p. 1. Citing MN PUC, ORDER DENYING RECONSIDERATION, DENYING STAY, AND APPROVING COMPLIANCE FILINGS (October 7, 2019), Docket No. E002/M-18-643

However, Parties reach different conclusions: Joint Commenters' request granting the petition; whereas, the utilities request denial.

V. Party Comments

Petition for Reconsideration

Joint Commenters' Petition requests the Commission withdraw the February 21, 2020 Order and determine that PURPA and Minnesota's implementing rules require public access to the avoided capacity cost and avoided energy cost data in Schedules A and B of the Utilities' filings.[4] The Petition outlines the Joint Commenters' position on the standard of review, statutory background, and a three-part argument in defense of the request.

The Joint Commenters' argument[5] is that the Commission:

1. Erred in the interpretation of "public inspection" in Minn. Rule 7835.1200; (**Public Inspection**)
2. Should revisit the Utilities' non-disclosure agreement practices to avoid frustration of the purpose of federal and state law; and, the public inspection requirement in Minn. Rule 7835.1200; and, (**Non-Disclosure Agreements**)
3. Recognize the decision on Trade Secret designations was arbitrary and capricious and not based on substantial evidence. (**Trade Secret Designations**)

The remainder of this section of briefing papers outline the Joint Commenters' legal argument for each of these topics and the Answers received in response:

Public Inspection

Joint Commenters' maintain their argument that plain language of Minn. Rule 7835.1200 and PURPA (CFR §292.302(b)) is clear that avoided cost data must be made available for public inspection, and that failure to do so acts as an obstacle to PURPA implementation and distributed generation in Minnesota.[6] Joint Commenters offer two new examples in defense of public inspection not being restricted by trade secret designations: 1) Commission ex parte communication reports; and 2) Commission rulemaking on large wind energy site permits that explicitly addressed trade secret information and public inspection.[7] Finally, the Joint Commenters' repeat their argument that PURPA preempts the MGDPA.[8]

The utilities maintain that the Joint Commenters misconstrue the law as requiring complete public disclosure of all of the contents of the cogeneration and small power production filings. Minnesota Power notes the Commission's Order appropriately identifies that Minn. Rule 7835.1200 is trumped by the MGDPA and Minn. Stat. 216B.164, which both allow for trade

[4] Joint Commenters, Petition for Reconsideration, p. 24
[5] *Id.*, pp. 8-24
[6] *Id.*, pp. 8-10.
[7] *Id.*, p. 11
[8] *Id.*, pp. 12-15

secret information. Further, MGDPA does not stand as an obstacle to PURPA.[9] Xcel Energy points to the availability of avoided cost information for qualifying facilities up to 1 MW, and highlight a developer acknowledging the availability of the information.[10]

For greater than 1 MW qualifying facilities, Xcel Energy highlights several alternatives to the information in these filings influencing these PPA negotiations. First, Minn. Stat. 216B.164; subd. 4 establishes "... the utility's least cost renewable energy or bid of a competitive supplier of a least cost renewable energy facility, whichever is lower". Second, Xcel Energy has used a competitive acquisition process for capacity needs. Finally, Xcel Energy has two recent PPAs based on rates set at the relevant MISO node's locational marginal price (LMP) at the time of production.

Non-Disclosure Agreements

Joint Commenters argue the Commission should revisit the issue of utility's non-disclosure agreements because the Commission is abandoning its obligation to make the data "available for public inspection *at the Commission*" (Minn. Rule 7835.1200, Joint Commenters' emphasis.) Joint Commenters argue utilities are allowed to unlawfully "bargain away PURPA regulations" with an NDA. Further, access to the avoided cost information under a NDA comes too late in the process – after a legally enforceable obligation (LEO) is established. Joint Commenters identify a "circular trap" for developers[11]:

> … they both need avoided cost data to get their renewable energy project off the ground and cannot obtain the avoided cost data until their renewable energy project is near operational.

Xcel Energy counters the Company provides pricing information to prospective developers "even if they have not started their project" to set an expectation after an inquiry from a qualifying facility.[12] Xcel Energy explains the actual price information is proprietary to a third party which is why a NDA after the LEO is established is warranted for the specific, detailed information. Lastly, Xcel Energy argues the information in the cogeneration and small power production filings is not the same information as the information provided under a NDA because this applies to projects over 1 MW and Minn. Stat. 216B.164; subd. 4 applies.

Minnesota Power and Otter Tail Power reiterate the utilities' concern that providing avoided cost information under a standardized NDA could expose ratepayers, third parties and utilities to harm if inappropriately shared with competitors (e.g. respondents to a RFP issued by the Company or MISO market participants.)[13]

[9] Minnesota Power Answer, p. 3
[10] Xcel Energy Answer, pp. 2-3
[11] Joint Commenters Petition, pp. 15-16
[12] Xcel Energy Answer, p. 3 and Attachment A provides further detail.
[13] Minnesota Power Answer, p. 4

Utilities express concern with the experience and standing of the Joint Commenters stating they are not themselves, nor do they represent, developers of qualifying facilities.[14]

Trade Secret Designations

Joint Commenters claim the Commission's "acceptance of the trade secret designations was arbitrary and capricious, contrary to law, and unsupported by substantial evidence." Joint Commenters re-offer three arguments to defend this claim. First, the Commission's Order is a departure, without explanation or reasoned analysis, from the Commission's previous position on public inspection of the avoided cost information. Again, the Joint Commenters cite, in part, the Commission's March 7, 1983 Order[15]:

> Restricting access to the [avoided cost] information would frustrate the purpose of Minn. Stat. § 216B.164 by discouraging cogeneration and small power production and would be unreasonable.

Joint Commenters argue the Commission should address why restricting access no longer "frustrate[s] the purpose of Minn. Stat. 216B.164…." Further, the utilities' long-standing treatment of the information as trade secret is not the same as the Commission's practice which has not been challenged until this instant docket.

While the Commission's February 21, 2020 Order states the "specific issue at hand appears to be an issue of first impression for the Commission," Xcel Energy reiterates the Commission has approved distributed generation tariff filings with nonpublic avoided cost information before.[16] Further, Xcel Energy continues to highlight how pertinent avoided cost information, specifically compensation rates for qualifying facilities 1 MW or less, is publicly available. Xcel Energy highlights a developer's comments supporting the availability of this information.[17]

Second, Joint Commenters argue the Commission is not adequately factoring the "… maximum encouragement to cogeneration and small power production… " required under Minn. Stat. §216B.164.[18] FERC Order No. 69 adopting the PURPA rules acknowledges qualifying facilities need access to pricing and avoided cost information for investment, and Joint Commenters argue lack of access to the avoided cost information is an obstacle to PURPA. Joint

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[14] *Id*., pp. 7-8; Xcel Energy Answer, p. 2

[15] MN PUC, ORDER ADOPTING RULES (March 7, 1983), Docket No. E999/R-80-560. Staff provides the full paragraph from the order at p. 30: "It is necessary that all tariff filings concerning purchase rates be made readily available so that the Commission, all qualifying facilities, and any potential qualifying facility can estimate present and future avoided cost based purchase rates. Access to filings will allow interested parties an opportunity to make a judgment as to the reasonableness of all computations and an opportunity to understand their responsibilities as sellers of energy to a utility. Restricting access to the information would frustrate the purpose of Minn. Stat. § 216B.164 by discouraging cogeneration and small power production and would be unreasonable."

[16] Xcel Energy Answer, p. 7. Citing MN PUC ORDER APPROVING DISTRIBUTED GENERATION TARIFF AND STANDBY SERVICE RIDER AS MODIFIED AND REQUIRING FILINGS (July 14, 2006), Docket No. E002/M-04-2055

[17] *Id*., pp. 2-3.

[18] Minn. Stat. 216B.164; subd 1. states "This section shall at all times be construed in accordance with its intent to give the maximum possible encouragement to cogeneration and small power production consistent with protection of the ratepayers and the public."

Commenters argue publicly providing the information is consistent with protection and benefit of ratepayers and the public by: 1) diversifying energy supply; 2) reducing fossil fuels; and 3) increasing competition and reducing generation costs.[19]

Xcel Energy reiterates participation in distributed generation is robust in the Company's service territory: by the end of 2018, over 4,800 distributed generation facilities (with over 970 MW of capacity) were interconnected.[20] Xcel Energy argues the Joint Commenters' claim of ratepayer benefit or protection is misplaced and based on outdated information. First, the Company has a nation-leading community solar garden program. Second, integrated resource plans inform the Company's generation portfolio – which is approaching 35% wind. Third, the Company procures most new generation through a competitive bid process. Further, Xcel Energy argues the Joint Commenters have not shown how providing the avoided cost information publicly would result in the ratepayer benefits claimed, and notes the opposite concern of harm to competitive bidding was the basis for justifying the trade secret designations.[21]

Minnesota Power and Otter Tail Power argue the Commission identified 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", and engaged in a "balancing of interests based on the specific facts at hand."[22]

Finally, Joint Commenters argue the Commission misapplied the MGDPA because the utilities' justification of trade secret designations are inappropriately based on conclusory allegations or "speculative harm." Joint Commenters argue the "floor" for bidding was bare speculation, and should have been confirmed with utility affidavits on bidding behavior. Joint Commenters note the Commission's Order acknowledges that "harm is not certain."[23] Further, Joint Commenters argue the Commission's Order does not "adequately explain how it derived its conclusion and whether that conclusion is reasonable on the basis of the record", and note the Commission relied on speculation without evidence (e.g. past action of bidders).[24]

Minnesota Power and Otter Tail Power suggest the Joint Commenters' claim of speculative harm is unsubstantiated, and point to the multiple rounds of comments and "voluminous record" discussing the potential harms. Citing the February 21, 2020 Order on the harm of public disclosure:[25]

> 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

[19] *Id*., p. 21
[20] Staff notes: Many of the facilities reported qualify for rates established by Minn. Stat. 216B.164; whereas, most of the MWs reported are due to the Community Solar Garden program (not PURPA qualifying facilities).
[21] Xcel Energy Answer, pp. 4-6
[22] Minnesota Power Answer, pp. 5-6. Citing the February 21, 2020 Order at p. 8.
[23] *Id*., pp. 22-23. Citing the February 21, 2020 Order at p. 9.
[24] *Id*., p. 24
[25] Minnesota Power Answer, pp. 6-7. Citing February 21, 2020 Order at p. 9.

cost information is publicly disclosed, it could 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.

VI. Staff Analysis

Using the agreed upon standard of review, staff offers the following analysis:

Raise new issues

Staff does not see new issues raised in the petition.

Point to new and relevant evidence

Staff notes the Joint Commenters' raise two new pieces of evidence related to the Commission's treatment of public inspection: ex parte reports and a rule on large wind site permits.[26] Staff in not convinced these examples support the Joint Commenters' position. First, Commission ex parte communication reports are filed publicly; however, if trade secret information was discussed that information would be marked as non-public and a trade secret and public version of the report would be filed. Second, the rulemaking on large energy wind site permits has unique factors. The common practice in rulemaking is not to restate or refer to applicable statutes or other rules unless a reference is deemed necessary. In this example, the site permit applicants may not be utilities familiar with the Commission's handling of trade secret information; thus, the redundancy serves a unique purpose. In other words, just because a rule does not refer to a statute does not mean the statute does not apply.

Joint Commenters provide new detail on what ratepayer protection or benefit they argue would come from making the trade secret designated information public; namely, diversifying energy supply, reducing fossil fuels, and increasing competition and lowering generation costs.[27] Xcel Energy counters this claim summarizing how the Company has diversified its generation through integrated resource planning, and uses a competitive bidding for most new generation. Staff notes the Joint Commenters cite to the intent of PURPA; however, did not provide evidence supporting their claim the benefit and protection would be realized.

Expose errors or ambiguities in the underlying order

The bulk of the record in the Petition and Answers focuses here. Joint Commenters argue the Commission's Order errs on three accounts: 1) treatment of public inspection and several underlying statutes and rules; 2) deferring to utilities for NDA access to avoided cost information; and 3) basing trade secret designations on "speculative harms". The Utilities

[26] Joint Commenters Petition, p. 11. Citing Minn. Rules 7845.7300; subp.3 and 7854.0400; subp. 3 respectively.
[27] *Id*., p. 21.

unilaterally rebuke the Joint Commenters' claims. Staff summarizes these arguments in **Section V. Party Comments**, and defers to the Commission on whether errors or ambiguities were exposed.

Persuades the Commission that it should rethink its decision

Staff defers to the Commission on this item.

If the Commission is convinced the February 21, 2020 Order warrants reconsideration, the Commission has two options. First, the Commission could adopt the Joint Commenters' request to withdraw the Order and require all the avoided cost information in Schedules A & B be filed as public by the utilities (**Decision Option 1.a.**). Another option is to grant the reconsideration and provide further clarification or modification to the Order as the Commission finds warranted **(Decision Option 1**). Alternatively, the Commission may choose to deny the petition as requested by the utilities (**Decision Option 2**).

VII. Decision Options

1. Grant the Joint Commenters' Petition for Reconsideration.

[*and*]

   a) Withdraw the February 21, 2020 Order in this docket and determine that PURPA and Minnesota's implementing rules require public access to the avoided capacity cost and avoided energy cost data in Schedules A and B of the Utilities' filings. (*Joint Commenters)*

2. Deny the Joint Commenters' Petition for Reconsideration. (*Xcel Energy, Minnesota Power, Otter Tail Power*)