

E-002/CG-88-491AFTER RECONSIDERATION

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Barbara Beerhalter	Chair
Cynthia A. Kitlinski	Commissioner
Norma McKanna	Commissioner
Robert J. O'Keefe	Commissioner
Darrel L. Peterson	Commissioner

In the Matter of the Petition of Rosemount Cogeneration Joint Venture, Biosyn Chemical Corporation, and Oxbow Power Corporation for an Order Resolving a Dispute with Northern States Power Company

ISSUE DATE: August 9, 1989

DOCKET NO. E-002/CG-88-491

ORDER AFTER RECONSIDERATION

PROCEDURAL HISTORY

On May 11, 1989, the Minnesota Public Utilities Commission (the Commission) issued its ORDER GRANTING PETITION, CONSTRUING CONTRACT, AND REQUIRING PAYMENT OF COSTS AND ATTORNEYS' FEES in this matter. That Order was not properly served on all parties. On May 19, 1989, the Commission properly served the Order. Parties were given until June 8, 1989 to file petitions for reconsideration.

Timely petitions for reconsideration were filed on June 8, 1989 by Northern States Power Company (NSP) and Rosemount Cogeneration Joint Venture, Biosyn Chemical Corporation, and Oxbow Power Corporation (Joint Venture). The Joint Venture filed a Conditional Petition for Reconsideration, stating that its petition should be considered withdrawn if no other party to this proceeding filed a petition seeking reconsideration, rehearing, or any other action by the Commission regarding its Order.

On June 19, 1989 the Joint Venture and the Department of Public Service filed Answers to NSP's Petition for Reconsideration. On that same date, NSP filed its Response to the Joint Venture's Conditional Petition for Reconsideration.

On June 27, 1989, the Commission issued its ORDER GRANTING PETITIONS FOR RECONSIDERATION which accepted the Petitions for reconsideration for the purpose of allowing sufficient time for Commission deliberation and decision on the merits of the issues raised.

On July 19 and August 2, 1989 the Commission considered this matter.

FINDINGS AND CONCLUSIONS

The Commission must decide whether the parties have presented any issues or positions that were not fully considered in its May 11 Order.

The Joint Venture

The Joint Venture asked that the Commission reconsider its decision that following execution of the contract NSP did not breach the duty of good faith required under the common law of contract in Minnesota or, at a minimum, vacate that decision as irrelevant.

The Commission finds that the Joint Venture's arguments on this point merely restate arguments that were presented earlier in this proceeding. The Commission fully analyzed the Joint Venture's position on this issue and rejected it. The Joint Venture's Petition for Reconsideration offers no new analysis or information, therefore, the Commission will deny it.

NSP

NSP made the several arguments for reconsideration in its June 8 Petition. NSP argued that the contract term with respect to price is unenforceable because the contract required a fluidized bed facility and performance in 1988 in order to obtain the rates of \$16.68 per kW per month.

This proceeding was initiated to determine whether a contract between NSP and the Joint Venture for the Rosemount Cogeneration facility is enforceable. Minn. Stat. § 216B.164, subd. 5 (1988) provides that in any dispute between an electric utility and a qualifying facility the utility has the burden of proof. In its May 11 Order the Commission determined that NSP had failed to meet its burden of showing that the contract was unenforceable. The Commission determined that the contract is enforceable. Further the Commission decided two basic issues: the type of facility required by the contract and the contract price to be paid for the capacity provided by that facility. NSP has presented no new evidence, information or analysis that requires the Commission to reconsider its ultimate determination in this matter.

NSP also argued that the Order is deficient on its face because it doesn't have sufficient findings to support its conclusions and the Order does not demonstrate that the Commission made an independent determination of facts.

Minnesota law establishes standards for agency decisions. Minn. Stat. § 14.62, subd.1 (1988) states:

Every decision and order rendered by an agency in a contested case shall be in writing, shall be based on the record and shall include the agency's findings of fact and conclusions on all material issues.

Commission rules require a concise statement of the conclusions upon each contested issue of fact

necessary to the decision. Minn. Rules, part 7830.3800.

The Commission's Order in this matter provides sufficient factual basis to support its decision. The Commission specifically found that the contract requires Biosyn or its assignee, the Joint Venture, to build a 50 Mw baseload qualifying cogeneration facility without further definition. Order, p.5. The Commission also decided that the 1988 reference in Appendix 2 of the contract did not prevent enforcement of the contract. The Commission provided two legal bases for this determination and noted that Biosyn had made an election under PURPA that allows the 1988 date to reflect a price term rather than a performance date. Order, p. 6. Finally at page 7 of the Order, the Commission listed several facts supporting its conclusion that NSP waived a 1988 performance date.

The Commission explicitly stated that it had made an independent review of the record in deciding this case:

The Commission has carefully analyzed the entire record: testimony and exhibits presented by parties during the contested case, the briefs, reply briefs, and the ALJ report and exceptions to it filed by the parties. Order, p. 4.

Following that review, the Commission identified the material facts, finding that a contract exists between the Joint Venture and NSP and that that contract contained certain terms that are set forth in the May 11 Order. The Commission concludes that its May 11 Order is legally sufficient.

NSP argued that the Commission's ultimate decision was contradictory and inconsistent with the facts found by the Commission.

The Commission deliberated on this matter on March 20 and April 12, 1989. The Commission may modify a decision prior to the issuance of an Order and may continue deliberations and change its decision during the course of those deliberations. Here the Commission followed proper procedures and acted within the scope of its authority in reaching its ultimate decision. The Commission acts through its Orders. Minn. Stat. § 216B.33 (1988); Minn. Rules, part 7830.3800. The Commission invites NSP to consider the Commission's final vote on this matter which occurred April 12, 1989. The May 11 Order is based on the decisions made there supported by the Commission's factual findings summarized above. NSP's arguments on this issue are without merit and the Commission will reject them.

Finally, NSP argued that the Commission erred in deciding that 1991 was a reasonable time for performance.

The Commission finds that this issue was thoroughly addressed and analyzed in this proceeding and the basis for its determination was properly set forth in the May 11 Order. The Company has failed to persuade the Commission that it needs to be revisited.

The Commission will deny NSP's Petition for Reconsideration in this matter.

ORDER

1. The Petition for Reconsideration filed by NSP and the Conditional Petition for Reconsideration filed by the Joint Venture in this matter are hereby denied.
2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Mary Ellen Hennen
Executive Secretary

(S E A L)