

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendraye
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Marshall Johnson
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Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of the Petition of Northern States
Power Company for Review of its 1999 All
Source Request for Proposals

ISSUE DATE: March 18, 2003

DOCKET NO. E-002/M-99-888

ORDER DECLINING TO RECONSIDER
FEBRUARY 7, 2001 ORDER, FINDING
CONTESTED CASE UNWARRANTED,
AND APPROVING XCEL'S POWER
PURCHASE AGREEMENT WITH
MANITOBA HYDRO

PROCEDURAL HISTORY

On November 30, 2000, the Commission met to discuss the final selections made by Northern States Power Company d/b/a Xcel Energy (Xcel) in its all-source bidding process, particularly Xcel's selection of the 500 MW Manitoba Hydro bid. At this meeting the Commission heard from a variety of interests in support and in opposition of Xcel's selection of Manitoba Hydro's bid. The main topic of discussion was whether Xcel had appropriately considered socioeconomic costs in selecting Manitoba Hydro's bid.

On February 7, 2001, the Commission issued an Order rejecting requests for further investigation of the selected bids, approving the final bid selections, and opening a docket regarding externality values.

On February 26, 2001, the Campaign to Respect Energy and the Environment filed a petition for rehearing of the Commission's February 7, 2001 Order in Docket No. E-002/M-99-888.

On March 9, 2001, the Nisichawayasihk Cree Nation (NCN), Manitoba Hydro, and the Split Lake Cree Nation filed comments in response to the petition for rehearing.

On March 12, 2001, Xcel filed reply comments.

On April 27, 2001, the Commission issued a notice denying the petition for rehearing.

On May 30, 2001, the Campaign to Respect Energy and the Environment filed a Petition for Writ of Certiorari, Writ of Certiorari, and Statement of the Case with the Minnesota Court of Appeals. These documents were also served on the service list in Docket No. E-002/M-99-888.

On July 3, 2001, the Minnesota Court of Appeals issued an order discharging the Writ of Certiorari and dismissing the appeal brought by the Campaign to Respect Energy and the Environment. The Court decided that the appeal was interlocutory and therefore premature.

On September 13, 2002, Xcel filed its petition for approval of the power purchase agreement (PPA) with Manitoba Hydro. On October 2, 2002, Xcel submitted a supplemental filing. Xcel provided public and non-public versions of both filings.

On October 21, 2002, the Pimicikamak Cree Nation (PCN) filed a petition for contested case hearing in this matter. Also, on October 21, 2002, Clean Water Action Alliance (CWAA), Minnesota Witness for Environmental Justice (MWEJ), and the Department of Commerce (the Department) filed comments on Xcel's petition.

On October 24, 2002, the PCN filed an affidavit in support of its petition for a contested case hearing.

On November 6, 2002, the Split Lake Cree Nation filed reply comments.

On November 7, 2002, NCN and The Minnesota Project filed reply comments.

On November 8, 2002, the Sierra Club, MWEJ, Manitoba Hydro, Manitoba Justice,¹ the Department, and Xcel filed reply comments.

The Commission met on December 19, 2002 to consider this matter.

FINDINGS AND CONCLUSIONS

This Order addresses two requests: 1) PCN's request for a contested case hearing; and 2) Xcel's request that the Commission approve the power purchase agreement (PPA) between Xcel and Manitoba Hydro.

I. PCN'S PETITION REQUESTING A CONTESTED CASE

A. PCN's Position

In its petition, PCN stated that the Commission has a legal duty under Minn. Stat. § 216B.2422,

¹ Manitoba Justice is a part of the government of the province of Manitoba.

subd. 3 and Minn. Rules, Part 7843.0500, subp.3 to consider the environmental and socioeconomic costs associated with Xcel's choice of the Manitoba Hydro Project. PCN asserted that the Commission has not done so and that a contested case is required to develop a factual record upon which the Commission can then make specific factual findings regarding the environmental and socioeconomic costs of the Manitoba Hydro Project. PCN Petition at page 2.

In its memorandum in support of its petition, PCN characterized the Commission's February 7, 2001 Order approving Xcel's selection of the Manitoba Hydro Project as assuming (finding as a matter of fact) that the environmental and socioeconomic costs of the project had been internalized and that Manitoba Hydro had undertaken the remediation and mitigation initiatives required by the Northern Flood Agreement (NFA). PCN asserted that there was no factual basis for such a finding and that the Commission must revisit this issue through a contested case proceeding. PCN Memorandum, pages 2-3.

PCN alleged that the Commission discounted or ignored the serious environmental impacts of the Manitoba Hydro Project and their attendant costs. PCN referred to severe environmental damage and devastation to PCN's way of life, social fabric, economy and the essence of its culture, caused by and being caused by the Manitoba Hydro Project. PCN requested a contested case proceeding to specify and seek redress for the harms caused by the Manitoba Hydro Project. PCN reasserted that the law required the Commission to make specific findings on the socioeconomic and environmental costs (presumably regarding the extent and value of uncompensated, unremediated costs) before it can properly consider those costs.

PCN argued that the Manitoba Hydro Project PPA was contrary to the public interest because it would perpetuate the existing environmental and socioeconomic harms and create new harms associated with the Manitoba Hydro PPA at issue in this docket.

Finally, PCN filed affidavits that it said identified material facts in dispute regarding the specific environmental and socioeconomic costs associated with the Manitoba Hydro Project. PCN stated that the affidavits set forth the nature and scope of the evidence PCN would present in a contested case proceeding.

B. Comments of Parties Supporting PCN's Petition

Minnesotans for an Energy Efficient Economy and the Izaak Walton League filed jointly in support of PCN's petition but did not file separate comments.

Minnesota Witness for Environmental Justice (MWEJ) supported PCN's request for a contested case. MWEJ stated that the Commission is required by law to consider both the existing harms and the new environmental and socioeconomic effects associated with the Manitoba Hydro PPA and to make specific findings of fact in making this resource decision. MWEJ argued that a contested case was needed to develop a strong factual record for the Commission's decision. The Sierra Club - North Star Chapter and The Minnesota Project made the same argument in

their comments. Clean Water Action filed a letter supporting the comments of the MWEJ.

C. Comments of Parties Opposing PCN's Petition

Written comments opposing PCN's petition were filed by the Department, Xcel, Manitoba Hydro, the Government of Manitoba, and two Cree nations that, like PCN, have experienced environmental and socioeconomic harms due to the Manitoba Hydro Project: Split Lake Cree Nation and Nisichawayasihk Cree Nation (NCN).²

1. The Department's Comments

The Department argued that PCN failed to show that a contested case is "required by law," the standard established by Minn. Stat. § 14.57.³ The Department noted that Minn. Rules, Part 7829.1000 addresses requests for contested cases as follows:

If a proceeding involves contested material facts and there is a right to hearing under statute or rules, ..., the commission shall refer the matter to the Office of Administrative Hearing for contested case proceedings.

The Department disagreed with PCN that the environmental and socioeconomic costs of the Manitoba Hydro Project are material facts in dispute. The Department argued that the Commission has already addressed environmental and socioeconomic costs in this proceeding (Order dated February 7, 2001) and since there are no incremental environmental and socioeconomic costs associated with this PPA, there are no new material facts regarding these costs which need to be determined by the Commission.

In the absence of material disputed facts, the Department argued, the Commission should order a contested case only if a contested case would be consistent with the public interest. As to whether a contested case would be consistent with the public interest, the Department reasoned that, since Xcel has appropriately accounted for the environmental and sociologic costs of the purchase, a contested case would simply result in delays, increased administrative costs, wasteful use of the resources of all concerned, and (potentially) increased costs to ratepayers. The Department concluded that a contested case should not be ordered because to do so would harm the public interest now and in the future.

² In parties' filings, the term "Manitoba Hydro Project" is used interchangeably with the term "Manitoba Hydro's Churchill-Nelson Rivers Project." The Commission clarifies that in this Order, the Commission will consistently use the single term "Manitoba Hydro Project," which of course equates (for purposes of this Order) to Manitoba Hydro's Churchill-Nelson Rivers Project.

³ Minn. Stat. § 14.57. states in pertinent part: "An Agency shall initiate a contested case proceeding when one is required by law."

2. Xcel's Comments

Xcel asserted that contrary to PCN's argument, the relevant statutes and rules do not mandate a contested case procedure. The Company stated that a contested case proceeding is appropriate if it is required by statute or rule or if the Commission determines that all significant issues have not been resolved to its satisfaction. The Company argued that PCN has the burden of establishing the need for a contested case and they have not done so here.

Xcel noted that PCN offered the Minnesota Pollution Control Agency (MPCA) rules as support for its request for a contested case. However, Xcel suggested that the MPCA's rules (like the Commission's rules) provide for a contested case proceeding if each of three conditions are met: 1) there must be a material issue of fact in dispute concerning the matter pending before the agency; 2) the disputed material fact must be within the agency's jurisdiction; and 3) resolution of the material fact would aid the agency in resolving the disputed facts in making a final decision on the matter.

Xcel argued that the issues raised by PCN are a matter for Canadian law and policy and are not material to this docket. Whether Manitoba Hydro is meeting its obligations under the NFA is not a question that can be resolved by the Commission. In addition, a Canadian contract between a Canadian Crown Corporation (Manitoba Hydro) and a First Nation (PCN) under Canadian law goes beyond the type of issues the Commission should be asked to resolve. Disputed facts that are beyond the agency's boundaries are not considered and do not satisfy the materiality test.

3. Manitoba Hydro's Comments

Manitoba Hydro asserted that PCN's petition rests on two arguments:

- 1) Manitoba Hydro and the governments in Canada are not complying with the NFA; and
- 2) this proceeding puts PCN's legal rights at issue.

Manitoba Hydro argued that neither argument supports PCN's request for a contested case. Manitoba Hydro stated that PCN's legal rights will not be affected by the Commission's decision on this PPA and, to the extent the PCN has ongoing concerns with NFA compliance, the NFA provides the legal mechanism for addressing those concerns.

Regarding the environmental and socioeconomic costs of the project, Manitoba Hydro stated that the Commission has already examined the issue of those impacts and properly found that Manitoba Hydro has internalized them.

4. Comments of the Government of Manitoba (Manitoba)

The Government of Manitoba (Manitoba) addressed several factors regarding Manitoba's efforts and obligations with respect to hydro development within the province and the effects on the aboriginal communities such as the PCN. Manitoba indicated that the principal mechanism for addressing the adverse effects of the hydro project on First Nation communities is the 1977 Northern Flood Agreement (NFA). Parties to the Agreement include five First Nations [Cross Lake (PCN), Norway House, Nelson House (NCN), Split Lake and York Factory], Manitoba Hydro and the Governments of Canada and Manitoba.

Manitoba stated that four of the five First Nations under the NFA have entered into Comprehensive Implementation Agreements which provide a method for implementing major provisions of the NFA. Manitoba cited accomplishments and provision for future accomplishments under the Comprehensive Implementation Agreements.

Manitoba stated that while the PCN has decided not to enter into a Comprehensive Implementation Agreement, the Government of Manitoba and Manitoba Hydro continue to work toward the implementation of the NFA with the PCN and the Government of Canada.

Manitoba provided a copy of a November 7, 2003 letter from Manitoba's Minister of Aboriginal Affairs to PCN affirming that the Manitoba Government accepts the NFA as a modern day treaty and has made a long-term commitment to NFA implementation. As examples of this commitment in operation, Manitoba stated that Manitoba Hydro representatives frequently meet with PCN representatives regarding NFA implementation issues and the Government of Manitoba is also proceeding with land transfers as partial compensation for the effects of the hydro project on reserve lands and is also proceeding with the construction of a bridge over the east channel of the Nelson River, which will provide all-weather access to the PCN community.

5. Comments of Split Lake Cree First Nation

Like PCN, Split Lake Cree First Nation is one of the five Cree tribes that has experienced adverse effects of the Manitoba Hydro Project. Split Lake Cree First Nation disagreed with PCN's central assertions: 1) that there are material facts in dispute that the Commission must resolve before properly considering the environmental and socioeconomic costs associated with the Manitoba Hydro Project; and 2) that the Commission's February 7, 2001 Order had assumed, erroneously, that Manitoba Hydro had paid for or remediated the environmental and socioeconomic costs of the Manitoba Hydro Project.

Split Lake countered these PCN assertions by stating that the Commission's Order had not found that Manitoba Hydro had fulfilled the promises made under the NFA, but only that Manitoba Hydro was accountable to do so pursuant to the NFA and that all adverse effects of the Manitoba Hydro Project on PCN were capable of being addressed under the NFA, either by the parties agreeing to the steps necessary to implement the provisions of the NFA or, if the parties cannot reach agreement, by use of arbitration under the NFA treaty. In these circumstances, Split Lake argued, the Commission need not undertake a contested case to resolve what damages to PCN have not yet been paid for or remediated and the monetary value of such damages in order for

these damages to be properly taken into account in this matter.

In sum, Split Lake acknowledged, as the Commission had in its Order, that there are matters in dispute between PCN and Manitoba Hydro (regarding payment for and remediation of environmental and socioeconomic impacts) that have not yet been resolved. Split Lake reaffirmed, however, that all these adverse effects are capable of being addressed under the NFA and, therefore, need not be determined through contested case hearings as part of this proceeding.

6. Nisichawayasihk Cree Nation (NCN)

NCN, which acknowledged suffering devastating losses due to flooding that occurred as a result of Manitoba Hydro's hydroelectric projects, opposed PCN's request for a contested case hearing. NCN identified and responded to PCN's principal allegation as follows:

PCN allegation #1: that the Commission's decision regarding the current PPA will affect the legal rights of PCN. NCN denied that the Commission's decision affected PCN's rights. NCN noted that PCN's rights arise under the NFA and the laws of Manitoba and Canada and that nothing the Commission does can affect PCN's claims and its rights to advance its claims under the NFA.

PCN allegation #2: that the Commission is required to consider the environmental and socioeconomic costs associated with this resource decision together with whether the PPA is in the public interest. NCN responded that the Commission has properly considered the environmental and socioeconomic costs associated with this resource decision and that imposing conditions upon the PPA to ensure that Manitoba Hydro lives up to the NFA would be an improper use of Commission power.

PCN allegation #3: that there are material facts with respect to the Commission's public interest determination which are in dispute. NCN denied that there are material facts in dispute which are relevant to these proceedings. NCN argued that the Commission has no jurisdiction to determine the facts PCN disputes, i.e. whether Manitoba Hydro has properly complied with the terms of the NFA. NCN asserted that the sole process for addressing those facts is through the process contained in the NFA itself.

PCN allegation #4: that the Commission erred in assuming that the environmental and socioeconomic costs of the Manitoba Hydro Project were internalized. NCN stated that the Commission did not simply assume internalization of the environmental and costs but concluded that Manitoba Hydro internalized such costs based on extensive evidence and submissions by several parties about the history and content of the NFA, which addresses compensation and processes for claiming costs to the First Nations associated with the Manitoba Hydro Project.

Finally, NCN stated that delaying the PPA in question to conduct a contested case investigation of the socioeconomic effects of the PPA could adversely affect NCN's interests by interrupting the future development process, leading to loss of training, employment and business

opportunities for NCN.

D. Commission Analysis and Action

1. PCN Petition Untimely

On February 7, 2001, the Commission issued its Order denying PCN's request for further investigation of the socioeconomic costs associated with the Manitoba Hydro Project and approving Xcel's final bid selections, including Xcel's selection of the Manitoba Hydro Project. The Campaign to Respect Energy and the Environment filed a petition for rehearing within the 20 day period allowed under Minn. Stat. § 216B.27, but PCN did not.

Instead, on October 21, 2002, PCN filed a petition requesting a contested case hearing. The title of PCN's petition (Petition for a Contested Case) notwithstanding, PCN's petition is in the nature of a Petition for Reconsideration or Rehearing of the Commission's February 7, 2001 Order.

PCN's reliance on Minn. Stat. § 216B.2242 and the relief it seeks (an alternative to what the Commission decided in its February 7, 2001 Order) and PCN's repeated assertions that the Commission's February 7, 2001 Order "erred" in making certain findings and conclusions about "internalization" of environmental and socioeconomic costs reveal that the nature of its filing is to 1) challenge the February 7, 2002 Order, 2) seek the suspension or reversal of the Commission's February 7, 2001 approval of the Xcel's selection of Manitoba Hydro bid, and 3) get the Commission to halt this proceeding and take a different direction than was ordered in the February 7, 2002 Order.

A petition that is essentially a petition for rehearing cannot avoid being treated as such merely because the petitioner has given it a different title. Minn. Stat. § 216B.27 requires that an application for rehearing must be filed within 20 days of the Order it challenges. Since PCN's petition was filed on October 21, 2002, more than 18 months after the Commission's February 7, 2001 Order, PCN's petition is untimely.

2. No Reconsideration or Rehearing on Commission's Own Motion

Despite the untimeliness of PCN's request for rehearing, the Commission has the discretion to reconsider the February 7, 2001 Order on its own motion. Having heard and reviewed PCN's arguments, however, the Commission finds no justification to do so.

The Commission finds that its February 7, 2001 Order properly found that the socioeconomic costs of the Manitoba Hydro Project have been adequately internalized by Manitoba Hydro, have been taken into account in this matter, and no further inquiry into the specifics of those costs need be made.⁴

⁴ See the Commission's discussion of these issues in its ORDER REJECTING REQUESTS FOR FURTHER INVESTIGATION, APPROVING FINAL BID SELECTIONS, AND OPENING DOCKET REGARDING EXTERNALITY VALUES (February 7, 2001), pages 12-18.

Moreover, the record indicates that initiating a contested case proceeding, as requested by PCN would 1) substantially delay the project, 2) add unnecessary administrative expenses to the state agencies involved and litigation expenses for all parties, and 3) jeopardize gains PCN's neighboring Cree Nations seek in the area of job training, employment, and business opportunities.

3. Merits of PCN's Petition

The Commission notes the high level of concern expressed by some parties in this proceeding who have repeatedly referred to unsatisfactorily compensated or remediated environmental and socioeconomic costs of the Manitoba Hydro Project. These parties see a contested case proceeding before the Commission as an opportunity to substantially redress the harms caused to PCN by the Manitoba Hydro Project. These parties ultimately want the Commission to impose conditions or requirements on Manitoba Hydro to mitigate existing harms and ensure Manitoba Hydro's compliance with the NFA.⁵

Despite the fact that PCN's petition is untimely and without waiving that untimeliness, the Commission will address the key arguments raised by PCN.⁶

In its request for a contested case, PCN alleged that in determining whether to approve the PPA between Xcel and Manitoba Hydro, the Commission is legally required to make specific findings of fact regarding the extent of uncompensated and unremediated environmental and socioeconomic costs of the Manitoba Hydro Project before approving the pending PPA . PCN cites two sources for that obligation:

1. Minn. Stat. § 216B.2422, Subd. 3 and
2. Minn. Rules, Part 7843.0500, subp. 3.

The Commission will address the obligations stemming from these two sources separately.

- a. **Minn. Stat. § 216B.2422, Subd. 3 does not obligate the Commission to make specific findings of fact regarding the extent of uncompensated and unremediated environmental**

⁵ PCN states: "a [contested case] proceeding . . . could lead to substantially addressing of the harms caused by the [Manitoba Hydro] Project." Memorandum at page 4. PCN further states: "...meaningful conditions must be imposed upon any approval of imported power to ensure that Manitoba Hydro lives up to its promises [under the NFA]. Such conditions would be consistent with Minnesota's long tradition of environmental protection and social justice." Memorandum at page 4.

⁶ The following analysis would apply equally to PCN's petition if, in fact, it had been timely filed or for some other reason is not subject to the 20 day deadline imposed by Minn. Stat. § 216B.27.

**and socioeconomic costs of the Manitoba Hydro Project
before approving the pending PPA**

Minn. Stat. § 216B.2422, Subd. 3 states in pertinent part:

A utility shall use the values established by the commission in conjunction with other external factors, including socioeconomic costs, **when evaluating and selecting resource options** in all proceedings before the commission, including resource plan and certificate of need proceedings. (Emphasis added.)

Minn. Stat. § 216B.2422, subd. 3 imposes an obligation to consider external costs (including socioeconomic costs) in the evaluation and selection of the Manitoba Hydro bid. And the time for the Commission to confirm that external costs have been properly taken into account was when it reviewed Xcel's request that the Commission approve the Company's selection of the Manitoba Hydro bid. The Commission has fully discharged its obligation under the statute by properly considering those costs at that time (Step 4 of this proceeding) as reflected in its February 7, 2001 Order approving Xcel's selection of the Manitoba Hydro bid. As previously noted, the Commission's February 7, 2001 Order discusses its decision and rationale on the external costs issue in detail. See footnote 6.

Contrary to PCN's argument, the statute imposes no requirement to consider these costs again at this stage of the proceedings (Step 5 - PPA review and approval). The plain language of the statute imposes this obligation at the evaluation and selection stage, which in this proceeding has passed.

Addressing the substance of PCN's criticisms of the February 7, 2001 Order, the Commission disagrees 1) that the Commission failed during Step 4 of these proceedings (the February 7, 2001 Order) to assure that external costs were properly taken into consideration and 2) that a contested case is required to specify such costs.

First, PCN claimed that the Commission has incorrectly and without basis in the record assumed that Manitoba Hydro has "undertaken" the remediation and mitigation initiatives required by the NFA. There is some ambiguity in PCN's use of the word "undertaken."

If PCN used the word "undertaken" in the sense of "having obligated itself," the Commission notes that such an undertaking was the unmistakable consequence of Manitoba Hydro's having signed the NFA. This conclusion, therefore, is not a mistaken assumption on the Commission's part, as PCN asserted, but a matter of record in this matter. Heretofore, no party (including PCN) has alleged that Manitoba Hydro has not obligated itself to the full range of remediation and mitigation steps outlined in the NFA and there is no basis for doing so.

If, however, PCN intended to assert that the Commission assumed that Manitoba Hydro had "undertaken" the remediation and mitigation initiatives required by the NFA in the sense of suggesting that the Commission believed that Manitoba Hydro had completed or even started all the remediation and mitigation initiatives required by the NFA, PCN's assertion is incorrect. The

Commission clearly spoke to this point in the February 7 Order:

The Commission understands that Manitoba Hydro has not paid to PCN all the compensation to which PCN believes it is entitled for socioeconomic damage nor has Manitoba Hydro expended all the remediation costs that PCN believes are due under the NFA. Order at page 16.

Second, PCN stated that PCN citizens could attest that the environmental and socioeconomic costs of the project have not been “internalized”. In so stating, PCN indicated that it misunderstands what the Commission meant when it said that the environmental and socioeconomic costs have been “adequately internalized”. The “internalization” referred to by the Commission does not mean that there are no environmental or socioeconomic costs that Manitoba Hydro has not paid for or remediated. It means, as the Commission explained in the Order that . . .

In signing the NFA, . . ., Manitoba Hydro has effectively given a promissory note to pay for the socioeconomic effects that its projects cause and has obligated itself to a process by which those amounts can be confirmed and collected by PCN if Manitoba Hydro fails to honor those obligations. Order at page 16.

In its February 7, 2001 Order, the Commission specifically addressed the socioeconomic costs experienced by PCN because it was with respect to socioeconomic cost (not environmental costs) that PCN had been allowed to intervene in this matter. See the Commission’s September 29, 2000 ORDER GRANTING INTERVENTION in this matter, page 11. As the February 7, 2001 Order noted at page 16, however, the NFA provides plenary compensation and remediation measures (and enforcement procedures) for environmental costs as well as for socioeconomic costs. The NFA provides comprehensive relief for “all the adverse results of the Project,” which would include environmental as well as socioeconomic, to the extent that these two costs are not coterminous.

Third, PCN stated that a contested case was needed to make factual findings regarding the specific environmental effects of the Commission’s approval of the Manitoba Hydro PPA in order to properly consider the environmental and socioeconomic costs associated with Xcel’s choice of the Manitoba Hydro Project. However, in its February 7, 2001 Order, the Commission did not make, nor did it need to make, findings regarding the specific adverse effects of the Manitoba Hydro Project. Whatever those harms are, they are guaranteed to be paid and/or remediated under the NFA. In that sense, they have been adequately internalized by Manitoba Hydro, evaluated by Xcel, and considered by the Commission. The only facts that the Commission needed to find to reach that conclusion related to the existence, nature, signatories, and provisions of the NFA. The record completely supports the Commission’s findings on those items.

Fourth, PCN stated that the affidavits of Arie Van Eck and Robert McCullough address the facts that PCN believes are material and in dispute. The affidavits do not identify material facts in dispute, as a review of those affidavits shows.

- In her affidavit, Arie Van Eck referred to the environmental and socioeconomic costs of the

Manitoba Hydro Project that have been reported in the Interchurch Inquiry into Northern Hydro development. While the record indicates that the Manitoba Hydro Project has had some positive as well as negative results, no one has contested that the Project has caused much environmental and socioeconomic damage. No contested fact is identified.

- Ms. Van Eck stated her understanding that the Commission had concluded that all of the environmental and socioeconomic costs associated with this hydro project have been internalized under the NFA and, therefore, felt the need to state that this was contrary to the findings of the Interchurch Report. This indicates the same misunderstanding articulated by PCN. As noted above at pages 11-12 of this Order, the Commission did not conclude in its February 7, 2001 Order that all the compensation and remediation required by the NFA have been accomplished. No contested fact is identified.
- Ms. Van Eck indicated that the extent of the damage caused by the Manitoba Hydro Project has not yet been addressed. The Commission has not found that all of the environmental and socioeconomic costs associated with this hydro project have been paid and remediated as required by the NFA. It is undisputable on this record, however, that Manitoba Hydro is obligated to do so by terms of the NFA and in that sense, these costs are addressed.
- Ms. Van Eck asserted that the history of NFA implementation is one of avoidance of responsibility on the part of Crown parties. However, she does not dispute the pivotal finding that the NFA obligates plenary cost payments and remediation for all environmental and socioeconomic damage done by the Manitoba Hydro Project and provides mechanisms for injured parties, such as PCN and its members, to enforce that obligation.
- In conclusion, Ms. Van Eck urged the Commission to fashion conditions which would require Manitoba Hydro to implement provisions of the NFA for PCN. To the extent that this requests imposing new requirements on Manitoba Hydro to prompt compliance with a Canadian treaty, this request would take the Commission far afield from its proper role in these proceedings. The record contains no evidence that such intervention by the Commission on behalf of one of the Cree tribes affected by the Manitoba Hydro Project is appropriate.
- In his affidavit, Robert McCullough first provided an overview of the Manitoba Hydro system. This overview identified no materially disputed facts on which findings must be made in order to properly consider the environmental and socioeconomic costs of the Manitoba Hydro Project.
- In a second part of his affidavit, Mr. McCullough reviewed allegations of existing and continuing environmental harm from the Manitoba Hydro Project. Due to the plenary remedies for all these costs provided by the NFA, however, it is not necessary to make findings in this proceeding regarding such items as the specific scope of these harms, their monetary value, or the extent to which they remain uncompensated, unremediated or not offset by benefits of the Project. While not minimizing or discounting the environmental harms referred to by Mr. McCullough, the Commission emphasizes that since the NFA provides for the compensation

and remediation of all such harms, specific findings regarding the scope and value of these harms are not material to the Commission's conclusion that under the unique facts of this case the adverse impacts of the Project have been adequately internalized by Manitoba Hydro as explained above and, hence, have been properly taken into account by Xcel in selecting the Manitoba Hydro Project, as required by Minn. Stat. § 216B.2422, subd. 3.

- Mr. McCullough asserted the inadequacy of the efforts to date to avoid and mitigate past (Paragraph 22) and future (Paragraph 48) environmental and socioeconomic harms associated with the Manitoba Hydro Project. However, assuming proof of the asserted inadequate efforts (or inadequate results) to date, these are not the relevant facts in this case. The relevant fact is that the NFA obligates Manitoba Hydro to pay for and remediate all adverse impacts of the Manitoba Hydro Project and provides a way for PCN to enforce that obligation.
- As a third part of his affidavit, Mr. McCullough identified additional (new) environmental impacts that he alleged would result from the PPA in question. Again, since the NFA provides plenary remedies for future harms as well as past harms, specification of such harms is not material to the Commission's decision in this matter.
- Finally, Mr. McCullough asserted that the PPA provides no countervailing requirements or incentives to mitigate the harms associated with Manitoba Hydro Project. Contrary to his assertions, however, such incentives and countervailing requirements are provided by the NFA.

Fifth, PCN characterized this proceeding as one which could lead to substantially addressing the harms caused to PCN by the Manitoba Hydro Project. PCN argued that the Commission must impose meaningful conditions upon its approval of this PPA to ensure that Manitoba Hydro lives up to its promises under the NFA. The Commission is unwilling to adopt the role that PCN requests. The NFA is a treaty under Canadian and international law and is governed and enforced by its terms under Canadian and international law.⁷ Under Minn. Stat. § 216B.2422, by contrast, the Commission's role is to see that Xcel, in selecting the Manitoba Hydro Project, has considered "external factors, including socioeconomic costs" in evaluating and selecting Manitoba Hydro's resource proposal.⁸ The Commission is convinced that Xcel has done so. Moreover, the record in this matter does not support PCN's contention that conditions beyond what the NFA, Canadian and international law provide are required to promote compliance with the NFA. To the contrary, the record shows that other Cree Nations (NCN and Split Lake) have pursued and secured implementation agreements under the NFA to their satisfaction.

Sixth, PCN asserted that the Commission must make specific findings of fact on the extent to which

⁷ Importantly, the record of this case includes assurances by the Government of Manitoba that there are working structures to address the past, present, and anticipated environmental and socioeconomic effects of the Manitoba Hydro Project and that Manitoba is committed to continued NFA implementation with PCN.

⁸ See Minn. Stat. § 216B.2422, subd. 3.

the environmental and socioeconomic consequences of the Manitoba Hydro Project are being addressed and which are not. The Commission disagrees. As previously noted, since the NFA makes Manitoba Hydro responsible for plenary compensation and remediation and provides a way for PCN to enforce those obligations, the Commission does not need to find the specific extent or value of those harms in order to determine that they have been considered by Xcel.

Seventh, PCN provided a proper formula for determining whether the Manitoba Hydro PPA was in the public interest when it stated:

The Manitoba Hydro PPA cannot possibly be in the public interest , *unless* workable conditions are imposed to address the ongoing and cumulative effects of this project. (Emphasis added) PCN Memorandum of Law, page 4.

Based on the record in this case, the Commission essentially found in its February 7, 2001 Order and reaffirms in this Order that the NFA as written imposes workable conditions addressing the ongoing and cumulative effects of this project. The NFA contains specific provisions providing for compensation lands, wildlife and fishing rights, programs to compensate for adverse effects on trapping and fishing, the construction of remedial works, the provision of a continuous supply of potable drinking water, removal of obstructions to navigation, comprehensive community planning and all other adverse results of the Manitoba Hydro Project. The NFA also provides an arbitration mechanism (appealable to Canadian courts) by which any person adversely affected may submit a claim. The NFA empowers the arbitrator to fashion a just and appropriate remedy⁹ and to pay the reasonable costs of claimants to prepare and advance their claims.¹⁰

As evidence that Manitoba Hydro's compliance with the NFA is attainable under the NFA, the Commission notes that of the five Cree nations affected by the hydro projects in question, PCN is the

⁹ Article 24.6 of the NFA states: "It is the intention of the parties to this Agreement that the Arbitrator shall have broad authority and power to make awards capable of implementation and to fashion an appropriate and just remedy in respect of any and all adverse effects of the Project on any [person and that such remedy shall at a minimum place that person in no worse position in that respect than he would have been in the absence of the adverse effect]"

¹⁰ A critical feature in making the arbitration mechanism work is that the NFA Arbitrator may order the respondents to a claim (Manitoba Hydro, the Government of Manitoba, or the Government of Canada) to pay the reasonable costs to the claimant to prepare and advance the claim. See NFA, Article 24.35. These costs include legal fees and the cost of consultants or experts, to the extent that the fees and costs are reasonable. Article 24.35.2. The Government of Manitoba reports that the responding parties (Manitoba Hydro, the Government of Manitoba, or the Government of Canada) have been paying reasonable costs incurred by the NFA claimants since the early 1980s.

only one to allege that the project's socioeconomic effects have not been properly compensated or accounted for by Manitoba Hydro. In fact, two of the affected Cree nations (NCN and Split Lake Cree Nation) are on record in this matter indicating that Manitoba Hydro has adequately addressed the socioeconomic impacts of the project on their members. Prior to the February 7, 2001 Order, these parties testified that all the adverse effects of the Manitoba Hydro Project are capable of being addressed under the NFA. They appeared again at this stage of the proceeding to confirm their progress in implementing the NFA and to affirm that the NFA provides the opportunity for all PCN claims to be addressed. NCN stated:

NCN and the three other First Nations affected by the [Manitoba Hydro Project] have properly and effectively implemented processes available under the NFA to remedy socioeconomic and environmental costs attributed to the adverse impacts caused by the Manitoba Hydro projects. NCN Response to PCN request for Contested Case Hearing, November 7, 2002, Paragraph 13 at page 10.

b. Minn. Rules, Part 7843.0500, subp. 3 does not apply to this proceeding

PCN argued that Minn. Rules, Part 7843.0500, subp. 3 obligates the Commission to make specific findings of fact and conclusions in regard to the environmental and socioeconomic effects of the Manitoba Hydro PPA. In particular, PCN stated that Minn. Rules, Part 7843.0500,

subp. 3(c) obligates the Commission to determine the extent to which the Manitoba Hydro PPA “minimizes the adverse socioeconomic effects and adverse effects on the environment.”

However, Minn. Rules, Part 7843.0500, which is entitled “COMMISSION REVIEW OF RESOURCE PLANS,” clearly applies only to the Commission’s consideration of Resource Plans, such as occurred when the Commission considered Xcel’s 1998 and 2000 Resource Plans. The rule is quite clear that the requirement of specific findings and conclusions based on consideration of the factors listed in Subd. 3 applies only to Commission Orders approving resource plans. Subdivision 1 of the rule states in pertinent part:

Based on the record, which is the information filed with the commission *in the resource plan proceeding* of a utility, ..., the commission shall issue a decision consisting of findings of fact and conclusions on the utility’s proposed *resource plan* and the alternative *resource plans*.

The Commission is not reviewing Xcel’s Resource Plan in the current proceeding, however. The Commission did that for NSP’s 1998 Resource Plan in Docket No. E-002/RP-98-32 and for NSP’s

2000 Resource Plan in Docket No. E-002/RP-00-787.¹¹

The current proceeding relates to Xcel's bid selections and PPAs implementing its bid selections, not its Resource Plans. Accordingly, the requirements of Minn. Rules, Part 7843.0500, subp. 3 did not apply to the decision the Commission made approving Xcel's final bid selections (February 7, 2001) nor do they apply to its decision in this Order approving Xcel's PPAs with Manitoba Hydro.

The Commission notes that while not required to do so by Minn. Rules, Part 7843.0500, the Commission's February 7, 2001 Order did and the current Order does address the consideration PCN raises about how adverse socioeconomic effects and adverse effects upon the environment can be minimized under the Manitoba Hydro Project. As the Commission found in its February 7, 2001 Order and reiterates here, the NFA provides plenary remedies for all adverse effects of the Manitoba Hydro Project and also provides a means for PCN and the other affected Cree Nations to enforce those remedies. The obligations imposed on and accepted by Manitoba Hydro in the NFA create a special relationship between Manitoba Hydro and the Five Cree Nations. These obligations and the means to enforce them provide powerful motivation for Manitoba

Hydro to compensate, remediate, and indeed to minimize by advance planning the environmental and socioeconomic effects of the Manitoba Hydro Project.

The Commission notes that the NFA is a unique and valuable harm-minimization feature of the Manitoba Hydro Project. No similar "remedy all harms" agreement with affected communities attends any of the other resource options considered by Xcel.

c. Conclusion Regarding the Merits of PCN's Request for a Contested Case Hearing

Based on the foregoing analysis, it is clear to the Commission that the contested case hearing requested by PCN is not required by law and would not be in the public interest.¹²

II. APPROVAL OF THE XCEL-MANITOBA HYDRO PPA

¹¹ See *In the Matter of the Application of Northern States Power Company for Approval of its 1998 Resource Plan*, Docket No. E-002/RP-98-32, ORDER GRANTING AND DENYING PETITIONS FOR RECONSIDERATION AND AMENDING ORDER LANGUAGE (May 3, 1999) and *In the Matter of Northern States Power Company's Application for Approval of its 2000-2014 Resource Plan*, Docket No. E-002/RP-00-787, ORDER APPROVING XCEL ENERGY'S 2000-2014 RESOURCE PLAN, AS MODIFIED (August 29, 2001).

¹² The Commission again clarifies that in so concluding, the Commission is not waiving the untimeliness of PCN's challenge to the Commission's February 7, 2001 Order.

A. Xcel's Proposed PPA

Xcel petitioned the Commission for approval of a PPA with Manitoba Hydro for 500 MW. The PPA results from negotiations between the parties following the final selection stage of the competitive bidding process. Xcel is also requesting that the Commission find that the PPA is subject only to ongoing prudence review, through the review process of annual automatic adjustment charges reports. Xcel believes approval of the PPA would allow it to recover the Minnesota jurisdictional portion of the energy charges incurred by the Company for the term of the PPA, from Minnesota retail customers.

The PPA provides for Manitoba Hydro to supply 500 MW of capacity and energy of system participation power rather than a purchase from a dedicated unit or source. The contract term is for a ten year period. The beginning date for the PPA is May 1, 2005, and runs through April 30, 2015. The beginning date of the PPA corresponds with the termination date (April 30, 2005) of an existing 500 MW power purchase between the Xcel and Manitoba Hydro. Xcel has indicated that the PPA, as written, requires an order from the Commission by July 31, 2003.

Under the PPA, Xcel will purchase 160,000 MWh of energy during each rolling 28-day calendar period. The PPA requires that Xcel purchase the energy in 16-hour blocks, five days per week. The energy schedules will have the characteristics of a 5 by 16 purchase under which Xcel will purchase the energy when it is needed most, Monday through Friday, during a sixteen hour continuous block, including the peak hours of the day.

In addition to the guaranteed energy, the PPA provides for Manitoba Hydro to make additional or supplemental energy available to Xcel when possible. The price of the supplemental energy shall be as mutually agreed to by the Parties with Manitoba Hydro having the discretion to propose any price for the energy.

Articles 4 and 5 of the PPA contain the pricing provisions. Both the capacity and energy prices are subject to change to take inflation into account. The prices are based upon a fixed price as of May 1, 2000. Xcel has proposed that the Minnesota portion of these expenditures be recovered through the automatic adjustment mechanism.

As a system participation purchase, Xcel's purchase is treated as a purchase of part of Manitoba Hydro's system. System participation purchases are generally more reliable than unit purchases. However, Xcel's purchase can be curtailed if conditions on the system preclude or substantially inhibit delivery.

As a result of lengthy negotiations, the parties reached agreement that curtailments would be permitted in three circumstances. First, Manitoba Hydro may curtail deliveries if Manitoba Hydro has transmission system reliability concerns. Second, Manitoba Hydro may curtail deliveries if Manitoba Hydro's generating sources are unavailable due to forced outages, low water flow, or the unavailability of DC transmission facilities from its generating sources to the AC transmission grid. Finally, energy

deliveries may be curtailed due to force majeure.

Xcel requested the Commission approve the PPA with a determination that the terms and prices are reasonable and in the interests of its ratepayers. Xcel asserted that pricing in the PPA is competitive as demonstrated by the selection and approval of this proposal in the 1999 All Source bidding process.

B. The Department's Comments and Recommendation Regarding the PPA

The Department stated that the PPA should be approved only if it is in the best interest of ratepayers. To be in the best interest of ratepayers, the Department stated, the PPA must meet the following two conditions:

- the purchase prices to be paid for capacity and energy must be reasonable, and
- ratepayers must be appropriately protected from the financial and operational risks associated with the purchase.

1. Reasonable Price

The Department noted that the 500 MW Manitoba Hydro purchase was selected in a competitive bid process. At the time of selection, the Department analyzed the bid and concluded that the selection of Manitoba Hydro was reasonable. In addition, the Commission approved the Manitoba Hydro bid as a final selection. The Department reasoned that the capacity and energy prices of the PPA would be reasonable if they were similar to the prices submitted by Manitoba Hydro in its bid proposal. The Department stated that based on its review, the contract prices in this PPA are not higher than the prices contained in Manitoba Hydro's bid and are, therefore, reasonable.

The Department also considered other pricing components to determine the overall reasonableness of the cost of the contract. The other components considered by the Department included supplemental energy, minimum energy, and transmission adjustments. Based upon its review of these pricing components, the Department concluded that the additional costs within the PPA are reasonable provided that Xcel can demonstrate the reasonableness of the price of supplemental energy, and if Xcel Energy can provide justification for not meeting the Minimum Guaranteed Energy amount in any given month.

The Department recommended that Xcel be required to provide reports to the Commission justifying the price paid for supplemental energy and the reasons for not meeting the Minimum Guaranteed Energy requirement in each month in which either or both events occur. The Department suggested that the reporting could be included as part of the Company's monthly fuel clause adjustments (FCAs) filings for the relevant months.

2. Reliability Issue

The Department noted that the contract provides for delivery of 500 MW through System Participation Power. The Department stated that System Participation Power is generally more reliable than power

delivered from a designated plant or unit, because a system is generally more diversified than a single unit. If a system loses a single unit, it may still be able to deliver the power by making up the generation using other units or resources on the system. Under a dedicated unit delivery, however, a breakdown of the plant makes power delivery impossible.

The Department further stated that the PPA addresses reliability in two main parts: 1) curtailment provisions, and 2) additional terms which relate to the likelihood of energy being delivered from Manitoba Hydro to Xcel. Except for the curtailment provisions, the PPA requires Manitoba Hydro to make 500 MW available to Xcel at all times. The PPA requires Manitoba Hydro to maintain sufficient resources to meet its commitment and sufficient reserves to meet the higher of Midwest Area Power Pool (MAPP) reserve capacity requirements or the reserve requirements of the Regional Reliability Organization to which Manitoba Hydro belongs. The PPA also requires Manitoba Hydro to plan for sufficient long-term resources to meet its obligations taking into account that the majority of Manitoba Hydro's generation resources is hydro based. Under the Agreement, Manitoba Hydro is required to plan for sufficient resources under the worst case scenario. The worst case scenario is defined as the lowest river flows in Manitoba from the year 1912.

In addition, the PPA also provides for remedies if Manitoba Hydro fails to deliver the guaranteed amount of energy, and, except where such failure is excused by the terms of the contract, a failure by Manitoba Hydro to deliver Guaranteed Energy constitutes an event of default by Manitoba Hydro. If the default is not cured by Manitoba Hydro, Xcel may terminate the PPA upon written notice to Manitoba Hydro. Finally, if Xcel purchases energy and capacity to replace accredited capacity and associated energy that Manitoba Hydro fails to deliver to the point of delivery, the cost of the purchased capacity and energy must be paid by Manitoba Hydro.

The Department concluded that the PPA contains sufficient provisions to provide reliable power to be delivered by Manitoba Hydro to Xcel and appropriately protects ratepayers from the operational risks of Manitoba Hydro's system.

3. Financial Risks

The Department stated that the financial risk associated with the PPA is that Manitoba Hydro will not be able to meet its financial obligations and as a result, will not be able to meet its operational requirements under the PPA. In addition, a third party could take over the Manitoba Hydro system and terminate the PPA. The Agreement contains specific terms regarding these financial risks.

The Department noted that Article 9 of the PPA addresses the issue of creditworthiness by allowing each party the right to audit the other parties' financial statements to assess the creditworthiness of the other party. If a party's credit rating for senior unsecured debt drops below investment grade, the requesting party can make a written request to the affected party to provide a performance assurance in a commercially reasonable amount as determined by the requesting party. The affected party has 14 days to respond the requesters request. A failure to provide the requested assurances allows termination of the PPA after 30 days notice.

The Department also noted that Section 11.02 prevents the parties from assigning the rights and obligations under the PPA without the written consent of the other party. In addition, either party may, without the consent of the other party, assign the rights and obligations under the PPA to a wholly

owned subsidiary or corporate successor or as a security in any financing provided that the assignor remains liable under the PPA.

The Department concluded, based on these contract provisions, that ratepayers are reasonably protected from the financial risks of the Manitoba Hydro's system.

4. Department Recommendation Regarding the PPA

Accordingly, the Department recommended that the Commission approve the PPA between Xcel and Manitoba Hydro and approve the proposed cost recovery with two conditions:

1. For each month in which supplemental energy is purchased, Xcel must file a report with the Commission showing that the price paid for such supplemental energy was competitive. The report may be included as part of the Company's monthly Fuel Clause Adjustment (FCA) filings but must be specifically highlighted. The failure to highlight such purchases may result in the disallowance of such costs.
2. For each month in which Xcel fails to purchase the full amount of the Minimum Guaranteed Energy, Xcel must file a report with the Commission demonstrating that its actions were prudent. This report may be included as part of the Company's monthly Fuel Clause Adjustment (FCA) filings but must be specifically highlighted. The failure to highlight such actions may result in the disallowance of costs associated with the amount of energy paid for but not taken by Xcel.

C. PCN'S Comments on the PPA

As previously noted, PCN's comments primarily addressed the shortcomings it perceived in the Commission's February 7, 2001 Order and the alternate course this docket should have taken in that Order rather than approving Xcel's selection of Manitoba Hydro's bid in that Order. PCN also addressed what it believed the Commission should do at this point before deciding about the Xcel-Manitoba Hydro PPA.

Regarding the PPA, PCN claimed that the PPA was not in the public interest because, in PCN's view, the PPA would perpetuate and exacerbate existing environmental and socioeconomic harms and add new ones. PCN also faulted the PPA for not containing conditions or requirements to mitigate existing harms.

D. Minnesota Witness for Environmental Justice (MWEJ) Comments on the PPA¹³

MWEJ acknowledged that Minn. Rules, Part 7843.0500 relates to Commission review of resource plans but argued that since the PPA comes out of the resource planning process, the Commission should keep the rule's criteria in mind when evaluating the public interest of the proposed PPA. MWEJ argued that the externalities of the Manitoba Hydro Project have not been taken into account. MWEJ also renewed concerns about the reliability of Manitoba Hydro's generating stations. MWEJ argued that due to outstanding reliability questions and unresolved socioeconomic and environmental problems, Minnesota resources (apparently referring to Xcel's purchasing power) should be put into developing in-state renewable energy sources that are closer to the load.

MWEJ stated that the Commission should reject the PPA as not in the public interest in face of the evidence of widespread and unmitigated environmental and socioeconomic costs, questions of reliability, and the social, economic, and reliability advantages of in-state renewable energy

development. The MWEJ also stated that if the Commission approves the PPA, it should take the following actions:

- 1) include a requirement that Manitoba Hydro adopt a less damaging operating regime;
- 2) establish an independent body to see that the NFA is fulfilled in its entirety; and
- 3) conduct its own study to see that the NFA is fulfilled in its entirety and adopt environmental cost values for large hydro.

E. Xcel's Reply Comments Regarding the PPA

Xcel agreed with the Department's analysis of the PPA and the reporting requirements that the Department recommended.

Second, Xcel disagreed with the conclusions of MWEJ that the PPA should be rejected or that further investigation is necessary. Xcel Energy argued that the PPA addresses the financial and operational risks to ratepayers of this purchase and should be approved.

Next, Xcel strongly disagreed with PCN's request for a contested case procedure before approving the PPA. Xcel stated that while the PCN has concerns regarding the implementation of the NFA, no material facts remain in dispute regarding the PPA and none is stated in PCN's petition. Xcel stated that PCN's dispute is with Manitoba Hydro over the NFA. According to Xcel, PCN's dispute with Manitoba Hydro is an inherently Canadian dispute between Canadian parties and must be addressed and resolved in a Canadian forum, under Canadian law.

¹³ Clean Water Action submitted a letter fully supporting the comments of MWEJ.

Fourth, Xcel asserted that the record contains all of the information needed to determine whether the PPA constitutes a reasonable purchase and whether the PPA adequately protects ratepayers from the associated risks.

F. The Department's Reply Comments Regarding the PPA

Responding to the reliability concerns raised by PCN and MWEJ, the Department stated that the Manitoba Hydro Project is potentially the least risky, most simple project that can be selected under the competitive bid process. The Department noted that this PPA is essentially a continuation of an existing 500 MW contract between Xcel and Manitoba Hydro (some of the terms are different, but the difference in these terms do not significantly impact the public interest). The PPA does not require new construction of generation or transmission facilities, minimizing the associated business and financial risks of the PPA.

The Department noted that the major change this PPA makes to an existing 500 MW contract is a change in the load factor from 75 percent down to 48 percent. The Department stated that PCN's argument that this PPA will significantly impact the operation of Manitoba Hydro's electric system is not well founded. The Department stated that Manitoba Hydro's generation will be dispatched in response to the spot market price for power and is independent of the approval or rejection of this PPA.

The Department also disagreed with PCN and MWEJ's assertion that the PPA does not internalize the environmental and socioeconomic costs of the Manitoba Hydro Project. The Department asserted that not only does the PPA cover the environmental and socioeconomic costs paid by Manitoba Hydro, but also the expected environmental and socioeconomic costs over the ten years covered by the PPA, 2005-2015. The Department stated that the actual costs may be higher or lower than the expected costs, but nevertheless, from a proper resource and risk allocation point of view, these costs are appropriately included and internalized in the PPA.

G. Reply Comments of Split Lake Cree Nation Regarding the PPA

Split Lake Cree Nation argued that the Commission properly considered the environmental and socioeconomic costs of the Manitoba Hydro Project when the Commission issued its February 7, 2001 Order. Split Lake Cree Nation stated that the Commission should not revisit these issues for purposes of reviewing and approving the PPA.

Split Lake Cree Nation concluded that there was no basis or reason for the Commission to adopt the options put forth by MWEJ such as the establishment of an independent body to see that the NFA is being fulfilled, or to conduct a study, or to reject the PPA.

H. Reply Comments of NCN Regarding the PPA

This Order has earlier presented NCN's comments related most directly to PCN's claim that it was entitled to a contested case hearing to detail the environmental and socioeconomic harms caused by the

Manitoba Hydro Project. The Commission has addressed that issue (PCN's request for a contested case hearing) in the previous section.

As to PCN and MWEJ's opposition to approving the PPA, NCN noted, among other things, that PCN's rights to past and future environmental and socioeconomic costs are fully protected by the NFA and the laws of Manitoba and Canada and would not be affected by the Commission's approval of the Xcel-Manitoba Hydro PPA.

I. Reply Comments of Manitoba Hydro Regarding the PPA

Manitoba Hydro commended the Department for a thorough review and analysis of the PPA. Manitoba Hydro noted that the Department examined the reasonableness of the pricing components of the contract including the energy and capacity prices, supplemental energy issues, minimum energy issues and transmission adjustments. Furthermore, the Department analyzed the potential operational and financial risks associated with the contract, reviewing the curtailment provisions, reliability issues, credit-worthiness as well as other issues.

Manitoba Hydro asserted that the Department's analysis demonstrates that the PPA is consistent with the public interest and should be approved.

Regarding MWEJ's recommendation that the Commission establish an independent body to see that the NFA is fulfilled in its entirety, Manitoba Hydro recommended that the Commission not attempt to assume the role of the Arbitrator under the NFA.

Manitoba Hydro also noted that MWEJ raised questions regarding the reliability of power provided by Manitoba Hydro. Manitoba Hydro responded that MWEJ's concerns fail on several grounds. First, Manitoba Hydro has a long history of providing reliable power. History simply does not demonstrate a basis for the MWEJ's concerns. Moreover, Manitoba Hydro argued, the PPA itself fully addresses the question of reliability as discussed in the Department's comments. Every source of supply has a risk of not being able to provide the service and an appropriate PPA should protect ratepayer's from such risks. Manitoba Hydro stated that the Department had determined that the PPA does just that.

Finally, Manitoba countered MWEJ's assertion that Xcel and ratepayers share in the liability of the environmental and socioeconomic costs of the project. Manitoba Hydro noted that Xcel is not a party to the treaty and, therefore, has no share in any liabilities under the NFA. Manitoba Hydro noted that Xcel's liability is defined in the PPA and relates to the purchase of the power only. The PPA establishes the terms for the provision of power and the prices have been agreed to by the parties. If Manitoba Hydro's costs go up related to NFA implementation, those costs are not passed on to Xcel or ratepayers.

J. The Commission's Analysis and Action

In its February 7, 2001 Order, the Commission reviewed the 5-Step competitive bid process¹⁴ and stated:

This Order concludes Step 4 of the Commission-approved bid process: Commission review and approval of the Company's final bid selections. The next and final step in this process is Step 5: NSP will submit Power Purchase Agreements with the three winning/approved bidders (Northern Alternative Energy; Black Hills Corporation, and Manitoba Hydro) for Commission review and approval. Before NSP's contracts with the winning bidders become operative, the Commission must approve the final Power Purchase Agreement (PPA) between NSP and the winning vendor(s).

Xcel has submitted the Manitoba Hydro PPA for approval and the Commission is, therefore, at Step 5, the final step in the competitive bid process. The Commission has already approved Xcel's selection of Manitoba Hydro's bid and the issue before the Commission is whether the Commission will approve Xcel's proposed PPA.

Accordingly, issues appropriate at Step 4, such as those raised by PCN and MWEJ raise regarding the appropriateness of Xcel's selection of Manitoba Hydro, are no longer before the Commission. Efficient and effective regulatory process requires that parties may not be allowed to continue to require the Commission and other affected parties to revisit, at any stage of the proceedings, issues properly resolved at earlier stages.

At this stage, then, the specific issues to be considered by the Commission in assessing the proposed PPA are as set forth in the Department's comments. The PPA should be approved if it is in the best interest of ratepayers. To be in the best interest of ratepayers, the Department noted, it must meet the following two conditions:

- the purchase prices to be paid for capacity and energy must be reasonable, and
- ratepayers must be appropriately protected from the financial and operational risks associated with the purchase.

Having considered the arguments of all parties, the Commission finds that the Xcel-Manitoba Hydro PPA should be approved, with attendant requirements and clarifications as follows:

¹⁴ Order at pages 1-2. The Commission first adopted the 5-step competitive bid process in an Order issued August 25, 1998 in Docket No. E-002/M-98-646. See *In the Matter of a Request by Northern States Power Company to Modify its Competitive Bidding Process*, Docket No. E-002/M-98-646, ORDER (August 25, 1998). The 5-step process has been reiterated and affirmed in the current docket in a series of Orders, starting with *In the Matter of Northern States Power Company's Petition for Review of its All Source Request for Proposal*, Docket No. E-002/M-99-888, ORDER GRANTING INTERVENTION (September 29, 2000), page 1.

1. The Department recommended and Xcel agreed that for each month in which supplemental energy is purchased, Xcel must file a report with the Commission showing that the price paid for such supplemental energy was competitive. The report may be included as part of the Company's monthly Fuel Clause Adjustment (FCA) filings but must be specifically highlighted. The failure to highlight such purchases may result in the disallowance of such costs.

2. The Department recommended and Xcel agreed that for each month in which Xcel fails to purchase the full amount of the Minimum Guaranteed Energy, Xcel must file a report with the Commission demonstrating that its actions were prudent. This report may be included as part of the Company's monthly Fuel Clause Adjustment (FCA) filings but must be specifically highlighted. The failure to highlight such actions may result in the disallowance of costs associated with the amount of energy paid for but not taken by Xcel.

3. On its own motion, the Commission will require Xcel to submit significant and/or material changes of a non-administrative nature to the Commission for Commission approval. As proposed, Section 11.07 suggests that the PPA could be changed at any time, and to any extent, without regulatory review and/or approval upon mutual consent of Xcel and Manitoba Hydro. Since the PPA will be considered Commission-approved, potentially significant modifications to the PPA [e.g. price, amount, or duration of the change(s)] must receive regulatory review. Xcel has agreed to this change.

4. On its own motion, the Commission will address the potential for double counting of green value or credits that exists due to the wording of Section 6.05, Paragraph 3 of the PPA. Section 6.05 of the PPA discusses the allocation of any and all credits for the reduction of gas emissions resulting from the sale of energy under the PPA. To eliminate the potential for double counting any credits which may result, the Commission clarifies that

1. the PPA is an agreement between two entities, Xcel and Manitoba Hydro;
2. this agreement is not accepted or binding on the Commission;
3. the Commission will not permit the potential double counting of the green value associated with this power as implied in Section 6.05 of the PPA; and
4. the burden for ensuring that the green value of the power is not double counted remains with Xcel or its successor.

With these attendant requirements and clarifications, the Commission finds that the proposed Xcel-Manitoba Hydro PPA meets the standard enunciated by the Department (best interests of the rate payers) and also is prudent, reasonable, and likely to result in fair and reasonable rates.

In addition, the Commission finds that Xcel has borne its burden to show that the PPA is in the public interest, a standard generally applicable to every Commission decision. Xcel has shown

- 1) that the PPA is consistent with the selection of Manitoba Hydro's bid,

- 2) that the PPA provides a reliable product that is well defined and understood and assures that ratepayers will benefit from the purchase,
- 3) that the PPA addresses potential changes in the industry during the contract term,
- 4) that it provides a limited right of curtailment appropriate for a system participation purchase, and
- 5) that the proposed PPA properly safeguards against the parties' reliability concerns.

The PPA also allows termination in the event of catastrophic failures that result in a substantially higher curtailment rate. In addition, this purchase benefits ratepayers because it continues the diversification of Xcel's energy supply. The Company has convinced the Commission that this purchase can provide a reliable, consistent and dependable energy source for ratepayers.¹⁵

Finally, for reasons previously explained in detail, PCN, MWEJ and others objecting to the proposed PPA have provided no convincing arguments that the PPA contravenes the public interest.

¹⁵ The Commission also addressed the issue of reliability in the February 7, 2001 Order, stating at page 11:

The Commission has considered the reliability concerns, which were based on the volatility of Manitoba Hydro's inflows and the fact that Manitoba Hydro relies on reservoirs, several of which are outside of Manitoba and not controlled by Manitoba Hydro, to provide firm generation.

Based on its review of the record and as recommended by the Department and the RUD-OAG, however, the Commission concludes that there is no concern for Manitoba Hydro's ability to deliver electricity to Minnesota ratepayers that cannot be accommodated (properly safeguarded) by appropriate language in the PPA. In these circumstances, the reliability concern is effectively neutralized.

At this stage of the proceedings (Step 5), the Department has found and the Commission agrees that the proposed PPA properly safeguards against the parties' reliability concerns.

III. COST RECOVERY

Xcel proposed to recover the energy costs of the purchase through the automatic adjustment clause and to seek recovery of the capacity costs including them in a future test year in a future rate case. No party objected to Xcel's proposed method of recovery. The Commission finds that this method is appropriate and will approve it.

IV. NFA MONITORING

Progress made implementing the NFA by four of the five affected Cree Nations testified to by Split Lake Cree Nation and NCN and the prospects for similar use of the NFA by PCN have been key factors in the Commission's determination that the environmental and socioeconomic harms done by the Manitoba Hydro Project have been adequately internalized, taken into account, and considered in this matter. The Commission, therefore, has an interest in the NFA and the ongoing ability of the parties to that treaty to use the treaty and related processes to address the environmental and socioeconomic harms done by the Manitoba Hydro Project.

The Commission will direct Xcel to monitor and report on the status of the on-going implementation of the NFA in its next Resource Plan.

ORDER

1. The Commission will not reconsider its February 7, 2001 Order in this matter.
2. The contested case hearing requested by PCN is not required by law nor is it in the public interest.
3. The Xcel-Manitoba Hydro Power Purchase Agreement is approved with the following attendant requirements and clarifications:
 - a. For each month in which supplemental energy is purchased, Xcel shall file a report with the Commission showing that the price paid for such supplemental energy was competitive. The report may be included as part of the Company's monthly Fuel Clause Adjustment (FCA) filings but must be specifically highlighted. The failure to highlight such purchases may result in the disallowance of such costs.
 - b. For each month in which Xcel fails to purchase the full amount of the Minimum Guaranteed Energy, Xcel shall file a report with the Commission demonstrating that its actions were prudent. This report may be included as part of the Company's monthly Fuel Clause Adjustment (FCA) filings but must be specifically highlighted. The failure to highlight such actions may result in the disallowance of costs associated with the amount of energy paid for but not taken by Xcel.

- c. Xcel shall submit significant and/or material changes of a non-administrative nature to the Commission for Commission approval.
- d. To eliminate the potential for double counting any green value or credits which may result from the wording of Section 6.05, Paragraph 3 of the PPA, the Commission clarifies that
 - 1) the PPA is an agreement between two entities, Xcel and Manitoba Hydro;
 - 2) this agreement is not accepted or binding on the Commission;
 - 3) the Commission will not permit the potential double counting of the green value associated with this power as implied in Section 6.05 of the PPA; and
 - 4) the burden for ensuring that the green value of the power is not double counted remains with Xcel or its successor.
- 4. Xcel's proposal to recover the energy costs of the purchase in the automatic adjustment clause and to seek recovery of the capacity costs by including them in a future test year in a future rate case is approved.
- 5. Xcel shall monitor and report on the status of the on-going implementation of the NFA in its next Resource Plan.
- 6. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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