

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendraye
Marshall Johnson
Ken Nickolai
Phyllis A. Reha

Chair
Commissioner
Commissioner
Commissioner

In the Matter of the Requirement Under
Minnesota Statutes 216B.1691, Subdivision 6
(c), for Northern States Power Company d/b/a
Xcel Energy to Enter into a Purchased Power
Agreement

ISSUE DATE: August 13, 2004

DOCKET NO. E-002/CI-03-2044

ORDER REFERRING THE MATTER FOR
MEDIATION AND REQUIRING
SUBMISSION OF ANY PURCHASE POWER
AGREEMENT FOR REVIEW AND
APPROVAL

PROCEDURAL HISTORY

Background

In 2001, the Minnesota Legislature enacted Minn. Stat. §216B.1691, Renewable Energy Objectives (REO).

Minnesota Laws 2003, 1st Special Session, Chapter 11, Article 2, Section 3, makes a number of changes and additions to the REO statute. The Commission established Docket No. E-999/CI-03-869 to fulfill its obligations under this legislation.

Under subdivision 6 which was added to Minn. Stat. §216B.1691 in the 2003 session, the REO is a mandate, not an objective, for Xcel, subject to resource planning and least cost planning requirements. As part this requirement, Xcel is "to enter into a power purchase agreement by January 1, 2004, for ten to 20 megawatts of biomass energy and capacity at an all-inclusive price not to exceed \$55 per megawatt-hour . ." The statute directs that a power purchase agreement (PPA) be entered into by January 1, 2004 and that the facility be producing energy by June 30, 2005.

History and Status of Xcel Obligations Under Minn. Stat. §216B.1691, subd. 6 (c)

Since the passage of the 2003 legislation, Xcel has commenced negotiations with Itasca regarding a biomass power purchase agreement, but have as yet been unsuccessful. The legislative deadline of January 1, 2004 has passed without a signed agreement.

On December 31, 2003, Xcel filed a letter to update the Commission on the status of its negotiation with Itasca Power. Xcel said that it had transmitted a "final proposed power purchase agreement" to Itasca, which it would hold open for 30 days. Xcel stated that it believed its "efforts to enter into a commercially reasonable PPA meet the directives of the statute and adequately fulfill the 'good faith requirement' referenced in the statute." Xcel further contended that unless Itasca chose to sign the PPA, there was no need for the Commission to create a docket or to further consider this matter.

On January 5, 2004, Itasca Power submitted a letter to the Commission in response to the Xcel letter. Itasca challenged Xcel's claim to have made good faith efforts to negotiate the contract, stating that Xcel had earlier agreed to certain changes which it later did not reflect in draft PPAs and that Xcel did not respond to offers to meet in the weeks immediately prior to the January 1, 2004, deadline. Itasca stated that the most recent draft PPA submitted to Itasca by Xcel was not commercially reasonable for Itasca. Moreover, Itasca disagreed with Xcel's interpretation of Xcel's statutory obligation under the statute. Itasca argued that by failing to have a signed PPA by January 1, 2004, it was Xcel was in clear violation of Minn. Stat. §216B.1691, subd. 6 (c) since the statutory language provides no exemption for a "good faith effort" as suggested by Xcel. Itasca requested that the Commission direct Xcel to complete a power purchase agreement with Itasca under Minn. Stat. §216B.1691, subd. 6 immediately.

This matter was originally a part of the Commission's agenda meeting for January 22, 2004. Several days before that meeting, Itasca asked staff to pull the matter from the agenda because Xcel had agreed to further negotiations, with resolution expected by February 15, 2004.

On July 7, 2004, Itasca filed a letter requesting that the Commission take action to move the power purchase agreement requirement forward. Itasca recounted the basis for its belief that Xcel has ceased negotiating in good faith toward a deadline. Itasca also reported that Xcel has taken the position that there is no statutory deadline for completing the PPA and no statutory deadline for an operational facility. Itasca contended that Minn. Stat. §216B.1691, subd. 6 (c) provides deadlines in Minnesota statutory law for completing the PPA and for achieving operation. Itasca concluded that it was unable to move the PPA forward in a timely fashion and requested assistance from the Commission in doing so. Itasca cautioned that the intent of the statute will be difficult to meet if the project is not built in the current construction season.

On July 19, 2004, Xcel replied to the July 7 Itasca letter. Xcel stated that negotiations are not progressing and are unlikely to move forward to a mutually agreeable PPA. Xcel contended that in addition to issues surrounding the negotiations, there are underlying state and federal legal concerns and interpretations of the statute that would need to be addressed should the Commission decide to take up this matter. Xcel attached a July 7, 2004 letter from Xcel to Itasca, which discusses a number of areas of disagreement.

On July 26, 2004, Itasca responded to Xcel's July 19 letter. Itasca objected to Xcel's inclusion of the July 7 letter in the record, stating that it disclosed "information which is part of active, closed

negotiations" and is highly confidential. Itasca stated that, contrary to Xcel's assertions, it is not asking the Commission to intervene directly in the negotiation procedure. Rather, Itasca is asking the Commission to:

1. confirm that Xcel is not in compliance with Minn. Stat. 216B.1691, subd. 6 (c);
2. direct Xcel to negotiate and finalize an agreement which is commercially reasonable for Itasca, by a set date; and
3. rule on whether the Commission is required to approve the PPA before it becomes effective.

The Commission met on August 5, 2004 to consider this matter.

FINDINGS AND CONCLUSIONS

I. ITASCA'S REQUEST FOR A RULING ON XCEL'S COMPLIANCE WITH MINN. STAT. 216B.1691, subd. 6 (c)

A. The Issue

Itasca has asked the Commission to find that Xcel is not in compliance with Minn. Stat. § 216B.1691, subd. 6 (c) because it has not entered into the power purchase agreement (PPA) described in Minn. Stat. 216B.1691, subd. 6 (c) by January 1, 2004. Itasca argued that the statute created a clear deadline for Xcel's achievement of such a PPA and created no "good faith" exemption.

Xcel argued that non-compliance with the renewable objectives statute can only be based on a finding that Xcel has not exercised good faith in pursuing those objectives, which would need to be assessed in light of its overall efforts to reach those objectives. Xcel asserted that it has exercised good faith in pursuing those objectives. With respect to Itasca's specific allegation that Xcel has violated Minn. Stat. 216B.1691, subd. 6 (c) by not signing a PPA by January 1, 2004, the Company stated that Itasca was unable to meet Xcel's commercially reasonable expectations under a PPA that is commercially viable for Xcel and that it exercised good faith throughout the negotiations with Itasca and therefore cannot be found in violation of Minn. Stat. 216B.1691, subd. 6 (c).

B. Commission Analysis and Action

The parties clearly are at an impasse with respect to this PPA. Setting aside for the moment Xcel's defense that it is protected from a finding of noncompliance with the statute by its good faith efforts and Itasca's inability to perform, the Commission does not believe that making the non-compliance finding requested by Itasca ultimately helps to dislodge the parties from that impasse. And given the nature of Xcel's fact-intensive defense, it is unlikely that such a finding could be made without extensive time-consuming fact finding in a contested case proceeding. In short, the

routes currently proposed by Xcel and Itasca appear to bear little prospect of facilitating expeditious achievement of the ultimate goal of Subdivision 6c: production of a certain amount of renewable energy by June 30, 2005.

In these circumstances, the Commission chooses to promote the renewable energy objectives statute by asking the Office of Administrative Hearings to mediate the parties' disagreements regarding the PPA and commending the parties to that process. By shifting the parties out of the time-consuming legal attack and defend mode and into mediation, the Commission will provide a space for the parties to find their common interests and hopefully move swiftly toward the public interests envisioned by the statute.

II. ITASCA'S REQUEST THAT THE COMMISSION DIRECT XCEL TO NEGOTIATE AND FINALIZE AN AGREEMENT WHICH IS COMMERCIALY REASONABLE FOR ITASCA BY A SET DATE

The Commission clarifies that the PPA should be commercially reasonable for both parties, not just for Itasca, as the wording of Itasca's request suggests. Nothing in the statute indicates that Xcel is obligated to accept a contract that is commercially reasonable for Itasca but not for Xcel.¹ Perhaps this was a misphrasing by inadvertence that is easily clarified by Itasca in further talks with Xcel, but warrants noting in this Order.

In light of the fact-intensiveness of the issue, as noted above, what is "commercially reasonable" for each party given the statutory mandate and other circumstances will not be addressed hypothetically in this Order.

III. COMMISSION APPROVAL OF THE PPA BEFORE IT BECOMES EFFECTIVE

A. The Issue

Itasca requested that the Commission rule on whether Commission approval is required before the PPA becomes effective.

Itasca asserted that the Commission is not required to approve its PPA with Xcel because the PPA is already authorized by statute. Itasca argued that the statutory timeline for the PPA does not appear to contemplate a Commission approval process.

Xcel stated that it regularly seeks Commission review and approval of these types of purchases (power purchase agreements) and stated that Commission approval in this case is particularly important because Itasca is requesting terms that go beyond the statutory requirements and standard industry practice, especially regarding price and delivery arrangements. Xcel added that the Itasca project may be greater than 12 MW in which case the project may need Commission approval to deviate from the competitive resource acquisition process.

¹ At the same time, Xcel's discretion to reject a proposed PPA on the grounds of asserted commercial unreasonableness is not unlimited and is subject to a "good faith" standard of review.

B. Commission Analysis and Action

Over the past several years, the Commission has consistently interpreted wind and biomass statutes as implying authority and duty for the Commission to review and approve the PPAs formed as a result of those statutes to assure adequate ratepayer protection. Ratepayer protection is to be evaluated in the context of the particular statutory mandate in question, of course, but remains a significant Commission obligation nevertheless. While the mandatory statutory language in the instant case may affect the Commission's evaluation of what PPA terms are reasonable, it does not relieve the Commission of the obligation to make such an evaluation.

Itasca suggested that the statutory timeline (January 1, 2004 for signing the PPA and June 30, 2005, for project operation and production of energy) indicated the legislature's intent to dispense with Commission review of the PPA for reasonableness.

The statutory language does not explicitly preclude the Commission's customary review of PPAs and changes from customary regulatory practice are not lightly inferred. In this case, the Commission finds no basis for doing so. The statutory timeline did not render Commission review in time to meet the June 30, 2005 production deadline impossible or unrealistic. The Commission views the statute, which was adopted in 2003, as having allowed adequate time for Xcel to secure Commission review and approval of the PPA in time to achieve the June 30, 2005, production deadline. The possibility at this point (August 2004) that Xcel may fail to meet the statute's January 30, 2005, production deadline does not support the notion that Commission review and approval was not intended.

IV. NEXT STEPS

In an effort to promote expeditious agreement between the parties and, hence, adherence to the statutory deadlines as closely as possible, the Commission will refer this matter to the Office of Administrative Hearings (OAH) with a request that the OAH mediate the matter between the parties and report on the progress of negotiations on or before October 1, 2004.

The ALJ assigned by the Office of Administrative Hearings to mediate this matter is:

Beverly Heydinger, Administrative Law Judge
Office of Administrative Hearings
100 Washington Square - Suite 1700
Minneapolis, MN 55401-2138
Beverly.Heydinger@state.mn.us
Telephone: 612/341-7606
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Any PPA emerging from this mediation process or otherwise will be submitted to the Commission for its review and approval.

ORDER

1. The Commission hereby requests the Office of Administrative Hearings to mediate the parties' disagreements regarding the Xcel/Itasca power purchase agreement (PPA). The Commission commends the parties to that process.
2. For the reasons explained in the text of this Order, the Commission directs Xcel to expeditiously submit any proposed PPA with Itasca to the Commission for review and approval.
3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

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