

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendraye	Chair
Marshall Johnson	Commissioner
Ken Nickolai	Commissioner
Thomas Pugh	Commissioner
Phyllis A. Reha	Commissioner

In the Matter of the Petition of Northern States Power Company d/b/a Xcel Energy for Approval of a Second Amendment to a Power Purchase Agreement with Lake Benton Power Partners I, LLC

ISSUE DATE: October 29, 2004

DOCKET NO. E-002/M-04-355

ORDER DENYING AMENDMENT TO XCEL'S POWER PURCHASE AGREEMENT WITH LAKE BENTON I

**PROCEDURAL HISTORY**

**I. Previous Request to Amend - Docket No. E-002/M-00-314**

On March 14, 2000, Lake Benton Power Partners I, LLC (Lake Benton I) filed a request for approval of an amendment to a power purchase agreement (PPA) with Xcel Energy, Inc. (Xcel). The amendment would incorporate certain property tax amounts into the price of the purchased power. The matter was assigned to Docket No. E-002/M-00-314.

On April 13, 2000, the Minnesota Department of Commerce (the Department) filed comments recommending denial and Xcel filed comments, stating that it could not support the amendment because property tax amounts are already included in the price that Lake Benton I was charging Xcel and which Xcel's customers were already paying.

On March 12, 2002, the Commission issued an Order rejecting the petition without prejudice.

**II. Current Request to Amend - Docket No. E-002/M-04-355**

On March 3, 2004, Xcel filed its request for an amendment to the PPA between Xcel and Lake Benton I. Xcel stated that the amendment represented a settlement between Xcel and Lake Benton I regarding the amount of personal property tax which Lake Benton I should be allowed to recover pursuant to Minn. Stat. § 216B.16, subd. 6d.

On June 2, 2004, the Department filed comments recommending denial of the proposal.

On June 14, 2004, Lake Benton I and Xcel each filed reply comments.

The Commission met on October 7, 2004 to consider this matter.

## **FINDINGS AND CONCLUSIONS**

### **I. Proposed Amendment to the Xcel/Lake Benton I Power Purchase Agreement**

Xcel sought approval of an amendment to its Wind Generation Purchase Agreement with Lake Benton I. Xcel indicated that its proposal reflected a settlement between Xcel and Lake Benton I regarding the amount of personal property taxes which Lake Benton I will be allowed to recover pursuant to Minn. Stat. § 216B.16, subd. 6d and the means by which that recovery will be accomplished.

Specifically, the proposed amendment would modify the existing PPA by establishing an allocation of the taxes paid by Lake Benton I over and above the amount of taxes assumed by Lake Benton I in its original bid and therefore included in the existing price structure of the PPA. The amendment allocates 25 percent of those taxes to Lake Benton and 75 percent to Xcel. The allocation would require Xcel to reimburse Lake Benton I a total of \$652,754 in a lump sum for taxes paid in 2000, 2001, 2002, and the first half of 2003.<sup>1</sup> Future tax payments, after deducting a specified amount for taxes assumed by Lake Benton I in its original bid, would be allocated 25 percent to Lake Benton I and 75 percent to Xcel.<sup>2</sup>

### **II. Xcel's Initial Arguments Supporting the Amendment**

In support of the proposed amendment, Xcel asserted that the amendment met the three criteria in Minnesota Statutes, § 216B.16, subd. 6d and therefore was entitled to Commission approval. Xcel also stated that approving the amendment would not have a large impact on rates and services since the total amount to be reimbursed by Xcel over the 30 year term (\$7 million or 59 percent of the total) represents a small portion of the total estimated payments to Lake Benton I over the duration of the PPA.

In addition, Xcel argued, the proposed amendment reasonably addressed the concern expressed by the Commission when it dismissed without prejudice Lake Benton I's request for tax recovery. Xcel stated that since the parties could not resolve whether Lake Benton I had incorporated a risk premium in its PPA for future tax uncertainty the parties' negotiated 75/25 split of property taxes was reasonable.

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<sup>1</sup> Lake Benton I agreed to forgo recovery of any amounts of tax payments made in 1999.

<sup>2</sup> Pursuant to a 75 percent allocation to Xcel, Xcel's ratepayers would pay an additional amount corresponding to 75 percent of the difference between the property taxes to be paid up to 2029 (estimated to be about \$11.8 million) and the amount of property taxes Xcel and Lake Benton I said were included in the PPA price (about \$2.5 million), or about \$7 million.

Finally, Xcel stated that the amendment was reasonable because it 1) provided a cost sharing of unanticipated changes in law which could threaten the financial performance of this project and 2) supported the original public interest in promoting development of renewable generation facilities by assuring project owners that they can continue to operate projects without substantial risk of cost increases beyond their control.

### **III. The Department's Comments**

The Department reviewed the record and arguments and concluded 1) that the PPA price appears to be adequate to compensate Lake Benton I for changes in property taxes, 2) that any further payment to Lake Benton I would therefore result in ratepayers paying the property taxes twice, and 3) as a result, the proposed amendment would not meet the second criterion of Minn. Stat. § 216B.16, subd. 6d.<sup>3</sup>

As the basis for those conclusions, the Department stated that the most important facts in the record of previous dockets applied equally in the current docket:

First: when the Lake Benton I PPA was initially under development, Xcel informed bidders (potential sellers) including Lake Benton I that there was continuing activity in the Legislature regarding property taxes on wind facilities and gave the bidders an opportunity to adjust their bid since the winning bidder would be held responsible for any change in tax law.

Second: Xcel's comments in Docket No. E-002/M-00-311 (petition for property tax recovery for Lake Benton II) documented the degree of risk premium for property taxes that Lake Benton II was imposing on ratepayers due to the uncertainty caused by continuing legislative changes. According to the Department, the risk premium documented for Lake Benton II was more than adequate to cover the amount of taxes paid by Lake Benton II. The Department stated that it was reasonable to conclude that Lake Benton I imposed a similar risk premium for property taxes in its PPA price.

In conclusion, the Department recommended that the Commission deny Xcel's petition on the grounds that the proposal fails to meet the second criterion in Minn. Stat. § 216B.16, subd. 6d.

### **IV. Xcel's Reply to the Department's Recommendation**

Xcel directed its reply comments to explaining why it believed the requirements of the second statutory criterion were met. Xcel stated that it was very unlikely that Lake Benton I could have anticipated all of the changes to wind generation property taxation so that their price would have

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<sup>3</sup> The second criterion is: “. . . the power purchase agreement between the public utility and the owner does not already require the utility to pay the amount of property taxes the owner has paid under this subdivision; . . .” Minn. Stat. § 216B.16, subd. 6d(2).

included “more than enough to pay for property taxes” as the Department had concluded. Xcel stated that the final revised (June 6, 1995) bid price reflected the typical pattern of taxes arising from the assessment of depreciable personal property.

Xcel stated that the property taxes paid by Lake Benton I have been increased two times subsequent to submission and acceptance of the June 6, 1995 final revised bid: 1) in 1997, the Legislature added additional taxable assets in the project’s tax base<sup>4</sup>; and 2) in 2002, the Legislature converted the assessment to one based on production, which meant that the project’s taxes, instead of declining over time as the taxed property was depreciated, would remain roughly equal from year to year, at levels higher than if taxes had continued to be assessed per the 1995 legislation.

Xcel suggested that the Commission’s March 12, 2002 Order rejecting Lake Benton I’s petition for property tax recovery was a directive or at least allowed for Xcel and Lake Benton to resolve their differences as to what is or is not included in the original agreement price. Consistent with that understanding, Xcel stated, it negotiated a settlement with Lake Benton I for sharing tax costs. Xcel stated that after deducting what the parties believe is already included to cover taxes in the price paid for the energy, it is reasonable to share the incremental tax burden with Lake Benton I. Xcel stated its belief that the state policy encouraging wind generation supported allowing the Commission to approve amending the PPA to address the increased property taxes.

## **V. Lake Benton’s Reply Comments**

### **A. Regarding the Department’s Recommendation**

Lake Benton I described the Department’s principal argument as asserting that Lake Benton I must have included an undefined “risk premium” for future tax increases in the June 6, 1995 bid that Xcel had accepted and incorporated into the PPA. Lake Benton I stated that the Department’s argument is not supported by any evidence pertinent to Lake Benton I and is incorrect, as revealed by the following undisputed evidence.

First, Lake Benton I stated that the amount of taxes included in the PPA price each year is precisely known because the June 6, 1995 bid included specific assumptions about property taxes for each of the 30 years of the project.

Second, Lake Benton I noted that when given the opportunity to change its bid price for property taxes, the June 6, 1995 bid did not raise the bid price (which would indicate the addition of a risk premium was not added) but instead lowered the price by \$1.00/Mwh.

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<sup>4</sup> Specifically, the 1997 tax law 1) removed tax exemption for the first five years of operation, 2) no longer used only a portion of the value of the concrete foundation and towers but rather 100 percent of their value, and 3) included 100 percent of the value of the turbine generator blades, transformers and all related electrical equipment. The 1997 Legislature also enacted the provisions of Minn. Stat. § 216B.16, subd. 6d.

Third, Lake Benton I stated that tax policy at the time was favorable to wind facilities to promote their development and the 1995 increases were expected to strike a long-lasting balance between the local taxing authorities' desire for increased revenues and the policy of promoting wind development. In these circumstances, Lake Benton I argued, there was no reason to believe that dramatic increases in taxes would occur in the future. It would be unreasonable, Lake Benton I concluded, to expect a risk premium to be included in the June 6, 1995 bid price for taxes that were neither expected nor foreseeable.

## **B. Regarding the Reasonableness of the Settlement**

Lake Benton I characterized the Commission's March 12, 2002 Order rejecting Lake Benton I's request for property tax recovery as based on a view that since NSP and Lake Benton I, both of whom had the June 6, 1995 bid data, could not agree whether the bid price included a risk premium for future tax increases, the Commission should not be expected decide that issue.

Lake Benton I also downplayed NSP's opposition to Lake Benton's request in the earlier docket. Lake Benton I stated that NSP's opposition was not based on the risk premium issue but was based on what Lake Benton I stated was an ill-founded notion that because the June 6, 1995 bid **could** have included a risk premium, Lake Benton I was not entitled to recover unforeseen future tax increases at this time.<sup>5</sup>

In conclusion, Lake Benton I argued that the settlement was reasonable. Lake Benton I stated that although it continues to believe that it is entitled to 100 percent recovery under the statute, it will accept a 25 percent allocation of taxes (thereby benefitting NSP ratepayers by reducing the amount passed through to them) as a concession to NSP's claim that a higher amount for 1995 taxes should have been included in the PPA price. Lake Benton I stated that it took to heart the Commission's encouragement to resolve the issue and that the settlement does so on mutually acceptable terms favorable to ratepayers and consistent with the law. Lake Benton I recommended that the Commission enforce the statute's clear mandate and approve the proposed amendment as reasonable and in the public interest.

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<sup>5</sup> Lake Benton's characterization of NSP's opposition in the previous docket is not consistent with NSP's actual comments filed April 14, 2000 in that docket (Docket No. E-002/M-00-314). In those comments, NSP summarized its extensive discussion of the second criterion (that the utility not already be required to pay in the purchase price the property taxes paid by the wind facility owner) as follows:

NSP does not believe that the petitioner [Lake Benton I] has adequately supported its claim that the power purchase agreement between the public utility and the owner does not already require the utility to pay the amount of property taxes the owner paid under this subdivision. In fact, substantial evidence from the Independent Evaluator's report indicates that NSP has already paid these taxes as part of the pricing contained in the PPA. (NSP's Response Comments filed April 14, 2000 in Docket No. E-002/M-00-314 at page 5.)

## **VI. Commission Analysis and Action**

Pursuant to a settlement or agreement among themselves, Xcel and Lake Benton I have agreed to ask and have asked the Commission to approve an amendment to their PPA which would increase the price Xcel would pay for future wind generated under the PPA. In addition, as part of their agreement, Xcel would immediately pay Lake Benton I a lump sum to reimburse Lake Benton I for a portion of the taxes Lake Benton I paid but was not already reimbursed as part of the bid price. Finally, they asked that Xcel be allowed to recover the lump sum and the incremental cost of future wind purchases from Lake Benton I from ratepayers through the Fuel Adjustment Clause.

### **A. Joint Petition**

Xcel and Lake Benton I have presented their proposal as a settlement. Analyzed as a settlement, the proposal would be approved by the Commission if the Commission found that the terms of the settlement were supported by substantial evidence and were in the public interest. In this case, however, Xcel's ratepayers have a very large stake in this matter because under the parties' proposal the amounts that the parties agree Xcel should pay to Lake Benton would be passed on to ratepayers and recovered by Xcel from the ratepayers via the Fuel Adjustment Clause. In addition, the Department of Commerce is not a party to the settlement or agreement between Xcel and Lake Benton I and, in fact opposes it. While it is likely that the Commission's analysis and ultimate conclusion would be the same under either analysis, it appears more accurate under the circumstances to view the parties' proposal as a joint proposal for relief under Minn. Stat. § 216B.16, subd. 6d.

### **B. Burden of Proof**

Minn. Stat. § 216B.16, subd. 6d requires the Commission to approve a proposed amendment of a PPA in response to property tax changes if certain facts are shown. The burden of proof, the burden to show entitlement to a Commission Order directing the utility to amend a PPA as proposed herein rests with the proponent(s) of such a request.

In this case, the proponents of that proposal, Xcel and Lake Benton I, have failed to carry their burden of proof with respect to the second criterion. Lake Benton I has vigorously reargued the facts presented in Docket No. E-002/M-00-314, but provided no new facts to support this criterion than were available when the Commission issued its March 12, 2002 Order rejecting Lake Benton I's request for property tax recovery in Docket No. E-002/M-00-314.

In the current case, Lake Benton I suggested that securing Xcel's support for a compromise amendment would be sufficient to carry the day. Lake Benton I mischaracterized the March 12, 2000 Order, asserting

Presumably, the Commission felt that if the two parties (NSP and Lake Benton I) actually privy to the bid data could not reach agreement on this issue, then the Commission should not be expected to either.<sup>6</sup>

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<sup>6</sup> See Lake Benton I's June 14, 2004 Reply Comments at page 3.

However, the fact that Xcel disagreed with Lake Benton I and argued against Lake Benton I's position in the previous docket was not at all the basis for the Commission's March 12, 2000 Order. In that Order, the Commission conducted its own review of the evidence<sup>7</sup> and explained its conclusion quite differently:

The Commission will reject the petition of LBPPI. The Commission is concerned that the final price under the PPA appears to include a built in risk premium by LBPPI for future property taxes. If the Commission were to require that these taxes be paid by the utility this would allow for double recovery by the seller, at the expense of the ratepayer.

The record supports the conclusion that potential sellers, including LBPPI, were informed by NSP that there was continuing activity in the legislature regarding property taxes on wind facilities and that sellers were given the opportunity to reexamine their bids in light of new information. The Commission agrees with the DOC that it is reasonable to conclude that LBPPI would have taken this into account in its bid and included a risk premium for property taxes. The record is insufficient to support the claim that LBPPI did not build in such a risk factor.<sup>8</sup>

Clearly the Order did not direct or encourage Lake Benton I and Xcel to resolve the matter by simply agreeing among themselves whether and to what extent taxes were already being recovered in PPA pricing. Instead, the Order found that taxes appeared to have been included in the PPA pricing, but dismissed the petition without prejudice to avoid foreclosing a second filing supported by evidence demonstrating that taxes in fact had not been included.

In addition, the fact that a party withdraws its opposition to a proposal or does not renew opposition earlier stated is not, of itself, evidence that the proposal is valid. The Commission is particularly unpersuaded by Xcel not renewing the strong arguments that it raised to Lake Benton I's position in the earlier docket since all amounts Xcel would pay to Lake Benton I under the parties' joint proposal would be passed through and in fact paid by ratepayers, automatically, via the Fuel Adjustment Clause.

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<sup>7</sup> *In the Matter of Lake Benton Power Partners I LLC's Petition for Property Tax Recovery*, Docket No. E-002/M-00-314, ORDER REJECTING PETITION WITHOUT PREJUDICE at pages 3-5.

<sup>8</sup> *Id.* at page 5.

In these circumstances, the Commission finds that Lake Benton I and Xcel, proponents of relief under Minn. Stat. § 216B.16, subd. 6d have not borne their burden of proof to show that the statute's second criterion has been met.<sup>9</sup>

**C. Applicability of Minn. Stat. § 216B.16, subd.6d to Wind Energy Production Taxes Paid Pursuant to Minn. Stat. § 272.029**

Having found that Lake Benton I and Xcel have not borne their burden of proof to show that the statute's second criterion has been met, the Commission need not find (and does not proceed to find) any further ground to deny the petition. Nevertheless, there is a further issue that warrants discussion: whether the recovery mechanism provided by Minn. Stat. § 216B.16, subd.6d applies to wind energy production taxes paid pursuant to Minn. Stat. § 272.029.

The Commission notes that the statute's terminology appears to apply specifically (and therefore exclusively) to property taxes. No other variety of taxes is identified in the statute as subject to the statute's recovery mandate. And while Minn. Stat. § 272.029 identifies certain statutes for purposes of which the production tax is to be considered a personal property tax, none of the statutes identified is Minn. Stat. § 216B.16.<sup>10</sup>

Moreover, the third criterion established in Minn. Stat. § 216B.16, subd 6d pertains to recovery of charges ordered by the Commission under Minn. Stat. § 272.02, subd. 22, which does not appear to incorporate the wind energy production taxes imposed pursuant to Minn. Stat. § 272.029.

If the 2002 Legislature had wanted to make production taxes paid pursuant to Minn. Stat. § 272.029 recoverable pursuant to Minn. Stat. § 216B.16, subd. 6d, it could have included plain language in either statute to achieve that result. In the absence of such language, it would appear the Commission has no warrant to read such an intention into the statutes. Where statutory language is plain and unambiguous, as here, the general rule is that no construction of a statute is permitted.

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<sup>9</sup> The Department cited the statutory requirement that the Commission resolve any doubt as to the reasonableness of a rate in favor of ratepayers. Minn. Stat. §216B.03. This directive, while not the basis for the Commission's decision in this case, certainly supports it.

<sup>10</sup> Minn. Stat. § 272.029, subd. 5 states in pertinent part: "Except to the extent inconsistent with this section, **the provisions of sections 277.01 to 277.24 and 278.01 to 278.13** apply to the taxes imposed under this section, and **for purposes of those provisions**, the taxes imposed under this section are considered personal property taxes." (Emphasis added.) By identifying specific statutes for purposes of which the taxes imposed under Minn. Stat. § 272.029 are considered personal property taxes, there is a strong argument that 1) that the Legislature intended those to be the only statutes for which the taxes imposed under this section are to be considered other than what the statute calls them, production taxes, and 2) that the production tax imposed by Minn. Stat. § 272.029 was not to be considered a property tax for purposes of any statute not named, including Minn. Stat. § 216B.16.

In sum, there appears to be a strong argument that Minn. Stat. § 216B.16, subd. 6d does not provide for an amendment to recover the production taxes that Lake Benton I paid or will pay pursuant to Minn. Stat. § 272.029.

Because this matter is disposed of based on the parties' failure to prove the second criterion listed in Minn. Stat. § 216B.16, subd. 6d and since the parties have not briefed this issue, the Commission finds no need or warrant to make a final determination of statutory construction at this time. In the context of any future Commission consideration of Lake Benton I's request to recover production taxes pursuant to Minn. Stat. § 216B.16, subd. 6d, however, the applicability of that statute to production taxes paid pursuant to Minn. Stat. § 272.029 would need to be established.

**ORDER**

1. The request of Xcel and Lake Benton I that the Commission approve the proposed amendment to their power purchase agreement is denied.
2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar  
Executive Secretary

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