

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer	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 an Amendment to a Wind
Generation Purchase Agreement with Lake
Benton Power Partners II, LLC

ISSUE DATE: November 3, 2004

DOCKET NO. E-002/M-04-354

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

PROCEDURAL HISTORY

I. Previous Request to Amend - Docket No. E-002/M-00-311

On March 14, 2000, Lake Benton Power Partners II, LLC (Lake Benton II) filed a request seeking approval of an amendment to the power purchase agreement (PPA) between Lake Benton II and Xcel to allow Lake Benton II to recover property taxes it incurred on the project.

On April 13, 2000, the Minnesota Department of Commerce (the Department) filed comments recommending denial on the grounds that Lake Benton II had not demonstrated that it met the second statutory criterion, that the PPA not already require the utility [NSP] to pay the amount of property taxes the owner [Lake Benton II] has paid.

On April 13, 2000, Northern States Power Company (NSP) filed comments recommending rejection of Lake Benton II's request. NSP stated that Lake Benton II had not adequately supported its claim that the PPA between NSP and Lake Benton II does not already require the utility to pay the amount of property taxes the owner has paid. NSP cited evidence that it stated indicated that Lake Benton II had included property taxes in the final pricing structure it negotiated with NSP.

On April 24, 2000, the Department filed reply comments stating that the evidence provided by NSP indicates that the PPA includes recovery of property taxes by Lake Benton II.

On June 21, 2000, Lake Benton II notified the Commission that it was withdrawing its petition. Lake Benton II stated that the docket could be dismissed without further action and that NSP agreed with the withdrawal. Lake Benton II explained that it had reviewed the comments received from the Department and NSP, had worked toward resolving the factual questions raised by those comments, and had been unable to do so.

On February 25, 2002, the Commission issued its ORDER PERMITTING WITHDRAWAL OF FILING. The Commission stated that the proposed withdrawal did not contravene the public interest, did not prejudice any party, and raised no issues requiring Commission action.

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 II. Xcel stated that the amendment represented a settlement between Xcel and Lake Benton II regarding the amount of personal property tax which Lake Benton II 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 request based on the failure to meet the second criterion of Minn. Stat. § 216B.16, subd. 6d.

On June 14, 2004, Lake Benton II 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/LakeBenton II Power Purchase Agreement

Xcel sought approval of an amendment to its Wind Generation Purchase Agreement with Lake Benton II. Xcel indicated that its proposal reflected a settlement between Xcel and LakeBenton II regarding 1) the amount of personal property taxes which LakeBenton II will be allowed to recover pursuant to Minn. Stat. § 216B.16, subd. 6d and 2) 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 II over and above the amount of taxes allegedly assumed by Lake Benton II in its original bid and therefore included in the existing price structure of the PPA. The amendment allocates to Lake Benton II 25 percent of the taxes it paid over and above the amount allegedly assumed by Lake Benton II in its original bid and allocates the remaining 75 percent to Xcel.

Applying the 25/75 allocation to the taxes paid in 2000, 2001, 2002, and 2003, Xcel would therefore reimburse Lake Benton II a total of \$648,495 in a lump sum. Future tax payments, after

deducting a specified amount for taxes assumed by LakeBenton II in its original bid, would be allocated 25 percent to LakeBenton II and 75 percent to Xcel.¹

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.

With respect to the second criterion, Xcel argued that the criterion is met because 1) the PPA currently requires Lake Benton II to pay all property taxes assessed against the project; 2) the PPA does not obligate Xcel to pay any property taxes assessed against Lake Benton II's project, except to the extent that Lake Benton II's bid price incorporates an assumption of taxes; and 3) the Amendment expressly excludes from reimbursement by Xcel the amount of taxes originally assumed in Lake Benton II's bid. Xcel argued that the Amendment therefore allows Lake Benton II to be reimbursed only for the property tax obligations not already assumed in the PPA's energy pricing.

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 LakeBenton II 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 II's request for tax recovery. Xcel stated that since the parties could not resolve whether Lake Benton II had incorporated a risk premium in its PPA for future tax uncertainty the parties' negotiated 75/25 split of property taxes was reasonable.

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 established in the previous docket regarding Lake Benton II's request to amend the PPA to allow recovery of property taxes (Docket No. E-002/M-00-314) as

¹ The difference between the property taxes paid and to be paid up to 2029 (\$10.7 million) and the amount of property taxes Xcel and Lake Benton II said were included in the PPA price (\$2.8 million) is approximately \$7.9 million. Pursuant to a 75 percent allocation to Xcel, Xcel's ratepayers therefore would pay approximately an additional \$5.9 million.

well as Xcel's filing in the current case. The Department conclude that the proposed settlement would not meet the second criterion of Minn. Stat § 216B.16, subd. 6d and therefore Xcel's petition should be denied.

In support of its recommendation, the Department argued that the proposed settlement did not change the facts in the record of Docket No. E-002/M-00-314, which the Department included by reference into the current docket. Regarding the statute's second criterion, the Department cited the evidence provided by Xcel in Attachment 2 of Xcel's April 13, 2000 comments that two final bids by Lake Benton II's predecessor in interest² were submitted: a higher bid with property taxes included and a lower bid, under which Xcel would pay the property taxes. Since the guaranteed price in the PPA approved by the Commission matches the higher bid, the Department concluded that the difference between the higher and the lower bid shows the amount of property taxes that Lake Benton II is already being compensated. The Department stated that this amount (the difference between the two bids) is substantially larger than the \$10.7 million estimate of property taxes to be paid up to 2025 provided by Xcel in this case.

The Department stated that no party during the initial proceeding contested Xcel's evidence regarding the higher and lower bids and no party in either the initial or current case has rebutted the Department's conclusion that the difference between the higher and lower bids represents the amount Lake Benton II is currently being compensated via the PPA price for payment of property taxes.

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

Xcel acknowledged that the "factual action" taken by Lake Benton II was to provide Xcel two pricing options, a higher and lower bid, as stated by the Department. Xcel disagreed, however, with the Department's conclusion in this case (and Xcel's own conclusion in the previous case) that the difference between the higher and lower bid represented the amount Lake Benton II is currently being compensated via the PPA price for payment of property taxes.

Xcel stated that it could only calculate the difference between the two bids but did not know with certainty what costs and risks were included in the higher bid price which was incorporated in to the PPA. Xcel stated that it believed Lake Benton II included in the bid price the following type of dollars: taxes on the expected value of the assets as expected to be depreciated under applicable federal tax law at the time, as well as Minnesota property tax law with respect to wind facilities as

² At the time of the bidding, the wind generation project in question was owned and operated by Zond Development Corporation (Zond) so the bids for the project in question were submitted by Zond and the original PPA with Xcel was between Zond and Xcel. Lake Benton II is the successor in interest to Zond because subsequent to the bidding, selection of Zond's bid and execution of a PPA between Zond and Xcel, the project underwent a series of ownership transfers, ultimately becoming owned and operated by Lake Benton II. As a consequence, Lake Benton II stands in the shoes of Zond with respect to the project.

of June 1995. Xcel stated that it was very unlikely that Lake Benton II could have anticipated in 1997 the change to production-based taxation in 2002 so that their price could have included a sufficient amount to cover the property tax obligations resulting from that change.

V. Lake Benton II's Reply Comments

Lake Benton II argued that the evidence supported the reasonableness of the settlement agreement between Lake Benton II and Xcel.

First, Lake Benton II argued that the June 12, 1997 memo offering the two final bid prices (one including taxes and the other not including taxes) is extraneous material because the PPA states that the terms of the PPA supercede any and all prior oral or written understandings. Looking strictly at the PPA, Lake Benton II noted that it did not mention that the PPA price included a reimbursement for all or part of the property taxes being paid by the Lake Benton II project. As a consequence, Lake Benton II suggested, the Commission should give weight to the understanding of what the PPA means and intends with respect to property tax responsibilities as reflected in the settlement.

Second, Lake Benton II asserted that the tax costs included in the actual bid accepted by NSP are known and quantifiable because the model underlying the successful bid (May 18, 1997) sets forth specific year by year amounts for taxes. Lake Benton II did not provide the asserted model from 1997 but stated that the yearly tax figures set forth in that document are the source of the figures that appear in a column entitled "Taxes Included in PPA Price" in Exhibit B of Xcel's March 3, 2004 petition in this docket and as Schedule 1 of the parties' settlement filed as part of that petition. Lake Benton II noted that the figures appearing on Exhibit B and Schedule 1 reflect real tax assumptions, consistent with the method of tax assessment in the 1995 and 1997 tax laws. Lake Benton II argued that the figures appearing in Schedule 1 of the Settlement represented the bidder's (Zond's) best effort to reflect its expectations based on Minnesota tax law in 1997 and did not include any premium for potential future tax increases.

Third, Lake Benton II argued that it was reasonable to conclude that no premium for potential future tax increases was included in the final, accepted bid for this project because in 1997 there was no reason to expect significant future property tax increases or a complete shift from traditional taxing formulas to the production-based method adopted by the 2000 legislature.

Fourth, Lake Benton II again asserted that the amounts for taxes included in the 1997 bid reflect traditional declining tax impositions.

In conclusion, Lake Benton II contended that the Department's position was based on speculation rather than on the evidence and that the Commission should approve the parties' negotiated settlement as reasonable and consistent with the law.

Lake Benton II asserted that the two bids submitted by Zond to Xcel were extraneous material and that the PPA expressly stated that the PPA superceded any and all prior oral understandings.

VI. Commission Analysis and Action

Pursuant to a settlement or agreement among themselves, Xcel and Lake Benton II 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 generation under the PPA. In addition, as part of their agreement, Xcel would immediately pay Lake Benton II a lump sum to reimburse Lake Benton II for a portion of the taxes Lake Benton II paid but was not already reimbursed as part of the bid price. Finally, they asked that Xcel be allowed to recover from ratepayers through the Fuel Adjustment Clause the applicable portion of the property taxes that it reimbursed to Lake Benton II.

A. Joint Petition

Xcel and Lake Benton II 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 II would be passed directly through 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 II 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 (three criteria) 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.

The second criterion petitioners must show in order to become entitled to an amendment pursuant to Minn. Stat. § 216B.16, subd. 6d is as follows:

(2) 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; . . .

In this case, the proponents of that proposal, Xcel and Lake Benton II, have failed to carry their burden of proof with respect to this second criterion. Lake Benton II has vigorously reargued the facts presented in Docket No. E-002/M-00-314. In addition, it has for the first time asserted the existence of a model that it contended set forth specific year by year amounts for taxes (totaling \$2.8 million) which it contended was the “known and quantifiable” amount included in the bid accepted by NSP.

At the same time, the record contains several items that appear to contradict Lake Benton II’s assertion that the amount of property taxes included in the PPA was limited to \$2.8 million.

- Although it has asserted the existence of the model which it contended set forth specific year by year amounts for taxes totaling \$2.8 million, Lake Benton II has not submitted that model. Instead, it has simply provided later-produced documents (Schedule 1 of the parties’ December 31, 2003 settlement and Exhibit B of Xcel’s March 3, 2004 petition in this matter) which it stated reflect figures based on the model that has not been provided. In the absence of the contemporaneously produced model, the record is inconclusive at best regarding the tax costs Lake Benton II contends were included in the bid accepted by NSP in 1997.
- In the previous docket, Xcel provided contemporaneous documentation from 1997 and argued persuasively that the difference between the higher bid which the bidder (Zond) identified as “bid price which includes property tax” and the lower bid that the bidder identified as the “bid price with no property tax” should be understood as identifying the amount of property taxes already included in the PPA price since the bid accepted by NSP and incorporated into the PPA is the same number as the “bid price which includes property tax.” In that docket, Lake Benton II did not rebut the documents and analysis but instead requested to withdraw its petition.³
- In the current docket, Xcel has not satisfactorily explained why the analysis and documentation it provided in the previous docket do not lead to the same conclusion it reached in the previous docket.

³ As noted above, Lake Benton II has argued that Zond’s June 12, 1997 memo conveying the two bids is extraneous because the PPA states that the terms of the PPA supercede any prior communications between the parties. This argument is not sound. The PPA’s exclusivity provision cited by Lake Benton II does not diminish the relevance of the Zond memo in the current docket because the issue at hand is not what the parties may enforce against each other (in which case the terms of the PPA would be conclusive) but whether the price adopted in the PPA includes an amount to compensate Lake Benton II for payment of property taxes. For such a question the PPA is only one of several possible sources of information on that subject and not one most likely to shed direct light on that subject.

In short, the proponents of the proposed amendment, Xcel and Lake Benton II, have failed to carry their burden of proof with respect to the second criterion, a prerequisite to relief pursuant to Minn. Stat. § 216B.16, subd. 6d. Accordingly, their request to amend the PPA will be denied.

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

Having found that LakeBenton II 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 Minn. Stat. § 216B.16, subd. 6d appears to refer specifically (and therefore to apply exclusively) to the recovery of 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.16.⁴

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, as here, statutory language is plain and unambiguous, the general rule is that no construction of a statute is permitted.

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 II paid or will pay pursuant to Minn. Stat. § 272.029.

⁴ 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 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.

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 II'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 II that the Commission approve the proposed amendment to their power purchase agreement is denied.

4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (651) 297-4596 (voice), or 1-800-627-3529 (MN relay service).