OAH 65-2500-38476

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE PUBLIC UTILITIES COMMISSION

In the Matter of the Application of Northern States Power Company for Authority to Increase Rates for Electric Service in the State of Minnesota, et al.
(MPUC Docket No. E-002/GR-12-961),

In the Matter of the Application of Northern States Power Company for Authority to Increase Rates for Electric Service in the State of Minnesota
(MPUC Docket No. E-002/GR-13-868),

In the Matter for the Review of the 2012-2013 Annual Automatic Adjustment Reports for All Electric Utilities
(MPUC Docket No. E-999/AA-13-599),

In the Matter for the Review of the 2013-2014 Annual Automatic Adjustment Reports for All Electric Utilities
(MPUC Docket No. E-999/AA-14-579),

In the Matter for the Review of the 2015-2016 Annual Automatic Adjustment Reports for All Electric Utilities
(MPUC Docket No. E-999/AA-16-523),

In the Matter for the Department's Report on the Electric Utilities' 2016-2017 Annual Automatic Adjustment Reports for All Utilities
(MPUC Docket No. E-999/AA-17-492),

In the Matter of the Review of the 2017-2018 Annual Automatic Adjustment Reports for All Electric Utilities
(MPUC Docket No. E-999/AA-18-373)

ORDER ON MOTION TO TAKE OFFICIAL NOTICE

This matter comes before Administrative Law Judge Ann C. O'Reilly pursuant to a Motion to Take Official Notice filed by the Department of Commerce - Division of Energy Resources (DOC-DER).

On June 16, 2023, the DOC-DER filed its Motion to Take Official Notice (Motion). Xcel Energy filed its Reply in Opposition to the Motion on June 26, 2023. No other parties in this action filed a response to the Motion and the motion record closed on July 3, 2023.

Greg Merz and Katherine Hinderlie, Assistant Attorneys General, appear on behalf of the DOC-DER. Eric Swanson and Christopher Cerny, Winthrop & Weinstine, P.A., appear on behalf of Northern States Power Company d/b/a Xcel Energy (Xcel or Company).

Based upon the filings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

THEREFORE, IT IS HEREBY ORDERED THAT:

The DOC-DER's Motion is **DENIED**.

Dated: July 10, 2023

ANN O'REILLY
Administrative Law Judge

MEMORANDUM

The central issue in these combined Public Utility Commission (PUC or Commission) dockets is whether energy replacement costs incurred by Xcel following a catastrophic failure of a turbine that was part of Xcel's Sherco 3 generating unit (Unit 3) were prudently incurred by the Company.[1] The incident occurred on November 19, 2011, and was the subject of two separate litigations: one between Xcel and General Electric (GE) (the manufacturer of the turbine); and the other between Xcel's insurers, Aegis Insurance Services, Ltd, *et al.* (Aegis) and GE.[2] Xcel and GE settled their dispute without a trial.[3] The case between Aegis, et al. and GE proceeded to trial in state district court in 2018 *(*see *Aegis Insurance Services, Ltd., et al. v. General Electric Co., et al.).*[4] The issue

[1] DOC-DER Memorandum in Support of Motion at 2.
[2] *Id.* at 3.
[3] *Id.*
[4] No. 71-CV-13-1472 (Minn. Dist. Ct.), aff'd, *Aegis Insurance Services, Ltd., et al. v. General Electric Co., et al.*, No. A19-0640, 2020 WL 614775 (Minn. Ct. App. Feb. 10, 2020).

in that case was whether GE was negligent in the course of its dealing with Xcel regarding Unit 3.[5]

The Commission deferred consideration of the energy replacement costs in these combined PUC dockets to allow the state court litigation against GE to be completed. The Commission reasoned: "The ongoing litigation between Xcel Electric and General Electric may well reveal facts about the steps each of those parties took, or failed to take, that contributed to the outage and related costs."[6]

In its Motion, the DOC-DER requests that the Administrative Law Judge take official notice of excerpts of trial testimony from four witnesses in the *Aegis* case:

- Timothy Murray, an employee of Xcel Energy;[7]
- Mark Kolb, an employee of Xcel Energy;[8]
- Duane Wold, an employee of Xcel Energy[9]; and
- William Allmon, a senior consultant employed by ChemStaff, Inc. and an expert in the field of chemistry and corrosion control in power plants.[10]

Two of these four witnesses are also witnesses in this utility proceeding: Mr. Murray and Mr. Kolb.[11] Mr. Wold, however, is unavailable to testify in this action.[12] Xcel has filed testimony from an expert witness, David Daniels, to address the matters discussed by Mr. Wold in the *Aegis* litigation.[13] Mr. Allmon was an expert hired by GE to testify in the *Aegis* litigation.[14] Xcel was not a party to the *Aegis* litigation and did not have the opportunity to question or cross examine Mr. Murray, Mr. Kolb, Mr. Wold, or Mr. Allmon in the *Aegis* trial.[15]

Pursuant to Minn. Stat. § 14.60 (2022), "[a]gencies may take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within their specialized knowledge."[16] An administrative law judge may also take notice of "judicially cognizable facts but shall do so on the record and with the opportunity for any party to contest the facts so noticed."[17]

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[5] Xcel Reply in Opposition at 2.
[6] *In the Matter of the Review of the 2013-2014 Annual Automatic Adjustment Reports for All Electric Utilities*, PUC Docket No. E-999/AA-14-579, ORDER ACTING ON ELECTRIC UTILITIES' ANNUAL REPORTS AND REQUIRING ADDITIONAL FILINGS at 5-6 (June 2, 2015) (eDockets No. 20166-121942-03).
[7] Decl. Greg Merz, Ex. A.
[8] *Id*., Ex. B.
[9] *Id*., Ex. C.
[10] *Id.,* Ex. D.
[11] *See* prefiled testimony of Kolb and Murray (eDockets Nos. **20236-196631-34** and **20236-196631-27**).
[12] Xcel Reply in Opposition at fn. 5.
[13] *Id.*
[14] *Id.* at 6.
[15] *Id.*
[16] Minn. Stat. § 14.60, subd. 4 (2022).
[17] Minn. R. 1400.7300, subp. 4 (2021).

Under the Minnesota Rules of Evidence, a court may take judicial notice of adjudicative facts in a civil case, but the "fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[18] Official notice may not be used as a substitute for adjudicating specific facts.[19] Moreover, a court may not take judicial notice of testimony in another proceeding.[20]

The excerpts of prior testimony from the four witnesses in the *Aegis* case do not contain facts that are generally known and are not the type of facts beyond reasonable dispute. First, as Xcel has shown, the prior testimony of these witnesses is, indeed, disputed for purposes of this proceeding. Second, the testimony was provided in a case with different legal issues and different parties. Third, Xcel was not a party to the *Aegis* case and did not have the opportunity to question or cross examine these witnesses in that trial. Fourth, Mr. Murray and Mr. Kolb have provided prefiled testimony in this case. The DOC-DER can examine these witnesses at trial and, if their testimony differs, the DOC-DER can impeach the witnesses with their prior testimony. Fifth, if the DOC-DER wants the expert testimony of Mr. Allmon, the agency could have hired him and had him testify in this case. Sixth, with respect to Mr. Wold, there will be a witness offered by the Company (Mr. Daniels) who has submitted prefiled testimony on subjects similar to what Mr. Wold testified to in the *Aegis* litigation. Thus, the DOC-DER can examine Mr. Daniels on those subjects or it can subpoena Mr. Wold to testify in this proceeding. Finally, prior testimony on disputed facts in a separate litigation is simply not the type of evidence of which a court can take official or judicial notice. This is exactly why the Court of Appeals has held that courts may not take judicial notice of disputed testimony in prior proceedings.[21]

In sum, because the testimony of the witnesses in the *Aegis* litigation contains facts not generally known or accepted as true by the parties, the agency, or the Judge in this case, the DOC-DER's Motion is **DENIED**.

A.C.O.

[18] Minn. R. Evid. 201.
[19] *In re Issuance of a Nat'l Pollutant Discharge Elimination Sys. and State Disposal Sys. to Hibbing Taconite Co.,* 431 N.W.2d 885, 892 (Minn. Ct. App. 1988) (citing *Ohio Bell Tel. Co. v. Pub. Util. Comm'n*, 301 U.S. 292, 301. 57 S.Ct. 724, 729 (1937)).
[20] *In re Zemple*, 489 N.W.2d 818, 820 (Minn. Ct. App. 1992)
[21] *Id.*