



Diane J. Peterson papers

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The Minnesota Project
c/o Carl Nelson
1885 University Ave. # 315
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November 6, 2002

Burl W. Haar
Executive Secretary
Minnesota Public Utilities Commission
121 7th Place East, Suite 350
St. Paul, Minnesota 55101-2147

**Re: Petition of Northern States Power Company dba Xcel Energy for
Approval of a Power Purchase Agreement with Manitoba Hydro
Docket No. E002/M-99-888**

Reply Comments of The Minnesota Project

Dear Dr. Haar,

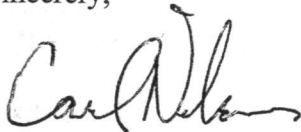
Below are the reply comments of The Minnesota Project regarding the Petition of Northern States Power Company dba Xcel Energy for Approval of a Power Purchase Agreement with Manitoba Hydro. We very much appreciate the opportunity to comment on this important decision.

The Minnesota Project supports Pimicikamak Cree Nation's Petition for a Contested Case.

The Commission is required by law to consider both the existing harms as well as the new environmental and socioeconomic effects associated with this PPA and to make specific findings of fact in making this resource decision. The Commission should refer this matter to the Office of Administrative Hearings for a contested case to develop a strong factual record upon which Commission decisions can be made.

Copies have been mailed to all parties on the service list.

Sincerely,

A handwritten signature in dark ink, appearing to read "Carl Nelson", with a stylized flourish at the end.

Carl Nelson
The Minnesota Project



MINNESOTA
DEPARTMENT OF
COMMERCE

85 7th Place East, Suite 500
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November 8, 2002

Burl W. Haar
Executive Secretary
Minnesota Public Utilities Commission
121 7th Place East, Suite 350
St. Paul, Minnesota 55101-2147

RE: Reply Comments of the Minnesota Department of Commerce
Docket No. E002/M-99-888

Dear Dr. Haar:

Attached are the reply comments of the Energy Division of the
Minnesota Department of Commerce in the following matter:

Power Purchase Agreement between Manitoba Hydro and
Northern States Power Company.

The petition was filed on September 13, 2002 by:

Debra J. Paulson
Regulatory Case Analyst
Xcel Energy
414 Nicollet Mall
Minneapolis, Minnesota 55401

The Department continues to recommend **approval** and is available to
answer any questions the Commission may have.

Sincerely,

EILON AMIT
STATISTICAL ANALYST

EA/sm
Attachment



BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

REPLY COMMENTS OF THE
MINNESOTA DEPARTMENT OF COMMERCE

DOCKET NO. E002/M-99-888

I. BACKGROUND

On August 2, 1999, Northern States Power Company d/b/a Xcel Energy (Xcel) issued its Request for Proposal (RFP) for supply of resources needed starting 2003-2005.¹

On January 25, 2000, Henwood Services filed its "independent Auditor's Short-List Selection Report" with the Minnesota Public Utilities Commission (Commission), the Department of Commerce (Department) and the Residential Utilities Division of the Office of the Attorney General (RUD-OAG).

On February 2, 2000, Xcel filed its "Short-List Initial Evaluation Report" (Short-List).

On February 7, 2001, the Commission issued an ORDER REJECTING REQUESTS FOR FURTHER INVESTIGATION, APPROVING FINAL BID SELECTION, AND OPENING DOCKET REGARDING EXTERNALITY VALUES.

On November 2, 2001, the Department filed comments recommending that the Commission issue an Order to Show Cause to require Xcel to show that it did not knowingly and intentionally violate the Commission's Order in Docket No. E002/RP-00-787.

On January 15, 2002, Xcel filed a petition for variance from the Commission's Order approving final bid selection.

¹ In 1999, Xcel was known only as Northern States Power Company. However, for simplicity in these comments, the Company is referred to as Xcel. This reference is specifically to the utility company that provides utility energy service in Minnesota, rather than its parent company, Xcel Energy.

On January 25, 2002, the Department filed comments recommending that the Commission find Xcel's request for variance to be unnecessary.

On February 7, 2002, Xcel filed reply comments.

On February 12, 2002, the Commission issued an ORDER DENYING REQUEST FOR ORDER TO SHOW CAUSE AND REQUIRING REPORT, INFORMATION, AND CONSULTATION.

On September 12, 2002, Xcel filed a petition for approval of a Power Purchase Agreement (PPA) between Manitoba Hydro (MH) and Xcel.

On October 21, 2002, the Department filed comments recommending approval of the PPA.

On October 21, 2002, the Pimicikmak Cree Nation (PCN) filed a petition requesting a contested case hearing on the PPA.

Finally, on October 21, 2002, the Minnesota Witness for Environmental Justice (MWFEJ) and the Clean Water Action Alliance of Minnesota (CWAA) filed comments on the PPA as well.

II. SUMMARY OF THE PCN'S, MWFEJ'S AND CWAA'S POSITIONS

A. PCN'S POSITION

The PCN's position is supported by Minnesotans for an Energy Efficient Economy (ME3) and the Izaak Walton League (IWL). The PCN argues that there are material facts in dispute. Therefore, based on Minn. Stat. § 14.02, subd. 2, Minn. Stat. § 216B.2422, subd. 3, and Minn. Rules 78.0500, subp. 3, PCN requests that the Commission set a contested case hearing on the material facts in dispute. According to PCN, the material facts in dispute are:

- the environmental and socioeconomic costs; and
- the internalization of these costs.

The Department fully discusses these issues later in these comments.

B. *MWFEJ'S AND CWAA'S POSITIONS*

1. *MWFEJ's*

MWFEJ's comments do not analyze any specific features of the PPA. Instead, their comments allege that:

- the PPA does not appropriately account for the environmental and socioeconomic impacts of the MH project, and
- the power provided by MH may not be sufficiently reliable.

2. *CWAA*

CWAA does not provide independent comments. Instead, CWAA supports the comments submitted by MWFEJ.

III. **DEPARTMENT ANALYSIS**

A. *DISCUSSION OF PCN'S COMMENTS*

The Department offers the following discussion regarding PCN's request to set the PPA for a contested hearing.

1. *PCN's Legal Arguments*

PCN's request for contested hearing for the PPA is based on the following rules and statutes:

- Minnesota Rule 7829.1000; Referral for Contested Case Proceeding;
- Minnesota Rule 7843.0500; Commission Review of Resource Plan;
- Minnesota Rule 7843.0300; Filing Requirements and Resources;
- Minnesota Statutes § 14.02 and § 14.57; and
- Minnesota Statute § 216B.2422. subd. 3.

According to PCN, the PPA will affect the legal rights of PCN. Therefore, the PCN can request a contested hearing based on Minn. Stat. § 14.02, subd. 2 and Minn. Stat. § 14.57. Minn. Stat. § 14.57 states:

- (a) an Agency shall initiate a contested case proceeding when one is required by law.

According to the definition in Minn. Stat. § 14.02, subd. 2, the Commission falls under the definition of "Agency."² The Department notes that Minn. Stat. § 14.02 and Minn. Stat. § 14.57 themselves are not sufficient to allow a contested case proceeding regarding the PPA between Xcel and MH. PCN must still show that a contested case proceeding regarding the PPA is required under law. It could be argued that the legal support for a contested case in this proceeding is supported by Minnesota Rule 7829.1000, which states:

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

Based on the above discussion, the Department concludes that the Commission clearly has the right to send the case to a contested case hearing, but is not obligated to do so unless there are material facts in dispute that affect the public interest under the Commission's jurisdiction.

PCN also argues that a contested case hearing is required based on Minn. Stat. § 216B.2422, subd. 3 and Minnesota Rule 7843.0500, subp. 3. Both require consideration, in resource selection, of the impacts of environmental and socioeconomic costs. The PCN argues that the environmental and socioeconomic costs are material facts in dispute, and therefore, should be set for a contested case hearing. Again, the Department concludes that the Commission may set these issues for contested case hearing if there are material facts in dispute that affect the public interest under the Commission's jurisdiction. However, as discussed below, the Department concludes that there are no such material facts in dispute in these proceedings for the Commission to decide and, therefore, no need for a contested case hearing.

² Minnesota Statute §14.02 defines "agency" as:

...any state officer, board, commission, bureau, division, department, or tribunal, other than a judicial branch court and the tax court, having a statewide jurisdiction and authorized by law to make rules or to adjudicate contested cases. "Agency" also means the capitol area architectural and planning board.

2. Discussion of PNG's Request for a Contested Case

a. Introduction

The Department recommends that the Commission approve the PPA if, and only if, it is consistent with the public interest under the Commission's jurisdiction. The Department notes that the PPA between Xcel and MH is the final step in the resource selection that originated from Xcel's 2000 resource plan (Docket No. E002/RP-00-787). Therefore, the criteria by which the appropriateness of the PPA should be judged is dictated by the Resource Planning Statute (Minnesota Statute § 216B.2442). Subd. 2 of Minnesota Statute 216B.2442 states:

The Commission shall approve, reject, or modify the plan of a public utility, as defined in section 216B.02, subdivision 4, consistent with the public interest.

This view that the need for a contested case must be determined based on the public interest is supported by the PCN, which states:

A contested case hearing is required to develop a factual record upon which the Commission can make specific factual findings regarding the environmental and socioeconomic costs of the Manitoba Hydro Project. These are material facts with respect to the Commission's public interest determination which are presently in dispute (page 2 of PCN's filing).

Therefore, we recommend that the Commission set a contested case hearing for the PPA only if it is consistent with the public interest. Further, based on the following discussion, the Department concludes that a contested case hearing on the PPA is not consistent with the public interest and is likely to negatively impact the public interest.

b. A Contested Case Hearing is Inconsistent with the Public Interest

PCN argues that the environmental and socioeconomic costs and the internalization of these costs are material facts in dispute, which impact the public interest. These issues are not new. The PCN has been an intervenor in the bidding process, Docket No. E002/M-99-888, since Xcel announced its short list selection. On September 29, 2000, the Commission issued an Order granting PCN its request to intervene in the selection step of the bidding process. Since then, PCN filed various comments, essentially claiming that the selection of MH is inappropriate because Xcel failed to correctly account for the environmental and socioeconomic costs of the MH project.

On September 1, 2000, the Department, Xcel, and Manitoba Hydro filed comments concluding that Xcel appropriately applied the environmental and socioeconomic costs to the selection of MH. On February 7, 2001, the Commission issued ORDER REJECTING REQUESTS FOR FURTHER INVESTIGATION, APPROVING FINAL BID SELECTIONS, AND OPENING DOCKET REGARDING EXTERNALITY VALUES.

In the Finding and Conclusions section of the above Order the Commission states in paragraphs C and F:

C. Commission Action

Having examined the Brandon emissions argument, the Commission is not persuaded to require a recalculating of Manitoba Hydro's bid. At the hearing, Manitoba Hydro clarified that it provided NSP with system-wide emissions data in connection with its bid. In evaluating the Manitoba Hydro bid, then, NSP did not disregard the thermal-generation factor. Manitoba Hydro provided and NSP ascribed thermal externality costs to Manitoba Hydro's bid based on the percentage of Manitoba Hydro's total generation (systemwide) that is thermally generated. This approach appears appropriate and reasonably takes in to consideration the externality costs of the electricity to be provided pursuant to this contract (Section V, part C.)

and

F. Commission Action

Minnesota Statutes, Section 216b.2422, subdivision 3, requires that the Commission, to the extent practicable, quantify and establish a range of environmental costs associated with each method of electricity generation. The Commission established interim values in 1994, and permanent values in 1997. The statutes also requires utilities to use these environmental costs values in conjunction with other external factors, including socioeconomic costs, when evaluating and selecting resource options in all proceedings before the Commission.

The Commission finds that proper consideration of the socioeconomic impacts of Manitoba Hydro's current bid does not alter NSP's selection of Manitoba Hydro. Under the unique facts of this case, the Commission deems the socioeconomic impacts of this generation be to adequately internalized by Manitoba Hydro

pursuant to the December 16, 1977 Northern Flood Agreement (NFA or "the treaty"). Accordingly, the Commission finds no reason to initiate a process aimed at further accounting for those costs. (Section VI, part F.)

In summary, the Commission has determined that Xcel correctly applied environmental and socioeconomic costs to the evaluation and selection of the MH's project.

The records on the issues of environmental and socioeconomic costs in that proceeding are voluminous. Based on these records, the Commission determined that environmental and socioeconomic costs were appropriately accounted for by Xcel in its selection of MH. Yet, without any additional significant new information, PCN continues its efforts to delay or prevent the selection of the MH project. Such attempts by PCN negatively impact the public interest by adding more administrative costs to a proceeding in which the MH project has already been selected as a reasonable and reliable source of energy for Xcel's ratepayers.

The Minnesota Statutes and Rules associated with this proceeding are applicable to Minnesota only. Therefore, as far as these statutes and rules are considered, the "public interest" concept applies, under the most generous interpretation, to all the people living in Minnesota, and under a more strict interpretation to Xcel's ratepayers that are directly impacted by the PPA between MH and Xcel. Even if, as a result of the PPA, MH has caused incremental environmental and socioeconomic costs to PCN (this issue is discussed further below), any remedy to address such incremental costs lies within the domain of the involved parties in Canada (MH, Canadian government institutions, PCN and other affected parties in Canada) and not with the Minnesota Commission.

The continuous efforts of PCN to derail MH's project without any new significant information is inconsistent with the public interest of ratepayers in Minnesota. Such an action by PCN would result in unnecessary wasteful use of resources of the Department, the Commission, Xcel and MH. Such a wasteful use of resources, forced on these parties by the actions of PCN, would be costly to Xcel's ratepayers.

Moreover, MH's project is perhaps the least risk, most simple project that can be selected under the competitive bidding process. Essentially, it is merely a continuation of an existing 500 MW contract between MH and Xcel (while the terms of the new contract may be different than the terms of the existing contract, the differences do not significantly impact the public interest). It requires no new construction of generation facilities or transmission facilities and, therefore, minimizes the business and financial risks associated with the PPA.

The negative effects of PCN's efforts could extend beyond the current PPA. Delaying approval of the PPA and sending it to a contested case hearing would send potential bidders in future all source bids a signal that it may be costly and risky to submit competitive bids in Minnesota. Such an outcome would likely significantly reduce the number of bidders willing to participate in competitive bidding process in Minnesota. As a result of fewer participants, future resource selections may be significantly more costly to Xcel and, therefore, to Xcel's ratepayers. For all of these reasons, the Department concludes that setting the PPA for a contested case in this proceeding would be harmful to the public interest now and in the future.

c. Environmental and Socioeconomic Costs as Material Facts in Dispute

PCN argues that there exist two material facts in dispute which affect the public interest. According to PCN these two material facts are:

- the environmental and socioeconomic costs of the MH project, and
- the degree to which the above mentioned costs were internalized.

Below is the Department's discussion of these issues.

i. Background

Minnesota Rules 7843.0500, subp. 3 requires the Commission to evaluate resource options using minimization of adverse socioeconomic effects and adverse effects upon the environment as one of five factors in such an evaluation. Additionally, Minnesota Statute § 216B.2422, subd. 3 states:

Subd. 3. **Environmental costs.** (a) The commission shall, to the extent practicable, quantify and establish a range of environmental costs associated with each method of electricity generation. 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.

PCN argues that the Commission failed to appropriately consider environmental and socioeconomic costs because the Commission has determined that such costs were internalized by MH. The Department notes that, to the degree these costs were internalized, the Commission's decision on environmental and socioeconomic costs is appropriate. The Department will discuss the issue of internalized costs under section (iii) below.

Regarding the application of the above mentioned Minnesota Statute and Rule, the Department notes that on January 3, 1997, the Commission issued an ORDER ESTABLISHING ENVIRONMENTAL COST VALUES. In this Order the environmental costs of emissions from plants located further than 200 miles from Minnesota were found to be zero. MH's hydro plants are located outside the 200 miles zone and, therefore, the valuation of MH's proposal should only include environmental costs associated with its natural gas fueled plants.

Additionally, on May 3, 2001, the Commission issued an Order in Docket No. E999/CI-00-1636. In Section D of the FINDINGS AND CONCLUSIONS the Order states:

Having considered the matter carefully, the Commission will not pursue establishing generic cost values for generic categories of socioeconomic damages: nor will it pursue establishing a checklist (framework) for consideration of socioeconomic cost in future dockets.

The Commission's Order further states the Commission's finding that:

In sum, the Commission finds that attempting to establish generic socioeconomic costs or even a list of socioeconomic categories as a framework for future examination of socioeconomic issues is not a practical or reasonably productive use of regulatory resources. Socioeconomic impacts are varied and case-specific. Socioeconomic benefits would have to be offset against costs, immeasurably complicating any attempt to quantify impacts. In these circumstances, the current practice of considering socioeconomic impacts qualitatively in individual proceedings remains appropriate.

However, the Commission stated that parties may raise socioeconomic issues if such issues are applicable to any specific case considered by the Commission. The Department discusses environmental and socioeconomic costs associated with this PPA in the next section.

ii. Environmental Costs and Socioeconomic Costs

PCN argues that the value of environmental and socioeconomic costs is a material fact in dispute. The Department disagrees for the following reasons.

First, the value of environmental and socioeconomic costs has already been decided in this proceeding. The Commission determined that the best estimate of the environmental and socioeconomic costs is the monetary value established by the Northern Flood Agreement. It represents a consensus between four of the five affected First Nations, with PCN as the only exception. As noted earlier in this proceeding, the dispute between MH and PCN over the implementation of Northern Flood Agreement has lasted for many years and cannot be resolved by the Commission. The environmental and socioeconomic impacts have been subject to many negotiations and agreements among the Canadian Government, Manitoba Hydro and the Cross Lake Cree Nation. These Parties are the best equipped to deal with this issue and the Commission should not intervene in the dispute between Manitoba Hydro, the Cree Nations and the Canadian Government.

Second, under the PPA no new construction is planned to meet the terms of the agreement. The new PPA will simply extend (with some changes) an existing 500 MW contract between Xcel and MH. The major change is that the new PPA will result in a load factor of 48 percent instead of 75 percent. PCN argues that such a change will greatly impact the operation of MH's electric system. This argument is not well supported. Based on Xcel's response to the Department inquiry, PCN's claim is not valid. The response states:

The change in the terms of the contract from 75 percent capacity factor to a 48 percent capacity factor will not impact Jenpeg operations. Jenpeg is primarily a control structure and the contract terms and power delivery will not affect the operation of the control structure as the sale is being made out of dependable resources. (Dependable resources are the minimum resources in the system.) The generation system is dispatched on a daily basis in response to the spot market price for power. The market price is independent of the water supply, Manitoba firm load and/or firm exports.

Moreover, in another response to the Department's information request, Xcel states:

The 500 MW sale is being made out of dependable resources of the power system and it will operate the same regardless of whether this sale is in place or not.

(Our assumptions on dependable flow are based on a flow matching the lowest water level conditions on record. Should it occur, this base is sufficient to meet our firm domestic load and have surplus power generation available for sale including exports.)

Under a situation where the sale to Xcel is not made, the unsold energy would be available to be sold as either short term firm or interruptible power resulting in no change in operation.

Our system operation and hence Jenpeg, primarily a control structure, will not change in order to meet the sale. Furthermore, Jenpeg's operation will not change if the sale is not in place as we still have to operate the water system and reservoirs regardless of market demand. The existing sale to NSP has been in place since 1993 and had no impact on Lake Winnipeg regulation or the Churchill River Diversion as they have been operated in the same manner since 1976.

In other words, even if the PPA were rejected, such a rejection would have no impact on the environmental and socioeconomic costs of the MH electric system. Based on the above discussion the Department concludes that:

- The costs of the environmental and socioeconomic impacts have already been decided in this proceedings and no new relevant issues have been raised.
- The incremental environmental and socioeconomic costs (if any) associated with MH's project do not affect the public interest under the Commission's jurisdiction, because they are outside the zone of relevancy of 200 miles.
- All the environmental and socioeconomic costs associated with the PPA pertain to historical factors and, therefore, there are no incremental environmental and socioeconomic costs associated with the PPA. Since there are no new environmental or socioeconomic costs with the contract extension, the appropriate value to assign to these costs is zero.
- Any dispute among various Canadian parties should be resolved by the parties involved in the Northern Flood Agreement, not by the Minnesota Commission.

In sum, the Commission has already addressed environmental and socioeconomic costs in this proceeding. Moreover, there are no incremental environmental and socioeconomic costs associated with the contract extension under the PPA. Therefore, there exist no new material facts regarding these costs to be decided by this Commission.

iii. Internalization of the Environmental and Socioeconomic Costs

The PCN argues that the degree to which the environmental and socioeconomic costs were internalized is a material fact in dispute. The Department disagrees. The price of MH's project reflects the costs of the NFA's implementation agreement with four of the five First Nations people. To date, the payments from MH to the four First Nations total \$819,910,310. These payments do not include payments from the Canadian and Manitoba governments. MH is still in negotiation with PCN regarding the implementation of the Northern Flood Agreement, but has paid PCN about \$64 million to date.

As four of the five First Nations People have reached an agreement with MH regarding the environmental and socioeconomic costs, and MH has paid significant amount of money to PCN on account of its environmental and socioeconomic costs, the PPA largely internalizes these costs. Moreover, since the PPA is a ten year contract starting in 2005, it reflects all MH's expected environmental and socioeconomic costs as reflected in the ongoing implementation of the Northern Flood Agreement. These expected costs include both the agreed upon compensations to be paid to the four First Nations People and the expected environmental and socioeconomic costs to be paid to PCN. The actual environmental and socioeconomic costs to be paid by MH to PCN in the future may be smaller or larger than their expected costs. However, from proper resource and risk allocations point of view, the expected environmental and socioeconomic costs are appropriate costs to be included and internalized in the PPA.

PCN may believe that the Implementation Agreements of the Northern Flood Agreement do not fully compensate the First Nations People for their environmental and socioeconomic costs. That may or may not be true. However, the appropriate remedy to pursue this issue would not be with the Minnesota Commission. For this proceeding, it is appropriate to conclude that, given these Agreements and the current state of negotiations between MH and PCN, the environmental and socioeconomic costs are appropriately internalized by MH by using the expected values of the environmental and socioeconomic costs to be paid by MH to PCN.

In summary, based on the above discussion, the Department concludes that the environmental and socioeconomic costs of MH's project are appropriately reflected in the PPA and there exist no material facts in dispute for the Commission to decide regarding this issue.

B. CONCLUSIONS

Based on its review and analysis of PCN's comments the Department concludes that:

1. There are no material facts in dispute that affect the public interest under the Commission's jurisdiction and, therefore, sending the PPA to a contested case hearing is not warranted.
2. Moreover sending the PPA to a contested case hearing would negatively impact the public interest and Xcel's current and future competitive bidding process.
3. The Commission has already decided the issues of the costs of the environmental and socioeconomic impacts in this proceeding.
4. The incremental environmental and socioeconomic costs (if any) associated with MH's project do not affect the public interest under the Commission's jurisdiction, because they are outside the zone of relevancy of 200 miles.
5. There exist no incremental environmental and socioeconomic costs associated with the contract extension under the PPA. All the environmental and socioeconomic costs pertain to historical factors and, therefore, the appropriate value for these costs is zero.
6. Any dispute among various Canadian parties should be resolved by the parties involved in the Northern Flood Agreement, not by the Commission.
7. Based on conclusions 3 through 6, there are no new environmental and socioeconomic costs associated with the PPA to be decided in this proceeding.
8. The environmental and socioeconomic costs of MH's project are appropriately internalized in the PPA and there exist no material facts for this Commission to decide regarding this issue.

B. MWFEJ'S AND CWAA'S COMMENTS

1. Introduction

CWAA does not provide independent comments, but supports MWFEJ's comments. MWFEJ does not provide any specific comments about the features of the PPA. Instead, MWFEJ claims that:

- The PPA does not appropriately account for the environmental and socioeconomic costs of the MH's project.

- The power provided by MH's project may not be sufficiently reliable.

2. *Department Analysis*

a. Environmental and Socioeconomic Issues

MWFEJ argues that there are not sufficient government controls and regulation in Canada to enforce the law regarding environmental and socioeconomic costs. Moreover, it argues that the Northern Flood Agreement is not being appropriately implemented. Finally, it suggests that the Commission open its own investigation of the environmental and socioeconomic costs of MH's project. The Department has discussed at length these issues in its analysis of PCN's comments. It is sufficient to note that:

- There are no new environmental and socioeconomic impacts associated with the contract extension under the PPA. All the environmental and socioeconomic impacts pertain to historical factors and rejection of the PPA would have no impact on the environmental and socioeconomic costs of the MH electric system.
- As discussed earlier in these comments, the environmental and socioeconomic costs were properly internalized by MH.
- the environmental and socioeconomic costs of MH's project must be resolved in Canada by all the Canadian parties involved in the Northern Flood Agreement and not by the Minnesota Commission.

In summary, counter to the claim by the NWFEJ, the environmental and socioeconomic effects of MH's project were appropriately considered in the PPA.

b. Reliability Issues

MWEJ provides no specific argument supporting its claim that reliability is an issue in this PPA. The Department discussed this issue in detail in its Comments and concluded that the PPA contains sufficient provisions to provide reliable power to be delivered from MH to Xcel. Additionally, Xcel's response to the Department's Information Request Nos. 9 and 14 shows that MH has sufficient capacity to meet the energy and capacity requirements as stated in the PPA. Based on the above discussion the Department concludes that MWFEJ's concerns about reliability are without merit.

III. CONCLUSIONS AND RECOMMENDATIONS

A. CONCLUSIONS

Based on its review and analysis of the Comments of PCN, MWFEJ and CWAA and based on additional information provided by Xcel the Department concludes that:

1. The Commission has already decided the environmental and socioeconomic costs in this proceeding.
2. All the environmental and socioeconomic costs associated with MH's hydro electric system pertain to historical factors. There are no incremental environmental and socioeconomic costs associated with the contract extension under the PPA. That is, rejection of the PPA will have no impact on the environmental and socioeconomic costs of the NH electric system.
3. The allocation of environmental and socioeconomic costs among the parties in Canada must be decided by MH, the Manitoba government, the Canadian government and the five First Nations, and not by the Minnesota Commission.
4. The internalization of the environmental and socioeconomic costs is not a material fact in dispute and requires no contested case hearing.
5. The PPA appropriately reflects the internalization of all the relevant environmental and socioeconomic costs.
6. Sending the PPA to a contested case hearing would not be consistent with the public interest. In fact, such an action would negatively impact the public interest of Minnesota ratepayers.

B. RECOMMENDATIONS

Based on its analysis and conclusions in these and previous comments the Department recommends that the Commission:

1. Reject PCN's request to send the environmental and socioeconomic costs and the internalization of these costs to a contested case hearing.
2. Approve the PPA between MH and Xcel.

3. Approve Xcel's cost recovery proposal with the following two conditions:
 - a. In each month in which Xcel purchases supplemental energy, Xcel must file a report with the Commission showing that the price paid for the supplemental energy was competitive. This report may be included with the monthly FCA filings for the relevant months but must be highlighted. Failing to show it may result in disallowance of the recovery of such costs.
 - b. In each month in which Xcel fails to purchase the full amount of the Minimum Guaranteed Energy, Xcel must file a report with the Commission showing that its action was prudent. This report may be included with the monthly FCA filings for the relevant months but must be highlighted. Failing to show it may result in disallowance of the recovery of the costs associated with the amount of energy paid for, but not taken by Xcel.

/sm

STATE OF MINNESOTA)
) ss
COUNTY OF RAMSEY)

AFFIDAVIT OF SERVICE

I, Kathy Aslakson, on the 8th day of November, 2002, served the attached MN Department of Commerce Reply Comments

MN PUC DOCKET NUMBERS: E002/M-99-888

- XX by depositing in the United States Mail at the City of St. Paul,
a true and correct copy thereof, properly enveloped with
postage prepaid
- XX by personal service (MN PUC)
by delivery service
by express mail

to all persons at the address indicated below and/or on the attached list:

see attached list

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November 5, 2002

Our File No. 90,470-3-6-6

DELIVERED

Dr. Burl W. Haar
Executive Secretary
Minnesota Public Utilities commission
121 7th Place East, Suite 350
St. Paul, Minnesota
U.S.A. 55101-2147

Dear Dr. Haar:

**Re: Reply Comments by Split Lake Cree First Nation
Petition of Northern States Power Company dba
Xcel Energy for Approval of a Power Purchase Agreement
with Manitoba Hydro; Docket No. E002/M-99-888**

We enclose the original and 15 copies of the reply comments of Split Lake Cree First Nation to the comments of Pimicikamak Cree Nation by way of Petition for a Contested Case Hearing, supported by Minnesotans for an Energy Efficient Economy and the Izaak Walton League, and to the comments of Minnesota Witness for Environmental Justice.

Copies have been mailed to all parties on the service list.

Yours truly,

CAMPBELL, MARR

Per:



Douglas J. Mackenzie,
Legal Counsel to
Split Lake Cree First Nation
DJM/lks

Encls.

cc: Service List



PROVINCE OF MANITOBA)
)ss.
CANADA)
)

AFFIDAVIT OF SERVICE
BY MAIL

Lisa Sparrow, of the City of Winnipeg, in the Province of Manitoba, Canada, being first duly sworn, says that on the 5th day of November, 2002, she served the annexed **REPLY COMMENTS OF SPLIT LAKE CREE FIRST NATION** on the individuals listed below in this action, by mailing to said individuals a copy thereof, enclosed in an envelope, by depositing the same in the post office of Winnipeg, Manitoba, Canada, direct to said individuals at their last known addresses.

(Attached Service List)



Lisa Sparrow

Subscribed and Sworn to before
me this 5th day of November, 2002.



Notary Public

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Barrister, Solicitor, Notary Public
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In the matter of NSP review of its
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BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

REPLY COMMENTS OF SPLIT LAKE CREE FIRST NATION

DOCKET NO. E002/M-99-888

PETITION OF NORTHERN STATES POWER DBA XCEL ENERGY FOR APPROVAL OF A POWER PURCHASE AGREEMENT WITH MANITOBA HYDRO

REPLY COMMENTS TO: (I) The Comment of Pimicikamak Cree Nation by way of Petition for a Contested Hearing
(II) The Comments of Minnesota Witness for Environmental Justice

(I) Reply Comments to the Comments of Pimicikamak Cree Nation by way of a Petition for a Contested Hearing

Although the Pimicikamak Cree Nation's (PCN) Petition for a Contested Case Hearing contains a number of assertions, the central themes in the petition are:

1. That PCN requests a contested hearing because, PCN alleges, there are material facts in dispute that the Public Utilities Commission (Commission) must consider under the scrutiny of a contested hearing, in order for the Commission to consider the environmental and socioeconomic costs associated with this resource decision; and
2. That the Commission erred when it "assumed" the environmental and socioeconomic costs of the Manitoba Hydro Project were internalized (see pages 1, 2, 5, 10, 12 and 13 of the PCN Petition). PCN alleges that in the result, the Commission must examine all disputed environmental and socioeconomic impacts of Manitoba Hydro's projects, and suggests that a one to three day hearing would be sufficient for the presentation of its case (pages 2 and 3 of the PCN Petition).

The PCN Petition is consistent with a PCN Press Release issued on October 22, 2002, stating that PCN had delivered its submission to the Commission calling for a contested case hearing into the environmental and socioeconomic harms from the Churchill-Nelson Rivers Project in northern Manitoba, and in which PCN stated:

"The Minnesota Public Utilities Commission (MPUC) is obligated by Minnesota Law to consider the environmental and socioeconomic consequences of every 'resource option'.

..

In February, 2001, the MPUC seemingly washed its hands of the issue by stating that the existence of the 1977 Northern Flood Agreement (NFA) which promises remediation, mitigation and compensation to Pimicikamak and other affected peoples ensures that social and environmental costs have been taken care of (internalized). The MPUC assumed that the NFA has achieved the fairness and equity it promises, without any factual evidence of NFA compliance; as if the existence of an IOU means a debt has been taken care of. In fact, extensive evidence exists to show that despite the NFA, Pimicikamak lands and people continue to bear the ongoing and accumulating socio-environmental costs of the industrial project in their watershed."

This is the core argument found within the PCN Petition, and the Split Lake Cree Nation (SLCN) respectfully submits that the Petition should fail.

The Commission, in its Order Rejecting Requests for Further Investigations, Approving Final Bid Selections, and Opening Docket Regarding Externality Values, issued February 7, 2001, in Docket E-002/M-99-888 (the "Order"), correctly outlined the procedural history, including the fact that the Commission convened a hearing on November 30, 2000, at which testimony was given and documents were tendered as exhibits in order that the Commission could determine whether it should launch an investigation into the environmental and socioeconomic externalities associated with Manitoba Hydro's bid.

On page 15 of its Order, the Commission properly noted that:

"Minnesota Statutes, Section 216B.2422, Subdivision 3, requires that the Commission, to the extent practicable, quantify and establish a range of environmental costs associated with each method of electricity generation. The Commission established interim values in 1994, and permanent values in 1997. The statute also requires utilities to use these environmental cost values in conjunction with other external factors, including socioeconomic costs, when evaluating and selecting resource options in all proceedings before the Commission."

The Commission was therefore fully aware of its statutory obligations when it then made the following finding, on page 15 of its Order:

"The Commission finds that proper consideration of the socioeconomic impacts of Manitoba Hydro's current bid does not alter NSP's selection of Manitoba Hydro. Under the unique facts of this case, the Commission deems the socioeconomic impacts of this generation to be adequately internalized by Manitoba Hydro pursuant to the December 16, 1977, Northern Flood Agreement (NFA or "the treaty"). Accordingly, the Commission finds no reason to initiate a process aimed at further accounting for those costs."

The Commission heard testimony on November 30, 2000, that PCN believes it is bearing environmental and socioeconomic costs that have not been remediated or compensated. Those facts were not disputed and lead the Commission to conclude, on page 16 of its 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."

Accordingly, PCN assertions that the "MPUC assumed that the NFA has achieved fairness and equity it promises. . ." is simply wrong.

On November 30, 2000, the Commission heard testimony with respect to the 1977 Northern Flood Agreement (NFA) among Canada, Manitoba, Manitoba Hydro and five Cree tribes (including PCN), including the fact that the NFA is a treaty that provides, through arbitration, a mechanism for dealing with all adverse effects of the Manitoba Hydro project borne by PCN. The facts relating to the NFA, and its provisions relating to arbitration, were not disputed by PCN or any other party. The NFA was filed as part of an exhibit in the November 30, 2000, proceedings. This testimony allowed the Commission to conclude on page 16 of its Order:

"In signing the NFA, however, 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."

SLCN submits, based on the testimony submitted on November 30, 2000, that the relief available through arbitration under the NFA goes further, and it is apparent that the Commission acknowledged that the comprehensive relief available under the NFA was wider in scope than compensatory payment. The Commission stated on page 16 of its Order:

"Based on its review, the Commission finds that the treaty provides comprehensive relief for 'all the adverse results of the Project', i.e. the negative socioeconomic effects of the hydro projects at issue in this matter. The treaty states:

Uncertainty as to the effects of the Project, with respect not only to the Project as it exists at the date of this Agreement but also as it may develop in the future, is such that it is not possible to foresee all the adverse results of the Project nor to determine all those persons who may be affected by it, and, therefore it is desirable to establish through the offices of a single arbitrator a continuing arbitration instrument, to which any person adversely affected may submit a claim, and as well as to fully empower such arbitrator to fashion a just and appropriate remedy; . . .

The NFA contains specific provisions providing for compensation lands, wildlife and fishing rights, programs to compensate for adverse effects of 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 other matters."

The Commission then went on in its Order to provide illustrations of such comprehensive relief, and it is clear from the Order, that the Commission was cognizant of the undisputed testimony relating to the contents of the NFA and its application, allowing the Commission to conclude on page 18 of its Order:

"Based on this analysis, then, the Commission concludes that to the extent that socioeconomic costs have been or will be incurred by the PCN and its members due to the

generation in question, these costs are assumed to have been internalized by Manitoba Hydro and, hence, already reflected in its bid price. In these circumstances, the Commission finds that NSP has given adequate consideration to the socioeconomic costs as required by Minn. Stat. § 216B.2422, subd. 3 and no further examination and evaluation of Manitoba Hydro's bid in light of such costs is necessary."

The testimony that the Commission heard on November 30, 2000, was that all adverse effects of the Manitoba Hydro Project on PCN, whatever they may be, are 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 the use of arbitration under the NFA treaty.

There are matters in dispute between PCN and Manitoba Hydro. That is clear. However, the Commission need not examine the issues in dispute, because the NFA provides the opportunity for all PCN claims to be addressed.

SLCN submits that a contested hearing is unnecessary in these circumstances. However, SLCN must also comment that it believes that the estimate of the time required for a contested hearing, put forward by PCN in its Petition is wholly unreasonable.

PCN counsel has suggested that a hearing of one to three days, dependent upon the time required to cross examine witnesses, is estimated for the contested hearing into all disputed environmental and socioeconomic impacts of Manitoba Hydro's projects (pages 2 and 3 of the PCN Petition). PCN has expressed in public documents that it has over 300 claims with the NFA Arbitrator that remain outstanding. SLCN says that unresolved NFA matters are the subject of extensive hearings in Manitoba. By way of illustration, under one claim made by Canada against Manitoba Hydro under the NFA Arbitration process, Claim 138, tens of thousands of documents have been disclosed in discovery, over 100,000 questions have been asked on examinations for discovery over a period of more than two years, and more than 5,000 undertakings have been given. Expert reports by more than a dozen experts have been requisitioned. This claim relating to potable water has covered the breadth of the physical construction of the various hydro works, but is limited to potable water issues, and has not addressed, at this stage, any issues relating to effects on wildlife, habitat, fish, trapping, use of domestic resources, navigation, or several of the other important impacts referred to in the NFA. The hearing itself is estimated to require several months of testimony at the minimum. SLCN submits that any hearing relating to the socioeconomic and environmental costs relating to all of the Manitoba Hydro Projects, if contested, would involve weeks, if not months, or even years of testimony.

It is the position of SLCN that any contested issues relating to environmental and socioeconomic impacts of Manitoba Hydro's projects are being or are able to be dealt with through arbitration under the NFA and that this arbitration process allows any outstanding claims of PCN to be internalized by Manitoba Hydro for the purposes of the Commission approving the Agreement.

(II) Reply Comment to Comments of Minnesota Witness for Environmental Justice

Minnesota Witness for Environment Justice (MWEJ) makes the statement that environmental affects and socioeconomic effects of each method of electric generation must be considered, and claims that externalities have not been taken into account. This premise is based upon the same erroneous position expressed by PCN, that the Commission did not take into account these issues when, in fact, by its Order, the Commission had.

In expressing the options that MWEJ suggests are available to the Commission, MWEJ fails to take into account that the undisputed testimony of November 30, 2000, shows that all environmental and socioeconomic costs can be dealt with under the NFA. If PCN has not had all of those costs dealt with by implementation or arbitration in the 25 years since the NFA has been signed, that is something that the Commission might sympathize with, as the Chairman indicated in the November 30th hearing itself, but it is not something that the Commission should now deal with. The Commission cannot substitute its judgment for that of the leaders of PCN who determined, in 1977, that arbitration should be the mechanism for having all adverse effects of the Manitoba Hydro projects dealt with, if mutual agreement on implementation measures cannot be reached.

There is no basis or reason on which the Commission should establish an independent body to see that the NFA is fulfilled, or to conduct a study or to reject the PPA.

SLCN accordingly recommends approval of the Agreement.

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November 8, 2002

Burl W. Haar
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Re: *In the Matter of the Petition of Northern States Power Company d/b/a Xcel Energy for
Approval of a Power Purchase Agreement with Manitoba Hydro*
MPUC Docket No. E-002/M-99-888

Dear Dr. Haar:

Enclosed for filing are 15 copies of the Reply Comments of Manitoba Hydro regarding the above referenced matter. Also enclosed is our Affidavit of Service.

Please feel free to contact me if you have any questions.

Very truly yours,

WINTHROP & WEINSTINE, P.A.

By -



Eric F. Swanson

EFS:mtb//Enclosure//idmsstp:667322_1

cc: All Parties on attached Service List

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott
Marshall Johnson
LeRoy Koppendraye
Phyllis Reha

Chair
Commissioner
Commissioner
Commissioner

MPUC Docket No. E-002/M-99-888

In the Matter of the Petition of
Northern States Power Company d/b/a
Xcel Energy for Approval of a Power
Purchase Agreement with Manitoba Hydro

**REPLY COMMENTS OF
MANITOBA HYDRO**

Manitoba Hydro submits this Reply to the October 21, 2002 Initial Comments of the Department of Commerce ("Department"), Pimicikamak Cree Nation ("PCN") and Minnesota Witness for Environmental Justice ("MWEJ") regarding the Xcel Energy Petition for Approval of a Power Purchase Agreement ("PPA") with Manitoba Hydro. Manitoba Hydro is a Crown Corporation owned by the Province of Manitoba, with capital assets in service exceeding \$7 billion (CDN), making it the fourth largest electric utility in Canada. Manitoba Hydro has engaged in energy trading with Minnesota utilities for over 30 years and is pleased to have earlier been approved as a winning bidder in this bidding process and to now have its PPA with Xcel Energy before this Commission for approval.

As discussed below, Manitoba Hydro recommends that the Commission accept the recommendation of the Department in this matter and approve the PPA. As the Department's comments demonstrate, the PPA is "in the best interest of Xcel's ratepayers." *Department Comments*, p. 16. Manitoba Hydro further recommends that the Minnesota Public Utilities Commission ("Commission") deny the PCN Petition for a Contested Case Hearing and decline the MWEJ recommendations including its recommendation that the Commission reject the PPA.

Neither PCN nor MWEJ provide a discussion of how this PPA fails to be in the public interest. Rather, these parties reargue positions already thoroughly explored and properly rejected by the Commission at earlier stages of this bidding process.

I. PROCEDURAL HISTORY.

Xcel's petition for approval of this PPA culminates an over three year process that has been overseen from day one by this Commission and involved an open bidding process with multiple parties submitting bids. During the course of this bidding process, various parties have had numerous opportunities to file comments and have presented oral and documentary evidence to the Commission. Indeed, Manitoba Hydro itself has previously filed comments with the Commission in March and September of 2000, after the announcement of the "short list" and the final selection of the winning bidders in this process. Further, Manitoba Hydro, along with Xcel, the Department, PCN and two other Canadian First Nations, presented oral argument before the Commission in a day-long hearing in November of 2000. At the conclusion of that hearing, the Commission approved the selection of Manitoba Hydro as a winning bidder and rejected PCN's request for further investigation of a number of issues, including the issue of socioeconomic costs. *Order Rejecting Requests for Further Investigation, Approving Final Bid Selections, and Opening Docket Regarding Externality Values, February 7, 2001 ("February 2001 Order")*. The Commission specifically found that, in the circumstances presented by this case, "NSP has given adequate consideration to the socioeconomic costs as required by Minn. Stat. § 216B.2422, subd. 3 and no further examination and evaluation of Manitoba Hydro's bid in light of such costs is necessary." *Id.*, p. 19.

Following the Commission's approval of the selection of Manitoba Hydro as a winning bidder in this docket, Xcel and Manitoba Hydro negotiated the Power Purchase Agreement

currently before the Commission. At this final stage of the bidding process, the issue before the Commission is whether or not this PPA is in the public interest and should be approved. The Department has thoroughly analyzed the PPA and recommends approval, concluding that the PPA is in the best interests of Xcel ratepayers. Manitoba Hydro agrees and looks forward to continuing its longstanding relationship with Xcel.

In contrast to the Department's thorough analysis of this PPA, PCN and MWEJ have filed comments rearguing issues already thoroughly discussed and debated during the course of this proceeding. In so doing, both PCN and MWEJ essentially argue that the Commission's February 2001 Order was wrong and the Commission should not have approved the selection of Manitoba Hydro. *See e.g., PCN Memorandum*, p. 2. While the Commission certainly has the authority to revisit prior orders, neither PCN nor MWEJ provide any basis for doing so in this case. To the contrary, the Commission's 2001 Order correctly found no basis for requiring further investigation of the socioeconomic issues again argued by PCN and MWEJ. The Commission appropriately approved Manitoba Hydro's selection as a winning bidder in this process and the Department's comments demonstrate that the PPA entered into by Manitoba Hydro and Xcel is in the public interest and should be approved.

II. REPLY TO THE DEPARTMENT OF COMMERCE.

The Department comments provide a thorough and accurate overview of the PPA. In addition, the Department comments demonstrate the thoroughness of the Department's review of this contract. 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. *Department Comments*, pp. 7-10. Further, the Department analyzed the potential operational or financial risks that may be associated with this contract,

examining the curtailment provisions, reliability issues, issues of credit-worthiness and other issues. *Id.*, pp. 11-16. Based on its review, the Department concluded that the PPA is in the best interest of Xcel's ratepayers because of the reasonableness of the pricing and the PPA's appropriate allocation of the financial and operational risks related to this contract. *Id.*, p. 16. As this analysis demonstrates, Xcel's PPA with this Commission-approved winning bidder is consistent with the public interest and should be approved.

III. REPLY TO PCN.

PCN's petition for a contested case hearing appears to rest on two arguments: PCN's argument that Manitoba Hydro, the Province of Manitoba and the Nation of Canada are not complying with the Northern Flood Agreement ("NFA" or "Agreement"), *See, e.g. PCN Memorandum, p. 10*, and PCN's assertion that this Commission proceeding somehow puts PCN's legal rights "at issue." *See, e.g. PCN Memorandum, p. 17*. Neither argument can support the call for a contested case hearing on this PPA. First, PCN's legal rights will not be affected by the Commission's decision on the PPA between Xcel and Manitoba Hydro.¹ Second, to the extent that PCN continues to have concerns regarding NFA compliance, now and in the future, the NFA provides the legal mechanism for addressing those concerns.

A contested case hearing is a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing. *See Minn. Stat. § 14.02, subd. 3*. Chapter 14 of Minnesota Statutes does not itself provide a right to a contested case hearing. Rather, it provides a procedure to be followed when such a right is granted. Thus, the Commission must initiate a

¹ PCN errs in suggesting that the Commission's approval of intervenor status for PCN somehow demonstrates that PCN's legal rights are at issue here. The Commission noted the interest of PCN is the socioeconomic issues raised by Manitoba Hydro's bid. This does not equate to a Commission finding that the bidding process or the current PPA impacts the legal rights of PCN. *See, Order Granting Intervention, September 29, 2000, p. 10*.

contested case proceeding only if the claimant has a right to a contested case hearing under: (a) a Minnesota statute; or (b) under the federal or state constitutions. *In re Implementation of Util. Energy Conservation Improvement Programs*, 368 N.W.2d 308, 312 (Minn. Ct. App. 1985).

In the current proceeding, no statute calls for a contested case hearing regarding a PPA. Indeed, the resource planning statutes and rules cited by PCN, while not directly applicable to a bidding process, make clear that contested case proceedings are not envisioned. *Minn. R. 7843.0300, Subp. 9*.

Where no statute specifically authorizes a Chapter 14 hearing, a party allegedly aggrieved by an agency action must rely on constitutional due process as a basis for its entitlement to a contested case hearing.

In re Request for Relocation of Deputy Registrar No. 112, 1994 WL 567666, *1 (Minn. Ct. App. Oct. 18, 1994).

With respect to a contested case hearing that descends from constitutional due process considerations:

The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to a prior hearing is paramount. But the range of interests protected by procedural due process is not infinite.

To have a property interest in the benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 569-70, 577 (1972) (as quoted by *Voettiner v. Comm'r of Educ.*, 376 N.W.2d 444, 448 (Minn. Ct. App. 1985)). Accordingly, a claimant demanding a contested case hearing on the basis of due process must demonstrate that they are in

danger of deprivation of either a liberty or property right protected by the Fourteenth Amendment.

The legal rights of PCN to address hydro project related impacts are contained within the 1977 NFA, already examined by the Commission at the earlier stages of this proceeding. The NFA, signed by Manitoba, Canada, Manitoba Hydro and the Northern Flood Committee representing the First Nations of York Factory, Split Lake, Nelson House, Norway House and Cross Lake Cree (PCN), was negotiated to address the impacts of the northern hydroelectric development projects. The rights of PCN contained within the NFA cannot be affected by the Commission's decision concerning the PPA. The Commission's decision necessarily affects only the ratepayers (and potentially the shareholders) of Xcel Energy. The Commission's decision in this docket simply cannot impair contractual obligations among national, provincial and First Nation governmental parties outside Minnesota.

The NFA was and is intended to address the impacts of the hydroelectric projects in Manitoba, including the Lake Winnipeg Regulation and the Churchill River Diversion. The Agreement recognized the uncertainty of the project impacts, both at the time of initial construction and into the future, and that it was not possible to foresee all of the impacts or who might be impacted by the project. Accordingly, the Agreement established an arbitration process and fully empowered the Arbitrator "to fashion a just and appropriate remedy;" (See the preamble to the NFA section E). Furthermore, the NFA set out the programs and principles for compensation or mitigation of the project impacts including land exchange provisions, navigation provisions, community infrastructure, trapping and fishing programs and others. *See, NFA Articles 3, 4, 5, 12 and 19.*

It is important to note that what PCN seeks in their petition -- a contested case hearing before an Administrative Law Judge -- duplicates the process and powers provided under the NFA arbitration process. PCN states that: "The Commission is simply wrong in 'assuming' that Manitoba Hydro has undertaken the remediation and mitigations initiatives required by the Northern Flood Agreement (NFA)." *PCN Memorandum*, p. 2. PCN would like the contested case hearing in Minnesota in order to put forward their premise the NFA has not been implemented. *Id.*, p. 10. This proposal, if allowed, would bypass the process set forth under the NFA, entered into by PCN, Manitoba, Canada and Manitoba Hydro.

Under the provisions of NFA, Article 24², the Arbitrator is provided a number of plenary powers. A critical section of the Article is section 24.6 which states:

24.6 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 provided that any recommendation which involves a mitigatory and/or remedial measure to be implemented by any party shall be dealt with as provided in Article 24.25 and Article 24.26. (Emphasis added.)

Article 24.24 is also critical as it sets out several methods that the Arbitrator can use to fashion remedies to the adverse effects of the project including "any further order he may deem to be appropriate in respect of a failure to comply with or give effect to any provisions of this Agreement or any matter arising out of this Agreement." The Agreement also provides the Arbitrator with:

- The power to hear any claim and determine if it arises directly or indirectly out of the project or arises by failure to comply with or give effect to any provision in the agreement, *See, NFA Article 24.7*;

² Article 24 is attached hereto as Exhibit A. The entirety of the NFA can be viewed on Manitoba Hydro's web site at www.hydro.mb.ca.

- the right to order interim compensation prior to determining any issue in totality; *See, Id., Article 24.9*; and
- the ability to hear any claim or matter before any actual damage has occurred. *See, Id., Article 24.17.*

Other provisions of the NFA should be noted as well. The NFA provides that the claimants may have counsel represent them and that the crown parties may fund the cost of counsel and technical experts for claimants under processes that are outlined in the Agreement. *See, NFA Article 24.35.* In addition, the Agreement provides a four (4) year window for the parties to file a claim with the Arbitrator from the date of the alleged cause of the claim becoming evident to the claimant. *See, id., Article 24.12.* Accordingly, if the project operations were to cause a new adverse effect, PCN has the right to file a claim for those effects under the NFA. The Arbitrator has the power to determine if the parties are in compliance with the NFA and assess damages in lieu of implementation or of full implementation or of implementation made on a timely basis. *See, id., Article 24.26.*

The NFA also has a reverse onus provision, which gives claimants an advantage on an evidentiary basis as it requires Manitoba Hydro to prove the project did not cause any adverse effects or damages claimed. Article 23.2 states:

The onus shall be on Hydro to establish that the Projects did not cause nor contribute to an adverse effect, where any claim arises by virtue of an actual or purported adverse effect of the Project.

Finally, the NFA provides that any appeal to an arbitrator's award must go to the Manitoba Court of Appeals. *See, id., Article 24.34.* Such appeals can be brought as to issues of law or jurisdiction only. *Id.*

These and other provisions within the NFA protect PCN's legal rights for addressing the impacts of the project and implementation of the Agreement. Furthermore, these rights are

protected for as long as the project is in place, whether Manitoba Hydro exports power or not. Therefore, any dispute concerning implementation of the NFA falls under the jurisdiction of the Agreement and the NFA Arbitrator.

The Commission understood this in its February 2001 Order when it stated:

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. In signing the NFA, however, 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.

Id., p. 16.

In its recent filing to the Canadian National Energy Board (“NEB”) challenging Canadian approval of this contract, PCN used language quite similar to the Commission’s Order. PCN argued, in part, “Manitoba Hydro has a legal obligation pursuant to the Northern Flood Agreement . . . to internalize (ensure bundling of) **ALL** impacts and costs causally related to the Project and perpetuated or exacerbated by the Contract.” *Submission from PCN to NEB, September 26, 2002, p. 3* (emphasis in original), attached as Exhibit B³. Given this statement, it seems odd that PCN now chastises the Commission for its February 2001 finding.

In contrast to the NFA, the PPA currently before the Commission provides the terms and conditions for Xcel’s purchase from Manitoba Hydro, a Commission approved winning bidder. As such, the PPA appropriately does not speak to any of the mitigation or remediation obligations to PCN as those obligations are contained within the NFA.⁴ Those obligations or

³ PCN seeks different relief from the NEB than requested from this Commission, arguing that the NEB should require specific mitigation measures to be taken. However, as it does before this Commission, PCN seeks to circumvent the NFA process. Manitoba Hydro is objecting to these PCN recommendations as the Canadian process for contract approval moves forward.

⁴ In fact, should additional compensation flow to PCN in the future from the NFA, Xcel and Minnesota ratepayers are protected from those costs by the terms of the PPA.

rights under the NFA do not relate to the export of power or to power purchases but relate to impacts from the project generally.

The Commission has already looked at the issue of impacts and whether or not Hydro has internalized the environmental and socioeconomic costs of the project. The Commission determined that the NFA provides the vehicle for that process. The Commission wisely and properly declined PCN's invitation to get itself involved in this Canadian process. The Commission should do so again and deny PCN's request for a contested case hearing. If PCN continues to object to the federal and provincial governments' and Manitoba Hydro's implementation of the NFA, PCN's avenue for redress is through the NFA, not through this Commission.

IV. REPLY TO MWEJ.

MWEJ's comments largely mirror the comments of PCN. MWEJ then recommends that the Commission become directly involved in NFA issues by "establish[ing] an independent body to see that the Northern Flood Agreement is fulfilled in its entirety." *MWEJ Comments, p. 11.* For all of the reasons discussed above, the Commission should not attempt to assume the role given the Arbitrator under the NFA.

In addition, MWEJ raises questions regarding the reliability of the power provided by Manitoba Hydro under this contract. MWEJ's concerns fail for primary reasons. First, Manitoba Hydro has a long and proud history of providing reliable power. History simply does not demonstrate a basis for MWEJ's concerns. Even more importantly, though, the PPA fully addresses the question of reliability as set forth in the Department's comments. Every potential source of supply has a risk of not being able to provide the service. As the Department noted, "there exist risks that [Manitoba Hydro] will not be able to provide the electric service as

specified in the PPA. An appropriate PPA should protect Xcel's ratepayer's from such risks." *Department Comments, p. 11.* The Department then examined the PPA to determine its effectiveness in protecting Xcel's ratepayers against both operational risks and financial risks and determined that the PPA appropriately protects ratepayers from such risks. *Id., pp. 11-16.*

Further, MWEJ stated that Xcel and its customers share in the liability of the environmental and socioeconomic costs of the project. However, Xcel has no share in any liabilities under the NFA as Xcel is not a party to the NFA. Xcel's liability is defined under the PPA and relates to the purchase of the power only. Manitoba Hydro, Manitoba and Canada are responsible for any NFA liability and any such liabilities have not passed on to Xcel. Furthermore the PPA has no risk for the financial liability for unmitigated damages; it sets out the contract terms for the provision of the power. The prices are established under the contract and 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 its customers.

CONCLUSION

For all of the reasons discussed above, Manitoba Hydro respectfully recommends that the Commission adopt the Department's recommendation in this matter and approve the PPA with Xcel. The Commission appropriately approved the selection of Manitoba Hydro as a winning bidder earlier in this docket. The PPA now before the Commission is consistent with Manitoba Hydro's bid and, as demonstrated by the thorough Department analysis, is consistent with the public interest. Neither PCN nor MWEJ provide a basis for rejecting this contract or for sending this matter to contested case hearing.

Dated: November 8, 2002

WINTHROP & WEINSTINE, P.A.

By: 

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ARTICLE 24

Arbitration

24.1

A person to be agreed upon by all the parties shall be appointed as a single Arbitrator to adjudicate upon claims and matters referred to herein, hereinafter referred to as the "Arbitrator".

24.2

An Arbitrator who dies or is unable or unwilling to act for any reason whatsoever (a "former Arbitrator") shall be replaced by a successor Arbitrator (also hereinafter referred to as the "Arbitrator") in the following manner:

24.2.1

Each party shall submit the names, addresses and occupations of five individuals to the other parties any one of whom may be selected by the other. Any one of the individuals so submitted who is unanimously selected, shall be the successor Arbitrator. If more than one individual is selected unanimously then any one of them who is able and willing to act may be called upon to hear any of the matters in dispute in respect to any matter arising out of this Agreement;

24.2.2

If the parties do not unanimously agree as to the individual to be named the successor Arbitrator then the individual who receives the support of the majority of the parties, shall be appointed;

24.2.3

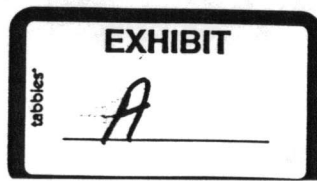
If no agreement can be reached by the parties then the Manitoba Court of Appeal shall appoint the successor Arbitrator.

24.3

In the event that a successor Arbitrator is appointed, any orders made by any former Arbitrator shall remain valid and binding and shall, if necessary, be implemented by the successor Arbitrator as if they were the orders of the successor Arbitrator.

24.4

The Arbitrator may be removed from his office if any three of Manitoba, Hydro, the Committee (or a single successor of the Committee) and Canada desire a change of Arbitrator for any reason



whatsoever. In that event, the parties shall appoint a successor Arbitrator as provided in Article 24.2. Notwithstanding anything to the contrary contained in this Agreement, in the event that the Committee has ceased to represent the Bands, then the concurrence in writing of any three Chiefs of the Bands shall be substituted for the concurrence of the Committee.

24.5

Except where otherwise provided, "person" where used in this Article shall mean any person previously defined in Article 1.12 as well as any of the parties hereto.

24.6

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 provided that any recommendation which involves a mitigatory and/or remedial measure to be implemented by any party shall be dealt with as provided in Article 24.25 and Article 24.26.

24.7

The Arbitrator shall have the power and authority to hear any claim or matter in dispute submitted by any person and he shall determine such claim or matter in dispute if the claim or matter in dispute arises directly or indirectly out of, or is attributable to the Project, or arises by reason of a failure to comply with or give effect to any provision contained in this Agreement.

24.8

Because mitigatory and/or remedial measures are more likely to have a lasting beneficial effect on the viability of a community and/or on individual residents than monetary compensation, such measures shall be preferred and only where mitigatory and/or remedial measures are not feasible or fail in effectiveness shall monetary compensation be ordered in lieu thereof in respect of any adverse effect.

24.9

The Arbitrator shall have the right to forthwith order interim compensation prior to the determination of any issue or matter in totality.

24.10

In dealing with claims or matters in dispute which are submitted to the Arbitrator and in particular in assessing compensation or recommending remedial action or the like, the Arbitrator shall deal with such matters on the basis that the liability to compensate any person adversely affected by the Project is the sole and exclusive responsibility of Hydro and any recommendation

for remedial action or the like is the responsibility of Hydro, Manitoba or Canada or any one or more of them.

24.11

Hydro shall have the right to settle individual claims with any person. Hydro shall advise the Committee and the appropriate Band Council of all such settlements that have been made to date ("prior settlements") and shall thereafter advise the Committee and the appropriate Band Council on a quarterly basis of all such settlements that may hereafter be made. It is understood and agreed that all prior settlements shall be reviewable by the Arbitrator within four years of the date of this Agreement at the request of any person and any such settlement made subsequent to the date of this Agreement shall be reviewable within four years after the date of such settlement and in either eventuality the said Arbitrator shall have the power to award additional compensation, including interest. No review of such claims shall be made after the aforesaid times have expired and the settlement shall then be deemed to be final.

24.12

It is understood and agreed between the parties hereto that any specific issue for which compensation or redress or remedial measure or the like is claimed or requested must be submitted in writing to the Arbitrator within four years of the date of the alleged cause of claim becoming evident to the claimant or five years from the date of this Agreement, whichever is later, otherwise the right of claim shall expire.

24.13

The powers and procedures set forth in the Arbitration Act of Manitoba RSM 1970 Chapter A 120 shall govern in all references to arbitration except where the said powers and procedures are contrary to the provisions herein set forth in which case the powers and procedures herein set forth shall govern, or where the Arbitrator deems such procedures to be inappropriate or inconsistent with his duty to arrive at a just award or order, in which case the Arbitrator shall give written reasons for deciding to vary the procedure in connection with any case before him.

24.14

Any person may have a claim or matter or dispute dealt with under the terms of this Agreement provided however that no claim or matter or dispute on behalf of any person shall be made by one of the parties hereto unless the consent in writing of the person to the initiation of such proceeding is submitted to the Arbitrator by such party.

24.15

Any person who wishes to have a settlement reviewed or a claim or matter or dispute decided by the Arbitrator may do so in person or be represented by counsel or by counsel of any of the parties hereto.

24.16

The Arbitrator may establish his own rules of conduct and may rule upon the admissibility of evidence. It is agreed however that evidence may be presented by affidavit and the evidence of consultants or experts may be presented without the author being physically present and hearsay evidence may be received and in all such cases it shall be for the Arbitrator to determine the weight to be placed upon such evidence.

24.17

Proceedings to bring any claim or matter or dispute before the Arbitrator may be initiated before any actual damage or dislocation has occurred.

24.18

Individual occupiers or users are entitled to claim compensation notwithstanding compensation to communities for loss of reserve land.

24.19

The parties hereto may proceed to arbitration by way of a statement of agreed facts.

24.20

Hydro and Manitoba and Canada shall provide, for the use of the Arbitrator and the Committee, all studies and reports which they possess or can, by their best efforts obtain, or which come into their possession, which touch upon the subject of the effects of the Project or on the property or lifestyle of any residents of a Reserve. Where such information is available, and at the request of the Committee, the said parties shall use their best efforts to provide also the background technical data and working papers upon which such studies or reports are based.

24.21

The Arbitrator may retain the assistance of such professionals or consultants as he may require in order to advise him on matters, without limitation, of accounting, law, engineering, or of physical, social or economic impact consequences, as may in the sole discretion of the Arbitrator be necessary in order to properly consider the evidence presented. It is understood and agreed, however, that the parties to any claim or dispute brought before the Arbitrator for determination shall have the primary responsibility for presenting evidence to support their positions, and the power of the Arbitrator to retain assistance of professionals or consultants shall be exercised only where the Arbitrator believes further advice or information would be necessary or desirable to formulate and reach a sound and fair decision, and in the eventuality that the said Arbitrator exercises his prerogative to call professional or consultant evidence, the parties hereto shall have the right to cross-examine on such evidence.

24.22

In the event that the Arbitrator exercises any of the powers aforementioned for the purpose of obtaining assistance, the person or his authorized representatives shall have the right to cross-examine any individual from whom such information was obtained by the Arbitrator and shall have the right to peruse any documentary evidence received by him to cross-examine thereon.

24.23

The Arbitrator in making an order shall inter alia:

24.23.1

Determine whether there is a liability under this Agreement;

24.23.2

Designate the party liable and, if more than one, apportion the liability;

24.23.3

Determine the appropriate remedy; and

24.23.4

If the liability is not to be compensated in a monetary form forthwith, determine the time within which the other compensation in lieu thereof shall be completed by each party. Any unreasonable delay in the implementation of the order shall be dealt with as provided by Article 24.26.

24.24

Without restricting the plenary power of the Arbitrator to fashion an appropriate and just remedy as provided in Article 24.6, the Arbitrator may:

24.24.1

Direct that financial payments be made, including dislocation and/or relocation allowances where appropriate;

24.24.2

Recommend that mitigatory or remedial work be undertaken by Hydro and/or Manitoba and/or Canada to reduce or eliminate potential damages which otherwise would likely occur;

24.24.3

Recommend that Hydro, and/or Manitoba, and/or Canada, acquire and provide real or personal property and make it available to the claimants, as compensation in whole or in part, or in order to reduce or eliminate potential damage in whole or in part;

24.24.4

Recommend that Hydro, and/or Manitoba, and/or Canada provide employment opportunities where this is a feasible method of remedy or compensation;

24.24.5

Recommend that Hydro, and/or Manitoba, and/or Canada undertake certain programs and/or public works projects for the benefit of communities which are adversely affected;

24.24.6

Recommend that a development corporation be established by Manitoba and/or Canada and funded by Hydro and/or Manitoba and/or Canada to enable such corporation to attain its specified objects;

24.24.7

Recommend that Hydro and/or Manitoba, and/or Canada pay the whole or part of the costs of certain municipal services where such direction is a suitable method of compensating a community;

24.24.8

Recommend that Hydro, Manitoba and Canada severally and jointly implement a practical program to provide an effective opportunity for residents of the communities to be employed in both the construction and the operation of the Project and also in the implementation of any works and measures undertaken pursuant to this Agreement;

24.24.9

Direct that financial payments be made and/or make any, or any further order, as he may deem to be appropriate in respect of a failure to comply with or to give effect to any provisions of this Agreement or any matter arising out of this Agreement.

24.25

As soon as possible or in any event, not later than one year after the Arbitrator makes a recommendation to Hydro, Manitoba or Canada, such party shall advise the Arbitrator:

24.25.1

Whether the recommendation will be implemented in whole or in part;

24.25.2

How the recommendation is to be implemented; and

24.25.3

The time within which such implementation will be completed.

24.26

Where such party advises that a recommendation will not be implemented, or will be implemented only in part, or where a dispute arises by virtue of the time contemplated for implementation of the recommendation, the issue may be remitted back to the Arbitrator by the party initiating arbitration procedures and the Arbitrator may fix damages in lieu of implementation or of full implementation or of implementation on a timely basis. A recommendation made to Canada can only be converted into monetary damages where the recommendation is with regard to Canada's obligations under this Agreement.

24.27

In fashioning a remedy in respect of any claim, the Arbitrator shall be entitled to take notice of any relevant statute and relevant regulations thereunder, and of any relevant government policies and programs established from time to time and he may refer to the preamble to give effect to the intention of the parties in determining the meaning or application of this Agreement.

24.28

Specific provisions for reference of certain matters to arbitration shall not be deemed to limit the power of the Arbitrator to hear and decide any claim in respect of any matter arising out of this Agreement.

24.29

The fact that a remedy may create discrimination or divisions within any settlement that might adversely affect the relationships between a community and other residents of a settlement shall not be taken into account by the Arbitrator in determining an appropriate and just settlement of any claim or order resulting from any claim.

24.30

In fashioning a remedy in respect of any claim, the Arbitrator shall be entitled to take notice of any Plan prepared pursuant to Article 16 hereof, and may hear evidence for the purpose of

considering and deciding the degree to which any order may or should be coordinated with any other relevant consideration, and especially for the purpose of ensuring the maximum effectiveness of any order.

24.31

The Arbitrator may direct that Hydro or Manitoba or Canada shall, within their respective areas of responsibility, monitor, record or report such information respecting the adverse effects of the Project or the effectiveness of any measure undertaken pursuant to this Agreement by any of the said parties, as may, in the opinion of the Arbitrator, be necessary or desirable to assist him in formulating decisions or any decision.

24.32

Every award or order of the Arbitrator shall be in writing and shall set forth reasons.

24.33

Any party to a submission to arbitration may apply in writing to the Arbitrator, within thirty days after the receipt of an award or order, to amend or vary it in respect of anything that was raised before the Arbitrator or in the application or interpretation of the said award or order.

24.34

There shall be no appeal from the order or award of the Arbitrator, except as to an issue of law or jurisdiction, in which case the issue shall be presented as a stated case to the Manitoba Court of Appeal for determination, and there shall be no further appeal therefrom.

24.35

The Arbitrator shall have the discretion to make an order that counsel of the claimant's choice be made available at the expense of one or more of the parties to assist the claimant in preparing and advancing his claim, and to award other costs on any reference that is brought before him for determination, subject to the following provisions:

24.35.1

The Arbitrator may award costs in favour of any person as he deems may be fair and equitable in the circumstances;

24.35.2

Any award of costs may include legal fees or the cost of consultants or experts retained in order to deal with the dispute brought to arbitration to the extent such fees and costs are reasonable;

24.35.3

Any award of costs may include travelling allowance, and ancillary expenses for the parties to a dispute, their legal counsel, consultants or necessary witnesses.

24.36

The costs of arbitration, including the reasonable expenses incurred for secretarial assistance, cost of court reporters, travelling expenses and reasonable fees paid to consultants who have been specifically retained by the Arbitrator, shall be determined by the Arbitrator. The Arbitrator shall be paid a fee which fee shall be fixed by the parties on appointment.

24.37

The provisions respecting arbitration and the Arbitrator in this Agreement shall remain in force and be binding upon the parties hereto for as long as any party shall deem it necessary that an Arbitrator hear and determine any of the matters referred to herein.

**SUBMISSION FROM
PIMICIKAMAK CREE NATION**

IN REGARD TO

**THE MANITOBA HYDRO-ELECTRIC BOARD
APPLICATION DATED SEPTEMBER 26, 2002**

**FOR THE EXPORT OF
SYSTEM PARTICIPATION POWER**

TO NORTHERN STATES POWER COMPANY



I. INTRODUCTION

Manitoba Hydro has applied to the NEB for approval of a contract between it and Northern States Power (NSP, or its parent Xcel) such that Manitoba Hydro would supply Xcel with 500 MW of firm power for a ten year period beginning May 2005. Pimicikamak Cree Nation (PCN) submits that this Contract will result in the worsening of serious and even catastrophic environmental harms. Because PCN's ways of life, culture, economy and society are interwoven with the environment, it will result in the worsening of catastrophic socioeconomic harms (which must be considered as a necessary extension of environmental impacts).

While at first blush the Application from Manitoba Hydro may seem a routine matter that would not require much investigation or debate, especially given Manitoba Hydro's assertion that this export sale simply replaces an existing sale contract (Application, Questions p. 20), PCN submits that such a perception would be in error. First, **the Contract would add to and worsen very serious and sweeping environmental (and socioeconomic) harms.** This can never be adjudged as a minor or routine issue. Second, PCN submits that the "routine" of ongoing and accumulating environmental and socioeconomic harm, and failure to meet legal obligations to address such harm, must be arrested by, in part, serious investigation into just what is going on, and the setting of conditions to ensure it goes on no longer.

The matter before the NEB could be precedent-setting as follows. **Electricity is a bundle of the power generation and transmission, and the impacts it causes. The definition of the impacts "caused" by a contract must change to reflect reality. They must, contrary to the assertion of Manitoba Hydro and how various other proceedings related to hydro contracts have been handled, include all impacts that are likely to continue under the contract, even**

if they originally resulted from construction (even construction a long time ago) of hydro facilities. Causation cannot be pinned to one moment in time: in regard to a hydro project that continues to operate, and environmental impacts that continue to grow if left unaddressed, causation is an ongoing and present phenomenon.

By way of analogy, virus X was introduced years ago by company Y. Company Y has not been treating this virus as it is required to do. If left untreated, the virus grows and spreads. Company Y now seeks approval to continue the status quo. The status quo, which is non-treatment, would result in further growth and spread of the virus. Thus, the status quo (failure to address the harms) causes the spread of the virus. The approval agency should not require a new virus Z to be injected into the mix before Company Y is found liable.

Electricity cannot be unbundled in fact or in law. Manitoba Hydro has a legal obligation pursuant to the Northern Flood Agreement (NFA, which is considered a treaty by the Province of Manitoba – which effectively “owns” Manitoba Hydro) to internalize (ensure bundling of) ALL impacts and costs causally related to the Project and perpetuated or exacerbated by the Contract. PCN asserts that the Contract both perpetuates (by failure to address) and exacerbates or makes worse, existing harms. Manitoba Hydro is attempting to unbundle the package by separating out the electrons which would flow to Xcel from the things that happened and continue to happen (impacts and costs caused by or associated with the Project) which resulted and result in the generation and supply of these electrons. These electrons and these impacts and costs supply the Contract. They cannot be unbundled.

PCN makes this submission in regard to the legal mandate of the National Energy Board (NEB) under Part VI, Division II (Exports and Imports – Electricity) of the National Energy Board Act (the Act). The NEB “shall have regard to all considerations that appear to it to be relevant, including ... including (b) the impact of the exportation [of power] on the environment” (s. 119.06(2)). The NEB may “make the permit subject to such terms and conditions respecting the matters prescribed by the regulations as the Board considers necessary or desirable in the public interest.” (s. 119.09(1)). The National Energy Board Electricity Regulations (SOR/97 – 130) stipulate that “terms and conditions may be included in any permit for the exportation of electricity” as listed in s. 10, including “(k) requirements relating to the protection and restoration of the environment”. If a hearing is held (in which case, the matter is treated as an application for a licence): “The Board may, on the issuance of a licence, make the licence subject to such terms and conditions as the Board may impose.” (s. 119.09(2)).

PCN submits that:

- The Contract would be supplied from the existing Manitoba Hydro system (Application by Manitoba Hydro to the NEB, Authorization Request p. 1, Questions pp. 6, 19); that 94% of Hydro’s total energy production is from hydroelectric generation, and 79% of the total is from hydroelectricity generated from one large project: the Churchill River Diversion and Lake Winnipeg Regulation Project (the Manitoba Hydro Project, the Churchill-Nelson Project, or the Project). As such, any impacts of the Project that may be affected by the Contract, must be considered by the NEB in assessing whether this Contract is in the public interest. (McCullough Affidavit paras. 4, 7, 13)

- The Project is on, near and/or affects PCN territory and people. (McCullough Affidavit para. 13)
- The environmental and socioeconomic impacts associated with the Project are serious, even catastrophic, and are ongoing and accumulate. (McCullough Affidavit, para. 16; Van Eek Affidavit paras. 10, 11, 12, 15)
- Most of these impacts have not been remediated, mitigated or (when nothing else is possible) compensated for, as required by the Northern Flood Agreement (NFA). Despite the legal obligations and promises by the Crown Parties in the NFA, most of the NFA has not been implemented. (Van Eek Affidavit, para. 15)
- The NFA was entered into in 1977 by Canada, Manitoba and Manitoba Hydro to address significant effects of the Project. Most of the Project had already been built. PCN is the only remaining indigenous party to the MFA that retains full NFA rights, which extend to the whole of the Project area and for the life of the Project.
- **The Contract at issue before the NEB will likely cause negative impacts to grow worse, in two ways.**
 - First, it would likely cause incremental (additional new) environmental and socioeconomic harms. The situation would likely be worse under the new Contract, due to capacity factors and the water regime required by these.
 - Second, as the new Contract does not include any conditions or requirements to mitigate existing harms, it would perpetuate these. Many of these existing harms are of the type that when left to continue, grow

worse through cumulative effects (the effects would not remain static even if the Contract situation remained static). For instance, continuing erosion leads to debris buildup and ongoing destruction of boreal forests along shorelines which will in turn magnify greenhouse gas (GHG) imbalances. So even if the new Contract did not add incremental harms, it would add to existing harms in this way. (McCullough Affidavit, para. 3, Sections B and C)

- Manitoba Hydro's assertion that "there are no material adverse environmental effects resulting from the proposed exportation" (Application, Questions p. 20) is very much disputed by PCN.

PCN seeks the following:

- That the NEB make the issuance of the permit for the exportation of the power through the Contract, subject to conditions that would ensure protection and restoration of the environment and PCN, both of which have been and continue to be so severely impacted by the Manitoba Hydro Project
- PCN submits that such conditions should require substantial and ongoing compliance by the Crown Parties with at least those aspects of the NFA where compliance can be readily monitored and measured. PCN proposes a condition herein. In the alternative, NEB itself could and should set conditions that require, on a reasonable timetable, remediation and mitigation, to the maximum possible extent, of measurable environmental and socioeconomic impacts associated with the Manitoba Hydro Project.

Pimicikamak Cree Nation (PCN or Pimícikamak) respects the fact that the National Energy Board (NEB) must consider a number of serious issues in this application. PCN hopes that the NEB respects PCN's need for recognition and addressing of the catastrophic environmental and socioeconomic consequences associated with the construction and operation of the Manitoba Hydro Project. Mutual respect between people, and between people and their natural environment, are cornerstones of PCN culture.

There are, no doubt, benefits associated with the Manitoba Hydro Project – most of which are enjoyed by electricity consumers far from the dams, reservoirs and turbines that provide this electric power. There are also tremendous environmental and socioeconomic costs – for which PCN and other indigenous people of northern Manitoba have paid, *and continue to pay*, dearly.

PCN submits that the NEB has a duty to look past the rhetoric about large hydro projects, and beyond the manner in which such projects have typically been considered (or not considered). While environmental and socioeconomic impacts of large hydro projects may be *different* than conventional sources of electricity (such as coal fired power plants or nuclear plants), the *magnitude and severity of these impacts may be just as great*. Coal, nuclear and other generating facilities normally occupy relatively small sites, while hydro projects often occupy (by virtue of the environment they re-engineer and rely on) a few million acres. Despite the difference in the size of their “ecological footprints”, regulators have less of an understanding of the harm caused by large hydro projects than the harm associated with the more traditional resources, such as coal and nuclear plants.

In this particular instance, the sheer size and scope of the Manitoba Hydro Project, and the fact that impacts and costs from the Project have barely begun to be addressed, and have thus been accumulating for about 30 years, means that the environmental and socioeconomic costs will likely far exceed those associated with the more traditional resources.

To Pimicikamak, these impacts and costs, and efforts to have them addressed, are not about politics; they are about survival.

II. OVERVIEW: PCN, MANITOBA HYDRO, AND THE NFA

A. Pimicikamak Cree Nation

PCN is an indigenous Nation of about 6000 people and a vast territory in northern Manitoba. As an indigenous People, Pimicikamak has a special relationship with the natural environment; it is integrally interwoven with who and what they are, their way of life, culture, economy and society. To PCN, humans do not own the land, they belong to the land, and thus have a spiritual responsibility to act as stewards and protectors of the natural environment. PCN remained a vibrant healthy People for at least 10,000 years. Its traditional economies of trapping, hunting and fishing remained strong, as long as its environment remained healthy.

In the 1960's and 1970's PCN was literally dispossessed of its once-healthy existence and environment. The lakes, rivers and forests in large parts of northern Manitoba were dramatically altered to create an enormous system of dams, reservoirs, and electric generation facilities. Entire watersheds were restructured and re-engineered and natural water flows diverted. Hundreds of thousands of acres were flooded. Natural water flows were reversed and water levels regulated. The result was severe environmental damage and devastation to PCN's

way of life, social fabric, economy and the essence of its culture. These are real costs, the price of which has not been paid by the consumers of the "cheap" energy.

B. Manitoba Hydro

The Manitoba Hydro Contract is an agreement under which Xcel will purchase 500 MW of electric capacity and energy from Manitoba Hydro over a ten (10) year period. The Act requires the NEB to consider the environmental costs associated with this resource (and PCN submits that the NEB must consider the socioeconomic costs resulting therefrom). It must consider these costs, just as it would consider the costs associated with air emissions from a coal plant. The following overview of the Manitoba Hydro system will provide the NEB with a better understanding of this particular resource.

The Manitoba Hydro Project was undertaken jointly by Canada, Manitoba, and Manitoba Hydro, a publicly owned provincial utility. The Project consisted of three elements: The Churchill River Diversion, Lake Winnipeg Regulation, and a series of generating stations on the Nelson River (Interchurch Inquiry Report, Exhibit to Van Eek Affidavit, p. 6). The Churchill and Nelson Rivers flow roughly parallel from west to east and empty into the Hudson Bay. The Churchill River was dammed at the eastern outlet of Southern Indian Lake, which is part of the Churchill River system. The Missi Falls Control Structure raised the level of Southern Indian Lake, causing the lake to overflow southward through a man-made channel into the Rat-Burntwood Rivers system. The water flow then empties into the Nelson River. The Churchill River diversion redirects roughly 85% of the flow of the Churchill River into the Nelson River

basin where the generating stations are installed. The diversion project went into operation in 1976. (McCullough Affidavit, para. 16)

The Nelson River drains Lake Winnipeg, the eleventh largest fresh water lake in the world. The Jenpeg Control Structure, which is located on the Nelson River near the northern outlet of the lake, holds back water in the lake during spring and summer months, reversing the natural cycle of river flows. Lake Winnipeg essentially serves as a huge storage reservoir. Man-made channels were then constructed to bypass the shallow and narrow passageways on the Nelson River. This allowed for a doubling of the potential flow from Lake Winnipeg through the Nelson River system. The Lake Winnipeg Regulation went into operation in 1976, when the Jenpeg Control Structure was completed. (Interchurch Inquiry Report, p. 6)

Manitoba Hydro's entire system consists of 14 power producing dams, two significant control structures, four bypass channels (artificial channels to allow water to flow faster), three thermal generating plants and about 48,159 miles of electric transmission and distribution lines within Manitoba (McCullough Affidavit para. 9).

Fifty-nine percent (59%) of Manitoba Hydro's energy sales, 16,958 GWh, were within Manitoba. Forty-one percent (41%) of energy sales, 11,771 GWh, were exported to extra-provincial customers. In 2002, Manitoba Hydro had gross revenues of \$CAD1.385 billion from electricity. (McCullough Affidavit para. 6)

Due to the prevalence of electric heating in an extremely cold climate, Manitoba Hydro's electric loads are 40% higher in the winter than in the summer (McCullough Affidavit para. 5).

Virtually all of Manitoba Hydro's existing generation is hydroelectric, and most of that is from the Churchill-Nelson Project. Approximately 94% of total Manitoba Hydro energy supply comes from hydroelectric generation in Manitoba, with the Churchill-Nelson Project accounting

for 79% of the total. The remaining supply is from thermal generation. The Churchill-Nelson Project is of overriding importance in terms of how Manitoba Hydro will supply energy to Xcel. (McCullough Affidavit para. 7)

The Nelson and Churchill Rivers are fed from vast drainage basins that cover more than 494,220 square miles. Due to the importance and major role that the Churchill-Nelson Project plays in Manitoba's total operations, the effects of this project are of overriding importance in assessing the environmental and socioeconomic impacts associated with the energy supply under the Manitoba Hydro Contract. (McCullough Affidavit paras. 8, 13)

C. Northern Flood Agreement

Unfortunately, substantive consultation and negotiation with the Aboriginal Peoples occurred only after the decision to proceed with the Project had been made, after licenses to flood reserve land had been granted, and after construction had progressed beyond the point of no return. The damaging Project was imposed upon the Aboriginal Peoples:

Although the project directly affected the lands and livelihood of the five treaty communities (York Factory, Nelson House, Norway House, Cross Lake and Split Lake) and one non-treaty community (South Indian Lake), they were not consulted, nor did they give approval for the undertaking...reserve and community lands were either flooded or affected by dramatic changes to levels in the surrounding lakes and rivers, and traditional land areas were damaged or rendered inaccessible.

(The Report of the Royal Commission on Aboriginal Peoples (1996), RCAP, Vol. 2, Part 2, p. 516.)

The NFA was signed in 1997 by Canada, Manitoba, Manitoba Hydro and the Northern Flood Committee, which represented Cross Lake (PCN), Nelson House, Norway House, Split Lake and York Factory First Nations. The First Nations signatories granted the Crown parties the *after the fact* right to flood reserve lands and the right to produce electricity. Since

construction was already almost completed, and the lands had already been flooded, the First Nation signatories had little, if any bargaining power. What was supposed to be a give and take process, ended up with the Aboriginal people giving up their traditional lands before the agreement was even signed. Obviously this led to an immediate and acute imbalance of power among the parties, and has resulted in a serious disincentive for Manitoba Hydro to perform its obligations under the NFA. (Interchurch Inquiry Report pp. 16-23)

The history of NFA implementation is characterized largely by avoidance of responsibility on the part of the Manitoba Hydro, the Canadian government and the Province of Manitoba. The federal Minister of Indian Affairs, who negotiated the NFA, Warren Allmand, having seen what has happened since that time, stated that he considers the lack of NFA implementation for PCN "a case of serious betrayal." (Interchurch Inquiry Report p. 19) The northern environment and its indigenous people have had to bear disproportionate burden of the costs of hydro production. The failure to implement the NFA has resulted in the subsidization of Manitoba Hydro's sizable net income, externalizing or offloading of the socio-ecological costs of electric production. (Interchurch Inquiry Report p. 14) In this regard the Interchurch Inquiry found:

Application of the principle of true cost pricing is essential. Simply put, the complete costs of hydroelectric production, including the costs of environmental rehabilitation and redress of all social consequences, must be shared among all beneficiaries of the Project. If the true and full costs of production are not reflected in the cost of electricity, a socio-ecological deficit results. This accumulating deficit, like any deficit, is unsustainable and will haunt the province if not rectified.
(Interchurch Inquiry Report at 14)

The Inquiry found that the environmental and socioeconomic costs associated with the Manitoba Hydro Project were *in fact* not being internalized. PCN citizens can attest, firsthand, to

the fact that these costs have not been "internalized." Other authoritative sources have attested to this fact as well:

"The untallied cost of electricity production in northern Manitoba has been two decades of extensive environmental destruction, violation of human rights, and even the loss of life. For Manitoba Hydro, the governments, and consumers the Project is a success, but in northern Manitoba it constitutes an ongoing ecological, social, and moral catastrophe". (Interchurch Inquiry Report, p. 3)

* * *

[NFA] history has been marked by little or no action in implementation of NFA obligations and a long, drawn-out (and continuing) process of arbitration to force governments to implement their obligations. (Report of the Royal Commission on Aboriginal Peoples (1996)).

While electricity consumers many hundreds of miles to the south – including Xcel's customers – get their "cheap" energy, PCN and the environment continue to suffer the devastating effects of this Project.

The Manitoba Hydro Contract with Xcel cannot possibly be in the public interest, unless workable conditions are imposed to address the ongoing and cumulative effects of this Project. The NFA may exist, but meaningful conditions must be imposed upon any approval of exported power to ensure that Manitoba Hydro lives up to its promises. PCN is confident that the people of Canada would not want to be party to a Contract that will perpetuate the existing environmental and socioeconomic harms, and create new harms associated with the hydroelectric operating regime resulting from the new Contract.

III. MANITOBA HYDRO'S BURDEN OF PROOF

Manitoba Hydro petitions the NEB for approval of the Contract. As Petitioner, Manitoba Hydro has the burden of proof to establish that the Contract is in the public interest, through in part, acceptability of environmental (and socioeconomic) impacts. It is trite law that the party proposing that certain action be taken must prove the facts at issues by a preponderance of the evidence.

Manitoba Hydro, however, has not made any showing or presented any facts or evidence regarding these issues. Instead, in its application, it merely states: "The exported power will be produced from Manitoba's existing system No significant difference in system operation will result from the export. Accordingly, there are no material adverse environmental effects resulting from the proposed exportation." (Application, Questions p. 20)

First, the assertion that no significant difference in system operation will result, is very much disputed (see PCN submission *infra*). PCN submits that there will be significant differences and that these will lead to incremental harms. The situation would likely be worse under the new Contract, due to load factors and the water regime required by these. Second, even if it were true (which PCN asserts it is not) that no significant difference in system operation will result, as the new Contract does not include any conditions or requirements to mitigate existing harms, it would perpetuate these. Many of these existing harms are of the type that when left to continue, grow worse through cumulative effects (the effects would not remain static even if the Contract situation remained static). For instance, continuing erosion leads to debris buildup and ongoing destruction of boreal forests along shorelines which will in turn magnify greenhouse gas

(GHG) imbalances. So even if the new Contract did not add incremental harms, it would add to existing harms in this way. (McCullough Affidavit, para. 3, Sections B and C)

There appears to be a serious lack of evidence forthcoming from both Manitoba Hydro and NSP/Xcel in regard to environmental and socioeconomic impacts associated with the Contract. In a parallel proceeding seeking approval this Contract, at the Minnesota Public Utilities Commission (PUC), the PUC repeatedly recognized that specific facts on environmental and socioeconomic harms had to be provided and assessed, and *directed* that "NSP shall continue monitoring issues surrounding the environmental effects of the dams supplying power to the Manitoba Hydro Electric Board and the effects of the dams on the Cross Lake Band of Cree [PCN]." Given its directive, the PUC acknowledges the existence of these environmental impacts. Implicit in their directive is Xcel's obligation to provide the Commission with the results of monitoring these issues. However, to date Xcel has ignored this order and has failed to supply any report about the results of its monitoring.

If impacts are minor or benign, or if all or most steps possible are being taken to address the impacts, one would expect that Manitoba Hydro would have provided facts and evidence to substantiate this.

IV. CONTRACT ADDS TO AND PERPETUATES EXISTING HARMS

There are many serious, even catastrophic harms associated with the Manitoba Hydro Project that exist, and are accumulating.

Electricity is a bundle of the power generation and transmission, and the impacts it causes. The definition of the impacts "caused" by a contract must change to reflect reality. They must, contrary to the assertion of Manitoba Hydro and how various other proceedings related to

hydro contracts have been handled, include all impacts that are likely to continue under the contract, even if they originally resulted from construction (even construction a long time ago) of hydro facilities. Causation cannot be pinned to one moment in time: in regard to a hydro project that continues to operate, and environmental impacts that continue to grow if left unaddressed, causation is an ongoing and present phenomenon.

Electricity cannot be unbundled in fact or in law. Manitoba Hydro has a legal obligation pursuant to the Northern Flood Agreement (NFA, which is considered a treaty by the Province of Manitoba – which effectively “owns” Manitoba Hydro) to internalize (ensure bundling of) ALL impacts and costs causally related to the Project and perpetuated or exacerbated by the Contract. PCN asserts that the Contract both perpetuates (by failure to address) and exacerbates or makes worse, existing harms. Manitoba Hydro is attempting to unbundle the package by separating out the electrons which would flow to Xcel from the things that happened and continue to happen (impacts and costs caused by or associated with the Project) which resulted and result in the generation and supply of these electrons. These electrons and these impacts and costs supply the Contract. They cannot be unbundled.

Impacts from the Project have been recognized by many, for years. This submission relies on and refers the NEB to the Affidavits of Reverend Arie Van Eek and Robert McCullough.

The Van Eek and McCullough Affidavits set out the many impacts. In addition, the McCullough Affidavit sets forth the facts that establish why and how the electricity to be supplied under the Contract cannot and should not be unbundled, and how the impacts and costs would grow worse as a result of the Contract.

In regard to the Van Eek Affidavit: In 1975, the Interchurch Task Force on Northern Flooding held a public inquiry to determine whether indigenous peoples would be severely impacted by the major hydro development then under construction in Northern Manitoba (Interchurch Inquiry Report p. 5). The Task Force undertook this initiative because the Manitoba and Canadian governments refused to do so. The inquiry asked the question: who would benefit from the hydro-electric development and who would pay for any social and environmental costs? The inquiry eventually contributed to the formation of the Northern Flood Agreement. (Interchurch Inquiry Report p. 5)

In 1999, the Manitoba Aboriginal Rights Coalition (MARC), successor to the Interchurch Task Force on Northern Flooding, recognized the need to publicly revisit the questions of fairness related to the Manitoba Hydro Project. As a result, MARC convened the Interchurch Inquiry into Northern Hydro Development. MARC is an organization that addresses justice issues involving Aboriginal people in Manitoba, and is composed of representatives from the Anglican, Christian Reformed, Lutheran, Mennonite, Roman Catholic, Unitarian, and United Churches. MARC convened a Panel of distinguished Commissioners who presided over the Inquiry. (Interchurch Inquiry Report p. 5)

The Panel heard testimony from different presenters, including chiefs, elders, past and present government ministers, human rights authorities, President and CEO of Manitoba Hydro, academics and church leaders. Following the inquiry, the Panel issued its Report which included the Panel's findings, conclusions and recommendations. *The Panel concluded that the tremendous environmental and socioeconomic costs of the Manitoba Hydro Project are ongoing and continuing. The Panel further found substantial noncompliance with the NFA, that remediation and mitigation initiatives required by the agreement were not being carried out, and*

that the PCN and other Aboriginal people of northern Manitoba were bearing a disproportionate share of the costs of the project. (Interchurch Inquiry Report pp. 8-27)

The Interchurch Inquiry Report provides an exceptional source of information, not only because of the qualifications and experience of the panelists, but because it is based upon many different perspectives on the Manitoba Hydro Project. The Inquiry Report reflects the continuity of oversight of the environmental and socioeconomic cost issues since 1975. The Report demonstrates the need for the NEB to make a fair and sound determination as to whether, and to what extent, the Contract is or is not in the public interest, and what conditions should be included in any permit or licence to help ensure the public interest is satisfied.

In regard to the McCullough Affidavit: The Contract will create additional incremental harm because of the operating regime resulting from the Contract. The NEB must consider both the existing harm as well as new environmental and socioeconomic costs associated with this Contract. The NEB is required by law to consider environmental impacts.

In addition, the NEB must consider how the Contract would perpetuate existing and accumulating harms. If the NEB unconditionally approves the Manitoba Hydro Contract, Manitoba Hydro will be rewarded for having created, and for having failed to remedy and mitigate (as it is required under law to do) what approaches an environmental, social and cultural catastrophe. If the Contract is approved without any conditions requiring Manitoba Hydro's performance under the NFA, or other similar conditions, there is little incentive for Manitoba Hydro to undertake the remediation and mitigation initiatives that Manitoba Hydro has promised under the NFA. The NEB should impose conditions requiring Manitoba Hydro to demonstrate implementation of aggressive mitigation and remediation measures designed to redress these environmental and socioeconomic harms. If the NEB fails to impose these conditions, it will

have virtually assured the perpetuation of the extraordinary environmental and socioeconomic consequences of the Manitoba Hydro Project which would supply the Contract.

V. PROPOSED CONDITION

PCN proposes that approval of the Contract be subject to the following condition:

That Manitoba Hydro be responsible for the removal or prevention of debris (including dead eroded or flooded trees and other vegetation) which has accumulated along shorelines of, or is falling into or floating in, waterways as a result of the Lake Winnipeg, Churchill and Nelson Rivers Hydro-Electric Project, as follows:

- That Manitoba Hydro develop forthwith, in bona fide and meaningful consultation with Pimicikamak, a restoration plan for removing all accumulated debris from all shorelines by 2032;
- That Manitoba Hydro develop and implement a fish-habitat replacement program in lakes affected by the project, including debris removal;
- That Manitoba Hydro develop forthwith, in consultation with Pimicikamak, a maintenance plan for preventing uncontrolled entry of debris into the waterways;
- That Manitoba Hydro pay for the restoration, habitat replacement, and maintenance, and activities consequent upon them;
- That Manitoba Hydro implement removal of debris at Jenpeg forebay and at Cross Lake forthwith, at a rate capable of removing all accumulated debris by the end of 2004, pending completion of the plans above;

- That Manitoba Hydro develop (in bona fide and meaningful consultation with Pimicikamak) and finance or arrange for financing, a prototype biomass energy plant with appropriate air-quality controls, fueled by debris removed from Sipiwesk Lake, and to be operational by the end of 2005.

"Shorelines" means the shores of all rivers and lakes in which the water regime is hydraulically affected by the Project.

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott
Marshall Johnson
LeRoy Koppendraye
Phyllis Reha

Chair
Commissioner
Commissioner
Commissioner

MPUC Docket No. E-002/M-99-888

In the Matter of the Petition of
Northern States Power Company d/b/a
Xcel Energy for Approval of a Power
Purchase Agreement with Manitoba Hydro


AFFIDAVIT OF SERVICE

Maureen T. Bartone, of the City of Woodbury, County of Washington, the State of Minnesota, being first duly sworn, deposes and says that on the 8th day of November, 2002, she served the attached **Reply Comments of Manitoba Hydro** by hand-delivery and/or by depositing in the United States Mail at said city, to all said persons on the attached Service List, true and correct copies thereof, enclosed in an envelope, postage prepaid, and by depositing same in the post office at St. Paul, Minnesota.

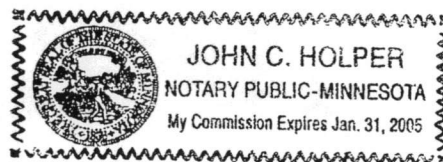


MAUREEN T. BARTONE

Subscribed and sworn to before me this
8th day of March, 2002.



Notary Public



SERVICE LIST

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

Docket No. E002/M-99-888

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STATE OF MINNESOTA PUBLIC UTILITIES COMMISSION

NOTICE OF UPDATED OFFICIAL SERVICE LIST

In the Matter of NSP Review of its 1999 All
Service Request for Proposals

DATE: November 1, 2002

DOCKET NO.: E002/M-99-888

PLEASE TAKE NOTICE that the official service list for this case has been updated. The updated list is enclosed and replaces all official service lists you have previously received.

If the official service list is expanded or reduced again in the future, the Commission will mail you an updated list.

Please note that Minn. Rules, part 7829.0700, subp. 4 requires you to provide written notice to the Commission's Executive Secretary and to all persons on the official service list if you wish to change the name or address of the person receiving service on your behalf.

This information can be made available in an alternate format (i.e., large print or tape) by calling 651/297-4596 (voice), or 651/297-1200 (TDD/TTY), or 1-800/627-3529 (TTY relay service).

BY THE COMMISSION
Burl W. Haar
Executive Secretary

Enclosure

www.puc.state.mn.us

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In the matter of NSP review of its
1999 all service request for proposals

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In the matter of NSP review of its
1999 all service request for proposals

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In the matter of NSP review of its
1999 all service request for proposals

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November 5, 2002

Christopher Clark
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Suite 2900
800 Nicollet Mall
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Re: DOCKET NO. E002/M-99-888

Dear Mr. Clark:

Enclosed please find the Department of Commerce information request number (s) 17-18 in the above cited docket number. Please provide me with the original and 2 copies of your response by the indicated due date at the following address:

Sharon Ferguson
Department of Commerce
85 7th Place East
Suite 500
St. Paul, MN 55101-2198

Please indicate the above cited docket number, the corresponding request number, the requesting analyst, and the respondent's name and title on your response. If your response contains Trade Secret data, please include a public copy.

If you have any questions or problems providing information in the time specified, please contact me at (651) 297-3652 and I will direct you to the analyst requesting the information. You may also contact me via facsimile at (651) 297-1959.

Respectfully submitted,

Sharon Ferguson
Regulatory Information Center

Enc.

C(w/enc.): All Parties of Record

State of Minnesota
DEPARTMENT OF COMMERCE

Utility Information Request

Docket Number: E002/M-00-888

Date of Request: November 5, 2002

Requested From: Xcel Energy

Response Due: November 15, 2002

Analyst Requesting Information: Eilon Amit

Type of Inquiry: ☐ Financial ☐ Rate of Return ☐ Rate Design
 ☐ Engineering ☐ Forecasting ☐ Conservation
 ☐ Cost of Service ☐ CIP ☒ Other: Resource Plan

If you feel your responses are trade secret or privileged, please indicate this on your response.

Request No.	
17	Under the PPA the capacity factor changes from 75 percent (under the existing MH-NSP contract) to 48 percent. How will the change impact the operations of MH's hydro-electric system?

Response by: _____

List sources of information: _____

Title: _____

Department: _____

Telephone: _____

State of Minnesota
DEPARTMENT OF COMMERCE

Utility Information Request

Docket Number: E002/M-00-888

Date of Request: November 5, 2002

Requested From: Xcel Energy

Response Due: November 15, 2002

Analyst Requesting Information: Eilon Amit

Type of Inquiry: ☐.....Financial ☐.....Rate of Return ☐.....Rate Design
 ☐.....Engineering ☐.....Forecasting ☐.....Conservation
 ☐.....Cost of Service ☐.....CIP ☒...Other: Resource Plan

If you feel your responses are trade secret or privileged, please indicate this on your response.

Request No.	
18	If the PPA is disapproved and MH is unable to sell the 500 MW elsewhere, what will be the impact on the operations of MH's hydro-electric system?

Response by: _____

List sources of information: _____

Title: _____

Department: _____

Telephone: _____

E002/M-99-888

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651-642-1371
November 6, 2002

Burl W. Haar
Executive Secretary
Minnesota Public Utilities Commission
121 7th Place East, Suite 350
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**Re: Petition of Northern States Power Company dba Xcel Energy for
Approval of a Power Purchase Agreement with Manitoba Hydro
Docket No. E002/M-99-888**

Reply Comments of Minnesota Witness for Environmental Justice

Dear Dr. Haar,

Below are the reply comments of Minnesota Witness for Environmental Justice regarding the Petition of Northern States Power Company dba Xcel Energy for Approval of a Power Purchase Agreement with Manitoba Hydro. We very much appreciate the opportunity to comment on this important decision.

Minnesota Witness for Environmental Justice supports Pimicikamak Cree Nation's Petition for a Contested Case.

The Commission is required by law to consider both the existing harms as well as the new environmental and socioeconomic effects associated with this PPA and to make specific findings of fact in making this resource decision. The Commission should refer this matter to the Office of Administrative Hearings for a contested case to develop a strong factual record upon which Commission decisions can be made.

Copies have been mailed to all parties on the service list.

Sincerely,



Janet C. Anderson
For Minnesota Witness for Environmental Justice



Attorneys at Law

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Paralegals

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Kari L. Koep (*Office Manager*)
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*Admitted in Wisconsin

November 12, 2002

Dr. Burl Haar
Minnesota Public Utilities Commission
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St. Paul, MN 55101-2147

**RE: Petition of Northern States Power Company d/b/a Xcel Energy for
Approval of a Power Purchase Agreement with Manitoba Hydro
MPUC Docket No. E-002/M-99-888**

Dear Dr. Haar:

The Pimicikamak Cree Nation (PCN) served certain Information Requests upon Xcel Energy (Xcel) in the above-referenced matter. Unfortunately, Xcel's responses were sent to an old address, and did not make their way to our offices until recently. Consequently, we did not have the benefit of Xcel's responses prior to filing our Petition for a Requested Case Hearing. In connection with the responses, we are offering the following observation.

In PCN Information Request number 5, we requested information regarding the operating parameters of the Manitoba Hydro Project. The information was requested to evaluate the environmental and socioeconomic impacts of the operating regime required under the Power Purchase Agreement (PPA) currently before the Commission for its consideration. Xcel indicated that it "does not have the information requested." Attached is a copy of Xcel's response.

Both Xcel and the Commission are required by law to consider the environmental and socioeconomic impacts that will result from this PPA. The Commission can only do so if it has access to the appropriate operating data. Xcel's inability to provide this data highlights the need for a thorough factual investigation that can only be done in the context of a contested case proceeding. PCN respectfully submits that Xcel's inability to provide the operating data provides further support for the PCN Petition for a Contested Case Hearing.

Very truly yours,

O'NEILL, GRILLS & O'NEILL, P.L.L.P.

Peter H. Grills
PHG:klk

cc: Service List

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- ☐ Non Public Document – Contains Trade Secret Data
☐ Public Document – Trade Secret Data Excised
☒ Public Document

Xcel Energy

Docket No.: E002/M-99-888

Response To: Pimicikamak Cree Nation Information Request No. 5

Date Received: October 8, 2002

Question:

Please provide the following information regarding historical and projected MH system operation. System operation data is necessary for the Pimicikamak Cree Nation to evaluate the reliability of the energy and capacity that will be supplied under the contract with Manitoba Hydro, and to estimate the environmental and socioeconomic impacts of the contract. We recognize that some of this data may not exist. Since it is unclear what information does exist for Manitoba Hydro, we are asking for all the operational information that might exist, based on experience with other electric power systems. Therefore we welcome partial response to this question. Our interest is in the patterns of operation and the range of variation in those patterns, historical and projected. If some of the requested information does not exist, please provide whatever does exist, including any aggregated data. For any information provided, if the information is available in a computer readable format, please provide the information in the most common computer readable format possible: most preferable would be Microsoft Excel or Access formats. In this question, "on peak" and "off peak" should be whatever definition Manitoba Hydro customarily uses for those terms, and in the absence of such custom should mean the 98 hours each week constituted by the 16 hours from 6 AM to 10 PM weekdays and Saturdays, except that official NERC holidays are always considered off peak. Much of this information can probably be found in unredacted or internal versions of Manitoba Hydro's Power Resource Plan, the current and/or past editions.

- a. Hydro energy production: complete historical record of annual and monthly generation; since 1992, hourly generation; if hourly is not available, then since 1992 or whatever part is available of daily on peak and off peak generation; if daily is not available then since 1992 or whatever part is available of weekly on peak and off peak generation; if daily is not available then since 1992 or whatever part is available of monthly on peak and off peak generation.
- b. Hydro streamflow information at all dams and diversion projects and any other measurement sites on the related river systems, annual, monthly, weekly,

daily, and hourly; with the same time periods and partial data requested as for the preceding part a. of this question; recognizing that the information for any specific project may be unavailable prior to that project's completed construction and start of operation.

- c. Thermal plant energy production since 1992 for each plant and, where possible, each unit; annual on peak and off peak, monthly on peak and off peak, weekly on peak and off peak, daily on peak and off peak, hourly; with the same time periods and partial data requested as for the preceding part a. of this question; recognizing that the information for any specific project may be unavailable prior to that project's completed construction and start of operation.
- d. Net MH system energy imports and exports, annual on peak and off peak, monthly on peak and off peak, weekly on peak and off peak, daily on peak and off peak, hourly; with the same time periods and partial data requested as for the preceding part a. of this question.
- e. Also please provide any projections made in the last 24 months regarding any of the above system operation information, and any projections used in evaluation of the contract with Manitoba Hydro.

Response:

a. – d. Xcel Energy does not have the requested information.

e. Xcel Energy does not have the requested information concerning projections. Assumptions made during the evaluation of the Manitoba Hydro proposal were provided in our response to Information Request 8 and 9 from the Department of Commerce. These responses were provided to you through your consultant, Joanna Birenbaum of Turkstra Mazza on November 7, 2000 and are included here for your convenience. Also attached we are providing you more recent values for similar information as provided to the Department of Commerce in a recent data request.

Response By: Mark McGree / Thomas McDonough
Title: Manager Resource Planning & Bidding / Sr. Attorney
Department: Energy Markets / Energy Markets
Telephone: 303-308-2747 / 612-337-2855
Date: October 17, 2002

PUC Docket No. E-002/M-99-888

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~~Paul Wellstone ???
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November 14, 2002

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Re: *In the Matter of the Petition of Northern States Power Company d/b/a Xcel Energy for
Approval of a Power Purchase Agreement with Manitoba Hydro*
MPUC Docket No. E-002/M-99-888

Dear Dr. Haar:

Please delete Lloyd Kuczek from the Official Service List in the above-captioned matter. Joanne Flynn should remain on the Service List. Please note the correct spelling of Ms. Flynn's first name.

Thank you for your attention to this matter and please contact me if you have any questions.

Very truly yours,

WINTHROP & WEINSTINE, P.A.

By -


Eric F. Swanson

EFS:mtb//idmsstp:667767_1

cc: All Parties on attached Service List

**In the Matter of the Petition of Northern States
Power Company for Review of its 1999 All
Source Request for Proposals (RFP)**
Docket No. E002/M-99-888

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November 8, 2002

Burl W. Haar
Executive Secretary
Minnesota Public Utilities Commission
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Re: PETITION OF NORTHERN STATES POWER COMPANY D/B/A
XCEL ENERGY FOR APPROVAL OF A POWER PURCHASE
AGREEMENT WITH MANITOBA HYDRO
DOCKET No. E002/M-99-888

Dear Dr. Haar:

Enclosed please find an original and 15 copies of the Reply Comments of Northern States Power Company d/b/a Xcel Energy ("Xcel Energy") submitted to the Minnesota Public Utilities Commission in the above stated matter.

We have served copies on the Department of Commerce and the Office of the Attorney General-Residential Utilities Division as well as all other parties on the attached service list. Please contact me at (612) 904-5366 if you have any questions regarding this filing.

Sincerely,

A handwritten signature in cursive script that reads 'Debra Paulson'.

DEBRA J. PAULSON
REGULATORY CASE SPECIALIST

Enclosure
c: Service List

CERTIFICATE OF SERVICE

I, Carole Wallace, hereby certify that I have this day served copies of the foregoing document on the attached list of persons by delivery by hand or by placing in the U.S. mail at Minneapolis, Minnesota.

DOCKET No. E002/M-99-888

Dated this 8th day of November 2002.

Carole Wallace

In the Matter of the Petition of
Northern States Power Company
for Review of its 1999 All Source
Request for Proposals (RFP)
Docket No. E002/M-99-888
Updated 11/04/02

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STATE OF MINNESOTA
BEFORE THE
MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott
Marshall Johnson
LeRoy Koppendrayner
Phyllis Reha

Chair
Commissioner
Commissioner
Commissioner

IN THE MATTER OF THE PETITION OF
NORTHERN STATES POWER COMPANY
D/B/A XCEL ENERGY FOR APPROVAL
OF A POWER PURCHASE AGREEMENT
WITH MANITOBA HYDRO

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

XCEL ENERGY'S REPLY
COMMENTS

INTRODUCTION

Northern States Power Company d/b/a Xcel Energy ("Xcel Energy" or "Company") submits this Reply to the Comments of the Minnesota Department of Commerce ("Department" or "DOC"), the Comments of Minnesota Witness for Environmental Justice ("MWEJ"), and the Petition of the Pimicikamak Cree Nation ("PCN") for a Contested Case Hearing in the above-referenced matter.¹ First, the Company agrees with the Department's analysis of the power purchase agreement ("PPA") and discussion of the pertinent issues arising out of this Docket. We accept the two reporting requirements recommended by the Department and believe that no further open issues are present. We continue to request approval of the PPA as supported by the Department.

Second, while we appreciate MWEJ's point of view, Xcel Energy respectfully disagrees with their conclusion that the PPA should be rejected or that further inquiry

¹ Clean Water Action Alliance submitted a letter supporting MWEJ's comments and Minnesota Senator Ellen Anderson submitted a letter opposing approval. While we do not believe we were served with these letters, our Reply comments fully address the concerns raised in them.

is necessary. The PPA adequately addresses the material financial and operational risks to Minnesota's ratepayers arising out of this resource purchase.

Third, the Company respectfully disagrees with the PCN's request for a contested case. While the PCN may have substantial concerns over implementation of the Northern Flood Agreement ("NFA"), no material factual dispute over approval of the PPA is stated. Rather, the PCN's dispute with Manitoba Hydro over the NFA is inherently a Canadian dispute, between solely Canadian parties, that must be resolved under Canadian law and in a Canadian forum.

Finally, the Commission has all of the information needed to determine whether the PPA constitutes a reasonable purchase in light of the requirements of the bid process and whether the PPA provides adequate protections to Minnesota's ratepayers. We respectfully request that the Commission adopt the Department's recommendations and approve this PPA.

DISCUSSION

A. Reply to the Department.

The Department thoroughly analyzed the PPA and its impacts on Minnesota's ratepayers. The Department properly posed the question as whether the Commission should "approve the PPA if, and only if, the PPA is in the best interest of Xcel's ratepayers." (Department Comments, p. 7.) The main criteria applied in the Department's analysis for answering this question were (i) whether the contract purchase price is reasonable in light of other available alternatives, and (ii) whether ratepayers are appropriately protected from the financial and operational risks of the project. (*Id.*) This is the same analytical approach consistently applied by the Department in considering Xcel Energy's previous PPA approval requests.

1. Pricing Considerations.

Pricing under this PPA is reasonable in the context of the competitive bidding process under which this proposal was made.² As confirmed in the Department's comments, the PPA prices "are not higher than the prices contained in the bid submitted to Xcel by MH." (Department Comments, p. 8.) As such the Department concluded that the pricing remained reasonable.

The Department raised two concerns about the pricing, both of which can be resolved through the suggested reporting requirements. First, the Department noted that the contract (§ 2.4) allows but does not require Xcel Energy to purchase additional "supplemental" energy at a mutually-agreeable price. In order to assure that the mutually agreed price remains reasonable, the Department recommended that Xcel Energy provide an annual report of all "supplemental energy" purchased under this contract. The Company agrees to provide the requested report and accepts the Department's suggestion that the report can be made in connection with the Company's periodic fuel clause adjustment filings.

Second, the Department notes that the PPA contains a "take or pay" requirement of 160,000 MWh of energy during each rolling consecutive 28-day period. (Department Comments, p. 8-9.) The Company agrees that this provision is symmetrical and creates a risk for both parties that they may have to compensate the other if the purchase and delivery obligations are not met. This type of symmetrical obligation will act as an incentive to both parties to perform their obligations under the contract and should serve to further enhance reliability of the purchased supply.

While Xcel Energy believes the circumstances under which this risk could be realized are rare, we agree to the Department's recommendation that we report the

² The bid process and the relative merit of Manitoba Hydro's pricing was previously considered by the Commission in its February 7, 2001 *Order Rejecting Requests for Further Investigation, Approving Final Bid Selections, and Opening Docket Regarding Externality Values, in this Docket* (hereinafter the "Bid Selection Order"). In that order, the Commission found Xcel Energy's selection of Manitoba Hydro's bid to be fully consistent with Minnesota law and the Commission's bid procedures.

amount of "deficit energy " and the reasons why the Company failed to purchase the required amount of energy be included in the relevant fuel adjustment clause reports.

2. Operational and Financial Issues.

Minnesota ratepayers are appropriately protected from "operational risks" and "financial risks" of this purchase from Manitoba Hydro. These issues had been previously raised by some parties who were concerned that Manitoba Hydro would not be a reliable supplier of electricity. In its Bid Selection Order, the Commission reviewed these reliability concerns and accepted the Department's recommendation 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." (Bid Selection Order, p. 11.)

We agree this PPA "contains sufficient provisions to provide for reliable power to be delivered from MH to Xcel." (Department Comments, p. 14.) While there are certainly circumstances when energy may not be available under the PPA, the "system participation" character of this purchase and the protections built into the contract all serve to mitigate this risk. We agree that the PPA provides appropriate ratepayer protection for known financial and operational risks and agree with the Department that the contract should be approved.

B. Reply to MWEJ

MWEJ revisits many of the same socioeconomic and environmental issues that have previously been reviewed in this and other related Dockets. MWEJ states concerns that Manitoba Hydro may not provide a reliable energy supply and that Manitoba Hydro's "large dams" cause social and environmental harm in northern Manitoba. MWEJ argues that the socioeconomic costs of this system participation purchase have not been adequately taken into account. MWEJ suggests that this is not just a Canadian problem and that Minnesota regulators should take on responsibility to mediate Manitoba Hydro's Canadian legal and contractual disputes.

In its Bid Selection Order, the Commission thoroughly reviewed these issues in determining that including Manitoba Hydro as a finalist for negotiation was appropriate. Focusing on the bidding process, the Commission specifically determined that the "bid process was fair and treated all bidders equally." (Bid Selection Order, p. 9.) As to MWEJ's specific complaints, they have all been addressed previously by the Commission and do not require rejection of the PPA or additional investigation.³

1. Reliability

MWEJ urges the Commission to find that "reliability is an issue." (MWEJ Comments, p. 10.) However, MWEJ does not appear to have analyzed the specific terms of the PPA which directly address reliability, and does not provide any alternatives for the Commission to consider. Nor does MWEJ provide any pricing or reliability comparison with the "in-state renewable" resources it suggests would be more appropriate.

Xcel Energy and Manitoba Hydro negotiated extensively to address reliability and came to an agreement that provides Xcel Energy's customers with reasonable assurances that energy will be reliably available. The reliability provisions contained in the PPA provide Xcel Energy and its customers with an appropriate level of protection in light of all the circumstances. MWEJ's reliability concerns do not provide a basis to reject the PPA or for further inquiry.

2. Environmental and Societal Costs.

MWEJ repeats arguments concerning whether the Commission's environmental externality values were applied properly and whether socio-economic costs were properly taken into account. MWEJ assumes that the Commission's environmental externality values were not taken into account in evaluating Manitoba Hydro's bid. However, as analyzed in the Bid Selection Order, Xcel Energy included

³ This same analysis and conclusion applies equally to the arguments contained in the letters submitted by Clean Water Action and Senator Anderson.

in its valuation model the emission rates provided by Manitoba Hydro in support of its bid. Manitoba Hydro provided Xcel Energy with system-wide emissions data which fully took into account the thermal-generation that could be utilized to provide power under the PPA. Moreover, MWEJ provides no additional basis to suggest that Manitoba Hydro's bid or the PPA were improperly valued or that a different outcome would have been warranted if a different analysis had been undertaken.

Likewise, the socioeconomic costs claimed by MWEJ were addressed in the Bid Selection Order and need not be revisited again. As the Commission previously found, the socioeconomic costs of Manitoba Hydro's electric generation have been internalized into the Northern Flood Agreement ("NFA") which provides a mechanism for compensating affected parties from the effects of hydroelectric generation in northern Manitoba. (Bid Selection Order, p. 15-18.) The NFA gives affected parties the right to compensation for a variety of impacts associated with hydroelectric dams. This contractual scheme supports the Commission's prior finding that Manitoba Hydro's price already reflects the internalized cost of the socioeconomic costs. (*Id.*, p. 18.)

3. Canadian Remedies are Available.

MWEJ candidly acknowledges that "the NFA *would* internalize the externalities associated with purchases from Manitoba Hydro, *if it were fulfilled and enforced.*" (MWEJ Comments, p. 9 (emphasis in original).) This admission frames MWEJ's attempt to obtain relief from a Minnesota regulatory body for a Canadian dispute over the implementation of Canadian legal and contractual obligations. But as the Commission has already addressed in the Bid Selection Order, the NFA contains extensive and detailed rights, obligations and dispute resolution mechanisms. Fulfillment and enforcement of that contract between its signatories must necessarily occur in Canada employing Canadian law and procedure. The Commission should continue to focus on whether the price and terms of the PPA as presented are in Minnesota ratepayers' interest.

C. Reply to the PCN

By arguing for a "contested case" on the issue of whether socioeconomic costs have been adequately accounted for, the PCN takes a somewhat different approach. However, this new procedural request does not change the nature of the underlying Canadian dispute. Rather, as the PCN acknowledges, its goal in participating in this Docket is to create the "incentive for Manitoba Hydro to undertake the remediation and mitigation initiatives that Manitoba Hydro has promised under the NFA." (PCN Memorandum, p. 38.) The PCN's dispute over the NFA and Manitoba Hydro's performance of its Canadian legal obligations does not establish grounds for a contested case and should be left to Canadian decision makers.

1. The Statutes and Rules do Not Require a Contested Case.

Contrary to the PCN's argument, the relevant statutes and rules do not mandate a contested case in this circumstance. Rather, under Minn. R. 7829.1000, the Commission has broad discretion to determine whether a contested case is justified. Only if a contested case is required by statute or rule or "if the commission finds that all significant issues have not been resolved to its satisfaction" is a contested case appropriate. *Id.* Moreover, the PCN bears the burden to establish the need for a contested case. The proponent of a contested case has "the burden of demonstrating the existence of material facts that would aid the agency before they are entitled to a contested case hearing." *Solid Waste Permit for the NSP Red Wing Ash Disposal Facility*, 421 N.W.2d 398, 404, (Minn. Ct. App. 1988).

In this situation the record has ample support for the Commission to resolve all issues which are material to the decision of whether the PPA is in the best interest of Minnesota's ratepayers. The Commission's consideration of the City-Required Facilities surcharge is instructive. In that case (Docket No. E-002/M-99-799), the Commission rejected parties' claims that Xcel Energy's proposed charge for the undergrounding facilities created fact questions suitable for a contested case. "As

discussed herein, the proposal under consideration is narrowly drawn and the issues raised are not questions of material fact but rather issues of policy within the purview of the Commission." *In re Xcel's Petition for Approval of a City Requested Facilities Surcharge Rider*, Docket No. E-002/M-99-799 (Sept. 21, 2001).

Similarly in this case, determination of whether the PPA is in the best interest of Minnesota's ratepayers, is much more an exercise of the Commission's policy judgment rather than a question of Canadian facts. Neither the environmental externalities statute (§ 216B.2422) nor the Commission's resource planning rules (7843.0500, subp. 3) cited in the PCN's memorandum, change this analysis. These authorities do not require the Commission to proceed with consideration of this PPA in any different fashion than it has done in all of Xcel Energy's other PPA filings.

The fundamental questions to be resolved are whether the price paid for electricity is appropriate given other available alternatives and whether the PPA provides sufficient ratepayer protections. In fulfilling its statutory duty, the Commission has extensive experience in the issues and policy surrounding public utility regulation. The Commission has the authority to apply its specialized knowledge to determine whether the PPA is in the best interest of Minnesota's ratepayers without resorting to a contested case. *See Moorhead v Minnesota Public Util. Com'n*, 343 N.W.2d 843, 846 (Minn. 1984)(when MPUC acts in "legislative capacity, its decision will not be set aside unless it can be shown to be illegal by clear and convincing evidence"). As described in the Department's comments, both of these questions are adequately resolved in this situation based on the current record.

The PCN offers the Minnesota Pollution Control Agency ("MPCA") rules as precedent in support of its request for a contested case hearing. The MPCA rules, however, provide no support and, in fact, clarify the proper analysis for rejecting the requested contested case. Minn. R. 7000.1900, subp. 1. As is the case under the Commission's rule (7829.1000), the MPCA's rule authorizes contested cases only when 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. Minn. R. 7000.1900, subp. 1. The PCN has not satisfied these conditions.

The Minnesota Supreme Court defines a material fact in a way parallel to the third criteria: a material fact is "one of such a nature as will affect the result or outcome of the case depending upon its resolution." *Rathburn v W.T. Grant Co.*, 219 N.W.2d 641, 646 (1974). The issues PCN tries to raise, while important questions of Canadian law and policy, are not "material" to this docket. Whether Manitoba Hydro is meeting its obligations to PCN under the NFA is not the question for decision by the Commission here.

Moreover, interpretation and implementation of a Canadian contract entered into between a Canadian Crown Corporation (Manitoba Hydro) and a First Nation (the PCN) under Canadian law goes beyond the types of issues the MPUC should be asked to resolve. See *M.T. Props., Inc. v Alexander*, 433 N.W.2d 886, 889 (Minn. Ct. App. 1989), rev. denied (Feb. 22, 1989) (when agency lacks authority to address issue, contested case hearing is not appropriate). Disputed facts that are beyond the agency's boundaries are not considered and do not satisfy the materiality test.

2. The PCN's Dispute Can be Resolved in Canada.

In this case the PCN's asserted factual disputes all revolve around alleged socioeconomic impacts occurring in northern Manitoba arising out of Manitoba Hydro's alleged defaults under the NFA. In its own words, the PCN argues that "compliance with the NFA is a vigorously disputed issue" (p. 10) and that "the remediation and mitigation initiatives required by the NFA are not being implemented" (p. 25-26). Whether or not these factual allegations are true, the PCN's purely Canadian dispute over rights and obligations under the NFA is not material to this proceeding. The PCN's focus on issues that exist exclusively north of the international border are merely an effort to obtain leverage in the PCN's long-

standing dispute with Manitoba Hydro. Manitoba Hydro and the PCN have ample contractual and legal remedies in Canada which can and should be implemented to address any grievances they have with one another.

Finally, PCN's assertions that Manitoba Hydro is breaching the NFA, do not make this a dispute for Minnesota to resolve. Rather, the NFA provides significant remedies and dispute resolution mechanisms. If Manitoba Hydro is not living up to its commitments, the PCN can and should address those issues in Canada, before a Canadian body, applying Canadian law. None of these claims create a material factual dispute for consideration by the Commission under Minnesota law.

3. The Bid Selection Order Addressed Socioeconomic Costs.

The PCN repeatedly criticizes the Commission's Bid Selection Order and claims that the Commission inappropriately "assumed" that the socioeconomic impacts of this purchase were included in Manitoba Hydro's bid price. The PCN misunderstands the Commission's decision on this point and does not recognize the Commission's analysis and the effect of the NFA on Manitoba Hydro's bid.

From pages 15 through 18 of the Bid Selection Order, the Commission extensively analyzes the claim of socioeconomic impacts in light of the facts of this situation, including the provisions of the NFA. This thorough and lengthy analysis concluded that "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." (Bid Selection Order, p. 16.) Recognizing that "Manitoba Hydro has not paid to PCN all the compensation to which PCN believes it is entitled for socioeconomic damage" (*id.*) does not change the fact the NFA is the vehicle through which all of the PCN's claimed costs are internalized.

CONCLUSION

The PPA provides reasonably-priced, long-term energy and capacity and implements a variety of mechanisms that will protect ratepayers from material financial and operation risks associated with the contract. Therefore, approval is in the public interest. There is no need for a contested case or other delay.

Dated: November 8, 2002
Northern States Power Company
d/b/a Xcel Energy

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