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April 29, 2015

Darrell Nitschke
Executive Secretary
North Dakota Public Service Commission
600 E. Boulevard, Dept. 408
Bismarck, ND 58505-0480

RE: Request for Jurisdictional Determination
Regarding Northern States Power Company's
Acquisition of Courtenay Wind Farm, LLC

Dear Mr. Nitschke:

Northern States Power Company, doing business as Xcel Energy (Xcel Energy or the Company), submits this Request for Determination of Jurisdiction to the North Dakota Public Service Commission regarding the Company's imminent acquisition of 100 percent of the membership interests of Courtenay Wind Farm, LLC from Courtney Wind Farm, LLC's ultimate corporate parent, Geronimo Wind Energy, LLC (Geronimo) (Proposed Transaction). As a result of the Proposed Transaction the Company will acquire all the assets of Courtenay Wind Farm, LLC, which includes the permits and land rights necessary to develop a 200 MW wind energy generation facility that Courtenay Wind Farm, LLC is currently in the process of developing at a location northeast of Jamestown in northeastern Stutsman County.

Introduction and Background

In July 2013, the Company submitted to the Commission an application for an advance determination of prudence for a power purchase agreement between the Company and Courtenay Wind Farm, LLC for all of the generation from the Wind Project (Case No. PU-13-706). The Commission granted an ADP for the Courtney PPA in its February 26, 2014 *Order Adopting Settlement* in Case No. PU-13-706.¹

¹ See Revised Second Amended Comprehensive Settlement Agreement attached to the Commission's 2/26/14 Settlement Order, at Section II.F on page 22.

In the course of the Wind Project's development, however, it was determined that Geronimo, through Courtenay Wind Farm, LLC, would be unable to bring the project to completion, and the Proposed Transaction was the only way of successfully developing this North Dakota based project. Xcel Energy and Geronimo have therefore entered into a purchase and sale agreement pursuant to which the Company will acquire all of the assets needed for developing the project by purchasing the entire membership interests in Courtenay Wind Farm, LLC from Geronimo.

Notwithstanding this request for a jurisdictional determination, Xcel Energy will seek all appropriate ratemaking and construction approvals from the Commission, including requesting a Certificate of Public Convenience and Necessity, Advance Determination of Prudence for Xcel Energy's ownership of the Project, and a request to transfer the Certificate of Site Compatibility from Courtenay Wind Farm, LLC to Xcel Energy.

Request for Jurisdictional Determination

The Company has identified N.D.C.C. § 49-04-06 (Merger Statute) as among the statutes potentially applicable to the Proposed Transaction. The Merger Statute requires the Company to obtain the approval of the Commission before acquiring the membership interests of a limited liability company that is incorporated for, organized for, or engaged in "the same or similar business" as Xcel Energy. The Company has analyzed the Merger Statute and concludes, based on the statute's language, the regulatory scheme of which the statute is a part, and Commission precedent applying the statute, that Section 49-04-06 should not be applicable to the Proposed Transaction.

As a result Xcel Energy requests a determination that N.D.C.C. § 49-04-06 is not applicable to the Proposed Transaction. We provide below our analysis in support of a determination that the Proposed Transaction is not subject to Commission jurisdiction pursuant to Section 49-04-06.²

Analysis in Support of Request for Jurisdictional Determination

Under the Proposed Transaction, Xcel Energy will purchase 100 percent of the membership interests in Courtenay Wind Farm, LLC, a limited liability company that owns the real estate, leases, permits and other assets necessary for the development of the 200 MW Courtenay wind generation facility being developed northeast of Jamestown, North Dakota. Once

² To be clear, our request for a jurisdictional determination is limited to the application of N.D.C.C. § 49-04-06 to the Company's purchase of Courtney Wind Farm, LLC. Xcel Energy believes the purchase is clearly subject to Commission jurisdiction under various other statutes, including N.D.C.C. § 49-22-07(1) (Site Permit); N.D.C.C. § 49-03-01 (Certificate of Public Convenience and Necessity); and N.D.C.C. § 49-05-16 (Advance Determination of Prudence), and as stated above will make the appropriate filings under these statutes with respect to the purchase of Courtney Wind Farm, LLC.

purchased, the membership interests will be merged into Xcel Energy, Courtenay Wind Farm, LLC will cease to exist as a separate entity, and its assets will become Company assets.

N.D.C.C. § 49-04-06 provides:

No public utility, directly or indirectly, shall acquire the stock, membership interest, or business of any other corporation or limited liability company incorporated for or organized for or engaged in the same or a similar business or proposing to operate or operating under a franchise from the same or any other authority unless authorized to do so by the commission. No such transaction shall be binding upon the public without the approval of the commission. (Emphasis added).

The statute appears only to require Commission approval of a public utility's acquisition of a corporation or limited liability company that is engaged in the "same or similar business" as the public utility. The Company submits that Xcel Energy and Courtenay Wind Farm, LLC are not engaged in the "same or similar business." The business Xcel Energy is engaged in is the provision of retail electric and gas service, which is subject to the Commission's jurisdiction pursuant to N.D.C.C. § 49-02-01.³ Courtenay Wind Farm, LLC, however, is an independent power producer engaged in the business of developing wind-powered electric generating facilities and selling the energy generated by those facilities at wholesale. While the Company also engages in the generation of electric energy and in wholesale electric energy transactions, these activities are merely part of the overall business that the Company is engaged in, namely, the provision of retail electric and gas service as a public utility under North Dakota law. Courtenay Wind Farm, LLC is not a public utility under North Dakota law, but rather an independent power producer, and as such is not engaged in the same or similar business as Xcel Energy.

This conclusion is buttressed by our analysis of the statute's purpose, which indicated its application is intended to be limited to the merger of public utilities. The regulatory regime under which electric utilities operate in North Dakota was enacted in 1919, and it included Section 49-04-06, which has not been materially amended.⁴ The title of the Act setting forth the regulatory regime refers to the Act authorizing the Commission to "Regulate, Control and Fix Rates, Charges and Services of all Public Utilities."⁵ The Act's title reinforces the

³ N.D.C.C. § 49-02-01(4) extends the scope of the Commission's jurisdiction to all "public utilities," which includes an "electric utility" like Xcel Energy that is "engaged in the generation and distribution of light, heat, or power" (emphasis added). Other types of "public utilities" are contract and common carriers (excluding air carriers), telecommunications companies, pipeline utilities, gas utilities, heating utilities, and agricultural product warehousing companies. N.D.C.C. § 49-02-01 (1)-(3), (5)-(7).

⁴ Compare 1919 N.D. Laws at 365, § 22, *with* Section 49-04-06.

⁵ 1919 N.D. Laws at 358, ch. 192 [hereinafter N.D. Public Utilities Act].

conclusion that the Commission’s jurisdiction was intended to address the combination of public utilities alone, since there were no independent power producers at the time, and there has been no subsequent revision of Section 49-04-06 to clarify that this new type of business is the same or similar to the business of an electric utility.

Further, the North Dakota Supreme Court has held that a statute’s terms may not be extended beyond the range stated in the title of the Act.⁶ Accordingly, under the regulatory regime initially enacted and subsequently maintained by the Legislature, only Xcel Energy’s acquisition of another entity that provides retail utility service would come within the scope of Section 49-04-06, as evidenced by the Merger Statutes’ language requiring Commission approval when the acquired business (i) is “the same or similar” to the public utility’s business, or (ii) operates under the authority of a utility franchise.

Our review of the Commission’s past application of the Merger Statute shows that Commission precedent is consistent with the conclusion that the statute should not apply to Xcel Energy’s acquisition of Courtenay Wind Farm, LLC. Our research shows that the Commission has only applied the statute to transactions involving the combination of two public utilities, specifically, the mergers of two trucking companies;⁷ two telecommunications companies;⁸ an electric and gas utility with a gas utility;⁹ and two vertically integrated utilities.¹⁰

These cases all involved the combination of two public utilities engaged in what we understand the Merger Statute to mean by the phrase “same or similar” businesses. For example, the *Great Plains/MDU Merger* involved the merging of two public utilities, one that provided retail gas and retail electric service, while the other provided retail gas service only. Their businesses were “similar” in that, while Great Plains and MDU both provided retail gas service, MDU was also engaged in the business of providing retail electric service.¹¹ The

⁶ See *Olson v. Erickson*, 217 N.W. 841, 841 (N.D. 1928) (“An act of the Legislature is to be interpreted in the light of its title, and where an act is subject to two interpretations, one of which would extend the provisions of the act beyond the range stated in the title, so as to include subjects not germane thereto, that interpretation will be adopted which is in harmony with the title of the act”).

⁷ *Fargo Freight Trucking, Inc. v. North Dakota Public Service Commission*, 129 N.W. 2d 368 (N.D. 1964) [hereinafter *Fargo Freight Merger*].

⁸ *In re Minot Telephone Company*, Case No. PU-156-94-11, 1994 WL 135200, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER (N.D.P.S.C. March 23, 1994) [hereinafter *Minot Merger*].

⁹ *Great Plains Natural Gas Co. Merge w/Montana-Dakota Utilities Co.*, Case No. PU-2228-00-28, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER (N.D.P.S.C. April 26, 2000) [hereinafter *Great Plains/MDU Merger*].

¹⁰ *Northern States Power Company Merge with New Century Energies, Inc.*, Case No. PU-400-99-418, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER (N.D.P.S.C. April 12, 2000) [hereinafter *NSP/NCE Merger*].

¹¹ *Great Plains/MDU Merger*, Findings at ¶¶ 1-2.

two public utilities in the *NSP/NCE Merger* were involved in the same business. NSP was an investor-owned electric and gas utility with electric and gas public utilities, a pipeline, and various unregulated businesses as subsidiaries. NCE was an investor-owned public utility holding company that also had electric and gas public utilities, a pipeline, and various unregulated businesses as subsidiaries.¹² Although the Commission’s analysis of the case was pursuant to a different statute, the telecommunications utilities in the *Minot Merger* were also engaged in the same business; both provided local exchange service to end-users and long distance access service to interexchange carriers.¹³ And the lease transaction in the *Fargo Freight Merger* also involved two entities that provided the same trucking services.¹⁴

In contrast, Xcel Energy is an investor-owned public utility providing retail electric and gas service to end-users, and Courtenay Wind Farm, LLC is a private independent power producer. As an independent power producer, Courtenay Wind Farm, LLC provides this service to electric utilities not end-users – an activity that is not within the Commission’s jurisdiction. Xcel Energy, on the other hand, provides all aspects of its retail electric service – as well as retail gas service - to end-users. Courtenay Wind Farm, LLC’s wholesale wind energy business is thus not “the same or similar to” Xcel Energy’s retail electric and gas service business within the meaning of Section 49-04-06 and Commission precedent.

Finally, the North Dakota regulatory scheme under which public utilities operate supports the conclusion that the Merger Statute does not apply to the Proposed Transaction. This scheme provides, among other things, that the Commission has jurisdiction to (i) supervise the rates of a public utility, including changing a utility’s rate if it finds the rate unjust and unreasonable (Section 49-02-03); (ii) regulate the services provided by a public utility, including setting the conditions under which a utility may provide a particular service or commodity (Sections 49-02-04 and 49-02-11); (iii) enter the premises of a public utility for purposes of examining or testing of the utility’s operations (Section 49-02-06); (iv) prescribe the accounting and record keeping practices of a public utility (Section 49-02-12); (v) inspect the accounting and business records of a public utility (Section 49-02-14); and (vi) investigate a claim that a public utility has charged an excessive or discriminatory rate and order the utility to pay reparation to the complainant, with interest (Section 49-02-16).¹⁵ These provisions do not apply to Courtenay Wind Farm, LLC, which is an independent power producer engaged in the business of providing wholesale wind power, while they all apply to Xcel Energy, which is in the business of providing retail electric service. This further

¹² *NSP/NCE Merger*, Findings at ¶¶ 1-3.

¹³ *Minot Merger*, Findings at ¶¶ 2-4.

¹⁴ *Fargo Freight Merger*, 129 N.W.2d 368, 370 (N.D. 1964)

¹⁵ See N.D. Public Utilities Act at §§ 2-5, 11-12, 14, 16.

supports concluding that Courtenay Wind Farm, LLC is not engaged in the “same or similar” business as the Company.

Conclusion

The Company’s analysis shows that Xcel Energy and Courtenay Wind Farm, LLC are not engaged in “the same or similar business” within the plain meaning of Section 49-04-06; that this conclusion is buttressed by the fact that Courtenay Wind Farm, LLC is not a public utility subject to the public utility regulatory scheme of which Section 49-04-06 is a part; and that Commission precedent supports a determination that the application of Section 49-04-06 is properly limited to transactions involving the combination of two public utilities. Based on this, the Company respectfully requests a jurisdictional determination that Section 49-04-06 does not apply to Xcel Energy’s acquisition of Courtenay Wind Farm, LLC.

Respectfully submitted,

/s/ Alison C. Archer

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