

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Ellen Anderson
David C. Boyd
J. Dennis O'Brien
Phyllis A. Reha
Betsy Wergin

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of Xcel Energy's Petition for a
Determination of Entitlement to Renewable
Attributes of Energy Purchases Pursuant to
Renewable Energy Requirements

ISSUE DATE: June 2, 2011

DOCKET NO. E-002/M-08-440

ORDER DETERMINING OWNERSHIP
OF RENEWABLE ENERGY CREDITS

PROCEDURAL HISTORY

On April 16, 2008, Northern States Power Company d/b/a Xcel Energy (Xcel) petitioned the Commission for a declaration that Xcel owns the renewable energy credits (RECS) associated with 46 specific power purchase agreements (PPAs) entered into pursuant to: 1) the federal Public Utility Regulatory Policies Act of 1978 (PURPA),¹ and 2) Minnesota's 1994 Wind and Biomass Mandates.²

Following comments and several preliminary Commission Orders in this docket requiring the parties to negotiate and report on negotiations,³ the Commission issued its September 9, 2010 Order determining ownership of the renewable energy credits of 46 power purchase agreements entered into by Xcel. In that Order, the Commission found, in relevant part, that the renewable energy credits resulting from the power purchase agreements entered into pursuant to the Wind and Biomass Mandates were owned by Xcel unless a generator could demonstrate that the power purchase agreement addressed renewable energy credit ownership.

St. Paul Cogeneration LLC (SPC) and Mission Funding Zeta (Mission) filed separate responses to the September 9, 2010 Commission Order. Both parties asserted that their respective power purchase agreements with Xcel explicitly provided that the associated renewable energy credits were to be owned by SPC and Mission.

¹ Pub. L. No. 95-617, § 2, Nov. 9, 1978, 92 Stat. 3119 (codified as amended in scattered sections of 15 U.S.C., 16 U.S.C., 30 U.S.C., 42 U.S.C., and 43 U.S.C.). Minnesota implemented PURPA through Minn. Stat. § 216B.164.

² Minn. Stat. §§ 216B.2423 and 216B.2424.

³ Order Requiring Negotiations and Reporting (July 24, 2009); and Order Requiring Further Negotiations and Reporting (March 2, 2010).

No written comments of any party were filed in response to the filings of SPC and Mission.

On April 7, 2011, the Commission met to consider the matter.

The following parties appeared and provided oral comments at the Commission meeting:

- SPC;
- Mission;
- Xcel Energy;
- Large Industrial Group;
- Department of Commerce; and
- Woodstock Wind Farms LLC.

FINDINGS AND CONCLUSIONS

I. Background

A. Renewable Energy Credits

Minnesota's Renewable Energy Standards (RES) statute directs electric utilities to supply a portion of their retail customers' demand for electricity in Minnesota with electricity generated from renewable sources of energy.⁴ This portion increases over time. By 2020, for example, Xcel must acquire 30 percent of the energy needed to serve its Minnesota retail customers from renewable energy sources.⁵

The RES also directs the Commission to establish a program of tradable credits for electricity generated from qualifying renewable sources.⁶ This program permits a utility with access to relatively inexpensive sources of renewable energy to acquire more renewable electricity than the RES requires, and to sell its surplus renewable energy credits to another utility that lacks access to these sources. To make this system effective, the statute requires a credit-tracking system⁷ to ensure that each credit is used only once.⁸

⁴ Minn. Stat. § 216B.1691.

⁵ Minn. Stat. § 216B.1691, subd. 2a(b).

⁶ Minn. Stat. § 216B.1691, subd. 4.

⁷ Minn. Stat. § 216B.1691, subd. 4(d).

⁸ Minn. Stat. § 216B.1691, subd. 4(a).

The Commission formally initiated the process of establishing a renewable energy credit trading program in 2004,⁹ and issued initial protocols for the Midwest Renewable Energy Tracking System (M-RETS) in 2007.¹⁰ The Commission directed that all generating units to be used to meet the RES, starting with the 2009 compliance year, must be registered with M-RETS.

During the creation of M-RETS in Docket No. E-999/CI-04-1616, Xcel asked the Commission to identify the ownership of the renewable energy credits associated with power purchase agreements that lack contract terms defining such ownership. The Commission declined to address Xcel's question in that docket and instead directed the parties to enter into negotiations.¹¹

B. September 9, 2010 Order

In the September 9, 2010 Order in this matter, the Commission found, at Ordering paragraph 2, that:

[F]or the remaining power purchase agreements referenced in this docket entered into pursuant to the Wind or Biomass Statutes (Minn. Stat. 216B.2423 and 216B.2424) Xcel owns the renewable energy credits, unless a generator can demonstrate that the PPA at issue is not silent as to renewable energy credit. (emphasis added)

The Commission recognized in its Order that renewable energy credits are valuable economic entities. The Commission likewise stated that the power purchase agreements had already been treated as renewable energy contracts and the Commission understood that the purchasing utility and its ratepayers would have the right to claim the generation as renewable.

The Commission found that any economic value associated with meeting the statutory renewable energy obligations under these power purchase agreements had passed to Xcel.

Importantly, however, the Commission noted that if a generator could demonstrate that its power purchase agreement was not silent but instead addressed renewable energy credit ownership, the benefit should not be presumptively granted to Xcel. The Commission reserved the right to further address the ownership of renewable energy credits if a generator could establish that the particular power purchase agreement was not silent as to renewable energy credit ownership so as to confer the ownership to the generator.

C. Power Purchase Agreements

The power purchase agreements at issue in this docket entered into pursuant to the Wind or Biomass Mandates are:

⁹ *In the Matter of a Commission Investigation into a Multi-state Tracking and Trading System for Renewable Energy Credits*, Docket No. E-999/CI-04-1616.

¹⁰ *Id.*; Order Approving Midwest Renewable Energy Tracking System (M-RETS) Under Minn. Stat. § 216B.1691, subd. 4(d) and Requiring Utilities to Participate in M-RETS (October 9, 2007); Order Establishing Initial Protocols for Trading Renewable Energy Credits (December 18, 2007).

¹¹ *Id.* at Ordering Paragraph 4.

1. Biomass (25 MW) contract between SPC and Xcel dated December 23, 1998;
2. Wind energy contract (10.2 MW) between Woodstock Wind Farm LLC and Xcel dated September 19, 1997;
3. Wind energy contract (11.25) between Lakota Ridge LLC and Xcel dated March 26, 1997; and
4. Wind energy contract (11.88 MW) between Shaokatan Hills LLC and Xcel dated March 26, 1997.

II. Positions of the Parties

A. SPC and Mission

SPC and Mission claim that their power purchase agreements are not silent as to REC ownership.¹² The power purchase agreement language at issue reads as follows:

Except as provided for to the contrary in this section, Seller during the Term of this Agreement, shall pay all federal, state, county, municipal or other lawful taxes or fees currently in effect applicable to Seller or the Plant or imposed on Seller or the Plant by reasons of sale of Energy or Capacity under this Agreement. Seller shall receive the benefit of any tax credits, allowances or **other credits** related to the Plant which take effect after the execution of this Agreement.¹³ (emphasis added)

SPC and Mission asserted that the term “other credits” was generically defined and included any benefit that accrues to the seller of renewable energy. They claimed that renewable energy credits fall into the category of benefits contemplated by “other credits.” In addition, SPC and Mission argued that even though renewable energy credits were not in existence when the power purchase agreement was entered into, the language of the contract anticipates a benefit or “credit” that may accrue in the future.

B. Xcel Energy

Xcel argued that the contract language at issue was unambiguous. Xcel noted that the canons of construction require that general words are construed to be restricted in their meaning by preceding particular words. Xcel asserted that “other credits” cannot include renewable energy credits because the other words in the contract paragraph, including the heading, refer to tax credits. Additionally, Xcel entered into the agreements at issue as part of the legislative mandate to purchase renewable energy. Xcel argued that the ratepayers have already paid for these renewable energy credits. Xcel argued that the environmental attributes associated with the renewable energy cannot be separated from the energy itself and cannot be retained by SPC and Mission.

¹² SPC and Mission power purchase agreement language is similar.

¹³ Section 5.11.1 of power purchase agreement between Xcel and SPC.

C. Large Industrial Group

The Large Industrial Group agreed with Xcel that ratepayers have already paid for the renewable energy credits and the renewable energy credits belong to Xcel.

D. Department of Commerce

The Department argued that Xcel was the rightful owner of the renewable energy credits because the renewable attributes of the power purchase agreements existed all along. The creation of M-RETS served the purpose of accounting for and tracking renewable attributes, not creating new attributes. The Department asserted that by not allowing Xcel ownership rights to the renewable attributes the ratepayers were not getting the benefits intended in the renewable energy contracts at issue.

III. Commission Action

The September 9, 2010 Order in this matter determined that Xcel owns the renewable energy credits for power purchase agreements at issue in this docket and entered into pursuant to the Wind or Biomass Mandate statutes if these agreements are silent as to renewable energy credit ownership. The September 9, 2010 Order allowed generators an opportunity to demonstrate that a power purchase agreement was not silent on the issue of renewable energy credit ownership.

Upon review of the contract language at issue and in consideration of the arguments of the parties, the Commission finds that the contract term addressing ownership of “other credits” is not ambiguous and therefore does not require application of the canons of construction. The contract language at issue is not narrowly focused on the tax consequences of the transaction. Instead, “tax credits, allowances or other credits” is broad language encompassing non-tax allowances and credits. The only reasonable inference is that the term “other credits” takes into account non-tax credits such as renewable energy credits.

Even if the contract required application of the canons of construction, the Commission would reach the same result. The particular words “tax credits” preceding “other credits” do not control or provide direction on interpretation because the words “other credits” would have to be in reference to credits outside the tax realm. Additionally, as the canons of construction hold, headings do not control.

The Commission concurs with SPC and Mission that the power purchase agreement language referring to “other credits” includes renewable energy credits. The power purchase agreements at issue are therefore not silent as to renewable energy credit ownership. Thus, the Commission concludes that the specific power purchase agreement language at issue in this matter confers renewable energy credit ownership on SPC and Mission.

ORDER

1. The Commission finds that St. Paul Cogeneration LLC and Mission Funding Zeta own the renewable energy credits under the terms of the four power purchase agreements at issue in this docket.
2. The Commission finds that, for all unsettled power purchase agreements entered into under Minnesota Statutes §§ 216B.2423 and 216B.2424, Xcel owns the renewable energy credits unless a generator can demonstrate within 30 days from the date of this Order that the power purchase agreement is not silent as to the renewable energy credit ownership.
3. Xcel shall promptly serve a copy of this Order on all parties to the 46 power purchase agreements at issue in this docket.
4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary



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