



414 Nicollet Mall  
Minneapolis, Minnesota 55401

June 17, 2013

— VIA ELECTRONIC FILING —

Dr. Burl W. Haar  
Minnesota Public Utilities Commission  
121 7<sup>th</sup> Place East, Suite 350  
St. Paul, MN 55101-2147

RE: COMPLIANCE FILING  
POWER PURCHASE AGREEMENTS WITH GOODHUE WIND, LLC  
DOCKET NOS. IP6701/CN-09-1186, E002/M-09-1349 and E002/M-09-1350

Dear Dr. Haar,

Northern States Power Company, doing business as Xcel Energy, submits this update to the Minnesota Public Utilities Commission in compliance with the Commission's March 20, 2013 Order in the above-referenced docket. Order Point 4 states:

*New Era Wind Farm and Xcel Energy shall file any amended purchased power contracts as soon as they are finalized, specifically highlighting any new in-service date(s) they may contain, and shall promptly file notice if their purchased power contracts are terminated.*

As we stated in our response to Information Request No. MPUC-03, filed in the above-referenced dockets on May 24, 2013, NSP would commence a declaratory judgment action in Minnesota District Court in the event we were unable to work out a voluntary termination of the PPAs. We filed this Declaratory Judgment with the Fourth District Judicial Court on June 14, 2013, included here as Attachment A. The purpose for this action will be to resolve any questions over whether the magnitude and quality of New Era's defaults are sufficient to justify termination for default. We continue to hope we can work out a voluntary termination but, at this time, believed it is in our customers' best interest to seek judicial determination that termination is legally justified.

Pursuant to Minn. Stat. § 216.17, subd. 3, we have electronically filed this document, and copies have been served on the parties on the attached service list.

Please call me at (612) 330-6732 if you have any questions regarding this filing.

Sincerely,

/s/

JAMES R. ALDERS  
STRATEGY CONSULTANT

Enclosure

Case Type: Declaratory Judgment

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

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Northern States Power Company, a  
Minnesota corporation, d/b/a Xcel Energy,

File No. \_\_\_\_\_

Plaintiff,

**VERIFIED COMPLAINT FOR  
DECLARATORY JUDGMENT**

v.

New Era Wind Farm, LLC f/k/a AWA  
Goodhue Wind, LLC,

**JURY TRIAL REQUESTED**

Defendant.

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For its Verified Complaint against Defendant New Era Wind Farm, LLC f/k/a AWA Goodhue Wind, LLC ("New Era", "Seller" or "Defendant"), Plaintiff Northern States Power Company d/b/a Xcel Energy ("NSP") states and alleges as follows:

**INTRODUCTION**

1. NSP is an electric utility that serves over 1 million customers in Minnesota and surrounding states. As part of its utility operations, NSP owns or purchases wind energy generation from a variety of sources. NSP currently owns or purchases significant amounts of wind energy generation in and around Minnesota. By statute, NSP is obligated to procure specified minimum amounts of wind energy generation. NSP plans ahead for such procurement through a process called 'resource planning.'

2. On October 20, 2009, NSP entered into two virtually identical Renewable Energy Purchase Agreements, as amended on February 26, 2010 (collectively, "the Agreements," or "the PPAs" (Power Purchase Agreements)) with Goodhue Wind, LLC ("Goodhue Wind"). Defendant

subsequently acquired Goodhue Wind's interest in the Agreements. Defendant and/or Goodhue Wind are collectively referred to in this Complaint as "Seller."

3. Under the PPAs, Seller agreed to develop, construct, own and operate a wind energy generation project, comprised of a total of 78 megawatts (MW) of wind generation capacity (collectively, the "Goodhue Project"). Seller agreed to sell and NSP agreed to buy the output from the Goodhue Project for a period of 20 years from completion of construction.

4. NSP has included the Goodhue Project in its resource plan as an expected resource to be available to meet its wind energy generation procurement obligations.

5. Defendant has (i) failed to advance construction of the Goodhue Project in the timeframes required by the Agreements (even as extended by claimed periods of force majeure) and Seller has provided NSP with no plan to advance construction of the Goodhue Project as required by the PPAs; (ii) failed to establish a Security Fund to protect NSP in the event of Project delays or breaches of contract, in breach of Section 11.1(A) of the Agreements; (iii) failed to pay liquidated Delay Damages in the contractual amounts and timeframes, in breach of Section 12.4 and Exhibit A of the Agreements as amended; and (iv) allowed for a change of control of the Goodhue Project without prior written approval by NSP, in breach of Section 19.3(B) of the Agreements. Defendant has failed to cure these material breaches of the Agreements.

6. NSP has been damaged by Seller's breaches of the Agreements. Seller's failure to perform means that NSP's resource plan must be revised to reflect the absence of this resource.

7. Defendant's breaches constitute Events of Default as defined in the Agreement, allowing NSP to terminate the Agreements pursuant to the terms of the contracts.

8. Defendant has disputed the magnitude and quality of its contract breaches and has called into question NSP's right to terminate the Agreements. An actual case and controversy exists.

9. Accordingly, NSP seeks declaratory and injunctive relief declaring that these breaches of the Agreements enable NSP to legally terminate the Agreements without further recourse by Defendant or its predecessor in interest.

### **THE PARTIES**

10. NSP is a Minnesota corporation with its principal place of business at 414 Nicollet Mall, Minneapolis, MN 55401. NSP is an electric and gas public utility providing services in Minnesota, including in Hennepin County.

11. Upon information and belief, Defendant New Era is a Minnesota Limited Liability Corporation. New Era is the successor in interest to GW Community Holdings, f/k/a Goodhue Wind, LLC, the original Seller under the Agreements.

### **JURISDICTION AND VENUE**

12. This Court has subject matter jurisdiction over NSP's claims pursuant to Minn. Stat. §§ 484.01 & 555.01, et seq.

13. Venue is proper in Hennepin County, Minnesota, pursuant to Minn. Stat. § 542.09, because the cause of action arose in this County.

### **FACTUAL BACKGROUND**

#### **A. THE AGREEMENTS**

14. On October 20, 2009, NSP entered into two Renewable Energy Purchase Agreements with Seller, for the purchase of 39 MW of wind power each to be produced at the Goodhue Wind Farm North and Goodhue Wind Farm South. The Agreements set forth, among other things, the following requirements:

**1. Commercial Operation Milestone**

15. Seller was required to obtain all regulatory approvals and meet all construction milestones to achieve a Commercial Operation Milestone of December 31, 2010. *See* Agreements §§ 1.4, 4.1 and Exhibit A.

16. NSP and Seller amended the Agreements on February 26, 2010 to reset the Commercial Operation Date Milestone to December 31, 2011. The parties also agreed to AWA Goodhue Wind, LLC's acquisition of Goodhue Wind, LLC's interests in the Agreements.

**2. Security Fund**

17. Section 11.1(A) of the Agreement requires: "Beginning one-hundred-twenty (120) days following [Minnesota Public Utilities Commission ("MPUC")] approval, Seller shall establish, fund and maintain a Security Fund, pursuant to the provisions of this Article 11, which shall be available to pay any amount due NSP pursuant to this PPA and to provide NSP security that Seller will construct the Facility to meet the Construction Milestones." The Security Fund was to be established in the amount of \$2,925,000 per Agreement, or \$5,850,000 total, in one of three forms set forth in the Agreements. *See* Agreements § 11.1(B),(E).

18. The MPUC approved the Agreements as amended as of April 28, 2010 in MPUC Docket Nos. E002/M-09-1349, 1350. In turn, the Agreement required establishment of the Security Funds 120 days later, or by August 28, 2010, pursuant to Section 11.1(A).

**3. Liquidated Damages for Delays**

19. Seller agreed to pay Delay Damages in the event it did not meet various required milestone dates set forth in the Agreements. *See* Agreements § 12.4

**4. Change of Control**

20. Section 19.3(B) of the Agreements provides: "Any direct or indirect change of control of (i) Seller or (ii) any Affiliate of Seller that is a direct or indirect parent entity of Seller... whether voluntary or by operation of law (a "Change of Control"), shall require the prior written consent of NSP, which shall not be unreasonably withheld...."

**5. Events of Default**

21. Pursuant to the Agreements, Seller's (i) "failure to meet any of the Construction Milestones, except the Commercial Operation Milestone"; (ii) "failure to establish and maintain the funding of the Security Fund"; and (iii) "failure to comply with any other material obligation under this PPA that would result in material adverse impact on NSP" each constitutes an Event of Default subject to a 30-day cure period from the date of written notice of the Event. Agreements § 12.1(B). Certain Events of Default give rise to "Delay Damages" prior to termination of the Agreements (Agreements § 12.4(B)), and may result in termination of the Agreements (Agreements § 12.5).

22. Seller's "failure to make any payment required under this PPA," and Seller's assignment of the Agreements without consent of NSP, each constitutes an Event of Default subject to 60-day cure periods, Actual Damages, and possible termination of the Agreements. Agreements §§ 12.1(D), 12.4(B), 12.5.

**B. FAILURE TO ESTABLISH A SECURITY FUND**

23. Seller did not establish a Security Fund pursuant to Agreements § 11.1(A) by August 28, 2010.

24. After giving Seller opportunities to cure the failure to establish a Security Fund, NSP formally notified Seller on December 2, 2010 of its failure to establish a Security Fund, but invited Seller to cure what would otherwise be an Event of Default. Subsequently, Seller

declared "Force Majeure" under the Agreements. The parties continued correspondence for more than two years, in which Seller's ongoing obligation and repeated failure to establish a Security Fund were frequently acknowledged by both parties.

**C. SELLER MISSES CONSTRUCTION DEADLINES**

25. The Agreements established Construction Milestones for the Projects, including a deadline to secure financing for the Project by September 2010. Agreements Exhibit A, as amended. Even accounting for Seller's subsequently-claimed events of Force Majeure, Seller failed to meet this Milestone.

**D. SELLER CLAIMS FORCE MAJEURE**

26. In a letter dated January 12, 2011, Seller notified NSP that it was declaring a Force Majeure event under the Agreements because no Site Permit had been issued by the MPUC. By the same letter, Seller acknowledged "our delay in establishing and funding a Security Fund in accordance with Section 11.1 and achieving certain milestones under Exhibit A of the [] Agreements."

27. By Orders dated August 23, 2011, the MPUC granted a Certificate of Need and Site Permit for the Goodhue Project pursuant to, among other statutes, Minn. Stat. §§ 216B.2421 and .243 and Minn. Stat. Chapter 216F. The issuance of these Orders brought Seller's claimed Force Majeure event, during which Seller claimed it "was not able to establish a security fund... and achieve its development milestones," to a close. The Site Permit required Seller to obtain, among other things, MPUC approval of an Avian and Bat Protection Plan.

28. On August 29, 2011, Seller again sent NSP a letter acknowledging its obligation to establish the Security Fund. Seller did not, however, fund the Security Fund.

29. On December 6, 2011, Seller claimed a second Force Majeure event due to a township's refusal to provide a road use agreement necessary to allow Seller to construct the



Goodhue Project. On information and belief, as of the date of this Verified Complaint, Seller has not yet obtained the road use agreement necessary to continue with construction of the Projects.

30. The MPUC rejected Seller's Avian and Bat Protection Plan on February 23, 2012. This means that Seller lacks the legal authority to construct the Goodhue Project. As of the date of this Complaint, Seller still has not obtained approval of the Avian and Bat Protection Plan necessary to proceed with the Projects.

31. On April 26, 2012, May 22, 2012, and June 22, 2012 NSP sent letters reiterating the need for a Security Fund regardless of periods of Force Majeure, and discussed the extent to which Delay Damages were owed under the Agreements.

**E. SELLER TRANSFERS PROJECT CONTROL WITHOUT CONSENT**

32. On July, 12, 2012, Seller sent NSP a letter requesting NSP's consent to a change of control and ownership of AWA Goodhue, LLC. NSP did not provide the requested consent and Seller made no further communication regarding the need to obtain such consent.

33. Rather than procuring NSP's consent as required by Section 19.3(B) of the Agreements, Defendant notified NSP on October 11, 2012 that a Change of Control had been effectuated without NSP's consent. At the same time, the corporate name of AWA Goodhue, LLC was changed to New Era Wind Farm, LLC.

**F. SELLER NEVER CURES EVENTS OF DEFAULT NOR ADVANCES PROJECT MILESTONES**

34. In further correspondence dated October 12, 2012; October 30, 2012; and November 12, 2012, NSP reiterated concerns regarding Goodhue Project delays, lack of a Security Fund, and the Change of Control without NSP consent. At the same time, the parties continued to seek a mutually acceptable resolution.

35. Seller voluntarily ended its second Force Majeure event on December 5, 2012. Notably, Section 14.3 of the Agreements provides that a Force Majeure event persisting longer than 365 days creates a right to terminate the Agreements. Seller terminated the Force Majeure event just prior to the 366<sup>th</sup> day, even though the road use agreement was not yet resolved.

36. On December 6, 2012, NSP provided a formal Notice of Event of Default, reiterating that Events of Default occurred and were continuing from the dates Seller failed to: (a) establish a Security Fund at all, let alone within the timelines established in the Agreements; (b) pay Delay Damages for ongoing failure to meet Construction Milestones – even after accounting for claims of Force Majeure; and (c) obtain NSP consent before transferring control of the Projects to a new owner.

37. On January 4, 2013, Seller provided a response to the Notice, contesting the magnitude and quality of the Events of Default. Seller invoked the dispute resolution provisions of the PPAs and argued that NSP had waived certain Events of Default. Seller contested NSP's right to terminate the PPAs as a result of the enumerated Events of Default.

38. On February 28, 2013, the MPUC convened a hearing in which it addressed Seller's failure to implement its Certificate of Need, failure to finalize an Avian and Bat Protection Plan, and other issues. In its Order dated March 20, 2013, the MPUC did not grant the Avian and Bat Protection Plan and reopened the Certificate of Need for further hearings.

39. From late 2012 through April, 2013, the parties exchanged correspondence and attempted to find a mutually agreeable resolution to these issues. Throughout this time, NSP reiterated the need for Seller to cure its failure to provide a Security Fund, its change of control without consent, and its failure to pay Delay Damages. Seller did not cure any of the Events of Default.

**COUNT I**  
**BREACH OF CONTRACT**

40. The Agreements are contracts between NSP and Seller.

41. Seller's failure to establish, fund, and maintain the Security Fund in compliance with the Agreements is an ongoing breach of Section 11.1(A) and Exhibit A of the Agreements, as amended.

42. Seller's failure to achieve additional Construction Milestones set forth in Exhibit A to the Agreements, as amended, including financing obligations, was in further breach the Agreements.

43. Seller's failure to pay liquidated damages for Events of Default is an ongoing breach of Section 12.4 of the Agreements, as amended.

44. Seller further breached Section 19.3 of the Agreements by allowing a Change of Control of Seller without first obtaining NSP's consent.

45. Seller has failed to cure any of these breaches/Events of Default within the timeframes set forth in the Agreements, even excluding Seller's claimed periods of Force Majeure.

46. In reliance on the Agreements, NSP invested time and money in the regulatory process to obtain resource plan approval of its acquisition of the output from the Goodhue Project, and has subsequently relied upon that acquisition in its resource plan and other regulatory filings. Seller's failure to complete the Goodhue Project will require NSP to revise its resource plan. NSP further expended significant time and cost encouraging Seller to cure its breaches of the Agreements.

47. As a result of Seller's breaches, NSP has been deprived of the Goodhue wind energy for which it contracted, has not received access to Delay Damages or the Security Fund to

which it is contractually entitled to mitigate Seller's failure to perform, and has invested substantial time and money in entering and enforcing the Agreements.

48. NSP is entitled to an Order declaring that no further efforts are required to allow Seller to cure breaches of the Agreements, declaring that the Agreements may be terminated as a result of Defendant's breaches, and awarding such other relief as may be warranted.

## **COUNT II**

### **DECLARATORY JUDGMENT**

49. NSP is entitled to terminate the PPAs in light of Defendant's breaches. Seller has disputed the underlying bases for the right to terminate the PPAs.

50. An actual controversy exists between NSP and Defendant concerning the ongoing validity of the Agreements in light of the previously-described breaches of the Agreement by Defendant.

51. NSP seeks declarations pursuant to Minn. Stat. §§ 555.01, 555.02, and 555.03 that (i) NSP has the right to terminate the Agreements; and (ii) Defendant, in its own capacity or in its capacity as successor to the original seller under the Agreements, has no right in equity or law to recourse for such termination.

### **PRAYER FOR RELIEF**

WHEREFORE, NSP requests the following relief:

1. An Order declaring that NSP may terminate the Agreements as a result of Defendant's uncured breaches of the Agreements as amended;

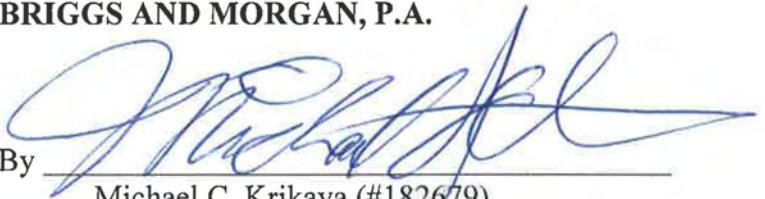
2. An Order declaring that Defendant, in its own capacity or as successor in interest to the Agreements, is not entitled to any remedies at law or equity as a result of NSP's termination of the Agreements;

3. Awarding such costs as the Court may deem equitable and just; and

4. Granting any such other and further relief as is warranted by the pleadings,  
evidence and equities.

Dated: June 14, 2013

**BRIGGS AND MORGAN, P.A.**

By 

Michael C. Krikava (#182679)

Elizabeth M. Brama (#0301747)

2200 IDS Center

80 South Eighth Street

Minneapolis, Minnesota 55402


Telephone: (612) 977-8400

**ATTORNEYS FOR NORTHERN STATES  
POWER COMPANY, A MINNESOTA  
CORPORATION, d/b/a XCEL ENERGY**

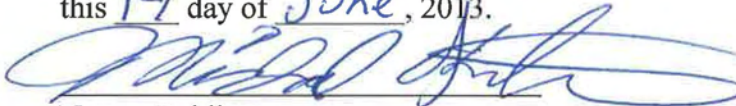
**VERIFICATION**

STATE OF MINNESOTA    )  
  ) ss.  
COUNTY OF HENNEPIN    )

James Alders being first duly sworn, says that he is Manager, Regulatory Projects with NSP, a plaintiff in the above-entitled action, and makes this verification on its behalf, being only authorized to do so; that he has read the above and foregoing Complaint and knows its contents, and the same is true and to the best of his knowledge, information and belief and he believes it to be true.

  
James R. Alders  
Manager, Regulatory Projects  
Northern States Power, a Minnesota  
corporation, d/b/a Xcel Energy

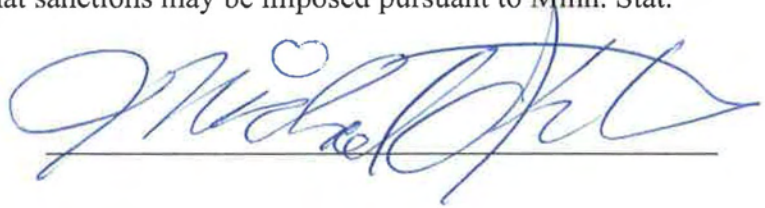
Subscribed and sworn to before me  
this 14 day of June, 2013.

  
Notary Public



**ACKNOWLEDGMENT**

The undersigned acknowledges that sanctions may be imposed pursuant to Minn. Stat.  
§ 549.211, subd. 3.

A handwritten signature in blue ink, appearing to be "Michael", written over a horizontal line.

5504258v4

## **CERTIFICATE OF SERVICE**

I, SaGonna Thompson, hereby certify that I have this day served copies of the foregoing document on the attached list of persons.

xx by depositing a true and correct copy thereof, properly enveloped  
with postage paid in the United States Mail at Minneapolis,  
Minnesota

xx electronic filing

**DOCKET NOS. IP6701/CN-09-1186, E002/M-09-1349 AND E002/M-09-1350**

Dated this 17<sup>th</sup> day of June 2013

/s/

---

SaGonna Thompson



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First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
John	Howe	email@johnhowe.us	Minnesota Senate	State Capitol, Room 323 75 Rev. Dr. Martin Luther King Jr. Blvd. St. Paul, MN 55155	Electronic Service	No	OFF_SL_9-1349_Official
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John	Lindell	agorud.ecf@ag.state.mn.us	Office of the Attorney General-RUD	1400 BRM Tower 445 Minnesota St St. Paul, MN 551012130	Electronic Service	Yes	OFF_SL_9-1349_Official
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SaGonna	Thompson	Regulatory.Records@xcelenergy.com	Xcel Energy	414 Nicollet Mall FL 7  Minneapolis, MN 554011993	Electronic Service	Yes	OFF_SL_9-1349_Official

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[illegible]

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John	Howe	email@johnhowe.us	Minnesota Senate	State Capitol, Room 323 75 Rev. Dr. Martin Luther King Jr. Blvd. St. Paul, MN 55155	Electronic Service	No	OFF_SL_9-1350_Official
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Mark	Lindquist	N/A	The Minnesota Project	57107 422nd St  New Ulm, MN 56073-4321	Paper Service	No	OFF_SL_9-1350_Official

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Lisa	Veith	lisa.veith@ci.stpaul.mn.us	City of St. Paul	400 City Hall and Courthouse 15 West Kellogg Blvd. St. Paul, MN 55102	Electronic Service	No	OFF_SL_9-1350_Official