

Minnesota Public Utilities Commission

Staff Briefing Papers

Meeting Date: April 19, 2007 Agenda Item # _____

Company: Northern States Power Company d/b/a Xcel Energy and Dairyland Power Cooperative

Docket No. E-002/TL-06 -1677

In the Matter of the Petition of Northern States Power Company d/b/a Xcel Energy and Dairyland Power Cooperative for a Certificate of Need for a 115/161 kV Transmission Line from Taylors Falls to the Chisago County Substation

Issue(s): Should the time frame for the Advisory Task Force be extended?

Should the Commission clarify its February 12, 2007 *Notice and Order for Hearing* regarding the contested case proceeding and the route permit process?

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Relevant Documents

Notice and Order For Hearing February 12, 2007
Department Letter on Advisory Task Force March 12, 2007
Department follow-up Letter to Local Government Officials March 13, 2007
City of Lindstrom Request to Extend Task Force March 22, 2007
Department Response to Request to Extend April 6, 2007
City of Lindstrom Petition for Contested Case April 9, 2007
Order Certifying Motion to Commission April 9, 2007
Chisago Task Force Report April 11, 2007

The attached materials are workpapers of the Commission Staff. They are intended for use by the Public Utilities Commission and are based upon information already in the record unless noted otherwise.

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Statement of the Issue

1. Should the Commission order the Department to extend the time frame for the Advisory Task Force?
2. Should the Commission clarify its February 12, 2007 Notice and Order For Hearing with respect to the contested case and the route permitting process?
3. Should the Commission require the Department to file a draft route permit at the time it submits the environmental assessment?

Background

Staff Note: The relevant document in this matter are relatively few and short in length. A full summary of those comments will not be repeated here. Some elaboration of positions is provided in this background section of the briefing paper.

On February 12, 2007 the Commission issued three orders with respect to the Chisago transmission project¹: The Notice and Order for Hearing. This Order sent the certificate of need application in docket E-002/CN-04-1176 to the Office of Administrative Hearings (OAH) for a contested case proceeding, authorized at least one public hearing, encouraged the Department to continue its investigation and ordered the Company to cooperate in that investigation.

A second Commission Order issued on February 12, 2007 found the application for a certificate of need for this project to be complete upon the submission of additional data in docket E-002/CN-04-1176.

Finally, the Commission issued a third Order on February 12, 2007 which found the application for a route permit for the Chisago project under the alternative review process to be complete in docket E-002/TL-06-1677. This Order also authorized joint public hearings with the certificate of need docket and combined the environmental review proceedings for both the need and routing dockets.

On March 12, 2007 the Department of Commerce filed a letter with the Commission related to the Commission's directive in the third Order to establish an advisory task force. The DOC letter indicated that due a lack of local governmental interest in participating on the advisory task

¹ See ***Notice and Order for Hearing***, Docket No. E-002/CN-04-1176; ***E-002/TL-06-1677; Order Accepting Certificate of Need Application as Substantially Complete Pending Submission of Additional Data***, Docket No. E-002/CN-04-1176; ***Order Accepting Route Permit Application as Complete, Authorizing Selection of Public Advisor, and Combining Environmental Review and Public Hearing with Certificate of Need Application***, Docket No. E-002/TL-06-1677.

force it was unable to meet the statutory requirement for task force representation under Minn. Stat. §216E.08, subp 1.² The March 12, 2007 letter also indicated the actions the Department would take to fulfill the intent of the Commission's directive to enhance local public participation outside of the formal structure of an advisory task force.

On March 22, 2007 the City of Lindstrom filed a motion with the Administrative Law Judge to extend the time frame of the advisory task force or, in the alternative, to certify the motion to the Commission. In its motion, the City argued that the time frame for task force activities, as developed by the Department, did not allow sufficient time and opportunity for governmental entities to appoint a representative in order to participate.

On April 6, 2007 the Department of Commerce filed a response to the City of Lindstrom's motion. In its comments, the Department argued that the route permit proceeding was not sent to the OAH for a contested case proceeding and encouraged the ALJ to certify the issue of extending the time frame of the advisory task force to the Commission for resolution.

On April 9, 2007 the City of Lindstrom filed a petition for a contested case on the route permitting docket under Minn. Rules 4400.1800. The City indicated its understanding that the route permit docket had been referred to the OAH, along with the certificate of need docket, for a contested case proceeding.

The City acknowledged that a review of the February 12, 2007 Orders issued by the Commission with respect to the Chisago project indicates that the route permit docket was not expressly referred to the OAH. The City of Lindstrom requested that the Commission clarify its intent with respect to the contested case and the route permit docket. The City asserted that referring the matter to the OAH would not require any changes in the review schedule and would not place an unreasonable burden upon any party.

On April 9, 2007, the Administrative Law Judge served his *Order Certifying Motion* to Commission. The Certification indicated the Judges concern that if he were to rule on the motion to extend and deny that motion, the ability of the Commission to later provide other, similar relief to the City would be greatly compromised. The ALJ made no recommendation concerning the disposition of the motion.

Also on April 9, 2007 the informal advisory task force, facilitated by Department staff, submitted a Report recommending certain route alternatives to be examined in the environmental assessment to be prepared on the project. The Commissioner of the Department has not yet issued the scoping document for the EA.

²See March 12, 2007 DOC letter to Executive Secretary.

Staff Comments

Motion to Extend Advisory Task Force

The City of Lindstrom has petitioned for an extension to the advisory task force suggesting the schedule developed by the Department to receive input was not workable and has thwarted meaningful public participation.

The Commission's February 12, 2007 *Order Accepting Route Permit Application as Complete, Authorizing Selection of Public Advisor, and Combining Environmental Review and Public Hearings with Certificate of Need Application* also "authorized the Department's Energy Facilities Permitting staff to establish an advisory task force and develop a proposed structure and charge for the task force."

The Department developed a proposed structure and charge for the task force. Given the fact that the Chisago route permit is being reviewed under the alternative permitting review process the DOC established a tight time frame for task force activities. After little interest to participate was received, the DOC filed a letter with the Commission on March 12, 2007. The letter outlined the difficulties it had experienced in establishing an advisory task force and indicated the steps it intended to take to fulfill the intent of the Commission's Order.

The City of Lindstrom's motion argued that, in addition to the time needed to appoint representation to the task force, the level of detail and work required for a task force report cannot be developed in three meetings over a week and a half. In this short of a time period, local governments and citizens cannot meaningfully participate.

The informal advisory task force, facilitated by DOC staff, submitted a report recommending certain route alternatives to be examined in the environmental assessment to be prepared on the project. The Commissioner of DOC has not yet issued the scoping decision for the environmental assessment.

While staff agrees with the City that the time allowed for advisory task force activities was minimal, staff believes that, within the context of the six month time line of the alternative review process, the Department has put forth a good faith effort to create a task force, fulfill the intent of the Commission's Order and gather input from local residents and officials with respect to alternatives to the proposed project. The informal advisory task force Report provides a discussion and recommendation of alternative routes and conditions (underground placement) that should be considered. Staff believes it is unlikely that an extension to the task force as, requested by the City, would substantially improve upon the alternatives already identified. Staff recommends the Commission deny the City of Lindstrom's motion to extend the advisory task force.

Petition for a Contested Case Proceeding

The City of Lindstrom has also petitioned for a contested case under Minn. Rules 4400.1800. This rule, in relevant part, reads as follows:

Subpart 1. Hearing. The EQB (now the Commission) shall hold a contested case hearing after the draft *environmental impact statement* is prepared on all applications for a site permit or a route permit. The hearing must be conducted by an administrative law judge pursuant to the contested case procedures of Minnesota Statutes, chapter 14. Notice of the hearing must be given in accordance with Minnesota Statutes, section 116C.57, subdivision 2d. At least a portion of the hearing must be held in a county where the proposed large electric power generating plant or high voltage transmission line would be located. (Emphasis Added)

Subpart 3. Joint Hearing. If the board (now the Commission) determines that a joint hearing with the Public Utilities Commission to consider both permitting and need issues is feasible, more efficient, and may further the public interest, the board (now the Commission) may decide to hold a joint hearing with the approval of the Commission. The board (now the Commission) may also elect to hold a joint hearing with other states pursuant to Minnesota Statutes.

Minn. Rules 4400.1800 subp. 1 is applicable to the full permitting process in the rules. The full permitting process requires the preparation of an Environmental Impact Statement, upon which a contested case proceeding can be requested. An EIS is a detailed and extensive environmental review with its own set of procedural options and requirements. This project, however, is being reviewed under the alternative permitting review process and will result in the preparation of an environmental assessment, a less extensive environmental review process, with its own set of procedural requirements.

Minnesota Statute § 216E.04 provides for eligible projects to elect to follow the alternative review “procedures of 4400.2000 to 4400.2950 instead of the full permitting procedures in parts 4400.1025 to 4400.1900.” Minn. Stat. § 216E.04, subd. 2 lists the types of projects eligible for alternative review. Subdivision 2 (3), make high voltage transmission lines of between 100 and 200 kilovolts (kV), eligible for alternative review. This criteria qualifies the Chisago project as proposed. For eligible projects, the Applicant can elect which process of review to file under. Xcel has selected the alternative review process for the project and its election was confirmed by the Commission in its February 12, 2007 Order in docket 06-1677.

As noted above, the alternative review process requires the preparation of an environmental assessment rather than an environmental impact statement. The environmental assessment describes the environmental impacts of the proposal, examines alternatives to the proposal, and discusses methods to mitigate the impacts identified. The EA is a less detailed environmental review, as opposed to an EIS. (Compare Minn. Rules 4400.1700 to Minn. Rule 4400.2750.)

As mentioned in the task force extension discussion above, the alternative permitting process is required to have a final decision within six months of completeness, with up to a three month extension for good cause, or the agreement of the applicant. The alternative permitting process does not provide for a contested case proceeding.

Staff believes the Commission has the general authority to refer this matter to a contested case

proceeding if it determines an issue cannot be resolved to its satisfaction. However, it is unclear from the City's petition what specific route issues the City believes are factual disputes. The City cited the historical controversy of the project and indicated that the route of the transmission line is of primary importance to it, however, it did not provide any support as to material facts in dispute.

The City of Lindstrom indicated its uncertainty on whether the route permit application had been referred by the Commission to the OAH. Staff believes the Commission's February 12, 2007 *Notice and Order for Hearing* is clear in referring the certificate of need application only to the OAH for contested proceedings. Any reference to the route permit proceeding in that Order relates to the combined environmental review and public hearings.

Having said the above, staff suggests that combining the environmental review of CON, sent to contested case, and the Route Permit application has the practical effect of making the EA a part of the contested case proceeding. The Environmental Assessment on the Chisago project will be entered into the record of the certificate of need proceeding and as a result is subject to cross-examination.

Additional Issue

Staff raises the following issue with respect to the route permitting process, public participation and sound record development. The issue is the development of the route permit document itself, the timing of its release and the due process it receives. The current practice with respect to the route permit is for it to be developed by the DOC EFP staff at the end of the review process and first presented to the public and to the Commission in the briefing papers (7-10 days) prior to the Commission meeting for deciding on the matter.

From a public perspective, the route permit is, perhaps, the most informative document on the actual impacts of the proposed project. The permit explains the project in sufficient detail, where it will go, what practices will be used, and what conditions have been placed on it during construction, operation and maintenance. Public participation would be enhanced if a draft route permit was made available earlier in the process, such as at the same time that the EA is made available.

From a due process perspective, the route permit is a rather extensive document to digest and respond to in the time currently provided. Given its central importance to the review process it should be provided to the public and parties earlier in order to allow for a more complete opportunity to review, commend, or criticize its merits.

Decision Alternatives

A. Advisory Task Force

1. Extend the time frame of the advisory task force activities and further encourage the Department to once-again establish a task force and develop a proposed structure and charge for it.
2. Deny the City of Lindstrom's motion to extend the time frame of the advisory task force by two months.

B. Contested Case Proceeding

1. Grant the City of Lindstrom's request for clarification and refer the route permit process to the Office of Administrative Hearings for a contested case proceeding.
2. Deny the City of Lindstrom's request for clarification and decline to refer the route permit process to the Office of Administrative Hearings.
3. Make some other decision based on the record.

C. Other Issue - Route Permit

1. Require the Department to provide a draft route permit, at the time it makes the environmental assessment in this matter available.
2. Require the Department to provide a draft route permit, at the time it makes the environmental assessment in this matter available. Enter the route permit into the record in the CON contested case proceeding.