

**STATE OF MINNESOTA
BEFORE THE PUBLIC UTILITIES COMMISSION**

Leroy Koppendraye
Marshall Johnson
Kenneth Nicolai
Thomas Pugh
Phyllis Reha

Chair
Commissioner
Commissioner
Commissioner
Commissioner

**In the Matter of Certificate of Need
Chisago County Transmission Line Proposal**

Docket No. E-002/CN/04-1176

REPLY COMMENTS OF CONCERNED RIVER VALLEY CITIZENS

I. INTRODUCTION

Due process violations in the Chisago docket leave the Commission and the state open to successful challenge of Commission decisions and present significant liability exposure in the court of public opinion. The review option set forth by Commission staff and the reasons provided open that door wide to legal challenge, and if adopted by the Commission, it will be propped open in invitation. In addition to the potential of civil litigation, there are also statutory penalties for violations. Because these are violations of environmental laws, a MERA action may also offer relief.

II. THE CHISAGO PROJECT DOCKET IS REPLETE WITH DUE PROCESS ISSUES

A. THE PARTIES REPEATEDLY FAIL TO SERVE OTHERS WITH FILINGS

1. ATTORNEY FOR CHISAGO PROJECT INTERVENOR NOT SERVED WITH APPLICATION

The most recent attorney of record for Chisago Intervenor Concerned River Valley Citizens (CRVC) is Carol A. Overland, well known to Applicants and Commission, and the CRVC attorney was not served with a copy of the Application. This is despite active participation in the Notice Plan!

2. INTERVENING ORGANIZATIONS NOT SERVED WITH APPLICATION

Both CRVC's Shellene Johnson, President, and the Citizen's Task Force, Bill Neuman the representative of record, were not served with a copy of the Application.

3. CRVC PRESIDENT SHELENE JOHNSON INEXPLICABLY REMOVED FROM SERVICE LIST

The Service List dated October 31, 2006, states "Removed: Shellene Johnson." CRVC President did not request removal from the Service List. No explanation is provided and no written request of removal is on file in the docket.

4. CRVC ATTORNEY, CRVC PRESIDENT SHELENE JOHNSON AND BILL NEUMAN WERE NOT SERVED WITH THE COMMERCE COMMENT

Again, parties of record who were prior Intervenors were not served and had no knowledge or opportunity to Comment on the process proposed, without authority, by Commerce.

B. STAFF BRIEFING PAPERS CLAIM "PARTY POSITIONS," BUT PARTIES WERE NOT AFFORDED OPPORTUNITY TO PARTICIPATE

The Staff Briefing papers has a heading "Party Positions" but prior Intervenors were not afforded opportunity to participate. CRVC is a known party that participated in the Notice Plan, and is known to all parties. When the Service error was discovered by CRVC, after due date for Comment, and request was made to set deadline back to allow opportunity to Comment, PUC Staff Bret Eknes refused to reset Comment due date and refused to afford prior Intervenors and interested parties opportunity to Comment and for that Comment to be included in record. CRVC Attorney was told that this was just a Completeness issue to be decided by the Commission and that, essentially, any comments we would make would be of no import. CRVC was not informed of the Commerce and staff "process" recommendation.

C. WITHOUT STATUTORY AUTHORITY, USING WRONG STANDARD, COMMERCE IS INVENTING "NON-CONTESTED" REVIEW PROCESS AND INVITES COMMISSION APPROVAL

Without any statutory authority, the Department of Commerce has invented a "Non-Contested" review process. This "Non-Contested" review process was invented and used in PUC Docket ET2/CN-06-367. The Dept. of Commerce bases this invention on a desire "to find process efficiencies... necessitated by the large number of CN petitions that could be filed during the next six months to one year," and "the Department consulted with Commission staff in an attempt to design a better process. ET2/CN-06-367, Commerce Comment on Completeness see also Commerce August 9, 2006 Comment,

ET2/TL-06-980. However, the Department is to hire staff to handle the workload under the statute.

Minn. Stat. §216B.65. The rules have clear guidelines for contested-case referral:

7829.1000 REFERRAL FOR CONTESTED CASE PROCEEDING.

If a proceeding involves contested material facts and there is a right to a hearing under statute or rule, or if the commission finds that all significant issues have not been resolved to its satisfaction, the commission shall refer the matter to the Office of Administrative Hearings for contested case proceedings, unless:

A. all parties waive their rights to contested case proceedings and instead request informal or expedited proceedings, and the commission finds that informal or expedited proceedings would be in the public interest; or

B. a different procedural treatment is required by statute.

But the guidelines for contested case referral are not controlling over informal or expedited proceeding when a rule covers just that. Commerce does not cite or quote that rule, which requires:

7829.1200 INFORMAL OR EXPEDITED PROCEEDING.

Subpart 1. When appropriate. Informal or expedited proceedings may be used when contested case proceedings are not required, for example, when:

A. there are no material facts in dispute;

B. the parties and the commission have agreed to informal or expedited proceedings; or

C. informal or expedited proceedings are authorized or required by statute.

Minn. R. 7829, 1200 (emphasis added). Based on the record available online, no party has waived the right to a hearing, not even Xcel, and no party has requested informal or expedited proceedings, other than Dept. of Commerce. An Intervention deadline has not been established, and other interested parties may petition for formal party status. Utilization of this process is not only in violation of due process requirements, and Certificate of Need statute and rules, it is not warranted in this case even under the inventor's rationale. The final point is the critical one – informal or expedited proceedings are required when informal or expedited proceedings are authorized or required by statute. In this case, there is no authorization or requirement, nor is there any authorization to hold informal proceedings absent authorization or requirement. On what authority does the Commerce make this recommendation?

1. without authority, commerce-invented process makes determinations on material issues in the case

The process invented by Commerce includes an evaluation of eight material factors:

- a. Presence of an apparent need for the facilities;
- b. Relatively little new land required;
- c. Length and voltage level of the line;
- d. For generation or interconnection of renewable or low emitting proposals;
- e. Few potentially affected persons;
- f. No apparent policy concerns;
- g. Policy support for the proposal; and
- h. Expected level of significant local opposition.

These factors were reviewed by Commerce and Commission staff and the recommendation was made that there were no material facts at issue and that this matter should proceed by “Non-Contested” review. This recommendation in the Briefing Papers was made knowing that interested parties had not been timely served with the Application, had not been served with Commerce Comment and process recommendation, and had been prohibited from participating.

2. PUC staff uses Commerce-invented criteria, without apparent factual base or inquiry, to justify support for invented process

Commission staff reviews Commerce-invented criteria for the “Non-Contested” review and essentially determines that there are no issues of material fact on issues such as need, technical transmission issues, and engineering determinations. These are not matters within Commission staff authority, expertise or qualifications to determine. The history of this proceeding is replete with evidence that there is no need for the line, and Commission staff ignores the extensive record already developed in this case. Commission staff has no authority to promote use of an illegitimate process invented by Commerce.

3. Staff improperly assumes need, a material fact issue in this case

Without authority and without factual basis, both Commerce and Commission staff make assumptions and determinations about need for the line. CRVC previously demonstrated, together with other parties, that there was no need for the line, sufficient to lead to NSP’s withdrawal of the application.

4. Staff improperly uses lowered voltage of line as rationale to avoid contested case

Without authority and without factual basis, both Commerce and Commission staff make assumptions and determinations regarding voltage of the line and improperly use voltage as justification to avoid contested case. Commerce and Commission staff seem impressed with lowering of the voltage of the line from 230kV to 115/161kV, but are not taking into account and are probably not even aware of the doubling of the capacity of the line.

The character of the transmission proposed has changed significantly over the years, and the conductor specification was a material term to the NSP and St. Croix Falls/Taylors Falls agreement. Under the terms of the agreement, the voltage of the line dropped, but the capacity of the line **DOUBLED**. This transmission line was originally a bundled ACSR conductor line with a 448 MVA capacity and a single 448 MVA transformer.¹ The agreement specifically stated that “bundled ‘795’ conductors be used for the Line,” but no MVA or conductor type, ACSR or ACSS, was specified.²

On May 14, 2001, Xcel Energy’s Scope Change to the Public Service Commission of Wisconsin, claimed use of “bundled 795 ACSS (SSAC) conductor with rating of 3112 amps for a total three-phase summer rating of 868 MVA.”³ This 868 MVA capacity should be compared with the 345 kV Arrowhead line’s rated capacity of 800 MVA and expected powerflow of 600MVA. Commerce and Commission staff have no authority or expertise to attach any value judgment or make any determinations regarding the character of the line.

5. Commerce and Commission staff improperly assume few are affected

Concerned River Valley Citizens had hundreds of members, and CRVC expressly did NOT sign on to the deal between Xcel and St. Croix Falls and Taylors Falls. For years, CRVC has been hearing that an application is imminent and it had not occurred, and CRVC has not begun organizing in earnest given the many prior cries of “Wolf!” Commerce and Commission staff have no idea how many people may be

¹ Chisago Electric Transmission Line Project, p.2-43;2-45; 2-53; Table 3-1, p. 3-2.

² Settlement Agreement, Para. 7(m), p. 4. It is not clear whether this agreement is valid, as NSP was required to “submit applications for the construction of the Line to the necessary state and local approval authorities in Minnesota and Wisconsin no later than 180 days after the Circuit Court for Polk County, Wisconsin, dismisses the State Actions.” Id., para. 4, p. 2.

³ Id., **Chisago-Apple River Line Capacity Comparison**, p. 3.

affected and in what ways, and given the high level of prior participation, continued high level of participation is likely.

6. Commerce and Commission staff improperly assume there are no apparent policy concerns.

It is unfortunate that Commerce and Commission staff conclude there are no apparent policy concerns, as the invented "non-contested" review process itself is an obvious example.

7. Commerce and Commission staff improperly assume policy support for the proposal

There is no information provided regarding this invented criteria -- this basis for staff's determination is without stated or declared basis and is improper.

8. Commerce and Commission staff do not know the level of opposition.

Where parties are excluded from the proceeding, when they are not served with the Application or documents, and they are not served with Comments even after they have made all parties aware of lack of service, it's unreasonable to use level of participation in this revived docket as any indication of potential for interested parties or potential Intervenors. Interested parties are being excluded.

III. COMMERCE AND COMMISSION ACTIONS CIRCUMVENT PROCESS OF CERTIFICATE OF NEED LAW

Notice and Service are elemental parts of Commission proceedings. Minn. Stat. §§216.16; 216.161; 216.17; 216B.243; Minn. R. 7829.0400; 7829.0600-0700. Formal Intervention status is not a prerequisite to submission of Comments. Minn. R. 7829.0900.

In addition to exposure to potential litigation, violation of these laws has specific penalties:

216B.57 PENALTY FOR VIOLATION OF ACT.

Any person who knowingly and intentionally violates any provision of Laws 1974, chapter 429, or who knowingly and intentionally fails, omits, or neglects to obey, observe, or comply with any lawful order, or any part or provision thereof, of the commission is subject to a penalty of not less than \$100 nor more than \$1,000 for each violation.

216B.58 PENALTIES; CONSTRUING ACT, OMISSION, AND FAILURE.

In construing and enforcing the provision of Laws 1974, chapter 429 relating to penalties, the act, omission, or failure of any officer, agent, or employee of any person acting within the scope of official duties of employment shall in every case be deemed to be also the act, omission, or failure of that person.

216B.59 CONTINUING VIOLATION.

Every violation of the provisions of Laws 1974, chapter 429 or of any lawful order of the commission, or any part or portion thereof by any person, is a separate and distinct offense, and in case of a continuing violation after a first conviction thereof each day's continuance thereof shall be deemed to be a separate and distinct offense.

216B.60 PENALTIES CUMULATIVE.

All penalties accruing under Laws 1974, chapter 429 shall be cumulative, and a suit for the recovery of one penalty shall not be a bar to or affect the recovery of any other penalty or forfeiture or be a bar to any criminal prosecution against any public utility or any officer, director, agent, or employee thereof or any person.

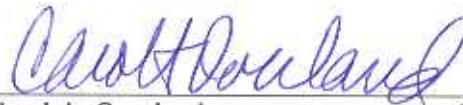
216B.61 ACTIONS TO RECOVER PENALTIES.

Actions to recover penalties under this chapter shall be brought in the name of the state of Minnesota in the district court of Ramsey County.

IV. CONCLUSION

Based on the above Comments, C.R.V.C. requests that the PUC Order staff to refrain from making unlawful, unauthorized and improper circumventions of statutory process, and Order that Commerce and Commission staff work within the long established statutory and regulatory framework. CRVC asks that the Commission Order that particular attention be paid to service of all documents to parties and interested persons. CRVC further requests that Commission Order staff to adhere to public participation statutory authority and rules and where process has been flawed, to afford parties and interested persons the opportunity to participate. Due process violations leave the Commission open to challenge, and where due process violations have occurred, ultimate project determinations and orders may be in jeopardy. The due process violations in this Chisago docket are egregious.

Dated: January 24, 2007



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