

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

PETITION FOR A CONTESTED CASE – SITING DOCKET

Due process problems continue in the Chisago docket that must be corrected. The Orders of the Commission specifically refer the Certificate of Need docket to the Office of Administrative Hearings for a contested case hearing, but are silent as to the Siting Docket. It was this writer's belief that the referral for contested case applied to both the Certificate of Need docket and the Siting Docket, joint hearings as provided by Minn. R. 4400.1800.

The Siting Docket is assuredly contested by the City of Lindstrom and by Concerned River Valley Citizens, two potential Intervenors who on March 19, 2007, filed with OAH for admission as a party under **BOTH** dockets. Those Petitions are still pending.

The City of Lindstrom requests that the Siting Docket be **expressly** forwarded to OAH as a contested case, to be heard together with the Certificate of Need docket. Xcel stated it expected this proceeding to be a contested case and had no objection. There is no need for any alteration of the schedule and there would be no delay nor would there be an unreasonable burden to any party.

A. A REVIEW OF ORDERS SHOWS THAT SITING DOCKET WAS NOT EXPRESSLY REFERRED TO OFFICE OF ADMINISTRATIVE HEARINGS FOR CONTESTED CASE BY THE COMMISSION

In response to the City of Lindstrom's Request for Extension of Task Force, the Dept. of Commerce asserts that the Siting Docket in this project is not a contested case. Exhibit A, Letter to ALJ Lipman, April 6, 2007. A close reading shows that the Siting Docket is silent as to a contested case.

Order, February 12, 2007, Docket E-002/CN-04-1176; Order, February 12, 2007, Docket E-002/TL-06-1677; Order, February 12, 2007, Dockets E-002/CN-04-1176 and E-002/TL-06-1677.

The history of the Chisago transmission project is one of a highly contested case – the prior Minnesota docket was an EQB siting docket that was arguably the most contested transmission case since the infamous transmission cases of the late 1970-1980s. The Dept. of Commerce had inexplicably promoted a “non-contested” case process to the PUC on January 25, 2007, and had not served this writer with Comments and Briefing Papers, nor, when this was discovered, was the Comment period altered to allow stakeholder Comment. Commerce bases its promotion of a “non-contested” case on a desire “to find process efficiencies... necessitated by the large number of CoN 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. Staffing issues are not the determining factor in a contested case referral.

At the January 25, 2007, hearing before the Commission, Xcel’s Jim Alders frankly admitted at that time, on the record, that the company expected a contested case and had no objection.

The Siting and Routing rules have clear guidelines for contested-case:

4400.1800 CONTESTED CASE HEARING.

Subpart 1. Hearing. The EQB 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 from the Office of Administrative Hearings 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.

Subp. 2. Issues. Once the Public Utilities Commission has determined questions of need, including size, type, and timing; questions of system configuration; and questions of voltage, those issues must not be addressed in the contested case hearing.

Subp. 3. Joint hearing. If the board 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 may decide to hold a joint hearing with the approval of the commission. The board may also elect to hold a joint hearing with other states pursuant to Minnesota Statutes, section 116C.53, subdivision 3.

The Commission's discussion and deliberation on January 25, 2007, left this writer with the belief that the two dockets under consideration were referred for joint hearings. But again, a close read of the Orders ultimately issued show that the Siting and Routing Docket Order is silent as to referral to OAH.

The Siting and Routing of this line is the primary issue for the City of Lindstrom, and to proceed without a contested case on siting and routing issues serves to cut the City out of the process, eliminate the City's ability to inform the record and hold the company to its burden of proof in this side of the docket in evidentiary hearings. To proceed without a contested case is a severe due process problem.

II. CONCLUSION

The City of Lindstrom requests that the PUC clarify the contested case referral and Order that the Siting docket of the Chisago Transmission Project be referred to OAH for a contested case proceeding, with joint hearings as contemplated by Minn. R. 4400.1800.

Dated: April 9, 2007



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April 6, 2007

The Honorable Eric L. Lipman
Administrative Law Judge
Office of Administrative Hearings
100 Washington Square, Suite 1700
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Minneapolis, MN 55401-2138

RE: 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 and 161 kV Transmission Line from Taylors Falls to Chisago County Substation; and

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

OAH Docket No.: 8-2500-17840-2

PUC Docket No.: E-002/CN-04-1176; E-002/IL-06-1677

Dear Judge Lipman:

I write on behalf of the Minnesota Department of Commerce (Department) to address the City of Lindstrom's Motion for Extension of Task Force, or in the Alternative, Motion for Certification to the Public Service (sic) Commission filed on March 23, 2007.¹ Specifically, the City of Lindstrom alleges that "the time frame established by the Department for the Task Force is not workable and thwarts meaningful participation by the affected local governments and the public generally." For the reasons discussed below, the Department strongly suggests that this motion be addressed directly by the Public Utilities Commission (Commission) at its earliest convenience. The Department provides the following background and discussion to explain its position.

¹ The City of Lindstrom also has an intervention petition pending in the Certificate of Need proceeding above-referenced.

Exhibit A

First, the Department questions whether the Office of Administrative Hearings (OAH) has jurisdiction to rule on the City's motion. The Task Force process is an early part of the environmental review process which was expressly delegated to the Department's Energy Facility Permitting (EFP) staff in the Commission's February 12, 2007 Route Permit Order; it was not referred to the OAH. The Department's EFP staff is not conducting the environmental review as part of the contested case proceeding. It is preparing a combined document, the Environmental Assessment, which has dual purposes: 1) it will provide the necessary review for the Route Permit application, and 2) it can be used to support testimony relating to the certificate of need (CON) petition in the contested case proceeding.

Xcel Energy and Dairyland Cooperative have filed *two* applications relating to the transmission line from Taylor's Falls to the Chisago County substation: 1) an application for a Certificate of Need (CON), E002/CN-04-1176; and 2) an application for a Route Permit, E-002/TL-06-1677. On February 12, 2007, the Commission issued a total of three orders in these dockets that are pertinent to the question of jurisdiction.² In these orders, the Commission accepted the two applications, combined the environmental review documents and procedures for the two proceedings and authorized the public hearings on the two permits to be held jointly. Specifically, the Commission's Route Permit Order states in pertinent part:

4. The Commission hereby combines the environmental review documents and procedures in Dockets E-002/CN-04-1176 and E-002/TL-06-1677. The Department is authorized to initiate and conduct the environmental review process.
5. The Commission authorizes the public hearings to be held jointly.
6. The Commission authorizes Department and Commission Staff to request assignment of an Administrative Law Judge to schedule, notice, and preside over the joint public hearing(s) authorized in Order Paragraph 5.

² 1. ORDER ACCEPTING ROUTE PERMIT APPLICATION AS COMPLETE, AUTHORIZING SELECTION of PUBLIC ADVISOR, AND COMBINING ENVIRONMENTAL REVIEW AND PUBLIC HEARING WITH CERTIFICATE OF NEED APPLICATION (Route Permit Order)

2. ORDER ACCEPTING CERTIFICATE OF NEED APPLICATION AS SUBSTANTIALLY COMPLETE PENDING SUBMISSION OF ADDITIONAL DATA (CON Order)

3. ORDER AND NOTICE FOR HEARING (Referral Order)

7. The Commission authorizes the Department Energy Facilities Permitting staff to establish an advisory task force and develop a proposed structure and charge for the task force.

The Route Permit Order clearly authorized the Department to undertake environmental review and task force activities and clearly limited the OAH's responsibility to scheduling, noticing, and presiding over the joint public hearing(s). The Department's environmental review is required for the Route Permit, and by combining the review in the Route Permit Order, the Commission authorizes it to be used for the CON proceeding as well.

In a similar manner, the Commission's Referral Order restates this position, clarifying its intent that the public hearings in the CON and Route Permit proceedings be held jointly by the ALJ:

VII. Joint Public Hearings

The Commission has authorized the public hearings in the certificate of need docket, E-002/CN-04-1176, and the route permit application, E-002/TL-06-1677, to be held jointly. In addition, the environmental review proceedings in both the certificate of need and routing dockets have been combined. The Commission asks the Administrative Law Judge to schedule, notice, and preside over the joint public hearing(s) in both matters.

Although the referral language quoted above is quite specific as to conducting the public hearing(s), the Commission did not refer the Route Permit proceeding to the OAH for a contested case proceeding. Instead, it authorized the Department to initiate and conduct the environmental review process. The Advisory Task Force in the Route Permit proceeding is just part of the complex environmental review process being administered and conducted by the Department's EFP staff. However, this review process must be completed expeditiously in order to meet the scheduled dates for filing testimony in the CON contested case proceeding.

The partial referral to OAH in the Route Permit proceeding is limited to scheduling, noticing and presiding over joint "public hearings." The Department is responsible for preparing the joint environmental document for the two dockets and for establishing a task force to provide input into the Environmental Assessment document. The Commissioner of Commerce will consider this input for his Scoping Decision which identifies the scope of the environmental review³. There are no intervenors in the Route Permit proceeding, and the only "parties" are the applicants. Moreover, there is no mention of separate evidentiary hearings for the Route Permit Order as there is with respect to the CON in the CON Order. Although the environmental review

³ Once the Commission authorizes the Department to conduct the environmental review, the authority to determine the scope of the review rests with the Commissioner of the Department, not the Commission, according to the provisions in Minn. Stat. § 216E.03, subd. 5 (2006).

process was not referred to the OAH, the end result of that process is an environmental review document. The environmental review document in this case will be an Environmental Assessment, which will be submitted for the record during the evidentiary hearing for the CON. Both the Commissioner of Commerce and the Department's EFP staff have distinct roles in these matters, quite separate from the role of its energy staff in the CON proceeding, and the Environmental Assessment EFP staff prepares will be used by witnesses in the CON proceeding to assess the criteria required for granting a petition for a certificate of need.⁴

Finally, the Department wishes to note that it disagrees with many of the statements in the City of Lindstrom's motion. The Department is seriously concerned that the motion contains speculative assertions and allegations about the task force process in this matter that are misleading, inaccurate, or irrelevant. However, these statements will not be addressed by the Department at this time.

In conclusion, although it appears that the OAH has no jurisdiction to rule on the City of Lindstrom's motion to extend the task force, the Department recommends that this matter be placed before the Commission, whether or not the Court determines it has jurisdiction to rule on the motion. Because the EFP staff is charged with a neutral advisory role to assist the Commission and is not acting as a party advocating a position, it is appropriate that issues involving the task force should be directed to the Commission. Therefore, if the Court concludes that it has authority to rule on the motion, it should decline to rule on its merits and certify the issue to the Commission for resolution.

Respectfully submitted,

s/ Karen Finstad Hammel

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AG: #1775010-v1

⁴ The decision on the scope of the Environmental Assessment is scheduled to be issued by the Commissioner of the Department by April 13, 2007, pursuant to Minn. Stat. § 216E.03, subd. 5 (2006) and Minn. R. 4400.2750, subp. 3. Department EFP staff will then prepare the Environmental Assessment based on the scoping decision and it will be submitted as an exhibit for the evidentiary hearing, according to the First Prehearing Order in this proceeding.