

OAH Docket No. 7-2500-19797-2
MPUC Docket Nos. E-002/CN-08-509
E-002/CN-08-510
E-002/GS-08-690

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE PUBLIC UTILITIES COMMISSION

In the Matter of the Application of Northern
States Power Company d/b/a Xcel Energy
for Certificates of Need for the Prairie
Island Nuclear Generating Plant for an
Extended Power Uprate

FIRST PREHEARING ORDER

In the Matter of the Application of Northern
States Power Company d/b/a Xcel Energy
for Certificates of Need for the Prairie
Island Nuclear Generating Plant for
Additional Dry Cask Storage

In the Matter of the Application of Northern
States Power Company d/b/a Xcel Energy
for an LEPGP Site Permit for the Prairie
Island Nuclear Generating Plant (PINGP)
Extended Power Uprate Project

A Prehearing Conference was held September 12, 2008, in the Public Utility Commission's Large Hearing Room before Administrative Law Judge (ALJ) Richard C. Luis. The following persons noted their appearance:

Christopher B. Clark, Assistant General Counsel, Xcel Energy, and Andrew Brown, Dorsey & Whitney, appeared on behalf of Xcel Energy.

Drew Moratzka, Mackall Crouse & Moore, appeared on behalf of Gerdau Ameristeel and Marathon Petroleum Company, (Xcel Industrial Intervenors or XLI).

John Knapp, Joseph Windler, and David Aafedt, Winthrop & Weinstine, appeared on behalf of the Prairie Island Indian Community (the Community).

Marya White, Regulation Unit Manager, Office of Energy Security (OES) of the Department of Commerce, and Bill Storm, Planning

Director of the OES Energy Facility Permitting Unit, appeared for the Department of Commerce (DOC, Department of Commerce).

Carol Overland, Overland Law Office, appeared on behalf of legalelectric.org.

Robert Cupit, Senior Facility Planner, Minnesota Public Utilities Commission, appeared on behalf of the staff of the Public Utilities Commission (the Commission or PUC). Mr. Cupit noted that he was filling in for Mike Kaluzniak, who is named as the Commission's Representative in this matter.

Based on the statements during the Prehearing Conference and the filings and proceedings in this matter, the Administrative Law Judge makes the following:

ORDER

Background

1. On May 16, 2008, Northern States Power Company d/b/a/ Xcel Energy (Xcel) filed an application for Certificates of Need from the Commission under Minn. Stat. § 216B.243 and Minn. Rules, Chapters 7849 and 7855. Xcel applied for an Extended Power Uprate (Docket 08-509) of Xcel's nuclear electrical power generating facility at Prairie Island, and also for approval of Additional Dry Cask Storage at its Independent Spent Fuel Storage Installation (ISPFSI) at Prairie Island (Docket 08-510).

2. On July 22, 2008, the Commission accepted the Certificate of Need applications submitted by Xcel Energy as complete, pending supplemental information. Also on July 22, 2008, the Commission issued a Notice and Order for Hearing that referred dockets 08-509 and 08-510 to the Office of Administrative Hearings for contested case proceedings.¹

3. On August 1, 2008, Xcel filed an application for a site permit for the uprated generation of the Prairie Island facility (Docket 08-690) under the Minnesota Power Plant Siting Act (Minn. Stat. Chap. 216E) and Minn. R. 7849.5010 through 7849.7010 regarding Large Electric Power Generating Plants (LEPGP).

4. On August 15, 2008, the Commission accepted the LEPGP Site Permit application submitted by Xcel Energy as complete, authorized the OES Energy Facilities Permitting Staff to initiate the full review process under Minnesota Rules Chapter 7849, and referred Docket 08-690 to the Office of

¹ Commission Notice and Order for Hearing, July 22, 2008
(<https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=5373455>)

Administrative Hearings to hold a contested case proceeding pursuant to Minn. Rule. Chap. 1405.²

5. **IT IS ORDERED THAT** this contested case proceeding is **CONSOLIDATED** for the purpose of hearing all contested issues in Dockets 08-509, 08-510, and 08-690.

Parties and Intervention

6. The only parties to this matter named by the Commission in its Notice and Order for Hearing were Xcel and OES.

7. A Petition to Intervene as a party was filed by Gerdau Ameristeel US Inc. and Marathon Ashland Petroleum LLC (identified as Xcel Industrial Intervenors or “XLI”) in Dockets 08-509 and 08-510. The Prairie Island Indian Community, also known as the Prairie Island Mdewakanton Dakota Community (the Community) petitioned to intervene in Docket 08-509. No objections have been received to either intervention petition and both XLI and the Community are admitted as parties in the requested docket(s).

8. Substantial discussion was had at the prehearing conference over the degree of intervention allowable under an agreement reached between Xcel and the Community. That agreement limits the participation of the Community in later Commission proceedings in exchange for considerations from Xcel. The Commission noted the issue in its Notice and Order for Hearing and referred the question to the ALJ, with the possibility of certifying the question back to the Commission.

9. While the Community has not petitioned to intervene in Dockets 08-510 or 08-690, the ALJ concludes that the Community has met all of the applicable standards under Minnesota Rules for intervention as a party in those dockets. The ALJ and the Commission have no jurisdiction to determine whether such intervention would breach the May 2003 Settlement Agreement between Xcel and the Community.³

10. The lack of jurisdiction by the ALJ and the Commission arises from the private contractual nature of the settlement. While an opinion could be rendered as to what effect the terms of the settlement should be given, such an opinion would not be binding on the District Court that has jurisdiction to decide disputes involving any breaches of the Settlement Agreement.⁴

² Commission Site Permit Order, August 15, 2008
(<https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=5437284>)

³ Prehearing Exhibit 1, ¶ 22.

⁴ *Id.*

11. The ALJ notes that the standards for obtaining a declaratory judgment appear to be met in this instance. As set out by the Minnesota Court of Appeals:

A declaratory action presents a justiciable controversy if it “(a) involves definite and concrete assertions of right that emanate from a legal source, (b) involves a genuine conflict in tangible interests between parties with adverse interests, and (c) is capable of specific resolution by judgment rather than presenting hypothetical facts that would form an advisory opinion.”⁵

12. Seeking a declaratory judgment in District Court would achieve the certainty sought by the Community, consistent with further participation in these proceedings.

13. Any person desiring to become a formal party must file a Petition to Intervene by April 15, 2009. Any person petitioning to intervene after that date may be restricted as to the scope of their participation. Any existing party that wishes to object must file an objection within seven days of service of the petition. Petitions to Intervene should comply with Minn. R. 1400.6200.

14. Any person who desires to be placed on the service list as a non-party participant must file a request with the Administrative Law Judges by April 15, 2009.

15. Members of the public need not become formal parties to participate in the hearings. Members of the public may offer either oral or written testimony, may offer exhibits for inclusion in the record and may question the parties’ witnesses as set forth below.

Procedure

16. The Administrative Procedure Act;⁶ the public hearing procedures for designation of sites and routes set forth in Minn. Stat. § 216E.02; the Certificate of Need and Siting Rules of the Commission;⁷ and the Siting and Routing Rules of the Office of Administrative Hearings;⁸ shall govern the conduct of the hearings in these matters. Provisions of these rules may be modified as necessary to accommodate recent statutory changes and to accomplish the purposes of the statute.

⁵ *Unbank Co., LLP vs. Merwin Drug Company, Inc.*, A03-1029 (Minn. App., April 6, 2004) (quoting *Cincinnati Ins. Co. v. Franck*, 621 N.W.2d 270, 273 (Minn. App. 2001)).

⁶ Minn. Stat. §§ 14.57 – 14.62.

⁷ Minn. R. 7849.0020 – 7849.7110.

⁸ Minn. R. 1405.0200 – 1405.2700.

Schedule

The following schedule is adopted:

Date	Event
March 17, 2009	Draft EIS prepared by OES (tentative)
April 1, 2009	Xcel's prefiled Direct Testimony
April 15, 2009	Deadline for Petitions to Intervene and requesting non-party participant status
April 22, 2009	OES and Intervenors' prefiled Direct Testimony
May 12, 2009	Prefiled Rebuttal Testimony by all parties
May 14, 2009	Public hearings on all dockets (locations TBD)
May 25, 2009	Written Public Comment deadline (must be received by 4:30 p.m.)
May 29, 2009	Prefiled Surrebuttal Testimony by all parties
June 8, 2009	Evidentiary hearing begins
TBD	Posthearing briefs
TBD	Reply Briefs of parties
TBD	ALJ Report and Recommendation to PUC
TBD	Exceptions
TBD	Final PUC decision

Public Comments

17. Public hearings will be convened, and notice will be given of the times and locations for those hearings when those details are arranged. Public comments may also be made in writing. In order to be considered, written public comments must be filed with the Administrative Law Judge on or before 4:30 p.m. on May 25, 2009. Comments can be filed with the ALJ by U.S. Mail, fax (651-361-7936), or e-mail to rulecomments@state.mn.us. Public comments are not to be eFiled by individual members of the public. Interested members of the

public who file comments by mail are encouraged to file them unbound, on standard letter-sized paper to aid in the processing and eFiling of those comments by the ALJ.

Filing of Documents

18. Prefiled testimony and exhibits may be in any reasonable format that is understandable, logically organized, and capable of being cited by page and line number, paragraph number, or similar identifier.

19. The Public Utilities Commission, the Department of Commerce, and the Office of Administrative Hearings have collaborated on the creation and use of an online electronic document filing system (the E-File system). Parties required to or capable of using the E-file system shall file electronic versions of their documents. Such E-filing also constitutes service upon persons who have agreed to accept e-filed documents in this docket.

20. All documents filed by the parties, including prefiled testimony, but excluding information requests and responses, shall be filed as follows:

a. The original document shall be filed using the E-file system wherever feasible. Otherwise, the original document shall be filed by delivery or mail to:

Honorable Richard C. Luis
Office of Administrative Hearings
P.O. Box 64620
600 North Robert Street
Saint Paul, Minnesota 55164-0620

b. Regardless of the method of filing the original, courtesy copies shall be mailed and emailed to the Administrative Law Judge.

c. After the Administrative Law Judge's Report is issued, the parties shall file the original of all documents with the Executive Secretary of the Commission, in the manner provided for by the Commission.

21. Copies of all documents shall be served on the persons listed on the attached service list, in the number indicated. E-filing is sufficient service on those persons so indicated on the official service list. Persons willing to accept E-filing as service should notify the Administrative Law Judge. The list will be revised as necessary by the Office of Administrative Hearings. Service shall be made according to the most current service list provided to the parties by the Office of Administrative Hearings and filed through the E-filing system.

22. The effective date of filing shall be the date the document is E-filed, mailed by U.S. Mail, or delivered to the Administrative Law Judge or, after the

issuance of the Administrative Law Judge's Report, to the Executive Secretary of the Commission.

23. Proof of service shall be filed with each filed document or within three business days thereafter. Parties using the E-filing system must retain the unique document identifier as proof of service through that system.

24. If nonpublic data is filed with the Administrative Law Judge or Commission, it shall be prepared and marked in accordance with the Commission's September 1, 1999, Revised Procedures for Handling Trade Secret and Privileged Data. Those procedures may be viewed at www.puc.state.mn.us/docs/tradsecret.pdf.

Discovery

25. Other than Information Requests between parties, discovery shall only be conducted upon motion to the Administrative Law Judge.

26. Discovery between parties shall be by Information Request and response. Information Requests shall normally be made by mail (or e-mail where available) to the party from whom the information is sought and a copy shall be mailed (or e-mailed) to all parties. Information Requests containing references to other documents shall be sufficiently detailed to inform the other parties of the nature of the request. Information Requests and responses shall **NOT** be sent to the Administrative Law Judge or the Court Reporter. The party responding to the Information Request shall provide the information requested within eight business days after receipt of the request. There shall be a continuing obligation to update and supplement information responses. The information need not be supplied as a matter of course to other parties unless specifically requested by a party. That request may take the form of a blanket request for all responses. Information Requests received after 4:00 p.m. on business days or on weekends or State holidays shall be considered to be received on the following business day, except that any U.S. Mail received during business hours shall be considered to be received on the same day.

27. In the event the information cannot be supplied within the required time, the responding party shall notify the requesting party as soon as reasonably possible in advance of the deadline of the reasons for not being able to supply the information and to work out a schedule of compliance with the requesting party.

28. Parties asked to provide information they deem confidential or nonpublic may require the requesting party to comply with the terms of a reasonable protective agreement or the Minnesota Government Data Practices Act. A protective order may be obtained on application to the Administrative Law Judge.

29. Disputes concerning the reasonableness of discovery requests and the timing and sufficiency of responses shall be resolved by the Administrative Law Judge upon motion of a party. Notice of such a motion should be made by email if possible and may be heard by telephone conference among the Administrative Law Judge and affected parties.

Offering of Prefiled Testimony and Order of Testimony

30. At the hearing, prefiled testimony and exhibits shall be offered and received as hearing exhibits and exhibit numbers shall be assigned at that time. In the case of E-filed documents, the sponsoring party will provide the unique E-file system designation as the official record copy of the document. A paper copy will be offered and marked for use in the hearing room, including the notation of errata. Prefiled testimony that is amended in total or that is not offered into the record shall be considered withdrawn and the sponsoring witness may not be cross-examined concerning the withdrawn testimony. Except for cause shown, all substantive revisions or corrections to any prefiled testimony shall be filed with the Administrative Law Judge and served on the parties no later than three days before the evidentiary hearing starts. E-filing shall be used where possible.

31. Except for good cause shown, any new affirmative matter that is not offered in reply to another party's direct or rebuttal evidence shall not be offered in rebuttal or surrebuttal testimony and exhibits.

32. All hearing exhibits capable of E-filing will be rendered in electronic format and E-filed. For those exhibits not already E-filed, the parties are encouraged to submit their hearing exhibits on unbound, standard letter-sized paper. A Hearing Exhibit List will be prepared following the hearing to identify the official hearing record of this proceeding.

33. Unless the parties agree otherwise, the order of testimony and questioning in the evidentiary hearing shall be Xcel, XLI, the Community, other intervenors in order of intervention, and OES.

Examination of Witnesses

34. Witnesses shall be allowed five minutes to summarize their prefiled testimony. Additional time may be allowed if necessary for a witness to respond to new issues raised by other parties, if no response was previously allowed.

35. Parties shall examine and cross-examine witnesses through their attorneys, if they are represented by counsel. Any party not represented by counsel may examine and cross-examine witnesses through any one representative chosen by the party. If time permits, interested persons may examine witnesses during the evidentiary hearing.

36. Except for good cause shown, objections by any party relating to the qualifications of a witness or the admissibility of any portion of a witness's

prefiled testimony shall be considered waived unless the objecting party files and serves an objection prior to commencement of the evidentiary hearing. If an objection is made by a party, the party shall be permitted to lay further foundation for the objection through cross-examination of the witness. Any prefiled testimony that is not objected to shall be admitted during the evidentiary hearings without the necessity of laying foundation for the testimony.

Order to Control Subject to Modification

37. This Order may be modified or amended by further order of the Administrative Law Judge. Parties seeking to modify or amend this Order shall make application to the Administrative Law Judge by motion and for good cause shown

Dated: October 3, 2008

 /s/ Richard C. Luis _____
RICHARD C. LUIS
Administrative Law Judge



MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS

600 North Robert Street
Saint Paul, Minnesota 55101

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P.O. Box 64620
St. Paul, Minnesota 55164-0620

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October 3, 2008

See Attached Service List

Re: *In the Matter of the Application of Application of Northern States Power Company d/b/a Xcel Energy for Certificates of Need and a Site Permit for the Prairie Island Nuclear Generating Plant*
OAH 7-2500-19797-2; PUC E-002/CN-08-509, 08-510, and 09-690

Dear Parties:

The First Prehearing Order in this matter has been eFiled and served as specified on the attached Service List.

Please let me know if the email addresses are correct and if any further addresses should be added. Anyone currently on the list who is not representing a party or has not obtained non-party participant status will be dropped from future service lists.

Sincerely,

/s/ Michael W. Lewis

MICHAEL W. LEWIS
Staff Attorney

Telephone: (651) 361-7840

Enclosures

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE PUBLIC UTILITIES COMMISSION

In the Matter of the Application of Northern
States Power Company d/b/a Xcel Energy
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OAH Service List as of October 3, 2008

In the Matter of the Application of Northern
States Power Company d/b/a Xcel Energy
for Certificates of Need for the Prairie
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Island Nuclear Generating Plant (PINGP)
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eFile documents at: <https://www.edockets.state.mn.us/EFiling/home.jsp> .
Filing with eDockets shall constitute service on the Public Utilities Commission, the
Department of Commerce and the Office of Administrative Hearings.

In accordance with the First Prehearing Order in this matter, the original document to be served is that eFiled with the Commission. In the event that a filing cannot be made through eFiling, the original document will be filed with the ALJ and appropriate numbers of copies will be served as indicated below. The ALJ receives a paper courtesy copy of each eFiled document. No information requests or responses are to be eFiled.

As of this date, parties are receiving e-mail at the e-mail addresses listed and that e-mail must be followed by mail or delivery of a hard copy, where a street address is provided. The Court Reporter in this matter has requested that documents served on her be transmitted only by e-mail. In the event that a pleading or attachment cannot be filed and served electronically, it must be filed and served on each of the parties at the addresses listed in hard copy.

Documents that contain trade secret or nonpublic data may be e-filed, but may not be served by email.

Burl W. Haar (eFile or 15 copies,
NO IRs or Responses)
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350 Metro Square Building
121 Seventh Place East
St. Paul, MN 55101-2147
FAX: 651-297-7073

Richard C. Luis (E-file or Original, and one
courtesy copy, **NO IRs or Responses**)
Office of Administrative Hearings
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Docket 08-690 ONLY

Karen Finstad Hammel
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Courtesy copy (excluding IR's and IR responses):

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CERTIFICATE OF SERVICE

In the Matter of the Application of Northern States Power Company d/b/a Xcel Energy for Certificates of Need for the Prairie Island Nuclear Generating Plant for an Extended Power Uprate	OAH 7-2500-19797-2 MPUC Docket Nos. E-002/CN-08-509 E-002/CN-08-510 E-002/GS-08-690
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Denise S. Collins, certifies that on the 3rd day of October, 2008, she served a true and correct copy of the attached **First Prehearing Order** by serving as specified on the attached service list and filing with the eDocket system.