STATE OF MINNESOTA

BEFORE THE

PUBLIC UTILITIES COMMISSION

Nancy Lange	Chair
Dan Lipschultz	Commissioner
Matthew Schuerger	Commissioner
Katie Sieben	Commissioner
John Tuma	Commissioner

In the Matter of Possible Amendments to Rules Governing Certificates of Need and Site and Route Permits for Large Electric Power Plants and High-Voltage Transmission Lines, Minnesota Rules, Chapters 7849 and 7850; and to Rules Governing Notice Plan Requirements for High-Voltage Transmission Lines, Minnesota Rules, Part 7829.2550

MPUC Docket No. E,ET,IP-999/R-12-1246

ITC MIDWEST LLC'S REPLY COMMENTS

I. INTRODUCTION

ITC Midwest LLC ("ITC Midwest") submits these reply comments in response to comments provided by the Minnesota Department of Commerce, Energy Environmental Review and Analysis ("DOC-EERA"), Minnesota Department of Commerce, Division of Energy Resources, Energy Regulation and Planning ("DOC-DER"), Great River Energy and Minnesota Power, Xcel Energy, NoCapX 2020 ("NoCapX") and Just Change Law ("JCL").

II. RESPONSE TO COMMENTERS

A. DOC-DER

ITC Midwest supports DOC-DER's recommendation that the reference to "power pool" in Minn. R. 7849.0300 be replaced with "RTO" which addresses the same issue ITC Midwest raised in its initial comments. *See* Minn. R. 7849.0125, Subp. 4.

B. DOC-EERA

DOC-EERA provided detailed comments on both the Certificate of Need ("CN") and route permit ("RP") rules. A number of DOC-EERA's suggestions relate to rule organization and clarifications. Here, ITC Midwest provides comments on three points: (1) how to define landowners who receive notice; (2) proposed Minn. R. 7850.2100; and (3) landowner notice regarding alternatives introduced after the scoping decision.

DOC-EERA recommends that in various rules that require notice to landowners "along a transmission line" route be replaced with "within a proposed transmission line route." *See* Minn. R. 7849.0125, Subp. 4; 7850.1610, Subp. 4(A). ITC Midwest agrees that some clarification would be helpful but instead proposes that notice be provided to landowners "within or immediately adjacent to a route." This phrasing is consistent with ITC Midwest's practice and would provide notice to more landowners.

DOC-EERA further proposes to delete the proposed Minn. R. 7850.2140 which sets out a comment period for a RP application after it has been determined to be complete. ITC Midwest supports retaining the commenting process with a revision to address DOC-EERA's comment that Minn. R. 7850.2140, Subp.1, is inconsistent with statute because it seeks public comment on all RP applications about whether a contested case should be held. DOC-EERA correctly notes that Minn. Stat. § 216E.03, subd. 6, requires a contested case for applications under the full process. The proposed rules recognize this in Minn. R. 7850.2120. When an application is made under the alternative process, Minn. Stat. § 216E.03, subd. 6, requires only that there be a "public hearing under procedures established by the commission" and does not make reference to a contested case proceeding. In such case, the Commission has broad authority to establish procedures and has done so in existing Minn. Rule. 7850.3800. To help inform the Commission's decision on public hearing procedures under the alternative process, it would be

helpful to seek public comment on (1) whether an administrative law judge should be assigned; (2) whether a transcript should be made of the proceeding; and (3) if an administrative law judge is assigned, whether he or she should prepare a report and recommendation to the Commission.

ITC Midwest also recommends that Minn. R. 7850.2110 be revised to include comments on whether a task force should be appointed. This would enable the Commission to make a decision on a task force at the time it refers the matter to hearing.

For Minn. R. 7850.2300, Subp. 3, DOC-EERA proposes removing language that advises landowners that alternatives not included in the scoping decision "could be excluded from additional analysis" in the environmental review process. DOC-EERA's concern appears to be that the rule does not accurately reflect DOC-EERA's role and responsibility with respect to the environmental review document. ITC Midwest believes it is important for landowners to be advised that new alternatives introduced after the scoping decision may not be considered by the Commission when determining the route for a proposed project. ITC Midwest proposes alternative language that may address EERA's concern and that the subpart be revised to state that the notice must include "a statement that alternatives not identified in the scoping process may not be considered by the Commission in determining a route/site for the project."

C. Great River Energy/Minnesota Power/Xcel Energy

Great River Energy and Minnesota Power's comments provide helpful clarifications to the proposed rules. Xcel Energy's comments are in general agreement with the suggestions ITC Midwest made in its opening comments, *e.g.* removal of the draft application comment process. ITC Midwest does not have any specific reply comments to these suggestions.

D. NoCapX

NoCapX comments that Minn. R. 7849.0100, Subp. 32, and 7850.100, Subp. 19, should not define "utility" because it is not "authorized by statute," citing primarily to Minn. Stat.

§ 216B.02, subd. 4. NoCapX Comments, at 3. JCL similarly, without citing legal authority, contends that "transmission companies" should not be included in the definition of "utility." JCL Comments at 1. These comments are misplaced.

The definition of "public utility" in Minn. Stat. Ch. 216B is specific to the Commission's ratemaking authority and is appropriately limited to specified entities that provide electric service in the state. The scope of "public utility" appropriately excludes municipalities and cooperatives, over which the Commission does not have ratemaking authority.[1] In contrast, "utility" is appropriately defined more broadly in Minn. Stat. § 216E.01, subd. 10, to include load serving entities, municipalities, and cooperatives, as well as transmission companies, as all of these entities construct facilities subject to the Commission's route permit authority:

> Minn. Stat. Section 216E.01, Subd. 10. Utility. "Utility" shall mean any entity engaged or intending to engage in this state in the generation, transmission, or distribution of electric energy including, but not limited to, a private investor-owned utility, cooperatively owned utility, and a public or municipally owned utility.

These same entities must obtain CN approval for certain jurisdictional projects. The Commission's definition of "utility" contained in Minn. R. Ch. 7849 and 7850 is fully consistent with the definition in Minn. Stat. § 216E.01, subd. 10, and the Commission has the authority to develop definitions to carry out its CN and RP responsibilities and the special expertise to determine what entities are "utilities."

Further, NoCapX's concern that a modification to the definition of a utility in the rules will impact a transmission company's condemnation authority is misplaced. The definition of a public service corporation that NoCapX is concerned about is Minn. Stat. §117.025, subd. 10.

[1] A cooperative is not subject to the Commission's ratemaking authority unless it elects to be rate regulated. Minn. Stat. § 216B.026, subd. 1.

The statute defines public service corporations, which have condemnation authority under Minnesota law, by reference to a statute, not rule. Minn. Stat. §§ 301B.01 and 117.025, subd. 10. Section 117.025, subd. 10, defines "public service corporation" to include "a utility, as defined by section 216E.01, subdivision 10." The Chapter 216E definition is the relevant definition for Chapter 117, and, therefore, Section 216E.01 is the relevant definition for eminent domain purposes. Minn. Stat. § 117.025, subd. 1 ("For the purposes of this chapter and any other general or special law authorizing the exercise of the power of eminent domain, the words, terms, and phrases defined in this section have the meanings given them.") (emphasis added).

NoCapX and JCL also comment that an environmental impact statement ("EIS") must be completed for a CN. NoCapX Comments at 5-6 and JCL Comments at 2. JCL suggests the change from an Environmental Report to an EIS without legal argument. NoCapX relies on the 2015 decision by the Minnesota Court of Appeals in *In re North Dakota Pipeline Company LLC*, 869 N.W.2d 693 (Minn. Ct. App. 2015) ("*Sandpiper*"). *Sandpiper* involved a CN for a crude oil pipeline under Minn. Stat. § 216B.243 and Minn. R. Ch. 7853. The *Sandpiper* decision has no applicability here for CNs for high voltage transmission lines (and other projects) under Minn. R. Ch. 7849. Specifically, both existing and proposed Minn. R. 7849.2000 provide that the Environmental Report prepared in these cases is an Environmental Quality Board ("EQB") approved alternative form of environmental review under Minn. Stat. § 116D.04.[2] Accordingly, no rule changes are needed in light of the *Sandpiper* decision. However, NoCapX's position as

[2] *See* Minn. R. 4410.3600 (providing for alternative form of environmental review); Minn. R. 4410.4400, Subp. 3 ("For construction of a large electric power generating plant, environmental review shall be conducted according to parts 7849.1000 to 7849.2100 and 7850.1000 to 7850.5600."); Minn. R. 4410.4400, Subp. 6 ("For construction of a high voltage transmission line, environmental review shall be conducted according to parts 7849.1000 to 7849.2100 and 7850.1000 to 7850.5600.").

to the EIS further underscores ITC Midwest's previous comments that it would be prudent to request the EQB affirm that all rule changes contemplated in Ch. 7849 and 7850 remain approved alternative forms of environmental review.

E. JCL

ITC Midwest appreciates JCL's desire to increase public participation and notice and generally supports more advance notice of steps in the proceeding. Similarly, ITC Midwest has no objection to broadening the composition of appointees to the citizen advisory taskforces.

However, ITC Midwest cautions that any extension of the deadlines for activities must be reconciled with the statutory decision deadlines set forth in Minn. Stat. §§ 216B.243, subd. 5, and 216E.03, subd. 10. For example, JCL recommends, as it has in numerous proceedings, that the Final EIS ("FEIS") be issued before the contested case hearing in the full permitting process. ITC Midwest does not support making this change for several reasons. First, there is no statutory requirement that the FEIS be available before the hearing. Second, the existing rules require the DEIS to be available, and the document provides the environmental information necessary for the contested case portion of the process. Minn. R. 7850.2600, Subp. 1. Third, requiring that the FEIS be completed by the hearing would, we understand based on the historical timelines for completing the document, mean that the one-year statutory deadline could not be met.

JCL also provides comments on the draft application comment process in the proposed rules. As discussed in our initial Comments, ITC Midwest disagrees that public comment and reply at the draft application stage is necessary or appropriate. The draft rules provide wide and early notice of draft applications and formalize the pre-application open house opportunities for public engagement. Comments and replies at this stage will not further the record and could add significant confusion to the process. ITC Midwest, therefore, continues to recommend that the draft application be reviewed by the DOC-EERA and that the completeness decision be

delegated to the Executive Secretary of the Commission as proposed in Minn. R. 7850.1710. To the extent that this time period can be utilized to inform the public of future participation opportunities, ITC Midwest has no objection.

III. CONCLUSION

ITC Midwest appreciates the opportunity to submit these reply comments.

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Respectfully submitted,

/s/ Lisa Agrimonti

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