

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

**Beverly Heydinger
J. Dennis O'Brien
David C. Boyd
Phyhs A. Reha
Betsy Wergin**

**Chair
Commissioner
Commissioner
Commissioner
Commissioner**

**In the Matter of Application for a Route Permit
for the CapX 2020 Hampton-Rochester-LaCrosse
High Voltage Transmission Project**

MPUC: E002/TL-09-1448

**MOTION FOR RECONSIDERATION
ST. PAUL'S LUTHERAN SCHOOL AND CHURCH
AND
CANNON FALLS LANDOWNERS
AND
MOTION TO STRIKE NARRATIVE AND ATTACHMENTS OF
XCEL'S EXCEPTIONS TO RECOMMENDATION OF ALJ**

St. Paul's Church and School and Cannon Falls Landowners bring this Motion for Reconsideration and request that the Public Utilities Commission Reconsider its decision of April 12, 2012 and its written Order of May 30, 2012, rejecting the Administrative Law Judge's 1P-003 route, and request that the Commission instead utilize the ALJ's Recommendation and Order that the "Alternate Route Segment" around problematic areas in Cannon Falls cannot be used for CapX 2020 transmission.

- The Cannon Falls greenfield "Alternate Route Segment" deviation from the Preferred route was added improperly at the last minute, during the public hearing, without adequate notice to landowners and without inclusion in the Scoping Decision and without evaluation in the DEIS and FEIS. Another Cannon Falls greenfield route segment in slightly further south was added during the public hearing with absolutely no notice to landowners.

- The “Alternate Route Segment” utilized in the Cannon Falls area of Segment 1 should not be used because it is a greenfield route with no shared corridor. Route Segment 1P-003, along Harry Avenue, was recommended by the Administrative Law Judge, because it more closely adheres to Minnesota’s policy of non-proliferation because impacts are lessened because of the three existing transmission lines along 1P-003 on Harry Avenue between Hwy. 52 and the Byllesby Dam, and another transmission line from the Byllesby Dam headed south.
- The Commission take must notice that there are material errors and omissions in the Final Environmental Impact Statement, which fails to show the three existing transmission lines along 1P-003 along Harry Avenue and the transmission line from the Byllesby Dam headed south. Statements in the Commission’s Order regarding impact are not supported by the Environmental Impact Statement.

The record in this proceeding does not support the Commission’s selection of the Modified Preferred Route’s new “alternate segments” for Segment 1 near Cannon Falls at the intersection of Hwy. 52 and Hwy 19 and Co. Rd. 24 – the Commission’s Order is an error of law and fact. Segment 1P-003 is the route that more closely adheres to routing criteria and Minnesota’s policy of transmission non-proliferation.

MOTION TO STRIKE ATTACHMENTS TO EXCEPTIONS

The Applicants Exceptions filed Exceptions to the Recommendation of the Administrative Law Judge dated February 23, 2012, months after the record had closed. Those Exceptions contained three maps for Segment 1, labeled as Attachments 1, 2 and 3, and also contained in the upper right-hand corner, charts with information regarding Xcel’s House count on Attachment 1, use of existing RoW on Attachment 2, and location of Byllesby Park land in Dakota and Goodhue County on Attachment 3. The Attachments 1, 2 and 3 contained information not in the record, as did the Segment 1 narrative of the Exceptions.

The Attachments and narrative Exceptions were referenced by the Commission in its Order, considered by the Commission, and for its decision, the Commission relies on the

information in the Exceptions that is not in the record. Order, p. 7-9; see also fn. 14. The Order's narrative regarding site review, house count impacts, land use and park impacts references Xcel's statements in the Exceptions and do not not information in the record. Citations regarding Segment 1 in the Commission's Order to the Final EIS, fn. 14 and 15, are inaccurate as the FEIS did not address the late-filed changes to Xcel's Preferred route that made it the "Modified Preferred" route.

The Exceptions contain information not in the Record. For example, statements regarding use of house counts, that "raw numbers do not fully capture the comparative impacts of the two alternatives. Moreover, the house count comparisons provided in the ALJ Report for the Modified Preferred Route do not reflect two alignment adjustments included in the Modified Preferred Route by the Highway 19 Interchange and the planned County Road 24 Interchange." Exceptions p. 4-5. The statement is true, because the information are not in the Hearing Record, and the ALJ's Recommendation and Commission's decision must be based on the Hearing Record.

Xcel's Exceptions go on to state that "After the ALJ Report was issued, the Company undertook a site review of Segment 1P-003 and the comparable portion of the Modified Preferred Route, including the alignment adjustments at Highway 19 and County Road 24" and then introduces narrative information not in the record and Attachments 1, 2 and 3. Exceptions, p. 5 in its entirety.

Regarding "Land Use" in the Exceptions, page 6, and "Corridor Sharing" on page 7, Xcel makes comparisons of cross-country versus roads using information not in the record – the FEIS did not incorporate the "adjustments" which are entirely cross country and incorporation of which would alter the comparison. Xcel in Attachment 2 claims that the southern "adjustment"

is following a road but there is no road there. Correction of that misinformation would also alter the comparison. Further, information regarding use of funds from the “Land and Water Conservation Act of 1965” to acquire “portions” of the park is gleaned from Xcel’s Exceptions, pages 6-7, which is not in the record. It is not disclosed what “portions” of the park were obtained with such funds, and this claim is inconsistent with the statement in the Byllesby Park Master Plan which states that the parkland was donated to Dakota and Goodhue Counties by Northern States Power in 1969. p. 4.19, Byllesby Park Master Plan. Xcel admits this is not part of the hearing record in footnote 14 in its Exceptions that “The Company researched the boundaries of the LAWCON funded portions of the park in response to the ALJ Report.”

Xcel’s Exceptions contained much information and maps not in the record and which is not available to the Commission for consideration. The Commission should not be using, citing or relying on information not in the record. This information has not been subject to public review and comment, it has not been verified vetted. The Segment 1 maps accompanying Xcel’s Exceptions, Attachments 1, 2 and 3, should be stricken, as should information not in the Hearing Record. The Commission’s Order, to the extent it cited and relied on the information not in the Hearing Record, should be vacated.

MOTION FOR RECONSIDERATION

I. BACKGROUND FOR MOTION FOR RECONSIDERATION

The sections at issue are near Cannon Falls, last-minute alternates, the first shown as an orange alignment and yellow corridor in Sheetmap 9 of Hearing Exhibit 36:

Hearing Exhibit 36 is a packet of materials that made its first appearance when filed with the Commission on June 13, 2012, with the statement that:

Xcel Energy intends to offer the mapbook and the affidavit of mailing as exhibits at trial.
Hearing Exhibit 36, p. 1.

The 25 foot restrictions noted on the maps are based on the DOT as “freeway standards” set forth in its Policy of Accommodation. Hearing Exhibit 102; see also Hearing Exhibit 103, Hwy. 52 Corridor Management Plan. The DOT notified applicants of concerns at the intersections of Highway 52 and Highways 19 and County Road 24 in Scoping Comments, DEIS Comments and in testimony at Public and Evidentiary Hearings. These areas are at issue because there are pinch points that were not possible to mitigate due to St. Paul’s Lutheran Church and School, initially shown as a “residence” on maps, and there were homes sandwiched in next to the DOT easements where the DOT has planned changes in the ramp configuration.

Because of the applicants’ failure to address DOT concerns previously in the CapX Brookings Docket that rendered its Preferred Route unfeasible, NoCapX 2020 and U-CAN requested that the DOT representative be subpoenaed, as it had in Brookings and Fargo CapX dockets. In those dockets, after being served with the subpoena request, the DOT willingly offered, and did, testify and a DOT representative was present at each public hearing and at the evidentiary hearing. The DOT’s Policy of Accommodation and Comments were entered as exhibits. See Hearing Exhibit 102, MN DOT Policy/Position Statement 7/27/98; Hearing Exhibit 103, Hwy 52 Corridor Management Plan and Hearing Exhibit 1, Application Appendix D; Hearing Exhibit 106, p. 11-12 of DOT May 20, 2010 Scoping Comment; Hearing Exhibit 20 and 39, Hillstrom Sched. 17 and Rohlfing Ex. F, MN DOT Letter 4/29/11 DEIS Comments (also FEIS O-15-18); see also Tr. Vol. 3, Testimony of David Seykora.

As with the late-added “Myrick Route” in the CapX 2020 Brookings route docket, the DOT’s limitations make the Applicant’s preferred route not feasible. When was this know by the Applicants? Again, see Hearing Exhibit 102, MN DOT Policy/Position Statement 7/27/98; Hearing Exhibit 103, Hwy 52 Corridor Management Plan and Hearing Exhibit 1, Application Appendix D; Hearing Exhibit 106, p. 11-12 of DOT May 20, 2010 Scoping Comment; Hearing Exhibit 20 and 39, Hillstrom Sched. 17 and Rohlfing Ex. F, MN DOT Letter 4/29/11 DEIS Comments (also FEIS O-15-18); see also Tr. Vol. 3, Testimony of David Seykora. These restrictions were laid out to the Applicants by the DOT in Comments and meetings and other communications, and are no surprise to the Applicants. When asked about the timing of notifying the Applicants about the potential for limitation, the DOT’s Seykora testified it was disclosed all along, in increasing increments, where at first “We were saying please and in the later letter we’re saying we really mean it more than please.” Hearing Transcript, Vol. 1, p. 2-6; 214-215. Knowledge of the DOT’s restrictions were admitted by Hillstrom, who testified that the DOT has “indicated that’s not likely a permissible alternative alignment.” Testimony of Hillstrom, Tr. Vol. 3, p. 72-73. Applicants chose not to alter the route after receiving the DOT’s Scoping comments and chose not to alter the route after DOT’s DEIS Comments. Applicants chose to alter the route during the Evidentiary Hearing.

The Applicants Exceptions urge selection of its Modified Preferred Route including the improperly proposed “alignment adjustments” providing information on “impacts” for a route alignment that is not in the Scoping Decision, that is not in the DEIS or FEIS, that has not been verified, and which has not been vetted through public comments. As above, these Exceptions contained much information and maps not in the record and are not available to the Commission

for consideration. To avoid confusion, the Segment 1 maps accompanying Xcel's Exceptions should be stricken.

In its Exceptions, the Applicant claims its improper Modified Preferred route for Segment 1 with the "alignment adjustments" has less impact on human settlement based on late inserted house counts admittedly not available to the ALJ:

Moreover, the house count comparisons provided in the ALJ Report for the Modified Preferred Route do not reflect two alignment adjustments included in the Modified Preferred Route by the Highway 19 Interchange and the planned County Road 24 Interchange.

Exceptions, p. 5. In the foot note for this statement, Applicants claim:

The two alignment modifications are shown in detail on Exhibit 94 (Highway 19) and on Exhibit 26, Sheetmaps 10 and 11 (Highway 24). Specific impacts tables were also included in the record for the Highway 19 alignment. Ex. 95. The Company notes that the Highway 19 Interchange alignment avoids the church and school referenced in ALJ Report Finding at No. 306.

Id. The sheet maps referenced were filed with a letter dated June 13, 2011. There was no opportunity for verifying the information or comment on it, and Commerce did not verify it or add it to the FEIS. In addition, the proposed "adjustment" does not avoid St. Paul's Lutheran School and Church, it merely shifts from one side of the property to the other. See Attachment A, Affidavit of Daniel Flotterud, President, St. John's Lutheran Church.

During the last day of the Evidentiary Hearing, Applicants entered these referenced Exhibits 94 and 95. Exhibit 94 showed its preferred options in the Cannon Falls Hwy. 19 and Hwy. 52 area. Applicant's first choice is the "Modified Preferred Route (US 52) Segment" alignment, the red line with dotted lines on each side indicating route width. Its second choice is the "Highway 19 Interchange Infield Alternative Segment" in pink through the cloverleaf. "And then the fallback position would be the orange line, the third choice." Hillstrom, Tr. Vol. 3, p. 73, l. 5-19.

In his testimony, Hillstrom admits that the exhibit's Highway 19 Interchange infield alignment segment" was "a new alignment shown in pink that had not previously been shown." Tr. Vol. 3,p. 62, l. 16-20. Hillstrom also admitted that Exhibit 94 also included its "Alternate Route Segment" in yellow (not yellow where it overlaps 1P-002). When asked whether the "Infield Alternate" was permissible, Xcel's Tom Hillstrom testified that "I don't think there's been discussions regarding this specific alignment, but in previous meetings that we've had with MnDOT when we've suggested things like this, they've indicated that's not likely a permissible alternative alignment." Id., p. 72-73. Hillstrom testified that "[t]he orange alignment... would require additional route width." Id. l. 12-15.



Hearing Exhibit 95.

Applicants also entered Exhibit 96 on the last day of the Evidentiary Hearing. This is a chart showing names and addresses of purported landowners and timing and means of contacting them regarding the CapX 2020 project. See Hearing Exhibit 96. This information has not been vetted, and those listed as landowners take issue with the statements in Exhibit 36. See Attachment A, Affidavit of Daniel C. Flotterud; Attachment B, Affidavit of Gina Schlueter; Attachment C, Affidavit of Jen Langdon; Attachment D, Affidavit of Tim Langdon; Attachment E, Affidavit of Michelle Sandstrom; Attachment F, Affidavit of Christopher and Kristy Strickland; Attachment G, Affidavit of Dennis Doffing. Landowners on the late-added “adjustments” did not receive notice until after the June 13, 2011 mailing at the earliest, and some did not receive notice at all. *Id.* Some who received notice were told by telephone that there was little chance this route would be selected and that they should not worry. *Id.* Others had not received notice at all. Attachment B, Affidavit of Gina Schlueter (landowners of record at 30149 – 59th Avenue, Cannon Falls).

This is a point by point replica of the late entry of the Myrick Road route alternative in the CapX 2020 Brookings routing docket (08-1474), where early disclosed DOT restrictions on the DOT scenic easements rendered the route unworkable. In this case, as with the Brookings Myrick Route, another option was inserted, improperly, in the very final stage of the administrative process, during the hearings. Similarly, it was entered so late that landowners couldn’t meaningfully participate, information was not provided in the record, and it was not part of environmental review.

The errors of fact and law should be corrected and another route selected by the Commission.

I. THE ROUTE SELECTED WAS NOT AVAILABLE TO THE COMMISSION BECAUSE IT WAS ADDED IMPROPERLY, WITHOUT ADEQUATE NOTICE OR ENVIRONMENTAL REVIEW.

During Public Hearing, Evidentiary Hearing and the April 12, 2012 Oral Argument, Xcel's Hillstrom admitted that the Hwy. 52 route was not feasible. Primary reason is DOT easements and Utility Policy of Accommodation prohibiting routing over DOT easements, and too narrow RoW available. The routes around problematic areas in Cannon Falls cannot be used as it was added improperly at the last minute, without adequate notice to landowners and without inclusion in the Scoping Decision and without evaluation in the DEIS and FEIS. This is similar to the Applicant's late and improper addition of the "Myrick Route" for Commission consideration in the CapX 2020 Brookings case, where it was added during the hearing, with inadequate or no notice to landowners and with no environmental review. The Commission is not to consider routes not included in the Environmental Impact Statement, and these two options were not evaluated in the EIS.

A. Notice to the Cannon Falls landowners was inadequate.

The Power Plant Siting Act requires notice be given to landowners within 15 days of submission of the route permit application. Minn. Stat. §216E.03, Subd. 4. The statute requires a bona fide attempt to comply be made. *Id.* However, the notice at issue is to be made within 15 days of filing of the application, at which time the segments added by the Applicants were not contemplated. What notice was provided, as set forth in attached Exhibits 36 and 96, was **MAILED** to landowners on the northern segment on June 13, 2011, **ONE DAY** before the start of public hearings, and **ONE WEEK** before the start of the evidentiary hearing, and **FIVE WEEKS** after the deadline for intervention. Applicants made no effort whatsoever to give notice within 15 days of the filing of the Application.

On June 13, notice was mailed by the Applicants to an outdated list of landowners, and several of the landowners were contacted by phone. Hearing Exhibit 96. Applicants provided a chart showing “Minnesota Highway 19/US Highway 52 Intersection Options – Landowner Contact Information.” See Hearing Exhibit 96; see also Attachment A, Affidavit of Daniel C. Flotterud; Attachment B, Affidavit of Gina Schlueter; Attachment C, Affidavit of Jen Langdon; Attachment D, Affidavit of Tim Langdon; Attachment E, Affidavit of Michelle Sandstrom; Attachment F, Affidavit of Christopher and Kristy Strickland; Attachment G, Affidavit of Dennis Doffing. At the time of the mailing, Ryan K. Rounds was not the landowner at 30149 – 59th Avenue, Cannon Falls, MN 55009, the Schlueters own this parcel. Attachment B, Affidavit of Gina Schlueter. Landowners Langdon and Sandstrom were told that it was “highly unlikely” that the route would be chosen and that they should not be concerned. Affidavit of Jen Langdon; Attachment D, Affidavit of Tim Langdon; Attachment E, Affidavit of Michelle Sandstrom. Many of these landowners attended the Public Hearing and submitted Comments. Public Hearing Transcript, June 16, 2012, Cannon Falls; see also OAH filed Comments.

Notice is required to be provided to landowners at various points along the administrative process. Notice is to be provided for those landowners affected by additional route options that are included in the Scoping Decision, which was issued August 6, 2010. These two route segments near Cannon Falls were not included in the Scoping Decision. Notice was sent to the Scoping Decision landowners by Commerce on September 17, 2010, but again, that did not include those landowners on the late-filed “adjustment.” See Hearing Exhibit 51, Notice to Landowners; see also, Id., Figure 12, map of Cannon Falls area showing proposed route alterations. There is nothing in the record that reflects that the Commerce Public Advisor for this

project made any effort to contact the landowners along the late-proposed route “adjustments” to let them know what options were open to them to participate in this docket.

The proposed route changes were introduced into the record at the evidentiary hearing, but they were not introduced until the final day of the Evidentiary Hearing. Hearing Tr., Vol. 2, June 21, 2012; Hearing Exhibits 94, 95 and 96. When these late-filed “adjustments” were discussed during evidentiary hearing, Asst. A.G. Karen Hammel requested Xcel provide “environmental information” to include in FEIS. The information was provided in Hearing Exhibits 94, 95 and 96 was not verified or vetted, or subject to review and commenting by the public. However, this information regarding these late-filed changes was not incorporated into the FEIS, and appropriately so as the “adjustments” were not part of the Scoping Decision.. The environmental information was not included in the Scoping Decision, DEIS or FEIS, there was no opportunity for the public to comment on environmental review because there was no environmental review.

Upon learning of Applicant’s new route, NoCapX 2020 and U-CAN filed a Motion for Extension of Intervention Deadline for Newly-Noticed Landowners, citing the statutory requirement that “the Commission shall adopt broad spectrum citizen participation as a principal of operation.” Minn. Stat. §216E.08, Subd. 2¹. Not only is intervention necessary to raise issues and inform the record, but it is necessary to preserve their rights to appeal.² That motion was rejected, noting that no party filed objections to the motion, and that “NoCapX and U-CAN

¹ Filed June 17, 2011, Docket 09-1448, available online at [20116-63772-01](#) PUBLIC 09-1448 TL NOCAPX2020 AND UCAN MOTION---TO EXTEND INTERVENTION DEADLINE 06/17/2011

² See members of U-CAN’s appeal: In the Matter of the Application of the Minnesota Pipe Line Company for a Certificate of Need for a Crude Oil Pipeline and In the Matter of the Application to the Minnesota Public Utilities Commission for a Pipeline Routing Permit for a Crude Oil Pipeline, PL-5/CN-06-2; PL-5/PPL-05-2003. <http://www.lawlibrary.state.mn.us/archive/ctapun/0806/opa071318-0610.pdf>

represent the interests of their members, but they do not represent either the general public or these specific landowners.” Order, June 30, 2011.³

Use of 1P-003, as recommended by the Administrative Law Judge, would address these deficiencies as there was sufficient notice to those landowners.

B. The late Cannon Falls routes weren't identified in the Scoping Decision and were not evaluated in the DEIS or EIS

The late Cannon Falls routes were added improperly -- added at the last minute and were not included in the Scoping Decision, the Draft Environmental Impact Statement or the Final Environmental Impact Statement. The Scoping Decision was issued August 6, 2010. Scoping Decision, Hearing Exhibit 50. These two route segments near Cannon Falls were not included in the Scoping Decision, and notice was sent to the Scoping Decision landowners by Commerce on September 17, 2010. See Hearing Exhibit 51, Notice to Landowners; see also, Id., Figure 12, map of Cannon Falls area showing proposed route alterations. Before these routes were added, there were two attempts to add additional routes for consideration very late in the process, and both of those attempts were soundly rejected.

The Commission must also acknowledge that the Environmental Impact Statement did not include the Segment 1 “adjustments,” and also that it did not “address the issues and alternatives” namely existence of 1P-003 transmission corridors, “to a reasonable extent considering the availability of information and the time limitations for considering the permit application. Minn. R. 7850.2500, Subp. 10(A).

Statements in the Commission’s Order claiming impacts of Route 1P-003 are not supported by the record, and do not reflect the pre-existing transmission corridors in the area and

³ Available online at [20116-64296-01](#) PUBLIC 09-1448 TL OAH ORDER--ORDER ON MOTION REGARDING FINAL ENVIRONMENTAL IMPACT STATEMENTS AND MOTION TO EXTEND INTERVENTION DEADLINE 06/30/2011

the omissions in the Environmental Impact Statement. The Commission is also incorrect in its statement in the Order that no party objected to the adequacy of the Final EIS – the North Route Group, NoCapX and United Citizen Action Network raised specific inadequacies in the EIS treatment of issues in the Scoping Document, stated that the 1P-003 transmission along Harry Avenue was not shown in the FEIS, but the Commission only addressed those pertaining to error regarding infrastructure near the Zumbro Dam⁴, and did not address the errors and omissions regarding the Byllesby Dam transmission corridor. Order, p. 5-6.

C. Other late attempts to add route segments and alignments were properly disallowed.

Others did attempt to introduce new route alignments during the Public and Evidentiary hearing, and those route proposals were rejected. During the public hearing, a member of the public, Paul Kalass, requested that he be allowed to propose a route change in a challenging spot in Zumbrota, along Hwy. 52 that had not been previously proposed. He was told by the ALJ that he could not propose a new route alignment adjustment. Tr. p. 145-147, Public Hearing – June 16, 2011 – Canon Falls – 6:30.

The Dept. of Commerce’s Matt Langan acknowledged it was too late to be adding a route:

What I wanted to respond to was the question, I guess, about whether a line can be added at this point. And we – my director signed the scoping decision in August of last year. And at that point, when that scope is put into place, that is the end of our adding any lines for consideration.

Tr. p. 146-147, Public Hearing – June 16, 2011 – Canon Falls – 6:30.

A party, Oronoco Township, tried a similar maneuver to enter a route into consideration and failed. Instead of legitimately offering a route proposal during scoping or through a Task Force meeting or via comments, Oronoco Township waited until the last minute, after

⁴ The Order is off by a magnitude of 10 regarding the transmission west of the Zumbro Dam, it is a 34.5 distribution sized line to the west of the dam, not “a 345 kV transmission line.” Xcel agreed with NRG, NoCapX and U-CAN that this was indeed a 34.5 kV line, not a transmission line.

completion of its testimony and case-in-chief, and contrary to rules for proposals of routes and submitted an utterly new route. This route was one that had not been previously proposed, one for which landowners had not received notice, and one that had not been evaluated in environmental review. Hearing Exhibit 89, New CapX 2020 Route Proposed by Oronoco Township. The Township attorney stated that he had asked the township's consultant, Mr. Broberg to prepare a map. Tr. Vol. 2, p. 158.

After a long off the record discussion, and a discussion on the record, when questioned, Broberg, the township consultant, testified that this proposal was a last minute effort hatched the evening before at a Township Planning Commission meeting. Testimony of Broberg, Tr. Vol.2, p. 166, l. 18- p. 167 l. 16. He testified that Oronoco Township made this proposal without doing any impact analysis under Minn. R. Ch. 7850. Id., p. 167. Broberg also testified that the residents along the new portion of the "route" had not been notified. Id., p. 163. The ALJ repeatedly stated, "I can't consider this" because the route was offered too late. Id.

That restriction applies to Xcel Energy as well – there are not different procedural rules for Xcel Energy regarding timing of route alignment "adjustments." As it was for Paul Kalass and Oronoco Township, the public hearing and evidentiary hearing are timed too late in the process to be adding route options.

Use of 1P-003, as recommended by the Administrative Law Judge, would address these deficiencies because 1P-003 was included in the Scoping Decision and it was evaluated in the Environmental Impact Statement.

D. The existing transmission lines and corridor on Harry Avenue extending to Hwy. 19 was omitted from the environmental review

The Administrative Law Judge recommended that the route near Cannon Falls follow existing transmission along Harry Avenue, across the Byllesby Dam and south to Hwy. 19. In

the Recommendation, the ALJ took note of the fact that there are existing transmission lines extending south from the Harry Avenue intersection with Hwy. 52 down to the Byllesby Dam Substation, and from that substation continuing south to Hwy. 19 that is addressed in the ALJ's Recommendation:

FOF 301. Route alternatives 1P-001, 1P-002, and 1P-003 would run along existing 69 kV, 115 kV, and 161 kV transmission lines on Harry Avenue to the Cannon Falls substation located near the hydroelectric dam that creates the Lake Byllesby Reservoir.

FOF 306. There are, however, significant problems following US 52 through the Cannon Falls area in the vicinity of Highways 19 and 24, because of the proximity of homes, churches, schools, and businesses. Use of option 1P-003 would bypass this area and would impact fewer total residences; would avoid the church, school, and businesses; would parallel existing transmission lines and use mostly existing road corridors; and would provide the opportunity to avoid potential conflicts with two future road projects (the railroad overpass and the County Road 24 interchange).³⁷³

ALJ Recommendation; see also Hearing Exhibit 35, Google Earth; Testimony of Denae Reiswig, p. 67-68, Public Hearing June 16, 2011 – Cannon Falls – 6:30; ALJ.

Source: Affidavit of Jen Langdon, p. 2 (attached)

This existing transmission is readily visible on Applicant's Google Earth Exhibit 35⁵. It is a wide corridor with three transmission lines, then narrowing to two:

Commerce's failure to include the obvious multiple transmission lines on Harry Avenue, between 52 and the Byllesby Dam, and southward from the Byllesby Dam to Hwy. 19 is inexplicable⁶. This omission was brought to the attention of the Commission at its April 12, 2012 meeting by counsel for NRG, NoCapX 2020 and U-CAN, counsel now representing the aggrieved St. Paul's Lutheran School and Church and Cannon Falls Landowners. The Commission must take this existing transmission corridor into account. We request that route segment 1P-003, as recommended by the Administrative Law Judge, be utilized in the Cannon Falls area of Segment 1 because it is an option was analyzed in the environmental review as required under the PPSA, which has existing transmission, and which is available for routing by the Commission.

II. THE IMPROPERLY ADDED ROUTE IS CONTRARY TO MINNESOTA'S POLICY OF NON-PROLIFERATION

More than three decades ago, the PEER decision set out the Minnesota transmission routing policy of "nonproliferation," to maximize utilization of existing and proposed railroad and highway rights-of-way. In a clear statement of intent, with full knowledge of the impact of establishment of nonproliferation on those near existing corridors, the court held:

We therefore concluded that in order to make the route-selection process comport with Minnesota's commitment to the principle of nonproliferation, the MEQC must, as a matter of law, choose a pre-existing route unless there are extremely strong reasons not to do so. We reach this conclusion partly because the utilization of a pre-existing route minimizes the impact of new intrusion by

⁵ The link provided by Applicants for its Hearing Exhibit 35, Google Earth is no longer working: [www.http://capx2020.com/Projects/projects-Ham-Roch-Lac.html](http://capx2020.com/Projects/projects-Ham-Roch-Lac.html). The best way to find it is to search the www.capx2020.com site for "kmz" to reveal the "kmz" google earth files on the CapX 2020 site. This failed link has been brought to the attention of Xcel and counsel.

⁶ It may be worth noting that Commerce's consultant for the EIS, Barr Engineering, was also a consultant for Dakota County's Lake Byllesby Master Plan.

limiting its effects to those who are already accustomed to living with an existing route. More importantly, however, the establishment of a new route today means that in the future, when the principle of nonproliferation is properly applied residents living along this newly established route may have to suffer the burden of additional powerline easements.

People for Environmental Enlightenment& Responsibility (PEER), Inc. v. Minnesota Environmental Quality Council, 266 N.W.2d, 858, 868 (Minn. 1978). The court compared proliferation with the MEQC's balance of noncompensable impairment of the environment against the compensable damages of number of homes to be condemned, and noted that:

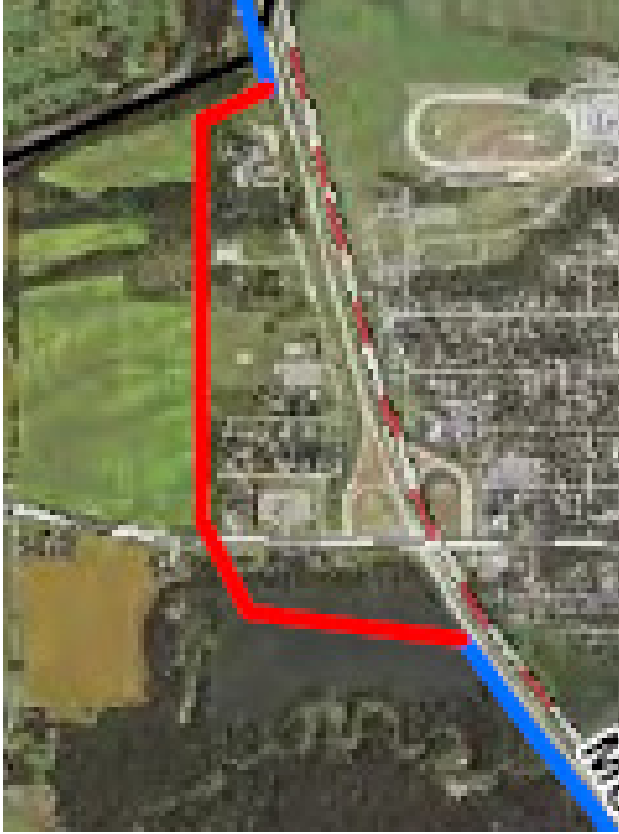
Although the hearing examiner, the MEQC, and the district court all accepted both their reasoning and their conclusion, condemnation of a number of homes does not, without more, overcome the law's preference for containment of powerlines as expressed in the policy of nonproliferation. Persons who lose their homes can be fully compensated in damages. The destruction of protective environmental resources, however, is noncompensable and injurious to all present and future residents of Minnesota.

Id., p. 869. In that case, the court emphasized that those along transmission routes "may have to suffer the burden of additional powerline easements." Id. at 868. That is the case in this situation with 1P-003 and the existing transmission corridor along Harry Avenue.

The PEER-based non-proliferation routing policy was recently emphasized by the addition of Minn. Stat. §216E.03, Subd. 7(e) requiring specific findings by the Commission:

The commission must make specific findings that it has considered locating a route for a high-voltage transmission line on an existing high-voltage transmission route and the use of parallel existing highway right-of-way and, to the extent those are not used for the route, the commission must state the reasons.

The late-proposed route segments near Cannon Falls added by the Applicants and chosen by the Commission are entirely within greenfield territory, with no shared transmission, road, pipeline or railroad right of way, and these greenfield additions are not addressed in the FEIS. This segment is gross proliferation under PEER or Minn.Stt. §216E.03, Subd. 7(e). That is clear from Xcel Energy's Exceptions, Attachment 2, where red is "No ROW or Parcel Following:"



Source: Map, Attachment 2, not in record but attached to Applicant's Exceptions.

The definition of corridors is important. PEER and Minn. Stat. §216E.03, Subd. 7(e) both refer to existing high-voltage transmission route and highway right of way, and PEER also refers to railroad right-of-way.⁷ Nowhere in the PEER decision or in the statutes are field lines and property boundaries equated with right-of-way, nor are field lines and property boundaries regarded as “corridor.” This route adjacent to Highway 52, near the Highway 19 interchange, however, has neither transmission nor road RoW sharing, it is a greenfield route by any measure. The northern part of the route parallels the Cannon River within the MCBS area along the banks

⁷ Minn. Stat. §216E.03, Subd. 7(b)(8) refers to “evaluation of potential routes that would use or parallel existing railroad and highway rights-of-way” and field lines and property boundaries are referenced in Minn. Stat. §216E.03, Subd. 7(b)(9) addresses “evaluation of governmental survey lines and other natural division lines of agricultural land so as to minimize interference with agricultural operations,” and not as non-proliferation. As factors to be considered, Minn. R. 7850.4100, Subp. H. addresses “use or paralleling of existing rights-of-way, survey lines, natural division lines, and agricultural field boundaries” and then separately in Subp. J, “use of existing transportation, pipeline, and electrical transmission systems or rights-of-way.”

of the river and traverses a Zoological MNDNR Natural Heritage site. Hearing Exhibit 113, FEIS, Appendix A, Sheetmap NR8, see also NR9.

The added route “adjustment” near Co. Rd. 24 is similarly a greenfield route – the blue in Xcel’s map represents sharing a corridor with a road, but there is no road at this location:



In addition to the above issues regarding Notice and Environmental Review, CapX 2020 Applicants’ last minute changes are contrary to Minnesota transmission routing policy because they are not utilizing existing rights-of-way where routes with existing transmission and roadway are available.

Proliferation of transmission corridors is inconsistent with Minnesota’s longstanding policy of Non-proliferation established by *People for Environmental Enlightenment & Responsibility (PEER), Inc. v. Minnesota Environmental Quality Council*, 266 N.W. 2d 858 (Minn. 1978). For these reasons, understanding that all transmission has significant impacts, our analysis shows that the “least harmful” routes for Segment 1 near Cannon Falls is route 1P-003.

On the other hand, Route 1P-003 utilizes a route with existing transmission lines. There is existing transmission on route P-003 from the intersection of Harry Avenue to the Byllesby Dam, and from the Dam southward to Highway 19. This existing transmission is noted in Exhibit 35, the Google Earth overview, in Harry Avenue landowner testimony, and in the ALJ's Recommendation:

FOF 301. Route alternatives 1P-001, 1P-002, and 1P-003 would run along existing 69 kV, 115 kV, and 161 kV transmission lines on Harry Avenue to the Cannon Falls substation located near the hydroelectric dam that creates the Lake Byllesby Reservoir. This is the east boundary of Lake Byllesby Regional Park (managed by Dakota County) and Lake Byllesby County Park (managed by Goodhue County). These route alternatives would also parallel a planned regional park recreational trail and a bridge crossing the Cannon River that are proposed in the park 2005 master Plan and are planned for construction in 2013. Because the viewshed in this area is already impacted by existing high-voltage transmission lines, however, impacts to these parks would be minimal if one of these route options were chosen.⁸

FOF 306. There are, however, significant problems following US 52 through the Cannon Falls area in the vicinity of Highways 19 and 24, because of the proximity of homes, churches, schools, and businesses. Use of option 1P-003 would bypass this area and would impact fewer total residences; would avoid the church, school, and businesses; would parallel existing transmission lines and use mostly existing road corridors; and would provide the opportunity to avoid potential conflicts with two future road projects (the railroad overpass and the County Road 24 interchange).⁹

See Ex. 35; Testimony of Denae Reiswig (we already have some high lines coming down our side of the road) p. 67-68, Public Hearing June 16, 2011 – Cannon Falls – 6:30; see also FOF 301-306, ALJ Recommendation.

As above, the existing 60kV, 115kV and 161kV transmission lines along route 1P-003 are missing from the Environmental Impact Statement, it is not shown on the map. FEIS, p. 103, Map 8.1-26. The existing transmission on 1P-003 is also not addressed in the narrative Route Descriptions for 1P-001, 1P-002 and 1P-003. The Commission was notified of this error and omission during oral arguments on April 23, 2012.

⁸ (ALJ Recommendation footnote) 369. Ex. 113 at 106-107; Ex. 1. Vol. 2, section M(Sheet Map 10).

⁹ (ALJ Recommendation footnote) 373 Ex. 113, Appendix A at A-11 (Map NR9); Ex. 36 at Sheet Map 10.

This route addition is contrary to Minnesota's long standing policy of transmission line route non-proliferation. We request that route segment 1P-003, as recommended by the Administrative Law Judge, be utilized in the Cannon Falls area of Segment 1 because it more closely adheres to Minnesota's policy of non-proliferation.

III. SPECIFIC ERRORS IN THE COMMISSION'S ORDER

The Commission's Order regarding Segment is in error in a number of specific ways. First, in its review of Xcel's position, it makes many statements and conclusion, and the statements that are cited are problematic. For example, any comparison of 1P-003 and the "Modified Preferred" route citing to the FEIS is erroneous because the FEIS does not include data regarding the late-added Greenfield route segment around the Hwy. 52 and Hwy. 19 interchange. The "backage" road which Xcel claims to follow in Attachment 2 does not exist. Worse, any citation to "Xcel's Exceptions to the ALJ's Report, Attachment 2 is citing to an Attachment not in the record. Order, p. 8.

In addition, the Order recites Xcel's statements that its late-filed "adjustment" would "move the line further away from St. Paul Lutheran Church and School, but this is not correct because the "adjustment" just puts the line on the other side of the church and school. Regarding house counts, there are no house counts in the record for Xcel's late-filed "adjustments" and many homes are missing from the southern "adjustment." See Attachment /, Affidavit of Diane Logue. Regarding the Land and Water Conservation Act of 1965, claiming routing on 1P-003 would "require permission for locating the line within park property," which contradicts the Lake Byllesby Master Plan statement that the land was donated to the County by Northern States Power. Master Plan, p. 4.19. Also, both Xcel in its Exceptions and the Commission's Order fail to acknowledge the large three transmission line corridor on the eastern edge of the park, which

shows a history of permission for locating transmission lines adjacent to the park. It is Xcel Exceptions Attachment 3, not the Commission's cited Attachment 2 that shows the location of the park, and as with Xcel Exceptions Attachment 2, Xcel Exceptions Attachment 3 is not in the hearing record.

In the section detailing the Commission's Action, piece by piece:

Relying on data comparing impacts on homes within 500 feet of the various route options, the ALJ found that fewer homes would be impacted by the 1P-003 route. Xcel's data, however, shows that there are more homes in closer proximity to the 1P-003 route than to the Modified Preferred Route

Order p. 9. As Xcel states in its Exception comments, the ALJ's data is what is in the record, and that is because there was no data in the EIS regarding the Modified Preferred Route's "adjustments" – no data about this greenfield cross-country path crossing and paralleling the Cannon River through the MCBS area on the south side of the river heading west around the Sandstrom's home and business, cross-country on the west side the St. Paul's Lutheran School and Church and cross-country along a subdivision of Cannon Falls. Data offered by Xcel came in via Hearing Exhibit 95, and there was no time to verify, Commerce made no attempt to verify, the impacts were not evaluated, and the changes were not incorporated into the EIS. Further, Xcel offered in its Exceptions maps that are not part of the record showing data not in the EIS and not in the record. The statement utilizing "Xcel's data" is an error of fact, utilizing data not verified or evaluated in the EIS. Use of "Xcel's data" without vetting and without evaluation in the EIS, and Commission selection of a route based on this data, is assuming facts not in evidence and an error of law.

In addition, 1P-003 would require the line to be constructed cross-country along fields in a residential area and would present adverse impacts to the natural environment and recreation.

Order, p. 9. The 1P-003 “residential” area of Harry Avenue is traversed by THREE transmission lines, a fact considered by the ALJ, FoF 301, that acknowledges that THREE transmission lines run along Harry Avenue to the Cannon Falls substation near the Byllesby Dam:

FOF 301. Route alternatives 1P-001, 1P-002, and 1P-003 would run along existing 69 kV, 115 kV, and 161 kV transmission lines on Harry Avenue to the Cannon Falls substation located near the hydroelectric dam that creates the Lake Byllesby Reservoir. This is the east boundary of Lake Byllesby Regional Park (managed by Dakota County) and Lake Byllesby County Park (managed by Goodhue County). These route alternatives would also parallel a planned regional park recreational trail and a bridge crossing the Cannon River that are proposed in the park 2005 Master Plan and are planned for construction in 2013. Because the viewshed in this area is already impacted by existing high-voltage transmission lines, however, impacts to these parks would be minimal if one of these route options were chosen.¹⁰

ALJ Recommendation, FOF 301.

The EIS has omitted this fact, and the EIS is inadequate to the extent that this fact is missing – the Commission was notified of this error during the April 12, 2012 meeting. Any crossing of the Cannon River between Hwy. 52 and the Byllesby Dam is in a designated “recreational” part of the Cannon River. The Commission’s statement is an error of fact. The adverse impacts will be addressed below.

Placing the line through a portion of Lake Byllesby Regional Park would fragment previously undivided forest community on both sides of the Cannon River and would impact more native plant communities and Sites of Biological Significance than the Modified Preferred Route, as detailed by the DOC-EFP in its comments and the EIS. Furthermore, there is planned activity for a recreation trail in the Park and a planned bridge crossing

Order, p. 9. Some fragmentation will occur at either of the potential crossing of the Cannon River west of Hwy. 52 and either 1P-003 and Xcel’s Modified Preferred route. EIS Sheet NR7 and NR8. Xcel’s Modified Preferred “adjustment” would not only fragment at the river crossing

¹⁰ (ALJ Recommendation footnote) 369. Ex. 113 at 106-107; Ex. 1. Vol. 2, section M(Sheet Map 10).

because it would cross west of the Hwy. 52 crossing, and in addition, with the late-added “adjustment” it would then parallel the south bank of the river through the Site of Biological Significance as it heads west just north of the Sandstrom’s house and business. FEIS Sheetmap NR7, note width of MCBS and location of Sandstrom’s residence. On the IP-003 route, the cited Dakota County Master Plan includes a pathway and bridge east of the dam, where the transmission line is proposed, and the pathway and bridge east of the dam would fragment this area. The dam itself, and the associated transmission, is nearby, grossly fragmenting the area. The transmission line would not be through an unfragmented area. Further, the MCBS area referenced by the DNR’s Jamie Schrenzel extends from the dam to Hwy. 52, and impacts would be the same for either crossing. Further, there is a zoological important species at the southern end of Applicant’s “adjustment” that has not been addressed, and which is not present on route 1P-003. FEIS NR8.

The oft-cited Byllesby Regional Park Master Plan and “planned activity” as set out in the Byllesby Park Master Plan seems to be an important aspect of this decision, and yet the Commission has failed to acknowledge that routing transmission near the dam is consistent with the park’s themes set out in the Master Plan. First, the route proposed is along Harry Avenue, the eastern border of the park, crossing near the dam, and then south following transmission – it does not go through the park, it borders it. Second, it is located on land donated to Dakota and Goodhue County by Northern States Power. Third, and more ironically, the Byllesby Park Master Plan focuses on electricity! See Attachment J, Byllesby Regional Park Master Plan (selected). Two of the four “interpretive themes” of the park focus on electricity and electric

generation¹¹, based on the history of the park, which originated through a donation of the land by Northern States Power.¹² The park's interpretive themes extol the wonders of electricity.

Placing the line through a portion of Lake Byllesby Regional Park would fragment previously undivided forest community on both sides of the Cannon River and would impact more native plant communities and Sites of Biological Significance than the Modified Preferred Route, as detailed by the DOC-EFP in its comments and the EIS. Furthermore, there is planned activity for a recreational trail in the Park and a planned bridge crossing of the Cannon River, both of which would be impacted by 1P-003.

¹¹ From Dakota Co. Master Plan:

THEME 3: POWERING MINNESOTA - HENRY BYLLESBY AND THE LAKE BYLLESBY DAM. With the increase in the population of Randolph and the subsequent move into the electrical age came the need for power in the homes, businesses, and industries of the Lake Byllesby area. The response to this need was provided by Henry Byllesby, a forerunner in the use of hydroelectric power in America. Byllesby, whose company, Consumers Power Company, was based in Chicago, realized that in directing the power of the rivers of Minnesota, North Dakota, South Dakota, and Wisconsin, he could create the energy needed to sustain the ever-growing populations of these states. One of these rivers was the Cannon River, upon which he had the Ambursen Hydraulic Construction Company construct the Lake Byllesby Dam in 1910. Six years later, he changed the name of his company to Northern States Power Company, recognized today as one of the major providers of power in the midwestern United States.

THEME 4: THE POWER OF ATTRACTION - LAKE BYLLESBY REGIONAL PARK. Though for many years, hydropower was the most economical method of producing power, by the 1960s, larger companies had largely replaced their hydropower plants with coal or nuclear power plants. In replacing many of their hydropower facilities, Northern States Power Company opted to donate much of its property upon which these facilities were situated to the towns or counties encompassing such property. One of these properties was the location of the Lake Byllesby Dam. After the land was donated to Dakota and Goodhue Counties in 1969, Dakota County created Lake Byllesby Regional Park from portions of the land on the north shore of the lake. Lake Byllesby Park attracted residents and visitors alike to picnic, camp, fish, swim, canoe, and simply enjoy the view. Today, both the park and the dam interact to provide a sense of all facets of the area's history, from natural history, to the history of everyday human interactions, to the engineering history at Lake Byllesby Regional Park.

Byllesby Park Master Plan, p. 4.19 (emphasis added).

¹² Id. Theme 4. "In replacing many of their hydropower facilities, Northern States Power Company opted to donate much of its property upon which these facilities were situated to the towns or counties encompassing such property. One of these properties was the location of the Lake Byllesby Dam. After the land was donated to Dakota and Goodhue Counties in 1969..."

Order, p. 9. As above, at most, any crossing of the Cannon River, be it 1P-003 or Xcel's late-added "adjustment" would fragment the same "undivided forest community" of the same level of Sites of Biological Significance." 1P-003 does not have a zoological Heritage area that the Applicant's late-filed "adjustment" does. As above, the EIS does not evaluate the additional impacts of paralleling the river in the area of Biological Significance inherent in Xcel's late-added "adjustment."

The Commission's order is an error of fact because the "adjustment" to the Modified Preferred route has not been evaluated, states as "facts" information not in the record and fails to acknowledge material facts in evidence. There is no data to rely on for the late-filed "adjustment." The Commission's order is an error of law because the Modified Preferred route with its "adjustment" was not in the Scoping Decision and has not been evaluated for environmental impacts.

The Commission also concurs with the DOC-EFP and Xcel that use of the existing corridor along U.S. 52 better corresponds with the industrial land use along the highway and is consistent with the statutory objective to site high-voltage transmission lines along parallel existing highway rights-of-way.

Order, p. 9. As above, there are three transmission lines along Harry Avenue visible on google earth maps and noted in the ALJ's Finding of Fact 301. See Hearing Exhibit 35. Both DOC-EFP and Xcel ignore the existing transmission north and south of the Byllesby dam. The Applicant's late-filed "adjustment" is not an industrial area and does not correspond with the PEER policy of non-proliferation, where transmission should be sited in existing transmission corridors. The Commission's statements in this paragraph of the order are errors of fact and law.

IV. CONCLUSION

St. Paul's Church and School and Cannon Falls Landowners bring this Motion to Strike, and request that the Commission strike Xcel Energy's references in its Exceptions, relied on by the Commission, that are not part of the Hearing Record.

St. Paul's Church and School and Cannon Falls Landowners also brings this Motion for Reconsideration and requests that the Public Utilities Commission Reconsider its decision of April 12, 2012 and its written Order of May 30, 2012, rejecting the Administrative Law Judge's 1P-003 route, and request that the Commission instead utilize the ALJ's Recommendation and Order that the "Alternate Route Segment" around problematic areas in Cannon Falls cannot be used for CapX 2020 transmission. The route chosen that comprises the "Modified Preferred" route near Cannon Falls was improperly added, without adequate notice and without identification in the Scoping Decision or inclusion in the DEIS or FEIS. Other attempts to propose routes late in the process were rejected, as this attempt should be. The Commission should vacate its decision for Segment 1 and order that the ALJ's Recommendation of 1P-003 be adopted for the Segment 1 route because the problems with notice and environmental review preclude use of the Modified Preferred route in the Cannon Falls area and because the existing transmission lines on Harry Avenue and south to Highway 19 provide a transmission corridor that can be utilized in compliance with Minnesota's policy of non-proliferation and Minn. Stat. §216E.03, Subd. 7(e).

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