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February 19, 2008

Beverly Jones Heydinger, Administrative Law Judge
Office Of Administrative Hearings
P.O. Box 64620
St. Paul, Minnesota 55164-0620

Re: In the Matter of the Application of Great River Energy, Northern States Power Company (d/b/a Xcel Energy) and others for Certificates of Need for the CapX 345-kV Transmission Projects
Docket No. CN-06-1115

Dear Judge Heydinger:

The Minnesota Department of Commerce Energy Facility Permitting Staff hereby efiles its Response To Motion of United Citizens Action Network.

Very truly yours,

s/ Karen Finstad Hammel

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AG1924396

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Commissioner

In the Matter of the Application of Great River
Energy, Northern States Power Company
(d/b/a Xcel Energy) and others for Certificates
of Need for the Cap X 345-kV Transmission
Projects

Docket No. CN-06-1115

**MINNESOTA DEPARTMENT OF COMMERCE
ENERGY FACILITY PERMITTING STAFF RESPONSE
TO MOTION OF UNITED CITIZENS ACTION NETWORK**

The Minnesota Department of Commerce Energy Facility Permitting Staff (“EFP Staff”) hereby responds to the motion filed by the United Citizens Action Network (“UCAN”) on February 4, 2008, to (1) enforce notice laws and (2) combine the Certificate of Need and route selection process or, in the alternative, estop Applicants’ diversionary tactics. Paragraphs 1-3 and 5 of the requests for relief relate to UCAN’s notice argument, and Paragraphs 4 and 6-10 of the requests for relief claim that the Department’s EFP Staff has inappropriately allowed discussion of routing issues as part of the Certificate of Need process when the Minnesota Public Utilities Commission (“PUC” or “Commission”) has ruled that the processes for need and routing may proceed separately and not concurrently. UCAN’s arguments demonstrate a fundamental misunderstanding of the Minnesota Rules governing the environmental review of an

application for a Certificate of Need. For the reasons explained below, UCAN's motions should be denied.

ARGUMENT

I. THE DEPARTMENT'S EFP STAFF HAS COMPLIED WITH THE NOTICE AND PUBLIC MEETING REQUIREMENTS SET FORTH IN MINNESOTA LAW, THUS MEETING ALL DUE PROCESS REQUIREMENTS.

UCAN's arguments concerning notice focus on the legal requirements for notice to interested persons set forth in Minn. R. 7849.7050, subp. 1 (2007), and the location and publication requirements in Minn. R. 7849.7050, subp. 3 (2007).

A. The Department's EFP Staff Has Complied With The Legal Requirements in Minn. R. 7849.7050, subp. 1, By Appropriately Notifying All Persons Who Must Receive Notice Of A Pending Certificate of Need Application.

Minnesota Rule 7849.7050, subpart 1 provides a comprehensive list of all "interested persons" who must receive the notice of public information meetings (for scope of the environmental report) from the Commissioner of the Department of Commerce ("Commissioner") for a pending Certificate of Need project:

Subpart 1. Notice to interested persons. Upon receipt of an application for a Certificate of Need or receipt of a transmission projects report seeking certification of a high voltage transmission line, the commissioner of the Department of Commerce shall provide notice to interested persons of the pending project. Notice must be mailed to the following persons:

A. those persons on the commissioner's list maintained pursuant to part 7849.5240 (project list);

B. those persons on the general service list maintained by the applicant pursuant to part 7829.0600;

C. those persons on any service list maintained by the Public Utilities Commission for the proceeding;

D. those persons who are required to be given notice of the Certificate of Need application or the transmission projects report under rules of the Public Utilities Commission;

E. local governmental officials in the area of the proposed project; and

F. those persons who own property adjacent to any site or within any route identified by the applicant as a preferred location for the project or as a site or route under serious consideration by the applicant if such sites or routes are known to the applicant.

UCAN argues that the Commissioner's notice falls short of legal requirements because it was not sent to all of the approximately 73,000 "landowners and residents reasonably likely to be affected by the proposed transmission line." UCAN recognizes that subpart 1(F), specifically relating to the potentially affected landowners that UCAN believes must receive notice of the Department's scoping meetings, does not come into play in this matter because no routes or sites have been officially identified. Yet UCAN would have the ALJ require the Department to send notice to *these same* landowners pursuant to subpart 1(D) (emphasized in the above quotation). The Department's EFP Staff believes this is an incorrect interpretation of the rule.

Minnesota Rule 7849.5200 was an Environmental Quality Board ("EQB") rule that did not change when the EQB's permitting authority was transferred to the PUC, except to include the rule as a PUC rule. Therefore, it should be read and interpreted with that fact in mind. Thus, the EQB would have looked to the PUC's procedural rules to determine which entities should receive notice, other than those already required under Minn. R. 7849.7050, subp. 1(A)-(C), and (E)-(F). Minnesota Rule 7829.2500, subs. 4 and 5 require publication of notice in the State Register and in newspapers of general circulation throughout the state. Entities who must be served with the application and/or receive notice under Minn. R. 7829.2500, subp. 3-5, also include the Department, the Residential and Small Business Utilities Division of the Office of the Attorney General, all persons on an applicable general service list (i.e., those interest in power plants and transmission lines), and those persons who were parties to its last general rate case or incentive plan proceeding, if applicable.

Furthermore, it is redundant to require notice to the same persons in two subparts of the same notice rule. Minnesota Rule 7849.7050, subp. 1(F) explains when it is appropriate to expand to a larger list of persons. The condition precedent for requiring such notice to potentially affected landowners--i.e., when such sites and routes are known to the Applicants--has not yet occurred. Minnesota Rule 7849.7050 only requires notice to potentially affected landowners if the preferred location for a site or route is known to the applicant. In this case, no preferred location for a route has been identified by the Applicants and the application for route permits has not been filed.

Therefore, UCAN's reading of the notice requirements is overbroad in that it requires the Department to provide notice to persons who have already received notice of the filing and been given the opportunity to be placed on the service list for the proceeding.

The public is not harmed because notice has been provided by numerous means around the time the Certificate of Need application was filed, and the Commissioner's notice has covered the necessary persons in Minn. R. 7849.7050, subp. 1. Furthermore, when the route application is later filed, additional detailed notice will be provided to all landowners within the proposed route, explaining the broad opportunity of the public to participate in that proceeding as well, including the opportunity to present route alternatives. This second proceeding will require a more detailed Environmental Impact Statement rather than the environmental report that will be completed for purposes of need in this proceeding.

However, landowners in the affected areas are not without notice of the project and the Department EFP Staff's scoping meetings. Prior to filing a Certificate of Need application, the applicant must have provided a pre-application notice to all landowners and other persons within the areas reasonably likely to be affected by the proposed transmission lines pursuant to Minn. R.

7829.2550. This notice gave them information about requesting to be placed on the project service list. They also received newspaper notice, and the Applicants' unofficial newsletter giving detailed information prepared by the Department's EFP Staff about the Department's scoping meetings to be held in 10 locations. In this case where the list of potentially affected landowners is voluminous, such a requirement as UCAN suggests is not only unnecessary, but would be extremely burdensome for the Department in terms of cost for postage and staff resources to prepare such mailings.

B. The Department's EFP Staff Has Complied With The Legal Requirements in Minn. R. 7849.7050, subp. 3, By Appropriately Publishing Notices Of The Certificate of Need Application In 17 Daily Newspapers.

Minnesota Rule 7849.7050, subpart 3 requires the Commissioner to publish notice, "in a newspaper of local circulation in the area," of the public information meetings that address the scope of the environmental report. These meetings must be held within 40 days after receipt of the application for a Certificate of Need. UCAN argues that the Department's notice should have been published not just in the 17¹ daily newspapers with circulation throughout the area, but also in the weeklies and shoppers in which the Applicant's published their notice of Certificate of Need application.

Subpart 3 does not require publication in every newspaper in the area affected. It requires notice in newspapers of local circulation to cover the entire area. The Department accomplished this by having the Applicants publish display ads in 17 daily newspapers that

¹ UCAN incorrectly states that the published newspaper notices announcing the public information meetings and the environmental review scoping process was only placed in 13 Minnesota Newspapers. In fact, the Applicants published notices in 14 Minnesota daily newspapers, and in daily newspapers in Fargo, North Dakota; Brookings, South Dakota; and in LaCrosse, Wisconsin.

together reached with circulation the entire area covered by the Certificate of Need application.² Certainly the Applicants' publication initially in over 100 newspapers covered the entire area as well. Some or many residents likely received several publications with the same information in them due to the widespread publication by the Applicants. UCAN, however, has not alleged that publication in only 17 newspapers has resulted in inadequate coverage of the entire area affected.

The second argument about inadequate publication made by UCAN is that a low turnout at the public meetings compared to the number of persons potentially affected means that the notice provided was insufficient. This argument is also without merit. The Department's EFP staff estimates conservatively that over 500 persons attended these meetings. Moreover, persons who attended and provided comments indicated by the nature of their comments that they knew this proceeding related only to the Certificate of Need and not the route permitting process. When the Applicants' route applications are filed, it is reasonable to expect that many more landowners will see a reason to participate, but at this point there is no indication that all properties have even been identified by the Applicants. However, blaming low turnout on the "Department's defiance of Minnesota's notice laws" is not only unfair, but is entirely wrong.

C. The Department's EFP Staff Has Complied With The Legal Requirements in Minn. R. 7849.7050, subp. 3 By Conducting Public Meetings At Times Convenient For The Public.

Minnesota Rule 7849.7050, subpart 3 requires that public meetings be held "in a location that is convenient for persons who live near the proposed project." UCAN argues that the 10 public meetings held by the Department throughout the area affected were held at inconvenient times and locations. Meetings were conducted from December 10-18, 2007 in 10 separate

² UCAN also implies that the notice is suspect because it was published by the applicants rather than directly by the Department. Although the Department prepared the notice, its reasonable practice is to have the applicant publish notices at its own expense.

communities, from either 12:00-2:00 p.m. or 6:00-8:00 p.m. In addition, the public was encouraged to file comments on the scope of environmental review, which many persons have done, including UCAN.

UCAN alleges that the Department EFP Staff purposely designed the meeting schedules to effect its strategy to deliberately minimize the public's ability to participate. Specifically, UCAN alleges that holding the meetings in the weeks before the Christmas holiday is one of the "inconveniences that were designed into these meeting schedules." There is simply no basis for this charge. These are the sort of spurious allegations that are easy to make and impossible to defend. The Department follows the rules for environmental review as consistently and correctly as possible and encourages public participation.

The meetings were scheduled to be consistent with the rules. Minnesota Rule 7849.7050, subp. 3 requires a public meeting within 40 days after receipt of a Certificate of Need application, which in this case was 40 days after the supplemental materials required by the PUC were provided by the Applicants. The EFP Staff has a limited time to prepare an environmental report in Certificate of Need proceedings; it must be completed within four months of the filing of the supplemental materials. Any scheduled meeting time likely would be inconvenient to some segments of the public. With regard to the pre-holiday scheduling, the Department intentionally eliminated Wednesdays from the schedule due to the fact that many churches schedule church events on Wednesdays. However, legal requirements dictate that the matter move forward expeditiously, regardless of the time of year. Furthermore, there will be numerous opportunities for public participation, not only in this proceeding, but in the routing process to be conducted subsequently to this proceeding.

Finally, while it does not constitute actual notice pursuant to the rules, the Applicants sent a newsletter to the approximately 73,000 potentially affected persons that included text concerning notice that was prepared by the Department's EFP Staff. UCAN's arguments about inadequate notice are all part of its allegation that the Department has violated the due process rights of potentially affected landowners. Due process requires adequate notice and the opportunity to be heard, which have been provided in this proceeding as required by PUC rules. UCAN's motion to enforce notice laws should be denied.

II. UCAN'S MOTION TO COMBINE CERTIFICATE OF NEED AND ROUTE SELECTION PROCESSES IS AN ATTEMPT TO REARGUE THE COMMISSION'S DECISION THAT SIMULTANEOUS ROUTING AND NEED PROCEEDINGS WOULD BE INFEASIBLE, INEFFICIENT AND CONTRARY TO THE PUBLIC INTEREST.

The PUC heard arguments for and against combining routing and Certificate of Need proceedings, and included findings on this issue in its November 3, 2006 ORDER APPROVING NOTICE PLANS AND REQUIRING COMPLIANCE FILINGS, at 11-12:

Addressing both need and routing in a single proceeding has certain advantages; in particular it's simpler to understand. ...

But a process that is simple to understand may be harder to implement. The problem of commentor confusion and frustration can be ameliorated through notice advising people about the relationship between the Certificate of Need process and the Route Permit process. But the CapX proposals are the largest transmission proposal the Commission has ever received, and the Commission finds no comparable way to ameliorate the complexity of conducting a hearing to demonstrate the need for all aspects of the proposals while also selecting their routes throughout the state. The Commission concludes that the burden of conducting such joint hearings would outweigh any procedural benefits.

Because hearings addressing both CapX's Certificate of Need and the Route Permits would prove to be infeasible, inefficient and contrary to the public interest, the Commission finds that joint hearings are not required by statute. Instead, the Commission will conduct separate hearings addressing need and routing, and will direct the applicants to incorporate into their notices language explaining the relationship between Certificate of Need process and the Route Permit process as recommended by Windustry and the Reinhardts.

As noted by the PUC in its order, the Reinhardts have presented to the PUC their arguments for combined route permit and need dockets. Here, the Reinhardts, on behalf of UCAN, now argue that the Applicants are utilizing the Certificate of Need process to divert landowners into unofficial, outside-the-record route proceedings, and are “responding to landowners’ questions about this Certificate of Need proceeding by suggesting they participate in a non-public, off-the-record, Applicant-controlled routing work group process.”

While the Department EFP Staff is aware that the Applicants have met with some landowners to discuss route issues, the Department has not participated in these discussions and there is no application for a route permit that is currently before the Commission. When the application for route permits is filed with the Commission, the Department EFP Staff will fully participate in that process. However, if members of the public have questions about the route process during the Certificate of Need public meetings, the Department will respond to such questions appropriately.

With regard to the Applicants’ efforts to engage the public in informal routing meetings, the EFP Staff views such discussions as potentially helpful in raising some routing issues that the Applicants may be able to address prior to choosing a proposed route. UCAN’s motion would require the Applicants to stop discussing routing issues with landowner groups prior to a formal docket being initiated--a requirement that may not be in the public interest. Moreover, such an order may well be a First Amendment violation³ of commercial speech under the *Central Hudson* doctrine.⁴ The *Central Hudson* doctrine holds that governmental restrictions on commercial speech must be narrowly drawn to address a substantial governmental interest. At

³ The First Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation.

⁴ See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

minimum, the restriction that UCAN seeks is inconsistent with the purpose of Commission rules encouraging public participation at all phases of a project such as this.

CONCLUSION

UCAN's Motion to Enforce Notice Laws (paragraphs 1-3, and 5) should be denied for the reasons set forth in Section I above. Its motion to Combine the Certificate of Need and Route Selection Process or, in the Alternative, Estop Applicants' Diversionary Tactics (paragraphs 4 and 6-9) should also be denied. This is UCAN's untimely attempt to obtain reconsideration of the November 3, 2006 Commission Order rejecting their arguments to combine the route and Certificate of Need processes.

Dated: February 19, 2008

Respectfully submitted,

s/ Karen Finstad Hammel

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AFFIDAVIT OF SERVICE

Re: In the Matter of the Application of Great River Energy, Northern States Power Company (d/b/a Xcel Energy) and others for Certificates of Need for the Cap X 345-kV Transmission Projects
Docket No. CN-06-1115

I hereby state that on the 19th day of February 2008, I efiled with eDockets the attached **Minnesota Department of Commerce Energy Facility Permitting Staff Response To Motion of United Citizens Action Network**, and served the same upon all parties on the attached service list by efile, email, and/or United States Mail, postage prepaid, by depositing the same in a U.S. Post Office mail receptacle, in St. Paul, Minnesota.

s/ Pat Silberbauer

Subscribed and sworn to before me
on February 19, 2008

s/ Deborah A. Bastyr
Notary Public - Minnesota
My Commission Expires Jan. 31, 2010

06-1115

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