

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

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

PUC Docket No. CN-06-1115
OAH Docket No. 15-2500-19350-2

**UNITED CITIZENS ACTION NETWORK'S
MOTION TO (1) ENFORCE NOTICE
LAWS AND (2) COMBINE THE
CERTIFICATE OF NEED AND ROUTE
SELECTION PROCESS OR, IN THE
ALTERNATIVE, ESTOP APPLICANTS'
DIVERSIONARY TACTICS**

United Citizens Action Network brings this motion before the Administrative Law Judge for the following relief:

1. Finding that the Minnesota Department of Commerce (the "Department") failed to comply with legal requirements set forth in Minn. Rule 7849.7050, subp. 1, for mailing notice to interested persons regarding the scope of environmental review at Certificate of Need.
2. Finding that the Department failed to comply with legal requirements set forth in Minn. Rule 7849.7050, subp. 3, for publishing notice "in a newspaper of local circulation" regarding the scope of environmental review at Certificate of Need.
3. Finding that the public meetings conducted by the Department pursuant to legal requirements set forth in Minn. Rule 7849.7050, subp. 3, were held at times and locations inconvenient to the public.
4. Finding that the Department allowed the Applicants to improperly exploit the Rule 7849.7050 public meeting process in an effort to divert citizens' attention away from the Certificate of Need process and into an unsanctioned, Applicant-controlled Route selection process.
5. Finding that the Department's and the Applicants' improper actions violated the due process rights of potentially-affected citizens in this proceeding.
6. Finding that Applicants, with the Department's knowledge and acquiescence, are performing unofficial Route selection proceedings or activities that serve to confuse the public and dampen landowner participation in the pending Certificate of Need regulatory process.
7. Ordering the Department to comply with legally required notice procedures and to conduct supplemental public meetings to cure the due process violations described herein.

8. Ordering that the Certificate of Need proceedings be stayed until the Applicants submit to a legitimate Routing process, and ordering consolidation of Certificate of Need and Route Permit proceedings.
9. In the alternative to motion point 8 above, estopping Applicants and the Department from performing any unofficial Route selection proceedings or activities during the pendency of this Certificate of Need regulatory proceeding.

This motion is made pursuant to Minn. Rule 1400.6600. If the Administrative Law Judge should find that all or any part of this motion is beyond the scope of her jurisdiction, then United Citizens Action Network respectfully requests that any such part be certified to the Public Utilities Commission pursuant to Minn. Rule 1400.7600.

A. Failure to Notify Potentially-Affected Landowners of Environmental Review Scoping Process.

1. Mailed Notices Were Not Sent as Required by Law.

In its Order Accepting the CapX Application as Substantially Complete (dated November 21, 2007), the Commission noted that new “and more detailed environmental rules” were now codified in Minnesota law.¹ The Commission listed each step in the process to be followed under these new rules. The first rule cited by the Commission is 7849.7050, subp. 1, which requires the Commissioner of Commerce to provide mailed notice of the pending project and the ER scoping process to the following persons:

- A. those persons on the commissioner’s list maintained pursuant to part 7849.5240;
- 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 for the proceeding;**
- E. local government 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.”

(Emphasis added.) The “Notice of Public Information Meetings” is the Department’s official notice document under the ER rules. It describes the regulatory review process, explains the procedure and deadline for filing comments on the scope of the ER, provides contacts and websites for further information, and offers inclusion on the official mailing lists for this project. The Department is also required to inform

¹ PUC ORDER ACCEPTING APPLICATION AS SUBSTANTIALLY COMPLETE PENDING SUPPLEMENTAL FILING, 11/21/07, p.4.

landowners in this notice as to “whether the project proposer may exercise the power of eminent domain to acquire the land necessary for the project and the basis for such authority.”² The Department scheduled public information meetings in some of the affected communities, and announced the schedule of public meetings as required by the ER rules. On November 29, 2007, the Department filed an Affidavit of Mailing the required notice.

We can't tell whether the Department complied with subparts A, B and C of the mailed notice requirement, because the Department attached a list of names to its Affidavit of Service without any information about where they came from or which part(s) of the law they might satisfy. There is a lengthy list of local governments included on the list, so subpart E may have been satisfied, although the Affidavit of Service should so state. Subpart F does not come into play, because no routes or sites have been officially identified in this docket.

That leaves subpart D's requirement to send the Notice to: “Those persons who are required to be given notice of the certificate of need application under rules of the Public Utilities Commission.” PUC Rule 7829.2550, subp. 3(A), states that “landowners and residents reasonably likely to be affected by the proposed transmission line” must receive direct mailed notice of a Certificate of Need application. Applicants' potentially-affected Landowner List contains the names and addresses of approximately seventy-three thousand Minnesota citizens to whom CapX Applicants mailed initial notice of the Application (in July 2007) as required by PUC's Certificate of Need Notice Rule 7829.2550.³ Subpart D connects directly to PUC's Certificate of Need application notice rule.

On January 3, 2008, John Reinhardt contacted David Birkholz, the Department of Commerce official who is handling environmental review in this case, to find out why mailed notices were not sent to Applicants' list of potentially-affected landowners as required by the new ER Notice Rule. Mr. Birkholz agreed that the Department's Notice was not sent to the Landowner List filed by the Applicants, but he disagreed that subpart D of the Rule requires the Department to do so. Although Mr. Birkholz couldn't explain what subpart D *does* require, he was certain that it didn't mean to send notice to all landowners identified as being potentially affected by the CapX Application.

² Minn. Rule 7849.7050, subp. 2(F).

³ Applicants' Notice Plan Compliance Filing, Docket No. E-002/CN-06-1115, p. 3 (see also landowner list filed electronically only).

Mr. Birkholz further argued that 73,000 persons are not “reasonably likely to be affected” by this transmission application, but that estimation is not the DOC’s to make.⁴ The list of Minnesota’s potentially-affected residents and landowners that were identified by Applicants is on file with regulators in this docket; it’s the list of people who received the first set of notices under PUC’s notice rules; and it names the people who must be sent mailed notice of the ER process under subpart D of the Rule. This was not done.

We’ve also learned that some people (including the Reinhardts) who did receive this mailed notice were sent only pages 1 and 2, without the critical information contained on page 3: stating that eminent domain may be used if the Application is approved, explaining the ER scoping and comment process, providing information regarding when and where to send written comments, and how to get on the state’s official mailing list.

2. Published Notices Were Inadequate.

The Commissioner of Commerce is also required by the ER laws to publish notice in a newspaper of local circulation in the area at least ten days before the public meetings.⁵ The Department didn’t bother with this publication, but left it up to the Applicants. At our request, Applicants provided the proofs of publication under the requirements of this rule.

When Applicants originally published newspaper notices announcing the Certificate of Need Application in August 2007, they placed the notice in 99 Minnesota newspapers.⁶ However, when Applicants published newspaper notices announcing the public information meetings and the ER scoping process, they only placed the notices in 13 Minnesota newspapers. We do not know why the list of newspapers was narrowed between the first published notice and the next (or why the Department did not handle notice publication as required by the rule), but since there are 35 counties affected by this 600 mile transmission project, the 13 published notices were inadequate.

Although the Department has not posted attendance records, several newspaper reports on the ER scoping meetings reveal a dismal turnout: The Fergus Falls Daily Journal reported “about 33 people were in attendance” at the Fergus Falls meeting; the Rochester Post-Bulletin reported “more than 60 landowners and area residents” at the Rochester meeting. Applicants’ list of potentially-affected landowners numbers approximately 73,000 people, yet hardly anyone appeared at these important State-

⁴ In the initial rounds of comments on notice plans that took place throughout the summer of 2006, the Reinhardts repeatedly argued that the notice corridors were too broad, and requested that the Commission order Applicants to narrow them. Applicants repeatedly insisted that broad notice corridors—some more than 20 miles wide—were necessary to ensure that all persons “reasonably likely to be affected” by these transmission projects would receive the notice. The Commission agreed, and the Department never complained that the notice corridors were unreasonably large until now.

⁵ Minn. Rule 7849.7050, subp. 3.

⁶ Applicants’ Notice Plan Compliance Filing, Docket No. E-002/CN-06-1115, p. 3 (Attachment 5, Affidavit of Publication/List of Newspapers and Copy of Advertisement).

sponsored meetings on the projects. The Department's defiance of Minnesota's notice laws resulted in almost no public participation in the "largest transmission proposal the Minnesota Public Utilities Commission has ever received."

3. The Public Meetings Were Held at Inconvenient Times and Locations.

Minnesota law requires the Commissioner to hold public meetings on the scope of environmental review "in a location that is convenient for persons who live near a proposed project."⁷ The Department held 10 public meetings over five days to cover 600 miles of proposed transmission line construction:

| | | | | |
|---------------------------|-----------------|---|---------------|----------------|
| December 10 – Moorhead: | 12:00-2:00 p.m. | / | Fergus Falls: | 6:00-8:00 p.m. |
| December 11 – Alexandria: | 12:00-2:00 p.m. | / | Clearwater: | 6:00-8:00 p.m. |
| December 13 – Winona: | 12:00-2:00 p.m. | / | Rochester: | 6:00-8:00 p.m. |
| December 17 – Marshall: | 12:00-2:00 p.m. | / | Olivia: | 6:00-8:00 p.m. |
| December 18 – Arlington: | 12:00-2:00 p.m. | / | Cannon Falls: | 6:00-8:00 p.m. |

The Department's meeting schedule illustrates that half the meetings were held during the day when people are at work. These meetings were geographically very far apart, so that if a working person wanted to try to attend a day session during their lunch hour, it could necessitate between 30-80 miles of round trip travel, depending on where the trip started. If a person wanted to attend an evening session because they were not available during the day, they could be required to travel between 40-120 miles round-trip, depending on where they started. Because the evening meetings began at 6:00 p.m. during the dinner hour, it would take a *Herculean* effort for workers who did not live near a meeting location to feed the kids, travel long miles required by the distant meeting location, return home in time to get the kids ready for school and into bed, and get themselves ready for work the next day.

Add in the fact that these meetings were held right before Christmas, and a clear picture emerges of the monumental inconveniences that were *designed* into these meeting schedules. The strategies for scheduling these public meetings not only violate the convenient location rule, but also common courtesy. It appears that the Department deliberately planned these meetings to minimize the public's ability to participate.

The Department's refusal to provide direct mailed notice of these meetings to the Applicants' pre-filed list of potentially-affected landowners, its failure to publish meeting notices in an adequate number of newspapers, and its failure to conduct public meetings at times and locations convenient for persons who live near the proposed project, results in an unacceptable breach of citizens' rights to notice and due process. These notice deficiencies must be remedied, and supplemental public meetings held, before this proceeding may advance.

⁷ Minn. Rule 7849.7050, subp. 3.

B. Applicants Utilized the Certificate of Need Public Meeting Process to Divert Landowners into Unofficial, Outside-the-Record Route Proceedings.

In the early Notice Plan portion of this proceeding (summer of 2006), John and Laura Reinhardt repeatedly argued that the need and routing portions of the CapX application process had to be combined under Minn. Stat. § 216B.243, subd. 4:⁸

Unless the commission determines that a joint hearing on siting and need under this subdivision and section 116C.57, subdivision 2d, is not feasible or more efficient, or otherwise not in the public interest, a joint hearing under those subdivisions **shall** be held.

The Reinhardts argued that the Legislature had substituted the word “shall” for the previous, more discretionary “may” in this law, to send a clear directive that it wants the Certificate of Need and Route Selection proceedings to be combined. Applicants argued against “**simultaneous** need and routing proceedings,”⁹ and Commission staff agreed:

“At some point it will become very difficult for members of the public to keep up with the proceeding. Further, does it really make sense to dump route alternatives on top of this agenda, when there is a substantial chance that the requested facilities will not be approved?”¹⁰

“In accordance with the Commission’s June 4, 2007 ORDER DESIGNATING APPLICANTS AND SETTING FILING REQUIREMENTS, routing proceedings will be separate from the need proceeding. Ultimately, specific routes will be determined by the Commission only for the proposed Project components that are certified for need.”¹¹

The Commission also agreed, noting that “the CapX proposals are the largest transmission proposal the Commission has ever received,” and that the *burden* of conducting joint need and routing hearings would outweigh any benefits. The Commission ruled that “hearings addressing both CapX’s Certificate of Need and the Route Permits would prove to be infeasible, inefficient and contrary to the public

⁸ See Reinhardt Comments Regarding Cap-X Proposed Certificate of Need Notice Plan, MPUC Docket No. E002/CN-06-857, p. 6/29/06, p. 7; Reinhardt Comments Regarding Second Installment Cap-X Proposed Certificate of Need Notice Plan, Docket No. E002/CN-06-979, pp. 8-9; Reinhardt Comments Regarding Third Installment Cap-X Certificate of Need Notice Plan, Docket No. E002/CN-06-1115, pp. 11 12.

⁹ See Xcel Energy’s Reply to Comments on Proposed Twin Cities-Rochester-LaCrosse Notice Plan, Docket No. E-002/CN-06-979, 8/10/06, pp. 7-8; Xcel Energy’s Reply to Comments on Proposed Fargo-Monticello Notice Plan, Docket No. E002/CN-06-1115, 9/12/06, pp. 8-9.

¹⁰ Staff Briefing Papers regarding CapX Notice Plan, September 21, 2006, p. 8.

¹¹ PUC Document: “Certificate of Need Process for the CapX 2020 Group I Transmission Facilities in Minnesota,” Commission Docket No. ET-2, E-002/CN-06-1115, 11/27/07, p. 2.

interest.”¹² The Commission also ordered the Applicants to explain each separate regulatory process to the public in their Notices of the Application, which Applicants did.¹³

Applicants’ Notice to Minnesota Legislators and Congressional Delegation: “***If the commission decides the lines are needed***, [the commission] will also conduct separate proceedings to determine specific routes for the lines. CapX 2020 utilities will encourage the public to participate at every stage of the process.”

Applicants’ Notice to Local Officials and Landowners: “Two Minnesota Public Utilities Commission proceedings must take place before our proposed transmission lines can be constructed. ***The first proceeding is to determine whether the facilities are needed.*** The second will be conducted to determine where the facilities should be built.”

September 2007 CapX Newsletter sent to the thousands of potentially-affected landowners named on Applicants’ Landowner List: “Following a rigorous public process, the Minnesota Public Utilities Commission will likely decide whether the lines are needed by early 2009. ***If it is determined that the projects are needed***, the Commission will decide routes for the new lines in separate proceedings.”

Therefore, we were surprised to learn that Applicants 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. When John Reinhardt called Applicants’ public advisor, Tim Carlsgaard, on January 3, 2008 to inquire about proofs of publication for the notice of public information meetings, John identified himself as a representative of the United Citizens Action Network landowner group. Mr. Carlsgaard told John that the landowners should go to Applicants’ routing work groups, and that Applicants were conducting need and routing “SIMULTANEOUSLY.”

John Reinhardt immediately contacted David Birkholz to complain that Applicants were diverting the public’s attention away from the Certificate of Need process by offering an unsanctioned routing process. Mr. Birkholz acknowledged these actions, and said the Applicants had actually *announced* this outside-the-record “routing work group process” to those citizens who were somehow able to make it to the inconvenient Department-sponsored public meetings on the Certificate of Need process in December 2007. The ER scoping decision is extremely important, because it sets the parameters for the entire Certificate of Need proceeding by choosing which alternatives, impacts, costs, etc. will be developed in the record. That’s why public information meetings are required by law, so government officials can explain this serious and complex legal process to the public:

¹² Public Utilities Commission ORDER APPROVING NOTICE PLANS AND REQUIRING COMPLIANCE FILINGS, November 3, 2006, pp. 11-12.

¹³ See Notices attached to Applicants’ Notice Plan Compliance Filing dated September 18, 2007.

“The commissioner’s staff shall explain the process for preparation of the environmental report. At the public meeting, the public must be afforded an opportunity to ask questions and present comments and to suggest alternatives and possible impacts to be evaluated in the environmental report.”¹⁴

The public notices issued by the Department state that:

“The meetings will inform the public about the project and the regulatory proceedings; discuss environmental, social and economic issues of importance in the areas potentially affected; and gather public input into the scope of the Environmental Report to be prepared for the project. The meetings provide the public an opportunity to ask questions about the project and suggest alternatives and specific impacts that should be addressed in the ER.”¹⁵

Applicants long ago convinced regulators that combining the Certificate of Need and route selection proceedings would be too overwhelming for the public to handle. Therefore, Applicants’ attempts to immediately divert the attention of affected landowners away from this all-important Certificate of Need proceeding—where authorization to build the CapX Transmission Projects will be decided, where eminent domain authority is conferred, and where the critical issues of size, type, timing, alternatives, impacts and costs will be examined—is underhanded and unfair.

Applicants’ official, Commission-approved notices sent to landowners and public officials caution that “Need issues are to be raised only during the Certificate of Need proceedings. Issues concerning routing of the transmission lines are to be raised only during Route Permit proceedings.” Why, then, did Minnesota authorities allow the Applicants to redirect landowners *away* from the Certificate of Need process and *into* an Applicant-controlled “simultaneous” routing process *during* State-sponsored Certificate of Need public meetings on the scope of the project’s legal analysis? This dirty trick violates citizens’ due process rights to understand and participate in the official Certificate of Need regulatory process that will decide whether the State should allow Applicants to build massive new power lines throughout Minnesota with the power of eminent domain.

Minnesota regulators are keenly aware that landowners want to know the routes in transmission line proceedings:

“Staff is well aware that, at the public hearings during the need process, landowners likely will want to know where the utilities intend to place the proposed lines.”¹⁶

¹⁴ Minn. Rule 7849.7050, subp. 4.

¹⁵ Written and published version of the Department’s Notice of Public Information Meetings issued November 2007.

¹⁶ Staff Briefing Papers regarding CapX Notice Plan, September 21, 2006, p. 8.

“Addressing both need and routing in a single proceeding has certain advantages; in particular, it’s simpler to understand. When members of the public are motivated to participate in a hearing because they receive notice that they live within the path of a potential power line, they can’t be frustrated by being told that it is too late to challenge the need for the line.”¹⁷

Applicants are shamelessly manipulating landowners’ passionate “interest in the routing process” to divert their attention away from the crucial Certificate of Need proceeding. Applicants’ December 2007 newsletter offers participation in work groups to those persons “with an interest in the routing process” (which describes every single landowner who might be affected by these power lines), and states that it intends to hold public open houses on routing in the Spring of 2008.¹⁸

The Commission has ruled that the burden of forcing landowners to deal with Certificate of Need and the Route Permit applications in a single (public) process “would prove to be infeasible, inefficient and contrary to the public interest.”¹⁹ Therefore, it cannot be argued that compelling affected landowners to cope with Certificate of Need and Routing issues in two separate, “simultaneous” processes—including one that is not even governed by our State’s laws and protections—is somehow feasible, efficient or in the public interest.

CONCLUSION

This Certificate of Need regulatory proceeding has been officially structured so that the route selection process would commence after the Certificate of Need decision is reached. However, since Applicants admit they have begun routing “simultaneously” with the State’s administration of this Certificate of Need proceeding, a combined process is required by statute.

Clearly, it is NOT in the public interest for State authorities to defy legal notice requirements, to conduct public meetings at inconvenient locations and times, and to allow Applicants to deceive landowners at public meetings that are held specifically to explain the complex legal process to affected citizens!

¹⁷ Minnesota Public Utilities Commission ORDER APPROVING NOTICE PLANS AND REQUIRING COMPLIANCE FILINGS, November 3, 2006.

¹⁸ Although this newsletter also announces the schedule of the Department’s December, 2007 public meetings, neither the Department nor the Applicants assert that the newsletter satisfies the Department’s notice requirements under Minn. Rule 7849.7050, subp. 1. The newsletter doesn’t even *mention* eminent domain, which is one of the Department’s notice content requirements; a multi-purpose “newsletter” from the Applicants does not carry the weight of an official notice from the State of Minnesota that is required by law; and the number and identity of newsletter recipients is undisclosed.

¹⁹ Public Utilities Commission Order Approving Notice Plans and Requiring Compliance Filings, November 3, 2006, pp. 11-12.

For all of the reasons outlined above, United Citizens Action Network respectfully requests that its motions be granted or, alternatively, certified to the Public Utilities Commission for consideration.

Pursuant to Minn. Rule 1400.6600, United Citizens Action Network requests a formal hearing on this motion. The parties are advised that if they wish to contest this motion, they must file a written response with the Judge and serve copies on all parties within ten working days after receipt. By our calculation, the deadline for written responses will be Monday, February 18, 2008.

Respectfully submitted,

Dated: February 3, 2008

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

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CERTIFICATE OF SERVICE

I, Laura A. Reinhardt, hereby certify that I have this day served and filed electronic copies of UNITED CITIZENS ACTION NETWORK'S MOTION TO (1) ENFORCE NOTICE LAWS AND (2) COMBINE THE CERTIFICATE OF NEED AND ROUTE SELECTION PROCESS OR, IN THE ALTERNATIVE, ESTOP APPLICANTS' DIVERSIONARY TACTICS, by e-filing the document, by e-mailing the document to all persons listed on the OAH Electronic Copies Distribution Service List dated January 3, 2008 [as updated by ALJ on January 28, 2008], and by arranging to mail a hard copy to those persons named to receive same on the OAH Services List.

Dated: February 3, 2008

/s/ Laura A. Reinhardt

Laura A. Reinhardt, Secretary
United Citizens Action Network