

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 Cap X 345-kV Transmission Projects.

Order Denying Motion of United Citizens Action Network

On February 3, 2008, the United Citizens Action Network (UCAN) filed its "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." On February 15, 2008, the Applicants filed their response opposing the motion; on February 19, 2008, the Department of Commerce filed its response opposing the motion.

Appearances are set forth in the attached Service List.

Based on the file herein, and for the reasons more fully set forth in the accompanying Memorandum,

IT IS HEREBY ORDERED: UCAN's Motion is DENIED.

Dated: February 29th, 2008.

/s/ Beverly Jones Heydinger
BEVERLY JONES HEYDINGER
Administrative Law Judge

MEMORANDUM

In its Motion, UCAN makes several allegations about deficiencies in the process followed by the Department of Commerce (Department) in scoping the Environmental Report and that the Applicants have subverted the certificate of need process by engaging in informal discussions about possible routes for the transmission lines.

Notification to Potentially-Affected Landowners of the Environmental Review Scoping Process

The Environmental Review Scoping Process requires that the Department mail notice to “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.”¹ It is UCAN’s position that this group includes the same persons that the Applicants were required to notify by of its Application by direct mail: “landowners and residents reasonably likely to be affected by the proposed transmission line.”² In complying with this requirement, the Applicants mailed notice to approximately 73,000 Minnesota landowners and residents. UCAN asserts that the Department was required to send notice to the same group of 73,000. In effect, it argues that the notice requirements of the two rules are the same and that “persons who are required to be given notice” is the same group as “landowners and residents reasonably likely to be affected” by the proposed transmission lines. UCAN acknowledges that it is uncertain whether the Department complied with the notice requirements because the Department did not identify which portions of the service list fulfilled each of the notice requirements.

UCAN also alleged that some of the recipients of the Department’s notice did not receive the complete notice, including the portion that stated that eminent domain may be used if the application is approved, but failed to attach a copy of what was received

The Department is required to publish notice of public meetings about the scoping of the Environmental Report in the local circulation area. UCAN states that the Applicants published the original notice of the certificate of need in 99 newspapers, but the notice of the public information meetings about the scoping was published in only 13 newspapers. Although UCAN does not attempt to describe the local circulation area of the 13 newspapers, it claims that, on its face, publication in 13 newspapers is inadequate to provide notice in the 35 counties affected by the proposed transmission project.

¹ Minn. R. 7849.7050, subp. 1 D.

² Minn. R. 7829.2550, subp. 3(A).

The Department held ten public meetings between December 10 and December 18, 2007, about the scoping of the Environmental Report. UCAN objects that there were too few meetings, that the meeting locations and times were inconvenient (half were held from noon to 2 p.m. and half were held from 6 to 8 p.m.), and by scheduling close to the Christmas holiday, that the meetings were deliberately inconvenient to the public. Moreover, it states that the number of people who attended the meetings, a number that it contends is very small, demonstrates that the notice was inadequate and that the meetings were poorly scheduled and advertised.

In order to remedy the defects, UCAN requests that the administrative law judge require the Department to schedule supplemental meetings at more convenient times and give broader notice of them.

The Environmental Report is prepared by the Department in order to fulfill the requirement set forth in Minn. Stat. § 116D.04, subd. 2a, that such a report be prepared to address the environmental impact of a proposed government action, in this case, consideration of the application for a certificate of need. In order to implement that requirement, the Environmental Quality Board promulgated rules, including rules that addressed the steps for developing the report to be used in certificate of need proceedings.³ The Commissioner of the Department of Commerce has the authority to prepare the report in such proceedings,⁴ and the process for developing that report is also set forth in rule.⁵

Challenges to the development of the Environmental Report are not within the jurisdiction of the Administrative Law Judge. Any such challenge must be reviewed by a declaratory judgment action in the district court.⁶ Although the other parties have not challenged the Administrative Law Judge's jurisdiction to consider UCAN's claims, jurisdiction may not be waived.⁷

In the judicial context, "jurisdiction" refers to "[t]he legal power and authority of a court to make a decision." Subject-matter jurisdiction "involves a court's authority to decide a particular class of actions and its authority to decide the particular questions before it." This concept goes to the heart of a court's legal authority to decide a case, and unlike personal jurisdiction, the court cannot acquire subject-matter jurisdiction "either by waiver or consent."

The Administrative Law Judge has no role to play in the scoping of the Environmental Report or its development and UCAN's objections are not properly raised in this proceeding. The Commissioner of Commerce has the authority to develop the Environmental Report and has not requested the assistance of the

³ Minn. Stat. § 116D.04, subd. 4; Minn. R. 7849.7010 *et seq.*

⁴ Minn. R. 7849.7030.

⁵ Minn. R. 7849.7050.

⁶ Minn. Stat. § 116D.04, subs. 10 and 13.

⁷ *City of Granite Falls v. Soo Line R. Co.*, 742 N.W.2d 690 (Minn. App. 2007), (citations omitted).

Administrative Law Judge, nor does the Administrative Law Judge have independent authority to oversee the scoping and preparation of the Report. Once the Report is complete, it must be offered into the record of the certificate of need proceeding.⁸ At that point, it will be considered as part of the evidence that contributes to the recommendation concerning the certificate of need. At hearing, the parties are free to argue that the preparation or scope of the report was inadequate, and such evidence may affect the weight that the Report is given. The parties may also argue that the report fails to address the issues identified by the Commissioner of Commerce in the decision issued pursuant to Minn. R. 7849.7050, subp 7, and may assert that the Commission should order the Report to be supplemented.⁹ The Administrative Law Judge may address those issues in findings, conclusions and recommendations to the Commission.¹⁰

Accordingly, UCAN's requests for relief numbered one through three are denied.

The Applicants' Informal Public Meetings

UCAN also objects to Applicants holding informal meetings about possible routes to include in their application for routing permits. UCAN conceded that the Commission directed the Applicants to separately explain both the certificate of need process and the routing permit process in their Notices of the Application, and that the Applicants did so.¹¹ However, UCAN states, without evidence to support its claim, that the Applicants' informal meetings with landowners are diverting attention from the public meetings concerning the certificate of need. It is curious that UCAN would object to the Applicants' efforts to engage the public in discussions about possible routes prior to the filing of the application for a routing permit since its members typically advocate for early, meaningful public participation.

UCAN's argument is built upon some misunderstandings and misperceptions. The meetings held by the Department of Commerce concerning the scoping of the Environmental Report are not the same public hearings that will be conducted by the Administrative Law Judge as part of the certificate of need process. Those public hearings are scheduled to be held during the last two weeks of June, 2008. UCAN has offered no evidence that the scoping meetings held by the Department of Commerce failed to inform the public about

⁸ Minn. R. 7849.7090, subp. 1.

⁹ Minn. R. 7849.7090, subp. 2.

¹⁰ It should be noted that there was extensive notice of the public information meetings about the scoping of the Environmental Report. It is undisputed that public officials throughout the affected area and individuals who requested placement on the service list received notice, that it was printed in at least 13 Minnesota newspapers,¹⁰ and the Applicants mailed additional notice and issued press releases.¹⁰ This constitutes very broad notice to the public of the time and place of the informational meetings.

¹¹ UCAN's motion at 7.

the project and the regulatory proceedings, or discouraged participation in the certificate of need process.

Apparently UCAN's point is that it is confusing to the public for the Applicants to hold informal meetings to begin the discussion about possible routes until the certificate of need proceeding is concluded. Although UCAN boldly asserts that the Applicants have "deceived" the public, it has not offered any evidence to support that claim, nor has it offered any legal authority for its position that the Applicants shall not engage the public in informal discussion of possible routes while the application for a certificate of need is pending or prior to filing the application for a routing permit. Moreover, if UCAN believes that the Applicants have improperly begun routing activities, the complaint must be taken to the Commission since routing is not part of this proceeding.

Although there is a risk that some members of the public may be confused about the timing and scope of the certificate of need and routing proceedings, one might reasonably conclude that getting an early start and some informal input is a practical way to develop the application. Such advance planning is undertaken with the knowledge that one or more of the requested certificates of need may not be granted. That is a risk that the Applicants may bear. If the application for a routing permit is filed, additional public meetings will be noticed and held as required by law to obtain additional input into the route selection.

Absent any basis in the law for precluding the Applicants from holding informal meetings about routing during the certificate of need proceeding, UCAN's requests for relief numbered four through nine are denied.

B.J.H.