

**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.

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

**CITIZENS ENERGY TASK FORCE**

**PETITION FOR RECONSIDERATION**

**JUNE 11, 2009**

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## I. INTRODUCTION

Pursuant to Minn. Stat. §216B.27 and Minn. R. 7829.3000, the Citizens Energy Task Force (“CETF”), hereby petitions for reconsideration of the Commission’s May 22, 2009 Order Granting Certificates of Need with Conditions for three CapX2020 transmission projects representing approximately 600 miles of 345 kV high voltage power lines at a cost of from \$1.6 to \$1.9 billion.<sup>1</sup>

In particular, CETF requests reconsideration of the issuance of any certificates of need for the La Crosse Project from the Twin Cities to the La Crosse, Wisconsin area, reconsideration of the issuance of a certificate of need for the double-circuited 345 kV Upsized Alternative for any of the CapX2020 Projects and reconsideration of the Commission’s decision regarding the eastern endpoint for the Brookings Project. CETF also requests reconsideration of the Commission’s decision not to reopen and supplement the record given new evidence of declines in electric demand that would bring reasonable forecasts of regional demand below the levels relied upon to justify the CapX2020 projects.

Given the magnitude of the CapX2020 power line projects, CETF believes that the Applicants, Xcel Energy (“Xcel”) and Great River Energy (“GRE”) should be required to sustain their burden of proof for each element of cost that ratepayers will be compelled to pay and each increment of impact to human settlement and to the natural environment represented by the CapX2020 Projects. With respect to the Hampton endpoint of the Brookings power line, the record evidence is insufficient to support the Commission’s decision. With respect to the Upsized Alternative, the increase in the size of power line poles and the \$200 million in increased costs for the “upsizing” cannot be justified by any need cognizable under law.

Issuance of a certificate of need for the La Crosse Project is clearly contrary to law. This certification violates the Minnesota Environmental Policy Act (“MEPA”) and the Minnesota Environmental Rights Act (“MERA”) and Minnesota Rules pertaining to avoidance areas for high voltage transmission lines and provisions of certificate of need statutes and rules requiring consideration of alternatives. The record shows that the La Crosse Project would impair the Great River Road Scenic Byway, the Wisconsin Great River Road, the Mississippi Flyway and

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<sup>1</sup> ALJ Finding 20, 22, 23, 28; Ex. 91 (Stevenson Chart).

the Upper Mississippi River National Wildlife Refuge. Given this record, the Commission erred in failing to shift the burden to Applicants to prove that there are no feasible and prudent alternatives to the Project that would avoid the impairment of natural resources and the crossing of a power line avoidance area. In fact, with respect to the La Crosse Project, the record demonstrates that local generation and transmission alternatives can meet the needs for the Project shown on this record.

The Commission's error in law in failing to hold Applicants to their burden of proof to demonstrate the lack of an alternative to the La Crosse Project is compounded by the weakness of the evidence of demand growth in this record. Any reasonable forecast of growth in peak demand would fall below the level of growth studied by Applicants to justify the CapX2020 Projects. After trial, Xcel's disclosures to the Securities and Exchange Commission alerted CETF to evidence previously undisclosed by Applicants that further undermined evidence of regional demand for the CapX2020 Projects.

Contrary to the representations made by the Minnesota Office of Energy Security ("OES") to the Commission in oral argument, the economic downturn has resulted in changes in long-term forecasts, not just short-term fluctuations. In other dockets, Xcel has modified its long-term forecasts due to this change in circumstances. The Commission erred in declining to reopen the record to permit an evaluation of regional and community reliability needs based on accurate forecasts given new evidence of demand declines and the change in circumstances.

The Commission should also reconsider certification of the La Crosse Project since Applicants have not demonstrated that the Project would comply with applicable federal policies and regulations, including those pertaining to fragmentation of habitats in national wildlife refuges. A letter recently sent from Don Hultman, the Refuge Manager of the Upper Mississippi River National Wildlife Refuge, to Xcel Energy highlights this concern. (Attachment B.)

If the Commission is unprepared at this time to deny outright the certificate of need for the La Crosse Project, the Commission should reopen the record to consider the potential that the La Crosse Project would violate federal policies and regulations with respect to fragmentation of habitats in national wildlife refuges, to obtain current evidence of declines in energy usage and forecasts of demand through 2020 and to evaluate whether Applicants can sustain their burden of proof that there are no feasible and prudent alternatives to meet the needs asserted for the La Crosse Project.

## **II. THE COMMISSION LACKED SUFFICIENT EVIDENCE TO DETERMINE THAT THE EASTERN ENDPOINT OF THE BROOKINGS PROJECT SHOULD BE AT HAMPTON.**

The Commission's determination that the eastern endpoint for the Brookings Project should be fixed at Hampton, Minnesota is not supported by substantial evidence on this record. This decision should be reconsidered, allowing the determination of the appropriate eastern endpoint for the Brookings Project to be made in routing proceedings, after further evidence is developed, similar to the process approved by the Commission for the western endpoint of the Fargo Project. (Findings of Fact, Conclusions of Law and Recommendations of the Administrative Law Judge ("ALJ Report"), Recommendation 2.)

The Administrative Law Judge ("ALJ") found that the segment of the Brookings Project from Lake Marion to Hampton Corners was included in the Southwestern Minnesota Study base plan for the Brookings Project but that the Applicants did not explain the benefit of the extension from Lake Marion farther east to Hampton Corners. The ALJ found, "Based on this record, it is not clear whether the segment is necessary for regional reliability or to achieve 700 megawatts ("MW") of generation outlet capacity." (ALJ Report, Finding 137.) The ALJ recommended that the Commission approve the Brookings project, subject to the qualification, "The decision whether the eastern termination should be at the Lake Marion Substation or the Hampton Corners Substation cannot be made on this record." (ALJ Report, Recommendation 3.) The ALJ explained:

It is inevitable in a proceeding of this size and complexity that some points are not fully addressed to the satisfaction of the Administrative Law Judge. One of those was raised by CETF. The underlying studies that led to the development of the Brookings Project included the new Hampton Corners Substation as the eastern endpoint. However, review of the record identified no explanation for extending the project from the Lake Marion Substation to Hampton Corners. In order to assure that the additional miles of transmission line are fully explained, the Commission may ask the Applicants to provide a basis for including the new substation in the studies and its benefits to regional reliability, community load serving and generation outlet. (ALJ Report, Memorandum, p. 97.)

The additional information cited by the Commission in its Order is insufficient to provide a basis for selection of the Hampton Corners Substation. Although Southwest Minnesota Study Twin Cities EHV [Extra High Voltage] Development Electric Transmission Study ("EHV Study") referenced in the Commission's May 22, 2009 Order in these proceedings ("Order") does include the Hampton Corner among the listed substations, it does not explain or justify the

Hampton Corner substation, let alone say it is the “best” option.<sup>2</sup> The technical material cited in the Order (Ex. 108) compares the base plan with a segment ending at Helena, rather than directly justifying the extension of the Brookings line from Lake Marion to Hampton Corners. Although the Applicants and other parties may have made colorable arguments regarding the need for the Hampton segment, these arguments are not evidence and do not address the weakness of the record on this issue.

The extension of the Brookings line another twenty or so miles east of the Lake Marion Substation is an important matter to the citizens and communities affected by that line. The economic costs of the Brookings Project segment from Lake Marion to the proposed Hampton substation range from \$70.2 million to \$84.5 million.<sup>3</sup> According to Applicants’ analysis, their preferred route from the Lake Marion Substation to a proposed new Hampton area substation would place 66 homes within 500 feet of the proposed centerline of the Brookings 345 kV high voltage transmission line. (Brookings Routing Application, *Supra*, p. 6-12.) This short section of the Brookings Project, representing 18 to 24 miles of the 237-to-262 mile transmission project (*Id.*, p. 2-3), would thus represent over one fifth of the residential exposures for the entire Brookings Project.<sup>4</sup>

The Lake Marion to Hampton section of the Brookings Project also impacts significant natural resources. This power line segment crosses the Rush-Vermillion major watershed, including the Vermillion River, the South Branch Vermillion River and a tributary to the Vermillion River that is a designated trout stream. (*Id.*, p. 6-58.) The proposed right of way crosses 43 wetlands, totaling 33.7 acres, including two Department of Natural Resources Public Waters Inventory wetlands (*Id.*, p. 6-58), and impacts two Metro Significant Natural Resource Areas and a Minnesota County Biological Survey Area of outstanding biodiversity. (*Id.*, p. 6-65, Appendix B.6, Sheet MP3.)

To minimize adverse human and environmental impacts, pursuant to Minn. Stat. § 216E.02, Subd. 1, the Applicants should be held to their burden of proof that each segment of the

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<sup>2</sup> The EHV Study Vol. I is contained in Ex. 1, the Application, at Appendix A-4. Page 39, which is cited in the Order at p. 31, makes no reference to the Hampton Substation, although it is listed as part of the base plan on page 40.

<sup>3</sup> Application to the Minnesota Public Utilities Commission for a Route Permit for the Brookings County –Hampton 345 kV Transmission Line Project, *In the Matter of the Route Permit Application for a 345 kV Transmission Line from Brookings County, South Dakota, to Hampton, Minnesota*, MPUC Docket #ET2/TL-08- 1474 (filed December 29, 2008) (“Brookings Routing Application”), p. 2-9.

<sup>4</sup> Brookings Routing Application, *supra*, p. 4-10, p. 6-12, Table 6-2.

proposed Brookings transmission project is, in fact, needed.

### **III. THE COMMISSION EXCEEDED ITS AUTHORITY IN CERTIFYING THE CAPX2020 UPSIZED ALTERNATIVE GIVEN THE LACK OF NEED FOR THE UPSIZE.**

The Commission's approval of the Upsized Alternative for the CapX2020 Projects exceeds the Commission's authority under certificate of need statutes and rules. The Commission acknowledges in its Order that "The Certificate of Need process ensures that no utility builds a high-voltage transmission line without demonstrating need." (Order, p. 30.) The Commission's authority to certify large energy facilities is constrained in statute by the requirement that the projects be needed:

No proposed large energy facility shall be certified for construction unless the applicant can show that demand for electricity cannot be met more cost effectively through energy conservation and load-management measures and unless the applicant has otherwise justified its need. Minn. Stat. § 216B.243, Subd. 3.

Applicable rules also require the Commission to find that the probable result of denial of a certificate of need would be an adverse effect upon the future adequacy, reliability of efficiency of the energy supply in order to certify a project. Minn. R. 7849.0120, Subp. A.

Yet, the Commission, without finding any need for a double-circuit 345 kV line for any of the CapX2020 345 kV Projects, proceeds in its Order to authorize Applicants to expend \$200 million in additional ratepayer costs (ALJ Report, Finding 28) and increase the height of the power lines by approximately four stories (40 feet)<sup>5</sup> to permit Applicants to "implement their plans for making optimum use of the resulting capital investments." (Order, p. 30.)

Neither Applicants nor any other party justified the need for double-circuited 345 kV transmission lines to prevent an adverse effect upon future adequacy, reliability or efficiency of energy. Having had the opportunity to fully consider all the testimony filed in this matter, including the work that was done to come forward with the upsizing alternative, Applicants' primary witness on this issue, Walter Grivna still agreed with the statement that the three CapX2020 projects as proposed in application were sufficient to meet the load serving and generation outlet needs in the certificate of need Application.<sup>6</sup>

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<sup>5</sup> Ex. 1, pp. 2.12 (Figure 2-5), 2.13 (Figure 2-7) (Application).

<sup>6</sup> Tr. V. 12, p. 91, ll. 10-16 (Grivna); Ex. 121, p. 9 (Grivna Rebuttal).

Mr. Grivna testified that there is uncertainty about how the future transmission system may develop both internal and external to Minnesota and whether a need to add a second circuit will materialize in the future.<sup>7</sup> Factors that contribute to this uncertainty include where other transmission may develop, the locations of generation proposed, how it may interconnect, load levels, generation technology innovations, climate change regulations, and social policy issues.<sup>8</sup> Mr. Grivna acknowledged that the electric industry is in a period of change; as a result, future growth patterns and future long-term needs could be altered.<sup>9</sup> Moreover, significant additional transmission infrastructure would need to be constructed before any benefits of the larger capacity lines described in the upsized proposal could be realized.<sup>10</sup>

Mr. Grivna testified one would need to find out where future growth would occur in order to determine if costs for a second 345 kV circuit and additional associated transmission infrastructure would be greater or less than other potential transmission enhancements to address that growth.<sup>11</sup> Given the uncertainty about how the future transmission system may develop, Mr. Grivna agreed that a solution to future load growth needs might involve a combination of generation and transmission or entail upgrades in different alignments or different sizes, rather than the proposed 345 kV corridor upsize.<sup>12</sup>

The performance of the CapX2020 double-circuit upsize has not been verified with a load flow study or by any other means. Without specific information on generation sites or conditions that would warrant using the capacity, there are no tools using scientific methods that could evaluate the performance of the upsize option.<sup>13</sup>

Without a showing of need, there is no provision in Minnesota statutes or rules authorizing the Commission to certify a large energy facility in order to make optimum use of capital investments. The error in imputing this authority to the Commission becomes clear when one considers the potential for approval of generating facilities sized beyond demonstrated needs in order to achieve possible future flexibility or economies of scale. The Commission could not certify a 500 MW gas plant upon demonstrating 200 MW of demand, and it is equally erroneous

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<sup>7</sup> Ex. 121, p. 33 (Grivna Rebuttal).

<sup>8</sup> Tr. V. 12, pp. 14-15 (Grivna).

<sup>9</sup> Tr. V. 11, p. 153 (Grivna).

<sup>10</sup> Ex. 121, p. 16 (Grivna Rebuttal).

<sup>11</sup> Tr. V. 12, pp. 74-75 (Grivna).

<sup>12</sup> Tr. V. 12, pp. 75-76 (Grivna).

<sup>13</sup> Tr. V. 11, p. 166 (Grivna); Ex. 121, p. 15 (Grivna Rebuttal).



to certify a double-circuited 345 kV power line system when any need demonstrated on the record has been for a single 345 kV transmission circuit.

**IV. THE COMMISSION’S CERTIFICATION OF THE LA CROSSE PROJECT VIOLATES MEPA, MERA, CERTIFICATE OF NEED LAW AND RULES PERTAINING TO POWER LINE AVOIDANCE AREAS.**

Although CETF has concerns about other portions of the Commission’s Order, the most problematic aspect of that decision is the certification of the La Crosse Project from the Twin Cities area to the La Crosse, Wisconsin area. Certification of the CapX2020 La Crosse Project violates the Minnesota Environmental Policy Act (“MEPA”) and the Minnesota Environmental Rights Act (“MERA”) and is inconsistent with Minnesota Rule 7849.5930, Subp. 2 prohibiting high voltage transmission lines in national parks. Once parties opposing the La Crosse Project demonstrated that the La Crosse Project is likely to cause pollution, impairment or destruction of protected natural resources and require a route crossing of a national wildlife area, Minnesota law required that the burden be shifted to project proponents to demonstrate that there is no feasible and prudent alternative to the La Crosse Project.

The Commission erred in failing to place the burden on project proponents to demonstrate the lack of alternatives to the La Crosse Project. The Commission’s Order made a general statement for the CapX2020 Projects as a whole that “the preponderance of the record did not demonstrate a more reasonable and prudent for achieving regional and community reliability, and generation outlet, than the Applicants’ proposals.” (Order, p. 28.)

However, the Order provided no analysis specific to the La Crosse Project. The Commission’s Order did not discuss applicable statutes protecting natural resources or the likelihood that the La Crosse Project’s crossing of the Mississippi River would impair visual and scenic resources of Great River Road Scenic Byway and the Wisconsin Great River Road, harm migratory birds using the Mississippi Flyway and impair species and habitats protected in the Upper Mississippi River National Wildlife Refuge.

The Commission did not shift the burden to the project proponents to demonstrate that no feasible and prudent alternatives would meet energy needs while preventing the harm to sensitive natural resources entailed by the La Crosse Project. Had such an alternatives analysis been done,

the La Crosse Project could not have been approved. CETF requests reconsideration of the certification of the La Crosse Project to rectify these errors of law.

**A. The Commission was required to shift the burden to project proponents to prove a lack of feasible and prudent alternatives once it was shown that the La Crosse Project will cross a national wildlife refuge and impair protected natural resources.**

High voltage transmission lines are subject to both MEPA and the MERA. People for Envir. Enlightenment and Responsibility (PEER), Inc. v. Minn. Envir. Quality Bd. (MEQB), 266 N.W.2d 858 (Minn. 1978); No Power Line, Inc. v. Minn. Envir. Quality Council (MEQC), 262 N.W.2d 312 (Minn. 1977). Once it has been shown that a high voltage transmission line results in environmental impairment, approval of the power line is only justified if the state agency demonstrates that no feasible and prudent alternative exists to the project consistent with the public health, safety and welfare. PEER v. MEQB, 266 N.W.2d at 867.

The Legislature has specifically required that the Department of Commerce and the Public Utilities Commission must carry out their responsibilities for transmission line proceedings in accordance with the MEPA.<sup>14</sup> MEPA provides, §116D.04, subd. 6:

No state action significantly affecting the quality of the environment shall be allowed, nor shall any permit for natural resources management and development be granted, where such action or permit has caused or is likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources located within the state, so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare and the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction. Economic considerations alone shall not justify such conduct.

As explained in PEER v. MEQB, the key provision of MERA relevant in transmission line proceedings is Minn. Stat. § 116B.04, which provides:

Whenever the plaintiff shall have made a prima facie showing that the conduct of the defendant has, or is likely to cause the pollution, impairment, or destruction of the air, water, land or other natural resources located within the state, the defendant may rebut the prima facie showing by the submission of evidence to the contrary. *The defendant may also show, by way of an affirmative defense, that there is no*

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<sup>14</sup> Legislation reorganizing Environmental Quality Board, Department of Commerce and Public Utilities Commission responsibilities in 2005 explicitly affirmed application of MEPA to transmission responsibilities. 2005 Minn. Laws, Ch. 97, Art. 3, § 17.

*feasible and prudent alternative* and the conduct at issue is consistent with and reasonably required for promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction. Economic considerations alone shall not constitute a defense hereunder.

PEER v. MEQB, 266 N.W.2d at 867 (emphasis in original).

Certificate of need proceedings for large energy facilities pursuant to Minn. Stat. § 216B.243, Subd. 3, as well as facility routing or siting, are subject to both the MERA and MEPA. In the Matter of an Application for a Certificate of Need for Construction of an Independent Spent Fuel Storage Installation, 501 N.W. 2d 638, 648-649 (Minn. App. 1993).

Under MERA, the burden of proof placed on a party opposing an action is to show the existence of a protectable natural resource and the likely pollution, impairment or destruction of that resource. State by Archabal v. Cty. of Hennepin, 495 N.W.2d 416, 421 (Minn. 1993). However, the project proponent bears the burden of offering an affirmative defense. *Id.*, 495 N.W. 2d at 422 (*citing* State, by Powderly v. Erickson, 285 N.W.2d 84 (Minn. 1979)); PEER v. MEQB, 266 N.W.2d at 867.

In the Archabal case, the Minnesota Supreme Court followed Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1976), which held that “paramount importance” should be given to protection of parkland in routing of right-of-way, in explaining how the protection of parkland should be applied consistent with MERA. “As here applied, this construction means that, in the absence of unusual or extraordinary factors, the trial court must enjoin environmentally destructive conduct if a feasible and prudent alternative is shown.” State by Archabal, 495 N.W.2d at 423 (*citing* Cty. of Freeborn by Tuveson v. Bryson, 243 N.W.2d 316, 320-21 (Minn. 1976).

Minnesota Rules also prohibit transmission line routing within several types of protected lands, including national parks, state parks, and state scientific and natural areas. In these protected areas, both a finding of a lack of feasible and prudent alternatives and a finding that the power line “would not materially damage or impair the purpose for which the area was designated” are required before a high voltage transmission line can be approved within a protected area. Minn. R. 7849.5930, Subp. 2.

**B. The record shows likely harm to protected natural resources, including a national wildlife refuge.**

By definition, the siting of high voltage transmission lines will cause some impairment of the environment. PEER v. MEQB, 266 N.W.2d at 867-68. Specifically, “The CapX Projects will have a substantial impact on the natural environment.” (ALJ Report, Conclusion 17.)

The hearing record shows that the La Crosse Project is likely to impair protectable natural resources located within the State, including the scenic characteristics of the Great River Road Scenic Byway, the Wisconsin Great River Road, migratory birds using the Mississippi Flyway and species and habitats protected within the Upper Mississippi River National Wildlife Refuge.

The La Crosse Project would impact areas of high visual sensitivity, including the Great River Road Scenic Byway (Highway 61) in Minnesota and the Wisconsin Great River Road (Highway 65). (Ex. 5, Environmental Report, pp. 17, 44.) Visual and environmental impacts from the proposed La Crosse Project would be different from those of existing lower voltage transmission lines. The typical steel structure for a double circuit 345 kV power line is 140-170 feet tall,<sup>15</sup> equivalent to a twelve to fifteen-story building.

All of the proposed routes for the CapX2020 La Crosse Project – whether at Alma, Winona or La Crescent/La Crosse -- would require crossing the Mississippi River within the USFWS Upper Mississippi National Wildlife Refuge.<sup>16</sup> The Upper Mississippi River National Wildlife Refuge provides recreation and habitat protection for fish, mammals, reptiles and amphibians and a large percentage of migratory birds that use the Mississippi Flyway.<sup>17</sup> The Mississippi Flyway is one of the major areas in the United States used by birds for migration, including migration to other countries.<sup>18</sup> High voltage power lines across a migratory bird flyway can result in deaths from birds flying into the lines. On the face of the statute, migratory bird deaths from flying into power lines violate the terms of the Migratory Bird Treaty Act.<sup>19</sup>

It is undisputed that routing of the CapX2020 La Crosse Project at any of the proposed locations – Alma, Winona or La Crescent/La Crosse -- would impact environmentally sensitive

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<sup>15</sup> Tr. V. 8, pp. 88-89 (Stevenson); Ex. 1, p. 2.12 (Application).

<sup>16</sup> Tr. V. 18A, pp. 44-45 (Birkholz); Tr. V. 13, pp. 79-80, (Rasmussen).

<sup>17</sup> Ex. 128, p. 8 (Rasmussen Direct).

<sup>18</sup> Tr. V. 13, pp. 80-81 (Rasmussen).

<sup>19</sup> Tr. V. 13, pp. 82-84 (Rasmussen); See 16 U.S.C. §703(a), “Unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill . . . any migratory bird.”

areas.<sup>20</sup> The Application and testimony documents that each of the potential crossings within the Upper Mississippi River Wildlife Refuge are likely to impair areas of biodiversity significance, habitat and nesting of rare and endangered species within the Refuge.<sup>21</sup>

Applicants' witness, Pam Rasmussen, agreed that unavoidable long-term environmental impacts could include permanent destruction of wetlands along the area where lines are located and clearing forested areas of trees – for the most part anything growing over twenty feet tall – across the right-of-way.<sup>22</sup> Ms. Rasmussen conceded that all three proposed Mississippi River crossings for the La Crosse Project – at Alma, Winona or La Crescent/La Crosse – would create both “unavoidable short-term and long-term environmental impacts.”<sup>23</sup>

**C. There are feasible and prudent alternatives to meet the needs asserted for the La Crosse Project while avoiding harm to protected natural resources.**

Once a showing was made that the CapX2020 La Crosse 345 kV power line is likely to impair a protectable natural resource and would, if certified, be routed across a national wildlife refuge, the Commission erred by failing to require project proponents to prove that there are no feasible and prudent alternatives to the La Crosse Project. Neither the Applicants nor the OES could meet that burden of proof.

The Application itself, in the Southeastern Minnesota-Southwestern Wisconsin Reliability Enhancement Study, (Ex. 1, Apx. A-2), demonstrates that a combination of lower voltage transmission lines in the Rochester and La Crosse areas, none of which cross the Mississippi River or impact the Upper Mississippi National Wildlife Refuge, would meet the needs alleged in the Application. To the extent that the Commission determined that this lower voltage transmission alternative need not be considered because this alternative “would prove to be more expensive” than the La Crosse Project (Order, pp. 18-19), such a determination would violate both MEPA and MERA which state clearly that economic considerations alone cannot

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<sup>20</sup> Tr. V. 13, pp. 87-88 (Rasmussen).

<sup>21</sup> Some impacts of the Alma route crossing are reflected in Tr. V.13, p. 67, 69-72 (Rasmussen); Ex. 1, Apx. E-1, pp. 13-14 and Map 5 (Application) and in Ex. 131 (2/19/08 Letter from USFWS); of the Winona route crossing are reflected in Ex. 1, Apx. E-1, pp. 17-18, Map 6 (Application); and of the La Crescent route crossing are reflected in Ex. 1, Apx. E-1, p. 23-25, Apx. E-1, Map 8 (Application); Tr. V. 13, p. 74-75,79-80, 86-87 (Rasmussen); Ex. 131, p. 1 (2/19/08 Letter from USFWS).

<sup>22</sup> Tr. V. 13, p. 94, ll. 14-21 (Rasmussen).

<sup>23</sup> Tr. V. 13, p. 88, ll. 9-10 (Rasmussen); Ex. 130, p. 3 (Rasmussen Rebuttal). See also Tr. V. 18A, pp. 28-29 (Birkholz).

justify state approval of a project that impairs natural resources, Minn. Stat. §116D.04, subd. 6, or constitute a defense to a MERA claim. Minn. Stat. §116B.04.

Reviewing the Applicants' general claims of need in the CapX2020 proceedings and the specific facts regarding the La Crosse Project, it is clear that the Applicants could not have sustained a burden of proof that there are no feasible and prudent alternatives to the La Crosse Project consistent with reasonable requirements of the public health, safety, and welfare and the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction.

The first need for the CapX2020 transmission lines in general, the need to provide generation outlet capacity, is not applicable to the La Crosse Project. OES witness Dr. Steve Rakow stated with respect to the La Crosse project, "The Applicants did not make a firm claim that they were going to get generation outlet due to the project."<sup>24</sup> No number for generation outlet capacity resulting from the CapX2020 La Crosse Project has been defined in the Application or in any testimony.<sup>25</sup> Although the CapX2020 Brookings Project and Fargo Project are described in the Renewable Energy Standards Report among the many projects identified as part of the transmission owners' plan to achieve RES milestones, the La Crosse Project is conspicuously absent.<sup>26</sup> The Commission found that the La Crosse Project was not designed to address a need for generation outlet capacity. (Order, p. 12.)

The second generic need asserted for the CapX2020 transmission projects, the need for community reliability, requires closer review. Applicants did demonstrate in their Application and testimony that, absent local generation or transmission upgrades, both the Rochester and the La Crosse area would have electric reliability concerns by 2020. However, the record also demonstrated that the La Crosse Project is not required for community reliability either in Rochester or the La Crosse area. Community reliability needs in these areas through and beyond 2020 can be met by upgrades to the lower voltage transmission system that are already completed or are underway to comply with Renewable Energy Standards ("RES") and by existing and planned local generation.

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<sup>24</sup> Tr. V. 25, p. 68 ll.16-19 (Rakow).

<sup>25</sup> Ex. 1, p. 4.47-4.48 (Application); Tr. V. 21, p. 39 (Ellison).

<sup>26</sup> Ex. 54, pp. 297-298 (Renewable Energy Standards Report 2007); Ex. 282, p. 13 (Rakow Direct). See also Supplemental Compliance Filing of the Minnesota Transmission Owners, p. 3-7, MPUC Docket No. E999/M-07-1028, #5497544 (September 11, 2008.)

The Rochester Incremental Generation Outlet (“RIGO”) projects, including three 161 kV transmission lines and a new West Side Energy Park substation in Rochester are currently being planned to provide up to 900 MW of generation outlet capacity for wind in southeastern Minnesota<sup>27</sup> and load-serving benefits to Rochester.<sup>28</sup> Notice plans and requests for exemption from certificate of need filing requirements have been filed for RIGO<sup>29</sup> and Xcel plans to seek expedited consideration of the RIGO application.<sup>30</sup> Xcel’s compliance with the 2012 RES milestone depends on the RIGO 161 kV lines.<sup>31</sup>

The Rochester-Adams 161 kV reconductoring project is a separate Dairyland Power project independent of CapX2020 and RIGO<sup>32</sup> that is scheduled for completion for the summer of 2009 to serve wind generation now being added in the Adams, Minnesota area.<sup>33</sup>

Additional transmission upgrades have been completed since the Applicants studied community needs in the La Crosse area. These include the Arrowhead-Gardner Park 345 kV line; Monroe County 60 MVAR 161 kV Capacitor; La Crosse MVAR 161 kV Capacitors; Hillsboro 30.24 VAR 161 kV Capacitor; Monroe County Council Creek 161 kV line; and the Genoa-Coulee 161 kV Upgrade.<sup>34</sup>

Existing and planned local generation also provides community reliability in Rochester and La Crosse. By 2020, Rochester Public Utilities plans to retire some aging coal plants and build 100 MW of new gas generation at the West Side Energy Park, resulting in a net gain of 23 MW of dispatchable generation.<sup>35</sup> RPU also plans to add another 50 MW of gas generation at West Side by 2025.<sup>36</sup> In connection with the West Side gas project, RPU has proposed two new 161 kV lines from West Side Energy Park to substations in the Rochester area. Each of these additional projects would provide an additional level of load support and affect the timing of any community need.<sup>37</sup>

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<sup>27</sup> Ex. 94, p. 21 (King Direct); Tr. V. 8, pp. 37-39 (Stevenson); see Ex. 5, Map 3 (Environmental Report).

<sup>28</sup> Tr. V. 8, pp. 106-107 (Stevenson); Ex. 83, pp. 9-10 (Stevenson Direct); Tr. V. 8, p. 164 (King).

<sup>29</sup> *In the Matter of the Application of Northern States Power Company d/b/a Xcel Energy for a Certificate of Need for Two 161 kV Transmission Lines in the Greater Rochester Area*, (“RIGO Proceeding”), MPUC Docket No. E002/CN-08-992.

<sup>30</sup> Tr. V. 8, p. 107 (Stevenson).

<sup>31</sup> Supplemental Compliance Filing of the Minnesota Transmission Owners, p. 6, *In the Matter of the 2007 Minnesota Biennial Transmission Project Report and Renewable Standards Report*, MPUC Docket No. E999/M-07-1028 (Document #5497544, filed 9/11/08; Compare with Applicants’ Proposed Finding #144.

<sup>32</sup> Tr. V. 9, p. 58 (King).

<sup>33</sup> Supplemental Compliance Filing of the Minnesota Transmission Owners, pp. 3-7, MPUC Docket No. E999/M-07-1028, #5497544 (September 11, 2008), p. 5. Compare with Applicants Proposed Finding #128.

<sup>34</sup> Ex. 11, p. 2 (Supp. Response to IR 16 of NAWO/ILSR).

<sup>35</sup> Ex. 222, p. “11 out of 23” (Response to IR No. 29 of OES), Tr. V. 22, pp. 19-22 (Shaw).

<sup>36</sup> Ex. 222, *Id.*

<sup>37</sup> Tr. V. 17A, pp. 17-18 (Michaud).

In the La Crosse area, Xcel Energy's French Island Units 3 and 4, which provide 140 MW of local dispatchable generation; Xcel has no plans to retire these units.<sup>38</sup>

Local generation and transmission upgrades, as detailed here, meet the needs for community reliability asserted for the La Crosse Project:

**Rochester:** If levels of local generation in Rochester remain stable, along with construction of the RIGO projects and the Adams reconductoring project, Applicants admit that there will be sufficient transmission capacity in Rochester to provide community reliability until 2026 or 2028 without the La Crosse Project.<sup>39</sup> Additional net local generation planned by RPU (23 MW) and demand savings from conservation would extend this date.

**La Crosse:** If existing peaking plants at Xcel Energy's French Island Units 3 and 4 are run as system support for summer peak loads, the CapX2020 projects are not needed for reliability through 2020. With these units running as system support, the capacity of the transmission system in the La Crosse area would be 610 MW, which is higher than the 2020 level of summer peak demand (602 MW) projected by Applicants.<sup>40</sup> Demand side management of 1.5 percent would reduce local need to about 539 MW by 2020, further enhancing local reliability.<sup>41</sup>

**La Crosse:** A second alternative to the La Crosse project is provide by lower voltage transmission improvements identified in the Rochester/ La Crosse study in the Application, Ex. 1, Apx. A-2. Given that many of the improvements have already been made, costs for additional 161 kV system upgrades that have not already been built may be as low as \$31 million.<sup>42</sup>

These are precisely the type of alternatives identified by Minnesota Rules as required to be considered in CON proceedings,<sup>43</sup> and are feasible and prudent alternatives consistent with the reasonable requirements of the public health, safety, and welfare and the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction. Minn. Stat. § 116D.04, subd. 6; Minn. Stat. § 116B.04. None of the completed or proposed local generation or transmission upgrades impair the scenic resources of the Great River Road Scenic Byway or the Wisconsin Great River Road, harm migratory birds

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<sup>38</sup> Tr. V. 22, p. 24 (Shaw); Ex. 222, p. "15 out of 23" (Response to IR No. 29 of OES).

<sup>39</sup> Tr. V. 9, p. 111 (King).

<sup>40</sup> Ex. 94, p. 11 (King Direct); Ex. 1, p. 4.10, Apx. C-2 (Application).

<sup>41</sup> Ex. 219, p. 2 (Davis Chart/Impact of CIP Statute).

<sup>42</sup> Ex. 1, Apx. A-2, p. 144 (Application). Remaining lower voltage improvements include the Bell Center Capacitor and all but the first two 161 kV line segment rebuilds projects.

<sup>43</sup> Specific types of alternatives to be considered in a CON proceeding for a HVTL include: (1) new generation of various technologies, sizes, and fuel types; (2) upgrading of existing transmission lines or existing generating facilities; (3) transmission lines with different design voltages or with different numbers, sizes, and types of conductors; (4) transmission lines with different terminals or substations; and (8) any reasonable combinations of the alternatives listed in subitems (1) to (7). Minn. R. 7849.0260, subp. B.



using the Mississippi Flyway or impact the Upper Mississippi River National Wildlife Refuge in any way.

There is no evidentiary basis from which the Commission could reasonably conclude that the La Crosse Project must be permitted due to some general allegation of regional need. The only document in the record with any engineering information regarding the need for CapX2020 power lines due to regional demand growth is the “Vision Plan” study dated October 2005 included in the Application. (Ex. 1, Apx. A-1.) Applicants admit that document was a “50,000 foot vision study,” in contrast with specific studies of transmission in impacted areas.<sup>44</sup> The “Vision Plan” study only analyzed 345 kV or 500 kV facilities among its options (*Id.*, p. 14) and contained no analysis of the efficacy in supporting regional load of either the RIGO projects or other transmission improvements later developed as alternatives to the La Crosse Project. The Vision Plan was far too general to make the showing required under MEPA or MERA of need for the La Crosse Project.

The Vision Plan, further, could not serve as the basis for a determination that the La Crosse Project is needed to support regional growth, since that 2005 study is substantially out-of-date and its forecasts of demand are inaccurate due to changed circumstances in law and in fact. The Vision Plan anticipated growth in demand within the CapX 2020 region of 2.49 percent annually from 2009 through 2020, for a total projected increase of 6,300 MW.<sup>45</sup> The study also modeled a reduced load level of 4500 MW.<sup>46</sup>

In 2007 Minnesota’s energy conservation standard was changed from a spending goal to an energy savings goal.<sup>47</sup> A state energy policy to achieve annual energy savings equal to 1.5 percent of annual retail electricity sales was set and the Commissioner of Commerce was given authority to establish and evaluate energy savings programs to meet this objective. The minimum level of annual energy savings that could be approved was set at one percent. Minn. Stat. §216B.2401, subd. 1c (d).

On March 7, 2008, in Ex. 51, Applicants provided updated projections of growth in demand which represent Applicants’ most recent effort to create reasonable forecasts offered in this record.<sup>48</sup> Even without fully taking into account the 1.5 percent energy conservation policy,

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<sup>44</sup> Tr. V.2B, p. 102, l. 23-24; p. 103, l. 12 – p. 104, l. 9.

<sup>45</sup> Ex. 1, Apx. A-1, p. 1, 5 (Application).

<sup>46</sup> Ex. 1, Apx. A-1, p. 27 (Application); ALJ Report, Attachment E.

<sup>47</sup> Minn. Stat. §216B.2401 (2007 Minn. Laws, Ch. 136, Art. 2, §§ 4-5).

<sup>48</sup> Ex. 51 (Response to IR No. 7 of NAWO/ILSR); Tr. V. 4, p. 17 (Lacey); Ex. 53, p. 10 (Lacey Rebuttal).

the Updated Median Resource Plan Forecast in Ex. 51 reflects a growth in demand through 2020 of 3,919 MW.<sup>49</sup> The OES conducted its own analysis to determine likely growth in demand within the CapX2020 region. The OES calculated that regional load growth through 2020, incorporating the State's 1.5 percent demand management policy, would be 3,462 MW.<sup>50</sup>

Load growth under these forecasts falls below 4,500 MW, which is the lowest level of growth studied by Applicants' engineers in the Vision Study. Applicants have performed no analysis to determine whether the CapX2020 projects or the La Crosse Project, specifically, would be needed for regional reliability under any load growth assumptions lower than the 4,500 MW projected in the Vision Study.<sup>51</sup>

The Vision Study model of the type of energy to be used is also out- of-date, since it is based on a lower proportion of renewable energy than is required under current Minnesota law.<sup>52</sup> Cost-effective generation, whether for wind, coal or gas, often depend on location, so that transmission best suited to serve the coal or nuclear power expansions predicted in the Vision Study may not be appropriate for a generation mix with a higher proportion of renewable energy. Changed laws and changed demand since the Vision Study prevents a finding that the CapX2020 projects or the La Crosse Project, in particular, are needed for regional reliability.

**V. THE COMMISSION ERRED IN FAILING TO REOPEN THE RECORD TO CONSIDER NEWLY-DISCOVERED EVIDENCE OF DEMAND DECLINE REDUCING FORECASTS BELOW LEVELS SUPPORTING CLAIMED NEED.**

Newly-discovered evidence of a decline in electric demand and changed circumstances that call regional demand for the CapX2020 projects into question require reopening the record, consistent with due process and the ends of justice. Reasonable forecasts based on actual demand decline and economic recession undermine the accuracy of forecasts used to justify regional need for the CapX2020 Projects and the La Crosse Project, in particular.

The Commission has the authority to reopen any record for the taking of further evidence or for any other reason. Minn. Stat. § 216B.25. In the Big Stone II transmission case, the Commission ordered supplemental evidentiary hearings after learning of a change in

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<sup>49</sup> Ex. 51 (Response to IR No. 7 of NAWO/ILSR); Tr. V. 4, p. 49 (Lacey)

<sup>50</sup> ALJ Report, Attachment E.

<sup>51</sup> Tr. V. 2B, pp. 15-16, 17-18 (Rogelstad); Ex. 26 (Response to IR No. 5 of CETF).

<sup>52</sup> Ex. 21 (Response to IR 12 of NAWO/ILSR); Ex. 274, p. 2 (Ham Surrebuttal); Ex. 275 (Minnesota Renewable Interconnection Need).

circumstances -- withdrawal of a utility from the Project -- that might result in downsizing of project or other project alterations.<sup>53</sup>

The Commission explained the rationale for reopening the proceedings to take further evidence, stating that “it is prudent and protective of the interests of all parties” to examine potential changes in project in context of recommenced proceedings conducted by the Office of Administrative Hearings and to establish an appropriate record “consistent with due process and the ends of justice.”<sup>54</sup>

In a case where calculations material to determining the appropriateness of rates had changed, the Commission similarly found that circumstances upon which calculations material to the case had “changed significantly,” making it “just and reasonable” for the Commission to reopen the proceeding pursuant to Minn. Stat. § 216B.25.<sup>55</sup>

Failure to reexamine the accuracy of forecasts relied upon for a certificate of need makes the Commission’s decision vulnerable to appeal. In judicial review, the Court of Appeals may affirm the decision of the agency, remand the case for further proceedings, or reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced. Minn. Stat. § 14.69. The Court also has authority to order that proceedings be opened and that additional evidence be taken. Minn. Stat. § 14.67.

In review of an agency decision, where new and additional evidence is “material and necessary to make a more equitable disposition” of the appeal, a court may remand for further evidence. Polk Cty. Welfare Bd. v. State Dep’t of Public Welfare, 234 N.W.2d 799, 801-02 (Minn. 1975). The remedy afforded in civil cases of reversal and new trial may be applied in review of administrative decisions, and the reviewing court has the discretion to grant a party leave to present additional evidence before the agency. Ellis v. Minneapolis Comm’n on Civil Rights, 295 N.W.2d 523, 525 (Minn. 1980).

Even in appeals from civil trials where there is more deference to the record, Minnesota appeals courts have reversed and remanded cases where there was newly-discovered evidence that would have been admissible in the hearing and likely to have an effect on the result of a new

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<sup>53</sup> Order Recommending Proceedings, *In the Matter of the Application of Otter Tail Power Company and Others for Certification of Transmission Facilities in Western Minnesota*, MPUC Docket ET-9/CN-05-619 (October 19, 2007) (“Big Stone II Order Recommending Proceedings”).

<sup>54</sup> Big Stone II Order Recommending Proceedings, *supra*, p. 4.

<sup>55</sup> Order Approving and Clarifying AFPO Agreement, p. 7, *In the Matter of the Petition of Minnesota Power and Light Company d/b/a/ Minnesota Power, for Authority to Change its Schedule of Rates for Retail Electric Service in Minnesota*, MPUC Docket E-015/GR-87-223, 1989 WL 509635 (Minn. P.U.C.)

trial. Blake v. Denelsbeck, 170 N.W.2d 337, 340 (Minn. 1969); Turner v. Suggs, 653 N.W.2d 458, 467 (Minn. App. 2002); Disch v. Helary, 382 N.W.2d 916, 918 (Minn. App. 1986).

Since the record closed in this matter, CETF and other intervenors learned from Form 10-K filings of CapX2020 utilities to the Securities and Exchange Commission that peak demand for Xcel Energy actually declined in 2007 and 2008. The SEC filings also revealed that levels of peak load in 2008 for both Xcel Energy and Minnesota Power were substantially below the 2009 “base” case contained in the Ex. 51 forecasts which were relied upon by the parties and the ALJ.

Projections based on this data demonstrate a substantial likelihood not only that Applicants’ forecasts are inaccurate, but that reasonable projections of 2020 peak demand fall below the lowest load threshold studied by engineers in connection with the CapX2020 projects. Although not mentioned in the Commission’s Order, the ALJ explicitly relied on two specific facts in finding that Applicants had met their burden of proof to demonstrate a need for the CapX2020 projects for regional reliability:

- The ALJ relied on the fact that load growth would rise to 24,701 MW or more by 2020, thus reaching the lowest threshold level studied in the Vision Plan. (ALJ Report, Findings 179, 290.)
- The ALJ relied on an assumption that changes in the economy, including a recession, might slow anticipated growth but would not “substantially slow or stop” load growth. (ALJ Report, Finding 159.)

Newly-discovered evidence calls these findings into question. Reopening of the record is necessary to determine the actual demand of all of the CapX2020 utilities in 2008, the appropriate 2009 “base” case for demand analysis, and the reasonable forecast of load growth and peak load by 2020 given current and ongoing economic recession.

Xcel’s 10-K disclosure to the SEC filed on February 27, 2009 revealed a 1,162 MW decline in peak demand of from 2006 to 2008. This data reflects substantial 11.79 percent actual decline in peak demand from 2006 to 2008, or an annual actual decline during the past two years of over 6 percent each year.<sup>56</sup>

This decline in demand may be sufficient to adjust forecasted demand by 2020 below the threshold relied upon by the ALJ to find regional need. Using a standard Compound Annual Growth Rate Calculator, Xcel’s actual 2008 peak demand, the annual growth rate proposed by

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<sup>56</sup> Affidavit of Paula G. Maccabee (“Maccabee Affidavit”) to CETF Brief in Support of Motion to Supplement Record and Exceptions to ALJ Report, Attachment 2.

Applicants in Ex. 51, and twelve years of compounded growth, the projected 2020 peak energy demand for Xcel Energy in 2020 would be 9,917 MW, thus reducing the CapX2020 median predicted peak load reflected in Ex. 51 in 2020 by 1,259 MW. Without assuming any declines in demand for other utilities or predicting further declines in demand in 2009 or beyond, this estimated forecast based on Xcel's actual 2008 peak energy demand would reduce predicted demand load forecast for the CapX2020 utilities in 2020 to 24,449 MW. As summarized in the ALJ Report, Attachment E, this projection falls below the 24,701 MW threshold relied upon by the ALJ.

Minnesota Power's Form 10-K filed February 13, 2009 disclosed that the company had an annual net peak load of 1,582 MW in 2008,<sup>57</sup> which is 12 percent lower than the base 2009 level assumed for Minnesota Power in the most recent forecast provided by Applicants in hearings, Ex. 51. Using the actual 2008 peak as the base and compounding by Minnesota Power's annual growth rate in Ex. 51 through 2020 reduces the CapX2020 median predicted peak load in 2020 by another 201 MW. This adjustment for a second CapX2020 utility would reduce forecasted demand in 2020 to 24,248 MW, nearly 500 MW below the 24,701 MW slow growth forecast that the ALJ used as a threshold for regional need.<sup>58</sup>

The ALJ clearly found this demand threshold significant, as stated in Finding 180, "Applicants have not completed an analysis of facilities needed at a level of forecasted growth lower than 24,701 MW in the slow-growth model." There is no evidence in the administrative record from which the Commission could determine that the CapX2020 Projects are needed for regional reliability if total forecasted demand by 2020 is below 24,701 MW.

There is also no reason to assume, based on recent disclosures by Xcel Energy and Minnesota Power that the total forecasted demand in 2020 will not continue to require downward adjustments once accurate and current information is obtained for all of the CapX2020 utilities. It is undisputed that recession reduces energy demand.<sup>59</sup> Upon reopening the record, CETF would have the opportunity to present evidence and conduct cross-examination regarding the severity of the recession and ongoing job loss and the utilities' reasonable forecasts of regional and local need given changes in energy consumption. Reduced regional demand would affect any asserted necessity for the size and type of the CapX2020 facilities and the La Crosse Project

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<sup>57</sup> Maccabee Affidavit, Attachment 3.

<sup>58</sup> See Maccabee Affidavit, *supra*, for more details on calculation.

<sup>59</sup> Tr. V. 4, p. 18 (Lacey); Tr. V. 16, p. 70 (Michaud); Tr. V. 15, pp. 119-120 (Alders), Tr. V. 23, p. 126 (Ham).

in particular.

The Minnesota Supreme Court has cited with approval an agency decision to void a certificate of need due to downward revisions of energy demand forecasts. In State by Citizens Against Power Plant Pollution, Inc. (CAPPP, Inc.) v. Minn. Envir. Quality Bd.(MEQB) 305 N.W.2d 575 (Minn. 1981), once a lawsuit was commenced regarding the construction of Sherco 3 and Sherco 4, the Minnesota Energy Agency (MEA) voided its certificate of need for Sherco 4 based on Northern States Power's downward revisions of energy demand forecasts. The Court noted that reduced demand "increases the possibility that changes in technology, economic factors, load characteristics, fuel options and political and social considerations" are likely to result in a change in the optimal size and type of the facility necessary. *Id.*, 305 N.W.2d at 581.

The Commission may have been misled by oral argument of the Applicant or OES to believe that the economic downturn has not changed energy forecasts through the 2020 time period. (see Order, pp.18-19). Forecasts made by Xcel in 2008, which have been summarized in other dockets, belie this claim. As noted in a Supplemental Filing by Xcel in the Prairie Island Nuclear Generating Plant docket, in 2008 Xcel increased its commitment to demand management and "updated our energy and demand forecast to reflect a drop in our current sales we have seen due to a nationwide economic downturn." The result was a peak demand forecast for Xcel 374 MW lower in 2012 and 613 MW lower in 2023 than the forecast developed for the December 2007 Resource Plan filing.<sup>60</sup>

There is no question that changed circumstances have reduced long-term forecasted demand. The only question is whether this reduction, taking into consideration the decline in demand all of the CapX2020 utilities and using the most current data, will reduce reasonable demand forecasts below the threshold specifically relied upon by the ALJ to find that there was a regional reliability need for the CapX2020 Projects. Reopening the record is critical to resolve this dispute.

To the extent that the Commission recognized in its Order that there might be "defects in the overall demand forecast," the Commission erred in concluding that this would not affect the need for any of the proposed facilities. (Order, p. 11.) For the La Crosse Project, in particular,

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<sup>60</sup> Supplemental Filing, *Application to the MPUC for a Certificate of Need for the Prairie Island Nuclear Generating Plant for Additional Dry Cask Storage*, MPUC Docket No. E002/CN-08-510 (March 20, 2009), p. S3.

the record demonstrates no need for generation outlet capacity and that needs for community reliability in the Rochester and La Crosse areas can be met by local generation and transmission enhancements that don't impair the national wildlife refuge and other protected natural resources. Once the Commission recognizes that the forecasts of regional demand for this 345 kV power line are inaccurate, certifying the La Crosse Project would violate certificate of need statutes and rules. Minn. Stat. § 216B.243, Subd. 3(1) and Minn. R. 7849.0120, Subp. A (1).

**VI. THE COMMISSION ERRED IN CERTIFYING THE LA CROSSE PROJECT WITHOUT CONSIDERING CONFLICTS WITH FEDERAL REGULATIONS AND POLICIES REGARDING WILDLIFE REFUGE HABITAT.**

The Commission's Order certifying the La Crosse Project violated Minn. Stat. §216B.243, Subd. 3(7) in that the Commission failed to consider the policies, rules, and regulations of the United States Fish and Wildlife Service regarding protection of the Upper Mississippi River National Wildlife Refuge and the prohibition of new power lines which fragment habitat.

Although CETF and many members of the public raised concerns regarding the impacts of the La Crosse Project on the Upper Mississippi River National Wildlife Refuge, the Commission's Order did not mention the National Wildlife Refuge and there is no indication that regulations and policy regarding this protected national resource were considered in any way by the Commission.

Prior to oral argument in this matter, on April 14, 2009, Don Hultman, the Refuge Manager of the United States Fish and Wildlife Service Upper Mississippi River National Wildlife and Fish Refuge wrote a letter to the Chair of the Commission "strongly supporting delaying a decision on the certificate of need" for the CapX2020 La Crosse Project. (Attachment A.) The Refuge Manager stated that any alternative for the project would have to cross the national wildlife refuge and suggested that additional time was needed to learn and understand "the true needs and the social and resource tradeoffs of this project." (*Id.*)

As the staff of the National Wildlife Refuge have continued to review Applicants' plans for the La Crosse Project, it has become evident that the La Crosse Project will conflict with regulations and policy prohibiting new uses or projects which fragment habitat, including new power lines. A letter dated May 4, 2009 from the Refuge Manager to Xcel Energy, which is

attached to this Petition as Attachment B, explains this conflict:

Regulations and policy governing uses on national wildlife refuges prohibit new uses or projects which fragment habitat and such projects include roads, bridges, and powerlines. The one exception is for minor expansion of existing rights-of-way. "Minor" is not defined and left to the discretion of the refuge manager based on professional judgment taking into account refuge-specific conditions and anticipated impacts.

Based on discussions with staff, a review of our regulations and policy, and a review of your preliminary right-of-way pole configurations, I do not believe the various options would involve a minor expansion of any of the existing rights-of-way. Most of the options involve a 75 percent or more expansion of right-of-way width to be viable. Therefore, I would have to recommend to our Regional Director (the deciding official on new or expanded right-of-way requests) that no expansion of existing right-of-way be granted and that any design option be restrained or confined to existing right-of-way width.

As explained in the ALJ's Report, the width of right-of-way required for a power line is a function of its voltage, and either a single-circuit 345 kV line or a double-circuit 345 kV line require a 150-foot right-of-way. (ALJ Report, Finding 145.) The analysis submitted to Xcel with the United States Fish and Wildlife Service ("USFWS") letter describes the existing rights-of-way for potential crossings of the National Wildlife Refuge, each of which is narrower than the 150-foot right-of-way required for the La Crosse Project. (Attachment B, p. 3.)

In light of the regulatory and policy conflict identified by the Refuge Manager of the USFWS Upper Mississippi River National Wildlife Refuge as well as the record evidence of impacts to the National Wildlife Refuge from all proposed routes for the La Crosse Project, the Commission should reconsider the granting of a certificate of need for the CapX2020 La Crosse Project.

## **CONCLUSION**

For the foregoing reasons, the Commission's decision to grant certificates of need for the CapX2020 Projects was unsupported by substantial evidence, in excess of statutory authority of and affected by errors of law in the following respects:

- There was insufficient evidence in the record for the Commission to determine that the eastern endpoint of the Brookings Project should be at Hampton, Minnesota.
- The Commission's approval of the upsized double-circuit alternative to the CapX2020 Projects was unsupported by evidence of need and the Commission exceeded its authority in certifying this upsize in the absence of need.
- The Commission's certification of the La Crosse Project violated the Minnesota



Environmental Policy Act, the Minnesota Environmental Rights Act, certificate of need law and rules pertaining to power line prohibition areas.

- The Commission erred by failing to shift the burden to project proponents to show the lack of feasible and prudent alternatives that would not impair the Upper Mississippi River National Wildlife Refuge and other protected natural resources.
- The Commission erred in certifying the La Crosse Project since there are feasible and prudent local generation and transmission upgrade alternatives to meet the needs for the La Crosse Project that do not impair the Upper Mississippi River National Wildlife Refuge and other protected natural resources.
- The Commission erred in failing to reopen the record to consider newly-discovered evidence of demand declines and reasonable forecasts below threshold levels relied upon for Applicants' claims of need.
- The Commission erred in certifying the La Crosse Project without considering conflicts with federal regulations and policies regarding fragmentation of national wildlife refuge habitat.

CETF would respectfully request that the Commission reconsider its decision and make the following determinations:

- The Commission's certification of the Brookings Project should be subject to a condition allowing flexibility in routing proceedings to determine the Twin Cities end point either at Lake Marion or Hampton based on evidence of costs and benefits of the alternatives.
- The Commission's certification of the Brookings or Fargo 345 kV lines should be modified so that it does not include the double-circuited upsized alternative.
- The Commission should void its certification of the La Crosse Project.

Should the Commission decline at this time to void its certification of the La Crosse Project, CETF requests that the Commission reopen the record to obtain evidence of reasonable forecasts based on actual declines in energy demand and changes in economic circumstances and consumption that undermine Applicants' claims for regional demand for the CapX2020 projects. CETF would also request, in light of recent information from the United States Fish and Wildlife Service, that the Commission reopen the record to obtain information regarding potential conflicts of the La Crosse Project with federal regulations and policies pertaining to the protection of national wildlife refuge areas.

Dated: June 11, 2009

Respectfully submitted,

A handwritten signature in black ink, reading "Paula J. Maccabee". The signature is written in a cursive, flowing style.

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