

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

David C. Boyd	Chair
J. Dennis O'Brien	Commissioner
Thomas Pugh	Commissioner
Phyllis A. Reha	Commissioner
Betsy Wergin	Commissioner

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

ISSUE DATE: September 3, 2010

DOCKET NO. ET-2, E-002/CN-06-1115

ORDER DENYING MOTION TO COMPEL, DECLINING TO ORDER NEW HEARINGS, AND DECLINING TO SET NEW IN-SERVICE DATE FOR BROOKINGS PROJECT

**PROCEDURAL HISTORY**

On May 22, 2009, the Commission issued its Order Granting Certificates of Need With Conditions, and on August 9, 2009, issued an Order Granting and Denying Motions for Reconsideration and Modifying Conditions. In these orders the Commission found that Great River Energy and Northern States Power Company d/b/a Xcel Energy (collectively, Applicants<sup>1</sup>) had established the need for, among other things, three 345 kilovolt (kV) transmission line projects:

- The Brookings Project would extend from Brookings, South Dakota, to the southeast quadrant of the Twin Cities metropolitan area, to become fully operational in 2013.
- The La Crosse Project would extend from the southeast quadrant of the Twin Cities through Rochester to La Crosse, Wisconsin, to become operational in 2015.
- The Fargo Project would extend from Fargo, North Dakota to Alexandria, St. Cloud and Monticello, to become operational in 2015.

Because Applicants had not finalized the details of each project's transmission capacity, owners and ownership structure, the Commission directed Applicants to file this information in the future.<sup>2</sup>

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<sup>1</sup> The Commission authorized Applicants to seek Certificates of Need on behalf of all potential participants in the Brookings, La Crosse and Fargo Projects. This docket, Order Designating Applicants and Setting Filing Requirements (June 4, 2007) at 3-5, 17.

<sup>2</sup> May 22, 2009 Order, Ordering Paragraph 4.

On May 17, 2010 the Applicants filed notice that they no longer anticipate completing the Brookings Project before the second quarter of 2015, and that they were informing the other parties to this docket pursuant to Minn. Rules, part 7849.0400, subp. 2.H. This rule provides for the Commission to determine whether the Applicants will now have to seek a new Certificate of Need for the project.

By June 2, 2010, the Commission had received comments on the Applicants' proposal from the Minnesota Department of Commerce's Office of Energy Security (OES), the Citizens Energy Task Force (CETF), the North American Water Office (NAWO), and jointly from NoCapX 2020 and United Citizens Action Network (UCAN). In addition, NoCapX 2020 and UCAN filed a Motion for an Order to Show Cause why the Applicants had not yet disclosed the Brookings Project's capacity, ownership, and ownership structure as required by the May 22, 2009 Order.

On June 21, 2010 the Applicants filed comments replying to the other parties' comments. The Commission received comments on the Applicants' replies from CETF, NAWO, Wind on the Wires, and jointly from NoCapX 2020 and UCAN.

The Commission met on August 5, 2010, to consider this matter.

## **FINDINGS AND CONCLUSIONS**

### **I. BACKGROUND**

#### **A. Authorization for High-Voltage Transmission Lines**

A party seeking to build a high-voltage transmission line in Minnesota must first obtain a Certificate of Need from the Commission. Specifically, anyone seeking to build --

- a transmission line that crosses into Minnesota with a capacity exceeding 100 kV,<sup>3</sup> or
- more than 1500 feet of transmission line within Minnesota with a capacity exceeding 200 kV<sup>4</sup>

must apply for a Certificate of Need from this Commission pursuant to Minn. Stat. § 216B.243. Alternatively, a transmission line owner that seeks to build --

- a new transmission line that crosses into Minnesota with a capacity of 100 kV or more, or
- at least 10 miles of line within Minnesota with a capacity of at least 100 kV, or
- any line within Minnesota with a capacity of at least 200 kV<sup>5</sup>

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<sup>3</sup> Minn. Stat. § 216B.2421, subd. 2(3).

<sup>4</sup> Minn. Stat. § 216B.2421, subd. 2(2).

<sup>5</sup> Minn. Stat. § 216B.2425 and Minn. Rules, part 7848.0100, subp. 5.

may apply for Commission authorization as part of the transmission owners' periodic report on the adequacy of the state's transmission grid (Biennial Transmission Projects Report).<sup>6</sup>

Each of the Applicants' proposed transmission line projects would cross a state line with a capacity exceeding 100 kV; consequently Applicants sought – and obtained – a Certificate of Need for each project.

### **B. Delay in Construction of Needed Projects**

When a Certificate of Need recipient finds that it will not be able to complete the needed project on schedule, Minn. Rules, part 7849.0400, subp. 2.H, directs the recipient to disclose the delay. The rule also provides for the Commission to determine whether the recipients will need to secure a new Certificate of Need before proceeding with the delayed project, and whether additional hearings are warranted:

If an applicant determines that a change in size, type, timing, or ownership other than specified in this subpart is necessary for a large generation or transmission facility previously certified by the commission, the applicant must inform the commission of the desired change and detail the reasons for the change. A copy of the applicant's submission to the commission must be sent to each intervenor in the certificate of need hearing proceeding on the facility. Intervenors may comment on the proposed change within 15 days of being notified of the change. The commission shall evaluate the reasons for and against the proposed change and, within 45 days of receipt of the request, notify the applicant whether the change is acceptable without recertification.<sup>7</sup> The commission shall order further hearings if and only if it determines that the change, if known at the time of the need decision on the facility, could reasonably have resulted in a different decision under the criteria specified in part 7849.0120.

### **C. Minnesota's Renewable Energy Standard (RES)**

The Renewable Energy Standard (RES) provides for Minnesota electric utilities to acquire a growing

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<sup>6</sup> *Id.* and Minn. Rules, part 7848.1400, subp. 2. Entities that own or operate transmission lines in Minnesota biennially file a Transmission Projects Report to identify present and foreseeable future transmission inadequacies, alternative means of addressing these inadequacies, and the economic, environmental, and social issues associated with each alternative. Minn. Rules, Chap. 7848.

<sup>7</sup> While the rule provides 45 days for the Commission to render a decision, the Commission varied this timeline to enable additional comment and deliberation. See this docket, Order Providing for Additional Comments, and Extending Period for Commission Action (June 22, 2010).

share of their electricity from renewable sources.<sup>8</sup> The statute eventually requires utilities to acquire sufficient renewable energy to serve 25% of their retail customers' needs by the year 2025.<sup>9</sup> Building to this 25% threshold, the statute establishes intermediate "milestone" requirements for the years 2012, 2016, and 2020.

## II. APPLICANTS' FILING

The Midwest Independent Transmission System Operator, Inc. (MISO)<sup>10</sup> is in the process of establishing the allocation formulas governing how the cost of transmission lines such as the Brookings Project would be recovered.<sup>11</sup> But delay in resolving this question has impeded Applicants' ability to secure agreements regarding the ownership, and ownership structure, of the Brookings Project, the Applicants report. Applicants propose to file a status report by January 15, 2011, apprising the Commission of Applicants' progress in resolving these issues.

In the meantime Applicants propose postponing the in-service date for the Brookings Project from 2013 to 2015. Applicants ask the Commission to accept the change in timing without requiring Applicants to secure a new Certificate of Need, and without ordering additional hearings.

## III. SUMMARY OF THE ISSUES

This order will address the following issues:

- A. Whether to grant the motion to compel Applicants to disclose the Brookings Project's transmission capacity, owners and ownership structure as required by the May 22, 2009 Order.
- B. Whether to initiate a proceeding to review the Commission's rules governing Certificates of Need.
- C. Whether to order further hearings in this matter.

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<sup>8</sup> Minn. Stat. § 216B.1691.

<sup>9</sup> *Id.* Note that the RES provides for Xcel to acquire 30% of the energy to serve its retail customers from renewable sources by 2020.

<sup>10</sup> MISO is a federally-regulated operator of the region's transmission grid. Among other things, MISO administers the market that determines which generators will operate at any given time, and administers the MISO Generator Interconnection Queue to determine which generators may interconnect with the transmission grid.

<sup>11</sup> See FERC Docket Nos. Docket No. ER-09-1431-000 (proposed interim changes) and ER-10-1791-000 (proposed final changes).

- D. Whether to delay the Brookings Project and establish a new in-service date for that project.

These issues will be addressed in turn.

#### **IV. MOTION TO COMPEL**

##### **A. Positions of the Parties**

In commenting on the Applicants' filing, NoCapX 2020 and UCAN note that Applicants have not yet complied with the requirement of May 22, 2009 Order directing Applicants to disclose the Brookings Project's transmission capacity, owners and ownership structure. NoCapX 2020 and UCAN ask the Commission to issue an order compelling Applicants to make such disclosures or to explain why the Certificate of Need should not be cancelled for non-compliance.

Applicants acknowledged that they have not yet complied with their duty to disclose the Brookings Project's capacity, ownership and ownership structure. But they deny that they have withheld these facts from the Commission; rather, Applicants claim that these facts have not yet been established, so there is simply nothing to disclose. Applicants affirm that they intend to make the necessary filing when the information becomes available. In the meantime, Applicants ask the Commission to deny the motion to compel.

OES finds Applicants' response to the motion to be reasonable and therefore joins Applicants in opposing the motion.

##### **B. Commission Action**

The Commission finds no evidence that Applicants have violated the May 22, 2009 Order. That order directs Applicants to disclose the Brookings Project's capacity, ownership and ownership structure, but does not specify a date by which such disclosure should occur. The Commission expects Applicants to comply with its orders as soon as reasonably possible – but not sooner. Because the Commission finds no evidence of bad faith or need for additional explanation, the motion to compel is denied.

That said, the Commission expects to be apprised of Applicants' progress in resolving these issues. To this end, the Commission will accept Applicants proposal to file a report by January 15, 2010, on the status of the Brookings Project's cost allocation and ownership issues.

#### **V. REQUEST FOR RULEMAKING**

##### **A. Positions of the Parties**

NAWO asks the Commission to use the delay proposed by Applicants as an opportunity to revise its Certificate of Need rules to ensure better consideration of alternative means by which a utility might match its supply of electricity to its customers' demand. In particular, NAWO asks that the

Commission change its rules to promote consideration of distributed generation – collections of smaller generators located throughout the transmission grid and that might form a substitute for a new generator or transmission line.

**B. Commission Action**

The proposal to revise the Commission’s rules exceeds the scope of this docket. The Commission observes that NAWO has now formally petitioned for a rulemaking on this matter, thereby initiating a separate docket.<sup>12</sup> The Commission will therefore refrain from addressing that matter here.

**VI. REQUEST FOR FURTHER HEARINGS**

**A. Positions of the Parties**

CETF, NAWO, NoCapX2020 and UCAN ask the Commission to order further hearings in this matter as provided for by Minn. Rules, part 7849.0400, subp. 2.H. In support of this request they variously argue as follows:

- The record the Commission relied upon in approving the Brookings Project is now out-of-date. The Commission should consider new evidence on the following topics, among others: recent declines in economic activity, the corresponding decline in demand for – and price of – electricity, decisions by the Federal Energy Regulatory Commission (FERC) regarding the allocation of transmission costs, a court ruling on that FERC decision, and popular resistance to large-scale transmission projects in other states.
- The fact that Applicants seek to delay construction of the Brookings Project demonstrates that the project is not urgent, and therefore the Commission has time to conduct additional hearings.
- Outside of this docket Xcel has reported that it has already made arrangements to secure all the resources it needs, including renewable resource credits, to comply with the RES through 2020. This fact suggests the Brookings Project is not needed.
- The uncertainty that delays will engender, and the hardship that these delays will cause for landowners along the proposed route, should prompt the Commission to reconsider the need for the Brookings Project.

In contrast, Applicants, OES and Wind on the Wires argue that the proposed delay in the Brookings Project does not warrant new hearings.

**B. Commission Action**

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<sup>12</sup> See *In the Matter of the Possible Rulemaking to Amend Minnesota Rules Chapter 7849 by Adding Additional Definitions, Application Content Requirements, Public Notification and Decision Criteria Provisions*, Docket No. P-999/R-10-874.

The Commission concludes that the parties have not articulated sufficient reasons to justify additional hearings.

First, the Commission observes that MISO's proposed cost allocations, FERC's review of those allocations, and a court's review of FERC actions reflect the unsettled nature of the law regarding cost recovery for transmission lines. These are legal and policy matters, not factual matters; they do not lend themselves to illumination via hearing.

Second, many of the new developments that allegedly warrant a rehearing – the consequences of the economic recession, the merits of distributed generation, even the unsettled nature of transmission cost recovery -- were in fact already acknowledged and discussed in the record.<sup>13</sup> The Minnesota Court of Appeals has already affirmed that the record provided a sufficient basis to support a finding that the various transmission projects are needed.<sup>14</sup>

Third, the need for the Brookings Project does not depend on whether Xcel needs additional renewable energy credits in the short term. This argument confuses a *stock* with a *flow*. Renewable energy credits are a means by which a utility may claim credit for acquiring more renewable energy during one period than it had a legal obligation to obtain; the credit permits the utility to cite this fact when demonstrating compliance with the RES during a future period. A utility that has enough credits to meet RES obligations through 2020 will nevertheless need to acquire more renewable energy (or credits) to meet its continuing RES obligations thereafter. In sum, a finite stock of renewable energy credits is not a substitute for the flow of renewable energy that the Brookings Project would provide.

Fourth, a new hearing would not reduce any problems arising from uncertainty regarding the schedule of the Brookings Project; to the contrary, it would tend to exacerbate the uncertainty.

In sum, transmission lines are designed to remain in service for decades, and the constant ebb and flow of circumstances does not undermine the Commission's determination that a line is needed. Consequently at this time the Commission finds no need for additional hearings at this time.

## **VII. REQUEST TO DELAY THE BROOKINGS PROJECT AND ESTABLISH A NEW IN-SERVICE DATE**

### **A. Positions of the Parties**

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<sup>13</sup> See, for example, May 22, 2009 Order at 10-12 (discussing consequences of recession), 22 (discussing distributed generation).

<sup>14</sup> *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*, 2010 WL 2266138 (Minn.App. 2010), Util. L. Rep. P 27,108; see, for example, slip op. at 7: “[E]ven with an overall regional decrease in demand for energy during the next decade, the credible evidence shows a need for these power lines.”

Applicants ask the Commission to approve delaying the Brookings Project until 2015. Applicants alternatively propose that the Commission approve an in-service date of 2014 with the understanding that Applicants might need to extend the in-service date to the following year; such brief extensions do not require Commission approval.<sup>15</sup>

OES and Wind on the Wires advocate making the Brookings Project operational as soon as feasible to enable the development of wind turbines in the Buffalo Ridge area and to secure a new source of renewable energy. They each express concern that the delay may complicate the plans of utilities trying to fulfill the RES requirements.

Nevertheless, OES finds that Applicants have stated sufficient grounds to justify delaying the in-service date to 2015. In contrast, Wind on the Wires expresses concern that approving a 2015 date would relieve any sense of urgency to develop the project sooner, even if it proved feasible to do so. As a result, Wind on the Wires asks the Commission to refrain from approving any new in-service date at this time, pending new developments regarding negotiations among the project's potential owners.

CETF and NAWO support Wind on the Wires's proposal. CETF notes that the Brookings Project was justified in part as a means to help utilities fulfill the RES's 2016 deadline. An additional two-year delay in the in-service date, combined with corresponding delays in the construction and interconnection of wind turbines, would undermine the project's purpose, CETF argues.

## **B. Commission Action**

The Commission finds that both Wind on the Wires and CETF raise legitimate concerns about Applicants' proposal. At this time, consequently, the Commission will decline to rule on the Applicants' request to delay the project's in-service date to 2015. This conclusion will not prejudice any future efforts by the Applicants to renew or refile their request.

In the meantime the Commission will require Applicants to provide additional information. As noted above, the Commission will direct Applicants to provide a status report in January on the Brookings Project's cost allocation and ownership issues.

In addition, the Commission is mindful that a delay in the Brookings Project could potentially affect utilities' efforts to comply with the RES. The Commission will therefore direct Applicants to analyze how the delay would affect Minnesota utilities' efforts to comply with the RES's milestone requirements in 2016, as well as during the year preceding and the year following that milestone. This analysis will be due as part of the Applicants' 2011 Biennial Transmission Projects Report.<sup>16</sup>

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<sup>15</sup> Minn. Rules, part 7849.0400, subp. 2.A.

<sup>16</sup> See Minn. Stat. § 216B.2425, subd. 7.

The Commission will so order.

**ORDER**

1. The Commission denies the motion to compel filed by NoCapX 2020 and UCAN.
2. The Commission declines to order a rehearing in this matter or to delay the in-service date for the Brookings Project at this time without prejudice.
3. By January 15, 2011, Applicants shall file a status report on the cost allocation and ownership issues discussed above.
4. In the 2011 Biennial Transmission Projects Report, Applicants shall provide an analysis of how delaying the Brookings Project could affect Minnesota utilities' efforts to comply with the Renewable Energy Standard, Minn. Stat. § 216B.1691, during the period 2015 - 2017.
5. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar  
Executive Secretary

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