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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1646, A09-1652**

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.

**Filed June 8, 2010
Affirmed
Shumaker, Judge**

Minnesota Public Utilities Commission
File No. ET-2, E-002, et al./CN-06-1115

Carol A. Overland, Overland Law Office, Red Wing, Minnesota (for relators United
Citizens Action Network and NoCapX 2020)

Paula Goodman Maccabee, Just Change Law Offices, St. Paul, Minnesota (for relator
Citizens Energy Task Force)

Lori Swanson, Attorney General, Anna E. Jenks, Julia Anderson, Assistant Attorneys
General, St. Paul, Minnesota (for respondents Minnesota Public Utilities Commission
and Minnesota Department of Commerce)

Michael C. Krikava, Briggs and Morgan, Minneapolis, Minnesota (for
respondents/Applicants Northern States Power Company and Great River Energy)

Christopher K. Sandberg, Lockridge Grindal Nauen, Minneapolis, Minnesota (for
respondent Midwest Independent Transmission System Operator, Inc.)

Elizabeth I. Goodpaster, Minnesota Center for Environmental Advocacy, St. Paul,
Minnesota (for Minnesota Center for Environmental Advocacy)

Considered and decided by Shumaker, Presiding Judge; Klaphake, Judge; and Crippen, Judge.*

UNPUBLISHED OPINION

SHUMAKER, Judge

The relators on certiorari review challenge the Minnesota Public Utilities Commission's order granting certificates of need for three high-voltage power line projects. Because the relators have failed to carry their burden to demonstrate an impropriety in that order or in the basis for the order, we affirm.

FACTS

After a contested-case hearing that culminated in an administrative law judge's (ALJ's) recommendation, Minnesota Public Utilities Commission (MPUC) granted to certain utilities certificates of need for the construction of three high-voltage power lines. Citizen groups challenge MPUC's decision, arguing that the agency failed to consider newly discovered evidence, improperly approved an upsizing alternative, and acted arbitrarily in approving an environmental report. The matter comes before us through a writ of certiorari.

In 2004, a group of regional utilities known as CapX2020 conducted studies to develop a comprehensive plan to address the anticipated demand for electric services in future decades in Minnesota and portions of neighboring states. CapX2020 created a broad blueprint, called its Vision Plan, for future transmission development. The Vision

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

Plan included a long-range analysis of problems that could occur if new transmission is not provided. The Vision Plan was not specific to any particular project but rather offered a framework for guidance in the analysis of specific projects.

Ultimately CapX2020 developed three projects that became the subject of the contested-case hearing and of our review. Designated the Fargo Project, the LaCrosse Project, and the Brookings Project, each called for the construction of high-voltage power lines and intermediate connections across portions of Minnesota, North Dakota, Wisconsin, and South Dakota.

Before a utility company may construct a “large energy facility,” it must obtain a certificate of need from MPUC. Minn. Stat. § 216B.243, subd. 2 (2008). Each of the projects at issue is a large energy facility. *See* Minn. Stat. § 216B.2421, subd. 2 (2008) (defining “large energy facility”). Two of the CapX2020 utilities, Xcel Energy and Great River Energy (the applicants), applied for the requisite certificates of need for themselves and on behalf of other participating utilities on August 16, 2007. Relators United Citizens Action Network (UCAN), NoCapX 2020, and Citizens Energy Task Force (CETF) became intervenors on the certificate-of-need docket.

MPUC accepted the application as substantially complete, pending a supplemental filing, on November 21, 2007, and an ALJ was assigned to conduct a contested-case hearing. After 19 public hearings, held between June 17 through July 2, 2008, in 13 communities located in the corridors where the proposed power lines are to be constructed, the ALJ held a 25-day contested-case hearing, concluding on September 18, 2008.

On November 23, 2008, NoCapX moved for an order allowing additional limited discovery and to reopen the case so that the ALJ could consider allegedly new information relating principally to a decrease in energy demand that would, according to NoCapX, demonstrate the lack of need for the proposed power lines. Noting that NoCapX offered no new forecasts, the ALJ denied the motion to reopen the case but allowed NoCapX to make an offer of proof to be included in the record and forwarded to MPUC for its consideration.

The ALJ issued findings of fact and conclusions of law on February 27, 2009, and recommended that MPUC approve certificates of need for all three projects. NoCapX moved again for an order allowing limited discovery and reopening the case.

MPUC granted certificates of need, with special conditions, for all three projects on May 22, 2009. Thereafter, MPUC denied relators' motions for reconsideration; granted the motions for reconsideration of the applicants and the Office of Energy Security (OES) with respect to wind conditions on the Brookings project; modified its May 22 order; and issued its final order approving the projects, as modified, on August 10, 2009. CETF and UCAN filed separate petitions for writs of certiorari, and we consolidated the cases for appellate review.

D E C I S I O N

Relators contend that MPUC erred and abused its discretion by refusing to reopen the case to consider newly discovered evidence of declining energy needs; erred by certifying the LaCrosse project, which, relators assert, will impair natural resources and

will result in the violation of various state and federal laws, when feasible alternatives are available; and exceeded its authority by certifying the CapX2020 upsized alternative.

When reviewing an administrative agency decision, we may affirm, reverse, modify the decision, or remand for further proceedings if the “substantial rights of the [relators] may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:

- (a) in violation of constitutional provisions; or
- (b) in excess of the statutory authority or jurisdiction of the agency; or
- (c) made upon unlawful procedure; or
- (d) affected by other error of law; or
- (e) unsupported by substantial evidence in view of the entire record as submitted; or
- (f) arbitrary or capricious.

Minn. Stat. § 14.69 (2008).

The party seeking appellate review of an agency decision has the burden of proving that the decision was the product of one or more of these statutory infirmities. *Markwardt v. State, Water Resources Bd.*, 254 N.W.2d 371, 374 (Minn. 1977). The decisions of administrative agencies are presumed to be correct and to have been based upon the application of the expertise necessary to decide technical matters that are within the scope of the agencies’ concerns and authority. *In re Universal Underwriters Life Ins. Co.*, 685 N.W.2d 44, 45-46 (Minn. App. 2004). In reviewing agency decisions, the courts must exercise restraint so as not to substitute their judgment for that which is the product of the technical training, education, and experience found within the agency. *Id.* We will not hold an agency’s decision arbitrary and capricious if there is a rational

connection between the facts found and the decision and if the agency has reasonably articulated the basis for its decision. *Id.* at 45. “We defer to the agency’s expertise in fact finding, and will affirm the agency’s decision if it is lawful and reasonable.” *In re an Investigation into Intra-LATA Equal Access & Presubscription*, 532 N.W.2d 583, 588 (Minn. App. 1995), *review denied* (Minn. Aug. 30, 1995). The relators contend that MPUC’s decision was neither lawful nor reasonable.

Although the relators have pointed to legitimate areas of environmental concern, after a review of the record, we are unable to conclude that the relators have shown that MPUC violated the law, acted beyond its authority, or made any arbitrary or capricious determination. Furthermore, the relators have failed to demonstrate that we may properly ignore the principle of deference that we are bound by law to follow in our review. Thus, we offer brief analyses of the relators’ primary arguments.

Allegedly New Evidence

An administrative agency’s decision may be found to have been arbitrary or capricious if the agency “entirely failed to consider an important aspect of the issue . . . [or] offered an explanation that conflicts with the evidence.” *Rostamkhani v. City of St. Paul*, 645 N.W.2d 479, 484 (Minn. App. 2002).

The relators correctly point out that a power-line project may be certified only if the applicant utility can demonstrate a need for the project. They concede that the ALJ considered forecasts as to future energy demand, but they argue that the ALJ and MPUC failed to consider new forecasts that became available after the ALJ made her recommendation. The relators argue that the case should have been reopened to allow

evidence of the new forecasts showing a decline in energy demand and need, attributable in whole or part to the current economic recession.

The relators point to the Vision Plan as having established a threshold forecast. But the Vision Plan is broad, general, and relatively abstract and is not per se controlling as to the only three power lines at issue. MPUC determined that the forecast data as applied to those three power lines supported the current need asserted by the applicants. Furthermore, the forecasts were only one of the factors MPUC considered in its decision to grant the certificates of need.

The relators urge that newly discovered evidence, namely, statements by utilities' representatives quoted in *The Wall Street Journal*, attests to the decreasing demand for energy and that, consequently, the need for additional power lines cannot be shown. Although the statements appearing in *The Wall Street Journal* were made after the contested-case hearing, the issues to which the statements refer were very much a part of the hearing. There was evidence at the hearing about forecasts and the effect the economy likely has had on energy demands, and the possible future decrease in energy consumption. The ALJ considered those issues as did MPUC. The only new thing added by the statements in *The Wall Street Journal* was commentary on the issues.

MPUC focused on the three power lines at issue and determined that, even with an overall regional decrease in demand for energy during the next decade, the credible evidence shows a need for these power lines. *The Wall Street Journal* comments did not relate to these power lines and provided no specific expertise to the analysis of current

need for the projects at issue. Thus, MPUC did not abuse its discretion by declining to reopen the case to receive this type of general evidence.

Finally, we note that legitimate challenges to the construction of future power lines embraced by the Vision Plan are not foreclosed by MPUC's decision relating to the three power lines at issue now.

Connected Projects

NoCapX and UCAN contend that “[o]n the eve of the Commission deliberations” they learned that CapX2020 is part of something larger, and therefore this case must be remanded to MPUC to take into account the future plans applicants may have to expand CapX2020. Because we may consider only the case before us, even though it may be part of a larger project, we can address only the three projects that are the subject of this appeal. *See Stubbs v. N. Mem'l Med. Ctr.*, 448 N.W.2d 78, 80-81 (Minn. App. 1989) (stating that it is not the function of the court of appeals to establish new causes of action, even though such actions appear to have merit), *review denied* (Minn. Jan. 12, 1990). As we have noted above, our affirmance cannot be taken as an approval of any future project as each new project is subject to further independent analysis if, and when, the project becomes an actuality. The record demonstrates that the power lines at issue are within the first phase of a larger project and that both the ALJ and MPUC were aware of that fact.

Environmental Report

The relators make several arguments as to why the environmental report was not adequate. They contend that the information in the environmental report is inadequate

because it was not independently verified; alternatives were not properly considered; the necessary analysis of impacts was omitted or insufficient; and the scope of environmental review expressly and falsely stated that there would be no federal environmental review.

The department of commerce (department) is responsible for the preparation of an environmental report, which is required before a certificate of need may be granted.

Minn. R. 7849.1200 (2009). The rule states that:

The commissioner of the Department of Commerce shall prepare an environmental report on a proposed high voltage transmission line or a proposed large electric power generating plant at the need stage. The environmental report must contain information on the human and environmental impacts of the proposed project associated with the size, type, and timing of the project, system configurations, and voltage. The environmental report must also contain information on alternatives to the proposed project and shall address mitigating measures for anticipated adverse impacts. The commissioner shall be responsible for the completeness and accuracy of all information in the environmental report.

Id.

The relators contend that, although the department prepared an environmental report, the information in the report was provided by the applicants, was not independently verified, and was incomplete.

To address this contention, we note first that an environmental report at the need stage, although important, does not address the site-specific environmental details that will necessarily be addressed in route-permit proceedings. Thus, it appears that what the relators claim to be insufficiencies in the environmental report are not insufficiencies for a need-stage report but rather are matters required to be addressed in significant

analytical detail at the permit stage. Secondly, as to the relators' contention that the applicants supplied the information for the report and the department failed to verify the information independently, the relators have failed to show any impropriety in that process or any support for the implication that independent verification would have revealed something other than what the report disclosed. Although we acknowledge that sometimes independent verification of alleged facts can be critical, experts in a particular field undoubtedly, and necessarily, possess a base of knowledge from which they can distinguish matters that are inherently plausible and probable from those that are suspect or possibly biased. Once again, we defer to the expertise of the involved agencies, absent a specific showing as to why such deference is not appropriate. Mere implication is not such a showing.

The relators next contend that alternatives, such as the no-build option, received a falsely restricted review. The record indicates that several alternatives were taken into consideration, including the no-build option; renewable transmission and gas generation; conservation and demand-side management; and existing system upgrades and reconfiguration. The relators do not seem to contend that alternatives were not addressed, but rather that the alternatives should have been given more weight. It is not the function of this court to weigh the evidence. Therefore, because, as required, alternatives were addressed and considered in the environmental report, we must defer to the agency's decision.

The relators also argue that the necessary analysis of impacts was omitted or insufficient. However, the record indicates that impacts on land-based economics, human

settlement, and socioeconomics were addressed with regard to each transmission line individually in the report. The relators appear not to be satisfied with the degree of attention and consideration given to certain impacts. However, because we defer to the agency's discretion, if the areas specified by the statutes and rules were addressed, we do not reconsider the evidence to decide whether this court would have made the same decision.

The relators' final argument with regard to the environmental report is that, when there is going to be federal environmental review, including an environmental impact statement (EIS), there is an expectation that state and federal review will be done as a joint effort, and that was not done here. The relators rely on the rule, which states that "[i]f a federal EIS will be or has been prepared for a project," the state shall use such draft if "the federal EIS addresses the scoped issues and satisfies the standards." Minn. R. 4410.3900, subp. 3 (2009). However, no federal report has yet been prepared, and the rule also indicates that "[g]overnmental units shall cooperate with federal agencies to the fullest extent possible to reduce duplication" between Minnesota statutes and the National Environmental Policy Act. *Id.*, subp. 1.

The department considered this rule, but ultimately determined that it was not possible to associate the state environmental review with the federal environmental review due to timing and relevance. Further, the department acknowledges that if the circumstances were to change, "when any route applications are filed, the [d]epartment would pursue all opportunities to coordinate the EIS reviews in those proceedings with any relevant federal agency reviews." It appears that federal agency coordination occurs

most appropriately at the permit stage. The department's efforts were adequate under this rule.

Interference with Wildlife and Fish Refuge

The relators claim that MPUC failed to consider the policies of other agencies when granting the certificate of need for the La Crosse project. *See* Minn. Stat. § 216B.243, subd. 3(7) (requiring MPUC to consider “the policies, rules, and regulations of other state and federal agencies and local governments” in assessing need). Prior to granting a certificate of need, MPUC must determine that “the record does not demonstrate that the design, construction, or operation of the proposed facility, or a suitable modification of the facility, will fail to comply with relevant policies, rules, and regulations of other state and federal agencies and local governments.” Minn. R. 7849.0120, subp. D (2009). Specifically, the relators assert that “[n]o high voltage transmission line may be routed through state or national parks or state scientific and natural areas unless the transmission line would not materially damage or impair the purpose for which the area was designated and no feasible and prudent alternative exists.” Minn. R. 7850.4300, subp. 2 (2009).

MPUC accepted the ALJ's findings when considering the environmental impact these projects could have. The ALJ found that the lines would disturb wildlife, protected habitat, and natural waterways, and that the construction process would entail more disturbances. Nevertheless, the ALJ concluded that the projects were necessary and recommended that “steps be taken in the routing process to minimize adverse consequences by avoiding especially sensitive areas, and by mitigating harms that cannot

be avoided.” The ALJ found that no party demonstrated a more reasonable and prudent alternative to the applicants’ proposal.

Because MPUC considered the impact that CapX2020 would have on wildlife and fish refuges, we must defer to its decision.

Upsized Alternative

The relators argue that Minn. R. 7849.0120, subp. A(5) (2009), which permits MPUC to enlarge the size of a facility beyond what is needed in order to make optimum use of resources, is inconsistent with the underlying certificate-of-need statute. The relators claim that Minn. Stat. § 216B.243, subd. 3 (2008), limits MPUC’s jurisdiction to certify high-voltage transmission lines to situations where a demand for electricity has been proved.

Although there must be a need shown before MPUC may approve a project, there is no requirement that the need be imminent. Because certificates of need are granted based on future forecasts, it is within MPUC’s authority to approve an upsized alternative when there is a foreseeable need to do so.

Affirmed.