

**STATE OF MINNESOTA  
BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION**

Phyllis Reha  
Dr. David C. Boyd  
J. Dennis O'Brien  
Betsy Wergin

Acting Chair  
Commissioner  
Commissioner  
Commissioner

**In the Matter of the Application by Xcel  
Energy for a Route Permit for the  
Hampton-Rochester-La Crosse 345-kV  
Transmission Line Project**

**OAH 3-2500-21181-2  
PUC No. E002/TL-09-1448**

**ORONOCO TOWNSHIP'S  
PETITION FOR RECONSIDERATION  
AND VACATION, REHEARING,  
AMENDMENT, OR REARGUMENT  
OF THE COMMISSION'S ORDER  
GRANTING ROUTE PERMIT FOR  
SEGMENT 3 OF THE HAMPTON-  
ROCHESTER-LA CROSSE 345-kV  
TRANSMISSION LINE PROJECT**

**INTRODUCTION**

Petitioner Oronoco Township ("Oronoco") respectfully requests reconsideration of the Public Utilities Commission's ("Commission" or "PUC") May 30, 2012 Order Issuing Route Permit as Amended ("Order"), which granted the Route Permit for Segment 3 of the Hampton-Rochester-La Crosse 345-kV Transmission Line Project ("Project").

The Commission's decision to reject Administrative Law Judge Kathleen D. Sheehy's ("ALJ") thoroughly-considered route Recommendation<sup>1</sup> in Segment 3 that the Project cross the Zumbro River near the Zumbro Power Dam ("Power Dam Route") and instead, order that the Project cross Lake Zumbro on route 3P ("White Bridge Route") is procedurally and substantively unfair to the hundreds of residents living in Oronoco. Despite the Order's lack of reference to the "Power Dam Group" witnesses by name, it is apparent the Power Dam Group's

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<sup>1</sup> The ALJ's Findings of Fact, Conclusions of Law and Recommendation ("Recommendation") was filed on February 8, 2012.

false and misleading testimony at the April 12, 2012 oral argument and Commission deliberations swayed and misled the Commissioners. The Commission granted disproportionate weight to testimony offered outside of the administrative process from the four people comprising the Power Dam Group, two of whom are married to each other, and in doing so, ignored much of the lengthy administrative process relied upon by the ALJ in her Recommendation of the Power Dam Route. The Commission's action deprived Oronoco's residents of the opportunity to rebut the Power Dam Group's false and misleading testimony, develop the record on the late-introduced evidence, and correct factual errors.

Oronoco followed the rules of procedure and created an extensive record opposing the White Bridge Route. Oronoco's position was accepted by the ALJ, and recommended by the Minnesota Department of Commerce, Energy Facility Permitting Staff ("Department"). No party filed exceptions to the Power Dam Route, yet it was rejected by the Commission. The extensive record created during the entirety of this multi-year proceeding does not independently support the Commission's selection of the White Bridge Route in its Order, which has inaccuracies in its own right. Accordingly, Oronoco's Petition should be granted.

### **PROCEDURAL POSTURE AND RELEVANT FACTS**

Over the past two years, Oronoco and the other formal parties to this contested-case proceeding worked to create an extensive record, and the ALJ made her Recommendation of the Power Dam Route as the final route for the Project in Segment 3 based upon that extensive record. The Commission's Order rejected the ALJ's Recommendation and selected the White Bridge Route as the final route for the Project, based in substantial part upon last-minute, false, and misleading testimony from the Power Dam Group at the April 12, 2012 Commission meeting.

## **I. Background Information.**

On January 19, 2010, Applicant Xcel Energy (“Xcel”) submitted its application for a high-voltage transmission line route permit for the Project (“Application”). On March 9, 2010, the Commission referred the matter to the Office of Administrative Hearings for contested-case proceedings to be presided over by the ALJ. The formal parties that intervened in the contested-case proceedings were the Department, NoCapX 2020, United Citizens Action Network (“UCAN”), the North Route Group, American Transmission Company LLC, ATC Management Inc., and Oronoco. The Power Dam Group did not intervene as a formal party, and none of the four people comprising the Power Dam Group participated in the contested-case proceeding.

Oronoco is a township located in the Rochester School District on the north edge of the fast-growing City of Rochester. During the lengthy administrative hearings, Oronoco opposed selection of the White Bridge Route as the final route for the Project in Segment 3, since such selection would significantly and negatively impact its people’s lives, homes, residential developments, farming operations, and businesses.

## **II. Oronoco’s Participation in Creating the Extensive Record Before the ALJ.**

Throughout the contested-case proceeding, Oronoco was responsible for providing testimony from multiple witnesses during three days of public hearings in Plainview, Pine Island, and Cannon Falls. Many of Oronoco’s residents also submitted comments and attended public comment and scoping meetings on the draft Environmental Impact Statement (“EIS”). Overall, the ALJ presided over six public comment meetings on the draft EIS, attended by approximately 350-400 people, who provided about 300 comment letters. There were also six scoping meetings attended by approximately 350 people who supplied about 250 written comments. (See Hr’g Tr., 8-10.) Oronoco submitted written comments from its engineer, Jeff Broberg, to the draft EIS.

Oronoco also offered numerous exhibits and submitted extensive written and oral expert testimony from two expert witnesses during the four-day contested-case evidentiary hearings before the ALJ. Those evidentiary hearings total 635 pages of testimony and 112 exhibits, consisting of thousands of pages. The Final Environmental Impact Statement (“FEIS”) alone consisted of 203 double-sided pages, together with hundreds of pages of appendices and maps. Upon the conclusion of the evidentiary hearings, Oronoco and the other formal parties submitted hundreds of pages of arguments and proposed findings for the ALJ’s review and consideration.

In contrast, the Power Dam Group did not participate in any evidentiary hearings and did not provide any witnesses, testimony, exhibits, or written submissions to the ALJ.

### **III. The ALJ’s Recommendation of the Power Dam Route.**

After considering the extensive record, on February 8, 2012, the ALJ issued her Recommendation. The ALJ agreed with Oronoco and decided not to place the final route for the 345kV transmission line along the White Bridge Route in Segment 3. Instead, the ALJ recommended that the Commission select the Power Dam Route, since this route “satisf[ie]d nonproliferation requirements but balance[d] competing land uses and minimize[d] human and environmental impacts.” (Recommendation, ¶ 490.) The ALJ’s Recommendation was 93 pages long and consisted of 490 individual findings of fact and 14 conclusions of law. The Recommendation also contained 571 footnote citations to the record, including exhibits and testimony, which supported the Recommendation that the Project cross the Zumbro River on the Power Dam Route. After receiving the ALJ’s Recommendation, three formal parties, Xcel, the North Route Group, and the Department, filed various exceptions. However, none of those exceptions challenged the ALJ’s Recommendation of the Power Dam Route in Segment 3.

#### **IV. The Commission Meeting and Order.**

On March 30, 2012, the Commission gave formal notice (“Notice”) of its April 12, 2012 meeting to decide whether to issue a route permit for the Project. The Notice stated that the Commission would hear oral argument from the formal parties and limited public comment. The Notice specifically provided, “Summary public comments will be heard following oral arguments. . . . Persons associated with one of the formal parties . . . should expect their positions will be presented during earlier oral argument by their representative.” (Notice, p. 3.) In reliance on the Notice, Oronoco believed that its residents would not be allowed to provide individual comments at the Commission meeting, since it was a formal party to the proceeding and its attorney would be participating in oral argument. Oronoco’s belief was reinforced at the Commission meeting by Commission Chair Reha, who stated that the Commission “would hear some summary, limited comment, from persons not affiliated with one of the formal parties in this matter.” (Hr’g Tr., 83:9-11.)

After the formal parties, including Oronoco, had made their oral arguments to the Commission, the Commission received testimony from the Power Dam Group, which was comprised of only four people, two of whom are married to each other: Anna and Merl Norman, Steve Walker, and Kevin Kautz. (*Id.* at 93, 97, 100, 130.) The Power Dam Group had not intervened in the contested-case proceeding, had no presence at the evidentiary hearings before the ALJ, and had not filed any exceptions to the ALJ’s Recommendation.<sup>2</sup> However, at the last possible moment in the contested-case proceeding, the Power Dam Group argued that the

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<sup>2</sup> Members of the Power Dam Group did participate in one or more of the three days of public hearings in Plainview, Pine Island and Cannon Falls, and their concerns were part of the record that was considered by the ALJ. (The poem “Trees,” which was read by Merl Norman at the April 12, 2012 Commission meeting, was already in the record.)

Commission should reject the Power Dam Route because of the alleged impacts the Project would have on trees and camps east of the Zumbro Dam, recreation on the Zumbro Dam, and biodiversity and natural resources at the Zumbro Dam crossing itself.

The Commission ultimately was persuaded by the testimony from the four people comprising the Power Dam Group and selected the White Bridge Route as the final route for the Project in Segment 3. Commissioner Boyd vocalized two reasons for the Commission's decision at the April 12, 2012 Commission meeting: (1) the existing corridor on the White Bridge Route was more substantial than that on the Power Dam Route; and (2) there would be greater impacts to biodiversity on the Power Dam Route. (Hr'g Tr., 184:17-22.)

Since the Power Dam Group did not file exceptions to the ALJ's Recommendation, the residents of Oronoco could not have anticipated either the Power Dam Group's presence at the April 12, 2012 Commission meeting or its late evidence, which turned out to be false and misleading. Hundreds of residents of Oronoco who participated throughout this lengthy process were left without the ability to respond, rebut, or correct the false statements made by the Power Dam Group on April 12, 2012.

On May 30, 2012, the Commission issued its Order, citing three reasons for its selection of the White Bridge Route over the Power Dam Route: (1) the Power Dam Route will require more deforestation and clearing than the White Bridge Route, which will significantly impact natural resources and biodiversity on the Power Dam Route; (2) "non-commercial" recreational resources, including a campground and two summer camps, will be impacted on the Power Dam Route; and (3) the White Bridge Route more closely adheres to the statutory objective of using existing highway right-of-way, since there is no existing high-voltage transmission line route or

parallel existing highway right-of-way on the Power Dam Route.<sup>3</sup>

### **STANDARD OF REVIEW**

The Commission has established standards in determining whether to reconsider its orders under Minn. R. 7829.3000, subp. 1. To persuade the Commission to reconsider an order, the petitioner must show:

1. a new issue requiring development;
2. new and relevant evidence;
3. errors or ambiguities in the original order; or
4. persuasive arguments that the Commission should rethink its original decision.

In the Matter of the Application of CenterPoint Energy for Authority to Increase Natural Gas Rates in Minn., Docket No. G-008/GR-05-1380, Order Denying Reconsideration, p. 2, (Minn. Pub. Utils. Comm’n Jan. 22, 2007).

Oronoco meets each of the four independent grounds above. First, at the April 12, 2012 Commission meeting, the Power Dam Group presented new testimony, not a part of the record before the ALJ, regarding alleged impacts to trees, biodiversity, and natural resources on the Power Dam Route, recreation at the Power Dam, and the absence of an aerial crossing at the dam itself. While the Commission’s Order does not mention the Power Dam Group or the specific testimony it provided, it is clear the Power Dam Group influenced the Commission’s Order, since the Order cites the same issues raised by the Power Dam Group—not otherwise supported in the record—to justify its selection of the White Bridge Route over the Power Dam Route. As

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<sup>3</sup> The Commission also noted the number of homes and the number of archaeological and historic sites along the Power Dam Route and the White Bridge Route, but found that these impacts on the two routes were nearly equivalent. (Order, p. 12.) As explained below, Oronoco asserts that five times as many homes are located on the White Bridge Route than on the Power Dam Route. (Testimony and Exhibits of Jeffrey S. Broberg, Ex. 1 (June 19, 2012) (“Broberg Test.”); infra p. 18.) Thus, the impacts to homes along the two routes are not equivalent.

described below, during deliberations, two Commissioners specifically expressed concerns about the Power Dam Route because of the information presented by the four people comprising the Power Dam Group. (See infra pp. 21-22.)

Second, the hundreds of residents of Oronoco must be afforded an opportunity to “develop” these “new issues” and provide “new and relevant evidence” to address the Power Dam Group’s false assertions. Third, the counter-evidence Oronoco offers so undercuts the Power Dam Group’s assertions as to create an “error” in the Commission’s Order that must be corrected, given that the Commission’s decision was significantly based upon information from the Power Dam Group that was false and misleading. Finally, the residents of Oronoco submit such persuasive arguments below “that the Commission should rethink its original decision” regarding the final route for Segment 3 and the Commission’s interpretation of Minn. Stat. § 14.61, subd. 2, since it received new evidence at the April 12, 2012 meeting.

The Commission’s receipt of new evidence creates a dilemma for any party who has properly participated in the process according to the established rules. **Are parties required to arrive at a PUC meeting armed with additional evidence and witnesses or rebuttal evidence (beyond the established, closed record) on the chance a non-party will appear and introduce new evidence at that PUC meeting?** The residents of Oronoco respectfully assert that such a posture exceeds the scope of Minn. Stat. § 14.61, subd. 2. If, indeed, the Legislature had intended the evidentiary record to remain open after an administrative hearing through the process of “oral argument” to the Commission, then it is fundamental to due process that the residents of Oronoco be afforded an opportunity they did not have at the April 12, 2012 Commission meeting—to present, in person, rebuttal evidence and argument in support of the selection of the Power Dam Route.



This due process can only be provided with a reconsideration of the Commission's Order, and a "rehearing, amendment, vacation," or "reargument" of that Order. Such action is now necessary to meet fundamental requirements of due process on this very important decision affecting the lives and property of hundreds of Oronoco residents, residential developments, farming operations, and businesses.

### **ARGUMENT**

#### **I. ORONOCO'S PETITION FOR RECONSIDERATION SHOULD BE GRANTED BECAUSE THE COMMISSION'S ORDER IS BASED ON ISSUES THAT HAVE NOT BEEN FULLY DEVELOPED, AND THE ORDER CONTAINS FACTUAL ERRORS.**

The Order states three<sup>4</sup> reasons supporting the Commission's rejection of the ALJ's and Department-supported Recommendation of the Power Dam Route in favor of the White Bridge Route: (1) the deforestation of trees in the area immediately east of the dam and the resulting effects on natural resources and biodiversity on the Power Dam Route; (2) the impact on recreation on the Power Dam Route; and (3) the existing highway right-of-way on the White Bridge Route. Each of these issues was addressed by the Power Dam Group at the April 12, 2012 Commission meeting, but Oronoco had no opportunity to respond to the Power Dam Group, rebut the Power Dam Group's false and misleading testimony, or develop the record further.

If given the opportunity to fully develop the record, in response to the Power Dam Group's assertions, Oronoco can show that the alleged deforestation and impacts to biodiversity and natural resources on the Power Dam Route can be almost entirely avoided by shifting the

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<sup>4</sup> The Commission actually references five reasons in support of its Order, but concludes the second and fourth reasons did not assist in its decision. Oronoco contends issue number two, impacts on homes, does matter when looking at homes within the 1,000-foot corridor. (See Broberg Test., Ex 1; *infra* p. 18.) Oronoco agrees that the fourth issue, regarding the number of archeological and historic sites along both routes, is a wash.

alignment of the Project slightly to the north, as proposed by Xcel at the April 14, 2012 meeting. Additionally, Oronoco can show that the negative impacts to recreation will be much greater on the White Bridge Route than on the Power Dam Route. Finally, Oronoco can show that the Commission's finding that the Project uses existing highway right-of-way on the White Bridge Route **is factually incorrect**.<sup>5</sup> (See Broberg Test., Ex. 2.) In order to fully develop the record and to correct any factual errors in its Order, the Commission should grant Oronoco's Petition.

**A. The Alleged Deforestation and Impacts to Biodiversity and Natural Resources on the Power Dam Route can be Avoided Through Micro-Siting.**

In its Order, the Commission found that the Power Dam Route would impact more natural resources and require more deforestation and clearing than the White Bridge Route. (Order, p. 12.) However, the Power Dam Group provided false and misleading information to the Commission in this regard. At the Commission meeting, Merl Norman, one of the members of the Power Dam Group, provided testimony. Interestingly, Mr. Norman did not identify himself as a Wabasha County Commissioner or owner of other land impacted by the Power Dam Route just to the east of the Woodland Camp.<sup>6</sup> He identified himself as the former owner and present operator of the Woodland Camp near the Power Dam Route. He implied that the transmission line will destroy the isolation and serenity of the forest and wildlife habitat at Woodland Camp. (Hr'g Tr., 97:21-98:5.) Mr. Norman testified that the transmission lines would be "devastating" to the area. (Id. at 98:21-22.)

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<sup>5</sup> This misunderstanding is likely based on the Department staff's assertion that this route would follow White Bridge Road. (Hr'g Tr., 14:6.) Presumably, the Department staff meant that the route would run parallel to White Bridge Road, which it does, but at about a quarter-mile distance. The route never runs within, or even close to, the highway right-of-way. (See Broberg Test., Ex. 2.)

<sup>6</sup> Woodland Camp is marked as "Laymen for Christ Camp" on Exhibit 5 attached hereto.

Contrary to Mr. Norman's testimony, the alleged damage to trees and forests at the crossing of the Power Dam is minimal. To the west of the Power Dam, trees have already been cleared to accommodate the existing power line. Since the Project is following this existing power line infrastructure, few if any additional trees will need to be cleared. (See Broberg Test., Ex. 3 (showing tree clearing to the west of the dam and existing power line).)

It is noteworthy that no one from Camp Victory, the second camp referenced, objected to the ALJ's Recommendation. However, Xcel's engineer, Thomas Hillstrom, spoke of Camp Victory at the Commission meeting:

We do have another landowner to the north, or to the left of this picture, which is another youth camp. But as far as we know this area of the -- of the Victory Camp is not designated for any specific use. It seems that it's woodland and so we wouldn't be affecting a particularly prescribed use in that area and we could stay away from the Normans' buildings.

And, again, we'd be downhill a bit from the Woodland Camp, staying to the left of the purple bluff we could, you know, follow the purple line here or, again, we've got a property boundary to the left and somewhere within that area we could site a line that would do the best to minimize the impacts to both landowners on either side of it.

(Hr'g Tr., 143:20-144:10.)

The Commission, perhaps not being familiar with the geographic area, refers to a campground in its Order. (See Order, p. 12.) That campground is on the west side of the Zumbro River, in the shadow of the dam itself, and is already encumbered by the existing transmission lines.

To the east of the Power Dam, Xcel and the DNR both testified at the April 12, 2012 Commission meeting that potential damages to trees and the forest could be mitigated by micro-siting the line to the north of its original position in a relatively flat area. (See Broberg Test., Ex.

4, Ex. 5 (showing Xcel's proposed alignment shift).) In response to Commissioner Wergin's question about micro-siting, Mr. Hillstrom of Xcel, testified:

MR. HILLSTROM: . . . First of all is the engineering constraints at the dam. That would likely push us about, oh, 100 to 200 feet to the north, or to the left of the picture as we're showing it. And if you followed that alignment a couple hundred feet to the left of the purple line, it brings you through the City of Rochester land, through this relatively flat land at the bottom of the bluffs –

COMMISSIONER WERGIN: And how has the City of Rochester responded to hearing this?

MR. HILLSTROM: Well, the City of Rochester, in the form of Rochester Public Utilities, is a partner in the CapX entity.

COMMISSIONER WERGIN: That's right. Thank you.

MR. HILLSTROM : And they've been right along with the engineering.

And then when you get to the point at the base of this bluff, again, I'll remind you that the high quality forest is on this north-facing slope in this area. So what we have proposed to do is, you have to go up this bluff eventually, and we will need to cut 150 feet of right-of-way through that bluff, but by staying farther to the north we stay away from the dam, we can stay away from the high quality forest as much as possible[.]

(Hr'g Tr., 142:14-143:14.)

By shifting the alignment, as Xcel has proposed, and placing poles to minimize impacts, the alleged negative impact to trees and forests can be almost completely avoided. If micro-sited in the manner suggested by Xcel, the Project will not even touch the Woodland Camp property. (See Broberg Test., Ex. 5 (showing the Power Dam Route does not cross the property marked "Laymen for Christ Camp").) In fact, it is likely the Project will not even be visible from most of the Woodland Camp itself, since it will be located away from the camp buildings on the opposite side of a large tree-covered ridge.

With respect to the Power Dam Group's claimed negative impacts on biodiversity and natural resources, neither of those issues should be considered outcome-determinative. The

Commission should take all of the factors in Minn. Stat. § 216E.03, Minn. R. 7850.4000, and 7840.4100 into account when rendering its decision on the final route, just as the ALJ did. Additionally, the Power Dam Group's focus on trees and biodiversity at only the river crossing on the Power Dam Route is insufficient. Not surprisingly, the Power Dam Group completely failed to mention that trees are also impacted on the White Bridge Route. (See Broberg Test., Ex. 6, Ex. 7 (showing impacted trees on the White Bridge Route); Ex. 8 (showing the impact on the moderate biodiversity area at White Bridge).) The woods and biodiversity affected along the totality of the 42.92-mile Power Dam Route and the 44.74-mile White Bridge Route, and not simply in the immediate area of the two river crossings, should be taken into account, as was done by the ALJ in her Recommendation.

When both of the entire routes are examined, the White Bridge Route has 348.5 acres of biodiversity ranked "outstanding," "high," and "moderate," compared to 334.8 acres in the same categories along the Power Dam Route. (See Final EIS, Segment 3 MCBS, Appendix J.) These acres are located in just 11 sites on the Power Dam Route, compared to 15 sites on the White Bridge Route. (Id.) That is why it is vital that the Commission examine the routes in their entirety, as the ALJ did, and not just the area immediately around the crossings, as the Power Dam Group did. Focusing only on the river crossings does not meet the statutory criteria.

Unlike the Power Dam Group, the residents of Oronoco have offered evidence relevant to both the Power Dam Route and the White Bridge Route during the evidentiary hearings, and such evidence has been subject to cross-examination and rebuttal by the parties and consideration (and ultimate acceptance) by the ALJ. (See Recommendation, p. 5, 71-92.) The Power Dam Group's late-offered testimony should be subject to the same standard, and Oronoco

should be allowed to rebut and correct the false testimony with respect to the Power Dam Group's claims.

**B. The Negative Impacts to Recreation are Greater on the White Bridge Route Than the Power Dam Route.**

The Commission based its selection of the White Bridge Route, in part, on its concern that recreation would be greatly impacted on the Power Dam Route. In fact, the impacts to recreation on the Power Dam Route will be minimal. The Commission expressed concern over the impacts to a campground and two summer camps, but as discussed immediately above in Section I(A), by micro-siting and shifting the Project alignment as proposed by Xcel, these impacts can be avoided.

The Power Dam Group also provided false and misleading testimony to the Commission regarding the alleged impacts to recreation on the Power Dam Route and the White Bridge Route. Steve Walker, Zumbro Township Supervisor, inaccurately testified that more people use the Zumbro Dam on the Power Dam Route for recreational purposes than they do Lake Zumbro on the White Bridge Route. Mr. Walker claimed this was because Lake Zumbro is no more than a “trickle” on the White Bridge Route and is “inundated with mud.” (Hr’g Tr., 101:7-9.)

In fact, Lake Zumbro is a far cry from a “trickle.” (See Broberg Test., Ex. 7 (photo of Lake Zumbro).)<sup>7</sup> Its usable width spans approximately 775 feet from bluff to bluff, in comparison to the 140-foot usable width of the Zumbro River just north of the Power Dam.<sup>8</sup> (See id. at Ex. 4 (showing 140-foot usable width of the Zumbro River); Ex. 9 (showing 775-foot usable width of Lake Zumbro).) Mr. Walker’s testimony is also completely contrary to the

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<sup>7</sup> Exhibit 7 is actually taken on the south side of the White Bridge where Lake Zumbro is not as wide as on the north side where the actual line would be placed. (See also Broberg Test., Ex. 9.)

<sup>8</sup> The area of the Zumbro River immediately north of the Power Dam is not usable for recreational purposes because of spilloff from the dam itself.

evidence provided by Oronoco's expert, Jeff Broberg, in both his written and oral testimony during the hearings before the ALJ. As Mr. Broberg testified, recreational activities abound at Lake Zumbro, on the White Bridge Route, since it is the only recreational lake in Olmsted County that allows motorized boat usage with gasoline engines. This allows water skiing and jet skiing, as well as other forms of recreational activities, such as swimming, kayaking, canoeing, and fishing. (Surrebuttal Test. & Exs. of Jeffrey S. Broberg, Docket No. E002/TL-09-1448 at Doc. ID 20116-63258-03, 4:9-6:11 (June 3, 2011).) In the area immediately to the north of the Power Dam, where the transmission line will cross, motorized boat usage is not allowed, which severely limits the use of that area for recreational activities. As Commissioner O'Brien noted at the April 12, 2012 Commission meeting, with the agreement of Commissioner Reha:

COMMISSIONER O'BRIEN: I'll have this observation, that it's been my experience that there's less recreational area above a dam than below it.

CHAIR REHA: I think you're right.

COMMISSIONER O'BRIEN: So there is less recreational area along dams than there are along bridges. It's a matter of a common sense observation.

(Hr'g Tr., 173:2-10.) Commissioner O'Brien is exactly right. As Oronoco has shown, less recreation occurs at the Power Dam, where just canoeing is allowed, than on Lake Zumbro at the White Bridge, where recreation abounds and where motorized boat usage is allowed.

As additional support for the intensity of recreational activities on Lake Zumbro at White Bridge, the 2007 DNR Division of Fish and Wildlife Lake Zumbro and Lower Zumbro River Creel Survey ("Survey"), which showed that the fishing pressure on Lake Zumbro at White Bridge is greater than it is on the Zumbro River near the Power Dam by a measure of 30,470 angling hours to 1,673 angling hours. (See Hr'g Ex. 68 at Ex. 5; Hr'g Ex. 69 at pp. 4-6.) Thus, there is 18 times more fishing done on the White Bridge Route than the Power Dam Route.

C. **The Project does not use Existing Highway Right-of-Way on the White Bridge Route.**

The Commission's Order states: "[T]he White Bridge Road Crossing along County Road 12 more closely adheres to the statutory objective of using existing highway right-of-way." (Order, p. 11.) **This statement is factually incorrect.** The White Bridge Route does not follow White Bridge Road as it travels east toward the river. (See Broberg Test., Ex. 2.) In fact, **the White Bridge Route never shares White Bridge Road right-of-way**, and instead, simply crosses that road twice. Clearly, this reliance on highway right-of-way was an important consideration for the Commission, but it is based on incorrect information, as the White Bridge Route never uses the right-of-way of White Bridge Road, which is a small two-lane road.

The White Bridge Route in relation to White Bridge Road is shown on Sheet Map 10 of 19, which accompanied the Commission's Order. As shown on Sheet Map 10, the White Bridge Route is initially about 1,300 feet (about ¼ mile) north of White Bridge Road. Then, it turns south, crosses White Bridge Road, and turns east again about 1,300 feet south of White Bridge Road. On Sheet Map 11 of 19, the line jogs north and crosses White Bridge Road for the second (and final) time,<sup>9</sup> jogs east to cross Lake Zumbro several hundred feet north of the White Bridge, then jogs even farther north before turning east and being located about 2,500 feet (about one-half a mile) north of White Bridge Road. At no point in the White Bridge Route's easterly journey does the transmission line run within the right-of-way of White Bridge Road, and it does not cross Lake Zumbro at the White Bridge. (See id.)

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<sup>9</sup> See Ex. 2; Ex. 9.



**II. ORONOCO CAN PRESENT NEW AND RELEVANT EVIDENCE THAT DAMAGE WILL OCCUR TO ITS PEOPLE, HOMES, RESIDENTIAL DEVELOPMENTS, FARMING OPERATIONS, AND BUSINESSES IF THE WHITE BRIDGE ROUTE IS SELECTED AS THE FINAL ROUTE FOR THE PROJECT.**

If the Commission chooses not to vacate its Order and accept the ALJ's Recommendation of the Power Dam Route, then, to be fair, the hundreds of people of Oronoco should be given the same opportunity the four people comprising the Power Dam Group were given to testify before the Commission itself about the devastating impacts the transmission line will have on their lives, homes, residential developments, farming operations, and businesses. The last-minute, unsubstantiated, false, and misleading comments made by the Power Dam Group can be rebutted, and it was unfair that the residents of Oronoco have not had the opportunity to do so.

Pursuant to Minn. Stat. § 14.61, the residents of Oronoco understood that the evidentiary record was closed, since the statutory deadline for filing exceptions to the ALJ's Recommendation of the Power Dam Route had expired.<sup>10</sup> At the Commission meeting on April 12, 2012, the residents of Oronoco did not expect any new statements or challenges to the ALJ's Recommendation, since no exceptions were filed to the recommended Power Dam Route in Segment 3.<sup>11</sup> Additionally, the residents of Oronoco did not understand they had the opportunity to speak during the public comment portion of the Commission meeting (if indeed they did), since the March 30, 2012 Notice of Commission Meeting specifically provided that, "Persons associated with one of the formal parties . . . should expect their positions will be presented during earlier oral argument by their representative." (Notice of Comm'n Mtg., Docket No.

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<sup>10</sup> The ALJ actually closed the time for public comment on June 30, 2011, after the conclusion of the contested hearing.

<sup>11</sup> There were exceptions filed to the ALJ's Recommendation of the route at Cannon Falls, and thus, the public was on notice that the Cannon Falls route was on the table to be discussed at the April 12, 2012 Commission meeting.

E002/TL-09-1448 at Submission No. 20123-73137 (Mar. 30, 2012).) Commission Chair Reha reiterated this point at the Commission meeting by stating that the Commission “would hear some summary, limited comment, from persons not affiliated with one of the formal parties in this matter.” (Hr’g Tr., 83:9-11.) Had the residents of Oronoco understood that the record was still open (if indeed it legally was) and they had the opportunity to speak, they would have continued to present testimony and evidence at the Commission meeting, just as they did before and during the lengthy administrative hearings before the ALJ.

Specifically, the residents of Oronoco would have presented evidence and testimony that, with a much higher population density on the White Bridge Route, there is greater concern for a larger number of residents with respect to the issues of stray voltage and electromagnetic fields (“EMF”), and the resulting negative health effects on humans and animals alike. As evidence of the fact that there is a higher population density on the White Bridge Route than the Power Dam Route, from the split off of the Project from Highway 52 to the east bank side of Lake Zumbro/Zumbro River, there are 31 year-round existing homesteads and farming operations located within 1,000 feet<sup>12</sup> of the centerline of the White Bridge Route, but only 6 homesteads or farming operations within 1,000 feet of the centerline of the Power Dam Route. (See Broberg Test., Ex. 1 (showing number of residences along the Power Dam Route and the White Bridge Route).) One of the homes located on the White Bridge Route is a day care center with many young children, who could suffer negative health effects living near EMF along that route. This evidence and testimony is somewhat set forth in the record already, and additional testimony or affidavits from families with young children can be provided.

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<sup>12</sup> The ALJ and the Commission only considered the number of homes impacted within 300 feet and 500 feet of the proposed placement of the transmission line. (Order, p. 12.)

**III. THE COMMISSION SHOULD RETHINK ITS ORIGINAL DECISION BECAUSE ITS CONSIDERATION OF THE POWER DAM GROUP'S NON-RECORD EVIDENCE, WITHOUT HEARING REBUTTAL FROM ORONOCO, RESULTS IN AN UNFAIR PROCESS.**

The siting of high-voltage transmission lines in Minnesota is subject to a specific administrative process, which includes an extensive effort to collect information, take testimony, receive documents, and understand and comprehend the nature and impact of all of the available route options. The requirements of both Minnesota Statutes and Minnesota Rules with regard to siting a transmission line such as this were considered and addressed in total by the ALJ throughout the contested-case proceeding.

The ALJ heard and considered extensive testimony and evidence in the record, (including prior statements from members of the Power Dam Group), took into account all of the route criteria set forth in Minn. Stat. § 216E.03, subd. 7, and Minn. R. 7850.4000 and 7850.4100. She selected the Power Dam Route in Segment 3 because it best “satisf[ied] nonproliferation requirements but balance[d] competing land uses and minimize[d] impacts to the environment.” (Recommendation, p. 91.)

In making its Order, the Commission was misled by false statements that were made outside the record by the four members comprising the Power Dam Group and focused the Commission’s attention on just the two river crossings and not the routes as a whole. As a result, the Commission considered only three issues: (1) the loss of trees just east of the Power Dam and the resulting effects on biodiversity and natural resources; (2) the impacts to recreation near the Power Dam; and (3) the existing infrastructure at the Power Dam and White Bridge. However, the Commission should have considered the impacts along the entire lengths of the routes and considered all of the statutory factors in Minn. Stat. § 216E.03, Minn. R. 7850.4000, and 7840.4100 when selecting the final route.

As a matter of Minnesota law, the Commission should not base its decision on non-record evidence, and as a result, it will hopefully reconsider its Order. If the Commission chooses to consider the false and misleading last-minute evidence introduced by the Power Dam Group, it should at least re-open the record in order to give the residents of Oronoco, as well as other parties, a full and fair opportunity to respond, more fully develop the record, and be heard. Given the importance of this matter and the impact on the residents and properties of Oronoco, refusal to afford those residents the process to which they are entitled would leave them with no option but appeal.

**A. The Commission Should not Base its Order on the Power Dam Group's Testimony.**

The evidence regarding the loss of trees just east of the Power Dam and the resulting effects on biodiversity and natural resources, the impacts to recreation near the Power Dam, and the existing infrastructure at the Power Dam and the White Bridge was presented by the Power Dam Group after the record had closed and should not have been considered by the Commission.

Minn. Stat. § 14.61 provides:

**14.61 Final Decision in Contested Case.**

Subdivision 1. **Filing of exceptions.** In all contested cases the decision of the officials of the agency who are to render the final decision shall not be made until the report of the administrative law judge as required by sections 14.48 to 14.56, has been made available to parties to the proceeding for at least ten days and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to a majority of the officials who are to render the decision. This section does not apply to a contested case under which the report or order of the administrative law judge constitutes the final decision in the case.

Subdivision 2. **Closure of record.** In all contested cases where officials of the agency render the final decision, the contested case record must close upon the filing of any exceptions to the report and presentation of argument under subdivision 1 or upon expiration of the deadline for doing so. The agency shall notify the parties and the presiding administrative law judge of the date when the

hearing record closed. In all contested cases where the report or order of the administrative law judge constitutes the final decision in the case, the hearing record must close as ordered in writing by the presiding administrative law judge.

(emphasis added). Pursuant to Minn. Stat. § 14.61, subd. 2, the record must close upon the expiration of the deadline for filing exceptions. In this case, the record closed on February 28, 2012, which was 20 days after the filing of the ALJ's Recommendation on February 8, 2012. See Minn. R. 7829.2700, subp. 1 ("[P]arties shall file and serve on the other parties any exceptions to the administrative law judge's report within 20 days of its filing."). No exceptions were filed to the ALJ's Recommendation that the Project follow the Power Dam Route in Segment 3.

Section 14.60, subd. 2, specifically defines what constitutes record evidence:

Subd. 2. **Made part of the record.** All evidence, including records and documents containing information classified by law as not public, in the possession of the agency of which it desires to avail itself or which is offered into evidence by a party to a contested case proceeding, shall be made a part of the hearing record of the case. No factual information or evidence shall be considered in the determination of the case unless it is part of the record.

(emphasis added).

By statutory mandate, the Commission should not have considered any of the Power Dam Group's non-record, false, and misleading statements. However, deliberation statements made by the Commission clearly indicate that is exactly what occurred. As Chair Reha stated:

But I'm concerned about some of the testimony that was presented here, in terms of the camps in the area and the virgin hardwood forest and the bluffs that are involved with the easterly portion of the dam site. . . . There were no exceptions filed to the dam crossing, but we certainly heard a lot of objection today from members of the public.

(Hr'g Tr., 167:12-19; 167:25-168:2.)

While the parties were allowed to argue about existing evidence in the record at the meeting before the Commission on April 12, 2012, the Power Dam Group should not have been

allowed to supplement or expand the record, when the residents of Oronoco were told they could not do so. Indeed, the Court of Appeals has held that the record cannot be supplemented with additional information once exceptions have been filed. See In the Matter of Determining the Natural Ordinary High Water Level of Lake Pulaski, 384 N.W.2d 510, 515 (Minn. App. 1986) (finding the DNR did not err in refusing to allow a party to provide additional information after it had filed written exceptions to the administrative law judge's report). The Court ruled:

All evidence to be considered must be in the record maintained by the administrative law judge. See Minn. R. 1400.7400, subp. 1 (1983). Factual information or evidence which is not part of the record may not be considered by either the administrative law judge or the agency when making its decision. Minn. R. 1400.8100, subp. 1 (1983). Thus, a request to provide additional information was inappropriate and the Commissioner was not obligated to respond to it.

Id. (emphasis added).

The Commission should not have considered, much less substantially based its decision on,<sup>13</sup> the false and misleading statements introduced at the Commission meeting by the Power Dam Group. This violates Minn. Stat. § 14.60. See In the Matter of the Application of Northern States Power Company for Authority to Increase its Rates of Electric Services in Minn., 440 N.W.2d 138 (Minn. App. 1989) (finding that Commission erred by basing its decision upon a study that was not made a part of the record in the contested-case proceedings).

The residents of Oronoco respectfully request that the Commission reconsider its Order, exclude any non-record evidence, and approve and adopt the ALJ's Recommendation of the

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<sup>13</sup> During deliberations, Commission Chair Reha noted that no exceptions had been filed to the ALJ's Recommendation of the Power Dam Route, but expressed her concerns about the Power Dam Group's testimony regarding the alleged impacts to camps, forests, and bluffs along the Power Dam Route. (Hr'g Tr., 167:12-19; 167:25-168:2.) In response, Commissioner O'Brien noted that he would rather defer to the Department's recommendation of the Power Dam Route, since the Department had "thought about it," but he would not "do three-one on it, . . . if everybody else want[ed] to go across the bridge" on the White Bridge Route. (Id. at 169:6-13.).

Power Dam Route in Segment 3, as supported by the parties and the Department.

**B. Oronoco will be Deprived of Due Process if it is not Afforded an Opportunity to Respond to the Power Dam Group.**

Alternatively, if the Commission receives the Power Dam Group's statements, as evidence, the Commission should re-open the record and provide all the parties with an opportunity for rebuttal. As the United States Supreme Court stated in Morgan v. United States, 304 U.S. 1, 58 S. Ct. 773, 82 L. Ed. 1129 (1938):

The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.

Id. at 18-19, 58 S. Ct. at 776.

If the Commission chooses not to vacate its Order based on this Petition, it should at least be fair to the residents of Oronoco and the other parties and give them the opportunity to be heard directly by the Commission, just as the four people who constitute the Power Dam Group were allowed to do. Failing to do so would essentially encourage parties to present false and misleading information in a surprise, last-minute effort at oral argument to sway the Commission. The Commission should not allow this precedent to stand, since it will encourage this approach by parties and non-parties in the future. Allowing this precedent would likely guarantee this will happen to the Commission again and again.

**CONCLUSION**

The residents of Oronoco respectfully request that the Commission review the evidence in the record, exclude any non-record evidence, and reconsider its Order by selecting the Power

Dam Route as the final route for the Project, as recommended by the ALJ and supported by the Department and the parties.

In the alternative, and in fairness, the residents of Oronoco respectfully request that the Commission allow a rehearing on the route that best satisfies the criteria set forth in Minn. Stat. § 216E.03, subd. 7, and Minn. R. 7850.4000 and 7840.4100, so that the hundreds of residents of Oronoco may have the opportunity to be heard directly by the Commissioners, to rebut the last-minute, false, and misleading testimony presented by the four people comprising the Power Dam Group at the April 12, 2012 Commission meeting, and to further develop the record.

Respectfully submitted,

Dated: June 19, 2012

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