

Minnesota Public Utilities Commission
Staff Briefing Papers

Meeting Date: August 2, 2012. Agenda Item # 4

Company: Northern States Power Company d/b/a Xcel Energy

Docket No. E-002/TL-09-1448

Subject: In the Matter of the Application for a Route Permit for the CapX2020
Hampton-Rochester-LaCrosse High Voltage Transmission Lines.

Issue(s): Should the Commission provide additional guidance in referring the Ex Parte
Complaint to the Office of Administrative Hearings?

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Relevant Documents

Order Granting Route Permit..... May 30, 2012
Laymen and Woodland Ex Parte Complaint June 29, 2012
Oronoco Township Answer to Ex Parte Complaint July 6, 2012
Reply of Laymen and Woodland July 9, 2012

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Statement of the Issues

Should the Commission provide additional guidance in referring the Ex Parte Complaint to the Office of Administrative Hearings?

Procedural Background

On May 31, 2012 the Commission released its *Order Issuing Route Permit as Amended*.

On June 29, 2012 Laymen for Christ and Woodland Camp (LCWC) filed a Complaint of Attempted Indirect Ex Parte Communications of Oronoco Township.

On July 6, 2012 Oronoco Township (Oronoco) filed an answer to the LCWC's ex parte complaint.

On July 9, 2012 LCWC filed a reply.

Laws and Rules

Laws

Minn. Stat. § 216A.037 **Ex Parte Communications; Code of Conduct; Rules.**; requires the Commission to establish rules prescribing permissible and impermissible ex parte communications. Specifically, Minn. Stat. § 216A.037, Subd. 4 provides for a complaint procedure that, in essence, requires that once a complaint of ex parte communication is made, the Commission must refer the matter to the Office of Administrative Hearings for an investigation and report.

Rules

The rules on Commission conduct and communication established in part to address permissible and impermissible ex parte contact are contained in Minn. Rules, Chapter 7845. Specifically, Minn. Rule 7845.7000 defines ex parte communication, Minn. Rule 7845.7200 prescribes the time-frame under which ex parte communications are impermissible and Minn. Rules 7845.7800 directs the Commission to refer an ex parte complaint to the Office of Administrative Hearings for an investigation and report.

Project Background

The Commission released its *Order Issuing Route Permit as Amended* on May 30, 2012. The Commission received two petitions for reconsideration on June 19, 2012. Among the submissions received by the June 29, 2012 comment deadline for responses to the petitions for reconsideration, was a complaint by Laymen for Christ, Inc. and Woodland Camp of ex parte, or attempted ex parte, communication by the Township of Oronoco. Oronoco Township filed a reply to the complaint on July 6, 2012 and LCWC filed a retort to Oronoco on July 9, 2012.

Ex Parte Complaint and Replies

Laymen for Christ, Inc. and Woodland Camp

Laymen for Christ, Inc. and Woodland Camp (LCWC) filed a complaint with the Commission alleging that Oronoco Township solicited impermissible ex parte contact regarding the reconsideration of the Commission's decision designating a route and granting a route permit for the Hampton –Rochester–LaCrosse transmission lines. The solicitation or encouragement to contact the Commissioners directly was observed in published statements apparently made at an Oronoco Township Planning Commission meeting. These comments apparently encouraged the Oronoco Community to contact Commissioners directly and gave contact information regarding three of the PUC Commissioners involved in the original decision.

LCWC indicated that the Township, in part, may not have been fully aware of the ex parte restrictions with respect to Commission decision making process. LCWC asserted, therefore, that the following sanctions should be appropriate to educate the Township on the ex parte rules and to prevent any advantage Oronoco seek through these efforts:

1. Disclosure and filing in eDockets of any and all ex parte staff and/or Commissioner reports, memos, or emails regarding Oronoco Township direct and/or indirect ex parte contact in this docket, to be filed in eDockets with "Ex Parte Contact" identification in the area for document name;
2. Declaratory Order that Oronoco Township, the Oronoco Township Planning Advisory Commission, and OPAC member Javon Bea have violated the statutory and regulatory ex parte provisions; and
3. Order that communications to the Public Utilities Commission by the Oronoco Township Planning Advisory Commission, its individual members, and Oronoco Township residents regarding Reconsideration be stricken from the record, retaining for consideration by the Commission only those legitimate Oronoco Township filings by and through its counsel.
4. Such other sanctions deemed appropriate.

Oronoco Township's Response to Ex Parte Complaint

Oronoco Township (Oronoco, the Township) requested that the Commission strike LCWC's complaint and give it no further consideration. The Township asserted that there is no support in statute or rule for LCWC's assertion of ex parte contact or attempted contact and that the complaint attempts to create a violation of statute which does not even exist.

Oronoco requested that the Commission dismiss the LCWC complaint of an alleged "solicitation" for an "attempt" at improper communication.

Reply of Laymen for Christ, Inc. and Woodland Camp

LCWC indicated that it had proposed less severe sanctions in its complaint in order to allow the Township to become more acquainted with the laws and rules governing ex parte restrictions in Commission decision making processes, and to prevent any advantage that could occur from such efforts. LCWC argued that the Township's Response to the Complaint was instead an attempt to obscure the ex parte statute and rules

Staff Comments

Staff notes that the discussion in this briefing paper is purposely pithy and limited to the issue of the ex parte complaint, and its referral to the Office of Administrative Hearings, only. Staff does not address the issues or merits associated with the reconsideration of the May 30, 2012 Order in this paper in any manner. In addition, given that a referral to the OAH is prescribed by both statute and rule, and the OAH will conduct an investigation, staff does not address the merits of the complaint or the responses to it.

Once an ex parte complaint is filed, the statute does not provide the Commission with discretion in referring the matter to the Office of Administrative Hearings. Minn. Stat. § 216A.037, Subd. 4 (e) states that:

The commission shall refer the complaint and any reply to the Office of Administrative Hearings.

With respect to the "additional guidance" suggested in the 'Statement of the Issues' section of the briefing paper, staff has no specific recommendation but believes items such as the timing or turn-around time for the OAH investigation and report could be considered.

Decision Alternatives

1. Ex Parte Complaint Referral
 - A. Refer the Exparte complaint to the Office of Administrative Hearings.
 - B. Refer the Exparte complaint to the Office of Administrative Hearings with additional suggestions and issues for consideration.

Attachment A

Laws

216A.037 EX PARTE COMMUNICATIONS; CODE OF CONDUCT; RULES.

Subdivision 1. Ex parte communications prohibitions; rules. (a) The commission shall adopt rules under chapter 14 prescribing permissible and impermissible ex parte communications. The ex parte rules may prohibit only ex parte communications, directly or indirectly, between a commissioner and a participant or party under the commission's rules of practice and procedure relating to:

- (1) a material issue during a pending contested case proceeding;
 - (2) a material issue in a rulemaking proceeding after the beginning of commission deliberations;
 - (3) a material issue in a disputed formal petition; and
 - (4) any other communication impermissible by law.
- (b) The commission may apply ex parte prohibitions, prospectively and after notice to affected parties, to other commission proceedings as the commission deems necessary.
- (c) A contested case is pending from the time the commission refers the matter to the Office of Administrative Hearings until the commission has issued its final order, and the time to petition for reconsideration has expired or the commission has issued an order finally disposing an application for reconsideration, whichever is later.

Subd. 2. Conflict-of-interest communications prohibited. A commissioner shall not communicate, directly or indirectly, with a person or entity who is a party to a pending proceeding before the commission regarding past or future benefits or compensation to be received from that person or entity. The commission may dismiss a proceeding if an applicant, petitioner, or complainant violates this subdivision

Subd. 3. Code of conduct rules. Except as limited by subdivision 1, the commission shall adopt rules prescribing a code of conduct for commissioners and employees of the commission. The code of conduct must include standards to preserve the quasi-judicial function of the commission.

Subd. 4. Complaint procedure; hearing; sanctions. (a) Any person seeking sanctions for alleged violations of the rules adopted under this section may file a complaint with the commission.

(b) A complaint seeking sanctions must include the following information: the name and address of the complainant; the name and address of complainant's counsel, if any; the name and address of each person alleged to have violated the ex parte prohibition (respondents); the name and address of each respondent's counsel, if known; the facts constituting the alleged violation; and the sanctions sought by the complainant.

(c) A complaint filed under this section must be filed with the commission and mailed to each respondent, the department, the Office of the Attorney General, and all persons on the

commission's service list for the proceeding.

(d) Within seven days of service of the complaint, a respondent shall file an answer with the commission and serve it on the complainant, the department, the Office of the Attorney General, and all persons on the commission's service list for the proceeding.

(e) The commission shall refer the complaint and any reply to the Office of Administrative Hearings.

(f) The administrative law judge assigned to the ex parte complaint proceeding by the Office of Administrative Hearings shall conduct a hearing investigation and shall issue a report within 30 days after the matter is referred. If the administrative law judge determines that the report cannot be properly completed within that time period, the judge shall report that fact to the commission within the 30-day period and shall file a final report within a reasonable time thereafter, no later than 60 days after the referral to the Office of Administrative Hearings.

(g) The report of the administrative law judge shall describe the relevant facts of the case and shall set forth the judge's findings as to whether ex parte violations occurred. The findings and decisions of the judge as to whether ex parte violations have occurred are binding on the commission. The judge shall also discuss and make recommendations regarding the imposition of sanctions in accordance with paragraph (h). The judge shall include in the report a discussion of the recusal of any commissioner or the removal of decision-making personnel from this case.

(h) In the report under paragraph (g), the administrative law judge may only recommend that the commission impose one of the following sanctions if the judge finds that the condition specified for the sanction is met:

(1) dismiss the proceeding if the prohibited ex parte communication has so prejudiced the proceeding that the commission cannot consider it impartially;

(2) issue an adverse ruling on a pending issue that is the subject of the prohibited ex parte communication if other parties are prejudiced by the prohibited ex parte communication;

(3) strike evidence or pleadings if the evidence or pleadings are tainted by the prohibited ex parte communication; or

(4) issue a public statement of censure, if the prohibited ex parte communication is determined to be part of a continuing pattern of improper ex parte communication or if the prohibited ex parte violation consists of a single prohibited communication and mitigating circumstances exist that:

(i) negate the need for a more severe sanction;

(ii) do not prejudice the proceeding to the extent that the commission is unable to consider it impartially;

(iii) do not prejudice other parties; or

(iv) do not taint the evidence or pleadings.

(i) If the administrative law judge finds the complainant's allegation of an ex parte violation was interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of the proceeding, the judge may recommend that the commission issue an appropriate sanction against the complainant.

Rules

7845.7400 HANDLING PERMISSIBLE EX PARTE COMMUNICATIONS.

Subpart 1. **Documentation.** Documentation is not needed for permissible ex parte communications with commissioners and decision-making personnel except as provided in subparts 2 to 4.

Subp. 2. **Written communications with staff.** Decision-making personnel who receive or generate a permissible written ex parte communication that is prohibited for commissioners under part 7845.7200 shall file a copy of the communication in the commission's public file with a notation of the sender and recipient within 48 hours after the communication is received or generated.

Subp. 3. **Oral communications with staff.** Decision-making personnel who receive or generate a permissible oral ex parte communication that is prohibited for commissioners under part 7845.7200 shall ensure that the substance of the communication and the name of the maker or recipient of the communication is recorded in a signed memorandum to the commission's public file within 48 hours. If a proceeding has been assigned to an administrative law judge, a copy of the memorandum must be sent to the judge.

Subp. 4. **Interim rate proceedings; compliance filings.** Commissioners and decision-making personnel may receive or generate written or oral ex parte communications with a party or participant in the setting of interim rates or the review of compliance filings following the issuance of a final order or order after reconsideration.

Commissioners and decision-making personnel who receive or generate written or oral ex parte communications in these situations shall place a signed note in the commission's public file containing the name of the party or participant, date, docket number of proceeding, and topic as soon as practicable, but no later than the issuance of the interim rate order or the compliance filing order.

Subp. 5. **Informing the public.** The commission shall make information regarding ex parte communications that occur in these situations available to the public upon reasonable request at its office during regular business hours. Most of the statutory considerations for reviewing the need for this project are addressed in the Commission's rules governing the review of generation projects, Minnesota Rules Chapter 7849. Minn. Rules 7849.0120 list the criteria the Commission must consider in granting a certificate of need and read as follows: