

# Minnesota Public Utilities Commission

## Staff Briefing Papers

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Meeting Date: **September 13, 2012** ..... Agenda Item #1\*

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

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

In the Matter of the Route Application for the CapX2020 Hampton-Rochester-La Crosse 345kV Transmission Line

Issue(s): Does the Commission have jurisdiction to take further action regarding the NoCapX2020 Complaint of Conflict of Interest Regarding Barr Engineering?

Staff: Tricia DeBleeckere.....(651) 201-2254

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### Relevant Documents

No CapX 2020 – Other: Conflict of Interest - Barr Engineering..... July 31, 2012

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The attached materials are work papers of the Commission Staff. They are intended for use by the Public Utilities Commission and are based upon information already in the record unless otherwise noted.

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**Issue(s)**

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Does the Commission have jurisdiction to take further action regarding the NoCapX2020 Complaint of Conflict of Interest Regarding Barr Engineering?

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**Background**

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On August 31, 2011 the Department of Commerce issued the CapX Hampton-Rochester-La Crosse 345kV and 161 kV Transmission Line Project Final Environmental Impact Statement.

On May 30, 2012 the Commission issued a Route Permit to Xcel Energy for the Hampton-Rochester-La Crosse High Voltage Transmission Line (La Crosse Project).

On August 14, 2012 the Commission issued its Order Denying Reconsideration regarding their May 30, 2012 decision. The Order was in response to petitions for reconsideration received by Oronoco Township, Cannon Falls Landowners and St. Paul's Lutheran Church and School.

On August 31, 2012, the Commission received a complaint from Carol Overland on behalf of No CapX2020 alleging a conflict of interest regarding Barr Engineering's work conducted on the Draft and Final Environmental Impact Statements issued by the Department of Commerce Energy Facilities Permitting staff.

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**Laws and Rules**

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**7829.1700 FORMAL COMPLAINT.**

**Subpart 1. Content.** A formal complaint 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 respondent; the name and address of respondent's counsel, if known; the statute, rule, tariff, or commission order alleged to have been violated; the facts constituting the alleged violation; and the relief sought by complainant.

**Subp. 2. Mailing and filing.** A formal complaint must be mailed to the respondent, the department, and the Residential Utilities Division of the Office of the Attorney General, as well as filed with the commission.

**7829.1800 INITIAL CONSIDERATION OF FORMAL COMPLAINT.**

**Subpart 1. Initial commission review.** The commission shall review a formal complaint as soon as practicable to determine whether the commission has jurisdiction over the matter and to determine whether there are reasonable grounds to investigate the allegation. On concluding that it lacks jurisdiction or that there is no reasonable basis to investigate the matter, the commission shall dismiss the complaint.

**Subp. 2. Answer.** On concluding that it has jurisdiction over the matter and that investigation is warranted, the commission shall serve the complaint on the respondent, together with an order requiring the respondent to file an answer either stating that it has granted the relief the

complainant requests, or responding to the allegations of the complaint. The answer must be filed with the commission and served on the complainant, the department, and the Residential Utilities Division of the Office of the Attorney General within 20 days of service of the complaint and order.

**Subp. 3. Reply.** Replies are not required unless the answer alleges that respondent has granted the relief sought by complainant. In that case, the complainant shall file a reply within 20 days admitting or denying that relief has been granted. If the complainant fails to file the reply, the commission shall dismiss the complaint. Copies of the reply must be served on respondents, the department, and the Residential Utilities Division of the Office of the Attorney General.

**Subp. 4. Failure to answer.** If the respondent fails to answer a complaint served by the commission under subpart 2, the commission shall consider the allegations of the complaint denied.

Staff includes at the end of this briefing paper the full text of Minnesota Statutes § 216A.035 and § 216A.037 for reference; these statutes address conflicts of interest and ex parte communications. While these statutes are applicable to the Commission generally, staff does not believe these statutes apply to the issues raised within the No CapX 2020 complaint to the Commission.

### ***NoCapX2020 Complaint***

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On August 31, 2012, No CapX 2020 (Complainant) filed with the Commission a complaint regarding the Department of Commerce's (DOC's) contract with Barr Engineering (Barr). The DOC hired Barr to assist in the preparation of a Draft and a Final Environmental Impact Statement for the Hampton-Rochester-La Crosse Transmission Line.

The Complainant believes that a conflict of interest existed in that Barr, in its capacity as an engineering firm, previously worked on projects located within or near contested proposed route locations on the Hampton-Rochester-La Crosse Transmission Line (for clients other than the DOC). The Complainant believes that pertinent information *may* have been knowingly withheld in the Environmental Impact Statement as a result of this conflict as previous clients may have had an interest in the outcomes regarding the Hampton-Rochester-La Crosse Transmission Line.

The Complainant provides a detailed analysis of concerns regarding the content of the EIS and the Administrative Law Judge's Findings of Fact, Conclusions of Law and Recommendation for the Hampton-Rochester-La Crosse Transmission Line. The Complainant notes that most of these issues were raised during the permitting process (via written comments and during public hearings) and should have been corrected prior the Commission's issuance of a Route Permit for this project.

The Complainant requests:

1. Disclosure and correction of errors regarding transmission and lack thereof at the Byllesby and Zumbro dam routes at issue in this proceeding and filed in eDockets.<sup>1</sup>

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<sup>1</sup> Use of 'this proceeding' is assumed to mean the Hampton-Rochester-La Crosse permit process and the associated record.

2. Disclosure of conflicts of interest review performed by Commerce prior to contracting with Barr Engineering for the Hampton-Rochester-La Crosse EIS and filed in eDockets; and
3. Update of conflicts of policy for Commerce contractors; and
4. Commission review of the routing Order in this docket in light of the misinformation regarding transmission near the dams; and
5. Such other sanctions deemed appropriate.

### ***Staff Analysis***

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Staff believes the Commission process in this matter must follow the requirements for a formal complaint, as listed above, in Minnesota Rule 7829.1700 and 7829.1800.

### ***Complaint Completeness***

The formal complaint must be mailed to the proper persons and include the following information pursuant to Minnesota Rule 7829.1700:

	<b>Required Information</b>	<b>Provided in NoCapX2020 Complaint?</b>
1.	The name and address of the complainant;	Yes
2.	The name and address of the complainant's counsel, if any;	Yes
3.	The name and address of the respondent;	Yes
4.	The name and address of the respondent's counsel, if known;	Yes
5.	The statute, rule, tariff, or commission order alleged to have been violated;	No
6.	The facts constituting the alleged violation; and,	No
7.	The relief sought by the complainant.	Yes

Staff believes that the complaint submitted to the Commission is lacking crucial pieces of required information, as noted in the table above. The Complainant does not include *the statute, rule, tariff, or commission order alleged to have been violated*. An allegation of a violation of a specific law must be included in the complaint in order for the Commission to determine whether it has jurisdiction over the complaint and whether the Commission has reasonable ground to investigate.

Staff does not believe that the Commission needs to consider this matter beyond a determination of incompleteness. Staff provides further analysis in the instance the Commission may want to provide more clarity to the Complainant.

### ***Complaint Process***

Once a complete complaint has been served, Minnesota Rule 7829.1800 outlines the process for the Commission to follow.

**Subpart 1. Initial commission review.** The Commission shall review a formal complaint as soon as practicable to determine whether the Commission has jurisdiction over the matter and to determine whether there are reasonable grounds to investigate the allegation. On concluding that it lacks jurisdiction or that there is no reasonable basis to investigate the matter, the commission shall dismiss the complaint.

Staff's further review of the complaint, beyond completeness, suggests that the bulk of the complaint is outside the Commission's jurisdiction. The Complainant in large part outlines concerns regarding the Department of Commerce's hiring of Barr Engineering, Barr Engineering's alleged clients other than the Department of Commerce, and following, concerns regarding record errors that may have stemmed from the use of this specific contractor.

The Commission does not have jurisdiction over the Department of Commerce, neither generally regarding its general administrative functions, or more specifically, in its role as the agency responsible for conducting environmental review. Therefore the Commission does not have a reasonable basis to investigate the complaints alleging conflicts of interest or to request Commerce update its internal policies.<sup>2</sup>

The Complainant further requests relief via the correction of errors in the record stemming from the alleged conflict of interest as well as a Commission review of the Order in this matter. Staff believes that the relief sought for these items are a request for record development outside the state permitting process. Therefore the record concerns addressed by the Complainant are issues that are untimely raised as the period for reconsideration of the Commission's Order on this matter has passed.<sup>3</sup>

The items listed by the Complainant cannot be rectified by the Commission as requested.

### ***Staff Conclusion***

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Staff believes that the Commission should find the complaint incomplete and dismiss it without prejudice.

If the Commission wishes to provide further analysis into the complaint, staff believes that the Commission does not have jurisdiction over the issues raised by the Complainant, for the reasons provided above, and therefore there are no grounds to investigate the allegations further.

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<sup>2</sup> Minn. Rule 7850.2500 EIS Preparation

<sup>3</sup> Minn. Stat. 216B.27 Rehearing; Condition Precedent to Judicial Review

### ***Commission Decision Alternatives***

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#### **1. Content Requirements**

- A. Find the formal complaint does not meet the content requirements outlined in Minn. Rule 7829.1700 and reject the filing without prejudice. (*No further decisions are necessary, the Commission may end here.*)
- B. Find the complaint meets formal complaint content requirements. (*Continue to Decision Alternative 2.*)

#### **2. Jurisdiction**

- A. Find that the Commission has jurisdiction over this matter and there is reasonable basis to investigate the matter, initiating the answer/reply complaint process outlined in Minn. Rule 7829.1800 by serving the matter on the respondent.
- B. Find that the Commission does not have jurisdiction over this matter and therefore there no is reasonable basis to investigate the matter.

### ***Staff Recommendation***

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Staff recommends Alternative 1.A.

If the Commission elects to address Alternative 2, staff recommends 2.B.

## MINNESOTA STATUTES

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### 216A.035 CONFLICT OF INTEREST.

(a) No person, while a member of the Public Utilities Commission, while acting as executive secretary of the commission, or while employed in a professional capacity by the commission, shall receive any income, other than dividends or other earnings from a mutual fund or trust if these earnings do not constitute a significant portion of the person's income, directly or indirectly from any public utility or other organization subject to regulation by the commission.

(b) No person is eligible to be appointed as a member of the commission if the person has been employed with an entity, or an affiliated company of an entity, that is subject to rate regulation by the commission within one year from the date when the person's term on the commission will begin.

(c) No person who is an employee of the Department of Commerce shall participate in any manner in any decision or action of the commission where that person has a direct or indirect financial interest. Each commissioner or employee of the department who is in the general professional, supervisory, or technical units established in section 179A.10 or who is a professional, supervisory, or technical employee defined as confidential in section 179A.03, subdivision 4, or who is a management classification employee and whose duties are related to public utility, telephone company, or telecommunications company regulation shall report to the Campaign Finance and Public Disclosure Board annually before April 15 any interest in an industry or business regulated by the commission. Each commissioner shall file a statement of economic interest as required by section 10A.09 with the Campaign Finance and Public Disclosure Board and the Public Utilities Commission before taking office. The statement of economic interest must state any interest that the commissioner has in an industry or business regulated by the commission.

(d) A professional employee of the commission or department must immediately disclose to the commission or to the commissioner of the department, respectively, any communication, direct or indirect, with a person who is a party to a pending proceeding before the commission regarding future benefits, compensation, or employment to be received from that person.

### 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.