

# Minnesota Public Utilities Commission

## Staff Briefing Papers

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Meeting Date: **October 4, 2012**..... Agenda Item **\*\*\*2**

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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 DeBleekere..... (651) 201-2254

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### Relevant Documents

NoCapX2020 – Other: Conflict of Interest - Barr Engineering..... July 31, 2012  
Commission Staff Briefing Papers ..... September 7, 2012  
NoCapX2020 – Letter and Amended Complaint..... September 10, 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 NoCapX2020 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.

On September 10, 2012 NoCapX2020 filed supplemental complaint information which included the Statutes and Rules alleged to have been violated.

On September 13, 2012 the Commission met to consider the complaint filed by NoCapX2020 and determined that the complaint was now complete, but due to the limited time to process the supplemental information supplied by NoCapX2020, action on the matter was delayed for a future agenda meeting.

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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.

### ***NoCapX2020 Complaint***

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On August 31, 2012, NoCapX2020 (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.

On September 10, 2012, NoCapX 2020 filed supplemental information which outlined the following Statutes and Rules alleged to be violated:

1. Environmental Policy Act – Minn. Stat. §116D.04, Subd. 2a(h); 5a(10);
2. State Procurement – Minn. Stat. §16C.04, Subd. 1 and 3. Ethical Practices and Conflict of Interest; and,
3. Minn. R. 1230.0750 – Organizational Conflicts of Interest.

The original and supplemental information provided that 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.

### **Statutes and Rules alleged to be violated:**

#### **1. Environmental Policy Act**

##### **a. Minn. Stat. § 116D.04 Subd. 2a (h)**

**Subd. 2a. When prepared.** Where there is potential for significant environmental effects resulting from any major governmental action, the action shall be preceded by a detailed environmental impact statement prepared by the responsible governmental unit. The environmental impact statement shall be an analytical rather than an encyclopedic document which describes the proposed action in detail, analyzes its significant environmental impacts, discusses appropriate alternatives to the proposed action and their impacts, and explores methods by which adverse environmental impacts of an action could be mitigated. The environmental impact statement shall also analyze those economic, employment and sociological effects that cannot be avoided should the action be implemented. To ensure its use in the decision-making process, the environmental impact statement shall be prepared as early as practical in the formulation of an action. No mandatory environmental impact statement may be required for an ethanol plant, as defined in section 41A.09, subdivision 2a, paragraph (b), that produces less than 125,000,000 gallons of ethanol annually and is located outside of the seven-county metropolitan area.

**(h)** An environmental impact statement shall be prepared and its adequacy determined within 280 days after notice of its preparation unless the time is extended by consent of the parties or by the governor for good cause. The responsible governmental unit shall determine the adequacy of an environmental impact statement, unless within 60 days after notice is published that an environmental impact statement will be prepared, the board chooses to determine the adequacy of an environmental impact statement. If an environmental impact statement is found to be inadequate, the responsible governmental unit shall have 60 days to prepare an adequate environmental impact statement.

##### **b. Minn. Stat. § 116D.04 Subd. 5a (10)**

**Subd. 5a. Rules.** The board shall, by January 1, 1981, promulgate rules in conformity with this chapter and the provisions of chapter 15, establishing:

(10) procedures for expediting the selection of consultants by the governmental unit responsible for the preparation of an environmental impact statement.

## 2. State Procurement

### a. *Minn. Stat. § 16C.04 Subd. 1*

**Subdivision 1.Duty.** An employee of the executive branch involved directly or indirectly in the acquisition or grants process, at any level, is subject to the code of ethics in section 43A.38.

### b. *Minn. Stat. § 16C.04 Subd. 3*

**Subd. 3.Organizational conflicts of interest.** (a) The commissioner shall make reasonable efforts to avoid, mitigate, or neutralize organizational conflicts of interest. To avoid an organizational conflict of interest, the commissioner may utilize methods including disqualifying a vendor from eligibility for a contract award or canceling the contract if the conflict is discovered after a contract has been issued. To mitigate or neutralize a conflict, the commissioner may use methods such as revising the scope of work to be conducted, allowing vendors to propose the exclusion of task areas that create a conflict, or providing information to all vendors to assure that all facts are known to all vendors. (b) In instances where a conflict or potential conflict has been identified and the commissioner determines that vital operations of the state will be jeopardized if a contract with the vendor is not established, the commissioner may waive the requirements in paragraph (a).

## 3. Minn R. 1230.0750 ORGANIZATIONAL CONFLICTS OF INTEREST.

**Subpart 1. Disclosure requirements.** A vendor who is aware of an actual or potential conflict of interest as defined in Minnesota Statutes, section 16C.02, subdivision 10a, prior to the submission of a response to a solicitation or who becomes aware of an actual or potential conflict of interest during the term of a contract shall disclose the following information to the director of the division:

- A. the identity of the parties involved in the actual or potential conflict;
- B. the facts that give rise to the actual or potential conflict; and
- C. any measures the vendor proposes to avoid, mitigate, or neutralize the conflict if possible.

**Subp. 2. Cooperation required.** In the event an actual or potential organizational conflict of interest is identified with respect to a pending or existing contract, the vendor shall cooperate with the director to explore potential measures to avoid, mitigate, or neutralize the conflict. These measures include, but are not limited to, amending the scope of work to exclude the tasks that give rise to the conflict or disclosing information for distribution to other responding vendors.

**Subp. 3. Remedies.** If an organizational conflict of interest for a particular contract cannot reasonably be avoided, mitigated, or neutralized, a vendor may be disqualified from participation in the solicitation process for that contract. If the conflict is identified after the contract has become effective, the contract is subject

to immediate cancellation. Pursuant to Minnesota Statutes, section 16C.04, subdivision 3, paragraph (b), the commissioner may waive the requirement to avoid, mitigate, or neutralize an organizational conflict of interest if vital operations of the state will be jeopardized. Vital operations include contracts relating to public health, welfare or safety, or contracts that are necessary to avoid a disruption in essential state functions.

Subp. 4. **Public data.** Data generated under this part becomes public in accordance with Minnesota Statutes, section 13.591.

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>
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.

During the September 13, 2012 Commission Agenda Meeting, the Complainant indicated that request number 4 was no longer necessary as the issue is now under appeal with the Minnesota Courts.

### *Staff Analysis*

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Staff believes, as was discussed at the September 13, 2012 agenda meeting that with the supplemental information provided on September 10, 2012, the complaint is now complete.

### *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.

### *Jurisdiction*

Three main statute/rule topics are alleged by the Complainant as being violated:

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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.

## 1) Environmental Review

### *a. Minn. Stat. § 116D.04 Subd. 2a (h)*

**(h) An environmental impact statement shall be prepared and its adequacy determined within 280 days after notice of its preparation unless the time is extended by consent of the parties or by the governor for good cause. The responsible governmental unit shall determine the adequacy of an environmental impact statement, unless within 60 days after notice is published that an environmental impact statement will be prepared, the board chooses to determine the adequacy of an environmental impact statement. If an environmental impact statement is found to be inadequate, the responsible governmental unit shall have 60 days to prepare an adequate environmental impact statement.**

Based on the record, the Commission found the FEIS adequate and issued a route permit, as amended, on May 30, 2012. Any challenge to this Commission decision should have been made during the period for reconsideration, and following, the court of appeals. Staff believes there is no further action that the Commission should (or could) take regarding this allegation.

### *b. Minn. Stat. §116D.04 Subd. 5a (10)*

**Subd. 5a. Rules. The board shall, by January 1, 1981, promulgate rules in conformity with this chapter and the provisions of chapter 15, establishing:**

**(10) procedures for expediting the selection of consultants by the governmental unit responsible for the preparation of an environmental impact statement.**

Staff believes that this statute, and the associated rule, Minn. Rule 4410.2100 Subpart. 10. Consultant Selection, are under the purview of the Environmental Quality Board and the RGU (the Department of Commerce).

**Minn. Rule 4410.2100 Subp. 10. Consultant selection. The RGU shall be responsible for expediting the selection of consultants for the preparation of the EIS.**

The Rule that stems from the statute above indicates that the RGU shall be responsible for expediting the selection of consultants for the preparation of the EIS. This responsibility is for the Department of Commerce, as the RGU.

## 2) State Procurement

### *a. Minn. Stat. § 16C.04 Subd. 1*

**Subdivision 1. Duty. An employee of the executive branch involved directly or indirectly in the acquisition or grants process, at any level, is subject to the code of ethics in section 43A.38.**

Statute section 16C, State Procurement, is regarding the Minnesota Department of Administration and the associated statute and rules regarding this section pertain to practices of executive agencies.

Staff believes this statute applies to the Commission but in no way has been violated by any action of the Commission, or its staff as no contract has been procured by the Minnesota Public Utilities Commission. Further, no allegation of the Commission or its staff was made by the Complainant. Therefore, staff believes there is no further action that can be taken by the Commission in regard to this issue.

*b. Minn. Stat. § 16C.04 Subd. 3*

**Subd. 3. Organizational conflicts of interest. (a) The commissioner shall make reasonable efforts to avoid, mitigate, or neutralize organizational conflicts of interest. To avoid an organizational conflict of interest, the commissioner may utilize methods including disqualifying a vendor from eligibility for a contract award or canceling the contract if the conflict is discovered after a contract has been issued. To mitigate or neutralize a conflict, the commissioner may use methods such as revising the scope of work to be conducted, allowing vendors to propose the exclusion of task areas that create a conflict, or providing information to all vendors to assure that all facts are known to all vendors. (b) In instances where a conflict or potential conflict has been identified and the commissioner determines that vital operations of the state will be jeopardized if a contract with the vendor is not established, the commissioner may waive the requirements in paragraph (a).**

Again, staff doesn't believe that this Statute, in this instance, applies to the issues before the Commission. There is no action that the Commission could take to assist any state agency to compliance with this Statute, nor any past or future action that that Commission could take to rectify what the Complainant seeks. Therefore, staff believes there is no action that can be taken by the Commission in regard to this issue.

**3) Minn R. 1230.0750 ORGANIZATIONAL CONFLICTS OF INTEREST.**

**Subpart 1. Disclosure requirements. A vendor who is aware of an actual or potential conflict of interest as defined in Minnesota Statutes, section 16C.02, subdivision 10a, prior to the submission of a response to a solicitation or who becomes aware of an actual or potential conflict of interest during the term of a contract shall disclose the following information to the director of the division:**

- A. the identity of the parties involved in the actual or potential conflict;**
- B. the facts that give rise to the actual or potential conflict; and**
- C. any measures the vendor proposes to avoid, mitigate, or neutralize the conflict if possible.**

**Subp. 2. Cooperation required.** In the event an actual or potential organizational conflict of interest is identified with respect to a pending or existing contract, the vendor shall cooperate with the director to explore potential measures to avoid, mitigate, or neutralize the conflict. These measures include, but are not limited to, amending the scope of work to exclude the tasks that give rise to the conflict or disclosing information for distribution to other responding vendors.

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**Subp. 4. Public data.** Data generated under this part becomes public in accordance with Minnesota Statutes, section 13.591.

Staff doesn't believe that this Statute, in this instance, applies to the issues before the Commission. There is no action that the Commission could take to assist any state agency to compliance with this Rule, nor any past or future action that that Commission could take to rectify what the Complainant seeks. Therefore, staff believes there is no action that can be taken by the Commission in regard to this issue.

### ***Relief Sought by Complainant***

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>2</sup>
- 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;
- 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.

During the September 13, 2012 Commission Agenda Meeting, the Complainant indicated that request number 4 was no longer necessary as the issue is now under appeal with the Minnesota Courts.

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<sup>2</sup> Use of 'this proceeding' is assumed to mean the Hampton-Rochester-La Crosse permit process and the associated record.

It remains staff's opinion that the complaints are 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 RGU. Therefore, it remains that 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>3</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>4</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 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>3</sup> Minn. Rule 7850.2500 EIS Preparation

<sup>4</sup> Minn. Stat. 216B.27 Rehearing; Condition Precedent to Judicial Review

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## ***Commission Decision Alternatives***

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### **1. Jurisdiction**

- A. Find that the Commission has jurisdiction over this matter and that 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 has jurisdiction over this matter but that there is no reasonable basis to investigate the matter further based on the reasoning provided above.
- C. Find that the Commission does not have jurisdiction over this matter and therefore there is no reasonable basis to investigate the matter further based on the reasoning provided above.

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### ***Staff Recommendation***

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Staff recommends Alternative 1.C.