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## STATEMENT OF THE ISSUES ON APPEAL

### **I. Whether the Commission's grant of a routing permit is invalid because notice to the Cannon Falls landowners was inadequate.**

The Commission granted a routing permit utilizing a route segment where the application was made January 19, 2010 and notice was mailed June 13, 2011, as public hearings were in progress.

**Apposite Authority:** Minn. Stat. §216E.03, Subd. 4.

### **II. Whether the Commission's selection of the Segment 1 route permitted was an error of law because only routes identified in the Application, Task Force Recommendation and/or Public Comments and then included in the Scoping Decision are legitimate candidates for route selection.**

The Commission selected a route near Cannon Falls that was not identified as a route option in the Scoping Decision, and which was not proposed as a route option until after the deadline to add routes for consideration.

**Apposite Authority:** Minn. Stat. §216E.03, Subd. 5, 10(b); Minn. R. 7850.2400, Subp. 3; Minn. R. 7850.2500, Subp. 2, 3, 4.

### **III. Whether the selection of the route through Segment 1 through greenfield, rather than utilizing a transmission corridor near Cannon Falls Route is contrary to Minnesota's policy of non-proliferation of transmission corridors.**

The Commission selected a Segment 1 route through a greenfield rather than utilize the route through a transmission corridor recommended by the Administrative Law Judge.

**Apposite Authority:** Minn.Stat. §216E.03, Subd. 7(b)(7), 7(b)(8), 7(e), 10(b); *People for Environmental Enlightenment & Responsibility (PEER), Inc. v. Minnesota Environmental Quality Council*, 266 N.W.2d, 858, 868 (Minn. 1978).

### **IV. Whether the Public Utilities Commission's decision is an error of law because it improperly relies on information not in the record.**

The Commission's decision relied on information from Xcel Energy's Exceptions, which is information not in the hearing record.

**Apposite Authority:** Minn. Stat. ch. 216E; Minn. Stat. §14.60, Subd. 2, Minn. R. 1405.2400.

**How preserved for appeal:** Issues I-IV raised above were preserved for appeal through a Motion for Reconsideration timely filed with the Public Utilities Commission, and a Complaint to the Public Utilities Commission regarding Conflict of Interest regarding Barr Engineering, consultant for the Environmental Impact Statement. Motion for Reconsideration, Appendix p. 1-62; Denial of Reconsideration, Addendum p. 1-2; Complaint of Conflict of Interest, Appendix p. 101 (denied for lack of jurisdiction).

### **STANDARDS OF REVIEW**

Any party aggrieved by a decision of the MPUC may appeal in accordance with chapter 14. Minn. Stat. § 216B.52, subd. 1 (2004). St. John’s Lutheran School and Church and Cannon Falls Landowners are landowners directly affected by the decision of the Public Utilities Commission. The appellate court may reverse or remand to the agency if the agency decision is arbitrary or capricious or affected by other error of law. Minn. Stat. § 14.69(d),(f) (2004).

The standard of review of an agency decision applicable in this case is set forth in Minn. Stat. §14.69, which states:

#### **14.69 SCOPE OF JUDICIAL REVIEW.**

In a judicial review under sections 14.63 to 14.68, the court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:

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

The agency's decisions have a presumption of correctness, and deference by the court to the agency's expertise. Relators must prove error on the part of the Commission. See *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977); *City of Moorhead v. Minnesota Pub. Utilities Comm'n*, 343 N.W.2d 843, 846, 849 (Minn. 1984), *Markwardt v. State Water Resources Board*, 254 N.W. 2d 371, 374 (Minn. 1977). A decision is not arbitrary and capricious if the agency, when presented with opposing points of view, reached a decision that rejects one point of view. *CUB Foods, Inc. v. City of Minneapolis*, 633 N.W.2d 557, 565 (Minn. App. 2001), *review denied* (Minn. Nov. 13, 2001).

An agency's decision is arbitrary and capricious if it reflects the agency's will and not its judgment. *Blue Cross & Blue Shield*, 624 N.W.2d 264, 278 (Minn. 2001). Questions of law are reviewed de novo. *Id.* "An agency's decision is arbitrary and capricious if the agency ... entirely failed to consider an important aspect of the problem... or if the decision is so implausible that it could not be ascribed to a difference in view or the result of agency expertise." *White v. Minn. Dept. of Natural Resources*, 567 N.W. 2d 724 (Minn. Ct. App. 1997); see also *Pope County Mothers v. Minn. Pollution Control Agency*, 594 N.W. 2d 233, 236 (Minn. Ct. App. 1999) (citing *Trout Unlimited, Inc. V. Minn. Dept. of Agric.*, 528 N.W. 2d 903, 907 (Minn. Ct. App. 1995).

### **STATEMENT OF THE CASE**

Relator St. Paul's Lutheran School and Church and Cannon Falls Landowners are specifically aggrieved by the Minnesota Public Utilities Commission's transmission routing decision regarding the northern-most segment of the CapX 2020 Hampton-Rochester-La Crosse Transmission Project ("Segment 1") near Cannon Falls. They are

directly affected by this project because it would run over their land, and their land would be taken by eminent domain. Minn. Stat. §216B.52. Relators appeal the PUC's May 30, 2012 Order granting a Routing Permit for Segment 1 of the CapX 2020 Hampton-Rochester-LaCrosse Transmission Project.

The Commission referred this docket to the Office of Administrative Hearings for contested case evidentiary proceedings, after which Administrative Law Judge Sheehy issued a Recommendation to the PUC. The PUC issued its written Order on May 30, 2012, and then denied various Motions and Petitions for Reconsideration on August 14, 2012, triggering this appeal of the Commission's Order regarding a portion of Segment 1 near Cannon Falls.

Appeals from final Public Utilities Commission decisions are taken pursuant to the Minnesota Administrative Procedures Act and Minn. Stat. §216B.52 and §216E.15. The Administrative Procedures Act authorizes review in the Court of Appeals by writ of certiorari. Minn. Stat. §14.63; Minn. R. Civ. App. P. 103.03(g) and 115.01. This appeal was timely filed within 30 days of the PUC's August 14, 2012 Order. Minn. Stat. §§14.63; 14.64.

The specific statutes and rules at issue are Minn. Stat. §§ 14.60, Subd. 2; 216E.02, Subd. 1; 216E.03, Subd. 4, 5, 7(b)(7), 7(b)(8), 7(e), 10(b); Minn. R. 1405.2400; Minn. R. 7850.2400, Subp. 3; Minn. R. 7850.2500, Subp. 2, 3, 4; Minn. R. 7850.4000, Subp. I, J. While there are several legally significant flaws with the Commission's decision, the primary matter at issue is Minnesota's "non-proliferation" statute requiring maximum utilization of existing transmission rights of way, *People for Environmental*

*Enlightenment & Responsibility (PEER), Inc. v. Minnesota Environmental Quality Council*, 266 N.W.2d, 858, 868 (Minn. 1978), and Minn. Stat. §216E.03, Subd. 7(e). The statutory requirement of compliance with Minnesota's policy of non-proliferation of transmission corridors under Minn. Stat. §216E.03, Subd. 7(e) is a matter of first impression.

Further, the Order of the Commission improperly relies on information not in the record, with citations to statements made by Applicants long after the record closed found in Exceptions to ALJ's Recommendation. Minn. Stat. 14.60, Subd. 2; Minn. R. 1405.2400. Also at issue is determination of adequacy of the Environmental Impact Statement because environmental review did not include or analyze the route chosen near Cannon Falls. Minn. Stat. §116D.04, Subd. 2a(a) and (h).

### **STATEMENT OF FACTS**

This case originated with an Application by Xcel Energy, as lead utility on this Hampton-Rochester-La Crosse transmission project, filed with the Commission on January 19, 2010, accepted as Complete on March 9, 2010, and set for hearing. Environmental Impact Statement Scoping Meetings were noticed on April 19, 2010 and held on May 4, 5 and 6, 2010. Advisory Task Force Reports were filed August 4, 2010 and the EIS Scoping Decision Document was filed August 6, 2010. The Scoping Decision was appealed on August 9, 2010, and that Appeal was denied on August 16, 2010. The September 1, 2010 Prehearing Order established that Public Hearings would be held the week of June 13, 2012 and Evidentiary Hearing the following week. Notice was provided May 24, and May 26, 2011. A subpoena request for Department of Natural

Resources and Department of Transportation testimony was filed on May 20, 2011 and withdrawn on May 25, 2011 after agreement that agency representatives would testify. The Draft Environmental Impact Statement was published March 21, 2011 and Revised March 29, 2011. See Public Utilities Commission's Amended Itemized List of Documents, Transcripts and Exhibits.<sup>1</sup>

On June 13, the day Public Hearings began, Xcel Energy filed a letter and mapbook announcing route changes and its intention to introduce these changes at the hearing the following week:

The Applicant Northern States Power Company, a Minnesota corporation ("Xcel Energy"), notes that in one area, the interchange of US 52 and Highway 19, a 25-foot setback from road right-of-way does not appear to be possible within the proposed route width without removing an existing home. *See* Sheetmap 9. As a result, Xcel Energy is requesting that a wider route width, as shown on Sheetmap 9, be approved. To facilitate development of this option in the record and to ensure potentially affected landowners have an opportunity to participate in the Route Permit proceeding, on Friday, Mr. Hillstrom called and mailed written notices of hearing to the 12 landowners adjacent to the new alignment. The notice and affidavit of mailing are also enclosed. Xcel Energy will also be mailing a copy of Sheetmap 9 to these landowners.

Xcel Energy intends to offer the mapbook and the affidavit of mailing as exhibits at trial.

Appendix p. 95, Hearing Exhibit 36, June 13, 2011 Letter and Mapbook.

The sections of Segment 1 of this transmission route at issue are near Cannon Falls, last-minute alternates, the first shown as an orange alignment and yellow corridor in Sheetmap 9 and 10 of Hearing Exhibit 36. Addendum, p.95. The yellow area depicting the corridor is not shown on Sheetmap 10.

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<sup>1</sup> The PUC's "Amended Itemized List of Documents, Transcripts and Exhibits" dated October 16, 2012, has not identified Hearing Exhibits 1-70, and this should be corrected. The list shows Public Hearing Exhibits 1-70 and continues Hearing Exhibits beginning at 71, however, there are Hearing Exhibits 1-70 that are not identified.



Hearing Exhibit 36 is a packet of materials that made its first appearance when filed with the Commission on June 13, 2012, with the statement that:

*Xcel Energy intends to offer the mapbook and the affidavit of mailing as exhibits at trial.*

Addendum p. 95, Hearing Exhibit 36, p. 1. The evidentiary hearing began the following Monday.

The 25 foot restrictions noted on the maps are based on the DOT's "freeway standards" set forth in its Policy of Accommodation. Hearing Exhibit 102; see also Hearing Exhibit 103, Hwy. 52 Corridor Management Plan. The DOT notified applicants of concerns at the intersections of Highway 52 and Highways 19 and County Road 24 in Scoping Comments, DEIS Comments and in testimony at Public and Evidentiary Hearings. Further, Sheetmap 10 of Hearing Exhibit 36 claims an existing road where there is none. Appendix p. 95 et seq.

These areas are at issue because there are pinch points that were not possible to mitigate due to the location of the Highway 52 easement and St. Paul's Lutheran Church and School, initially shown as a "residence" on maps, and there were also homes sandwiched in next to the DOT easements where the DOT has planned changes in the ramp configuration. Addendum p. 153-154, EIS Sheetmaps NR 6-9. A DOT representative was present at each public hearing and at the evidentiary hearing. The DOT's Policy of Accommodation and Comments were entered as exhibits. See Hearing Exhibit 102, MN DOT Policy/Position Statement 7/27/98; Hearing Exhibit 103, Hwy 52 Corridor Management Plan and Hearing Exhibit 1, Application Appendix D; Hearing

Exhibit 106, p. 11-12 of DOT May 20, 2010 Scoping Comment; Hearing Exhibit 20 and 39, Hillstrom Sched. 17 and Rohlfing Ex. F, MN DOT Letter 4/29/11 DEIS Comments (also FEIS Appendix O-15-18); see also Tr. Vol. 3, Testimony of David Seykora.

The DOT's Policy of Accommodation restrictions make the Applicant's preferred route not feasible. This restriction were known by Applicants long before the public or evidentiary hearings started because these details were laid out to the Applicants by the DOT in Comments and meetings and other communications. See again Hearing Exhibit 102, MN DOT Policy/Position Statement 7/27/98; Hearing Exhibit 103, Hwy 52 Corridor Management Plan and Hearing Exhibit 1, Application Appendix D; Hearing Exhibit 106, p. 11-12 of DOT May 20, 2010 Scoping Comment; Hearing Exhibit 20 and 39, Hillstrom Sched. 17 and Rohlfing Ex. F, MN DOT Letter 4/29/11 DEIS Comments (also FEIS O-15-18); see also Tr. Vol. 3, Testimony of David Seykora. When asked about the timing of notifying the Applicants about the potential for limitation, the DOT's Seykora testified it was disclosed all along, in increasing increments, where at first "We were saying please and in the later letter we're saying we really mean it more than please." Hearing Transcript, Vol. 1, p. 2-6; 214-215. Knowledge of the DOT's restrictions were admitted by Hillstrom, who testified that the DOT has "indicated that's not likely a permissible alternative alignment." Testimony of Hillstrom, Tr. Vol. 3, p. 72-73. Applicants chose not to alter the route after receiving the DOT's Scoping comments and chose not to alter the route after DOT's DEIS Comments. Applicants chose to alter the route during the Evidentiary Hearing.

The Applicants' Exceptions urge selection of its Modified Preferred Route including the improperly proposed "alignment adjustments" providing information on "impacts" for a route alignment that is not in the Scoping Decision, that is not in the DEIS or FEIS, that has not been verified, and which has not been vetted through public comments. As above, these Exceptions contained much information and maps not in the record and are not available to the Commission for consideration. To avoid confusion, the Segment 1 maps accompanying Xcel's Exceptions should be stricken.

In its Exceptions, the Applicants claim their improper Modified Preferred route for Segment 1 with the "alignment adjustments" has less impact on human settlement based on late inserted house counts admittedly not available to the ALJ:

*Moreover, the house count comparisons provided in the ALJ Report for the Modified Preferred Route do not reflect two alignment adjustments included in the Modified Preferred Route by the Highway 19 Interchange and the planned County Road 24 Interchange.*

Appendix p. 72, Exceptions, p. 5. In the foot note for this statement, Applicants claim:

The two alignment modifications are shown in detail on Exhibit 94 (Highway 19) and on Exhibit 26, Sheetmaps 10 and 11 (Highway 24). Specific impacts tables were also included in the record for the Highway 19 alignment. Ex. 95. The Company notes that the Highway 19 Interchange alignment avoids the church and school referenced in ALJ Report Finding at No. 306.

Id. The sheet maps referenced were filed with a letter dated June 13, 2011. There was no opportunity for verifying the information or for comment on it, and Commerce did not verify it or add it to the FEIS. In addition, the proposed "adjustment" does not avoid St. Paul's Lutheran School and Church, it merely shifts

from one side of the property to the other. See Appendix p. 30, Affidavit of Daniel Flotterud, President, St. John's Lutheran Church.

During the last day of the Evidentiary Hearing, Applicants entered these referenced Exhibits 94 and 95. See Addendum, p. 145-148. Exhibit 94 showed its preferred options in the Cannon Falls Hwy. 19 and Hwy. 52 area. Applicant's first choice is the "Modified Preferred Route (US 52) Segment" alignment, the red line with dotted lines on each side indicating route width. Its second choice is the "Highway 19 Interchange Infield Alternative Segment" in pink through the cloverleaf. "And then the fallback position would be the orange line, the third choice." Hillstrom, Tr. Vol. 3, p. 73, l. 5-19.

In his testimony, Hillstrom admits that the exhibit's Highway 19 Interchange infield alignment segment" was "a new alignment shown in pink that had not previously been shown." Tr. Vol. 3, p. 62, l. 16-20. Hillstrom also admitted that Exhibit 94 also included its "Alternate Route Segment" in yellow (not yellow where it overlaps 1P-002). When asked whether the "Infield Alternate" was permissible, Xcel's Tom Hillstrom testified that "I don't think there's been discussions regarding this specific alignment, but in previous meetings that we've had with MnDOT when we've suggested things like this, they've indicated that's not likely a permissible alternative alignment." Id., p. 72-73. Hillstrom testified that "[t]he orange alignment... would require additional route width." Id. l. 12-15. See Addendum, Hearing Exhibit 95.

Applicants also entered Exhibit 96 on the last day of the Evidentiary Hearing. This is a chart showing names and addresses of purported landowners and timing and means of contacting them regarding the CapX 2020 project. See Hearing Exhibit 96. This information has not been vetted, and those listed as landowners take issue with the statements in Exhibit 36. See Appendix pages 95-100, See also Appendix Motion for Reconsideration Attachments A-I Landowner Affidavits including Affidavit of Daniel C. Flotterud; Affidavit of Gina Schlueter; Affidavit of Jen Langdon; Affidavit of Tim Langdon; Affidavit of Michelle Sandstrom; Affidavit of Christopher and Kristy Strickland; Affidavit of Dennis Doffing. Landowners on the late-added “adjustments” did not receive notice until after the June 13, 2011 mailing at the earliest. *Id.* Some who received notice were told by telephone that there was little chance this route would be selected and that they should not worry. *Id.* Others had not received notice at all. Addendum p. 32, Motion Attachment B, Affidavit of Gina Schlueter (landowner of record at 30149 – 59<sup>th</sup> Avenue, Cannon Falls).

### **SUMMARY OF ARGUMENT**

The record in this proceeding does not support the Commission’s selection of the Modified Preferred Route’s new “alternate segments” for Segment 1 near Cannon Falls at the intersection of Hwy. 52 and Hwy 19 and Co. Rd. 24 – the Commission’s Order is an error of law and fact. Segment 1P-003 is the route that more closely adheres to routing criteria and Minnesota’s policy of transmission non-proliferation.

The Commission erred in three fundamental ways. First, it chose a route where notice was provided at the very last minute, as public hearings on the project were commencing, in June, 2010, a year and a half after the Application was filed in January 2010. Another fundamental error made by the Commission was selection of a route not available to it as an option. The Commission rejected route 1P-003, recommended by the Administrative Law Judge in favor of one not identified in the Scoping Decision and not evaluated in the Environmental Impact Statement – this route option is not available for consideration or selection. Third, the Commission violated Minnesota’s policy of non-proliferation of transmission corridors by choosing this route over 1P-003 which utilizes a large transmission corridor along Harry Avenue, across the Byllesby Dam, and south to Highway 19. In making its route selection, the Commission seriously erred because it based its decision on Xcel Energy’s post hearing Exceptions to the Recommendation of the Administrative Law Judge. These Exceptions were filled with information not in the record, and not available to the Commission as the basis for a decision.

**I. THE COMMISSION’S GRANT OF A ROUTING PERMIT OVER CANNON FALLS LANDOWNERS’ LAND IS AN ERROR OF LAW BECAUSE APPLICANT FAILED TO GIVE NOTICE WITHIN 15 DAYS OF APPLICATION OR MAKE GOOD FAITH EFFORT**

The Power Plant Siting Act requires notice be given to landowners within 15 days of submission of the route permit application. Minn. Stat. §216E.03, Subd. 4. The statute requires a bona fide attempt to comply be made. *Id.* However, the notice at issue is to be made within 15 days of filing of the application, in this case, in January, 2010. What notice was provided, as set forth in attached Exhibits 36 and 96, was mailed to

landowners on the northern segment on June 13, 2011, just one day before the start of public hearings, and one week before the start of the evidentiary hearing, and five weeks after the deadline for intervention. See Appendix p. 95, Addendum p. 148. Applicants did not make a good faith effort to provide notice within 15 days of the filing of the Application.

On June 13, notice was mailed by the Applicants to an outdated list of landowners, and several of the landowners were contacted by phone. Hearing Exhibit 96. Applicants provided a chart showing “Minnesota Highway 19/US Highway 52 Intersection Options – Landowner Contact Information.” See Addendum p. 148, Hearing Exhibit 96; see also Appendix p. 30-62, Landowner Affidavits, Affidavit of Daniel C. Flotterud; Affidavit of Gina Schlueter; Affidavit of Jen Langdon; Affidavit of Tim Langdon; Affidavit of Michelle Sandstrom; Affidavit of Christopher and Kristy Strickland; Affidavit of Dennis Doffing. At the time of the mailing, Ryan K. Rounds was not the landowner at 30149 – 59<sup>th</sup> Avenue, Cannon Falls, MN 55009, the Schlueters own this parcel. Appendix p. 33-35, Affidavit of Gina Schlueter. Landowners Langdon and Sandstrom were told that it was “highly unlikely” that the route would be chosen and that they should not be concerned. See Appendix p. 30 et seq; Affidavit of Jen Langdon; Attachment D, Affidavit of Tim Langdon; Attachment E, Affidavit of Michelle Sandstrom. Many of these landowners attended the Public Hearing and submitted Comments. Public Hearing Transcript, June 16, 2012, Cannon Falls; see also OAH filed Comments.

Notice is required to be provided to landowners at various points along the administrative process. Notice is to be provided for those landowners affected by

additional route options that are included in the Scoping Decision, which was issued August 6, 2010. These two route segments near Cannon Falls were not included in the Scoping Decision. Notice was sent to the Scoping Decision landowners by Commerce on September 17, 2010, but again, that did not include those landowners on the late-filed “adjustment.” See Hearing Exhibit 51, Notice to Landowners; see also, *Id.*, Figure 12, map of Cannon Falls area showing proposed route alterations. There is nothing in the record that reflects that the Commerce Public Advisor for this project made any effort to contact the landowners along the late-proposed route “adjustments” to let them know what options were open to them to participate in this docket.

The proposed route changes were introduced into the record at the evidentiary hearing, but they were not introduced until the final day of the hearing. Hearing Tr., Vol. 2, June 21, 2012; Hearing Exhibits 94, 95 and 96. When these late-filed “adjustments” were discussed during the evidentiary hearing, Asst. A.G. Karen Hammel requested Xcel provide “environmental information” to include in FEIS. The information was provided in Hearing Exhibits 94, 95 and 96 but it was not verified or vetted, or subject to review, analysis or commenting by the public. However, this information regarding these late-filed changes was not incorporated into the FEIS, and appropriately so as the “adjustments” were not part of the Scoping Decision. The environmental information was not included in the Scoping Decision, DEIS or FEIS, there was no opportunity for the public to comment on environmental review because there was no environmental review.



Use of 1P-003, as recommended by the Administrative Law Judge, would address these deficiencies in notice to Cannon Falls landowners by instead utilizing a route where there was sufficient and proper notice to the landowners on the 1P-003 route.

**II. ONLY ROUTES IDENTIFIED IN THE SCOPING DECISION AND EVALUATED IN THE ENVIRONMENTAL IMPACT STATEMENT ARE LEGITIMATE CANDIDATES FOR ROUTE SELECTION**

The route chosen by the Commission is not available because statutory procedures for route proposals were not followed. Under the siting statutes and rules there are specific procedures and timing for proposal of routes, and routes may be submitted in an application, through public comment or by the Citizen Advisory Task Force up until the time the Scoping Decision is issued, at which time no further routes may be added for consideration without a change in the Scoping Decision.

The commissioner shall study and evaluate any site or route proposed by an applicant and any other site or route the commission deems necessary that was proposed in a manner consistent with rules concerning the form, content, and timeliness of proposals for alternate sites or routes.

Minn. Stat. §216E.03, Subd. 5.

***Alternative sites or routes.***

During the scoping process, a person may suggest alternative sites or routes to evaluate in the environmental impact statement. A person desiring that a particular site or route be evaluated shall submit to the commissioner of the Department of Commerce, during the scoping process, an explanation of why the site or route should be included in the environmental impact statement and any other supporting information the person wants the commissioner to consider. The commissioner shall provide the applicant with an opportunity to respond to each request that an alternative be included in the environmental impact statement. The commissioner shall include the suggested site or route in the scope of the environmental impact statement only if the commissioner determines that evaluation of the proposed site or route will assist in the commissioner's decision on the permit application.

Minn. R. 7850.2500, Subp. 3.

Once the commissioner has determined the scope of the environmental impact statement, the scope must not be changed except upon decision by the commissioner that substantial changes have been made in the project or substantial new information has arisen significantly affecting the potential environmental effects of the project or the availability of reasonable alternatives.

Minn. R. 7850.2500, Subp. 2.

The late Cannon Falls route north and south segments were added improperly -- added at the last minute and not included in the Scoping Decision, the Draft Environmental Impact Statement or the Final Environmental Impact Statement. The Scoping Decision was issued August 6, 2010. Appendix p. 79-95, Scoping Decision, Hearing Exhibit 50. These two route segments near Cannon Falls were not proposed for or included in the Scoping Decision, and notice was sent to the Scoping Decision landowners by Commerce on September 17, 2010. See Hearing Exhibit 51, Notice to Landowners; see also Notice Figure 12, map of Cannon Falls area showing proposed route alterations.

The applicant was not the only one to try to introduce a route contrary to established procedures. Others did attempt to introduce new route alignments late in the process during the Public and Evidentiary hearing, and those route proposals were rejected. During the public hearing, a member of the public, Paul Kalass, requested that he be allowed to propose a route change in a challenging spot in Zumbrota, along Hwy. 52 that had not been previously proposed. He was told by the ALJ that he could not propose a new route alignment adjustment. Tr. p. 145-147, Public Hearing – June 16,

2011 – Canon Falls – 6:30. At that hearing, in response, the Dept. of Commerce’s Matt Langan acknowledged it was too late to be adding a route:

What I wanted to respond to was the question, I guess, about whether a line can be added at this point. And we – my director signed the scoping decision in August of last year. And at that point, when that scope is put into place, that is the end of our adding any lines for consideration.

Tr. p. 146-147, Public Hearing – June 16, 2011 – Canon Falls – 6:30.

A party, Oronoco Township, also tried to enter a route into consideration, and although it was entered into the record, the attempt failed as it was not put into consideration as a route. Instead of legitimately offering a route proposal during scoping or through a Task Force meeting or via comments on scoping, Oronoco Township waited until the last minute, after completion of its testimony and case-in-chief, and contrary to rules for proposals of routes, submitted an utterly new route. This route was one that had not been previously proposed, one for which landowners had not received notice, and one that had not been evaluated in environmental review. Hearing Exhibit 89, New CapX 2020 Route Proposed by Oronoco Township. The Township attorney stated that he had asked the township’s consultant, Mr. Broberg to prepare a map. Tr. Vol. 2, p. 158.

After a long off the record discussion, and a discussion on the record, when questioned, Broberg, the township consultant, testified that this proposal was a last minute effort hatched the evening before at a Township Planning Commission meeting. Testimony of Broberg, Tr. Vol.2, p. 166, l. 18- p. 167 l. 16. He testified that Oronoco Township made this proposal without doing any impact analysis under Minn. R. Ch. 7850. Id., p. 167. Broberg also testified that the residents along the new portion of the

“route” had not been notified. *Id.*, p. 163. The ALJ repeatedly stated, “I can’t consider this” because the route was offered too late. *Id.* This was reflected in the ALJ

Recommendation:

Exhibit 89 (Oronoco’s preferred route) includes a segment where the line would run south that was not contained in the scoping decision for the EIS and was consequently not studied in the DEIS or the FEIS. This route alternative cannot be considered in this proceeding. Tr. 2:162-163.

Addendum p. 56, FoF 15, fn. 24.

That restriction applies to Xcel Energy as well – there are not special procedural rules for Xcel Energy regarding timing of route alignment “adjustments.” As it was for Paul Kalass and Oronoco Township, the public hearing and evidentiary hearing are timed too late in the process to be adding route options.

The DOT restriction deeming the Preferred route infeasible was known by the Applicants long before the Public or Evidentiary Hearing. See Hearing Exhibit 102, MN DOT Policy/Position Statement 7/27/98; Hearing Exhibit 103, Hwy 52 Corridor Management Plan and Hearing Exhibit 1, Application Appendix D; Hearing Exhibit 106, p. 11-12 of DOT May 20, 2010 Scoping Comment; Hearing Exhibit 20 and 39, Hillstrom Sched. 17 and Rohlfig Ex. F, MN DOT Letter 4/29/11 DEIS Comments (also FEIS O-15-18); see also Tr. Vol. 3, Testimony of David Seykora. These restrictions were laid out to the Applicants by the DOT in Comments and meetings and other communications, and are no surprise to the Applicants. When asked about the timing of notifying the Applicants about the potential routing conflict, the DOT’s Seykora testified it was disclosed all along, in firmness of increasing increments of firmness, where at first “We

were saying please and in the later letter we're saying we really mean it more than please." Hearing Transcript, Vol. 1, p. 2-6; 214-215. Knowledge of the DOT's restrictions were admitted by Hillstrom, who testified that the DOT has "indicated that's not likely a permissible alternative alignment." Testimony of Hillstrom, Tr. Vol. 3, p. 72-73. Applicants chose not to alter the route after receiving the DOT's Scoping comments and chose not to alter the route after DOT's DEIS Comments. Applicants chose to alter the route during the Evidentiary Hearing.

Use of 1P-003, as recommended by the Administrative Law Judge, would address these process deficiencies and improprieties because 1P-003 was included in the Scoping Decision and it was evaluated in the Environmental Impact Statement where the Applicant's late proposal was not.

**III. THE COMMISSION VIOLATED MINNESOTA'S POLICY OF NON-PROLIFERATION OF TRANSMISSION CORRIDORS BY SELECTING A GREENFIELD ROUTE OPTION RATHER THAN AN EXISTING TRANSMISSION CORRIDOR.**

More than three decades ago, the PEER decision set out the Minnesota transmission routing policy of "nonproliferation," to maximize utilization of existing and proposed railroad and highway rights-of-way. In a clear statement of intent, with full knowledge of the impact of establishment of nonproliferation on those near existing corridors, the court held:

*We therefore concluded that in order to make the route-selection process comport with Minnesota's commitment to the principle of nonproliferation, the MEQC must, as a matter of law, choose a pre-existing route unless there are extremely strong reasons not to do so. We reach this conclusion partly because the utilization of a pre-existing route minimizes the impact of new intrusion by limiting its effects to those who are already accustomed*

*to living with an existing route. More importantly, however, the establishment of a new route today means that in the future, when the principle of nonproliferation is properly applied residents living along this newly established route may have to suffer the burden of additional powerline easements.*

People for Environmental Enlightenment & Responsibility (PEER), Inc. v. Minnesota Environmental Quality Council, 266 N.W.2d, 858, 868 (Minn. 1978). The court compared proliferation with the MEQC's balance of noncompensable impairment of the environment against the compensable damages of number of homes to be condemned, and noted that:

*Although the hearing examiner, the MEQC, and the district court all accepted both their reasoning and their conclusion, condemnation of a number of homes does not, without more, overcome the law's preference for containment of powerlines as expressed in the policy of nonproliferation. Persons who lose their homes can be fully compensated in damages. The destruction of protective environmental resources, however, is noncompensable and injurious to all present and future residents of Minnesota.*

Id., p. 869. In that case, the court emphasized that those along transmission routes “may have to suffer the burden of additional powerline easements.” Id. at 868. That is the case in this situation with 1P-003 and the existing transmission corridor along Harry Avenue.

The PEER-based non-proliferation routing policy was recently emphasized by the addition of Minn. Stat. §216E.03, Subd. 7(e) requiring specific findings by the Commission:

*The commission must make specific findings that it has considered locating a route for a high-voltage transmission line on an existing high-voltage transmission route and the use of parallel existing highway right-of-way and, to the extent those are not used for the route, the commission must state the reasons.*

Minn. Stat. §216E.03, Subd. 7(e).

The Administrative Law Judge recommended that the route near Cannon Falls follow existing transmission along Harry Avenue, across the Byllesby Dam and south to Hwy. 19. In the Recommendation, the ALJ took note of the fact that there are existing transmission lines extending south from the Harry Avenue intersection with Hwy. 52 down to the Byllesby Dam Substation, and from that substation continuing south to Hwy. 19, as addressed in the ALJ's Recommendation:

FOF 301. Route alternatives 1P-001, 1P-002, and 1P-003 would run along existing 69 kV, 115 kV, and 161 kV transmission lines on Harry Avenue to the Cannon Falls substation located near the hydroelectric dam that creates the Lake Byllesby Reservoir.

FOF 306. There are, however, significant problems following US 52 through the Cannon Falls area in the vicinity of Highways 19 and 24, because of the proximity of homes, churches, schools, and businesses. Use of option 1P-003 would bypass this area and would impact fewer total residences; would avoid the church, school, and businesses; would parallel existing transmission lines and use mostly existing road corridors; and would provide the opportunity to avoid potential conflicts with two future road projects (the railroad overpass and the County Road 24 interchange).

ALJ Recommendation; see also Hearing Exhibit 35, Google Earth; Testimony of Denae Reiswig, p. 67-68, Public Hearing June 16, 2011 – Cannon Falls – 6:30; Appendix p. 36-38, Affidavit of Jen Langdon, p. 2.

This existing transmission is readily visible on Applicant's Google Earth Exhibit 35<sup>2</sup>. It is a wide corridor with three transmission lines, then narrowing to two:

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<sup>2</sup> The link provided by Applicants for its Hearing Exhibit 35, Google Earth is no longer working: [www.http://capx2020.com/Projects/projects-Ham-Roch-Lac.html](http://capx2020.com/Projects/projects-Ham-Roch-Lac.html). The best way to find it is to search the [www.capx2020.com](http://www.capx2020.com) site for "kmz" to reveal the "kmz" google earth files on the CapX 2020 site. This failed link has been brought to the attention of Xcel and counsel.



*Source: Addendum p. 36-38, Affidavit of Jen Langdon, p. 2.*

Commerce's failure to include the obvious multiple transmission lines on Harry Avenue, between 52 and the Byllesby Dam, and southward from the Byllesby Dam to Hwy. 19 is inexplicable<sup>3</sup>. This omission was brought to the attention of the Commission at its April 12, 2012 meeting by counsel for NRG, NoCapX 2020 and U-CAN, counsel now representing the aggrieved St. Paul's Lutheran School and Church and Cannon Falls Landowners. This was also brought to the attention through a NoCapX 2020 Complaint

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<sup>3</sup> Commerce's consultant for the EIS, Barr Engineering, was also a consultant for Dakota County's Lake Byllesby Master Plan and for the Lake Zumbro Improvement District in Segment 3 of this route. Information provided by Barr regarding transmission at both these sites was wrong – at Byllesby, the large existing corridor was not reported, and for Lake Zumbro, there was a claim of a transmission line where there was none. The Commission corrected the record and altered its route selection in Segment 3 but did not do so in Segment 1 near Cannon Falls.



of Conflict of Interest against Barr Engineering, which the Commission dismissed stating lack of jurisdiction. Appendix p. 101.

The Commission must take this existing transmission corridor along Harry Avenue, across the Byllesby Dam, and to Highway 19 into account. R route segment 1P-003, as recommended by the Administrative Law Judge, should be utilized in the Cannon Falls area of Segment 1 because the ALJ addressed statutory siting factors in her recommendation, it is an option was analyzed in the environmental review as required under the PPSA, it has an existing transmission corridor, and unlike the route chosen by the Commission, it is available for routing by the Commission.

The late-proposed route segments near Cannon Falls added by the Applicants and chosen by the Commission are entirely within greenfield territory, with no shared transmission, road, pipeline or railroad right of way, and these greenfield additions are not addressed in the FEIS. This segment is gross proliferation under PEER or Minn.Stt.§216E.03, Subd. 7(e). That is clear from Xcel Energy’s Exceptions, Attachment 2, where red is “No ROW or Parcel Following:” See Appendix p. 65, Exceptions, Attachment 2 (map).

The definition of corridors is important. PEER and Minn. Stat. §216E.03, Subd. 7(e) both refer to existing high-voltage transmission route and highway right of way, and PEER also refers to railroad right-of-way.<sup>4</sup> Nowhere in the PEER decision or in the

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<sup>4</sup> Minn. Stat. §216E.03, Subd. 7(b)(8) refers to “evaluation of potential routes that would use or parallel existing railroad and highway rights-of-way” and field lines and property boundaries are referenced in Minn. Stat. §216E.03, Subd. 7(b)(9) addresses “evaluation of governmental survey lines and other natural division lines of agricultural land so as to minimize interference with agricultural operations,” and not as non-proliferation. As factors to be considered, Minn. R. 7850.4100, Subp. H. addresses “use or paralleling of existing rights-of-way,

statutes are field lines and property boundaries equated with right-of-way, nor are field lines and property boundaries regarded as “corridor.” This route adjacent to Highway 52, near the Highway 19 interchange, however, has neither transmission nor road RoW sharing, it is a greenfield route by any measure. The northern part of the route parallels the Cannon River within the MCBS area along the banks of the river and traverses a Zoological MNDNR Natural Heritage site. Addendum p. 153-156, Hearing Exhibit 113, FEIS, Appendix A, Sheetmap NR8, see also NR9.

The added route “adjustment” near Co. Rd. 24 is similarly a greenfield route – the blue in Xcel’s map represents sharing a corridor with a road, but there is no road at this location. See Appendix p. 65, Exceptions, Attachment 2, Map.

In addition to the above issues regarding Notice and Environmental Review, CapX 2020 Applicants’ last minute changes are contrary to Minnesota transmission routing policy because they are not utilizing existing rights-of-way where routes with existing transmission and roadway are available.

Proliferation of transmission corridors is inconsistent with Minnesota’s longstanding policy of Non-proliferation established by People for Environmental Enlightenment & Responsibility (PEER), Inc. v. Minnesota Environmental Quality Council, 266 N.W. 2d 858 (Minn. 1978). For these reasons, understanding that all transmission has significant impacts, our analysis shows that the “least harmful” routes for Segment 1 near Cannon Falls is route 1P-003.

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survey lines, natural division lines, and agricultural field boundaries” and then separately in Subp. J, “use of existing transportation, pipeline, and electrical transmission systems or rights-of-way.”

Route 1P-003 utilizes a route with existing transmission lines. There is existing transmission on route P-003 from the intersection of Harry Avenue to the Byllesby Dam, and from the Dam southward to Highway 19. This existing transmission is noted in Exhibit 35, the Google Earth overview, in Harry Avenue landowner testimony, and in the ALJ's Recommendation of 1P-003:

FOF 301. Route alternatives 1P-001, 1P-002, and 1P-003 would run along existing 69 kV, 115 kV, and 161 kV transmission lines on Harry Avenue to the Cannon Falls substation located near the hydroelectric dam that creates the Lake Byllesby Reservoir. This is the east boundary of Lake Byllesby Regional Park (managed by Dakota County) and Lake Byllesby County Park (managed by Goodhue County). These route alternatives would also parallel a planned regional park recreational trail and a bridge crossing the Cannon River that are proposed in the park 2005 master Plan and are planned for construction in 2013. Because the watershed in this area is already impacted by existing high-voltage transmission lines, however, impacts to these parks would be minimal if one of these route options were chosen.<sup>5</sup>

FOF 306. There are, however, significant problems following US 52 through the Cannon Falls area in the vicinity of Highways 19 and 24, because of the proximity of homes, churches, schools, and businesses. Use of option 1P-003 would bypass this area and would impact fewer total residences; would avoid the church, school, and businesses; would parallel existing transmission lines and use mostly existing road corridors; and would provide the opportunity to avoid potential conflicts with two future road projects (the railroad overpass and the County Road 24 interchange).<sup>6</sup>

See Ex. 35 Google Earth; Testimony of Denae Reiswig (we already have some high lines coming down our side of the road) p. 67-68, Public Hearing June 16, 2011 – Cannon Falls – 6:30; see also Addendum, Recommendation of ALJ, FOF 301-306.

As above, the existing 69kV, 115kV and 161kV transmission lines along route 1P-003 are missing from the Environmental Impact Statement, it is not shown on the map.

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<sup>5</sup> (ALJ Recommendation footnote) 369. Ex. 113 at 106-107; Ex. 1. Vol. 2, section M(Sheet Map 10).

<sup>6</sup> (ALJ Recommendation footnote) 373 Ex. 113, Appendix A at A-11 (Map NR9); Ex. 36 at Sheet Map 10.

FEIS, p. 103, Map 8.1-26. The existing transmission on 1P-003 is also not addressed in the narrative Route Descriptions for 1P-001, 1P-002 and 1P-003. Again, the Commission was notified of this error and omission during oral arguments on April 23, 2012 and did not correct the error.

This route segment selection is contrary to Minnesota's long standing policy of transmission line route non-proliferation. We request that the court reject the routing permit for Segment 1 near Cannon Falls, and instead follow route segment 1P-003, as recommended by the Administrative Law Judge because it more closely adheres to Minnesota's policy of non-proliferation.

**IV. THE COMMISSION'S DECISION IS AN ERROR OF LAW BECAUSE IT IMPROPERLY RELIES ON INFORMATION NOT IN THE RECORD AND IGNORED PERTINENT INFORMATION IN THE RECORD.**

The Commission improperly relied on new information submitted by Applicants in their Exceptions filed after the record had closed. The Applicants' filed Exceptions to the Recommendation of the Administrative Law Judge on February 23, 2012. Appendix p. 65-78. The hearing record and public comment closed on June 30, 2012. Addendum p. 62, OAH Recommendation FoF 56. Much of the narrative regarding Segment 1 and Attachments 1, 2 and 3, cited and relied on by the Commission in its decision, contained information not in the record. The Commission is prohibited from using, citing or relying on information not in the record:

No factual information or evidence shall be considered in the determination of the case unless it is part of the record.

Minn. Stat §14.60, Subd. 2. Appellants' timely filed a Motion to Strike these Exceptions, requesting that the many portions of Exceptions not in record be stricken, which was not taken up by the Commission.

The Exceptions filed by the Applicants contained narrative and three maps for Segment 1, labeled as Attachments 1, 2 and 3, and the maps also contained charts in the upper right corner with information regarding Xcel's House count on map Attachment 1, use of existing Right of Way on map Attachment 2, and location of Byllesby Park land in Dakota and Goodhue County on map Attachment 3. Specifically, page by page, the information not in the record is as follows:

- Applicants now refer to the route as the "Modified Preferred Route" and state it was "modified further during the hearing process." Appendix p. 69, Exceptions p. 3. However, it was not. Instead, it was unilaterally changed at the very end of the proceeding with insufficient notice and no independent verification of claims made.
- "Attachment 1 is a map of the area showing both the Modified Preferred Route and Segment 1P-003." Id. Attachment 1 is instead Applicant's house count.
- Exceptions claim "[t]he Modified Preferred Route follows U.S. 52 which is a high traffic infrastructure corridor characterized by primarily industrial and commercial uses. Id. Instead, the route chosen by Applicants is on the north end, is residential and contains a school and church, and on the southern end, is residential with another church.
- Exceptions state that the alignment was altered "to address Minnesota Department of Transportation's ("Mn/DOT") permitting requirements..." but these permitting requirements were known from early in the application process and are not sufficient justification for a last minute change. Id.
- Exceptions claim that "the alignment was altered to follow a planned Mn/DOT access road running behind the businesses abutting the highway." As above, these permitting requirements were known from early in the

application process and are not sufficient justification for a last minute change. Id.

- Exceptions claim that “The ALJ’s Report notes that Segment 1P-003 was generally supported by some members of the public and the City of Cannon Falls” but fails to note that it was the route Recommended by the ALJ. Id., p. 4.
- Exceptions claim that “[t]he segment was opposed by Dakota County because of impacts to park lands and the residents living along Harry Avenue.” Id. However, Dakota County made no objection regarding the impacts to residents living along Harry Avenue, only to the potential impacts on park lands. See OAH Finding 233, Addendum p. 96.
- Environmental impacts have not been identified or compared. There is no data in the EIS regarding the Modified Preferred Route’s “adjustments” – no data about this greenfield cross-country path crossing and paralleling the Cannon River through the MCBS area on the south side of the river heading west around the Sandstrom’s home and business on the south side of the Cannon River west of Highway 52, then south cross-country on the west side the St. Paul’s Lutheran School and Church and cross-country along a subdivision of Cannon Falls.
- Exceptions state that Segment 1P-003 “would cross within ‘40 feet’ of horse arena maintained along the route.” That route is already home to a transmission corridor with three transmission lines near the horse arena. If Applicant’s late announced “Modified Preferred” route were to be built, it would traverse the horse arena at the home just south of the Cannon River. Addendum p. 154, EIS Sheet Map NR-7.
- Exceptions state:

*It appears the ALJ relied upon house impacts for total homes within 500 feet to reach her conclusion that Segment 1P-003 would ‘impact fewer total houses.’ However, in this case, raw numbers do not fully capture the comparative impacts of the two alternatives. Moreover, the house count comparisons provided in the SLJ Report for the Modified Preferred Route do not reflect two alignment adjustments included in the Modified Preferred Route by the Highway 19 Interchange and the planned County Road 24 Interchange.”*

Appendix p. 71-72 Exceptions, p. 4-5.

The house count comparisons do not reflect the two alignment adjustments because those numbers are not in the record.

- Exceptions state that “[a]fter the ALJ Report was issued, the Company undertook a site review of Segment 1P-003 and the comparable portion of the Modified Preferred Route...” Exceptions, p. 5. This entire paragraph admits that the information within was collected after the ALJ Report was issued, long after the record closed. None of this information has been independently verified, and Affidavits provided by residents state under oath that their house counts are incorrect. Appendix p.p. 30-61; see also see also Public Comment of Laurie J. Felton (Anderson) and attached map showing missing houses, received June 24, 2011.
- Exceptions state that “there are only two homes within 150 feet of the Modified Preferred Route compared to six for Segment 1P-003. Attachment 1.” Id. Again, these numbers are not in the record. (Exceptions cite route 3P-003 where it should be 1P-003). Each time in this paragraph of the Exceptions that the term “Modified Preferred Route” is used, is an instance where the information is not in the record.
- Exceptions claim that “[t]he company notes that the Highway 19 Interchange alignment avoids the church and school referenced in ALJ Report Finding at No. 306.” Id., p. 5, fn. 11. This is not true. The route proposed just puts the line on the west side of the church instead of the east side. See Flotterud Affidavit, Appendix p. 30-32.
- Exceptions cite Exhibits 94 and 95 as sources for impacts tables, however, these numbers were not independently verified or vetted and are not incorporated into the Final Environmental Impact Statement. Exhibits 94 and 95 were added into an Appendix to the EIS, Appendix L, and were not incorporated into the narrative, maps or analysis.
- Exceptions cites “FEIS at Appendix A at Sheets NR6-NR9” as showing comparative information regarding the “Modified Preferred Route” but the “Modified Preferred Route” is not shown on any maps in the FEIS Appendix A maps, and is not shown on Sheets NR6-NR-9. Id., p. 6, and fn. 12; see Maps NR 6-9 at Addendum p. 153-156.
- Exceptions refer to “3P-03” and “Attachment 2” which are not correct. Attachment 3 reflects the green area claimed to be LWCA funded.

- Exceptions state that “The Company researched the boundaries of the LAWCON funded portions the park in response to the ALJ Report.” Id., fn. 14. This is another admission that the information was compiled long after the record closed.
- Regarding the Land and Water Conservation Act of 1965, claiming routing on 1P-003 would “require permission for locating the line within park property,” which contradicts the Lake Byllesby Master Plan statement that the land was donated to the County by Northern States Power. Appendix p. 62-64, Master Plan, p. 4.19. Also, both Xcel in its Exceptions and the Commission’s Order fail to acknowledge the large three transmission line corridor on the eastern edge of the park, which shows a history of permission for locating transmission lines adjacent to the park. Appendix, Affidavit of Langdon p. 38.
- Exceptions state that “3P-03 also parallels Lake Byllesby Park,” but the map in Attachment 3 (not Attachment 2) shows that the line would “parallel” and not encroach on parkland, and testimony of Hillstrom was that if it crossed at the dam, it would cross east of the dam, away from the green area on the map that is west of the Byllesby Dam.
- Exceptions state that “Segment 1P-003 would place the line through at least a part of Lake Byllesby Regional Park north of the river,” but 1P-003 would utilize an existing transmission corridor. Exceptions., p. 7.
- Exceptions claim percentages of Right of Way sharing in Attachment 3 (really Attachment 2) but the tables on Attachment 2 are not in the record, and have not been independently verified.
- Exceptions proposed modified findings for Finding of Fact 110, but there is no citation to the record for the information proposed, and to the extent it relies on information in the Exceptions, it is not in the record. Exceptions., p. 9-10.
- Exceptions proposed modified Conclusions of Law, Conclusion 7, but again there is no citation to the record for the information proposed, and to the extent it relies on information on the Exceptions, it is not in the record.
- Attachment 1, Map, in Exceptions refers to a “Modified Preferred Route” and house counts for various distances from the centerline, but there is no shaded corridor drawn on this map as there is on other maps



and there is no information in the record regarding house counts for a “Modified Preferred Route.” The numbers of houses in the table on Attachment 1 also do not match the numbers of houses in Exhibit 95. One or the other is wrong, and they have not been independently verified or vetted and we do not know where the errors are.

- Attachment 2, Map, in Exceptions contains a table purporting to represent “Paralleling of existing Row...” comparing Applicant’s “Modified Preferred” with Segment 1P-003, however, the numbers of houses in the table on Attachment 2 also do not match the numbers of houses in Exhibit 95. One or the other is wrong, and they have not been independently verified or vetted and we do not know where the errors are.
- Attachment 3, Map, focuses on “LAWCON” parkland, which was not addressed in the hearing record. Again, this also contradicts information that the parkland was donated to Dakota and Goodhue County by Northern States Power. See Appendix p. 62-64, Byllesby Master Plan selected.

The Attachments and narrative Exceptions were referenced by the Commission in its Order, considered by the Commission, and for its decision, the Commission relies on the information in the Exceptions that is not in the record. Addendum p. 9-11, Commission Order, p. 7-9; see also fn. 14.

The Commission Order’s narrative regarding site review, house count impacts, land use and park impacts improperly references Xcel’s statements in the Exceptions and does not cite information in the record. Addendum, p. 3 et seq. Citations regarding Segment 1 in the Commission’s Order to the Final EIS, fn. 14 and 15, are inaccurate as the FEIS did not address the late-filed changes to Xcel’s Preferred route that made it the “Modified Preferred” route. Addendum p. 10, Order p. 8. Appendix L to the EIS, where Applicants Hearing Exhibits 94, 95 and 96 were inserted, is the only location of information regarding the late-filed changes proposed by Xcel. Any comparison of 1P-

003 and the “Modified Preferred” route citing to the FEIS is improper because the FEIS does not include data regarding the late-added greenfield route segment around the Hwy. 52 and Hwy. 19 interchange, what is contained separately in Appendix L is late filed information compiled by Xcel Energy, not independently verified, not vetted, not subject to public comment, and not analyzed and incorporated into the FEIS.

Xcel’s Exceptions contained maps, charts and extensive narrative information not in the record and which is not properly available to the Commission for consideration. The Commission then erred in use and reliance on the information not in the record.

In addition, the Commission also did not utilize the available information regarding the transmission corridor along Harry Avenue which was recognized by the Administrative Law Judge in her Recommendation – that there is a large transmission corridor along Harry Avenue, from Highway 52 heading south, across the Byllesby Dam, and further south crossing Highway 19. Instead, the Commission’s Order states:

*In addition, 1P-003 would require the line to be constructed cross-country along fields in a residential area and would present adverse impacts to the natural environment and recreation.*

Addendum p. 11, Order, p. 9. The 1P-003 “residential” area of Harry Avenue is traversed by a transmission corridor with three transmission lines, a fact considered by the ALJ, FoF 301, that acknowledges the three transmission lines that run south along Harry Avenue to the Cannon Falls substation near the Byllesby Dam:

FOF 301. Route alternatives 1P-001, 1P-002, and 1P-003 would run along existing 69 kV, 115 kV, and 161 kV transmission lines on Harry Avenue to the Cannon Falls substation located near the hydroelectric dam that creates the Lake Byllesby Reservoir. This is the east boundary of Lake Byllesby Regional Park (managed by Dakota County) and Lake Byllesby County Park

(managed by Goodhue County). These route alternatives would also parallel a planned regional park recreational trail and a bridge crossing the Cannon River that are proposed in the park 2005 Master Plan and are planned for construction in 2013. Because the viewshed in this area is already impacted by existing high-voltage transmission lines, however, impacts to these parks would be minimal if one of these route options were chosen.<sup>7</sup>

Addendum, p. 108-109, ALJ Recommendation, FOF 301, p. 57-58.

The EIS has omitted this fact, and the Commission was notified of this error during the April 12, 2012 meeting. Any crossing of the Cannon River between Hwy. 52 and the Byllesby Dam is in a designated “recreational” part of the Cannon River. The Commission’s statement is an error of fact. The adverse impacts will be mitigated by existing infrastructure.

The Commission’s Order also fails to address the fragmentation impacts of the existing transmission corridor from Highway 52, south across the Byllesby Dam on to Highway 19.

*Placing the line through a portion of Lake Byllesby Regional Park would fragment previously undivided forest community on both sides of the Cannon River and would impact more native plant communities and Sites of Biological Significance than the Modified Preferred Route, as detailed by the DOC-EFP in its comments and the EIS. Furthermore, there is planned activity for a recreation trail in the Park and a planned bridge crossing*

Addendum p. 12, Commission Order, p. 9. Some fragmentation will occur at either of the potential crossing of the Cannon River west of Hwy. 52 and either 1P-003 and Xcel’s Modified Preferred route. Addendum p 154-155, EIS Sheet NR7 and NR8. Xcel’s Modified Preferred “adjustment” would not only fragment at the river crossing because it would cross west of the Hwy. 52 crossing, and in addition, with the late-added

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<sup>7</sup> (ALJ Recommendation footnote) 369. Ex. 113 at 106-107; Ex. 1. Vol. 2, section M(Sheet Map 10).

“adjustment” it would then parallel the south bank of the river through the Site of Biological Significance as it heads west just north of the Sandstrom’s house and business. FEIS Sheetmap NR7, note width of MCBS and location of Sandstrom’s residence. On the IP-003 route, the cited Dakota County Master Plan includes a pathway and bridge east of the dam, where the transmission line is proposed, and the pathway and bridge east of the dam would fragment this area. The dam itself, and the associated transmission, is nearby, grossly fragmenting the area, and transmission crosses the Cannon River in that area as well. The transmission line, if routed along Harry Avenue, would not be traversing through an unfragmented area. Further, the MCBS area referenced by the DNR’s Jamie Schrenzel extends from the dam to Hwy. 52, and impacts would be the same for either crossing, if not more on Xcel’s late-proposed route due to running parallel to the river between the river and Sandstrom’s home. There is also a zoological important species shown in the EIS at the southern end of Applicant’s “adjustment” that has not been addressed, and which is not present on route 1P-003. Addendum p. 155, FEIS NR8. Using 1P-003 would mitigate impacts to this zoologically important species.

The oft-cited Byllesby Regional Park Master Plan and “planned activity” as set out in the Byllesby Park Master Plan seems to be an important aspect of this decision, and yet routing transmission near the dam is consistent with the park’s themes set out in the Master Plan. First, the route proposed is along Harry Avenue, the eastern border of the park, crossing near the dam, and then south following transmission – it does not go through the park, it borders it. See Appendix p 78, Exceptions Attachment 3 map; see also Appendix p. 62-64, Byllesby Master Plan. Second, it is located on land donated to

Dakota and Goodhue County by Northern States Power. Id. Third, and more ironically, the Byllesby Park Master Plan focuses on electricity! Appendix p. 62-65, Motion for Reconsideration Attachment J, Byllesby Regional Park Master Plan (selected). Two of the four “interpretive themes” of the park focus on electricity and electric generation<sup>8</sup>, based on the history of the park, which originated through a donation of the land by Northern States Power.<sup>9</sup> The park’s interpretive themes extol the wonders of electricity.

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<sup>8</sup> From Dakota Co. Master Plan:

***THEME 3: POWERING MINNESOTA - HENRY BYLLESBY AND THE LAKE BYLLESBY DAM.*** With the increase in the population of Randolph and the subsequent move into the electrical age came the need for power in the homes, businesses, and industries of the Lake Byllesby area. The response to this need was provided by Henry Byllesby, a forerunner in the use of hydroelectric power in America. Byllesby, whose company, Consumers Power Company, was based in Chicago, realized that in directing the power of the rivers of Minnesota, North Dakota, South Dakota, and Wisconsin, he could create the energy needed to sustain the ever-growing populations of these states. One of these rivers was the Cannon River, upon which he had the Ambursen Hydraulic Construction Company construct the Lake Byllesby Dam in 1910. Six years later, he changed the name of his company to Northern States Power Company, recognized today as one of the major providers of power in the midwestern United States.

***THEME 4: THE POWER OF ATTRACTION - LAKE BYLLESBY REGIONAL PARK.*** Though for many years, hydropower was the most economical method of producing power, by the 1960s, larger companies had largely replaced their hydropower plants with coal or nuclear power plants. In replacing many of their hydropower facilities, Northern States Power Company opted to donate much of its property upon which these facilities were situated to the towns or counties encompassing such property. One of these properties was the location of the Lake Byllesby Dam. After the land was donated to Dakota and Goodhue Counties in 1969, Dakota County created Lake Byllesby Regional Park from portions of the land on the north shore of the lake. Lake Byllesby Park attracted residents and visitors alike to picnic, camp, fish, swim, canoe, and simply enjoy the view. Today, both the park and the dam interact to provide a sense of all facets of the area’s history, from natural history, to the history of everyday human interactions, to the engineering history at Lake Byllesby Regional Park.

Byllesby Park Master Plan, p. 4.19 (emphasis added).

<sup>9</sup> Id. Theme 4. “In replacing many of their hydropower facilities, Northern States Power Company opted to donate much of its property upon which these facilities were situated to the towns or counties encompassing such property. One of these properties was the location of the Lake Byllesby Dam. After the land was donated to Dakota and Goodhue Counties in 1969...”

*Placing the line through a portion of Lake Byllesby Regional Park would fragment previously undivided forest community on both sides of the Cannon River and would impact more native plant communities and Sites of Biological Significance than the Modified Preferred Route, as detailed by the DOC-EFP in its comments and the EIS. Furthermore, there is planned activity for a recreational trail in the Park and a planned bridge crossing of the Cannon River, both of which would be impacted by 1P-003.*

Addendum p. 12, Commission Order, p. 9. As above, at most, any crossing of the Cannon River, be it 1P-003 or Xcel's late-added "adjustment" would fragment the same "undivided forest community" of the same level of Sites of Biological Significance."

1P-003 does not have a zoological Heritage area that the Applicant's late-filed "adjustment" does. As above, the EIS does not evaluate the additional impacts of paralleling the river in the area of Biological Significance inherent in Xcel's late-added "adjustment." Addendum p. 153-156, Maps NR 6-9.

Use of "Xcel's data" without vetting and without evaluation in the EIS, and Commission selection of a route based on this data, is assuming facts not in evidence and an error of law. Conversely, failure to utilize information provided in the Recommendation of the Administrative Law Judge regarding a known transmission corridor and routing the transmission line contrary to Minnesota's policy of Non-Proliferation is an error of law.

**V. THE COURT MUST DECLARE THE COMMISSION'S ROUTE CHOICE IN THE CANNON FALLS AREA INVALID AND DIRECT THE COMMISSION TO ADOPT 1P-003 OF THE SEGMENT 1 ROUTE AS RECOMMENDED BY THE ADMINISTRATIVE LAW JUDGE**

St. Paul's Church and School and Cannon Falls Landowners requests that the court find the Commission's decision an error of law and direct it to reverse its decision of

April 12, 2012 and its written Order of May 30, 2012, rejecting the Administrative Law Judge’s 1P-003 route, and instead utilize the ALJ’s Recommendation and Order that the “Alternate Route Segment” around problematic areas in Cannon Falls cannot be used for CapX 2020 transmission. The route chosen that comprises the “Modified Preferred” route near Cannon Falls was improperly added, without adequate notice, without identification in the Scoping Decision, and without environmental review and inclusion in the DEIS or FEIS. Other attempts to propose routes late in the process were rejected, as this attempt by the Applicant should be as well – the rules do apply to Xcel Energy.

The lack of notice and environmental review preclude use of the Applicant’s “Modified Preferred” route in the Cannon Falls area. Because existing transmission lines on Harry Avenue and south to Highway 19 provide a transmission corridor that can be utilized, Route 1P-003 is more in compliance with Minnesota’s policy of non-proliferation and Minn. Stat. §216E.03, Subd. 7(e).



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Carol A. Overland #254617  
Attorney for Cannon Falls Landowners  
OVERLAND LAW OFFICE  
1110 West Avenue  
Red Wing, MN 55066  
(612) 227-8638  
[overland@legalelectric.org](mailto:overland@legalelectric.org)