

A12-1607
(Oronoco Township Appeal)
and
A12-1632
(consolidated)

**State of Minnesota
In Court of Appeals**

In the Matter of Xcel Energy's Application
for a Route Permit for the CapX 2020
Hampton-Rochester-La Crosse
High Voltage Transmission Line

**BRIEF AND ADDENDUM OF PETITIONER
ORONOCO TOWNSHIP**

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STATEMENT OF THE ISSUES

- I. WHERE THE PUBLIC UTILITIES COMMISSION (PUC) FAILS TO FOLLOW THE PRESCRIBED STATUTORY PROCEDURES AND ADMINISTRATIVE RULES AND DEPRIVES A PARTY TO THE PROCEEDINGS OF DUE PROCESS AND A FAIR PROCESS, IS THE PARTY SO PREJUDICED ENTITLED TO REVERSAL AND REMAND TO THE PUC FOR REHEARING TO BE NOTICED AND TO BE HEARD AND FOR A DECISION TO BE MADE IN ACCORD WITH DUE PROCESS, WHICH INCLUDES COMPLIANCE WITH MINNESOTA STATUTES AND ADMINISTRATIVE RULES?

The failure of the PUC to follow the statutes, the rules and deprivation to Petitioner/Appellant Oronoco Township of due process was timely and specifically raised by Petitioner in accord with Minn. R. 7829.3000, subp. 2, and Minn. Stat. § 216B.27, subd. 2, by Oronoco's Petition for Reconsideration and Vacation, Rehearing and Reargument of the PUC's Order Issuing Route Permit As Amended. The PUC, by order issued May 30, 2012, rejected the ALJ's recommendation of the Zumbro Dam Route for Segment 3 and granted a route permit utilizing a different route, the White Bridge Route opposed by Oronoco. (Add. 3). The denial of Oronoco Township's petition for rehearing rendered the PUC's decision final. (Add. 1).

Minn. Stat. § 14.69 (2006).

Minnegasco, a Div. of NorAm Energy Corp. v. Minn. Pub. Utils. Comm'n, 549 N.W.2d 904 (Minn. 1996).

Application of Minnegasco, 565 N.W.2d 706 (Minn. 1997).

Yellowbird, Inc. v. MSP Exp., Inc., 377 N.W.2d 490 (Minn. Ct. App. 1985).

STATEMENT OF THE CASE AND FACTS

The CapX 2020 Project involves the construction of three new high voltage transmission lines from Brookings, South Dakota to Hampton, Minnesota; from Hampton through Rochester to La Crosse, Wisconsin (the subject of this appeal); and from Fargo, North Dakota to Alexandria, St. Cloud and Monticello, Minnesota. (Finding 2; Addendum [Add.] 22).¹ The Minnesota portion of the Hampton-Rochester-La Crosse Project (“Project”) will provide transmission primarily to Rochester and Winona. It will consist of a new 345 kilovolt (kV) transmission line, approximately 15 miles of 161 kV line, and a new North Rochester Substation. (Add. 4).

The Project has three distinct segments and associated facilities. (Finding of Fact 6; Add. 23). Segment 1 consists of a 345 kV double-circuit capable transmission line from the proposed Hampton Substation near Hampton, Minnesota, to a proposed North Rochester Substation to be located between Zumbrota and Pine Island, Minnesota. (Id.) Segment 2 consists of a new 161 kV transmission line between the proposed North Rochester Substation and the existing Northern Hills Substation located in northwest Rochester. (Id.) Segment 3 consists of a new double-circuit capable 345 kV transmission line from the proposed North Rochester Substation to the proposed Mississippi River crossing near Alma, Wisconsin. (Id.)

Petitioner/Appellant Oronoco Township’s (“Oronoco”) petition for certiorari review to this Court concerns solely Segment 3. (Oronoco’s Appendix [O.A.] 76). Oronoco

¹ Findings refers to the Findings of Fact issued by ALJ Sheehy on February 8, 2012 (Add. 21), which the Public Utilities Commission accepted, adopted and incorporated except as set out in its order of May 30, 2012. (Add. 3).

challenges the Public Utilities Commission’s (“PUC”) issuance of a route permit on the route designated by the PUC for Segment 3 by order issued as amended on May 30, 2012 and for which rehearing/reconsideration was denied on August 14, 2012. (Add. 1, 3). Oronoco asserts the PUC failed to follow the administrative rules and statutes and deprived Oronoco of due process to Oronoco’s prejudice. (O.A. 76).

The material facts, which include the Project’s procedural history, are as follows.

A. The Project’s Applicant Is Xcel Energy.

The Project’s applicant is Respondent Xcel Energy, also known as Northern States Power (“Applicant”), and its CapX 2020 utility partners. (Finding 1; Add. 21-22). The PUC issued a Certificate of Need for the Project in May 2009. (Finding 4; Add. 23). On January 19, 2010, Applicant submitted its Application for a Route Permit under Minn. Stat. § 216E.03 and Minn. R. 7849.0200 for the Project. (Finding 5; Add. 23).

B. Those Impacted by the Project Area Were Notified.

Minnesota statutes and rules required Applicant to provide notice to the public and to local governments before and during the application process. (Finding 19; Add. 26; citing Minn. Stat. § 216E.03, subd. 3a and 4 and Minn. R. 7850.2100, subp. 2, Minn. R. 7850.2100, subp. 4). Before filing its application, Applicant notified local governments within the Project area, in accord with Minn. Stat. § 216E.03, subd. 3a. (Finding 20; Add. 26).

When it filed its Application, Applicant mailed a notice to landowners shown on the county record whose property is within or adjacent to the preferred and alternative routes and substation sites, the list of persons on the Project service list, and the list of persons

requesting notice of submitted High Voltage Transmission Line Applications for Route Permits maintained by the PUC. (Finding 21; Add. 27). Applicant also mailed a notice and copy of the Application to all officials of Local Government Units within the proposed and alternate routes. (Finding 22; Add. 27). A copy of the Application was mailed to public libraries within the Project area and notice that the Application had been filed was published in newspapers of general circulation in the Project area. (Findings 23 and 24; Add. 27).

C. Applicant Submitted One Preferred Route and Alternatives for Segment 3.

The North Rochester to Mississippi River 345 kV segment requires the crossing of the Zumbro River. (Application 5-13; O.A. 32-33; Finding 184; Add. 55). Applicant looked at three possible Zumbro River crossings. (O.A. 32). The Applicant found “there wasn’t a clear superior one.” (Evidentiary Hearing Transcript [Hrg. Tr.] June 20-24, 2011, Vol. 1, p. 121). “They all stacked up fairly evenly” and Applicant concluded “there wasn’t a big enough difference in the data to justify eliminating any one of them.” (Id.)

The White Bridge Road crossing of the Zumbro River (“White Bridge Route”) was ultimately designated as Applicant’s preferred route. (O.A. 32). This route cuts through Oronoco Township. It crosses the Zumbro River at the White Bridge Road and is 44.74 miles in length. (Finding 376; Add. 92). This route requires additional tree clearing at the Zumbro River. (Application 5-18; O.A. 33).

An alternative route identified by the Applicant – the Zumbro Dam Route – crosses the Zumbro River at an existing river crossing – the Zumbro Dam and Hydroelectric Generation Facility. (Application 5-18; O.A. 33; Findings 392-394; Add. 95). This route

requires new tree clearing on the Zumbro River's east bank and is in proximity to a campground and two summer camps. (*Id.*; O.A. 33).

Another alternative route – the North Route – follows the Zumbro River where there is no existing linear corridor on either side of the river. (Finding 397; Add. 95; O.A. 33).

D. The Case Was Assigned to ALJ Sheehy for Contested Case Proceedings.

On March 9, 2010, the PUC accepted the Application as complete and authorized the Energy Facilities Permitting Unit (“EFP”) of the Department of Commerce staff to process the Application under the full permitting process in Minn. R. 7850.1700 to 7850.2700. (Finding 7; Add. 24). Also on March 9, 2010, the PUC issued a Notice and Order for Hearing referring the matter to the Office of Administrative Hearings (“OAH”) for contested case proceedings. (*Id.*) The Administrative Law Judge (“ALJ”) assigned to this case was Kathleen D. Sheehy. (Add. 21).

E. DOC-EFP Held Six Public Information and EIS Scoping Meetings.

As previously stated, the Project is subject to environmental review under Minn. Stat. § 216E.03, subd. 5. Minnesota Statutes and Rules direct the Commissioner of the Department of Commerce (“DOC-EFP”) to prepare an Environmental Impact Statement (“EIS”) for the proposed Project. (Finding 27; Add. 28). Minn. Stat. § 216E.08 authorizes the PUC to establish advisory task forces (ATF) to assist in evaluating routes. DOC-EFP established two task forces, the North Rochester to Mississippi River Task Force and the Hampton to North Hills Task Force. (Commission 3/16/10 Order; Finding 29; Add. 28). Each task force identified alternative routes to be considered and assessed by the EIS.

(Findings 33-34; Add. 28). The DOC-EFP appointed 11 persons to the Hampton to Northern Hills ATF and 7 persons to the North Rochester to Mississippi River ATF. (Finding 32; Add. 28). The North Rochester to Mississippi River ATF identified eight alternatives for consideration in the EIS; the Hampton to Northern Hills ATF identified seven. (Finding 37; Add. 29).

The DOC-EFP held six Public Information and EIS Scoping Meetings on May 4, 5 and 6, 2010, which provided Project information and was used to identify issues and route alternatives to be addressed in the EIS. It accepted public comment. (Findings 35-36; Add. 29). On August 4, 2010, EFP filed two ATF reports. (Finding 37; Add. 29). EFP also held Public Information Meetings to obtain comments on the Draft EIS. (Finding 50; Add. 30).

During the scoping process the public had the opportunity to comment and express any issues or concerns with the Project. Approximately 350 people attended these public meetings. (FEIS App. K). The issues raised with greatest frequency are expressed in the following table:

<u>Issue</u>	<u>Number of Times Issue Mentioned</u>	<u>Percentage of All Commenters Who Raised the Issue</u>
Property value	67	32%
Proximity to homes/structures	66	31%
Land based economics	50	24%
Visual and aesthetic impacts	42	20%
Electric and Magnetic Fields (EMF)	40	19%

(FEIS App. K, tbl. 1).

A public comment period beginning April 19, 2010 and ending May 20, 2010 provided the public an additional opportunity to submit comments and alternative routes. A total of 211 commenters provided comments. (*Id.*)

F. The Contested Case Hearing Included Six Public Hearings and an Evidentiary Hearing.

A contested case hearing (Minn. R. 7850.2600 and Minn. R. 1405.0200 through 1405.2700) was conducted by ALJ Sheehy. (Add. 21). The contested case hearing was in two stages. There were six public hearings in the Project area between June 14 and 16, 2011. (Add. 21; Finding 54; Add. 31). The evidentiary hearing was held on June 20, 2011 through June 22, 2011 and June 24, 2011. (Add. 21; Finding 55; Add. 31).

Persons who wished to intervene and become a party were required to petition for intervention no later than May 2, 2011 in accord with Minn. R. 1405.0900, subp. 1. (O.A. 2). Any party sponsoring witnesses was required to have the witnesses available at the public/evidentiary hearings. (*Id.*)

Members of the public who wanted to participate in the hearings need not become a party to so participate. Minn. R. 1405.0800. (O.A. 1-2). Such persons could “offer either oral or written testimony; they may offer exhibits . . . and they may ask questions.” (*Id.*) Comments provided at the public hearings were part of the record as well as written public comments filed with the ALJ before 4:30 p.m. on June 30, 2011. (O.A. 2, 4). “[T]estimony which is offered without benefit of oath or affirmation, or written testimony which is not subject to cross-examination, shall be given such weight as the administrative law judge deems appropriate.” Minn. R. 1405.0800, subp. B; see also Minn. R. 1405.1700, subp. 8.

On June 30, 2011, the public comment period closed. (Finding 56; Add. 31; O.A. 2).

G. Oronoco Township and Others Were Permitted to Intervene and Thereby Are Parties to This Proceeding.

1. Oronoco was granted intervention and opposed the White Bridge Route.

Pursuant to Minn. R. 7829.0800 and 1405.0900, one who desires to become a party must file a timely petition to intervene. Oronoco Township timely sought and was granted intervention. (Finding 14; Add. 25; O.A. 9, 44). The White Bridge Route is opposed by Oronoco. (Finding 378; Add. 92). It cuts through Oronoco Township west of the Zumbro River that contains small hobby farms as well as many miles of agricultural land to the east. (Finding 376; Add. 91).

The White Bridge Route interferes with planned residential areas in Oronoco Township and would have a negative impact on the recreational use of Lake Zumbro. (Finding 378; Add. 92). This route affects more residents and is in an area where Oronoco has gone to considerable effort to zone carefully to protect wildlife and to develop housing in a manner that accommodates the needs of the residents. (Finding 379; Add. 92). The current house count for this route does not take into account the future residential development that is planned in Oronoco Township and Olmsted County pursuant to their respective land use plans. (Evidentiary Hearing Exhibit [Hrg. Ex.] 66 at Ex. 5; Ex. 8; Hrg. Tr. Vol. 1 at 124). Less than one mile from this route is identified as "Potential Suburban" for future residential development. (Finding 380; Add. 92-93). The White Bridge Route will have the greatest impact on recreational users due to the fact recreation abounds on Lake

Zumbro. (Hrg. Ex. 68 at Ex. 5). Farmers living further east also objected to the impact of this route on their farming operations. (Finding 381; Add. 92).

At the hearings, Oronoco presented the testimony of two experts who advocated in support of the Northern Route.² (Finding 15; Add. 25; Hrg. Ex. 66-69). In the alternative, Oronoco supported the Zumbro Dam Route, also referred to as the 3P-Zumbro S Route. (Hrg. Ex. 68 at 7-9; Finding 15; Add. 25). Oronoco's experts were subject to cross-examination, including examination by the ALJ. (Hrg. Tr. Vol. 2, pp. 40-108, 110-175).

Oronoco's expert Jeffrey Broberg is a licensed professional geologist and a Registered Environmental Manager with the National Registry of Environmental Professionals. He has been professionally engaged in environmental and land use assessments in Oronoco Township and Olmsted County for 20 years. (Hrg. Ex. 68, pp. 1-2).

Mr. Broberg explained the environmental characteristics are similar between the three Segment 3 route options, but settlement pattern characteristics, recreational resources and tourism uses vary greatly between these routes. (Id., p. 4). The development patterns and planned future use along the White Bridge Route had not been properly considered in the route siting. (Id., p. 5). Placement of transmission lines at the White Bridge Route will have the greatest impact on recreation. (Id.) Lake Zumbro is the only recreational lake within

² Oronoco expert William Smith's direct testimony is Exhibit 66 and his surrebuttal is Exhibit 67. Expert Jeffrey Broberg's direct testimony is Exhibit 68 and his surrebuttal is Exhibit 69. Their testimony at the evidentiary hearing is at Hrg. Tr. Vol. 2 (6/21/11), pp. 40-176.

Olmsted County and is known to have a higher fishing pressure per acre than most Minnesota lakes. (*Id.*, p. 12; Hrg. Ex. 68 at Ex. 5).

Oronoco's other expert, William Smith (Hrg. Ex. 66 and 67), is employed by and founder of Biko Associates, Inc., a firm providing professional consultant services in land use and urban design. Mr. Smith testified as to the impact the White Bridge Route would have on Oronoco. (*Id.*, pp. 4-5). Specifically, Mr. Smith addressed the effects on human settlement. (*Id.*) He explained his findings that the Applicant's preferred route – the White Bridge Route – would have “the most severe impacts on human settlement.” (*Id.*, p. 15). He explained how this route affects Oronoco's growth and development plans. (*Id.*, pp. 24-25).

2. Others were granted intervention.

Others granted intervention, and thereby becoming parties, include No CapX 2020, United Citizens Action Network (“UCAN”), North Route Group (“NRG”) and ATC. (Findings 11, 12, 16; Add. 24-25; O.A. 9, 47, 49). No CapX 2020 and UCAN are organizations of affected landowners and residents within and in the immediate vicinity of the preferred and alternate routing options. (Finding 11; Add. 24-25; O.A. 47, 49).

NRG is composed of landowners, farmers and residents living in the vicinity of the Northern Route. (Finding 12; Add. 25; O.A. 49). NRG advocated against the Northern Route and supported the White Bridge Route. (Finding 13; Add. 25).

Also intervening was ATC, a Wisconsin limited liability company. It intervened to protect its interest in the regional development of transmission facilities terminating in Wisconsin. (Finding 16; Add. 25).

H. State Agencies Who Participated Include MNDOT and the DNR.

The Minnesota Department of Transportation (“MNDOT”) is not a party to these proceedings. MNDOT, however, participated in the public and evidentiary hearings and offered testimony and exhibits regarding the route options in all three segments. (Finding 17; Add. 26).

The Minnesota Department of Natural Resources (“DNR”) also participated in the public and evidentiary hearings and offered testimony and comments concerning all segments of the Project. (Finding 18; Add. 26). The DNR supported the White Bridge Route, asserting it would involve the least amount of tree clearing and would use an existing river crossing. The DNR so favored because the Northern Route is a green field crossing that has no existing infrastructure and the Zumbro Dam Route is near a site of high biodiversity significance. (Id.)

I. ALJ Recommends Zumbro Dam Route for Segment 3.

On August 31, 2011, EFP issued the final EIS (“FEIS”). (Finding 57; Add. 31). No party objected to the FEIS on any grounds set out in Minn. R. 7850.2500, subp. 10. The ALJ then issued her recommendation on February 8, 2012, which recommendation is premised on 490 detailed findings of fact and 14 conclusions of law (ALJ Report). (Add. 21).

The ALJ Report contains an evaluation of the route alternatives using the route permitting criteria set out in Minn. Stat. § 216E.03, subd. 7(b) and the Minn. R. 7850.4000, criteria which the PUC must consider in designating routes for high voltage transmission lines. (Findings 110-115; Add. 40-43). The ALJ Report reiterates the Power Plant Siting Act's (Minn. Stat. § 216E.02, subd. 1) overarching objective to locate large electric power facilities in an orderly manner compatible with environmental protection and the effective use of resources. (Finding 112; Add. 41).

1. ALJ presents detailed findings of fact with footnotes to the record.

The ALJ Report identified the route impacts and mitigation measures and drew conclusions based on the record. (Add. 40-113). The ALJ presents findings of fact for each of the decision's criteria under Minn. R. 7850.4100. (Add. 43-91). The ALJ Report includes extensive references in footnotes to oral comments made at the public hearings and the written comments that are part of the record in this proceeding. (*Id.*) It does not include a separate summary of written and oral comments from the public.

ALJ Sheehy's findings are structured by addressing the routing criteria to the Project as a whole and then addressing the Project's segments, offering a segment-by-segment analysis. (Finding 116; Add. 43). Segment 3 findings are contained under heading VII and consist of Findings 376 through 485. (Add. 91-111).

2. Zumbro Dam Route was chosen because it satisfied nonproliferation requirements but balanced competing land uses and minimized human and environmental impacts.

The route ALJ Sheehy recommended for Segment 3 is the Zumbro Dam Route, specifically Route 3P-Zumbro S with 3P-0004 option. (Finding 490; Add. 111). This route leaves the southern location of the North Rochester Substation, but instead of turning south through Pine Island and Oronoco Township, it heads straight east. It crosses the Zumbro River at the Zumbro Dam. It then heads south and southeast. This route is 42.92 miles in length. (Findings 376, 392; Add. 91, 95).

ALJ Sheehy acknowledges all route alternatives would cross the Zumbro River twice. The Zumbro Dam crossing at the dam is about 620 feet. The White Bridge Road crossing is approximately 845 feet. (Finding 433; Add. 102). Using the White Bridge Road would require crossing Lake Zumbro, which is on the impaired waters list. (Finding 439; Add. 103).

The Zumbro Dam Route was chosen because it satisfied “nonproliferation requirements” but balanced “competing land uses and minimize[d] human and environmental impacts.” (Finding 490; Add. 111). It is the least expensive option. (Finding 488; Add. 111). It impacts fewer residences. (Id.) At the Zumbro Dam, there is an existing crossing of the river (the Zumbro Dam and Hydroelectric Generation Facility) and a 69 kV transmission line runs west from the dam. (Finding 394; Add. 95). This crossing would require new tree clearing on the east bank of the Zumbro River. (Id.)

ALJ Sheehy, based on the information presented, addressed in detail the following categories in her findings which led to her recommendation of the Zumbro Dam Route. They include analysis of the following Minn. R. 7850.4000 criteria:

- Effects on human settlement, with specific findings on a proposed segment's proximity to structures and displacement of homes (Findings 410-419; Add. 98-100).
- Effects on land use (Findings 420-423; Add. 100-101).
- Effects on land-based economics, which include agriculture, mining and forestry (Findings 424-427; Add. 101).
- Effects on cultural resources (Findings 428-430; Add. 101-102).
- Effects on the natural environment, which findings are broken down to the following subcategories:
 - Water resources (Findings 431-444; Add. 102-104);
 - Flora (Finding 445; Add. 104);
 - Fauna (Findings 446-455; Add. 104-106);
 - Effects on rare and unique natural resources (Findings 456-462; Add. 106-107).
 - Use of parallel or existing right-of-way (Findings 463-464; Add. 107).
 - Effects on transportation (Findings 465-473; Add. 107-109).
 - Effects on recreation (Findings 474-485; Add. 109-111).

3. ALJ acknowledges objections by some members of the public to the Zumbro Dam Route.

As set out in the ALJ's findings, some members of the public objected to the Zumbro Dam Route. (Finding 395; Add. 95). Those members of the public identified by the ALJ in

her findings with citations to their public objections include Merl Norman,³ a board member of Laymen for Christ, Inc., Woodland Camp, and Steven Walker, 57040 Highway 63N, Zumbro Falls. They both spoke at the June public hearings before the ALJ. (Finding 395 and footnote 476; Add. 95).

ALJ Sheehy acknowledges the Zumbro Dam Route is located near a summer camp on the east bank of the Zumbro River. (Finding 483; Add. 110). But utilizing the Zumbro Dam route would not require the crossing of Lake Zumbro. Lake Zumbro provides recreational opportunities for boating, fishing, water skiing, tubing and swimming. (Finding 484; Add. 111).

4. The record as a whole supports the Zumbro Dam Route.

Based on the record as a whole, ALJ Sheehy, in Finding 490 (Add. 111-112), acknowledges her recommended Zumbro Dam Route requires some clearing of trees, but this route satisfies the nonproliferation requirements, balances land uses and manages environmental impact. She states:

In light of the record as a whole, the ALJ recommends the use of 3P-Zumbro S with the 3P-004 option [Zumbro Dam Route], as these routes satisfy nonproliferation requirements but balance competing land uses and minimize human and environmental impacts. The Applicant should work with the DNR and landowners in the area of the dam crossing to minimize impacts to the environment. Clearing of trees should be limited to only

³ In addition, Merl Norman represented Wabasha County on the North Rochester to Mississippi River Task Force, assisting the EFP staff in developing the scope of the environmental impact statement of the Project. (*Id.*; Hrg. Ex. 47; O.A. 189, 206).

those trees necessary to permit passage of equipment and to maintain the appropriate cleared right-of-way width.

(Id.)

ALJ Sheehy reached the following conclusion:

11. In Segment 3, route option 3P-Zumbro-S with the 3P-004 option [Zumbro Dam Route] best satisfy the route permit criteria set forth in Minn. Stat. § 216E.03, subds. 7(a) & (b) and Minn. R. 7850.4000 & 7850.4100.

(Add. 112).

J. Following the ALJ's Recommendation, No Party Files an Exception to Segment 3 – the ALJ Recommended Zumbro Dam Route.

Under the PUC's Rules of Practice and Procedure, Minn. R. 7829.0100 to 7829.3200, exceptions to the ALJ's Report by any party adversely affected must be filed within 15 days. (Add. 113). “Exceptions must be specific, relevant to the matters at issue in this proceeding” (Id.) Proposed Findings of Fact, Conclusions and Order were to be included. (Id.)

Two parties filed exceptions: the Applicant and NRG/No CapX 2020/UCAN,⁴ but no exception was filed as to Segment 3 – Zumbro Dam Route. (O.A. 51, 60). NRG/No CapX 2020 and UCAN did file exceptions to 33 of the ALJ's findings and to three of the headings. (O.A. 51, 119-120). They did not challenge the ALJ's recommendations for any of the route segments. (Id.)

⁴ NRG, No CapX 2020 and UCAN are represented by the same counsel and filed one joint exception. (O.A. 52).

On March 30, 2012, the DOC-EFP staff filed comments and recommended the PUC adopt the ALJ's Report with certain modifications. It specifically recommended the ALJ's recommended route for Segment 3 – Zumbro Dam Route. (O.A. 137; T. 4/12/12, p. 14).

K. While Parties Are to Be Allowed Oral Argument Before the PUC, There Is No Provision for the PUC to Hear Oral Testimony From the General Public.

Minn. R. 7829.2700, subp. 3 states “[p]arties must be granted an opportunity for oral argument before the [PUC] as required under Minnesota Statutes, section 14.61.” Minn. Stat. § 14.61, subd. 2 states as follows with regard to the argument before an administrative agency:

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

A party is defined under Minn. R. 7829.0100, subp. 14 as “a person by or against whom a proceeding before the [PUC] is commenced or a person permitted to intervene in a proceeding . . .”

Pursuant to Minn. R. 7829.0900, “a person may file comments in a proceeding before the commission without requiring or obtaining party status,” but only “a participant may also be granted an opportunity for oral presentation.” The term participant does not include one who has commented or appeared in proceedings held in contested cases that were conducted to receive general public comments. Minn. R. 7829.0100, subp. 13.

On March 30, the PUC gave notice that “Oral Argument, Deliberation and Decision” would be held on April 12, 2012 as to whether the PUC should “issue a route permit identifying a specific route and permit conditions for the proposed CapX 2020 Hampton-Rochester-La Crosse 345 kV and 161 kV transmission line.” (Add. 115). The PUC states “[f]ormal parties⁵ are allowed an opportunity for oral argument . . . pursuant to Minn. Rule 7829.2700.” The PUC set out the order for argument and time allotted as follows:

- Applicant – 20 minutes
- Oronoco – 15 minutes
- North Route Citizens Alliance (No CapX 2020, UCAN, NRG) – 15 minutes
- ATC – 15 minutes
- Applicant Rebuttal – 10 minutes

(Add. 116).

The PUC, offering no citation to any rule or statute, states: “[s]ummary public comments will be heard following oral arguments.” (Id.) Those wishing to make public comment were to sign up in advance and “[b]ecause the hearing record is closed, no new evidence can be accepted.” (Add. 117). The PUC stated that if a person is “associated with one of the formal parties [they] should expect their positions will be presented during earlier oral argument by their representative.” (Add. 116). Applicant was to be “allowed 10 minutes for summary rebuttal to public comments.” (Add. 117).

Following the “conclusion of oral arguments and public summary comments,” the PUC “will publicly deliberate and may decide this matter the same day.” “No additional

⁵ Under the Rules, there are no “formal” parties or informal parties. It defines only “party.” Minn. R. 7829.0100, subp. 14.

testimony is taken except as direct and limited response to a specific question from Commissioners.” (*Id.*)

L. Argument Was Held Before the PUC on April 12, 2012 and NRG, No CapX 2020 and UCAN, Which Had Not Filed Written Exception to Segment 3, Orally Opposed the ALJ’s Recommended Route.

At the April 12, 2012 hearing before the PUC, Oronoco, through its attorney, pointed out that no exception was filed to Segment 3 and the ALJ’s recommendation should be adopted. (T. 4/12/12 [hereinafter “T.”], p. 41).

After Oronoco had so stated, NRG, No CapX 2020 and UCAN, which had filed no exception to the Zumbro Dam Route, nonetheless through their attorney orally asserted it was not the appropriate route. (*Id.*, pp. 43-51). The NRG/No CapX 2020/UCAN attorney did assert in accord with the written exception that certain of the ALJ findings, specifically Findings 436, 464 and 488, should be modified to clarify there is no existing aerial transmission line crossing at the Zumbro Dam. (*Id.*, pp. 46-47).

In response to the NRG/No CapX 2020/UCAN’s assertions, Applicant explained that while there is no aerial transmission line crossing at the Zumbro Dam, there is a transmission line that comes out at the west side of the dam. (*Id.*, p. 61). Applicant proposed that it move the route alignment on the east side of the Zumbro Dam to the north, which would avoid high quality forest, and then rejoin the intended alignment on top of the bluff. (*Id.*, pp. 62-64). Applicant told the PUC that all three of its proposed routes – Northern Route, Zumbro Dam Route and White Bridge Route – “were very similar when you compared the impacts and it

was not easy to identify a preferred route.” (*Id.*, p. 64). There was “by no means [a] clear cut choice” and one could not identify “a clearly superior route.” (*Id.*, p. 65).

M. PUC Heard From Four Individuals Who Opposed the Zumbro Dam Route.

The PUC then turned to “public presentations.” Chair Rhea states public comment before the PUC was sought, because “we thought that we would hear some summary, limited comment, from persons who are not affiliated with one of the formal parties in this matter.” “[I]t would be appropriate to hear from the public who wishes to address the Commission in person, as this is probably your only opportunity to come face to face with the Commissioners, in terms of some of the serious concerns that you might have with the project.” (*Id.*, p. 83).

Speaking out against the Zumbro Dam Route were four individuals – husband and wife Anna and Merl Norman, Steven Walker and Kevin Kautz. (*Id.* at pp. 93, 97, 100, 130). These individuals did not intervene to become parties, had no presence at the evidentiary hearing before the ALJ, and therefore did not and could not file any exception to the ALJ’s route recommendations. Merl Norman and Steven Walker had, however, participated in one or more of the three days of public hearings which allowed for public commenting, and their participation was noted in the ALJ’s findings at footnote 476. (Add. 95). Mr. Norman also had represented Wabasha County on the North Rochester-La Crosse Task Force. (Hrg. Ex. 47; O.A. 189, 206). These individuals argued the PUC should reject the Zumbro Dam Route because of alleged impact the Project would have on trees and the Normans’ camp east

of the Zumbro Dam, its impact on recreation around the Zumbro Dam, and on the natural resources at the Zumbro Dam crossing itself. (Id., pp. 93-96, 97-100, 100-102, 130-131).

Merl Norman read from the poem “Trees.” (Id., pp. 99-100). He testified that as president of Laymen for Christ, as owner and operator of Woodland Camp, the transmission lines could endanger campers and pose liability for the camp. (Id., p. 97-98). He testified the Normans chose this campsite because of its isolation and “uniqueness of the area, which is original growth, and includes eagles nesting . . .” (Id., pp. 97-98).

Ms. Norman testified that the Normans made the down payment on this property in 1966 with a small inheritance from her parents. (Id., p. 94). This “camp facility is a living memorial to my family and a ministry for [us].” (Id.) The Normans then gave the land to Laymen for Christ for the development of the Woodland Camp. She asserted this “peaceful camp environment” will be taken away if “these huge 175-foot power poles are erected,” with the demand for power benefitting Olmsted County and Oronoco developments, not Wabasha County. (Id., pp. 95-96).

In speaking out against the Zumbro Dam Route, Mr. Walker told the PUC that the proposed White Bridge Route is “inundated with mud up there and it’s just like a small trickle where the bridge is up there.” He states “the dam is where most of the people boat and it’s about two and a half miles that goes to the south where they can boat and have their fun, but where they want to cross up there it isn’t.” (Id., p. 101).

N. Applicant Explained to the PUC That Potential Damage to Trees/Forests and Campsites Would Be Mitigated by Micrositing the Line to the North.

After hearing from these non-parties, Commissioner Wergin told Chair Rhea he would like “to just have a short review or look at the two alternatives going over the dam and using White Bridge Road.” (Id., p. 138). To that, Chair Rhea responded, “now that we’ve heard from the public I do want to give an opportunity to the parties to respond to some questions that we might have and also respond to some things that may have been said by the members of the public. So kind of as a rebuttal, if you will.” (Id., p. 138).

Applicant explained to the Commissioners that to the east of the Zumbro Dam crossing, potential damage to trees and forests and the Laymen for Christ campsite could be mitigated by micrositing the line to the north of its original position in a relatively flat area. (Id., pp. 142-143). In response to Commissioner Wergin’s questions about micrositing, Mr. Hillstrom of Applicant states:

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

(Id., pp. 142-143).

Applicant also explained there was another landowner to the north, which is another youth camp, but this “Victory Camp” is not designated for any specific use. “It seems that it’s woodland and so we wouldn’t be affecting a particularly prescribed use in that area and

the area and the virgin hardwood forest and the bluffs that are involved with the easterly portion of the dam site.” (*Id.*, p. 167). She admits being influenced by the objections of these four anti-dam individuals presented by their testimony directly to the PUC:

There were no exceptions filed to the dam crossing, but we certainly heard a lot of objection today from members of the public. And the bridge crossing was the original preferred route that the Applicant had made, but probably also didn’t take a strong view on it because it’s such a close call.

(*Id.*, pp. 167-168). In Chair Rhea’s view, the recreational benefits of either site – Zumbro Dam Route or White Bridge Route – is a wash. (*Id.*, p. 172).

Commissioner Wergin and Commissioner Boyd then express their views that it was a “tremendously close call.” (*Id.*, pp. 168-169). Commissioner Boyd, again with reference to the testimony of the four anti-dam individuals, asserts as to recreational opportunities, “you know, the way things were portrayed seemed to depend on who you are and where you look.” (*Id.*, p. 168).

Commissioner O’Brien responded, “I don’t have strong views on Segment 3 because it’s such a close call. And in that circumstance, I think that in my value system I would rather defer to the recommendations of the EFP staff. And I don’t do that very often, but I look for opportunities, and if they want the dam, they’ve thought about it.” (*Id.*, p. 169). He would not oppose White Bridge Route “if everybody else wants to go across the bridge, or next to the bridge.” (*Id.*, p. 169).

The Commissioners chose the White Bridge Route. (T. 180-185).

P. The May 30, 2012 Order Issued a Permit for Segment 3 Utilizing the White Bridge Route.

On May 30, 2012, the PUC issued its order. (Add. 1). It acknowledged the ALJ's Report "is well reasoned, comprehensive, and thorough." The Commission concurs "in most of her findings, conclusions, and recommendations." (Add. 8). It did not concur in the ALJ's selection of the Zumbro Dam Route in Segment 3. It cited three reasons for its selection of the White Bridge Route over the Zumbro Dam Route – (1) the Zumbro Dam Route will require more deforestation and clearing than the White Bridge Route, which will significantly impact natural resources and biodiversity on the Zumbro Dam Route (Add. 14); (2) "noncommercial" recreational resources, including a campground and two summer camps, will be impacted on the Zumbro Dam Route (Add. 14); and (3) the White Bridge Route more closely adheres to the statutory objective of using existing highway right-of-way, since there is no existing high voltage transmission line route parallel to the existing highway right-of-way on the Zumbro Dam Route (Add. 13). The PUC also noted the number of homes and the number of archeological and historic sites along the Zumbro Dam Route and the White Bridge Route, but found these impacts on the two routes were nearly equivalent. (Add. 14).

Although no exception was filed to the Zumbro Dam Route, as the Commission acknowledged at the April 12 hearing (T. 166-167), the PUC now states in its written order that NRG/No CapX 2020/UCAN "recommended against the Dam Crossing, stating there is no existing aerial crossing there and that it is not consistent with the statutory preference for use of an existing high-voltage transmission route and the use of parallel existing highway

right-of-way.” (Add. 12-13). As part of its order, the PUC eliminated ALJ Finding 436 (Add. 16, 103), changed the last sentence of ALJ Finding 464 (Add. 16, 107) and modified the second and third sentences of ALJ Finding 488 (Add. 16, 111). This was done to clarify there is no existing aerial crossing at the Zumbro Dam. (Add. 16). There is a low voltage transmission line along the west side of the dam. (Add. 19; Finding 394; Add. 95).

The PUC accepted, adopted and incorporated the ALJ’s findings and conclusions and that of the DOC-EFP “except as set forth in this Order.” (Add. 19). It then issued the high-voltage transmission line route permit as attached to its order. (*Id.*; O.A. 144).

Q. Oronoco Filed a Petition for Reconsideration/Rehearing Objecting to the PUC’s Failure to Follow the Administrative Rules and Minnesota Statutes, Depriving Oronoco of Due Process.

Following the PUC’s order, Oronoco, in accord with Minn. R. 7829.3000, subp. 2, filed a Petition for Reconsideration and Vacation, Rehearing, Amendment and Re-Argument of the PUC’s Order Granting Route Permit for Segment 3. In its Petition, Oronoco specifically set out how the PUC’s decision was unlawful and/or unreasonable. Oronoco objected to the PUC’s order on the grounds the PUC’s process was procedurally and substantively contrary to Minnesota’s rules and statutes to the prejudice of Oronoco. Oronoco objected to the PUC’s allowance of testimony/commentary offered by four anti-dam individuals outside of and contrary to the administrative process rules and statutes, which testimony obviously swayed the PUC.

Oronoco was penalized because it followed the rules. It created an extensive record opposing the White Bridge Route. Oronoco’s position was accepted by the ALJ and

recommended by the DOC-EFP staff. No party filed exceptions to the Zumbro Dam Route. The procedure utilized by the PUC deprived Oronoco's residents of the opportunity to rebut the anti-dam individuals' testimony.

The PUC required Oronoco, because it was a party, to speak through its "representative." In contrast, because no party filed an exception to the Zumbro Dam Route, individuals who opposed it were allowed to speak without the constraints placed on Oronoco. Oronoco residents, if they had been so allowed, would have given their "testimony" before the PUC as well. Oronoco asserted that its residents must be allowed to present to the PUC through live testimony the damage that will occur to the people, homes, residential developments, farming operations and businesses if the White Bridge Route is selected as the final route for the Project.

Further, and in opposition to the PUC's route choice of the White Bridge Route, Oronoco specifically pointed out:

- The alleged deforestation and impacts to biodiversity and natural resources on the Zumbro Dam Route can be avoided through micrositing.
- The negative impacts to recreation are greater on the White Bridge Route than the Zumbro Dam Route.
- The White Bridge Route does not use existing highway right-of-way.

Oronoco submitted the affidavit of its expert, Jeffrey Broberg, and nine exhibits supporting the above-stated points. (O.A. 95).

R. Laymen for Christ and Woodland Camp, Which Are Not Parties, Filed an Answer and Motion to Strike.

Laymen for Christ and Woodland Camp, which are not parties, filed a response to Oronoco's Petition for Reconsideration/Vacation and a motion to strike the Broberg affidavit and exhibits. Laymen for Christ and Woodland Camp were represented by the same counsel that represents NRG/No CapX 2020 and UCAN.

Oronoco objected, explaining that since Laymen for Christ and Woodland Camp are not parties, they have no standing to file a response or objection and it must be stricken. Minn. R. 7829.3000, subp. 4 allows only parties to file answers to petitions for reconsideration.

Faced with this objection, an amended answer was filed by these non-parties to which No CapX 2020, a party, now joined and filed an amended motion to strike Broberg's testimony. But such response by No CapX 2020 was untimely since the 10-day period to answer under Minn. R. 7829.3000, subp. 4 had expired and no rule allowed for such amendment. The deadline for Laymen for Christ and Woodland Camp to intervene was May 2, 2011. (O.A. 2). See also Minn. R. 7829.0800, subp. 1.

Applicant also filed an answer to Oronoco's petition, asserting among other things, that all persons had equal opportunity to address the PUC.

S. Oronoco's Petition Was Denied Without Hearing or Explanation.

Oronoco's Petition was placed on the PUC's agenda for August 9, 2012. The PUC denied Oronoco's Petition without a hearing or oral argument. (Add. 1). In so denying, the

PUC states “on June 29, 2012, Laymen for Christ, Inc. and Woodland Camp filed comments opposing reconsideration.” (Id.)

Oronoco has now filed this Petition for Certiorari seeking reversal of the PUC’s order as to the permit granted for Segment 3 using the White Bridge Route. (O.A. 76).

ARGUMENT

THE PUC’S DECISION AS TO ROUTE SEGMENT 3 PER THE WHITE BRIDGE ROUTE MUST BE REVERSED BASED ON THE PUC’S FAILURE TO FOLLOW ITS RULES AND STATUTORY PROCEDURES, DEPRIVING ORONOCO OF DUE PROCESS.

The Minnesota Legislature has dictated the process for the PUC to follow in contested-case hearings. The PUC did not follow that process and violated the statute in three separate and independent ways: (1) it allowed non-parties to be heard at the commission hearing; (2) it allowed testimony from non-parties at the commission hearing, rather than just argument; and (3) it failed to provide the statutory requirement of cross-examination and rebuttal to the testimony elicited at the close of the contested case, right before deliberation. Each separate ground requires reversal.

In addition, the actions taken by the PUC violated the due process rights of the Oronoco residents and other parties to this contested case. In their deliberations here, the Commissioners stated that they heard a lot of objection on the day of the hearing to the Zumbro Dam Route. In fact, they heard from four people. They also heard from counsel for NRG/No CapX 2020 and UCAN, which they acknowledge did not file an exception to the ALJ’s recommended routes.

The PUC noted the objections it had just heard from the four anti-dam individuals in its deliberations, but did not note the public comments made at hearings attended by 250 to 400 other people. The testimony of these four people was outside of the statutory process that provides for the checks and balances of cross-examination and rebuttal evidence submission.

Testimony allowed from individuals who opted not to become parties and not to file an exception eviscerates due process by allowing these people to present whatever they want without providing the parties notice of the issues they wish to raise or providing an opportunity to rebut false or misleading information and to correct factual errors. It provides four people with the undue advantage of live testimony right before deliberation – while precluding such live testimony from those who actually intervened and became a party to the action. The PUC’s procedures stand in stark contrast to the administrative hearing process and destroys the essence of due process for the parties, particularly for Oronoco.

The PUC acted outside of the parameters of statutory authority by failing to follow the statutory to-do list. The PUC acted in excess of its statutory authority when it improperly allowed additional public comment/testimony at the close of its hearing and precluded members of the “formal” parties from doing the same. The PUC’s procedures violate the statute, run afoul of its own rules and the due process rights of the Oronoco residents. Its decision must be reversed.

A. Errors of Law, Questions as to Whether an Agency Exceeded Its Authority and Due Process Violations Are Reviewed De Novo.

This Court's review of the PUC's decision in a contested-case hearing is governed by Minn. Stat. § 14.69. In re Petition of N. States Power Co., 676 N.W.2d 326, 331 (Minn. Ct. App. 2004). On review, this Court may affirm, remand for further proceedings, reverse or modify the PUC's decision if the substantial rights of Oronoco have been prejudiced because the decision is in violation of constitutional provisions, beyond the statutory authority of the agency, made on unlawful procedure, affected by other error of law, or is arbitrary and capricious. Minn. Stat. 14.69 (2006). Oronoco, as the party seeking reversal, bears the burden of proving that the PUC's decision was the product of one or more of these statutory infirmities. Markwardt v. State, Water Res. Bd., 254 N.W.2d 371, 374 (Minn. 1977).

Review of errors of law is de novo and there is no need to defer to the agency's expertise. In re Denial of Eller Media Co.'s Applications for Outdoor Adver. Permits in City of Mounds View, 664 N.W.2d 1, 7 (Minn. 2003). The determination of whether the PUC has exceeded its statutory authority raises questions of law that are subject to de novo review. Minnegasco, a Div. of NorAm Energy Corp. v. Minn. Pub. Utils. Comm'n, 549 N.W.2d 904, 907 (Minn. 1996). This Court also reviews de novo the procedural due process afforded a party. Zellman ex. rel. M.Z. v. Ind. Sch. Dist. No. 2758, 594 N.W.2d 216, 220 (Minn. Ct. App. 1999).

B. PUC Is a Creature of Statute and Must Follow Statutory Procedures.

The PUC, as a creature of statute, has only the authority given to it by the Minnesota Legislature. Application of Minnegasco, 565 N.W.2d 706, 711 (Minn. 1997). This Court will not enlarge the powers of the PUC beyond those expressly granted by the legislature. Minnegasco, 549 N.W.2d at 910. The legislature dictates what the PUC is to do and how it is to do it. Id. at 907. Any reasonable doubt as to existence of any particular power in the PUC is to be resolved against exercise of such power. Petition of Minnesota Power for Authority to Change Its Schedule of Rates for Retail Elec. Service, 545 N.W.2d 49, 51 (Minn. Ct. App. 1996).

C. Allowance of Testimony by Four Anti-Dam Individuals Violated Statutory Procedures.

The PUC in this instance did not follow the Minnesota Legislature's prescribed procedures. Its process violated the statute by allowance of testimony of four anti-dam individuals, non-parties to the action, at the end of the PUC hearing. Only argument may be heard at the PUC hearing, but the PUC took additional testimony from four individuals, two of whom had already been heard at prior public comment hearings; at the same time, the PUC did not allow members of the parties to the matter any opportunity to personally address the PUC. The parties were further denied cross-examination and rebuttal by this improper process used by the PUC.

The PUC's notice of the hearing itself sets out the faulty procedures the PUC utilized stating that, although it was under no obligation to take public comment at that stage in the permitting process, it intended to take limited public comment following the final oral

argument of the parties. (Add. 116-117). The PUC notes that this limited public comment could only come from persons not affiliated with one of the “formal parties” in this matter; precluding interested persons within the “formal parties” from addressing the PUC other than through argument of their representative – i.e., their lawyer. Only Applicant was allowed a rebuttal. (*Id.*) This procedure fails to abide by statutory requirements on several levels.

1. Only parties may file exceptions and be heard.

In all contested cases where officials of the agency render the final decision, as in this instance, the contested case record must close upon the filing of exceptions to the report and presentation of argument under Minn. Stat. § 14.61, subd. 1 or upon expiration of the deadline for doing so. Only parties may file exceptions pursuant to the statute. *Id.* The PUC properly afforded each party the opportunity to file an exception. In this case, no exceptions were filed to the ALJ’s decision regarding the Zumbro Dam Route she selected as the best option as set out in her detailed Findings of Fact. Even though no exceptions to this selection were filed by any party, the PUC allowed four anti-dam individuals – who had not intervened to become a party at any point – to come forward objecting to the ALJ route selection and presenting testimony in this case, in violation of the statute.

Minn. Stat. § 14.61 sets out the timing to “file exceptions and present argument.” Throughout its sections, the statute couples the two things together – (1) filing an exception and (2) presenting argument. A party who would be adversely affected by the ALJ’s recommended decision must act promptly to schedule the opportunity to present argument to the agency decision-makers. 21 Minn. Prac., Administrative Prac. & Proc. § 10.05.1 (2d

ed.). If a party timely requests oral argument, the agency must respond and establish a proper form, time and place for argument. Commers v. Spartz, 294 N.W.2d 321, 322 (Minn. 1980); Matter of Haugen, 278 N.W.2d 75, 79-80 (Minn. 1979). If it fails to do so, the agency's decision is invalid. Yellowbird, Inc. v. MSP Exp., Inc., 377 N.W.2d 490, 494 (Minn. Ct. App. 1985). In this instance, no party filed an exception challenging the ALJ's recommendation regarding selection of the Zumbro Dam Route.⁷ The PUC's allowance of additional testimony by non-parties at the PUC hearing to challenge the ALJ's selected route violated the statute and requires reversal of the PUC's decision.

2. Only argument may be presented; not new factual assertions.

In a contested case, the evidentiary record closes with the submission of any written memoranda and any late-filed exhibits that all parties and the ALJ have agreed may be accepted, and the filing of the transcript of the contested-case hearing. Minn. R. 1400.7800, subp. J (2005). Pursuant to Minn. R. 1405.0800, subp. B and 1405.1700, subp. 8, any "testimony" offered "without benefit of oath or affirmation" is to be "given such weight as the administrative law judge deems appropriate." Id.

The parties may "file exceptions and present argument" concerning the ALJ's recommendation and those filings are made part of the record. Minn. Stat. § 14.61 (2006). No evidence that has not been agreed to may be submitted after the evidentiary record closes. See In re Excess Surplus Status of Blue Cross and Blue Shield of Minnesota, 624 N.W.2d

⁷ The record is undisputed that no written exception to Segment 3 was filed with the PUC. The PUC wrongly credited the oral argument of NRG/No CapX 2020/UCAN. (Add. 12-13). It should have been and must be disregarded as well.

264, 274 (Minn. 2001). The statute and the applicable rules prohibit the introduction of new evidence after the evidentiary record closes.

The PUC here noted the evidentiary record was closed but stated in its notice that “[n]o additional testimony is taken except as direct and limited response to a specific question from Commissioners.” (Add. 117). Those wanting to make comment – except those affiliated with a “formal party,” were to sign up in advance. They were advised that the hearing record was closed. (Add. 116-117).

Although the PUC said that it “would hear some summary, limited comment” (T. 83), it then accurately called what these four people said “testimony” (T. 167) as they made various assertions about the use and nature of the land being considered as a route and their own personal uses of the land at issue.

The four anti-dam individuals were allowed to present facts. For instance, the Normans testified about the camps they ran on the property near the selected site. (Id., pp. 93-100). Another individual, Mr. Walker, a Zumbro Township supervisor, testified inaccurately that more people use the Zumbro Dam for recreational purposes than they do Lake Zumbro or the White Bridge Route. He asserted this was because Lake Zumbro is no more than a “trickle” on the White Bridge Route and is “inundated with mud.” (Id., p. 101).

This testimony by the four anti-dam individuals is inadmissible evidence. Allowing such testimony means that the parties who actually do follow all of the statutory procedures are sandbagged without any recourse. The parties are deprived of an opportunity to cross-examine any witnesses and rebut any factual assertions that they make at the very close of

the PUC hearing. Rather than such testimony offered without benefit of oath being given such weight as the ALJ deems appropriate (Minn. R. 1405.0800, subp. B and 1405.1700, subp. 8), the PUC took it upon itself to hear testimony and give it the weight it deemed was appropriate.

In this instance, the PUC began deliberations shortly after hearing from the four anti-dam individuals – effectively giving someone who had not intervened or filed an exception the last say in the matter. It was improper for the PUC to take testimony from non-parties. This violation of the statute and the administrative rules requires reversal.

3. Statutory right to cross-examination and rebuttal was violated.

The statute mandates that “[e]very party or agency shall have the right of cross-examination of witnesses who testify, and shall have the right to submit rebuttal evidence.” Minn. Stat. § 14.60, subd. 3. Oronoco became a party and offered relevant evidence during the evidentiary hearings and such evidence was subject to cross-examination and rebuttal by the parties. The four anti-dam individuals’ testimony should be subject to the same standard.

The statutory mandate of the right to cross-examination and rebuttal was overlooked here because these non-parties were given an opportunity to speak without becoming a party and without filing an exception stating what their testimony would be. Without providing an exception, no party could be prepared to submit rebuttal to the four individuals’ assertions. The importance of such notice is acknowledged in another section of that statute – Minn. Stat. § 14.60, subd. 4 – where the agency is required to notify the parties in writing of anything they take judicial notice of and afford the parties an opportunity to contest the facts

so noticed. No such opportunity was afforded to the residents of Oronoco with regard to the four non-party individuals' anti-dam testimony. Instead, the PUC's Chair stated that

[N]ow that we've heard from the public I do want to give an opportunity to the parties to respond to some questions that we might have and also respond to some things that may have been said by members of the public. So kind of as a rebuttal, if you will.

(T. 138.)

"Kind of as a rebuttal" simply does not satisfy the statute. Allowing testimony by the public – non-parties – at the end of a two-year process and after the evidentiary record closed – violated the statute and the administrative rules promulgated pursuant to the statute and requires reversal. There was no opportunity to prepare and offer a rebuttal of the assertions just presented.

The PUC failed to do what the legislature required it to do. The PUC's statutory violations each independently require a reversal.

D. Consideration of Four Anti-Dam Individuals' Testimony Is Prejudicial to Oronoco and Violates Due Process.

The Administrative Procedure Act is a remedial statute designed to give citizens a fair opportunity to be heard before the official of the agency who is charged with passing on that case. Hawaii Laborers' Training Center v. Agsalud, et al., 650 P.2d 574, 576 (Haw. 1982) (applying Act similar to that of Minnesota). The Minnesota Supreme Court has stated that in a contested case parties shall be afforded an opportunity for hearing after reasonable notice and those materially affected by the outcome of the proceedings could intervene as parties. In re Wilmarth Line of the C U Project, 299 N.W.2d 731, 734-35 (Minn. 1980). The four

anti-dam individuals here could have intervened, become parties to the proceeding and participated in the contested-case hearing, but did not do so. Instead, they simply appeared – for a second time in the case of two of the individuals – at the final hour of the contested-case PUC hearing and presented their allegations directly to the PUC. The PUC’s process of allowing such live testimony at the very end of a lengthy contested-case in what the Commissioners themselves called a close-call was clearly prejudicial to the parties such as Oronoco.

In their deliberations here, the Commissioners stated that they heard “a lot of objection” on April 12, 2012. (T. 168). In fact, they heard from four people, two of whom are husband and wife, and two of whom had already spoken at prior public comment hearings. The Commissioners noted the objections of these four people in its deliberations but did not ever note the public comment hearings attended by the 250 to 400 other people.

The actual evidentiary hearing before the ALJ took four days, consisted of 635 pages of testimony, and 112 exhibits with thousands of pages. At the conclusion of the evidentiary hearing, the parties submitted hundreds of pages of argument and proposed findings for ALJ Sheehy’s review and consideration. ALJ Sheehy issued a recommendation of 93 pages, 440 individual findings of fact and 14 conclusions of law. Despite all that, the PUC’s deliberations were fraught with what the Commissioners heard that day from the four individuals – non-parties to this contested case.

Allowing live testimony at this critical closing of the hearing from four individuals who never intervened to become parties provides those individuals with an undue advantage.

[B]ecause of the greater weight and impact which the live testimony of witnesses on the stand is apt to have in comparison with a mere reading of the written testimony of other witnesses given at another time and before someone else, we think that the appellee obtained an undue advantage through the procedure that was followed.

Board of County Commissioners of Prince George's County v. Donohue, 152 A.2d 555, 559-560 (Md. 1959).

As noted, this testimony was also taken outside of the statutory process that provides for checks and balances. As stated, parties are required to file exceptions if they dispute the decision of the ALJ so that the issues are noted for all to respond. Testimony allowed from individuals who opted not to become parties and not to file an exception eviscerates due process by allowing these people to present whatever they want without providing the parties notice of the issues they wish to raise, an opportunity to rebut false or misleading information and to correct factual errors. It stands in stark contrast to the administrative hearing process that started on March 9, 2010 when the PUC referred the matter to OAH for contested case proceedings that ended with the ALJ's thorough recommendation in February 2012. The ALJ issued her report on February 8, 2012, nearly two years after the referral for the contested case proceeding. The ALJ's decision contained 571 footnotes to citations in the record. While parties filed exceptions to the ALJ's decision, none filed exceptions to the ALJ's selection of the Zumbro Dam Route at issue here.

The essence of due process is the opportunity to be heard in a meaningful time and in a meaningful manner. Eisen v. State, Dep't of Pub. Welfare, 352 N.W.2d 731, 736 (Minn. 1984). The Minnesota statute affords each party adversely affected the opportunity to file exceptions. Minn. Stat. § 14.61. The opportunity to file an exception results in an opportunity to present argument; it does not set up a right to have a new hearing or submit new evidence. In the Matter of Real Estate Appraiser's License of Agaga, 2000 WL 1780289 (Minn. Ct. App. 2000) (O.A. 210). Interpreting Minn. Stat. § 14.61, this Court has stated:

Although “argument” has been construed to mean parties are entitled to oral argument if they so request, the statute makes no mention of the right to a new hearing, and caselaw has not interpreted the statute as requiring such hearing.

Id. at *6 (O.A. 214).

These four individuals never intervened as a party to submit evidence. The four individuals did not file an exception and the parties, including the residents of Oronoco, could not have anticipated this late evidence. Nor could the residents of Oronoco challenge any false or misleading statements made by the four individuals that day. The residents of Oronoco who participated throughout the lengthy process were on the final day left without the ability to rebut or correct false statements made by the non-party individuals. Such a process creates a dilemma for any party who properly participates in the process and abides by the established rules.

Failure to provide notice and an opportunity to contest the facts so noticed results in a due process violation. In re Excess Surplus Status of Blue Cross and Blue Shield of

Minnesota, 624 N.W.2d at 281-282. In the Excess Surplus case, the deputy commissioner of commerce improperly considered an internet web site and member publication when ruling that a nonprofit's plan for surplus money from settlement of a lawsuit against tobacco companies would duplicate its own health education programs. Id. at 282. The deputy commissioner did not take official notice of information outside the record, notify the parties in writing, and provide them an opportunity to respond. Id. The Supreme Court found that the deputy commissioner overstepped his authority by considering materials outside the record. Id.

Similarly, the PUC could not rely on a cost study from a prior proceeding without making that cost study a part of the record in a electric rate case. Application of Northern States Power Co., 440 N.W.2d 138, 140-141 (Minn. Ct. App. 1989). The NSP court found that relying on evidence not in the record was prejudicial error. Id. at 141. That same lack of notice and ability to respond to the four individuals testifying at the end of the PUC hearing make the actions here a violation of due process. When the PUC fails to follow statutory procedure, resulting in a "lack of basic fairness" in its decision-making process, reversal is required. Yellowbird, 377 N.W.2d at 494.

Evidence of prejudice is found in the transcript of the PUC hearing as well as the decision itself. During deliberations, two Commissioners specifically expressed concerns about the Zumbro Dam Route because of the information presented by four people:

And then nobody really filed any exceptions to the ALJ's recommendation of the dam site. But I'm concerned about some of the testimony that was presented here, in terms of the camps

in the area and the virgin hardwood forest and the bluffs that are involved with the easterly portion of the dam site.

(T. 167).

There were no exceptions filed to the dam crossing, but we certainly heard a lot of objection today from members of the public.

(T. 167-168).

The Order itself cites the same issues raised by the four anti-dam individuals to justify its selection of the White Bridge Route over the Zumbro Dam Route. (Add. 3). Two primary reasons given for overruling the ALJ's decision and selecting a different route were (1) negative impact on recreation, specifically noncommercial recreation, and (2) biodiversity impact – the very issues raised by the four individuals in their testimony. (Add. 14). The PUC did not recognize that it had given two of these people a second opportunity to present their own assertions – while precluding residents of a party, Oronoco, from so appearing.⁸

What the PUC essentially did in this instance was to try de novo just pieces of the contested case as to Segment 3 with the important exception that only the four non-parties were allowed to so participate, precluding Oronoco residents who were only allowed to present argument through their counsel. Even acting through counsel, Oronoco residents' due process rights were compromised by the failure to provide cross-examination and rebuttal at the eleventh hour. Such error cannot be regarded as harmless. Allowing such

⁸ The PUC also ignored the fact that NRG, No CapX 2020 and UCAN had not filed a written exception to the choice of the Zumbro Dam Route for Segment 3. (Add. 12-13).

testimony at this final juncture does not comply with the statutory process set out by the legislature or the agency's rules and violates the due process rights of the Oronoco residents who were not allowed to so testify. The PUC's due process violations require reversal.

CONCLUSION

Oronoco respectfully requests that the PUC's order and its resulting grant of permit for Segment 3 utilizing the White Bridge Route be reversed and this case be remanded to the PUC for rehearing to be noticed and heard and a decision to be made in accord with the statutory procedures and rules.

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Dated: November 28, 2012

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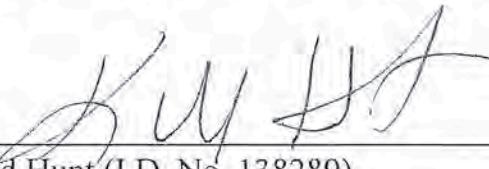
CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 11,018 words. This brief was prepared using Word Perfect 10.

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