

No. A12-1607

No. A12-1632

STATE OF MINNESOTA

IN COURT OF APPEALS

**In the Matter of Xcel Energy's Application for a Route Permit
for the CapX2020
Hampton-Rochester-La Crosse High Voltage Transmission Line**

BRIEF OF RESPONDENT

MINNESOTA PUBLIC UTILITIES COMMISSION

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LEGAL ISSUES

1. **Is the Minnesota Public Utilities Commission's ("Commission's") decision to select the Modified Preferred Route in Section One of the Hampton-La Crosse transmission line project near Cannon Falls supported by substantial record evidence and reflective of the Commission's reasoned judgment?**

The Commission's decision is supported by substantial record evidence and reflective of the Commission's reasoned judgment.

Apposite Authority:

In re Excess Surplus Status of Blue Cross & Blue Shield of Minnesota, 624 N.W.2d 264 (Minn. 2001) .

In re Detailing Criteria & Standards for Measuring an Electric Utility's Good Faith Efforts in Meeting the Renewable Energy Objectives Under Minn. Stat. 216B.1691, 700 N.W.2d 533 (Minn. Ct. App. 2005), *aff'd*, 714 N.W.2d 426 (Minn. 2006).

2. **Did the Commission's selection of the Modified Preferred Route near Cannon Falls Satisfy the State of Minnesota's policy of nonproliferation?**

The Commission appropriately complied with the State's policy of nonproliferation.

Apposite Authority:

Minn. Stat. § 216E.03, subd. 7(e) (2012).

People for Environmental Enlightenment & Responsibility (PEER), Inc. v. Minnesota Environmental Quality Council, 266 N.W.2d 858, 868 (Minn. 1978).

3. **Did the Commission's decision to select the Modified Preferred Route near Cannon Falls meet the due process requirements of notice and opportunity to be heard?**

The Commission met the due process requirements of notice and opportunity to be heard when it selected the Modified Preferred Route.

Apposite Authority:

Minn. Stat. § 216E.03 (2012).

Commissioner of Natural Resources v. Nicollet County Public Water/Wetlands Hearings Unit, 633 N.W.2d 25, 29 (Minn. Ct. App. 2001).

4. **Did the Commission meet the due process requirements of notice and opportunity to be heard when it found that the Environmental Impact Statement was adequate?**

The Commission met the due process requirements in regards to the Environmental Impact Statement.

Apposite Authority:

Minn. Stat. § 216E.03, subd. 5 (2012).

Commissioner of Natural Resources v. Nicollet County Public Water/Wetlands Hearings Unit, 633 N.W.2d 25, 29 (Minn. Ct. App. 2001)

5. **Did the Commission properly rely on maps that were filed with Xcel Energy's exceptions and previously submitted into record evidence?**

The Commission appropriately relied on maps that were filed with Xcel Energy's exceptions because they were part of the record.

Apposite Authority:

Minn. Stat. § 14.61, subd. 2 (2012)

State v. Fenney, 448 N.W.2d 54, 61 (Minn. 1989).

6. **Is the Commission's decision to select the White Bridge Road Crossing over the Zumbro River in Section Three of the Hampton-La Crosse transmission line project supported by substantial record evidence and reflective of the Commission's reasoned judgment?**

The Commission's decision is supported by substantial record evidence and reflective of the Commission's reasoned judgment.

Apposite Authority:

In re Excess Surplus Status of Blue Cross & Blue Shield of Minnesota, 624 N.W.2d 264 (Minn. 2001).

In re Detailing Criteria & Standards for Measuring an Electric Utility's Good Faith Efforts in Meeting the Renewable Energy Objectives Under Minn. Stat. 216B.1691, 700 N.W.2d 533 (Minn. Ct. App. 2005), *aff'd*, 714 N.W.2d 426 (Minn. 2006).

7. **Did Commission satisfy due process requirements toward Relator Oronoco Township when it allowed public comment during its meeting?**

The Commission provided Relator Oronoco with sufficient due process and appropriately allowed the public to comment during its meeting.

Apposite Authority:

Barton Contracting Co., Inc. v. City of Afton, 268 N.W.2d 712, 716 (Minn. 1978)

In Re Excelsior Energy Inc., 782 N.W.2d 282, 296 (Minn. Ct. App. 2010)

STATEMENT OF THE CASE

On January 19, 2010, Northern States Power Company d/b/a Xcel Energy (“Xcel Energy”) filed an application for a route permit for a 345 kilovolt (“kV”) transmission line, a new 161 kV transmission line, and associated substation facilities in southeastern Minnesota (“Hampton-La Crosse transmission line project”). Index No. 1. The Minnesota Public Utilities Commission (“Commission”) had previously issued a certificate of need for the project in May 2009. *Id.*

After the development of a voluminous factual record in a contested case proceeding, on May 30, 2012, the Commission issued its Order Issuing Route Permit as Amended (“Order”). Cannon Falls Add. 3; Oronoco Add. at 3.¹

On June 19, 2012, St. Paul’s Lutheran Church and School and Cannon Falls Landowners and Oronoco Township each filed a petition for reconsideration. Cannon Falls App. 1;² Index No. 327. Although Oronoco had been a party since May 17, 2011, Relator St. Paul’s Lutheran Church and Cannon Falls Landowners participated for the first time with their motion for reconsideration. Cannon Falls App. 1.

The Commission denied the petitions for reconsideration on August 9, 2012, and issued its Order Denying Reconsideration on August 14, 2012. Cannon Falls Add. 1; Oronoco Add. 1. These appeals by Relator St. Paul’s Lutheran Church and School and

¹Items in Relator St. Paul’s Lutheran Church and Cannon Falls Landowners’ Addendum will be referred to as Cannon Falls Add. ___. Items in Relator Oronoco Township’s Addendum will be referred to as Oronoco Add. ___.

²Items in Relator St. Paul’s Lutheran Church and Cannon Falls Landowners’ Appendix will be referred to as Cannon Falls App. ___.

Cannon Falls Landowners (“Relator Cannon Falls” or “Cannon Falls”) and Relator Oronoco Township (“Relator Oronoco” or “Oronoco”) followed.

STATEMENT OF FACTS

A. Overview Of The Siting Process For A High-Voltage Transmission Line Project.

The Commission is the agency responsible for siting high-voltage transmission lines. Minn. Stat. § 216E.03, subd. 1 (2012). To site a high-voltage transmission line, an applicant must apply to the Commission for a site permit in which the Commission approves a route for the transmission line. *Id.*, subd. 2. In its application to the Commission, the applicant must propose at least two routes for the high-voltage transmission line. *Id.*, subd. 3. It is common for other alternative routes to be identified during the process because of concerns by interested entities.

Within fifteen days of filing an application for a high-voltage transmission line, the applicant must publish notice of the application in a newspaper in the counties in which the transmission line is proposed, and it must send a copy of the application to any regional development commission, county, incorporated municipality, and town in which the line is proposed. *Id.*, subd. 4. Additionally, notice must be sent to property owners whose property is on or adjacent to the proposed line. *Id.*

The Minnesota Department of Commerce is responsible for preparing an Environmental Impact Statement (“EIS”) on a proposed high-voltage transmission line. *Id.*, subd. 5. The Commission uses the Final EIS to assist it in considering the

environmental factors that it must consider in making its final route determination. *Id.*, subd. 7.

Upon determining that the application is complete, the Commission must refer the matter to the Office of Administrative Hearings for a public hearing. *Id.* at subd. 6. An administrative law judge (“ALJ”) conducts the public hearing pursuant to the contested case procedures in Minnesota Statutes chapter 14 after the Draft EIS is prepared. *Id.*; Minn. R. 7850.2600, subp. 1 (2011). After the contested case proceeding, the ALJ issues her recommendations to the Commission. Minn. R. 7850.2700, subp. 1 (2011).

Once the Final EIS and ALJ’s recommendations are complete, the Commission holds a public meeting to consider the matter. Minn. Stat. § 216E.03, subd. 7. At this meeting, the Commission must determine that the Final EIS is adequate. Minn. R. 7850.2500, subp. 10 (2011). The Commission must also consider numerous factors in deciding where to site the transmission line. Minn. Stat. § 216E.03, subd. 7; Minn. R. 7850.4000 (2011).

It is important to note that throughout this process, state agencies that are authorized to issue permits required for construction or operation of the high-voltage transmission line must participate at the public hearings and before the Commission. Minn. Stat. § 216E.10, subd. 3 (2012). These state agencies often include the Minnesota Department of Transportation (“MnDOT”) and the Minnesota Department of Natural Resources (“MnDNR”).

B. Procedural History.

1. Application for the Hampton–La Crosse Transmission Line.

Xcel Energy filed an application for a route permit for the Hampton-La Crosse transmission line project on January 19, 2010.³ Index No. 1. The application was for the Minnesota portion of the project, which consists of eighty miles of new 345 kV transmission line, approximately fifteen miles of 161 kV line, a new North Rochester Substation to be located between Pine Island and Zumbrota, and related transmission line interconnections. *Id.* A certificate of need for the project was previously issued on May 22, 2009. *In the Matter of the Application of Great River Energy, N. States Power Company (d/b/a Xcel Energy) and Others for Certificates of Need for the CapX 345-kV Transmission Projects*, Order Granting Certificates of Need with Conditions, Docket No. ET-2, E-002, et al./CN-06-1115 (May 22, 2009, as modified Aug. 9, 2009).

This project involves three distinct segments and associated facilities. Segment One of the project consists of a 345 kV double-circuit capable transmission line from a proposed Hampton Substation near Hampton, Minnesota, to a proposed North Rochester Substation to be located between Zumbrota and Pine Island, Minnesota. Index No. 1 at ES-1. Segment Two consists of a new 161 kV transmission line between a proposed North Rochester Substation and an existing Northern Hills substation, located in northwest Rochester, Minnesota. *Id.* Finally, Segment Three consists of a new

³The Hampton-La Crosse transmission line project is part of a larger project that involves the construction of three new 345 kV transmission lines from Brookings, South Dakota, to Hampton, Minnesota; from Hampton through Rochester to Lacrosse, Wisconsin; and from Fargo, North Dakota, to Alexandria, St. Cloud, and Monticello, Minnesota.

double-circuit capable 345 kV transmission line from a proposed North Rochester Substation to the Minnesota border near Kellogg, Minnesota. *Id.* These appeals involve portions of Segment One and Segment Three.

2. Order Accepting Route Permit Application.

On March 9, 2010, the Commission issued an order accepting the Route Permit Application as complete. Index No. 17 at 8. In this Order, the Commission also authorized the Department of Commerce, Division of Energy Resources, Energy Facilities Permitting (“EFP”) to name a public advisor in the case, approved necessary task forces, and referred the project to the Office of Administrative Hearings for a contested case proceeding. *Id.*

3. Environmental Impact Statement.

On April 19, 2010, the EFP issued a Notice of Public Information and Environmental Impact Statement (“EIS”) Scoping Meetings. Index No. 31. The EFP published notice of the public information and EIS scoping meetings in newspapers between April 22, 2010, and April 28, 2010. Index No. 134.

Between April 2010 and June 2010, the Advisory Task Forces met and identified specific impacts and local concerns to be addressed in the EIS. Index Nos. 47-48. The Advisory Task Force Reports were filed with the EFP on August 4, 2010. *Id.*

Public information and EIS scoping meetings were held on May 4, 2010, in Plainview, Minnesota; May 5, 2010, in Pine Island, Minnesota; and May 6, 2010, in Cannon Falls, Minnesota. Index No. 31. Written public comment was accepted on the scope of the EIS until May 20, 2010. *Id.*

On August 6, 2010, the EIS Scoping Decision was issued. Index No. 43. The EFP mailed the EIS Scoping Decision on August 13, 2010. Index No. 46. On September 17, 2010, the EFP mailed a letter to the landowners along the new routes identified in the EIS Scoping Decision. Index No. 55. And, on September 22, 2010, and September 23, 2010, the EFP mailed notice to landowners and local government units of new alternative routes included in the EIS Scoping Decision. Index Nos. 55-56.

On March 21, 2011, the Draft EIS was issued, and notice was mailed of its availability and of the public information meetings. Index Nos. 57-58. Paper copies of the Draft EIS were also provided to public libraries in each county of the proposed project. Index No. 57. On March 29, 2011, the EFP issued revised maps for the Draft EIS and notified the public. Index Nos. 60-63.

On April 8, 2011, notice was mailed to landowners along the routes that were added during the Draft EIS scoping process notifying them of the routes and the availability of the Draft EIS. Index No. 65. On April 14, 2011, notice was sent to those landowners along the routes that were not on the EFP project list. Index No. 69. Additionally, notice was published in newspapers throughout the project area. Index Nos. 66-67.

The EFP held public information and public comment meetings on the Draft EIS on April 12, 2011, in Plainview, Minnesota; April 13, 2011, in Pine Island, Minnesota; and April 14, 2011, in Cannon Falls, Minnesota. Index No. 69. Written comments were accepted by the EFP until April 29, 2011. Index No. 57.

4. Public Hearings Before The Administrative Law Judge.

On May 24 and May 26, 2011, notice of public hearings before the ALJ to accept public comment on the project and the Draft EIS were mailed. Index Nos. 110, 112. On May 30, 2011, notice of the availability of the Draft EIS was published in the EQB Monitor. Index No. 123.

On June 13, 2011, Xcel Energy called landowners along a new route alignment change and mailed them notice of the public hearings before the ALJ. Index No. 227.

Public hearings before ALJ Sheehy were held in Plainview, Minnesota, on June 14, 2011; in Pine Island, Minnesota, on June 15, 2011; and in Cannon Falls, Minnesota, on June 16, 2011. Cannon Falls Add. 62 at Finding 54; Oronoco Add. 31 at Finding 54. From June 20 through June 22, 2011, and on June 24, 2011, ALJ Sheehy held evidentiary hearings in St. Paul, Minnesota. Cannon Falls Add. 62 at Finding 55; Oronoco Add. 31 at Finding 55. On June 30, 2011, the public comment period for the administrative hearing closed. Cannon Falls Add. 62 at Finding 56; Oronoco Add. 31 at Finding 56.

5. Final Environmental Impact Statement.

The Final EIS was issued on August 31, 2011. Index No. 274. On September 1, 2011, notice of the Final EIS's availability was mailed, and on September 5, 2011, the Notice of the Availability of the Final EIS was published. Index No. 288; 35 EQB Monitor 18 at p. 9 (Sept. 5, 2011).

6. Findings of Fact, Conclusions of Law, and Recommendation.

ALJ Sheehy submitted her Findings of Fact, Conclusions of Law, and Recommendation (“ALJ Report”) on February 8, 2012. Cannon Falls Add. 52; Oronoco Add. 21.

7. Exceptions Filed.

On February 23, 2012, Xcel Energy, North Route Group, NoCapX 2020, and United Citizens Action Network filed exceptions to the ALJ Report. Cannon Falls App. 65; O.A. 60.⁴ Oronoco Township and American Transmission Company, LLC also intervened in the matter but did not file exceptions. Index No. 96.

8. Public Commission Meeting.

On March 29, 2012, the Commission noticed its April 12, 2012 meeting. Oronoco Add. 116. In this notice, the Commission notified the public that it would be accepting public comment at its meeting. *Id.*

On April 12, 2012, the Commission held a public meeting to consider the matter. Cannon Falls Add. 3; Oronoco Add. 3. At this meeting the Commission accepted public comment from twenty-two members of the public. Cannon Falls Add. 7; Oronoco Add. 7. The Commission had previously received dozens of public comments throughout the proceedings. *Id.*

9. Commission Issues Its Order.

The Commission issued its Order Issuing Route Permit As Amended on May 30, 2012. Cannon Falls Add. 3; Oronoco Add. 3.

⁴Items in Relator Oronoco’s Appendix will be referred to as O.A. ____.

10. Petitions for Reconsideration.

On June 19, 2012, both St. Paul's Lutheran Church and School and Cannon Falls Landowners and Oronoco Township filed separate petitions for reconsideration. Cannon Falls App. 1; Index No. 327.

The Commission denied the petitions for reconsideration on August 9, 2012, and issued its Order Denying Reconsideration on August 14, 2012. Cannon Falls Add. 1; Oronoco Add. 1.

C. SECTION ONE OF THE HAMPTON-LA CROSSE TRANSMISSION LINE NEAR CANNON FALLS .

Relator Cannon Falls' appeal involves a portion of Section One of the Hampton-La Crosse transmission line project. Section One of the transmission line extends from Hampton to North Rochester, Minnesota. Index No. 274 at 5. The specific portion being appealed is in Dakota and Goodhue Counties west of the City of Cannon Falls; a portion of Xcel Energy's Modified Preferred Route, Route 1P ("Modified Preferred Route"), and a variant of the Modified Preferred Route, Route 1P-003 ("Route 1P-003"). *Id.* at 9 and Appendix L. Relator Cannon Falls' appeal involves the Commission's selection of the Modified Preferred Route instead of Route 1P-003, the route recommended by ALJ Sheehy. Cannon Fall Add. 109 at Finding 306; Oronoco Add. 78 at Finding 306.

The Modified Preferred Route was designated to follow U.S. Highway 52 ("U.S. 52"), a high volume highway that the MnDOT plans to convert to a freeway in the future. Index No. 71 at 9. The Modified Preferred Route is 36.11 miles in length. Index No. 274 at 66. The Modified Preferred Route evolved out of Xcel Energy's Preferred Route due

to two alignment adjustments that Xcel Energy made to the Preferred Route to address concerns raised by the MnDOT over freeway setbacks. Cannon Falls Add. 145; Index No. 286 at Appendix L. Xcel Energy revised its proposed alignment and route width in the area directly west of Cannon Falls at the Highway 19 and U.S. 52 interchange because MnDOT advised Xcel Energy that it would require an alignment approximately twenty-five feet off the road right-of-way, and in this location, this would result in the removal of an existing home. Index No. 116 at 9. Consequently, the Modified Preferred Route leaves U.S. 52 north of Highway 19 and runs through a field behind the homes and other structures located close to U.S. 52 before rejoining the highway just south of Highway 19. Cannon Falls Add. 145; Index No. 286 at Appendix L.

The Route 1P-003 variant preferred by Relator Cannon Falls is approximately 5.5 miles in length and diverges from the Modified Preferred Route at U.S. 52 at Harry Avenue in Cannon Falls. Index No. 274 at 74. Route 1P-003 follows Harry Avenue to the south and runs along Stanton Trail for 0.5 miles before turning east and following field lines and a portion of 323rd Street and returning to U.S. 52 and the Modified Preferred Route. *Id.*

D. SECTION THREE OF THE HAMPTON-LA CROSSE TRANSMISSION LINE AT THE ZUMBRO RIVER CROSSING.

Relator Oronoco's appeal involves the Zumbro River Crossing in Section Three of the Hampton-La Crosse transmission line. Section Three of the Hampton-La Crosse transmission line is forty-two to forty-eight miles and extends from the North Rochester Substation to a substation near La Crosse, Wisconsin. Index No. 274 at 5. The

transmission line would cross the Mississippi River at a location near Kellogg, Minnesota, and Alma, Wisconsin. *Id.* Oronoco complains that the White Bridge Road Crossing was selected instead of the Zumbro Dam Crossing, as recommended by the ALJ. Cannon Falls Add. 142 at Finding 490; Oronoco Add. 111 at Finding 490.

Xcel Energy's preferred route uses the County Road Bridge 12, which is identified in the record as the White Bridge Road Crossing, over the Zumbro River. Index No. 1 at 5-18. While the White Bridge Road Crossing would require some additional tree clearing at the Zumbro River, this route lacks any high quality resources. *Id.* The bridge also provides an existing corridor that would minimize impacts to the Zumbro River. *Id.*

The Zumbro Dam Crossing preferred by Relator Oronoco would cross the Zumbro River at the Zumbro Dam. *Id.* This crossing would require new tree clearing on the east side of the river in a forested area identified by the MnDNR as an area of high biodiversity significance. *Id.* This route would also be located next to several recreational resources, a campground and two summer camps. *Id.* Additionally, it would affect the highest number of residences within 300 feet of any of the three proposed crossings. *Id.*

STANDARD OF REVIEW

An agency's decision will be affirmed unless the administrative findings, inferences, conclusions, 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.

Minn. Stat. § 14.69 (2012). On appeal from an agency decision, the party seeking reversal bears the burden of proving that the agency's conclusions violate one or more provisions of Minn. Stat. § 14.69. *Markwardt v. State, Water Res. Bd.*, 254 N.W.2d 371, 374 (Minn. 1977).

The Court reviews the Commission's factual findings to determine whether they are supported by substantial evidence or whether its conclusions are arbitrary and capricious. *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 277-279 (Minn. 2001). Substantial evidence for purposes of appellate review of an administrative agency's decision is: (1) such evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; and (5) evidence considered in its entirety. *Cable Commc'ns Bd. v. Nor-West Cable Commc'ns P'ship*, 356 N.W.2d 658, 668 (Minn. 1984). A reviewing court may not substitute its own judgment for that of an administrative agency when the finding is properly supported by the evidence. *Vicker v. Starkey*, 122 N.W.2d 169, 173 (Minn. 1963).

A decision may be deemed arbitrary and capricious if the decision reflects the agency's will and not its judgment. *In re Detailing Criteria & Standards for Measuring an Elec. Utility's Good Faith Efforts in Meeting the Renewable Energy Objectives Under*

Minn. Stat. 216B.1691, 700 N.W.2d 533, 539 (Minn. Ct. App. 2005) (“*Detailing Criteria*”), *aff’d*, 714 N.W.2d 426 (Minn. 2006). If the agency explains the connection between the facts and choices made, the agency’s decision is not arbitrary and capricious. *Blue Cross*, 624 N.W.2d at 277. “An agency decision is not arbitrary and capricious if the agency, presented with opposing points of view, reaches a reasoned decision that rejects one point of view.” *Detailing Criteria*, 700 N.W.2d at 539. A reviewing court will affirm the agency’s decision if it was not arbitrary and capricious “even though [the court] may have reached a different conclusion had it been the factfinder.” *White v. Minn. Dep’t of Natural Res.*, 567 N.W.2d 724, 730 (Minn. Ct. App. 1997).

Minnesota courts “defer to an agency’s conclusions, regarding conflicts in testimony, the weight given to expert testimony and the inferences to be drawn from the testimony.” *Blue Cross*, 624 N.W.2d at 278. “The standard of review is not heightened where the final decision of the decision-maker differs from the recommendation of the ALJ.” *Id.* This Court will “adhere to the fundamental concept that decisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by the courts to the agencies’ expertise and their special knowledge in the field of their technical training, education, and experience.” *Id.* (quoting *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977)). This is especially true in matters concerning policy considerations and value judgments within the agency’s expertise. *In re Grand Rapids Pub. Util. Comm’n*, 731 N.W.2d 866, 871 (Minn. Ct. App. 2007) (citing *Reserve Mining*, 256 N.W.2d at 824).

Further, while this Court reviews questions of law de novo, “judicial deference, rooted in the separation of powers doctrine, is extended to an agency decision-maker in the interpretation of statutes that the agency is charged with administering and enforcing.” *Blue Cross*, 624 N.W.2d at 278; *see also In re Minn. Dep’t of Commerce for Comm’n Action Against AT&T*, 759 N.W.2d 242, 246 (Minn. Ct. App. 2009).

ARGUMENT

I. THE COMMISSION PROPERLY SELECTED THE MODIFIED PREFERRED ROUTE, FOLLOWING THE EXISTING CORRIDOR OF U.S. HIGHWAY 52.

A. The Commission’s Selection Of The Modified Preferred Route, Following The Existing Corridor Of U.S. Highway 52 Is Supported By Substantial Record Evidence And Reflective Of The Commission’s Reasoned Judgment.

The Commission properly decided under Minn. Stat. § 216E.03 to select the Modified Preferred Route for Section One of the Hampton-La Crosse transmission line. The Commission found that “[t]he Modified Preferred Route, on balance, is the better route for the segment covered by Segment 1P-003 based on residential impacts, existing land use, natural resources impacts and corridor sharing. Route 1P shares more existing [right of way], has fewer natural resource impacts, is more compatible with existing land uses, and has fewer recreational impacts.” Cannon Falls Add. 24. The Commission reached this decision using its technical expertise in the area of siting to weigh the evidence regarding the Modified Preferred Route and Route 1P-003.

Under section 216E.03, subd. 7, in deciding to site a transmission line, “the Commission must be guided by the state’s goals to conserve resources, minimize environmental impacts, minimize human settlement and other land use conflicts, and

ensure the state's electric energy security through efficient, cost-effective power supply and electric transmission infrastructure.” Minn. Stat. 216E.03, subd.7. Section 216E.03, subd. 7⁵ and Minn. R. 7850.4100 (2011)⁶ provide factors that the Commission must

⁵Minnesota Statute section 216E.03, subd. 7 requires the Commission to consider the following factors: “(1) evaluation of research and investigations relating to the effects on land, water and air resources of large electric power generating plants and high-voltage transmission lines and the effects of water and air discharges and electric and magnetic fields resulting from such facilities on public health and welfare, vegetation, animals, materials and aesthetic values, including baseline studies, predictive modeling, and evaluation of new or improved methods for minimizing adverse impacts of water and air discharges and other matters pertaining to the effects of power plants on the water and air environment; (2) environmental evaluation of sites and routes proposed for future development and expansion and their relationship to the land, water, air and human resources of the state; (3) evaluation of the effects of new electric power generation and transmission technologies and systems related to power plants designed to minimize adverse environmental effects; (4) evaluation of the potential for beneficial uses of waste energy from proposed large electric power generating plants; (5) analysis of the direct and indirect economic impact of proposed sites and routes including, but not limited to, productive agricultural land lost or impaired; (6) evaluation of adverse direct and indirect environmental effects that cannot be avoided should the proposed site and route be accepted; (7) evaluation of alternatives to the applicant's proposed site or route proposed pursuant to subdivisions 1 and 2; (8) evaluation of potential routes that would use or parallel existing railroad and highway rights-of-way; (9) evaluation of governmental survey lines and other natural division lines of agricultural land so as to minimize interference with agricultural operations; (10) evaluation of the future needs for additional high-voltage transmission lines in the same general area as any proposed route, and the advisability of ordering the construction of structures capable of expansion in transmission capacity through multiple circuiting or design modifications; (11) evaluation of irreversible and irretrievable commitments of resources should the proposed site or route be approved; and (12) when appropriate, consideration of problems raised by other state and federal agencies and local entities.”

⁶Minn. R. 7850.4100 requires the Commission to consider the following factors: “a) effects on human settlement, including, but not limited to, displacement, noise, aesthetics, cultural values, recreation, and public services; b) effects on public health and safety; c) effects on land-based economies, including, but not limited to, agriculture, forestry, tourism, and mining; d) effects on archaeological and historic resources; e) effects on the natural environment, including effects on air and water quality resources (Footnote continued on next page.)

consider in making its siting determination. Section 216E.03, subd. 7 (e) provides that the “[C]ommission 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.” In deciding to site the Modified Preferred Route, the Commission properly considered the factors in section 216E.03 and Minn. R. 7850.4100 and explained that the Modified Preferred Route has less residential impacts and nonproliferation, as well as less impact on natural resources.

1. The Modified Preferred Route Has Less Residential Impacts Than Route 1P-003.

Although maps of the area indicate that there are fewer homes within 500 feet of Route 1P-003, forty-three homes versus thirty, there is less impact to the homes along the Modified Preferred Route. Cannon Falls Add. 11; Oronoco Add. 11; Index No. 315 at Attachment 1. The maps show that there are only two homes within 150 feet of the Modified Preferred Route compared to six homes within that short distance of Route 1P-

(Footnote continued from previous page.)

and flora and fauna; f) effects on rare and unique natural resources; g) application of design options that maximize energy efficiencies, mitigate adverse environmental effects, and could accommodate expansion of transmission or generating capacity; h) use or paralleling of existing rights-of-way, survey lines, natural division lines, and agricultural field boundaries; i) use of existing large electric power generating plant sites; j) use of existing transportation, pipeline, and electrical transmission systems or rights-of-way; k) electrical system reliability; l) costs of constructing, operating, and maintaining the facility which are dependent on design and route; m) adverse human and natural environmental effects which cannot be avoided; and n) irreversible and irretrievable commitments of resources.”

003. Index No. 315 at Attachment 1. Additionally, fifteen of the homes along the Modified Preferred Route are separated from the line by U.S. 52. *Id.* There are also four homes that are in closer proximity to Route 1P-003 than to the Modified Preferred Route. *Id.*

2. The Modified Preferred Route Has Less Nonproliferation Than Route 1P-003.

The Modified Preferred Route would follow transmission line or road right-of-way for seventy-two percent of its length compared to fifty-six percent for Route 1P-003. Index No. 286 at Map 8.1-26. Additionally, using Route 1P-003 would require the line to be constructed cross-country and along fields, using a smaller percentage of existing fields. Index No. 286 at 104; Cannon Falls App. 77. And, Route 1P-003 would also place the line closer to a natural river gorge, where a recreation park trail is planned, and a bridge crossing the Cannon River. Index No. 286 at 106.

3. The Modified Preferred Route Has A Lower Potential Impact On Natural Resources.

The Modified Preferred Route crosses fewer Native Plant Communities than does Route 1P-003. Index No. 287 at Appendix H. Route 1P-003 crosses more Sites of Biological Significance than the Modified Preferred Route. *Id.* Route 1P-003 has more native plant community sites and acreage, and a greater acreage of Sites of Biological Significance than the Modified Preferred Route. *Id.*

Route 1P-003 would also have a greater impact on Lake Byllesby because it would cross the Cannon River on the eastern portion of Lake Byllesby. Index No. 286 at 95. By contrast, the Modified Preferred Route would cross the Cannon River

approximately one mile east of Lake Byllesby. *Id.* Lake Byllesby has been designated as an Important Bird Area by the National Audubon Society. *Id.* at 96. It serves as an important habitat for ducks, heron, geese, gulls, terns, and shorebirds. *Id.* Additionally, sandhill cranes, a bird known to collide with transmission lines, have been observed near Lake Byllesby. *Id.*

Further, Route 1P-003 would cross the Little Cannon River, which would necessitate clearing a right-of-way through previously unfragmented floodplain forest community on both sides of the river. Index No. 287 at A-11.

4. The Modified Preferred Route Has Fewer Archeological And Historical Sites Than Route 1P-003.

Additionally, the Modified Preferred Route has fewer archaeological and historic sites within one-half mile of the route than Route 1P-003. Index No. 286 at 100.

In summary, after examining all of the record evidence, the Commission used its technical expertise to determine that the Modified Preferred Route best met the factors it is required to consider in section 216E.03, subd. 7 and Minn. R. 7850.4100. The Commission decision is well supported by record evidence and should not be disturbed.

B. The Commission Properly Considered Whether The Siting Of The Modified Preferred Route Complies With Nonproliferation Requirements.

In making its determination to use the Modified Preferred Route through Cannon Falls, the Commission properly considered the issue of nonproliferation and stated its reasons for choosing the Modified Preferred Route.

In *People for Environmental Enlightenment & Responsibility (PEER), Inc. v. Minnesota Environmental Quality Council*, 266 N.W.2d 858, 868 (Minn. 1978), the Supreme Court found that the Commission must route a transmission line along a “pre-existing route unless there are extremely strong reasons not to do so.” The Court defined a preexisting route as either an existing railroad and highway right-of-way or a preexisting high voltage transmission line route. *Id.* Section 216E.03, subd. 7(e) provides that the Commission must state its specific reasons for not choosing an existing right-of-way. When there is no route that is clearly superior in terms of nonproliferation, the court defers to the Commission’s determination. See *In re Route Permit for Construction of a Substation and a High Voltage Transmission Line in Dakota County*, No. A05-661, 2006 WL 618903, at *5-6 (Minn. Ct. App. Mar. 14, 2006) (finding that the EQB had engaged in reasoned decision-making when considering the preexisting corridors of various routes).

As discussed above, the Commission made detailed findings to support its conclusion that the Modified Preferred Route “has more existing [right-of-way], has fewer natural resource impacts, is more compatible with existing land uses, and has fewer recreational impacts.” Cannon Falls Add. 24. The Commission found that the Modified Preferred Route would follow a transmission line or road right-of-way for seventy-two percent of its length compared to fifty-six percent for Route 1P-003. Index No. 286 at Map 8.1-26. It also discussed the impact to homes, cropland, and natural and cultural resources. Cannon Falls Add. 11; Oronoco Add. 11. This court should defer to the Commission’s expertise in determining which route is superior in terms of

nonproliferation because both the Modified Preferred Route and Route 1P-003 would cause some nonproliferation and the Commission used its expertise in siting and routing to determine that the Modified Preferred Route better met the requirements. *Route Permit*, 2006 WL 618903, at *5-6.

C. The Landowners On The Modified Preferred Route Along U.S. Highway 52 Received Adequate Notice And Had Numerous Opportunities To Be Heard.

1. Xcel Energy Properly Complied With The Statutory Notice Requirements.

Section 216E.03, subd. 4 requires that within fifteen days of the submission of an application for a high-voltage transmission line, mailed notice must be made to property owners whose property is on or adjacent to the proposed transmission line. Minn. Stat. § 216E.03, subd. 4. “The failure to give mailed notice to a property owner, or defects in the notice, does not invalidate the proceedings, provided a bona fide attempt to comply with this subdivision has been made.” Minn. Stat. § 216E.03, subd. 4. Minn. R. 7850.2100 further states, “the commission may extend the time for the public to participate if the failure has interfered with the public’s right to be informed about the project.” Minn. R. 7850.2100 (2011).

The court should infer a continuing notice obligation under section 216E.03, subd. 4. Even if the court were to infer such a continuous notice obligation, Xcel Energy complied with section 216E.03. Xcel Energy properly noticed the landowners who were located on the Preferred Route and the alternative route, the routes identified in the application, within fifteen days of the submission of its application. Index No. 9. Seven

included the U.S. 52 as the preferred route.

Additionally, the EFP served each of the eight landowners with the EIS Scoping Decision on August 13, 2010. Index No. 46. The EIS Scoping Decision included notice of Xcel Energy's preferred route along U.S. 52 and also included notice of a new route alternative along Highway 19. Index No. 43.

Further, on June 13, 2011, once Xcel Energy identified that an alignment change was going to be needed near U.S. 52 and Highway 19, Xcel Energy called adjacent landowners and mailed them notice of the new alignment and public hearings. Index Nos. 139, 148, 227. The notice was one day before the start of the public hearings and seventeen days before the close of public comment.

2. The Due Process Requirements Of Notice And Opportunity To Be Heard Were Satisfied.

Due process in the administrative process requires adequate notice and the opportunity to be heard. Relators Cannon Falls received due process during the siting proceedings.

"Due process requires that deprivation of property be preceded by notice and an opportunity to be heard." *Comm'r of Natural Res. v. Nicollet County Pub. Water/Wetlands Hearings Unit*, 633 N.W.2d 25, 29 (Minn. Ct. App. 2001) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985)), *rev. denied* (Minn. Nov. 13, 2001). The Court has recognized that it is impossible to set a rigid formula as to

the kind of notice that must be given because the notice required will vary with the circumstances and conditions. *Walker v. City of Hutchinson*, 352 U.S. 112, 115 (1956). For instance, in *In re Route Permit for Construction of a Substation and a High Voltage Transmission Line in Dakota County*, the city complained that residents were not notified or afforded an opportunity to be heard regarding a proposed route. 2006 WL 618903, at *6. This Court found that because the city was involved at every stage of the process, there was no evidence of a due process violation. *Id.*

In this instance, Relator Cannon Falls received adequate notice and had ample opportunity to be heard as identified above. They had notice and the opportunity to testify at the public hearings before ALJ Sheehy or submit written comments to ALJ Sheehy, as well as notice and the opportunity to submit written comments or testify before the Commission.

Indeed, Relator Cannon Falls availed themselves of these opportunities. St. Paul's Lutheran Church and School and two of the Cannon Falls Landowners spoke at the public hearings in Cannon Falls. Index No. 218 at 116-117 (Cory McDonald on behalf of St. Paul's Lutheran Church and School); Index No. 219 at 81-88 (Andy Sandstrom), 124-129 (Jennifer Langdon). St. Paul's Lutheran Church and School and a Cannon Falls Landowner also submitted written comments to ALJ Sheehy. Oronoco Add. 65, fn. 279 (St. Paul's Lutheran Church and School); Oronoco Add. 76, fn. 359 (Patricia Doffing). And, St. Paul's Lutheran Church and School and the Cannon Falls Landowners spoke at the Commission's public hearing. Index No. 323 at 102-105 (Tim Langdon), 121-124

(Michelle Sandstorm), 125-128 (Andy Sandstorm), 128-130 (Richard Busiahn on behalf of St. Paul's Lutheran Church and School), 131-134 (Jennifer Langdon).

The notice in this case complied with the statutory requirements, and Relator Cannon Falls received multiple opportunities to be heard.

D. The Commission Appropriately Found That The Final EIS Was Adequate.

Minnesota Statutes chapter 216E and Minn. R. chapter 7850 direct the process by which a Final EIS is developed. Section 216E.03 provides that the Commissioner of the Department of Commerce “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 the rules concerning the form, content, and timeliness of proposal for alternate sites or routes.” Minn. Stat. § 216E.03, subd. 5. A Final EIS is developed through a process delineated in Minn. R. chapter 7850. The rules provide that the Commissioner of the Department of Commerce must prepare a scoping decision that identifies the issues and alternatives to be addressed in the Final EIS. Minn. R. 7850.2500, subp. 4. Once a scoping decision is issued, the Department of Commerce must issue a Draft EIS and make it available to the public. *Id.*, subp. 7. The Commissioner of Commerce must then schedule informational meetings for public comment, and respond to these substantive comments by issuing a Final EIS. *Id.*, subp. 9.

The Commission must make an adequacy determination of the Final EIS. *Id.*, subp. 10. To make an adequacy determination, the Commission must decide that the

Final EIS reasonably addresses the issues and alternatives raised in the scoping decision, provides responses to the timely substantive comments received regarding the EIS, and was prepared in accordance with Minnesota Rules 7850.1000 to 7850.5600. *Id.*

In this instance, the Commission found that the Final EIS for the Hampton-La Crosse transmission line project was adequate under Minnesota Rule 7850.2500, subp. 10. In so deciding, the Commission stated “the Final EIS adequately responds to the substantive comments received during the draft EIS process. The Commission also finds that the Final EIS was prepared in compliance with the Procedures in Minn. Rules, parts 7850.1000-7850.5600.” Cannon Falls Add. 8; Oronoco Add. 8. The Commission noted in its Order that no party had objected to the Final EIS on any of the requirements under law for the development of the Final EIS. Cannon Falls Add. 7; Oronoco Add. 7.

Although the final alignment adjustments were not contained in the Scoping Document or the Draft EIS, the final alignment adjustments were contained in the Final EIS. Index No. 287 at Appendix L. Thus, the public, including Relator Cannon Falls, had the opportunity to comment before the Commission determined the adequacy of the Final EIS. The ALJ held six public hearings on the project on June 14, 15, and 16, 2011, after the new alignment was identified. Cannon Falls Add. 7; Oronoco Add. 7. The Commission also received dozens of public comments throughout the proceedings. *Id.* It is important to note that on April 22, 2012, the Commission allowed public comment and twenty-two members of the public spoke at this meeting. *Id.*; Index No. 323. No public comment was received in opposition to the adequacy of the Final EIS for alteration of the Modified Preferred Route. Oronoco Add. 7; Cannon Falls Add. 7; Index No. 323.

Even now, Relator Cannon Falls does not allege that the Final EIS was inadequate. This is because the Commission properly determined that the Final EIS was adequate.

E. The PUC Relied On Evidence In The Record.

1. Exceptions Are Legitimately Part Of The Administrative Record.

Relator Cannon Falls claims that the Commission made an error of law when it permitted or relied on exceptions to the ALJ's Report timely filed by Xcel Energy. Cannon Falls Br. at 26-36. Cannon Falls argues that the Commission erred as a matter of law because exceptions are not part of the record. *Id.* at 26.

Contrary to Relator Cannon Fall's argument, timely filed exceptions to an ALJ's Report are part of the record. Minn. Stat. § 14.61 provides:

Subdivision 1. Filing of exceptions. In all contested cases the decision of the officials of the agency who are to render the final decision shall not be made until the report of the administrative law judge as required by sections 14.48 to 14.56, has been made available to parties to the proceeding for at least ten days and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to a majority of the officials who are to render the decision. This section does not apply to a contested case under which the report or order of the administrative law judge constitutes the final decision in the case.

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. In all contested cases where the report or order of the administrative law judge constitutes the final decision in the case, the hearing record must close as ordered in writing by the presiding administrative law judge.

Minn. Stat. § 14.61 (2012).

Section 14.61 unambiguously establishes that the record closes upon the filing of exceptions if the agency is the decision-maker. In this case, since the Commission was the decision-maker, the record closed after Xcel Energy's exceptions were filed. Since Xcel Energy's exceptions were part of the record as a matter of law, the decision of the Commission appropriately reviewed and relied on them.

2. Evidence Identified And Relied Upon In The Exceptions Were Already Part Of The Record.

Even if exceptions were not part of the record, Relator Cannon Fall's argument fails because the evidence identified and relied upon by Xcel Energy in exceptions at issue were already submitted as evidence in the contested case proceeding and part of the record. The three exceptions at issue involve details of GOOGLE maps that were admitted as Exhibit 35 in the contested case proceeding. Index No. 180 (Public Exhibit 35). Cannon Falls has identified no authority for the proposition that a photographed map already in the record cannot be the subject of narrative and argument in a legal memorandum or exceptions.

3. Relator Cannon Falls' Motion to Strike Was Untimely Below.

Relator Cannon Falls moved to strike attachments 1, 2 and 3 to Xcel Energy's exceptions and associated narrative after the Commission had issued its Order. Cannon Falls made the Motion to Strike in conjunction with its Motion for Reconsideration. Cannon Falls App. 1. The Motion to Strike was untimely because it was not made at the first opportunity, before the Commission issued its Order. A Motion to Strike must be made at the earliest possible time or it is waived. *State v. Fenney*, 448 N.W.2d 54, 61

(Minn.1989) (stating that “error may not be predicated upon a ruling which admits evidence unless a timely objection or motion to strike appears of record.”). Indeed, it makes no sense to permit an evidentiary objection after a decision has been rendered. Since Cannon Falls’ Motion to Strike was untimely, it cannot seek review at this Court.

II. THE COMMISSION PROPERLY SELECTED THE WHITE BRIDGE ROAD CROSSING OF THE ZUMBRO RIVER.

A. The Commission’s Selection Of The White Bridge Road Crossing Of The Zumbro River Is Supported By Substantial Record Evidence And Reflective Of The Commission’s Reasoned Judgment.

The Commission properly decided under section 216E.03 and Minn. R. 7850.4100 to select the White Bridge Road Crossing of the Zumbro River rather than the Zumbro Dam Crossing. The Commission’s decision is supported by substantial record evidence and reflective of its reasoned judgment. The Commission looked at factors such as nonproliferation, impacts to residences, archeological and historical sites, recreational resources, and natural resources. Cannon Falls Add. 13, Oronoco Add. 13.

1. The White Bridge Road Crossing More Closely Adheres To The Statutory Objective Of Using An Existing Right-Of-Way Than The Zumbro Dam Crossing.

The White Bridge Road Crossing crosses the Zumbro River at the White Bridge Road along County Road 12. Index No. 1 at 5-18. By comparison, there is no aerial transmission line at the Zumbro Dam Crossing, although there is a low voltage transmission line. Cannon Falls Add. 13; Oronoco Add. 13; Index No. 323 at 53, 61, 15. The Commission decided that the bridge crossing more closely adheres to an existing

right-of-way and satisfies the nonproliferation requirements. Cannon Falls Add. 13; Oronoco Add. 13.

2. The White Bridge Road Crossing And The Zumbro Dam Crossing Have Similar Residential Impacts.

The differences in the potential impacts to residential properties between the White Bridge Road Crossing and the Zumbro Dam Crossing are minor: The White Bridge Road Crossing would affect twenty-six homes within 500 feet of the transmission line and the Zumbro Dam Crossing would affect twenty-four homes within that distance. Index No. 286 at Table 8.3.4.3-1. Within 300 feet of the river crossings, the White Bridge Road Crossing would affect five homes and the Zumbro Dam Crossing would affect seven homes. *Id.* The evidence also demonstrates that the White Bridge Road Crossing would not cross any existing suburban land and only less than a mile of potential suburban development. Index No. 116 at 4.

3. The White Bridge Road Crossing And The Zumbro Dam Crossing Have Similar Archeological And Historical Impacts.

The impacts to archeological and historical sites would be similar between the two crossings. There are seven archeological and fourteen historical sites along the White Bridge Road Crossing and seven archeological and eleven historical sites affected by the Zumbro Dam Crossing. Index No. 286 at Table 8.3.4.10-1.

4. The White Bridge Road Crossing Impacts Fewer Recreational Resources Than The Zumbro Dam Crossing.

The MnDNR presented evidence that the entire river is a recreational area, and that no one crossing would have a greater impact on the recreational use of the river.

Index No. 323 at 53, 61, 151. Despite the impacts to the recreational use of the river being equal, however, the Zumbro Dam Crossing would be in close proximity to several recreational resources, including a campground and two summer camps on the east bank of the Zumbro River. Index No. 1 at 5-18.

5. The White Bridge Road Crossing Impacts Fewer Natural Resources Than The Zumbro Dam Crossing.

Of great significance to the Commission was evidence that the White Bridge Road Crossing would impact fewer natural resources. The MnDNR recommended using the White Bridge Road Crossing because it would result in the “least impact from clearing, and utilizes an existing river crossing.” Index No. 278 at June 29, 2011 Letter to ALJ Sheehy. The MnDNR was concerned that the Zumbro Dam Crossing is located next to a Minnesota Biological Survey (MBCS) Site of Biodiversity Significant ranked as “high”, which includes state listed special concern American ginseng (plant) and moschatel (plant). *Id.* Also, the Zumbro Dam Crossing area includes one of the country’s largest concentrations of the Blandings turtle, a state-listed threatened species. *Id.* at April 29, 2011 Letter to Matthew Langan. By comparison, the White Bridge Road Crossing would only affect a MCBS site of Biodiversity Significance ranked as “moderate” and one ranked as “low”. Index No. 278 at June 29, 2011, Letter to ALJ Sheehy (Public Comment Received Before June 30, 2011).

Ultimately, based on substantial evidence in the record, the Commission used its expertise in siting and routing to weigh the various factors and conclude that the White Bridge Road Crossing of the Zumbro River best satisfied the routing requirements.

B. The Commission Did Not Deprive Anyone Of Due Process Rights.

1. Relator Oronoco Does Not Have Standing To Allege A Violation Of Due Process Rights On The Basis That A Third-Party Landowner Has Been Aggrieved.

Relator Oronoco contends that the process as a whole failed to provide its citizens who opposed the White Bridge Road Crossing an opportunity to be heard. Oronoco Br. at 37. Oronoco fails to assert any facts as to how Oronoco as a party has been denied any notice or opportunity to be heard. Oronoco has been a full participant throughout these proceedings. Index No. 96. Oronoco itself received direct, mailed notice throughout the permitting process and participated fully at hearings as well as through written comment. Indeed, Oronoco does not allege that it was unaware of the White Bridge Road Crossing alternative. In addition, Oronoco was not itself prejudiced by any alleged due process violation.

It appears that Relator Oronoco, on behalf of non-party residents, simply disagrees with the Commission's decision to select the White Bridge Road Crossing for a portion of the line. Oronoco's allegations of due process violations cannot be based merely on argument that a different route should have been chosen. To bring such a claim, Oronoco must establish direct and personal harm to it as an entity. *City of Minneapolis v. Wurtele*, 291 N.W.2d 386, 392-93 (Minn. 1980); *see also N. States Power Co. v. City of Mendota Heights*, 646 N.W.2d 919, 927 (Minn. Ct. App. 2002) (suggesting that a city may not necessarily assert rights of affected property owners). Oronoco cannot make any such showing and, in fact, has not alleged any harm due to the selection of the White Bridge

Road Crossing. Consequently, Oronoco's appeal should be rejected and the decision of the Commission affirmed.

2. Relator Oronoco And The Public Had The Opportunity To Be Heard.

Even if Relator Oronoco had standing to assert the interests of some of its residents, its due process claim would fail because the interested residents had notice of the April 12, 2012, meeting and an opportunity to be heard at that meeting. Oronoco Add. 116.

As discussed in Section I(C)(2), *supra* pp. 24-25, the essence of due process in the Commission process is notice and the opportunity to be heard. *Commissioner of Natural Resources*, 633 N.W.2d at 29; *Route Permit*, 2006 WL 618903, at *6. While Relator Oronoco claims that its citizens who opposed the alternative eventually selected by the Commission were denied the right to be heard, it is incorrect. Oronoco cannot identify any evidence that the Commission in any way limited Oronoco's citizens from making oral comment at the public meeting.

Relator Oronoco also argues that it or others were denied the opportunity for cross-examination of members of the public who spoke at the April 12, 2012, Commission meeting. Oronoco Br. at 30, 36-37. Oronoco, however, was not treated any differently than any other party. No party had the opportunity to cross-examine the public speakers at the Commission meeting. Index No. 323. Additionally, the absence of the opportunity to cross-examine unsworn public speakers at a public meeting is not a due process violation. *Barton Contracting Co., Inc. v. City of Afton*,

268 N.W.2d 712, 716 (Minn. 1978) (holding that cross-examination is not an essential element of due process at a public hearing before the Planning Commission).

Relator Oronoco's argument that its citizens were somehow deterred from attending the April 12, 2012, hearing because no exceptions were filed against the sub-route preferred by Oronoco is irrelevant. The Commission is not statutorily prohibited from selecting an alternative route when the route recommended by the ALJ has not been the subject of exceptions. Minn. Stat. § 216E.03, subd. 7. In addition, the Commission is authorized to render a decision differing from the ALJ's recommendations as long as the deviation from the recommendations is explained. Minn. Stat. § 14.62, subd. 1 (2012). Because the potential decisions by the Commission are not dependent upon whether exceptions are filed, the absence of exceptions is not a legal justification for the failure of Oronoco's citizens to avail themselves of the opportunity to be heard at the April 12, 2012, public meeting.

3. The Commission Based Its Decision On Facts In The Record.

a. Relator Oronoco has failed to identify facts provided in oral comment relied upon by the Commission.

Relator Oronoco premises its due process argument, at least in part, on its assertion that the Commission based its decision regarding the route alternative on facts presented during oral public comment at the April 12, 2012, meeting. Oronoco Br. at 34.

Relator Oronoco has failed to identify any facts relied upon by the Commission which are found only in the public comments. However, while public comments referred to evidence already in the record, the Commission is permitted to rely on these facts.

Barton Contracting, 268 N.W.2d at 717 (holding that City Council did not rely on evidence outside the record when public comments involved facts already in the record). Indeed, since Oronoco has failed to identify any fact relied on by the Commission in its analysis of the route that is not supported by evidence in the record, it cannot show any prejudice occasioned by the public comments. In addition, Oronoco has failed to prove or even to argue that the Commission decision is not supported by substantial evidence in the record as a whole. Minn. Stat. § 14.69 (e). As shown in Section II(A), *supra* pp. 30-32, the Commission decision was reasonable and supported by substantial evidence in the record.

b. The Commission speaks through its orders.

In an effort to show that the Commission viewed the public comment as factual testimony, Relator Oronoco purports to quote Commissioners referring to the public comment as “testimony.” Oronoco Br. at 35. There are many problems with this argument. First, as described above, Oronoco has failed to identify any facts relied upon by the Commission that originated in public comment and are only found there. Second, the use of the word “testimony” by Commissioners does not show that the Commission relied on particular facts not in the record. Third, the Commissioners were aware that the public speakers were not sworn.

Finally, comments by Commissioners are not relevant on appeal because the Commission speaks through its written decisions, not through individual deliberative comments. *See* Minn. Stat. § 216B.33 (2012) (“Every order, finding, authorization, or certificate issued or approved by the commission under this chapter must be in writing

and retained in the commission's official record system."); *see also In Re Excelsior Energy Inc.*, 782 N.W.2d 282, 296 (Minn. Ct. App. 2010) (holding that Commission's initial discussion of location of project does not constitute error); *Reserve Mining Co. v. Minn. Pollution Control Agency*, 364 N.W.2d 411, 415 (Minn. Ct. App. 1985) ("Reading a transcript might give the court ideas of individual member's views, but one member's views may not reflect the basis for the action of other members."); *City of Frisco v. Tex. Water Rights Comm'n*, 579 S.W.2d 66, 72 (Tex. App. 1979) ("The thought processes or motivations of an administrator are irrelevant in the judicial determination whether the agency order is reasonably sustained by appropriate findings and conclusions that have support in the evidence.").

4. The Commission Has Inherent Authority To Permit Public Comment.

Relator Oronoco discusses rules and statutes designed to insure that parties to Commission proceedings have the opportunity to be heard. Oronoco Br. at 32-34. From these provisions, it leaps to the conclusion that only parties may address the Commission. *Id.* at 33-34. From this premise, Oronoco asserts that the Commission exceeds its authority by allowing non-parties to orally participate at its hearings. *Id.* Oronoco identifies no legal authority for this illogical conclusion. Rather, only when statutes contain exceptions does the statute exclude other exceptions by rules of construction. Minn. Stat. § 645.19 (2012). Moreover, a construction of these statutes or rules that would permit the Commission to offer public comment to non-parties would favor the public interest over the private. Minn. Stat. § 645.17, subd. 5 (2012). Finally, a state

agency obligated to host open meetings has inherent authority to permit public comment at those meetings.

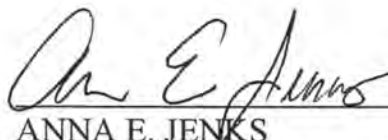
CONCLUSION

For all of the reasons stated above, Respondent requests that the Court affirm the Commission decision.

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Respectfully submitted,

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