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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1607
A12-1632**

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

**Filed June 10, 2013
Affirmed
Bjorkman, Judge**

Minnesota Public Utilities Commission
File No. E-002/TL-09-1448

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and

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Considered and decided by Bjorkman, Presiding Judge; Connolly, Judge; and Stauber, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

These consolidated certiorari appeals challenge a high-voltage-transmission-line (HVTL) route permit issued by respondent Minnesota Public Utilities Commission (MPUC) to respondent Northern States Power Company, doing business as Xcel Energy (Xcel). The appeal of relator-church and relators-landowners concerns the first segment of the permitted route. The church and landowners argue that the MPUC erred by designating Xcel's preferred route for that segment because (1) Xcel improperly modified its proposed route late in the application process, which violated statutory notice and environmental-review requirements; (2) the route violates Minnesota's nonproliferation policy; and (3) the MPUC relied on extrarecord information in designating the route. Relator-township's appeal concerns the third segment of the route. The township argues that the MPUC improperly considered testimony as to that segment that was offered after the record closed. We affirm.

FACTS

On January 19, 2010, Xcel applied to the MPUC for a route permit for the Minnesota portion of a proposed HVTL from Hampton, through Rochester, to La Crosse,

Wisconsin.¹ The HVTL consists of three distinct segments: Segment 1 includes a 345 kV transmission line extending southeast from a substation near Hampton to a proposed North Rochester substation between Zumbrota and Pine Island; segment 2 includes a new 161 kV transmission line in the Rochester area; and segment 3 consists of a new 345 kV transmission line extending east from the proposed North Rochester substation, across the Zumbro River, and across the Mississippi River near Alma, Wisconsin. Only the first and third segments are at issue in this appeal.

The MPUC accepted Xcel's application as complete in March 2010 and referred it to the office of administrative hearings for a contested-case hearing before an administrative law judge (ALJ). The ALJ scheduled public and evidentiary hearings for mid-2011, to follow a period for independent environmental review and an opportunity for interested entities to intervene.

The Minnesota Department of Commerce, through its energy-facility permitting staff (EFP), conducted the environmental review, which included identifying alternative route options and preparing an environmental impact statement (EIS). *See* Minn. R. 7850.2500 (2011). The EFP consulted with two citizen advisory task forces and considered input from the public and relevant state agencies, including the Minnesota Department of Transportation (MnDOT) and the Minnesota Department of Natural Resources (DNR). The EFP issued a draft EIS on March 21, 2011. The draft EIS

¹ The proposed route is one of three new 345 kV transmission lines that make up Xcel's CapX 2020 project: one from Brookings, South Dakota, to Hampton; the one at issue here from Hampton through Rochester to La Crosse; and one from Fargo, North Dakota, to Alexandria, St. Cloud, and Monticello, Minnesota.

addressed 17 route alternatives for segment 1, with several variations on Xcel's preferred route along US Highway 52 (US 52) and several variations on an alternative route following field divisions and property boundaries through agricultural land west of US 52. For segment 3, the draft EIS addressed 31 route alternatives, including three options for crossing the Zumbro River: Xcel's preferred crossing at County Road 12/White Bridge Road, a middle crossing at the Zumbro Dam, and a northern crossing.

Five entities intervened in the contested case as parties: relator Oronoco Township (township); citizen groups respondent No CapX 2020 (No CapX), United Citizens Action Network, and the North Route Group; and American Transmission Company, LLC (ATC), a Wisconsin company that plans to develop a transmission line from Xcel's terminus in La Crosse.

On June 13, 2011, the day before the first public hearing, Xcel filed a letter with the ALJ proposing a slight variation for a portion of its preferred route near the interchange of US 52 and Highway 19 (near Cannon Falls), and a corresponding wider route width,² to accommodate MnDOT's setback requirements. That same day, Xcel notified landowners in the area of this expanded preferred route³ by telephone and mail.

The ALJ conducted six public hearings on June 14, 15, and 16 at various sites along the proposed route, and a four-day evidentiary hearing between June 20 and 24 at

² An HVTL route may have a variable width of up to 1.25 miles. Minn. Stat. § 216E.01, subd. 8 (2012).

³ We are mindful that one of the concerns on appeal is a lack of clarity in distinguishing between various proposed routes. We use the phrase "expanded preferred route" to refer to Xcel's preferred segment 1 route, as modified by Xcel's June 2011 proposal, which the MPUC ultimately designated as the segment 1 route in the permit.

the MPUC offices in St. Paul. The EFP subsequently issued a final EIS, which discussed the same route alternatives identified in the draft EIS and included an appendix addressing Xcel's expanded preferred route for segment 1.

The ALJ issued findings of fact, conclusions of law, and recommendations on February 8, 2012. For segment 1, the ALJ recommended a variation on Xcel's initial preferred route along US 52 with one 5.5-mile deviation to the west in the area of Cannon Falls (option 1P-003). Option 1P-003 was among the 17 route alternatives initially identified in the EIS process and is similar to but extends farther west than Xcel's expanded preferred route. For segment 3, the ALJ recommended Xcel's preferred route, but with the Zumbro Dam crossing instead of the White Bridge Road crossing.

No CapX, North Route Group, and United Citizens Action Network jointly filed exceptions to the ALJ's report. They supported the decision not to use the northern Zumbro River crossing for segment 3 but asserted that the ALJ erred in finding there is an existing aerial crossing at the Zumbro Dam. Xcel also filed exceptions. Xcel supported approval of the ALJ's recommended route, except for segment 1, for which it argued the MPUC should designate the expanded preferred route. The EFP reviewed the ALJ's report and the parties' exceptions and submitted comments and recommendations to the MPUC, largely supporting Xcel's exceptions.

The MPUC conducted a public hearing on April 12, 2012. The MPUC heard from the EFP, the DNR, MnDOT, and all of the parties except ATC. The MPUC then allowed members of the public not associated with one of the parties three minutes each to present

“summary, limited comment” on the application. Twenty-three individuals spoke, after which the MPUC gave the parties time to respond to the individuals’ comments.

The MPUC adopted most of the ALJ’s findings and conclusions but amended several findings regarding segment 1 near Cannon Falls and segment 3 at the Zumbro River crossing, clarified corresponding conclusions, and made several new findings. Based on its determinations, the MPUC issued a route permit designating Xcel’s expanded preferred route for segment 1 and Xcel’s preferred route with the White Bridge Road crossing for segment 3.

Though not parties to the MPUC proceeding, relator St. Paul’s Lutheran Church and School and relators Cannon Falls landowners⁴ (collectively, the Cannon Falls relators) became involved by petitioning the MPUC to reconsider its decision. The township also petitioned for reconsideration. The MPUC denied the petitions, and these appeals follow.

D E C I S I O N

On certiorari review, we will affirm the MPUC’s decision to issue an HVTL route permit unless the decision is arbitrary or capricious, exceeds the agency’s jurisdiction or statutory authority, is made upon unlawful procedure, reflects an error of law, or is unsupported by substantial evidence in view of the entire record. *See* Minn. Stat. §§ 14.69, 216B.52, 216E.15 (2012). The party seeking review has the burden of proving

⁴ The Cannon Falls landowners are not individually listed on their brief but presumably are the ten individuals who submitted affidavits in support of the reconsideration petition: Gina Schlueter, Jennifer and Timothy Langdon, Michelle and Andrew Sandstrom, Chris and Kristy Strickland, Patricia Doffing (through her son Dennis Doffing), Richard Peterson, and Diane Logue.

both error and prejudice. See Minn. Stat. § 14.69; *Minn. Ctr. for Env'tl. Advocacy v. Comm'r of Minn. Pollution Control Agency*, 696 N.W.2d 95, 100 (Minn. App. 2005). We review issues of law de novo. *No Power Line, Inc. v. Minn. Env'tl. Quality Council*, 262 N.W.2d 312, 320 (Minn. 1977). But we afford the decision of an administrative agency “a presumption of correctness” and defer to its independent fact-finding process. *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278-79 (Minn. 2001) (*BC&BS*). “The standard of review is not heightened where the final decision of the agency decision-maker differs from the recommendation of the ALJ.” *Id.* at 278.

I. The MPUC did not err by designating the expanded preferred route for segment 1.

The Cannon Falls relators argue that the MPUC erred by designating the expanded preferred route because Xcel proposed the route for the first time in June 2011, in violation of statutory notice and environmental-review requirements. The Cannon Falls relators also assert that the expanded preferred route violates Minnesota’s nonproliferation policy and that the MPUC relied on extrarecord evidence in designating that route. We address each argument in turn.

A. Substantial evidence indicates Xcel made a bona fide attempt to comply with the statutory notice requirements.

Under Minnesota’s Power Plant Siting Act (PPSA), a route-permit applicant must, within 15 days after submitting the application, send notice, including a description of the proposed project and information about where a copy of the application can be reviewed, to “each owner whose property is . . . along any of the proposed routes for the

transmission line.” Minn. Stat. § 216E.03, subd. 4 (2012). But an applicant’s “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.” *Id.*; *see also* Minn. R. 7850.2100, subp. 6 (2011) (reiterating “bona fide attempt” standard and permitting the MPUC to “extend the time for the public to participate if [a notice] failure has interfered with the public’s right to be informed about the project”). Whether an applicant made a bona fide attempt to comply with the notice requirements presents a question of fact. *See Tonka Tours, Inc. v. Chadima*, 372 N.W.2d 723, 728 (Minn. 1985) (stating that determining “what constitutes good faith necessarily involves factual findings”). We defer to the MPUC’s factual findings. *See BC&BS*, 624 N.W.2d at 278-79.

It is undisputed that Xcel provided timely notice of the HVTL route-permit application to landowners along its initial preferred route in January 2010. When Xcel modified its application to include the expanded preferred route in June 2011, strict compliance with the 15-day notice requirement was impossible. But Xcel called and mailed notice of the expanded preferred route to the 13 adjacent landowners (including the Cannon Falls relators), all but one of whom had received the original route-application notice. Those landowners had an opportunity to respond to the application, including the expanded preferred route. Many of the Cannon Falls relators took advantage of this opportunity: three spoke at public hearings before the ALJ, two submitted written comments to the ALJ, and six spoke at the MPUC’s public hearing, though some voiced concerns in more than one of these venues.

The Cannon Falls relators contend that Xcel's actions do not reflect a bona fide attempt to comply with the statute because Xcel knew of MnDOT's setback requirements long before June 2011 but did not modify its application and notify affected landowners until the day before the first public hearing. We disagree. While the MPUC did not expressly determine that Xcel made a bona fide attempt to comply with the notice requirements, we construe the MPUC findings to reject this argument. The MPUC found that Xcel proposed the expanded preferred route "in response to [Mn]DOT's concerns," and adopted the ALJ's finding that Xcel "promptly proposed an alignment using an expanded route width in [the Cannon Falls] area, and . . . gave notice to the newly affected landowners by telephone and by mail." The record, which includes policy statements from MnDOT and evidence of communications between MnDOT, the EFP, and Xcel regarding this permit application, amply supports those findings.

In sum, Xcel provided the required notice of its initial preferred route, proposed a slight variation on that route in timely response to the concerns of a state agency, and provided actual notice to affected landowners sufficient to afford them an opportunity to be heard. On this record, we conclude that Xcel's June 2011 notice of its expanded preferred route did not invalidate the agency proceedings.

B. Xcel's proposal of the expanded preferred route after the draft EIS was issued did not preclude the MPUC from designating that route.

The PPSA requires the department of commerce to prepare an EIS for all HVTL route-permit applications. Minn. Stat. § 216E.03, subd. 5 (2012). To do so, the department (acting through its EFP) studies and evaluates the applicant's proposed routes

and any other route that it “deems necessary that was proposed in a manner consistent with rules concerning the form, content, and timeliness of proposals for alternate . . . routes.” *Id.*; *see also* Minn. R. 7850.2500 (defining procedures for EIS preparation). In turn, the MPUC must “determine the adequacy of the final [EIS]” before issuing a route permit. Minn. R. 7850.2500, subp. 10, .2700, subp. 2 (2011).

The Cannon Falls relators argue that the MPUC could not consider the expanded preferred route because the EFP did not evaluate it in preparing the draft EIS and did not consider it in the body of the final EIS. We are not persuaded. The EIS does not limit the MPUC’s authority; it is a tool to assist the MPUC in satisfying its obligation to evaluate the environmental impact of any route it considers permitting. *See* Minn. Stat. § 216E.03, subd. 10(b) (2012) (stating that the MPUC may not issue a route permit “in violation of the route selection standards and criteria established in [Minn. Stat. § 216E.03] and in [MPUC] rules”); *see also* Minn. Stat. § 216E.03, subd. 7(a), (b)(1) (2012) (requiring the MPUC to consider effects on land, water, and air resources and the state’s goal to “minimize environmental impacts”); Minn. R. 7850.4000, .4100 (2011) (same). In other words, an EIS represents only part of the information the MPUC relies on in making permitting decisions. Nothing in the record indicates that Xcel’s proposal of the expanded preferred route after the draft EIS was issued interfered with the MPUC’s ability to conduct its independent environmental review.

Xcel submitted maps detailing the expanded preferred route, and its representative discussed the expanded preferred route extensively at public hearings in Cannon Falls. The Xcel representative further discussed the expanded preferred route during the

evidentiary hearing. Xcel also submitted two exhibits (94 and 95) depicting the expanded preferred route and explaining its anticipated environmental effects; none of the parties objected to the exhibits or cross-examined Xcel's representative about them. And although the Cannon Falls relators correctly assert that the EFP did not specifically discuss the expanded preferred route in the final EIS, the EFP appended exhibits 94 and 95 to the final EIS and explained in its written comments to the MPUC, and at the MPUC hearing, that it intended thereby to incorporate the exhibits into the EIS. The MPUC considered this evidence, and evidence of the initial preferred route, and compared the anticipated environmental effects of option 1P-003 to those of the expanded preferred route.

Because Xcel's June 2011 proposal of the expanded preferred route did not interfere with the MPUC's required consideration of environmental factors, we conclude that the timing of that proposal did not preclude the MPUC from designating the expanded preferred route.

C. The expanded preferred route does not violate Minnesota's nonproliferation policy.

The Cannon Falls relators argue that the expanded preferred route violates Minnesota's nonproliferation policy by establishing a new transmission corridor. They contend the MPUC violated this policy by not designating option 1P-003, where there is an existing transmission line, as the route for segment 1. We disagree.

Minnesota has a longstanding "policy of nonproliferation," *see People for Env'tl. Enlightenment & Responsibility, Inc. v. Minn. Env'tl. Quality Council*, 266 N.W.2d 858,

868 (Minn. 1978) (*PEER*), which is codified in several places throughout the PPSA, *see* Minn. Stat. §§ 216E.02, subd. 1, .03, subd. 7(a), (b)(8) (2012).⁵ The policy seeks to minimize the impact of new HVTL routes on natural resources by co-locating them with existing infrastructure. *PEER*, 266 N.W.2d at 868. But nothing in *PEER* or the PPSA requires use of existing *transmission* corridors to satisfy nonproliferation concerns. Rather, both focus on co-locating HVTLs with various types of existing or proposed infrastructure, including highway rights-of-way, to maximize use of that infrastructure. *See* Minn. Stat. § 216E.03, subd. 7(b)(8); *PEER*, 266 N.W.2d at 868.

The MPUC noted the presence of the existing transmission line along option 1P-003⁶ but found the expanded preferred route, which largely shares right-of-way with US 52, a better use of existing infrastructure in light of all of the environmental and land-use considerations. The Cannon Falls relators complain that the expanded preferred route deviates from US 52's right-of-way and creates new transmission corridors in some places. This is true. But this fact does not differentiate it from option 1P-003, which also would have had some sections of entirely new transmission. We conclude that the

⁵ The Cannon Falls relators rely on Minn. Stat. § 216E.03, subd. 7(e) (2012), in addressing nonproliferation. That provision requires the MPUC to consider co-locating proposed HVTL routes along existing HVTL routes or within parallel existing highway rights-of-way. But while subdivision 7(e) is consistent with *PEER* and other portions of the PPSA, it was added in 2010 and applies only to route applications filed on or after April 30, 2010. *See* 2010 Minn. Laws ch. 288, § 3, at 702.

⁶ The Cannon Falls relators assert that the MPUC “did not utilize the available information” about the transmission line. The MPUC may not have attributed the same significance to the line that the Cannon Falls relators do, but it did not overlook the line's presence.

MPUC did not violate Minnesota's nonproliferation policy in designating the expanded preferred route for segment 1.

D. The MPUC did not rely on extrarecord information in designating the expanded preferred route.

Finally, the Cannon Falls relators assert that the MPUC improperly relied on information that Xcel submitted for the first time with its February 2012 exceptions to the ALJ's report. *See* Minn. Stat. § 14.60, subd. 2 (2012) (stating "no factual information or evidence shall be considered in the determination of the case unless it is part of the record."). We disagree. The Cannon Falls relators cite 26 examples of "information not in the record." But our review persuades us that these challenges largely concern Xcel's alleged mischaracterizations of record evidence, not the submission of identifiable new information. For example, the Cannon Falls relators object to Xcel's explanation for the timing of its expanded-preferred-route proposal, urging that MnDOT's setback requirements "were known from early in the application process." The Cannon Falls relators may disagree with Xcel's explanation, but this is not an instance of Xcel introducing new information after the evidentiary hearing. The only "new information" the Cannon Falls relators point to are three aerial maps Xcel attached to its exceptions, which depict the proximity of option 1P-003 and the expanded preferred route to residences, existing rights-of-way, and parks. Xcel explains that the maps are nothing more than manipulations of an electronic exhibit that is in the record; the Cannon Falls relators conceded as much at oral argument. Because the Cannon Falls relators fail to

identify any extrarecord evidence that influenced the MPUC's decision to designate the expanded preferred route for segment 1, they are not entitled to relief on this basis.

II. The MPUC did not err by designating the White Bridge Road crossing for segment 3.

Relator township challenges the MPUC's decision to designate a route for segment 3 that includes the White Bridge Road crossing of the Zumbro River, rather than the Zumbro Dam crossing that the ALJ recommended. The township argues that the MPUC's decision is the result of unlawful procedure because the MPUC improperly accepted testimony at its public hearing.

In considering the township's argument, we are guided by the language of the PPSA, which defines the scope of the MPUC's authority to issue HVTL route permits and the procedure for doing so. A route-permit application requires notice to the public, independent environmental review, and the opportunity for "broad spectrum citizen participation," including public hearings. Minn. Stat. §§ 216E.03, subds. 3a-6, .08, subd. 2 (2012). An ALJ conducts all hearings pursuant to the contested-case procedures of the Administrative Procedure Act, Minn. Stat. §§ 14.001-.69 (2012), but the PPSA mandates that "[a]ny person may appear at the hearings and offer testimony and exhibits without the necessity of intervening as a formal party to the proceedings." Minn. Stat. § 216E.03, subd. 6; *see also* Minn. R. 7850.2600, subp. 1 (2011). After the ALJ submits a report and recommendation to the MPUC, all "parties to the proceeding" are afforded an opportunity to "file exceptions and present argument" to the MPUC, after which the

contested-case record closes. Minn. Stat. § 14.61, subs. 1-2; Minn. R. 7829.2700 (2011).

Here, the MPUC allowed the parties to file exceptions and present oral arguments but also invited individual members of the public not associated with the parties to present their own brief comments during the MPUC's public hearing. Among those who did so were Anna Mae Norman, Merl Norman, Steven Walker, and Kevin Kautz, who all spoke against the Zumbro Dam crossing. The township argues that the MPUC erred by accepting their comments because only parties "may file exceptions and be heard." We disagree.

While the township is correct that only parties to the contested-case proceeding have a right under Minn. Stat. § 14.61 to file exceptions to the ALJ's report and present argument to the MPUC, the township has not identified anything in this or any other statute that bars the MPUC from also accepting public comments. To the contrary, the statutes and rules governing the MPUC's consideration of an HVTL route-permit application favor broad public participation throughout the process. *See* Minn. Stat. §§ 216E.08, subd. 2 (requiring the MPUC to "adopt broad spectrum citizen participation," including but not limited to public hearings, "as a principle of operation"), 216E.09 (requiring that all the MPUC meetings and hearings be "open to the public") (2012); *see also* Minn. R. 7829.3000, subp. 1 (2011) (permitting "[a] party or a person aggrieved and directly affected by [an MPUC] decision or order" to petition for reconsideration).

The township further argues that the statements made by the four nonparty individuals who spoke for a few minutes against the Zumbro Dam crossing went beyond mere comment to become testimonial evidence presented after the record was closed. We disagree. The township points to the Normans' statements about the camp they run on property near the Zumbro Dam. This was not new information; it was addressed multiple times during the application process, including in Xcel's application, at a public hearing before the ALJ, in the ALJ's report, and during Xcel's presentation to the MPUC. The township also focuses on Walker's assertion that more people use the Zumbro Dam area for recreational purposes than Lake Zumbro or the White Bridge Road area. Again, this was not new information; the recreational uses at the various proposed river crossings and Lake Zumbro were addressed in Xcel's application, in the EIS, in the ALJ's report, and the DNR's discussion during its presentation to the MPUC. Likewise, statements regarding the importance of trees and other natural resources at the Zumbro Dam site were not new evidence but reiterated and highlighted ample record evidence of potential effects of the HVTL on these resources. The ALJ acknowledged this evidence, and the DNR highlighted it during the MPUC hearing. In short, our careful review of the record indicates that the MPUC did not receive or consider any new evidence during the public hearing.⁷

Moreover, our examination of the MPUC's decision reveals that it independently considered the statutory criteria and relied on substantial record evidence in designating

⁷ Because the record indicates the MPUC did not receive new evidence at the hearing, one commissioner's reference to "testimony" is a harmless misstatement.

the White Bridge Road crossing. First, the MPUC clarified that, contrary to the ALJ's factual determination, there is no existing transmission line that crosses the river at the Zumbro Dam. Accordingly, a crossing at that location does not particularly serve Minnesota's nonproliferation policy. *See PEER*, 266 N.W.2d at 868 (discussing state "policy of nonproliferation" requiring use of existing rights-of-way for HVTL routes). And the MPUC accurately noted a statutory preference for routing HVTLs along existing highway rights-of-way, which favors a crossing at White Bridge Road, rather than the Zumbro Dam. *See Minn. Stat. § 216E.03, subd. 7(b)(8)* (requiring consideration of "routes that would use or parallel existing railroad and highway rights-of-way"). Substantial evidence supports the MPUC's finding that the White Bridge Road crossing best supports Minnesota's nonproliferation policy.

Second, the MPUC found that impacts on recreation at Lake Zumbro do not necessarily weigh against the White Bridge Road crossing (which will necessitate a Lake Zumbro crossing) because recreation occurs throughout the Zumbro River. The record evidence noted above substantially supports that finding.

Finally, and most significant to the MPUC's decision, the MPUC found that the Zumbro Dam location contains more rare and sensitive natural resources likely to be harmed by installation of an HVTL than there are at the White Bridge Road location. While the township points to some discussion of micro-siting to mitigate some of these effects, extensive record evidence indicates that such measures will, at best, lessen the more extensive harm expected at the Zumbro Bridge crossing.

In sum, the MPUC did not err in permitting members of the public to voice opposition to the Zumbro Dam crossing during the public hearing and the MPUC's decision designating the White Bridge Road crossing for segment 3 is supported by substantial evidence.

Affirmed.