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

STATE OF MINNESOTA
IN SUPREME COURT

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

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# PETITION FOR REVIEW OF DECISION OF COURT OF APPEALS

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Date of Filing of Court of Appeals Decision:
June 10, 2013

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TO: THE SUPREME COURT OF THE STATE OF MINNESOTA:

Petitioner Oronoco Township requests Supreme Court review of the above-entitled decision of the Court of Appeals upon the following grounds:

## 1. STATEMENT OF LEGAL ISSUES AND THEIR RESOLUTION BY THE COURT OF APPEALS.

(1) In all contested cases where state agency officials render the final decision, the contested case record must close upon the filing of exceptions to the administrative law judge (ALJ) report and presentation of argument to the state agency under Minn. Stat. § 14.61 or upon expiration of the deadline for doing so. (A. 288). Only parties may file exceptions and present argument pursuant to statute. Even though no exception was filed as to the ALJ recommended route for Segment 3, the Minnesota Public Utilities Commission (MPUC) allowed non-parties to present oral comment/testimony to the MPUC opposing the ALJ recommended route, and the MPUC chose the route segment so favored by these individuals. Does the MPUC's selective allowance of testimony/public comment by non-parties after the record closed and where no party filed an exception to the ALJ's recommended route violate Minnesota law?

The Court of Appeals held in the negative, agreeing with Petitioner Oronoco that the filing of exceptions and argument is confined by statute to parties, but then holds Oronoco "has not identified anything in this or any other statute that bars the MPUC from also accepting public comments." (A. 15).

(2) Minn. Stat. § 216E.16 directs that the MPUC may adopt rules consistent with Chapter 216E governing electric power facility permits, including establishment of minimum guidelines for public participation in the development and enforcement of any rule, plan or program established by the MPUC. (A. 297). It further directs that the chief administrative law judge shall adopt procedural rules for public hearings relating to the site and route permit process and the rules shall attempt to maximize citizen participation. (Id.) The MPUC promulgated no rule that allowed it to take public comment at the final decision stage and that allowed it to weigh that select comment in reaching its decision. The allowance of public comment violated the promulgated rules Minn. R. 1405.0800, subp. b and 1405.1700, subp. 8 that public comment offered "without benefit of oath or affirmation" is to be "given such weight as the administrative law judge deems appropriate." (A. 133, 134, 247, 299, 300). Following public comment/testimony, the MPUC rejected the ALJ's recommended route and adopted the routing advocated by the select oral public comments made just prior to its deliberations to the prejudice of Petitioner Oronoco. Did the MPUC's failure to follow statutory procedures and its own rules constitute a lack of due process and fairness, requiring reversal and remand?

The Court of Appeals held in the negative, referencing Minn. Stat. § 216E.03, subd. 6, governing proceedings before the ALJ and holding nothing bars MPUC from "also accepting public comments." (A. 14-18).

## 2. STATEMENT OF THE CASE (FACTS AND PROCEDURAL HISTORY).

The North Rochester to Mississippi River 345 kV segment of new high voltage transmission line requires the crossing of the Zumbro River. The Project's applicant, Respondent Xcel Energy (Applicant), looked at three possible Zumbro River crossings for Segment 3. Applicant concluded there was no clear

superior route, but the White Bridge Route (White Bridge Route) was designated as Applicant's preferred route. Oronoco Township, in accord with Minnesota law, timely sought and was granted intervention as a party and opposed the White Bridge Route. The White Bridge Route cuts through Oronoco Township. It interferes with planned residential areas in Oronoco Township. It would significantly negatively impact its residents, farming operations as well as recreation on Lake Zumbro.

A contested case hearing (Minn. R. 7850.2600 and 1405.0200 through .2700) was conducted by ALJ Sheehy in two stages. In the first stage, six public hearings were held between June 14 and 16, 2011, with members of the public given every opportunity to appear and make public comment. Not only could the public present their oral comments to ALJ Sheehy, but they also had the opportunity to submit written comments to her as well by June 30, 2011. (A. 136). Pursuant to Minn. R. 1405.0800, subp. b and 1405.1700, subp. 8, public comment, given "without benefit of oath or affirmation," is to be "given such weight as the administrative law judge deems appropriate." (A. 299, 300). After the evidentiary hearing (stage two) was held, the ALJ issued her route recommendations, which recommendations are premised on 490 detailed findings of fact and 14 conclusions of law. (A. 39). As to Segment 3, ALJ Sheehy did not recommend the White Bridge Route opposed by Oronoco and instead recommended the Zumbro Dam Route. (Findings 376 through 490; A. 109-129, and Conclusion 11; A. 130). The ALJ's findings reflect that members of the public had appeared and objected to the Zumbro Dam Route. (Finding 395; A. 113). Her findings also reflect there are fewer people and homesteads affected by the Zumbro Dam Route and it is the least expensive option. (Findings 488, 490; A. 129). The Zumbro Dam Route would eliminate any crossing of Lake Zumbro. Lake Zumbro provides recreational opportunities for boating, fishing, water skiing, tubing and swimming. (Findings 484, 488; A. 129).

Under the MPUC's Rules of Practice and Procedure, Minn. R. 7829.0100 to 7829.3200, and in accord with Minn. Stat. § 14.61, any party adversely affected by the ALJ's recommendation is entitled to file an exception. No exception was filed as to the Zumbro Dam Route recommendation. The Department of Commerce staff filed comments and recommended the MPUC adopt the ALJ's recommended route for Segment 3 – Zumbro Dam Route. (A. 169-170, 193).

Pursuant to Minn. Stat. § 14.61, subd. 2, the record closes on the filing of any written exceptions to the ALJ report and presentation of argument. Only a party may file an exception and only a party may present argument. (A. 288). Minn. R. 7829.2700, subp. 3 states "[p]arties must be granted an opportunity for oral argument before the [MPUC] as required under [Minn. Stat. §] 14.61." (A. 303). Minn. R. 7829.2600 further provides that if the Commission staff recommends actions not advocated by any party, all parties must be granted oral argument. (A. 302). Though no exception to the ALJ's selection of the Zumbro Dam Route was filed by any party, the MPUC at its hearing allowed oral public comment/testimony by non-parties who opposed the ALJ's recommended Zumbro Dam Route. (A. 247, 257-270). These individuals made various assertions about the land surrounding this route and the uses of the land at issue, which included use by church groups. (Id.) When the MPUC began its public deliberations, Chair Rhea focused on the impact of the non-parties' comments in opposition to the Zumbro Dam Route, which comments she describes as "testimony." (A. 275-277). After stating the White Bridge Route and Zumbro Dam Route are "so incredibly close, in terms of the factors that we have to consider" and that "nobody really filed any exceptions to the ALJ's recommendation of the dam site," Chair Rhea acknowledges the impact the non-parties' oral "testimony" had on decision-making. (Id.) The MPUC's oral decision choosing the White Bridge Route followed thereafter, and on May 30, 2012, the MPUC issued its written order. (A. 21, 283-287).

Following the MPUC's order, Oronoco, in accord with Minn. R. 7829.3000, subp. 2, filed a Petition for Reconsideration/Vacation because the MPUC's process at its final hearing was procedurally and substantively contrary to Minnesota rules and statutes to the prejudice of Oronoco. Oronoco objected to the MPUC's allowance of testimony/commentary offered outside of and contrary to the administrative process rules and statutes, which testimony obviously swayed the MPUC. Oronoco explained that the MPUC had ignored the testimony before it that the alignment shift proposed by Applicant would avoid woodland/biodiversity issues. (A. 154-155, 251-253). And contrary to the MPUC's statement (and that of the Court of Appeals at A. 17), the White Bridge Route is actually outside the County Road 12 right-of-way. (A. 155-156). Oronoco's petition for rehearing was denied without hearing or explanation. (A. 19). Oronoco filed a Petition for Certiorari seeking reversal of the MPUC's order and the Court of Appeals affirmed. (A. 1, 14-18).

## 3. A BRIEF ARGUMENT IN SUPPORT OF THE PETITION, INCLUDING THE CRITERIA OF THE RULE RELIED UPON TO SUPPORT THE PETITION.

The extent of authority bestowed upon the MPUC is measured by the statutes from which it derives its authority. Frost-Benco Elec. Ass'n v. Minn. Pub. Utils. Comm'n, 358 N.W.2d 639, 642 (Minn. 1984). Authority is not obtained by the agency's own acts or by its assumption of authority. Id. And the Court of Appeals declared in Yellowbird, Inc. v. MSP Express, Inc., 377 N.W.2d 490, 494 (Minn. Ct. App. 1985), that a state agency's failure to follow statutory procedures results in a "lack of basic fairness" in its decision-making process requiring reversal and remand. The Court of Appeals' decision to the contrary in this case requires this Court's review to clarify and harmonize the law.

The Court of Appeals acknowledges that under Minn. Stat. § 14.61 only parties may file exceptions and present argument to the MPUC, but then inconsistently holds that nothing "bars the MPUC from also accepting public comment." (A. 15). Such holding requires this Court's further review and presents an issue of statewide impact that will recur. The Court of Appeals, in so ruling, ignored the rules promulgated – Minn. R. 1405.0800, subp. b and 1405.1700, subp. 8 – which gave the ALJ sole authority to weigh the credibility of public comment. (A. 299, 300). And the MPUC obviously promulgated no rule that would allow it to take oral public comment at its decision stage and weigh such comment because such rule would directly contradict Minn. R. 1405.0800, subp. b and 1405.1700, subp. 8 as well as Minn. Stat. §§ 14.61, 216E.03, subd. 6 and 216E.16. The MPUC had no authority to selectively decide to hear oral public comment from non-parties and then weigh that oral comment. The Court of Appeals' blessing of the MPUC's disregard of its rules, procedures and Minnesota statutes presents an issue of statewide impact that calls for this Court's review.

The MPUC allowed public comment before it, but only by persons who are not affiliated with one of the "formal parties" in this matter (A. 134, 258). The impact on the MPUC of this select live testimony is obvious in the transcript of its deliberations. The MPUC states it heard "a lot of objection today from members of the public." (A. 276-277). It actually heard objections from four individuals against the Zumbro Dam Route, ignoring the public comment heard by the ALJ in compliance with the rules and statutes, which included public comment presented at hearings attended by 350 to 400 people. Because oral presentations

contain more vivid detail, they have greater impact. As Judge Posner succinctly stated in Traylor v. Husqvarna Motor, 988 F.2d 729, 734 (7th Cir. 1993), "[p]sychologists and decision theorists point out, what is anyway common sense, that a living person generally conveys a stronger impression than does his resume, or a transcript of his remarks." By allowing such select live presentations "[t]here was a thumb on the scale." Id. Such a "thumb on the scale" is contrary to Minnesota law, and the Court of Appeals failed to recognize that this "thumb on the scale" required reversal and remand. The Court of Appeals emphasizes that the non-parties' oral comments were not "new evidence," but that is irrelevant. What was said was public comment presented out of context and provided special emphasis over all other public comments made to the ALJ and to which the ALJ was assigned sole authority regarding credibility. (A. 16; *see* A. 134, 258). And while it is true that there is no existing transmission line over the entirety of the Zumbro Dam, such was not a reason in itself to reject the ALJ's recommendation, nor were the natural resources along the Zumbro Dam a reason for rejection. (*Compare* A. 251-254 and 271-272 *with* A. 16-18). The ALJ had thoroughly and fully considered all factors in choosing the Zumbro Dam Route and no party filed an exception. This case calls for this Court's review.

WHEREFORE, Petitioner respectfully requests that this Court grant further review.

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Dated: July 10, 2013

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