

Appellate Court Case Nos. A12-1607 and A12-1632  
Court of Appeals Decision Filed June 10, 2013

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STATE OF MINNESOTA

IN SUPREME COURT

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

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RESPONDENTS' RESPONSE TO PETITION FOR REVIEW

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TO: The Supreme Court of the State of Minnesota

Respondents respectfully request that the Supreme Court deny review of the decision of the Court of Appeals upon the following grounds.

**I. STATEMENT OF LEGAL ISSUES AND THEIR RESOLUTION BY THE COURT OF APPEALS.**

**1. 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 Court of Appeals affirmed as supported by substantial record evidence and reflective of the Commission's reasoned judgment.

**2. Did the Commission provide due process to Petitioner Oronoco Township when it allowed public comment during its meeting?**

The Court of Appeals affirmed that the Commission provided Petitioner Oronoco with sufficient due process and appropriately allowed the public to comment during its meeting.

**II. STATEMENT OF CRITERIA RELIED UPON TO SUPPORT THE PETITION.**

This case does not satisfy any of the criteria identified in Minn. R. App. P. 117, subd. 2 because the unpublished Court of Appeals' decision is firmly within this Court's authority established by *Barton Contracting Co., Inc. v. City of Afton*, 268 N.W.2d 712, 716 (Minn. 1978).

**III. 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"). ALJ Sheehy submitted her Findings of Fact, Conclusions of Law, and Recommendation ("ALJ Report") on February 8, 2012. On March 29, 2012, the Commission noticed its April 12, 2012 meeting. In this notice, the Commission notified the public that it would be accepting public comment at its meeting. At the April 12, 2012 meeting the Commission accepted non-testimonial comment from twenty-two members of the public. The Commission had previously received dozens of public comments throughout the proceedings. On May 30, 2012, the Commission issued its Order Issuing Route Permit as Amended ("Order"). Oronoco Township filed a petition for reconsideration on June 19, 2012. Oronoco had been a party to the proceedings since May 17, 2011. The landowners whom Oronoco purports to

represent in this appeal did not request reconsideration. The Commission denied Oronoco's petition for reconsideration on August 9, 2012, and issued its Order Denying Reconsideration on August 14, 2012. The Court of Appeals affirmed the decision of the Commission in an unpublished Opinion issued June 10, 2013. Petitioner Oronoco's appeal involves only the Zumbro River Crossing in Section Three of the Hampton-La Crosse transmission line.

**IV. ARGUMENT.**

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

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 appropriately examined factors such as nonproliferation, impacts to residences, archeological and historical sites, recreational resources, and natural resources.

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." 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". Also, the Zumbro Dam Crossing area includes one of the country's largest concentrations of the Blandings turtle, a state-listed threatened species. By comparison, the White Bridge Road Crossing would only affect a MCBS site of Biodiversity Significance ranked as "moderate" and one ranked as "low".

Since Oronoco has failed to identify that the Commission's decision is arbitrary, capricious or not based upon substantial evidence in the record, the Petition should be denied.

**A. The Commission Did Not Deprive Anyone Of Due Process Rights.**

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

Petitioner Oronoco contends that the PUC's allowance of public comment at its April 12, 2012, hearing somehow denied it due process and violated Minnesota law. Oronoco, however, was a party

below and has failed to identify any facts as to how it, as a party, has been denied any notice or opportunity to be heard. 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 does not argue that it was prejudiced by any public comment.

It appears that Petitioner 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 harming non-parties is not a valid basis for an appeal. Rather, 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). Since Oronoco does not have standing, the petition should be dismissed.

## **2. Petitioner Oronoco And The Public Had The Opportunity To Be Heard.**

Even if Petitioner 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.

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 Petitioner claims that its citizens who opposed the alternative eventually selected by the Commission were denied the right to be heard, this claim is manifestly incorrect. The April 12 meeting was properly noticed and the notice stated that public comment would occur. Oronoco cannot identify any evidence that the Commission in any way limited Oronoco's citizens from making oral comment at the public meeting.

Petitioner Oronoco also argues that it or others were denied the opportunity for cross-examination of public commenters at the Commission meeting. 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.*

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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).

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

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

Petitioner Oronoco appears to premise its argument, at least in part, on its unfounded belief that the Commission based its decision regarding the route alternative on facts presented during oral public comment at the April 12, 2012, meeting.

Fatal to its argument is its failure to identify any facts relied upon by the Commission which are found only in the public comments. 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. Consequently, a remand would accomplish nothing.

**b. The Commission speaks through its orders.**

In an effort to show that the Commission viewed the public comment as factual testimony, Petitioner Oronoco purports to quote Commissioners referring to the public comment as “testimony.” 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.”); *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.”).



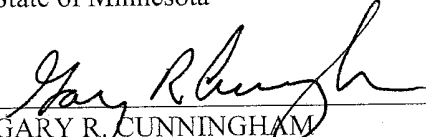
Petitioner Oronoco identifies rules and statutes designed to insure that parties to Commission proceedings have the opportunity to be heard. From these provisions, it leaps to the conclusion that only parties may address the Commission. Then from this incorrect premise, Oronoco asserts that the Commission exceeds its authority by allowing non-parties to orally participate at its hearings. 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, in violation of the rules of construction. Minn. Stat. § 645.17, subd. 5 (2012).

### CONCLUSION

For all of the reasons discussed above, the Respondents request that the Supreme Court deny the Petition for Review.

Dated: August 1, 2013

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