

No. A12-1607
(Oronoco Township Appeal)
and
No. A12-1632
(Consolidated)

State of Minnesota
In Supreme Court

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

**RESPONSE TO PETITION FOR REVIEW OF MINNESOTA COURT OF
APPEALS OPINION FILED JUNE 10, 2013**

Kay Nord Hunt (#138289)
LOMMEN, ABDO, COLE,
KING & STAGEBERG, P.A.
2000 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 339-8131

Phillip R. Krass (#58051)
Rachel R. Lorentz (#0386915)
MALKERSON GUNN MARTIN LLP
220 South Sixth Street, Suite 1900
Minneapolis, MN 55402
(612) 344-1111

*Attorneys for Petitioner
Oronoco Township*

Lisa M. Agrimonti (#272474)
Valerie T. Herring (#336865)
BRIGGS AND MORGAN, P.A.
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 977-8400

Jennifer Thulien Smith (#029701X)
Assistant General Counsel
Xcel Energy Services Inc.
414 Nicollet Mall
Minneapolis, MN 55401

*Attorneys for Respondent
Northern States Power Company, a
Minnesota corporation*

(Additional Counsel listed on following page)

Carol Overland (#254617)
LEGALECTRIC - OVERLAND LAW
OFFICE
1110 West Avenue
Red Wing, MN 55066
Telephone: (612) 227-8638

Attorney for Respondent
North Route Group, NoCapX 2020 and U-
CAN

Brian Meloy
LEONARD STREET & DEINARD
150 South Fifth Street, Suite 2300
Minneapolis, MN 55402
(612) 335-1500

Attorneys for Respondent
American Transmission Company, LLC

Gary R. Cunningham (#0180610)
Office of the Attorney General
State of Minnesota
445 Minnesota Street, Suite 1100
St. Paul, MN 55101

Attorney for Respondent
Minnesota Public Utilities Commission

Lori Swanson, Attorney General
Office of the Minnesota Attorney General
445 Minnesota Street, Suite 1100
St. Paul, MN 55101
(651) 296-6196

Office of the Attorney General of the State
of Minnesota

Petitioner Oronoco Township (“Oronoco”) seeks Supreme Court review to decide whether the Minnesota Public Utilities Commission (“Commission”) has the authority to allow public comment at a hearing to designate a route for a high voltage transmission line project. Yet, Oronoco’s petition fails to pinpoint any law or rule barring public comment. Oronoco’s argument not only lacks legal foundation, it also runs counter to the Minnesota statute that requires the Commission to allow “broad spectrum citizen participation” in the siting of high voltage transmission lines. Minn. Stat. § 216E.08, subd. 2. Further, the record demonstrates that the public comments received included no new information and the Commission independently evaluated the evidence and rendered its decision. Because the laws and rules governing Commission procedure are straight-forward and were correctly applied by the court of appeals, this Court should deny Oronoco’s request for review as there is no need to clarify or harmonize the law. Minn. R. Civ. App. P. 117, subd. 2(d).

I. Statement of Issue and Decisions Below

Oronoco’s appeal seeks further review of the Commission’s decision to grant a Route Permit to Northern States Power Company, doing business as Xcel Energy (“Xcel Energy”), for the Hampton – Rochester – La Crosse 345 kilovolt (“kV”) Transmission Project (“La Crosse Project”).

Although Oronoco parses its argument into two issues, both relate to whether the Commission can accept public comment at its route permit hearing. First, Oronoco alleges that because Minn. Stat. § 14.61 grants parties the right to file exceptions to the Administrative Law Judge (“ALJ”) report and to present arguments to the Commission, that this same statute bars the Commission from allowing non-parties to comment at the final hearing. Second, Oronoco contends that because the Commission has not adopted any rules to allow public comment, that only the ALJ could accept public comment. The court of appeals rightly rejected Oronoco’s arguments, holding that “[Oronoco] has not identified anything in this [Minn. Stat. § 14.61] or any other statute that bars the [Commission] from also accepting public comment.” (Petitioner’s Appendix (“PA.”) 15).

The court of appeals also concluded that the public comments made at this final hearing did not sway the Commission because it “independently considered the statutory criteria and relied on substantial record evidence in designating” the route for the La Crosse Project. (PA. 16).

II. Statement of Facts Relevant to the Petition

The La Crosse Project consists of 345 kV transmission line facilities and substation connections between the Hampton Substation and a new substation in the La Crosse, Wisconsin area, as well as a 161 kV transmission line between the proposed North Rochester Substation and the existing Northern Hills Substation. Oronoco’s petition concerns the most contested portion of the La Crosse Project, the Zumbro River Crossing for the 345 kV transmission line. In its Route Permit application, Xcel Energy identified three potential Zumbro River Crossings: (1) a northern crossing of the Zumbro River which does not follow any existing infrastructure (“North Crossing”); (2) a central crossing at the Zumbro Dam (“Dam Crossing”), and (3) the southern alternative which crosses the Zumbro River at the County Road 12 bridge in Oronoco Township (“White Bridge Road Crossing”).

The Commission accepted Xcel Energy’s application as complete in March 2010 and referred the matter to the office of administrative hearings for a contested case hearing before an ALJ. The ALJ held six public hearings, four days of evidentiary hearings, and accepted 170 exhibits into the record.

On February 8, 2012, the ALJ issued the Findings of Fact, Recommendations, and Conclusions (“ALJ Report”). The ALJ evaluated all three Zumbro River crossings using the applicable permitting criteria contained in Minn. Stat. § 216E.03, subd. 7(b) and concluded that several criteria weighed more heavily in favor of the Dam Crossing. (PA. 31). The ALJ noted that slightly fewer homes would be impacted by the Dam Crossing, considering the number of homes within 500 feet of the crossing. *Id.* The ALJ also concluded that the Dam Crossing follows an existing transmission line at the Zumbro Dam and avoids crossing Lake Zumbro, which is located at the White Bridge Road Crossing. *Id.* Finally, the ALJ found that the Zumbro Dam Crossing is shorter and more direct, as well as less costly. *Id.* The ALJ

Report is a recommendation to the Commission and the Commission is authorized to modify or reject that recommendation as long as it provides a rationale for its decision. Minn. Stat. § 14.62, subd. 1.

On April 12, 2012, the Commission met to consider the matter. The Commission heard from some of the parties and several state agencies.¹ (PA. 245-274). The Commission allowed members of the public who were not associated with the parties to provide “limited comment.” (A. 258). Twenty-two members of the public spoke, including four individuals in opposition to the Dam Crossing. (PA. 25). After public comment, the Commission gave the parties the opportunity to respond to these public comments. (PA. 271-275).

On May 30, 2012, the Commission issued its order granting a Route Permit for the La Crosse Project that included the White Bridge Road Crossing of the Zumbro River (“Order”). (PA. 21). In making this crossing selection, the Commission thoroughly analyzed all of the record evidence and exercised its sound judgment in determining that, on balance, the White Bridge Road Crossing best meets the applicable routing criteria. (PA. 32). In designating the White Bridge Road Crossing, the Commission found specific advantages over the Dam Crossing. First the White Bridge Road Crossing runs parallel to existing highway right-of-way. (PA. 31). Second, both proposed crossings had recreational impacts but the Dam Crossing would impact two summer camps and a campground not present at the White Bridge Road Crossing. (PA. 32). Third, more homes would be impacted within 300 feet of the Dam Crossing compared to the White Bridge Road Crossing. *Id.* Fourth, and most significant to the Commission’s decision, the Dam Crossing would potentially impact rare and sensitive natural resources because “the Dam Crossing includes rare species and a Site of Biological Significance ranked high [and] would require deforestation and clearing.” *Id.*

¹ Oronoco has never argued that the state agencies should have been prevented from addressing the Commission because they were not parties.

Oronoco filed a petition for reconsideration with the Commission. The Commission denied Oronoco's petition and Oronoco sought further review at the court of appeals. (PA. 19). The court of appeals affirmed the Commission's decision. (PA. 1-18).

III. Argument

In reviewing agency decisions, appellate courts "adhere to the fundamental concept that decisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by courts to the agencies' expertise and their special knowledge in the field of their technical training, education and expertise." *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278-79 (Minn. 2001)(quotation omitted) ("*Blue Cross*"). Moreover, while questions of law are entitled to de novo review, "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.

Oronoco argues that the Commission lacked authority to allow public comment at the final hearing because Minn. Stat. § 14.61, subd. 1 only grants "parties" the right to file exceptions and present argument to the Commission. However, as the court of appeals noted, nothing in Minn. Stat. § 14.61 "or any other statute that bars the [Commission] from also accepting public comment." (PA. 15). Indeed, such a prohibition would be contrary to the statutory mandate requiring that the Commission should "adopt broad citizen participation as a principal of operation" in siting high voltage transmission lines. Minn. Stat. § 216E.08, subd. 2; *see also* Minn. Stat. § 216E.09 (requiring all Commission meetings and hearings be "open to the public"); Minn. R. 7829.3000, subp. 1 (permitting "a [p]arty or a person aggrieved and directly affected by [a Commission] decision or order" to petition for reconsideration); Minn. Stat. § 216E.03, subd. 6 ("Any person may appear at the hearings and offer testimony and exhibits without the necessity of intervening as a formal party to the proceedings.").

Oronoco also points to the rules governing the contested case hearings which allow the ALJ to weigh the credibility of testimony and other evidence offered during the public hearings. *See* Minn. R.

1405.0800, subp. b and 1405.1700, subp. 8. These rules, however, do not govern the Commission hearing and do not prohibit the Commission from accepting public comment.

Oronoco also contends that the public comments received were prejudicial and persuaded the Commission to approve the White Bridge Road Crossing. Oronoco points to the comments made by commissioners during deliberations as evidence of this prejudice. However, these remarks are not proof of the basis for the Commission's decision because "the commission does not speak through deliberations . . . it speaks thorough written orders." *In re Excelsior Energy, Inc.*, 782 N.W.2d 282, 296 (Minn. Ct. App. 2010) *citing* Minn. Stat. § 216B.33 (stating that all orders of the Commission must be in writing). In addition, the four individuals who spoke at the Commission in opposition to the Dam Crossing did not offer any new factual evidence. These public comments expressed personal opinions and highlighted facts already in evidence. In fact, two of the four individuals offered similar comments during the public hearings conducted by the ALJ. (PA. 113 at fn. 476)


Moreover, in evaluating the Commission's written Order, the court of appeals rightly found that the Commission "independently considered the statutory criteria and relied on substantial record evidence in designating the White Bridge Road [C]rossing." (PA. 17). Specifically, the court of appeals examined the four grounds set forth in the Commission's Order for selecting the White Bridge Road Crossing, use of existing highway right-of-way, recreational impacts, residential impacts, and impacts to rare and sensitive natural resources, and determined that these reasons were sufficient to support the Commission's selected river crossing. In sum, a review of the Commission's Order reveals that while designation of a Zumbro River crossing was a difficult decision, the Commission's decision is supported by the substantial evidence.

CONCLUSION

Because the court of appeal's decision correctly applied Minnesota law governing Commission procedure and there is substantial evidence to support the Commission's decision, the Petition fails to raise an issue that warrants this Court's review.

Dated: August 2, 2013.

BRIGGS AND MORGAN, P.A.

By: 

Lisa M. Agrimonti (#272474)
Valerie T. Herring (#336865)
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 977-8400

Jennifer Thulien Smith (#029701X)
Assistant General Counsel
Xcel Energy Services Inc.
414 Nicollet Mall
Minneapolis, MN 55401

**ATTORNEYS FOR RESPONDENT
NORTHERN STATES POWER COMPANY, A
MINNESOTA CORPORATION**

5611146v1