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May 27, 2014

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ELECTRONIC FILING

Hon. James E. LaFave
Office of Administrative Hearings
PO Box 64620
600 North Robert Street
St. Paul, MN 55164-0620

Re: *In the Matter of the Application of ITC Midwest LLC for a Certificate of Need for the Minnesota-Iowa 345 kV Transmission Line Project in Jackson, Martin, and Faribault Counties*

and

In the Matter of the Application of ITC Midwest LLC for a Route Permit for the Minnesota-Iowa 345 kV Transmission Project and Associated Facilities in Jackson, Martin, and Faribault Counties

OAH Docket No.: 60-2500-30782

PUC Docket Nos.: ET6675/CN-12-1053 and ET6675/TL-12-1337

Dear Judge LaFave:

Enclosed for filing in the above-referenced dockets is ITC Midwest LLC's Memorandum in Response to Citizens Energy Task Force and NoCapX2020's Amended Motion for Extension of Period for Public Comment.

Please feel free to contact me with any questions.

Sincerely,

/s/ Lisa M. Agrimonti

Lisa M. Agrimonti

LMA/rlr
Enclosure
Cc: Service List

In the Matter of the Application of ITC Midwest LLC for a Certificate of Need for the Minnesota-Iowa 345 kV Transmission Line Project in Jackson, Martin, and Faribault Counties, Minnesota

MPUC Docket No. ET6675/CN-12-1053
OAH Docket No.: 60-2500-30782

and

In the Matter of the Application of ITC Midwest LLC for a Route Permit for the Minnesota-Iowa 345 kV Transmission Project and Associated Facilities in Jackson, Martin, and Faribault Counties, Minnesota

MPUC Docket No. ET6675/TL-12-1337
OAH Docket No.: 60-2500-30782

CERTIFICATE OF SERVICE

Rachel L. Rolseth certifies that on the 27th day of May, 2014, she filed a true and correct copy of **ITC Midwest LLC's Memorandum in Response to Citizens Energy Task Force and NoCapX2020's Amended Motion for Extension of Period for Public Comment** by posting the same on eDockets (www.edockets.state.mn.us). Said document was also served via U.S. Mail or email as designated on the Official Service Lists on file with the Minnesota Public Utilities Commission in the above-referenced dockets.

/s/ Rachel L. Rolseth _____

Rachel L. Rolseth

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**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE PUBLIC UTILITIES COMMISSION**

In the Matter of the Application of ITC
Midwest LLC for a Certificate of Need and
a Route Permit for the Minnesota-Iowa 345
kV Transmission Line Project in Jackson,
Martin, and Faribault Counties

OAH Docket No.: 60-2500-30782
PUC Docket No.: ET-6675/CN-12-1053
ET-6675/TL-12-1337

**ITC MIDWEST LLC'S MEMORANDUM IN RESPONSE TO
CITIZENS ENERGY TASK FORCE AND NOCAPX2020'S AMENDED
MOTION FOR EXTENSION OF PERIOD FOR PUBLIC COMMENT**

INTRODUCTION

On May 13, 2014, Citizens Energy Task Force and NoCapX2020 (collectively, "CETF/No") submitted an amended Motion for Extension of Period for Public Comment to July 18, 2014 ("Motion"), one week after the anticipated filing date of the final Environmental Impact Statement ("FEIS") that is being prepared for the Certificate of Need and Route Permit proceedings. CETF/No will have the opportunity to comment on the adequacy of the FEIS in briefing, but argues an extension of the public comment period is necessary because the public must be allowed to comment on the FEIS.

Minnesota law does not provide for a public comment period on the FEIS and past practice in other recent Minnesota Public Utilities Commission ("Commission") route permit proceedings does not support providing such a comment period. Since CETF/No's proposed amendment of the Third Amended Scheduling Order dated April 10, 2014 ("Scheduling Order") is not supported by the law or Commission practice, ITC

Midwest requests that the Administrative Law Judge (“ALJ”) deny the Motion. For these same reasons, ITC Midwest requests that the ALJ deny CETF/No’s alternative motion that the FEIS comment period issue be certified to the Commission for determination.

DISCUSSION

In this case, the procedures for the EIS process rightly followed the requirements in the Power Plant Siting Act, Minnesota Statutes Chapter 216E, and Minnesota Rules Chapters 1405 and 7850.¹ Under these rules, the Department of Commerce, Energy Environmental Review and Analysis (“DOC-EERA”) issued the draft EIS (“DEIS”), made it available for public review, held informational meetings, and provided the required comment period. The rules provide that the DOC-EERA “shall hold the record on the environmental impact statement open for the receipt of written comments for not less than ten days after the close of the informational meeting.”²

Now that the comment period has concluded, the DOC-EERA prepares the FEIS, which must respond to the substantive public comments that have been timely submitted on the DEIS.³ Rather than creating a new document, the DOC-EERA typically prepares the FEIS as a copy of the DEIS to which the DOC-EERA attaches the public comments and its responses to those comments, as provided by rule.⁴ Upon receipt of

¹ Minn. R. 4410.4300 subp. 6 (providing that for the construction of a transmission line of 100 kV or more, the environmental review is to be conducted according to Minnesota Rules Chapter 7849 and 7850). In this combined Certificate of Need and Route Permit proceeding, the Power Plant Siting Act and Minnesota Rules Chapter 1405 and 7850 govern the environmental review process.

² Minn. R. 7850.2500, subs. 7 and 8 (emphasis added).

³ *Id.* at subp. 9.

⁴ *Id.*

the FEIS, the Commission determines whether it is adequate, which it must do before making its final determination on the route permit application.⁵ This is the process that is being followed in this case⁶ and it is the process that is required under the Minnesota Environmental Policy Act (“MEPA”), Minnesota Statutes Chapter 116D.⁷ There is no statute or rule that allows for public comment on the FEIS.

Representative scheduling orders that counsel for DOC-EERA shared with the ALJ and the parties also demonstrate that CETF/No’s motion is contrary to past practice in route permit proceedings.⁸ Of the five representative orders, two provided that the public comment period on the contested case evidentiary hearing record would close on the same day that it was anticipated that the DOC-EERA would file the FEIS,⁹ and two provided that the public comment period on the contested case evidentiary hearing record would close before the FEIS was anticipated to be filed by the DOC-

⁵ *Id.* at subp. 10; Minn. R. 7850.2700, subp. 2.

⁶ The DEIS was issued on March 21, 2014, with the required informational meetings on the DEIS held April 22-24, 2014. The record on the DEIS was held open until May 9, for 15 rather than 10 days after the informational meetings. The FEIS is anticipated to be available to the Commission on July 11, 2014, while the ALJ Report and Recommendation is scheduled to be sent to the Commission a month later, on September 8, 2014. The Commission will then makes its determinations on both the route permit application and the adequacy of the FEIS.

⁷ CETF/No contends that Minn. Stat. § 116D.04, subd. 6a supports its claim that the responsible governmental unit (“RGU”) must obtain public comments on the FEIS. Motion at 1-2. However, the plain language of that statutory provision requires the RGU to consult with and solicit comments from other governmental agencies with jurisdiction over or expertise regarding the environmental effects that are the subject of the EIS. The cited provision provides no direction regarding the issue of public comments on the FEIS.

⁸ See Email of May 12, 2014, 3:58 pm, Subject: 12-1337 ITC Route; FEIS Comment Period, from Linda Jensen to ALJ James LaFave and parties.

⁹ *In the Matter of the Route Permit Application for the Hollydale 115 kV Transmission Line Project in the Cities of Plymouth and Medina, Hennepin County*, OAH Docket No. 8-2500-22806-2, MPUC Docket No. E002/TL-11-152, Second Pre-Hearing Order at ¶ 7 (July 5, 2012); *In the Matter of the Application for a Route Permit for the Monticello to St. Cloud 345 kV Transmission Line Project*, OAH Docket No. 15-2500-20665-2, MPUC Docket No. ET2, E002/TL-09-246, Prehearing Order at ¶¶ 4, 6, 7 (Sept. 29, 2009).

EERA.¹⁰ The fifth order – and the oldest – is from the Brookings Route Permit proceedings, where NoCapX2020 successfully moved for the evidentiary record for the route permit application to be held open until one week after the FEIS was anticipated to be filed.¹¹ As CETF/No acknowledges in its Motion, however, NoCapX2020’s same motion for a FEIS public comment period in the more recent Hampton – La Crosse Route Permit proceedings was denied as inconsistent with the law.¹²

CETF/No’s contention that the contested case evidentiary record on ITC Midwest’s Certificate of Need and Route Permit applications must remain open to provide an opportunity for public comment on the adequacy of the FEIS should be rejected. The Commission’s rules provide for a comment period on the DEIS, which was provided. There is no requirement for public comments on the FEIS under existing rules and prior practice confirms the lack of a comment period.

CETF/No’s request that its issue be certified to the Commission for determination should also be denied. Minnesota Rule 1400.7600 provides that any party may request that a pending motion before the ALJ or a motion decided adversely to the requesting party by the ALJ be certified to the agency for determination. The ALJ must consider the following factors in reaching a decision on the request: A) whether the motion involves a controlling question of law where there is substantial difference of

¹⁰ *In the Matter of the Application by Xcel Energy for a Route Permit for the Hampton-Rochester-La Crosse 345 kV Transmission Line Project*, OAH Docket No. 3-2500-21181-2, MPUC Docket No. E002/TL-09-1448, First Prehearing Order at ¶¶4, 6 (Sept. 1, 2010); *In the Matter of the Application for a Route Permit for the Fargo to St. Cloud 345 kV Transmission Line Project*, OAH Docket No. 15-2500-20995-2, MPUC Docket No. ET2/E002/TL-09-1056, Prehearing Order at ¶¶ 4-6 (May 25, 2010).

¹¹ *In the Matter of the Route Permit Application by Great River Energy and Xcel Energy for a 345 kV Transmission Line from Brookings County, South Dakota to Hampton, Minnesota*, OAH Docket No. 7-2500-20283-2, MPUC Docket No. ET2/TL-08-1474, Second Prehearing Order at ¶ 1 (Sept. 11, 2009).

¹² CETF/No Motion for Extension at 2.

opinion; B) whether a final determination by the agency would materially advance the ultimate termination of the hearing; C) whether the delay associated with the certification would adversely affect the prevailing party; D) whether failure to certify would render the matter moot or a later reversal would have no meaning; E) whether certification is necessary to promote full development of the record and avoid remanding; or F) the issues moved are solely within the expertise of the agency. A review of these factors shows that no certification is warranted.

As an initial matter, only parties may request certification of their motions to the Commission and it is not clear that CETF/No may make such a request given its status as a limited party. CETF/No's request for certification also fails on its merits. As evidenced by the prior ALJ orders on this point, CETF/No's motion does not involve a controlling question of law over which there is a substantial difference of opinion, nor does it raise an issue solely within the Commission's expertise. Further, certification of the motion would not materially advance the termination of the hearing in this matter, but rather would cause delay that would adversely affect ITC Midwest. Additionally, failure to certify the Motion would not moot the issue CETF/No raises; should the Commission determine that a comment period should be established, it could do so and defer its final decision. Giving the unambiguous applicable rules, certification is also not required for a full development of the record or to avoid remand. Finally, while the issue is within the expertise of the agency, multiple ALJ decisions demonstrate consistent rulings not requiring Commission action.

CONCLUSION

ITC Midwest requests that the ALJ deny CETF/No's Motion for Extension of Period for Public Comment in its entirety. CETF/No's proposed amendment to the Scheduling Order to establish a public comment period for the FEIS is inconsistent with the law and Commission practice. There is no basis upon which to grant the motion, and there is also no need to certify it to the Commission for determination.

Dated: May 27, 2014

BRIGGS AND MORGAN, P.A.

By: /s/ Lisa M. Agrimonti

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