

BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
600 NORTH ROBERT STREET
ST. PAUL, MINNESOTA 55101

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION
SUITE 350
121 SEVENTH PLACE EAST
ST. PAUL, MINNESOTA 55101-2147

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

**DOC-EERA REPLY TO CETF AND NO
CAPX**

MPUC File No. ET-6675/TL-12-1337
MPUC Docket No. E-6675/CN-12-1053

INTRODUCTION

On September 16, 2013 the Administrative Law Judge (ALJ) issued a scheduling order that contemplated the close of public comment on April 25, 2014 and the filing of initial briefs by parties and the initial comments and final environmental impact statement (FEIS or Final EIS) of the Minnesota Department of Commerce-Energy Environmental Review and Analysis (DOC-EERA) on June 4, 2014 in the above matters.

The DOC-EERA subsequently determined that, due to the complexity and scope of the environmental review, the scheduled needed to be amended. Upon consent of the parties, the ALJ issued an Amended Scheduling Order on December 24, 2013 that moved the deadline for public comments to May 30, 2014 and the due date for the FEIS and post hearing briefs and comments to July 11, 2014.

Thereafter, on January 20, 2014, the Citizen Energy Task Force (CETF) and No CapX 2020 (No CapX) filed an “Out-of-Time” Petition for Limited Intervention. On January 31, 2014, an ALJ Order admitted these entities as limited parties that may review discovery and file an initial brief, a reply brief, and exceptions. No other participation in this proceeding was allowed.¹

On May 13, 2014, CETF and No CapX filed an amended motion in the above matters, seeking an extended comment period for the receipt of public comments on the FEIS for the ITC Midwest Minnesota to Iowa 345 kV transmission line project.

The Minnesota Department of Commerce - Energy Environmental Review and Analysis (DOC-EERA) respectfully submits this Reply to the motion to extend the comment period, to provide the Administrative Law Judge (ALJ) with an analysis of the facts and law pertaining to the motion, and to recommend the motion’s denial.

ARGUMENT

I. DOC-EERA RECOMMENDS DENIAL OF CETF AND NO CAPX’S AMENDED MOTION FOR AN EXTENDED COMMENT PERIOD ON THE FEIS.

First, a public comment period on the FEIS is inconsistent with past transmission line hearing practice. On May 12, 2014, DOC-EERA supplied to the ALJ, by email, copies of five prehearing orders for prior transmission line projects and a discussion of possible FEIS comment

¹ MPUC Dockets TL-12-1337 and CN-12-1053, “Order on Petitions to Intervene by the CETF and No CapX,” January 31, 2014.

periods. Four of the five Orders² had no public comment period on the FEIS. Such a comment period is an exception and not the practice.

Second, the motion of CETF and No CapX claims incorrectly that the Minnesota Environmental Policy Act (MEPA) requires a comment period on the FEIS here. Though MEPA anticipates a comment period on an FEIS, and Minnesota Rule 4410.2800 requires a 10-day comment period for an FEIS, this requirement is inapplicable to environmental review conducted in accordance with the Power Plant Siting Act (Minn. Stat. Ch. 216E) and its associated rules – Minnesota Rules 7850 (routing) and Minnesota Rules 1405 (hearing).

CETF and No CapX state that No CapX made a similar request for an FEIS comment period in the Hampton–Rochester–La Crosse 345 kV transmission line project (HRL Project)³ and the request was denied. The denial there was appropriate, and the sound analysis of ALJ Sheehy is instructive as to the instant matter:

MEPA sets out the environmental review requirements applicable to all types of proposed actions that may adversely impact the environment, including, for example, underground mines, petroleum refineries, paper mills, highway projects, and solid waste disposal facilities. The Environmental Quality Board

² *ITMO Route Permit Appl. by Great River Energy and Xcel Energy for a 345 kV Trans. Line from Brookings County, South Dakota to Hampton, Minn.*, MPUC Docket No. ET-2/TL-08-1474, OAH Docket No. 7-2500-20283-2, “Second Prehearing Order,” Sept. 11, 2009; *ITMO Appl. for a Route Permit for the Monticello to St. Cloud 345 kV Trans. Line Project*, MPUC Docket No. ET-2,E-002/TL-09-246, OAH Docket No. 7-2500-20665-2, “Prehearing Order,” Sept. 29, 2009; *ITMO Appl. for a Route Permit for the Fargo to St. Cloud 345 kV Trans. Line Project*, MPUC Docket No. ET-2,E-002/TL-09-1056, OAH Docket No. 15-2500-20995-2, “Prehearing Order,” May 25, 2010; *ITMO Appl. by Xcel Energy for a Route Permit for the Hampton-Rochester-La Crosse 345 kV Transmission Line Project*, MPUC Docket No. E002/TL-09-1448, OAH Docket No. 3-2500-21181-2, “Prehearing Order,” Sept. 1, 2010; *ITMO Route Permit Appl. for the Hollydale 115 kV Trans. Line Project-Plymouth and Medina, Hennepin Co.*, MPUC Docket No. E-002/TL-11-152, OAH Docket No. 8-2500-22806-2-2, “Second Prehearing Order,” July 5, 2012.

³ *ITMO Appl. by Xcel Energy for a Route Permit for the Hampton-Rochester-La Crosse 345 kV Trans. Line Project*, MPUC Docket No. E002/TL-09-1448, OAH Docket No. 3-2500-21181-2.

adopted rules pursuant to Minn. Stat. § 116D.04, subd. 5a, establishing which governmental units are to be responsible for the environmental review of particular proposed actions and how the review is to take place. The rules established under this authority explicitly provide that, for the construction of high voltage transmission lines, the environmental review "shall be conducted" according to the PUC's rules for environmental review in a certificate of need proceeding (Minn. R. 7849.1000 to 7849.2100) or in a route permit proceeding (Minn. R. 7850.1000 to 7850.5600). Minn. R. 4410.2800, subp. 2, which requires a public comment period for a final EIS in other circumstances, is simply not applicable here.⁴

Third, Minnesota Rule 1405.1400 does not provide for the record remaining open to receive comments on the FEIS. The rule requires that the

record of the hearing shall be closed at a date to be set by the administrative law judge...Written comment will be accepted if postmarked no later than the date set by the administrative law judge. However, the record shall remain open beyond that date for the sole purpose of receiving board responses to relevant comments received on the environmental impact assessment.

Minn. Rule 1405.1400. Although this language is somewhat outdated in that it refers to the "board" (EQB) and an environmental impact assessment (instead of an environmental impact statement, (EIS)), the rule requires the record to be closed on a date set by the ALJ, remaining open solely to receive the regulatory agency's responses to the draft EIS, i.e., the FEIS.

Fourth, CETF and No CapX incorrectly claim that the lack of a comment period on the FEIS in the HRL Project was problematic. DOC-EERA believes this characterization is inaccurate because, while there is inconsistency within the text of the FEIS for the HRL Project as to whether a transmission line crossed the Zumbro Dam, no uncertainty was carried forward into the ALJ's Report for the project. Judge Sheehy's finding regarding routing options across

⁴ *In the Matter of the Application by Xcel Energy for a Route Permit for the Hampton-Rochester-La Crosse 345 kV Transmission Line Project*, PUC Docket No. E002/TL-09-1448, OAH Docket (Footnote Continued On Next Page.)

the Zumbro Dam relied upon the route permit application, not the FEIS, regarding existing transmission infrastructure at the dam⁵. Judge Sheehy’s finding correctly describes the existing infrastructure and potential tree clearing at the dam. Further, DOC-EERA disagrees that a particular segment of existing transmission line near the Byllesby Dam was not analyzed in the FEIS for the HRL Project. This segment and the associated routing options were analyzed in several parts of the FEIS.⁶ Moreover, despite CETF and No CapX’s characterization of purported issues with the FEIS for the HRL Project, the Commission found the FEIS adequate.⁷

Fifth, no public purpose would be served by extension of the comment period on the Final EIS. The Final EIS is final. No changes or amendments would be made to the document based on comments received during an FEIS public comment period. To the extent comments on the FEIS would be helpful for the Commission, they would best be addressed to the adequacy of the FEIS.⁸ The Commission, before issuing a route permit, must find the FEIS to be adequate

No. 3-2500-21181-2, “Order on Motion Regarding Final Environmental Impact Statements and Motion to Extend Intervention Deadline,” June 30, 2011, eDockets Number 20116-64296-01.

⁵ MPUC Docket TL-09-1448, “Findings of Fact, Conclusions of Law, and Recommendation,” February 8, 2012, at Finding 394, eDockets No. 20122-71372-01.

⁶ MPUC Docket TL-09-1448, “Final Environmental Impact Statement, CapX Hampton-Rochester-La Crosse 345kV and 161 kV Transmission Lines Project,” published at <http://mn.gov/commerce/energyfacilities/resource.html?Id=32194>. Section 8.1, p. 106 states that “[r]oute alternatives 1P-001, 1P-002, and 1P-003 would all run along the east boundaries of Lake Byllesby Regional Park and Lake Byllesby County Park (Map 8.1-27). These route alternatives would run along *an existing HVTL* and Harry Ave.” (emphasis added)). See also, Section 8.1, p. 107 (“However, there is already *an existing HVTL* in the viewshed of Lake Byllesby Regional Park and Lake Byllesby County Park, where route alternatives 1P-001, 1P-002, and 1P-003 would run; because of this, impacts to these parks would be minimal if one of these route alternatives were chosen.” (emphasis added)).

⁷ MPUC Docket TL-09-1448, “Order Issuing a Route Permit as Amended,” May 30, 2012, eDockets No. 20125-75128-01.

⁸ CETF and No CapX discuss the FEIS adequacy determination in their amended motion. CETF and No CapX assert that the FEIS for the HRL Project was not “adequate” because the FEIS contained inaccuracies. DOC-EERA disagrees that any inaccuracy existed in the HRL, but notes

(Footnote Continued On Next Page.)

(Minn. Rule 7850.2700). To be found adequate, the FEIS must: (1) address the issues and alternatives raised in scoping, (2) provide responses to the timely substantive comments on the DEIS, and (3) be prepared in compliance with the procedures in Minnesota Rules 7850 (Minn. Rule 7850.2500, subp. 10). The adequacy of the FEIS can be addressed in any post-hearing briefs that the CETF or No CapX may file.

Finally, the motion is also procedurally improper because motion practice is outside the scope of the limited intervention rights the ALJ granted to CETF and No CapX on January 31, 2014

CONCLUSION

For all of the above reasons, DOC-EERA recommends denial of CETF and No Cap X's amended motion for an extended comment period on the FEIS.

Dated: May 23, 20014

Respectfully submitted,

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that, even if the assertion were true, minor inaccuracies in an FEIS, such as those raised by CETF and NoCapX, are not a criteria for determining the adequacy of the document. While DOC-EERA prefers that there be no inaccuracy whatsoever, that is not the standard; the document needs to be "adequate," not "perfect."