

Nos. A09-1646 and A09-1652

State of Minnesota
In Court of Appeals

In the Matter of the Application of Great River Energy, Northern States Power Company (d/b/a Xcel Energy) and Others for a Certificate of Need for the CapX 345-kV Transmission Projects

Citizens Energy Task Force, NoCapX 2020
and United Citizens Action Network,

Relators,

vs.

Minnesota Public Utilities Commission,

Respondent,

Northern States Power Company, a Minnesota corporation,
and Great River Energy,

Respondent/Applicants.

**REPLY BRIEF AND ADDENDUM OF RELATOR
CITIZENS ENERGY TASK FORCE**

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SUMMARY

Respondents Great River Energy and Xcel Energy (“Applicants”), Minnesota Public Utilities Commission (“MPUC”) and Midwest ISO (“MISO”)¹ did not contradict any facts critical to the assertions made by Citizens Energy Task Force (“CETF”) that the record on regional need for the CapX2020 high voltage transmission lines should be reopened; that the La Crosse Project should be rejected, since the need for regional reliability in Rochester and La Crosse can be met by alternatives that avoid environmental harm and conflicts with policies to protect wildlife refuges; and that the “upsizing” of the CapX2020 power lines is not needed for adequacy or reliability of energy supply under certificate of need statutes.

Respondents did not dispute that recent forecasts of Xcel Energy demonstrate that regional demand load in 2020 will fall below the 24,701 MW slow growth threshold, which is the lowest level of load growth for which an engineering analysis of regional need has been provided in this record. Respondents did not assert that there was a generation outlet need that could justify the La Crosse Project. Respondents did not dispute that the local and lower voltage transmission alternatives identified in CETF’s brief would provide community reliability through 2020 in the areas proposed to be served by the La Crosse Project; Rochester and La Crosse. Respondents did not dispute that the La Crosse Project would have an adverse environmental impact upon the Upper Mississippi River National Wildlife and Fish Refuge and conflict with federal and state

¹ MISO is a trade organization of which transmission owners are the primary members. Applicants Great River Energy, Xcel Energy and other CapX2020 utilities are members of MISO. Ex. 61.

policies designed to protect wildlife refuge areas or that the local and lower voltage transmission alternatives described by CETF would avoid these impacts. And respondents did not dispute a record where the CapX2020 utilities' own expert witnesses called into question any need for the "upsizing" of high voltage power lines for the reliability or adequacy of energy supply.

Respondents asserted that CETF's concerns were with short-term demand declines, that the single and disputed opinion of a utility employee without scientific verification was sufficient to establish regional need for a project that would cost ratepayers nearly two billion dollars, that Applicants could not be expected to address alternatives presented by citizens, even if they were contained in their own Application and testimony, that this Court should not consider claims based on environmental statutes, effectively denying any recourse when large energy facilities impair natural resources, and that the discretion of the Public Utilities Commission should be virtually unlimited. CETF briefly challenges each of these assertions.

I. Changes in Demand Documented by CETF to Support Reopening the Record on Need for the CapX2020 Projects are Substantial and Affect Long-Term Forecasts.

Respondents' assert that CETF requested that the record be reopened to take evidence on the "short-term" decline in consumer demand, (App. Brief, pp. 2, 17); that the data and forecasts referenced by CETF from Xcel Energy's Securities and Exchange Commission ("SEC") filings and discovery are somehow less valid than an illustrative diagram citing no evidence or forecasts (*Id.*, p. 19); that the newly discovered evidence detailed in CETF's brief and motions to the MPUC is not new (App. Brief, p. 14); and

that newly discovered evidence is not of sufficient magnitude to undermine the conclusion that the CapX2020 power lines are needed for regional reliability. (MISO Brief, p. 6). Each of these assertions is misleading and inaccurate.²

CETF's analysis of the decline in demand reported by Xcel Energy and Minnesota Power to the SEC focused on whether that decline in demand would impact the 2020 forecast in the Applicants' Vision Plan engineering study. As explained in the ALJ's Report, CETF Add., p. 38 (Finding 179) and echoed in the MPUC's Brief at pages 8 and 22, "Each forecast in the record is at or above the 24,701 slow growth forecast in the Vision Plan upon which the engineering analysis was conducted." CETF's concern was that if the rate of growth in demand supplied by Applicants were applied to actual demand data, any reasonable 2020 forecast would fall below this 24,701 MW lower bound for growth, rendering the engineering analysis inapplicable to support regional need for the CapX2020 projects.

In its Motion to Reopen the Record, CETF's Affidavits applied the rate of growth from Applicants' median forecast in the CapX2020 hearing record, Exhibit 51, to project a reasonable 2020 forecast based on newly discovered evidence of demand from SEC reports. That projection fell below the slow growth forecast, in the CapX2020 engineering study, the 24,701MW referenced by the ALJ and in the MPUC brief.

In CETF's Motion for Reconsideration, in addition to the undisputed evidence of demand decline filed with the SEC, CETF had discovered a more recent forecast

² Applicants also state that CETF "concedes the point" that slower growth may impact the timing of the projects but does not change the need for the three CapX projects (App. Brief, p. 15). This is a bald misrepresentation.

extending beyond 2020 prepared by Xcel Energy and disclosed in response to a discovery request in another energy proceeding. That forecast, provided in the CETF Addendum at page 184, demonstrated that, using Xcel's own forecasting methodology, Xcel Energy's forecasted demand in 2020 would drop 1,280 MW as compared to the prediction in the CapX2020 hearing record, Ex. 51. With this forecast from Applicant Xcel Energy in hand, CETF did nothing more than subtract this decline from the median projection made by the Applicants in the hearing record.

The result was striking. Adjusting only for the decline in forecasted demand for Xcel Energy, since CETF had no similar data from other CapX2020 utilities, the change in forecasted demand was of sufficient magnitude to reduce the predicted 2020 regional demand forecast to 24,428 MW, a demand level below the 24,701 MW slow growth forecast which was the lowest forecast to which the Applicants' engineering study applied.

The evidence that would be provided on reopening the record is not difficult to deduce. CETF would request each CapX2020 utility not only to provide factual information on the decline in demand from 2006 to 2009, but to provide updated forecasts of demand through 2020 which take into account short-term drops in demand, structural changes in demand and reasonable predictions within the 2020 time frame for which a need was alleged for the CapX2020 projects. Based on the information cited by CETF from Xcel Energy and information in the public record about ongoing impacts of the depressed economy on energy demand and planned energy facilities, CETF believes that reopening the record would confirm that there is no reasonable forecast for 2020 load

that would meet or exceed the low growth threshold in the CapX2020 Vision Plan engineering study.

II. With Demand Projections Outside the Range Studied in the CapX2020 Vision Plan Engineering Study, an Unsubstantiated Opinion Cannot Support Regional Need for the CapX2020 Projects.

None of the Respondents disputed that reasonable forecasts through 2020 based on CETF's newly discovered evidence would fall below the range studied in the CapX2020 utilities' Vision Plan engineering study. They asserted that an opinion by a CapX2020 utility employee, Timothy Rogelstad, that the projects would be needed even if overall growth was as low as 2,000 MW, would have been sufficient to sustain the huge CapX2020 projects, even if the engineering studies in the record were inapplicable. (App. Brief, pp. 12-13). They further asserted that Mr. Rogelstad's opinion was "uncontroverted." (*Id.*, p. 14, MPUC Brief, p. 17).

The opinion that the CapX2020 projects can be justified by regional demand was sharply contested in the expert testimony of Michael Michaud, an engineer sponsored by intervenors NAWO/ILSR, as well as in the arguments of various intervening parties.

They [Applicants] have not demonstrated that these lines are the appropriate solution to the generalized system load growth needs in 2020 because they have over projected load growth forecasts for 2020 and have not studied the applicability of their proposal and its alternatives in light of realistic Minnesota load growth forecasts. Ex. 154, p. 47, ll. 4-8 (Michaud Surrebuttal)

Mr. Rogelstad admitted that no analysis had been done by Applicants to assess whether the CapX2020 projects would be needed to support regional growth at any level below 4,500 MW:

Q. So with that clarification, that we're talking about systemic load growth and community reliability, would I be correct in saying that no analysis has been done by the Applicants to determine whether the CapX 2020 power lines would be needed under any systemic load growth lower than the 4,500 megawatts?

A. I believe that's true. Tr. V. 2B, p. 15, l. 22 – p. 16, l. 3 (Rogelstad)

The record substantiates the difference between an opinion and an engineering analysis of transmission solutions particular to a projected demand load. The Vision Plan, Ex. 1, Apx. A-1 (Application), discussed the steps needed to reach conclusions regarding transmission that would be needed at a specific load/generation level:

The technical team tested several transmission solutions for each generation scenario and performed steady-state powerflow analysis (first contingency simulations) to determine which transmission solution eliminates thermal overloads on transmission lines 161 kV and higher in the region. *Id.*, p. 15.

The team simulated the loss (outage) of single transmission elements (n-1 analysis) to help determine transmission alternatives to address potential violations of North American Electric Reliability Council criteria, such as low voltages and thermally overloaded facilities. *Id.*, p. 16.

For the slow growth n-1 analysis, the same contingencies from the anticipated growth study were run again and the transmission system was monitored . . . The recommended facilities were individually removed to determine which of the facilities were also necessary at the 4,500 MW load/generation level. *Id.*, pp. 28-29.

No such analysis was done for any load growth below 4,500 MW or for any forecasted 2020 load below 24,701 MW, the slow growth threshold highlighted in the ALJ's report.

The unsubstantiated statement of an Applicant's witness regarding regional reliability would not be sufficient evidence to impose a nearly two billion dollar cost on ratepayers for 600 miles of ultra high voltage transmission lines. Mr. Rogelstad's opinion that the CapX2020 projects would be needed no matter what happened to demand in the real world, could be considered a "scintilla" of evidence supporting regional need. Absent

evidence that the CapX2020 projects are needed for some other purpose -- to provide generation outlet capacity or local community reliability -- certification of the projects is “unsupported by substantial evidence in view of the entire record as submitted,” and should be reversed or remanded pursuant to Minn. Stat. § 14.69(e).

The case cited by Respondents for its dictum, *Reserve Mining Co. v. Herbst*, 256 N.W. 2d 808 (Minn. 1977), supports CETF’s conclusion in its holding. The Supreme Court in *Reserve Mining* reversed a decision of state agencies, affirming the district court’s conclusion that “the agencies’ findings and conclusions were based ‘not only on unsubstantial evidence but on almost no evidence at all.’” *Id.*, at 819. Case law cited to suggest the MPUC’s decision in a rate matter was supported by “substantial evidence” was reversed on appeal. *Minnegasco v. Minn. Pub. Util. Comm’n* (“MPUC”), 529 N.W. 2d 413 (Minn. Ct. App. 1995), 549 N.W. 2d 904 (Minn. 1996).

The MPUC in its May Order (CETF Add., p. 118; Order, p. 11) and in its brief (MPUC Brief, p. 23) agrees that if there are defects in the overall regional reliability demand forecast such a defect would impact the ALJ’s conclusion regarding the need to meet regional reliability. Where new material evidence would probably produce a different outcome, reopening the record is warranted.

Determining that the CapX2020 projects are not needed for regional reliability might produce a different outcome for the Brookings and Fargo Projects. With respect to the La Crosse Project, CETF has demonstrated that this high voltage power line cannot be justified on the basis of community reliability or generation outlet capacity. The MPUC’s certification of the La Crosse Project must be reversed.

III. Local, Lower Voltage Transmission Alternatives to the La Crosse Project were Properly Presented on this Record and Demonstrate that the La Crosse Project is Not Needed.

Respondents have not asserted that the La Crosse Project is needed for generation outlet capacity. MISO's references to support for the renewable energy standards pertain to the CapX2020 Brookings Project, not the La Crosse transmission line. (MISO Brief, pp. 16-18). Neither have Respondents asserted that the alternatives to the La Crosse Project detailed in CETF's brief (pp. 17-20) fail to meet the need for community reliability in Rochester or La Crosse. What they have argued is that these alternatives need not be considered because CETF, a small and unincorporated group of citizens "never submitted a formal alternative to the La Crosse Project and as a result failed to satisfy its evidentiary burden to present a more reasonable and prudent alternative." (App. Brief, p. 32).

Both the Minnesota Environmental Policy Act ("MEPA") and the Minnesota Environmental Rights Act ("MERA") require that agencies consider environmental impacts and preclude state action or permits for conduct that impairs natural resources, where there is a feasible and prudent alternative. Minn. Stat. § 116D.04, subd. 6; Minn. Stat. § 116B.09, subd. 2. Neither requires citizens to formally present alternatives to projects that would impair natural resources.

However, in this proceeding the Court need not rule whether burdening citizen intervenors to find a more reasonable and prudent alternative to a project that impairs the environment would violate MEPA or MERA. In this case, whether or not citizens could

be required to do so, CETF has proposed a specific alternative to the CapX2020 La Crosse Project based on information supplied by and known to Applicants.

The local and lower voltage transmission alternatives described in CETF's brief were identified as alternatives to the La Crosse Project in Appendices to the Application for certificates of need, were verified in discovery from Applicants and the testimony of Applicants' witnesses, and were proposed as an alternative to the CapX2020 La Crosse Project by intervenors with whom CETF was aligned prior to the hearing of this matter.³ Respondents can't claim to be surprised that there are local, lower voltage transmission alternatives to provide community reliability in Rochester and La Crosse.

Under Minnesota Rules 7849.0260, subp. B and 7849.0120, subp. B, Applicants themselves should have provided a thorough analysis of 161 kV local transmission alternatives along with local generation in Rochester and La Crosse, to evaluate whether there were feasible and prudent alternatives to the CapX2020 La Crosse Project that would provide community reliability in these areas and avoid adverse impacts on the natural environment, including the Upper Mississippi River National Wildlife and Fish Refuge. This would have reduced the burden on CETF and other intervenors. The fact that Applicants either did not conduct or did not disclose this analysis should not permit them to claim that they are somehow being required to "prove a negative."

³ The MPUC's reference to ALJ Finding 337 that no party came forward with a "distributed generation" alternative to the CapX project as a whole is not relevant to CETF's appeal, which pertains to a local, lower voltage transmission alternative to meet community reliability needs for the La Crosse Project.

CETF and other intervenors became aware of local lower voltage transmission alternatives cited in the CETF brief by reading the Appendices to the Application. Local, lower voltage power upgrades in the Rochester and La Crosse areas were described as potential alternatives to the CapX2020 345 kV La Crosse Project in the Southeastern Minnesota – Southwestern Wisconsin Reliability Enhancement Study (“Rochester/La Crosse Study”) contained in Appendix A-2 of the Application (Ex.1).

Specific lower voltage transmission lines in the Rochester area, known as the Rochester Incremental Generation Outlet (“RIGO”) projects, and in the La Crosse area cited in CETF’s brief (pp. 17-20) were identified in the Direct Testimony of Applicants’ witnesses and explicitly proposed as an alternative to community reliability needs for the La Crosse Project in the prefiled Direct Testimony of Michael Michaud, an expert for intervenor NAWO/ILSR. Mr. Michaud described a the local transmission upgrade alternative to meet community reliability needs in the Rochester area:

In Direct Testimony provided by Applicants witness Amanda King, (p. 21) it has been disclosed that Xcel Energy plans to build three new 161 kV facilities in the Rochester area, and that Dairyland Power plans to upgrade a fourth 161 kV facility in the Rochester area. These are massive changes to the Rochester area transmission system that will provide additional load support out to at least 2018, according to Ms. Kings’ testimony. Since this information was just recently made available, I have been unable as yet to discover the details of the assumptions behind her projection of 2018 as a date when the reliability issues are now projected to occur. Ex. 140, p. 19, l.17 – p. 20, l. 1 (Michaud Direct)

Subsequent cross-examination disclosed that if 181 MW of local Rochester generation were not assumed to cease existing, these 161 kV local transmission upgrades would provide reliability to at least 2026. (See CETF Brief, p. 18).

Mr. Michaud also detailed a feasible and prudent local alternative to meet community reliability needs in the La Crosse area based on Applicants' filings:

They have not shown that the proposed 345 kV line to La Crosse is needed for community reliability load serving purposes. Instead, the alternative of adding just the 161 kV system upgrades, which appear to be those shown on p. 144 of Appendix A-2 for a cost of \$32 million, may be a cost effective solution to the 2020 time frame load serving issues. Ex. 140, p. 23, ll. 17-21 (Michaud Direct)

MISO's analysis that the La Crosse Project was needed for community reliability didn't take these local transmission alternatives into consideration:

Q. Are you familiar with the regional incremental generation outlet, the so called RIGO analysis?

A. I'm aware of them. For one thing, I read about them in the -- it's in the rebuttal testimony, I believe it was, or testimony, but not specifically. We haven't done any analysis of those projects one way or another.

Q. Okay. So you have not analyzed the impact of the proposed RIGO lines on the Rochester reliability?

A. No. Tr. V. 4, p. 127, l. 25 – p. 128, l. 9 (Webb)

It is undisputed that the local transmission upgrades proposed by CETF (and by NAWO/ILSR) obviate the need for the La Crosse Project to address community reliability needs.

IV. Errors in Applying Environmental and Certificate of Need Statutes to the CapX2020 La Crosse Project are Properly before this Court and Require Reversal of the MPUC's Certificate of Need.

Despite efforts made by Respondents (App. Brief, pp. 25, 27; MPUC Brief, p. 30) to characterize CETF's appeal as a challenge to the environmental review, CETF has brought no claim under Minn. Stat. §116D.04, subd. 10. CETF is challenging a state action outcome, not the provision of information in an environmental review document.

In this appeal, CETF relies on many sources of information regarding alternatives to and environmental impacts of the CapX2020 projects, including discovery, cross-examination of Applicants' witnesses, opinions of its own and NAWO/ILSR experts, letters from the United States Fish and Wildlife Service and public comments reflected in the ALJ's Report. The limits of the Environmental Report as a particular source of information, whether modest or egregious, are simply not pertinent to CETF's arguments.

More fundamental is the assertion made by Respondent Applicants (App. Brief, p. 34) that the only "output" required under MEPA, Minn. Stat. § 116D.04, subd. 6, is an environmental review document. Applicants' assertion flatly contradicts the language of the MEPA statute, the "output" of which is limits on state action and permits in order to protect natural resources:

No state action significantly affecting the quality of the environment shall be allowed, nor shall any permit for natural resources management and development be granted, where such action or permit has caused or is likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources located within the state, so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare and the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction. Economic considerations alone shall not justify such conduct. Minn. Stat. § 116D.04, subd. 6 (2009). (emphasis added)

Applicants' interpretation of Minnesota environmental law to be no more than a paper requirement is contrary to precedent. *People for Env'tl. Enlightenment and Responsibility ("PEER"), Inc. v. Minn. Env'tl. Quality Bd. ("MEQB")*, 266 N.W.2d 858, 867, 874 (Minn. 1978). This Court has recently affirmed the obligation of state agencies

under both MEPA, Minn. Stat. §116D.04, subd. 6, and MERA, Minn. Stat. § 116B.09, subd. 2, to render decisions that protect Minnesota's natural resources. *Minn. Ctr. for Env'tl. Advocacy ("MCEA") v. Minn. Pollution Control Agency ("MPCA")*, 696 N.W. 2d 95, 102 (Minn. Ct. App. 2005).

The case cited by the MPUC for the proposition that MERA "does not create any substantive standard" (MPUC Brief, p. 33) contained no such holding. *National Audubon Society v. Minn. Pollution Control Agency*, 569 N.W. 2d 211 (Minn. Ct. App. 1997) dealt with an agency's negative determination on the need for an EIS. Neither MEPA's substantive standard, Minn. Stat. §116D.04, subd. 6, nor MERA's substantive standard, Minn. Stat. 116B.09, subd. 2, upon which CETF rely in this matter, were even cited in the *National Audubon Society* case.

The MPUC's assertion that conflicts with applicable federal and state rules, regulations and policies need not have been considered since other agencies can enforce permit requirements (MPUC Brief, p. 34) is also contrary to statute. Certificate of need statutes require MPUC consideration, stating that the Commission "shall evaluate . . . the policies, rules, and regulations of other state and federal agencies and local governments." Minn. Stat §216B.243, subd. 3(7) (emphasis added). Minnesota Rules also state that a certificate of need will be granted when the record does not demonstrate that the facility "will fail to comply with relevant policies, rules, and regulations of other state and federal agencies and local governments." Minn. R. 7849.0120, subp. D. Applicable statutes and rules do not grant the MPUC the discretion

to sidestep evaluation of conflicting regulations or policies.

In this case, no Respondent has challenged CETF's facts or citations demonstrating that the La Crosse Project will fail to comply with relevant policies, rules and regulations of state and federal agencies, including the United State Fish and Wildlife Service. To certify the La Crosse Project in conflict with MEPA and MERA and in conflict with certificate of need requirements under Minn. Stat. § 216B.243, subd. 3(7) constituted an error of law.

V. Deferring CETF's Claims to the Routing Process is Contrary to Law and Would Preclude any Legal Remedy.

Respondents' primary response to the substantive environmental challenge raised by CETF to the La Crosse Project is to suggest that this Court deny CETF any remedy for harms caused to protected natural resources. They do not dispute that any route for the La Crosse Project would require new right-of-way through the Upper Mississippi River National Wildlife and Fish Refuge. They also do not dispute that any of the proposed routes for the La Crosse Project through the National Wildlife Refuge would create both temporary and long-term impacts to Minnesota's natural resources. (*See* CETF Brief, pp. 12-17).

Instead, respondents claim that this Court should not consider CETF's argument that local transmission upgrades provide a better environmental alternative than the CapX2020 La Crosse Project since such concerns are "not ripe" until the routing process. (App. Brief, pp. 4, 28-29, 38; MPUC Brief, pp. 31-32). This argument would deny any

effective remedy for certification of a power line that causes unnecessary harm to Minnesota's natural resources.

Minnesota law states clearly that once a certificate of need has been approved, routing proceedings cannot consider other alternatives.⁴ There is no jurisdiction to consider "questions of need, including size, type and timing, alternative system configurations; and voltage" in environmental review for transmission routing proceedings. Minn. Stat. §216E.02, subd. 2. Rules provide that once the MPUC has issued a certificate of need, neither the EIS, the contested case nor the permit for a high voltage transmission line route may even consider the appropriateness of an alternative facility:

When the Public Utilities Commission has issued a Certificate of Need for a large electric power generating plant or high voltage transmission line or placed a high voltage transmission line on the certified HVTL list maintained by the commission, the environmental impact statement shall not address questions of need, including size, type, and timing; questions of alternative system configurations; or questions of voltage. Minn. R. 7850.2500, subp. 5.

Once the commission has determined questions of need, including size, type, and timing; questions of system configuration; and questions of voltage, those issues must not be addressed in the contested case hearing. Minn. R. 7850.2600, subp. 2.

When the Public Utilities Commission has issued a Certificate of Need for a large electric power generating plant or a high voltage transmission line or placed a high voltage transmission line on the certified HVTL list maintained by the commission, questions of need, including size, type, and timing, questions of alternative system configurations, and questions of voltage shall not be factors

⁴ These laws were changed since the cases cited by the MPUC (MPUC Brief, p. 32). *No Power Line v. Minn. Env'tl. Quality Council ("MEQC")* 262 N.W.2d 312 (Minn. 1977) appealed from administrative proceedings designating a transmission line corridor, designating a route within that corridor issuing a certificate of need and a construction permit.

considered by the commission in deciding whether to issue a permit for a proposed facility. Minn. R. 7850.4200.

The routing process for the La Crosse Project has yet to commence, while appeal from the MPUC's certificate of need decision required action within 30 days of the MPUC's August 10, 2009 Order. Minn. Stat. § 14.63. By suggesting that this Court defer CETF's concerns that the La Crosse Project would cause environmental harm that local transmission upgrades would avoid, Respondents are cynically suggesting that their actions become unreviewable and that there should be no remedy in certificate of need cases for failure to comply with substantive environmental law. Precedent permitting environmental review of certificate of need decisions, *In re Application for a Certificate of Need for Construction of an Independent Spent Fuel Storage Installation*, 501 N. W. 2d 638, 649 (Minn. Ct. App. 1993), and common sense both dictate otherwise.

VI. Approving the Upsized Alternative Exceeded the MPUC's Statutory Jurisdiction.

Respondents do not dispute that certificate of need law, Minn. Stat. § 216B.243, subd. 3, limits the MPUC's jurisdiction to certify high voltage transmission lines to situations where a demand for electricity has been proved. They do not dispute that the MPUC's May Order certifying an "upsized" alternative to the CapX2020 transmission lines justified its action based on factors, such as "increased flexibility" other than demand for electricity, stating that any benefits from upsizing would not accrue until beyond the planning horizon of the Application. (*See* CETF Brief, pp. 43-44).

Respondents, similarly, do not dispute that the factual record of uncertainties regarding future energy demand, future generation types and locations and the costs of

other transmission alternatives would prevent a finding that the “upsized” alternative to the CapX2020 power lines is needed and would even call into question its possible future “benefits.” (*See* CETF Brief, pp. 20-21)

Applicants argue that Minnesota Rule 7849.0120, subp. A (5) permits the MPUC to enlarge the size of a facility beyond what is needed in order to make optimum use of resources. (App. Brief, p. 24). This interpretation is inconsistent with the underlying certificate of need statute, and the plain language of the Rule itself, which requires a showing for a certificate of need that “the probable result of denial would be an adverse effect upon the future adequacy, reliability, or efficiency of energy supply.” Minn. R. 7849.0120, subp. A.

The limit on the MPUC’s authority to approve large energy facilities to those for which a need has been shown reflects legislative policy. Power plants and high voltage transmission lines impose hundreds of millions or, in this case, billions of dollars of costs upon ratepayers. They create adverse impacts on the natural environmental and on human settlement in the communities where they are located. Since utilities receive a guaranteed rate of return on investment, they may have a structural incentive to “upsized” large energy facilities. The Legislature, reasonably, limited the MPUC’s discretion to approve such facilities to the situation where a demand for electricity had been proved.

VII. There is a Limit to the MPUC’s Discretion.

The primary argument made in Respondents’ briefs is that the MPUC has virtually unlimited discretion to decide matters pertaining to energy and the fulfillment of environmental policy, and this Court should defer to the MPUC’s expertise. (*See* App.

Brief, pp. 11, 37; MISO Brief, p. 10). However, the MPUC's discretion is limited by statutory and case law, and none of the claims made by CETF require this Court to make a judgment beyond the scope of review in Minn. Stat. §14.69.

Failure to reopen the record was arbitrary and erroneous. Newly discovered evidence demonstrated a defect in the forecasts that both the ALJ and MPUC had relied upon to find regional need. Absent a forecast of 2020 load at or above 24,701 MW, the finding of regional need for the CapX2020 projects was unsupported by substantial evidence. Minn. Stat. §14.69 (e). The certification of power lines is not a unique and complex policy matter in an area where broad agency authority has been vested by the Legislature, as was the tobacco settlement litigation cited by Respondents. *In re Blue Cross & Blue Shield*, 624 N.W. 2d 264 (Minn. 2001). This Court has the authority and capacity to review whether a single statement of a witness that there is a regional need for the CapX2020 projects at 2,000 MW of growth is substantial evidence or almost no evidence at all. *Reserve Mining Co. v. Herbst, supra*, 256 N.W. 2d at 819.

Certification of the CapX2020 high voltage transmission lines, can only upheld if the power lines are needed for community reliability or generation outlet capacity. The MPUC did not find that the La Crosse Project was needed for generation outlet capacity. Although a community reliability need in the Rochester and La Crosse areas was demonstrated on the record, the evidence is undisputed that an alternative based on local, lower voltage transmission improvements would meet this community reliability need without requiring new right-of-way in the Upper Mississippi River National Wildlife and Fish Refuge and without adverse environmental impact on this protected natural resource.

The MPUC did not apply technical knowledge to determine that CETF's proposed alternative could not meet community reliability needs with less environmental harm than the La Crosse Project, a decision that might be entitled to some deference under the cases cited by Respondents. See e.g., *In re Review of 2005 Automatic Adjustment of Charges*, 768 N.W. 2d 112 (Minn. 2009). The MPUC declined to evaluate whether local, lower voltage transmission alternatives to the La Crosse Project would avoid environmental impacts and conflicts with rules protecting wildlife refuge areas.

CETF's assertion, on the facts in this record, that certification of the La Crosse Project violated substantive environmental laws and provisions of certificate of need statutes and rules must be reviewed by this Court *de novo*. This Court is not bound by the MPUC's interpretation of statutes. *In re City of Redwood Falls*, 756 N.W.2d 133, 137 (Minn. Ct. App. 2008) and no deference is given to an agency's interpretation of its own regulation if the language is clear and capable of understanding. *MCEA v. MPCA, supra*, 696 N.W.2d at 108.

Similarly, CETF's claim that "upsizing" the CapX2020 projects exceeded the MPUC's statutory jurisdiction is a question of law, determined without deference to the MPUC. Courts have been unwilling to imply "a new factor of considerable consequence into the regulatory equation" in the absence of "explicit legislative action" providing authority to the MPUC. *Peoples Natural Gas Co. v. Div. of Inter-North Inc. v. Minnesota*, 369 N.W. 2d 530, 535 (Minn. 1985):

"[I]t is elementary that the Commission, being a creature of statute, has only those powers given to it by the legislature." *Great Northern Railway Co. v. Public Service Comm'n*, 284 Minn. 217, 220, 169 N.W.2d 732, 735 (1969). The

legislature states what the agency is to do and how it is to do it. While express statutory authority need not be given a cramped reading, any enlargement of express powers by implication must be fairly drawn and fairly evident from the agency objectives and powers expressly given by the legislature. "Neither agencies nor courts may under the guise of statutory interpretation enlarge the agency's powers beyond that which was contemplated by the legislative body." *Waller v. Powers Department Store*, 343 N.W.2d 655, 657 (Minn. 1984). *Peoples Natural Gas Co. v. Div. of Inter-North Inc. v. Minnesota*, *supra*, 369 N.W. 2d at 534.

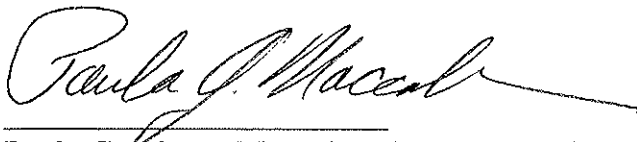
CONCLUSION

Respondents play an important role in providing electricity to customers, but that role is constrained by the rule of law. Certificate of need statutes and environmental laws limit the MPUC's discretion to impose costs on ratepayers and adverse impacts on Minnesota citizens and natural resources.

For the foregoing reasons and upon the records, files and authorities herein, CETF requests remand to the MPUC to supplement the record regarding regional demand for all of the CapX2020 Projects and reversal of both the certificate of need for the La Crosse Project and the certification for the "upsized" double-circuited version of the CapX2020 345 kV high voltage transmission projects.

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Respectfully submitted,



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