

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.

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

Preparer of Brief and Addendum:

Paula Goodman Maccabee (#129550)
JUST CHANGE LAW OFFICES
1961 Selby Avenue
St. Paul, MN 55104
(651) 646-8890

Attorney for Relator

Citizens Energy Task Force

Alison C. Archer
Assistant Attorney General
Bremer Tower, Suite 1100
445 Minnesota Street
St. Paul, MN 55101
(651) 297-5945

Attorney for Respondent

Minnesota Public Utilities Commission

(Additional Counsel listed on following page)

Carol Overland
OVERLAND LAW OFFICE
P.O. Box 176
Red Wing, MN 55066
(612) 227-8638
*Attorney for Relators No CapX 2020
and United Citizens Action Network*

Michael C. Krikava
BRIGGS AND MORGAN, P.A.
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 977-8400
*Attorney for Respondent/ Applicants
Northern States Power Company and
Great River Energy*

Julia Anderson
Assistant Attorney General
1400 Bremer Tower
445 Minnesota Street
St. Paul, MN 55101-2131
(651) 296-8703
*Attorney for Minnesota Department of
Commerce*

Christopher K. Sandberg
LOCKRIDGE GRINDAL NAUEN
Suite 2200
100 Washington Avenue South
Minneapolis, MN 55401
(612) 339-6900
Attorney for Midwest ISO

Elizabeth Goodpaster
Staff Attorney
MINNESOTA CENTER FOR
ENVIRONMENTAL ADVOCACY
26 East Exchange Street, Suite 206
St. Paul, MN 55101
(651) 223-5969
Attorney for Joint Intervenors

George Crocker
Executive Director
NORTH AMERICA WATER OFFICE
P.O. Box 174
Lake Elmo, MN 55042
(651) 770-3861
Pro se

TABLE OF CONTENTS

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 4

Regional Need – CapX2020 Projects 5

Impacts on Natural Resources - La Crosse Project 12

Alternatives – La Crosse Project 17

“Upsizing” – CapX2020 Projects 20

STANDARD OF REVIEW 21

SUMMARY OF ARGUMENT 22

I. THE MPUC ERRED IN FAILING TO REOPEN THE RECORD TO CONSIDER NEWLY-DISCOVERED EVIDENCE THAT THE CAPX2020 PROJECTS WERE NOT NEEDED. 24

A. Power lines can only be certified if an Applicant demonstrates a need for the facilities based on accurate forecasts of energy supply and demand. 24

B. The MPUC erred in failing to reopen the record to consider evidence of demand critical to finding need for the power lines. 26

II. THE MPUC ERRED IN CERTIFYING THE LA CROSSE PROJECT. 29

A. The La Crosse Project conflicts with federal rules, regulations and policies regarding wildlife refuges, and the MPUC failed to consider these conflicts, in violation of law. 29

B. The MPUC failed to evaluate alternatives to the La Crosse Project that meet community reliability needs, as required by law. 34

C. The MPUC erred in certifying the La Crosse Project in an area prohibited under Minnesota law. 38

D. Approval of the La Crosse Project violated MEPA and MERA, since the Project is likely to impair natural resources and there are feasible and prudent alternatives consistent with the State’s paramount concern for the environment. 39

III. THE MPUC EXCEEDED ITS AUTHORITY IN CERTIFYING THE CAPX2020 UPSIZED ALTERNATIVE GIVEN THE LACK OF EVIDENCE OF NEED FOR THE UPSIZED PROJECTS.	42
CONCLUSION	45

TABLE OF CITATIONS

Minn. Stat. § 14.67 (2009)	27
Minn. Stat. § 14.69 (2009)	27
Minn. Stat. § 116B.09, subd. 2 (2009)	1, 23, 40, 41, 42
Minn. Stat. § 116D.04, subd. 6 (2009)	1, 23, 39, 40, 41, 42
Minn. Stat. § 216A.01(2009)	42
Minn. Stat. § 216B.16, subd. 7b (2009)	42
Minn. Stat. § 216B.1691, subd. 2a (2009)	6
Minn. Stat. § 216B.2401 (2009)	6
Minn. Stat. § 216B.241, subd.1c (2009)	6, 8
Minn. Stat. § 216B.2421. subd. 2(2) (2009)	24
Minn. Stat. § 216B.243, subd. 3 (2009)	1, 2, 3, 23, 24, 29, 30, 35, 42, 44
Minn. Stat. § 216B.25 (2009)	26
Minn. Stat. § 216B.27 (2009)	3
Minn. Stat. § 216H.03 (2009)	6, 7
Minn. R. 7849.0120, subp. A (2009)	24
Minn. R. 7849.0120, subp. B (2009)	35, 37
Minn. R. 7849.0120, subp. D (2009)	1, 30, 34

Minn. R. 7849.0260, subp. B (2009)	35
Minn. R. 7850.4300, subp. 2 (2009) ¹	1, 23, 38, 39
16 U.S.C, § 668.dd (a)(2) (2008)	31
16 U.S.C. §703a (2008)	13
50 C.F.R. 26.41 (2008)	23, 31
50 C.F.R. 26.41(c) (2008)	23, 32
50 C.F.R 29.21 (2008)	23,31
50 C.F.R 29.21-1(a)(2008)	23, 31
340 FW 3, Rights-of-Way and Road Closings, FWM#105 (July 28, 1993)	33
<i>Blake v. Denelsbeck</i> , 170 N.W.2d 337 (Minn. 1969)	28
<i>Disch v. Helary</i> , 382 N.W. 2d 916 (Minn. App. 1986)	28
<i>Frost-Benco Elec. Ass'n v. Minn. Pub. Utils. Comm'n</i> , 358 N.W.2d 639 (Minn. 1984)	22, 43
<i>In re Application for a Certificate of Need for Construction of an Independent Spent Fuel Storage Installation</i> , 501 N. W. 2d 638 (Minn. App. 1993)	22, 40, 41
<i>In re Application of Otter Tail Power Co. and Others for Certification of Transmission Facilities in Western Minn.</i> , MPUC Docket ET-9/CN-05-619 (October 19, 2007)	26, 27
<i>In re City of Redwood Falls</i> , 756 N.W.2d 133 (Minn. App. 2008)	22
<i>In re Denial of Eller Media Co.'s Applications</i> , 664 N.W.2d 1 (Minn. 2003)	22
<i>In re Investigation into the Commission's Jurisdiction</i> , 707 N.W.2d 223 (Minn. App. 2005)	23, 43

¹ Prior to September 18, 2009, this section of Minnesota Rules was codified as Minn. R. 7849.5930, subp. 2, by which it is referenced in CETF's briefs to the MPUC.

<i>In re Proposal by US West Communications,</i> 558 N.W.2d 777 (Minn. App. 1997)	22
<i>McKee v. Cty. of Ramsey,</i> 245 N.W.2d 460 (1976)	42, 43
<i>Minn. Ctr. for Env'tl. Advocacy ("MCEA") v. Minn. Pollution Control Agency ("MPCA"),</i> 696 N.W. 2d 95 (Minn. App. 2005)	22, 23, 37, 41
<i>No Power Line v. Minn. Env'tl. Quality Council ("MEQC"),</i> 262 N.W.2d 312 (Minn. 1977)	21, 40
<i>People for Env'tl. Enlightenment and Responsibility("PEER"),Inc. v. Minn. Env'tl. Quality Bd. ("MEQB"),</i> 266 N.W.2d 858 (Minn. 1978)	23, 40, 41
<i>Polk Cty. Welfare Bd. v. State Dep't of Public Welfare,</i> 234 N.W.2d 799 (Minn. 1975)	23, 27
<i>Senior Citizens Coalition v. Minn. Pub. Util. Comm'n.,</i> 355 N.W.2d 295 (Minn. 1984),	42, 43
<i>Soo L. R. Co. Minn. Dep't of Transp.,</i> 304 N.W.2d 301 (Minn. 1981)	27
<i>State by Archabal v. Cty. of Hennepin,</i> 495 N.W.2d 416, 421 (Minn. 1993)	41
<i>State by Citizens Against Power Plant Pollution, Inc. (CAPPP, Inc.) v. Minn. Env'tl. Quality Bd.(MEQB)</i> 305 N.W.2d 575 (Minn. 1981)	27
<i>State by Spurck v. Civil Service Board,</i> 32 N.W.2d 583 (1948)	43
<i>Turner v. Suggs,</i> 653 N.W.2d 458 (Minn. App. 2002)	28

STATEMENT OF ISSUES

- 1) Did the Minnesota Public Utilities Commission (“MPUC”) err and abuse its discretion in failing to re-open the record to consider newly-discovered evidence of a decline in energy demand that undermined the asserted need for the CapX2020 high voltage transmission lines, given statutes requiring applicants to justify the need for the projects based on accurate forecasts of energy supply and long-range energy demand? Minn. Stat. § 216B.243, subd. 3(1)(2009).
- 2) Did the MPUC err in certifying the CapX2020 La Crosse Project, which will expand power line right-of-way in a United States Fish and Wildlife Service (“USFWS”) national wildlife and fish refuge and is likely to impair natural resources, in conflict with federal rules, regulations and policies regarding refuge areas which must be considered under Minn. Stat. § 216B.243, subd. 3(7) (2009) and Minn. R. 7849.0120, subp. D (2009); in violation of state rules pertaining to prohibited power line routes, Minn. R. 7850.4300, subp. 2 (2009); and in violation of the Minnesota Environmental Policy Act (“MEPA”), Minn. Stat. § 116D.04, subd. 6 (2009) and the Minnesota Environmental Rights Act (“MERA”), Minn. Stat. § 116B.09, subd. 2 (2009), since there are feasible and prudent alternatives to the Project that meet energy needs, consistent with the reasonable requirements of public health, safety and welfare and the state’s paramount concern for the protection of natural resources?
- 3) Did the MPUC exceed its authority in certifying the CapX2020 upsized alternative given the lack of need for the upsized alternative under applicable statutes, Minn. Stat. § 216B.243, subd. 3?

STATEMENT OF THE CASE

Great River Energy and Northern States Power (d/b/a Xcel Energy), the (“Applicants”), applied on their own behalf and on behalf of nine other utilities, the (“CapX2020 utilities”), for certificates of need for three single-circuit 345,000 volt (“345 kV”) power line projects representing approximately 600 miles of transmission, the “CapX2020 Projects.” Applicants initially filed separate applications for the three CapX2020 Projects, but in a November 3, 2006 Order, the Minnesota Public Utilities Commission (“MPUC”) consolidated the three projects in a single application in Docket No. ET-2/CN-06-1115.

On November 21, 2007, the MPUC referred the matter for a contested case hearing before an Administrative Law Judge (“ALJ”). The hearing was conducted over 25 days, between July 14 and September 18, 2008. Citizens Energy Task Force (“CETF”), the appellant-relator herein, was granted party status on April 22, 2008 and participated in the contested case proceedings.

In the contested case proceeding, other parties proposed that the single-circuit 345 kV transmission lines sought by Applicants be enlarged, and Applicants modified their proposal to include an “upsized” version of the Projects that would be capable of supporting a second circuit of 345 kV transmission at some future date. Relator CETF Addendum (“CETF Add.”), pp. 10-11 (ALJ Findings of Fact, Conclusions and Recommendations, “ALJ Report,” Findings 25-26).

The ALJ issued her Report on February 27, 2009, recommending that all three CapX2020 Projects –Brookings, Fargo and La Crosse – be granted certificates of need. *Id.*, p. 94 (ALJ Conclusion 8). The ALJ recommended that the Brookings and Fargo Projects, but not the La Crosse Project, be “upsized” to larger poles capable of supporting a future double circuit of 345 kV transmission. *Id.*

CETF filed exceptions to the ALJ Report with the MPUC, opposing certificates of need for the La Crosse and the Fargo Project and opposing the Brookings Project unless conditions requiring wind energy were imposed. CETF also filed a motion to reopen proceedings and supplement the record, with a brief and affidavits describing newly-discovered evidence undermining regional demand for the CapX2020 projects. CETF Add., pp.171-174; Relator CETF Appendix (“CETF App.”), pp. 1-67. The MPUC met

April 15 and April 16, 2009 to consider CETF's motion, motions of other parties to reopen the record and exceptions of various parties to the ALJ Report and issued an Order Granting Certificates of Need with Conditions on May 22, 2009 ("May 22, 2009 Order"). CETF Add., pp. 108-152.

The MPUC Order denied the motions of CETF and other parties to reopen and supplement the record and granted certificates of need for the Brookings, Fargo and La Crosse CapX2020 Projects. *Id.*, pp. 119, 149. The MPUC ordered that all three projects be "upsized" to permit a future double circuit and imposed conditions requiring purchase of wind energy on the certificate of need for the Brookings Project. *Id.*, p. 150.

CETF filed a petition for reconsideration on June 11, 2009, pursuant to Minn. Stat. § 216B.27 (2009), CETF App., pp. 68-93, and filed an answer to other parties' petitions for reconsideration on June 22, 2009. *Id.*, pp. 95-103. CETF asked the MPUC to reconsider its decision not to reopen the record to hear evidence of demand declines reducing forecasts below the threshold for Applicants' regional reliability need. CETF asked for reconsideration of the decision to certify the La Crosse Project, asserting conflicts with federal regulations and policies regarding wildlife refuge habitat and violations of certificate of need statutes and rules, environmental laws and rules pertaining to prohibited power line routes. CETF also asked that the MPUC's decision to certify the "upsized" version of the CapX2020 Projects be reconsidered. CETF supplied new evidence of the decline in demand forecasts and of conflicts with federal regulations and policies identified by the United States Fish and Wildlife Service ("USFWS") regarding the La Crosse Project. CETF Add., pp. 175-185.

Applicants and the Office of Energy Security (“OES”) filed petitions for reconsideration seeking the removal or modification of wind conditions on the Brookings line. NoCapX2020 and United Citizens Action Network (“UCAN”) filed petitions for reconsideration based on inadequacies of the Environmental Report and new information regarding both demand and the need for exported power.

The MPUC considered CETF’s petition and petitions of other parties for reconsideration on July 14, 2009 and issued a final Order Granting and Denying Motions for Reconsideration, and Modifying Conditions on August 10, 2009 (“August 10, 2009 Order”). CETF Add., pp. 153-170. This final Order denied without substantive discussion the petitions of CETF and other parties to reopen the record for new evidence of declines in energy demand and to reconsider the MPUC’s grant of the certificates of need for the CapX2020 Projects. *Id.*, p. 164. The MPUC granted motions for reconsideration filed by the Applicants and the OES pertaining to wind conditions on the Brookings line and modified these conditions. *Id.* pp. 164-170. No appeal has been taken pertaining to wind conditions on the Brookings line.

On September 9, 2009, CETF filed a petition for a writ of certiorari along with a statement of the case. CETF App. pp. 106-113. No CapX2020 and United Citizens Action Network also filed a petition for certiorari on September 9, 2009, and the Court consolidated the appeals in an order dated September 25, 2009.

STATEMENT OF FACTS

Relator Citizens Energy Task Force (“CETF”) is a public interest organization representing citizens potentially impacted by the CapX2020 high voltage transmission

lines. CETF's goals include minimizing the environmental harm caused by power lines, promoting renewable energy, promoting community-based wind generation and protecting Upper Mississippi River Basin natural areas. CETF Website <http://cetf.us/about/> (last visited Oct. 8, 2009).

The CapX2020 high voltage transmission lines sought by Applicants in these proceedings include the Brookings Project, approximately 200 miles of 345 kV transmission line from Brookings, South Dakota to the Twin Cities along with a 345 kV line from Marshall to Granite Falls, Minnesota; the Fargo Project, approximately 250 miles of 345 kV transmission line from Fargo, North Dakota to the Twin Cities area and the La Crosse Project, approximately 150 miles of 345 kV transmission from the Twin Cities area to La Crosse, Wisconsin. CETF Add., p. 10 (ALJ Findings 20, 22, 23). Each of these Projects is functionally independent and does not depend on another Project to go forward. *Id.*, (ALJ Finding 19).

The total cost of the CapX2020 Projects is from \$1.6 to \$1.9 billion, including approximately \$200 million in costs for "upsizing" transmission poles and foundations so that they may be double-circuited with a second 345 kV power line at some unspecified future date. *Id.*, p. 11 (ALJ Findings 27, 28).

Regional Need – CapX2020 Projects

Applicants claimed that each CapX2020 Project is needed to address three types of need through the year 2020: regional reliability, community reliability in specific areas and generation outlet support, particularly for renewable generation. *Id.*, p. 33 (ALJ Finding 151), Ex. 1, pp. 1.4, 1.21(Application). The ALJ found that, although there was

evidence that some of the local needs identified in the Application could be met with generation and lower voltage transmission, no alternative was offered that would address the need for regional reliability. CETF Add., pp. 59,82 (ALJ Findings 296, 415).

Applicants' assertion of a regional reliability need was based on a single engineering study completed in 2005, called the "Vision Study." The Vision Study projected an annual growth rate in demand of 2.49 percent each year between 2009 and 2020, resulting in 6,287 megawatts ("MW") of peak load growth in the CapX2020 utilities' service area and a total "expected" demand of 26,500 MW by 2020. *Id.*, pp. 16, 35 (ALJ Findings 61, 161, 162).

The Vision Study also conducted a sensitivity analysis, reducing the "expected" growth in peak demand by about 30 percent, to 4,500 MW between 2009 and 2020. *Id.*, p. 35 (ALJ Finding 163). Under this "slow growth" analysis in the Vision Study, the overall load level for the CapX2020 utilities in 2020 was projected to be 24,701 MW. *Id.*, pp. 16, 35, 106 (ALJ Findings 61,163 Attachment, "Att.," E).

The Vision Study's assumptions regarding the type and location of generation facilities were based on law in effect at the time, prior to the enactment in 2007 of Minnesota's "Next Generation" law² which established greenhouse gas emissions limits prohibiting an increase in state power sector carbon dioxide emissions, Minn. Stat. § 216H.03 (2009); Renewable Energy Standards, Minn. Stat. § 216B.1691, subd. 2a (2009); and energy conservation requirements, including a 1.5 percent energy savings policy. Minn. Stat. §§ 216B.2401 (2009), 216B.241, subd. 1c (2009).

² Next Generation Energy Act of 2007, 2007 c. 136, art 2 s 5; art 4 s 10; art 5 s 2; art 5 s 3.

The mix of energy resources modeled in the Vision Study to serve Minnesota load, Ex. 1, Appendix, "Apx.," A-1, p. 4 (Application), had more coal power than would likely be permitted under the 2007 Greenhouse Gas Emissions Control statute, Minn. Stat. § 216H.03. Two out of the three energy supply scenarios in the Vision Study assumed 600 MW of coal from the Big Stone II coal plant, and base load coal comprised from 1,600 MW to 2,850 MW of new generation predicted to come on line before 2020 in Minnesota and adjacent states. CETF App., p. 114 (Ex. 21 Chart); Ex. 1, Apx. A-1, p. 15 (Application); Hearing Transcript Volume ("Tr. V.") 2A, pp. 113-114 (Rogelstad).

The Vision Study also planned for 2,275 MW of renewable wind energy, less than OES or the Minnesota Transmission Owners projected would be required to comply with the 2007 Renewable Energy Standards. CETF Add., pp. 17-18, 21, 38 (ALJ Findings 67, 81, 176); CETF App., p. 114 (Ex. 21 Chart).

The location of cost-effective generation, whether for wind or coal, depends critically on the location of the wind resource, railroad or mine. Tr. V. 18A, p. 51 (Kildegaard). Transmission engineering depends on where energy generation is sited, since location of transmission influences generation and location of generation influences transmission. Ex. 303, pp. 18-19 (Rakow Rebuttal). There was no evidence in the record that changing inputs for energy supply to comply with new renewable energy laws would result in the same engineering output result as in the Applicants' 2005 Vision Study. Tr. V. 24, p. 37, ll. 17-19, p. 38, ll. 16-21 (Ham).

The 2007 change in Minnesota's energy conservation law set an energy savings goal for each utility of 1.5 percent of annual retail electricity and set a minimum level of

annual energy savings that could be approved for a utility at 1.0 percent. Minn. Stat. §216B.241, subd.1c(b) and (d).

The most recent forecast provided by Applicants during discovery and the contested case hearing was Exhibit 51, a Response to an Information Request supplied on March 7, 2008. CETF App., pp. 51-55 (Ex. 51). Exhibit 51 partially took into account changes in forecast resulting from Minnesota's new conservation law. Tr. V. 4, p. 49 (Lacey). The median forecast in Ex. 51 reflected an annual growth in demand from 2009 to 2020 of 3,919 MW. CETF App., p. 54; CETF Add., p. 106 (ALJ Att. E).

The OES also provided an analysis of likely growth in demand within the CapX2020 region based on previously approved resource plans adjusted for new conservation. Ex. 265 (OES Chart); Ex. 217 (OES Chart); Tr. V. 24, p. 41, l. 20- p. 42, l.25. (Ham). Applying the minimum one percent conservation under the 2007 law, OES predicted that demand would grow by 4,129 MW from 2009 to 2020; with 1.5 percent conservation, demand would grow by 3,462 MW. CETF Add., p. 106 (ALJ Att. E).

Load growth under either of these forecasts falls below 4,500 MW, which is the lowest level of growth studied by Applicants' engineers in the Vision Study. Applicants performed no analysis to determine whether the CapX2020 projects or the La Crosse Project, specifically, would be needed for regional reliability under any load growth assumptions lower than the 4,500 MW "slow growth" scenario in the Vision Study. Tr. V. 2B, p. 15, l. 22 – p.16, l.13 (Rogelstad); Ex. 26 (Applicants, "App.," Response, "R." to Information Request, "IR" 5 of CETF).

A witness for Applicants testified that the CapX2020 projects would be necessary even if demand growth were as low as 2,000 MW to 2020. Mr. Tim Rogelstad opined that the need for the CapX2020 projects would not be eliminated at this level of growth based, in part, on local studies pertaining to the Red River and the Rochester-La Crosse area which he believed would still support a local need for the projects. Tr. V. 3, p. 83, l. 17 - p. 85, l.7 (Rogelstad). Mr. Rogelstad's testimony did not discuss overall forecasted demand level.

The ALJ reviewed forecasts of growth in demand falling below the 4,500 MW minimum level in Applicants' Vision Study engineering analysis. CETF Add., p. 106 (ALJ Att. E). However, the ALJ noted that, by 2020, each forecast in the hearing record predicted that overall demand in the CapX2020 region would be at or above the 24,701 MW slow-growth threshold in Applicants' Vision Plan:

Each forecast in the record is at or above the 24,701 MW slow-growth forecast in the Vision Plan upon which the engineering analysis was conducted. Both the Applicants' revised medium growth forecast of 25,708 MW and the OES estimate of 25,690 to 26,357 MW exceed the level used in the Applicants' analysis. *Id.*, p. 38 (ALJ Finding 179)

The ALJ found, "Applicants have not completed an analysis of facilities needed at a level of forecasted growth lower than 24,701 MW in the slow-growth model." *Id.*, p. 38 (ALJ Finding 180). The ALJ explicitly relied upon the fact that Applicants had "demonstrated that load growth will rise to 24,701 MW or more by 2020" to find that Applicants had shown that the probable result of denial of the certificates of need would be an adverse effect upon the future adequacy, reliability, or efficiency of energy supply to the Applicants, their customers, or to the people of Minnesota and neighboring states.

Id., p. 58 (ALJ Finding 290). The ALJ also found that changes in the economy, including a recession, might slow anticipated growth but would not “substantially slow or stop” load growth. *Id.*, p. 35 (ALJ Finding 159).

After the hearing record closed, CETF and other intervenors learned from Securities and Exchange Commission filings of CapX2020 utilities that peak demand for Xcel Energy actually declined from 2006 to 2008 and that peak load levels for both Xcel Energy and Minnesota Power were substantially below the base case contained in the Ex. 51 forecasts. Xcel’s 10-K form filed on February 27, 2009 disclosed a 11.79 percent actual decline in peak electricity demand (from 9859 MW to 8,697 MW) for Xcel Energy from 2006 through 2008. CETF Add., pp. 171-173 (Affidavit); CETF App., pp. 56-57 (Attachment). Xcel represents approximately 43 percent of the CapX2020 utilities demand. *Id.*, p. 54 (Ex. 51).

Using Xcel Energy’s actual 2008 peak demand and compounding annual growth at Applicants’ median growth rate for Xcel, CETF projected that 2020 demand load for the CapX2020 utilities would be 24,449 MW -- below the 24,701 MW low-growth level analyzed in Applicants’ engineering studies. CETF Add., pp. 172-173 (Affidavit). Performing similar analysis for Minnesota Power, CETF projected that the CapX2020 aggregate regional demand would be reduced by another 201 MW to 24,248 MW, further below the 24,701 MW slow-growth threshold in the ALJ’s Findings. *Id.*, p. 173.

CETF requested that the record be reopened to make reasonable adjustments in forecasts once accurate information was obtained for all of the CapX2020 utilities. CETF

App., pp. 19, 29-31. CETF also suggested that evidence of the ongoing recession be considered both to forecast regional and local community energy needs. *Id.*, pp. 31, 64-67. It is undisputed that recession reduces energy demand. *Id.*, p. 64 (J.F. Affidavit); Tr. V. 4, p. 18 (Lacey); Tr. V. 23, p. 126 (Ham).

After the MPUC denied CETF’s motion to reopen, CETF filed a motion for reconsideration. CETF submitted to the MPUC an updated 2009 forecast provided by Xcel Energy in discovery for another case. Xcel’s updated forecast confirmed estimates made by CETF. Peak demand for Xcel in 2020 was forecasted at 9,896 MW, reducing overall load in the CapX2020 region by 1280 MW. CETF Add., pp. 182-185 (Attachments). Without considering decline in demand of other utilities, Xcel’s analysis puts CapX2020 demand below the threshold level studied to justify regional need.

Effect of Decline in Demand (Xcel Energy) on CapX2020 Regional Demand Load in 2020

	2009	2020
Xcel Median Forecast (CETF App., p. 54, Ex. 51)	9,881 MW	11,176 MW
Xcel Current Demand Forecast (CETF Add, p. 184, Attachment)	9,399 MW	9,896 MW
Change in Xcel Demand -- Prior Ex. 51 to Current Forecast	(482 MW)	(1,280 MW)
TOTAL CAPX2020 FORECASTS Vision Plan “slow growth” threshold		24,701 MW
Median CapX2020 Forecast (CETF App., p. 54, Ex. 51)	21,789 MW	25,708 MW
Adjusted for Change (Xcel) Demand (Current 2009 Forecast)	21,307 MW	24,428 MW

Impacts on Natural Resources - La Crosse Project

The CapX2020 projects will have a substantial impact on the natural environment, CETF Add., p. 95 (ALJ Conclusion 17) including potential impacts on threatened and endangered species and habitats, *Id.*, p. 85 (ALJ Finding 433), audible noise, interference with electromagnetic signals and adverse effects from electrical and magnetic fields extending along the entire length of the transmission lines. *Id.*, pp. 77-79 (ALJ Findings 392-407); Tr. V. 12, pp. 131-132 (LaCasse).

The World Health Organization (“WHO”) has classified electromagnetic fields as “possibly carcinogenic to humans” based on studies demonstrating a consistent pattern of a two-fold increase in childhood leukemia associated with exposure to power line magnetic fields. Ex. 5, p. 27 (Environmental Report, “Env. Rep.”). Electromagnetic fields at the edge of the right-of-way for significant portions of the proposed CapX2020 high voltage transmission projects would exceed the exposure levels associated with childhood leukemia in the WHO review of power line health implications. CETF Add., pp. 79-80 (ALJ Finding 404).

All of the proposed routes for the CapX2020 La Crosse Project – whether at Alma, Winona or La Crescent/La Crosse -- would require crossing the Mississippi River within the USFWS Upper Mississippi River National Wildlife and Fish Refuge (“Wildlife Refuge”). Tr. V. 13, p. 79, l.25 – p. 80, l. 4 (Rasmussen). The Upper Mississippi River National Wildlife and Fish Refuge provides recreation and habitat protection for fish, mammals, reptiles and amphibians and a large percentage of migratory birds that use the Mississippi Flyway. Ex. 128, pp. 8-9 (Rasmussen Direct). The Mississippi Flyway is one

of the major areas in the United States used by birds for migration, including migration to other countries. Tr. V. 13, pp. 80-81 (Rasmussen). High voltage power lines across a migratory bird flyway can result in deaths from birds flying into the lines, violating the Migratory Bird Treaty Act. Tr. V. 13, pp. 82-84 (Rasmussen).⁴ The USFWS suggested that an alternative corridor with a buried line should be considered in place of the La Crosse Project, “due to the large number of eagles, egrets, herons, and pelicans [that] cross back and forth over the interstate bridges as they use the various sloughs and channels on either side.” CETF App. p. 116 (USFWS Letter, Ex. 131).

Routing of the CapX2020 La Crosse Project at any of the proposed locations – Alma, Winona or La Crescent/La Crosse -- would impact environmentally sensitive areas. Tr. V. 13, p. 87, 1.18- p.88, 1.4 (Rasmussen). The proposed Alma crossing of the La Crosse Project contains “areas of high and outstanding diversity significance,” including calcareous and other large fens, which are “critically imperiled” in Minnesota. Tr. V.13, p. 71 (Rasmussen); Ex. 1, Apx. E-1, p. 13, Map 5 (Application). The proposed Alma crossing includes a number of threatened and endangered species, including a “critically imperiled” section of swamp white oak terrace forest and several state threatened and endangered plants. *Id.*, Apx. E-1, pp. 13-14.

The area near an existing lower voltage power line that is being considered for the Alma route has an active bald eagle nest adjacent to the existing power line on the Minnesota side of the Wildlife Refuge. CETF App., p. 115 (USFWS, Ex. 131). One record places a peregrine falcon near the proposed crossing, and falcons are beginning to

⁴The Act makes it unlawful, by any means, to kill a migratory bird. 16 U.S.C. § 703(a)(2008).

nest in cliffs along the Mississippi. Ex. 1, Apx. E-1, p. 15 (Application). The peregrine falcon is the rarest bird of prey in Minnesota and is considered an endangered species. *Id.* The Alma crossing area has four other State threatened animal species populations considered species of special concern: the wood turtle, Blanding's turtle, the ottoe skipper butterfly and the paddlefish. *Id.*, p. 14.

The proposed Winona crossing for the La Crosse Project is within the Wildlife Refuge. The crossing has several state threatened and endangered plant species and an assortment of state threatened and endangered species, including the northern cricket frog, the rock pocketbook mussel, the wartyback mussel, the smooth soft shell turtle, Blanding's turtle, the timber rattlesnake and the paddlefish. Ex. 1, Apx. E-1, pp. 17-18 and Map 6 (Application). Bald eagle and osprey nesting areas exist around the crossing, and peregrine falcons have been identified in the southeastern portion of the crossing area. *Id.*, p. 17. The USFWS explicitly requested that the Winona crossing be removed from further consideration due to conflicts with federal policy and regulations. CETF App., p. 116 (USFWS, Ex. 131).

The proposed La Crescent/La Crosse crossing for the La Crosse Project is also within the Wildlife Refuge. The crossing vicinity contains areas of high biodiversity significance. Ex. 1, Apx. E-1, p. 23 and Map 8 (Application); Tr. V. 13, pp. 74-75 (Rasmussen). The LaCrescent/La Crosse route would also impact areas of high visual sensitivity, where transmission lines would have impacts on view sheds from residences and from scenic roads, including the Great River Road (Southern Minnesota Scenic Byway). Ex. 1, Apx. E-1, p. 24 (Application); Tr. V. 13, pp. 86-87 (Rasmussen). The

typical steel structure for a double-circuit 345 kV power line is 140-170 feet tall, Ex. 1, p. 2.12 (Application), equivalent to a twelve to fifteen-story building.

Many state threatened and endangered species are found within the La Crescent/La Crosse crossing vicinity, including mussel species, the peregrine falcon and the timber rattlesnake. Ex. 1, Apx. E-1, p. 25 (Application). This crossing is in proximity to an active eagle nest and a blue heron colony on the Wisconsin side and an important heron and egret feeding area on the Minnesota side. CETF App., p. 115 (USFWS, Ex. 131).

Any of the potential crossings within the Upper Mississippi River Wildlife and Fish Refuge are likely to impair areas of biodiversity significance, habitat and nesting of rare and endangered species within the Refuge. See generally, Ex. 1, Apx. E-1, pp. 13-19, 22-25, Maps 5, 6, 8 (Application); Tr. V. 13, pp. 67-88 (Rasmussen); CETF App., pp. 115-117 (USFWS, Ex. 131). Unavoidable long-term environmental impacts could include permanent destruction of wetlands along the area where lines are located and clearing forested areas of trees – for the most part anything growing over twenty feet tall – across the right-of-way. Tr. V. 13, p. 93, l. 10-21; p. 94, l. 14-21 (Rasmussen). The Environmental Report did not reach a conclusion that any route could be found within the proposed corridor that would do no lasting damage to the Mississippi River valley. CETF Add., p. 75 (ALJ Finding 383). Applicants’ environmental witness, Pam Rasmussen, testified that all three proposed Mississippi River crossings for the La Crosse Project – at Alma, Winona or La Crescent/La Crosse – would create both “unavoidable short-term and long-term environmental impacts.” Tr. V. 13, p. 88, ll. 5-10 (Rasmussen).

Prior to the MPUC hearing, Don Hultman, the Refuge Manager of the USFWS Upper Mississippi River National Wildlife and Fish Refuge, asked the MPUC to delay a decision on the certificate of need for the La Crosse Project due to concerns about the project crossing the Refuge and the need for more to analyze “the social and resource tradeoffs of this project.” CETF App., p. 94. The MPUC did not delay its decision.

The USFWS continued to review Applicants’ plans for the La Crosse Project and concluded in a May 4, 2009 letter to Xcel Energy that any of the routes for the Project, including the Alma route, would conflict with regulations and policy prohibiting new or expanded uses which fragment wildlife habitat. CETF Add., pp. 175-180. This new evidence was provided by CETF to the MPUC to support reconsideration of the La Crosse Project certificate of need.

A chart of refuge habitat impacts included with this USFWS letter shows a permitted right-of-way at Alma of 180 feet, but that the actual existing right-of-way at Alma is 125 feet, at Winona is less than 100 feet and at La Crescent/La Crosse is less than 100 feet. *Id.*, p. 177. The width of right-of-way required for a power line is a function of its voltage, and either a single-circuit 345 kV line or a double-circuit 345 kV line requires a 150-foot right-of-way. CETF Add., p. 32 (ALJ Finding 145).

Comparing existing right-of-way through the Refuge with the expansion of right-of-way proposed for the La Crosse Project, the Refuge Manager concluded that the expansion would conflict with federal regulations and policy and should not be granted:

Regulations and policy governing uses on national wildlife refuges prohibit new uses or projects which fragment habitat and such projects include roads, bridges, and powerlines. The one exception is for minor expansion of existing rights-of-way. "Minor" is not defined and left to the discretion of the refuge manager based on

professional judgment taking into account refuge-specific conditions and anticipated impacts.

Based on discussions with staff, a review of our regulations and policy, and a review of your preliminary right-of-way pole configurations, I do not believe the various options would involve a minor expansion of any of the existing rights-of-way. Most of the options involve a 75 percent or more expansion of right-of-way width to be viable. Therefore, I would have to recommend to our Regional Director (the deciding official on new or expanded right-of-way requests) that no expansion of existing right-of-way be granted and that any design option be restrained or confined to existing right-of-way width. CETF Add., p. 175 (USFWS, May 4, 2009).

Alternatives – La Crosse Project

Applicants designed the La Crosse Project to bolster electric reliability, and especially reliability in the Rochester and La Crosse/Winona areas. CETF Add., p. 123 (May 22, 2009 Order). The Project was not designed to address the need for generation outlet capacity for new sources of electricity. *Id.*, p. 119. Applicants did not make a firm claim that they were going to get generation outlet capacity from the La Crosse Project. Tr. V. 25, p. 68 ll.16-19 (Rakow). No prediction for generation outlet capacity resulting from the La Crosse Project was provided in the Application or in any testimony. Tr. V. 21, p. 39, ll.12-16 (Ellison). The La Crosse Project was not part of the transmission owners' plan to meet the Renewable Energy Standards milestones. Ex. 54, pp. 296-298 (RES Report); Ex. 282, p. 13 (Rakow Direct).

The record described transmission and generation alternatives that would provide community reliability through 2020 in the area to be served by the La Crosse Project. Applicants' Southern Minnesota, Southwestern Wisconsin Reliability Enhancement Study ("Rochester/La Crosse Study") evaluated alternatives with local lower voltage transmission improvements in Rochester and in the La Crosse area, as well as the 345 kV

power line option that was selected for the La Crosse Project. Ex. 1, Apx. A-2 (Application).

Applicants' Rochester Incremental Generation Outlet ("RIGO") Study also identified lower voltage transmission that would provide generator outlet capacity in Southeastern Minnesota and provide load-serving benefits to the Rochester area. As a result of the RIGO study, three new lines were proposed in another proceeding:

(1) Pleasant Valley–Byron 161 kV line; (2) Pleasant Valley–Willow Creek 161 kV line; (3) Byron– Westside Energy Park 161 kV line. CETF Add., p. 19 (ALJ Finding 72). Xcel Energy's compliance with the 2012 Renewable Energy Standards milestone depends on construction of these RIGO 161 kV lines. Supplemental Compliance Filing of the Minnesota Transmission Owners, p. 6, *In re 2007 Minn. Biennial Transmission Project Report and Renewable Standards Report*, MPUC Docket No. E999/M-07-1028 (September 11, 2008). The Rochester-Adams 161 kV reconductoring project is a separate Dairyland Power project scheduled for completion in 2009 to serve wind generation now being added in the Adams, Minnesota area. *Id.*, pp. 3-7.

It is undisputed that the RIGO 161 kV transmission improvements and the Rochester-Adams reconductoring would provide sufficient transmission capacity in the Rochester area to reliably serve load until 2026 or 2028 without the La Crosse Project if levels of local generation are maintained in Rochester. Tr. V. 9, p. 111 (King); CETF Add., p. 44 (ALJ Finding 209). Information provided by the CapX2020 utilities demonstrates that, by 2020, Rochester Public Utilities ("RPU") plans to retire some aging coal plants and build 100 MW of new gas generation at the West Side Energy Park,

resulting in a net gain of 23 MW of dispatchable generation in the Rochester area. Tr. V. 22, pp. 19-22 (Shaw); Ex. 222, p. 11 of 23 (App. R. to IR). RPU also plans to add another 50 MW of gas generation in Rochester by 2025. *Id.* The La Crosse Project is not needed to serve local Rochester area demand through 2020.

Neither the RIGO Projects, the Rochester-Adams reconductoring nor plans to retire coal plants and build new gas generation to serve Rochester require construction of new 345 kV transmission or a crossing of the Mississippi River within a national wildlife refuge.

Applicants' Rochester/La Crosse Study also found that local lower voltage transmission improvements could meet local reliability needs in the La Crosse area. Ex. 1, Apx. A-2 (Application). OES made a cost comparison of the 161 kV lower voltage transmission alternative and the La Crosse Project and concluded that the lower voltage alternative would have higher capital costs and line losses than the La Crosse Project. Ex. 282, pp. 70, 82-83 (Rakow Direct). The OES cost comparison assumed that the cost for the La Crosse Project remained at \$191 million, the cost estimated in the Rochester/La Crosse study, Tr. V. 24, p. 160, l.22-p.161, l.5 (Rakow); Ex. 1, Apx. A-2, pp. 143-145 (Application). However, actual costs for the La Crosse Project in these proceedings range from \$355 million to \$374 million for the single-circuit 345 kV line and from \$389 million to \$432 million for the "upsized" project. CETF Add., p. 25 (ALJ Finding 110). In addition, several local transmission improvements recommended in the Rochester/La

Crosse Study have already been implemented, reducing the costs for a local transmission alternative to the La Crosse Project. Ex.11 (App. R. to IR).⁵

In the La Crosse area, Xcel Energy's French Island Units 3 and 4, which provide 140 MW of local dispatchable generation, are currently run as peaking plants. It was not disputed that if these units were to be run as system support for summer peak loads the capacity of the transmission system in the La Crosse area would exceed the 2020 level of summer peak demand projected by Applicants, thus providing local reliability. Ex. 94, p. 11, ll.3-5 (King Direct); Ex. 1, p. 4.10, Apx. C-2 (Application).

Neither lower voltage transmission alternatives in the La Crosse area nor running the French Island plants for system support Crosse area require new 345 kV transmission or crossing the Mississippi River within a national wildlife refuge.

“Upsizing” – CapX2020 Projects

Applicants agreed that the single-circuit 345 kV CapX2020 transmission projects proposed in the Application were sufficient to meet regional reliability, load-serving and generation outlet needs detailed in the study work and reflected in the certificate of need Application. Ex. 121, p. 9, ll. 12-14(Grivna Rebuttal); Tr. V. 12, p. 91, ll.10-16 (Grivna); CETF Add., p. 11 (ALJ Finding 26). Any benefits associated with the “upsized” alternative could not be realized until significant additional future transmission projects were constructed and would be beyond the Application's 2020 planning horizon. *Id.*, pp. 54, 61(ALJ Findings 266, 308); Ex. 121, p. 16, ll.8-18 (Grivna Rebuttal).

⁵ These include the Arrowhead-Gardner Park 345 kV line; Monroe County 60 MVAR 161 kV Capacitor; La Crosse MVAR 161 kV Capacitors; Hillsboro 30.24 VAR 161 kV Capacitor; Monroe County Council Creek 161 kV line; and the Genoa-Coulee 161 kV Upgrade. Ex. 11 (App. R. to IR).

Applicants' conceded it is uncertain how the future transmission system may develop both internal and external to Minnesota and whether a need to add a second circuit will materialize in the future. Ex. 121, p. 33, ll.21-26 (Grivna Rebuttal). Factors contributing to this uncertainty include where other transmission may develop, the locations of generation proposed, how it may interconnect, load levels, generation technology innovations, climate change regulations, and social policy issues. Tr. V. 12, pp. 14-15 (Grivna). Applicants agreed that the electric industry is in a period of change; as a result, future growth patterns and future long-term needs could change. Tr. V. 11, p. 153 (Grivna).

Without knowing where future growth would occur, it cannot be determined whether a second 345 kV circuit and associated transmission infrastructure would cost more or less than other potential transmission enhancements to address that growth. Tr. V. 12, p. 74, l.15 - p. 75, l.2 (Grivna). Future load growth needs might be met with a combination of generation and transmission or entail upgrades in different alignments or different sizes, rather than the proposed 345 kV corridor upsize. *Id.* p. 75, ll.11-21. Without specific information on generation sites or conditions that would warrant using the double-circuit capacity, Applicants conceded that there are no tools using scientific methods that could evaluate the performance of the upsize option. Tr. V. 11, p. 166, ll.12-16 (Grivna).

STANDARD OF REVIEW

On purely legal issues such as statutory interpretation, this Court may review agency decisions *de novo*. *No Power Line v. Minn. Env'tl. Quality Council* ("MEQC"),

262 N.W.2d 312, 320 (Minn. 1977); *In re Denial of Eller Media Company's Applications*, 664 N.W.2d 1, 7 (Minn. 2003) ("We retain the authority to review de novo errors of law which arise when an agency decision is based upon the meaning of words in a statute."); *In re City of Redwood Falls*, 756 N.W.2d 133, 137 (Minn. App. 2008) ("This court is not bound by the [MPUC] commission's interpretation of statutes"); *In re Proposal by US West Communications*, 558 N.W.2d 777, 779 (Minn. App. 1997) (reasoning that a "relatively uncomplicated statutory interpretation" issue does not require deference to Commission). Whether an agency has jurisdiction over a matter is a legal question to be reviewed *de novo*. *Frost-Benco Elec. Ass'n v. Minn. Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984).

"No deference is given to an agency's interpretation of its own regulation if the language of the regulation is clear and capable of understanding, and the court may substitute its own judgment," *Minn. Ctr. for Envtl. Advocacy ("MCEA") v. Comm'r of Minn. Pollution Control Agency ("MPCA")*, 696 N.W.2d 95, 108 (Minn. App. 2005). The court may also find an agency decision to be arbitrary, capricious and unsupported by substantial evidence. *Id.*; *In re Application for a Certificate of Need for Construction of an Independent Spent Fuel Storage Installation*, 501 N.W. 2d 638, 642-643 (Minn. App. 1993).

SUMMARY OF ARGUMENT

The MPUC erred and acted arbitrarily in failing to reopen the record to consider newly-discovered evidence showing that regional demand in 2020 will fall below the lowest threshold studied by Applicants' engineers. High voltage transmission lines

cannot be certified unless applicants justify the need for the power lines based on accurate forecasts of long-range energy demand. Minn. Stat. §216B.243, subd. 3(1). The record should be reopened to furnish a record that permits a full understanding of the facts and equitable disposition of the proceedings. *Polk Cty. Welfare Bd. v. State Dep't of Public Welfare*, 234 N.W.2d 799, 801-802 (Minn. 1975).

Issuance of a certificate of need for the La Crosse Project was an error of law. The La Crosse Project would expand power line right-of-way within the Upper Mississippi River National Wildlife and Fish Refuge in conflict with federal rules, regulations and policies. 50 C.F.R. §§ 26.41, 26.41(c), 29.21, 29.21-1(a)(2008). The MPUC violated certificate of need statutes, Minn. Stat. §216B.243, subd. 3(7)(2009), by failing to consider this conflict.

The MPUC erred in certifying the La Crosse Project where there were feasible and prudent alternatives that would not require crossing a power line avoidance area, Minn. R. 7850.4300, subp.2 (2009), and would avoid likely impairment of protected natural resources, Minn. Stat. §§ 116D.04, subd. 6, 116B.09, subd. 2 (2009). *People for Env'tl. Enlightenment and Responsibility ("PEER"), Inc. v. Minn. Env'tl. Quality Bd. ("MEQB")*, 266 N.W.2d 858, 864 (Minn. 1978); *MCEA v. MPCA, supra*, 696 N.W.2d 95.

The MPUC exceeded its authority in certifying the "upsized" alternative absent evidence of need under authorizing statutes. Minn. Stat. §216B.243, subd. 3; *In re Investigation into the Commission's Jurisdiction*, 707 N.W.2d 223, 226 (Minn. App. 2005).

I. THE MPUC ERRED IN FAILING TO REOPEN THE RECORD TO CONSIDER NEWLY-DISCOVERED EVIDENCE THAT THE CAPX2020 PROJECTS WERE NOT NEEDED.

A. Power lines can only be certified if an Applicant demonstrates a need for the facilities based on accurate forecasts of energy supply and demand .

The CapX2020 high voltage transmission lines are large energy facilities. Minn. Stat. § 216B.2421, subd.2(2)(2009). Minnesota certificate of need statutes provide,

No proposed large energy facility shall be certified for construction unless the applicant can show that demand for electricity cannot be met more cost effectively through energy conservation and load-management measures and unless the applicant has otherwise justified its need. Minn. Stat. § 216B.243, subd.3(2009).

To justify need, the MPUC does not just determine whether there might be some benefit from a transmission facility, but 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 (2009).

In assessing need, the MPUC must evaluate “ (1) the accuracy of the long-range energy demand forecasts on which the necessity for the facility is based.” Minn. Stat. §216B.243, subd. 3(1). A finding of need must also be based on “(1) the accuracy of the applicant's forecast of demand for the type of energy that would be supplied by the proposed facility.” Minn. R. 7849.0120, subp. A(1).

Whether forecasts of energy demand and supply are accurate is critical to the MPUC’s determination. If accurate forecasts do not demonstrate that the probable result of denial of a certificate of need would be an effect upon the adequacy, reliability or efficiency of energy supply, a large transmission facility cannot be certified. Under

this standard, the single unsupported opinion of an Applicant's witness is insufficient to demonstrate need. The ALJ's Report emphasized that her findings of regional reliability need depended on record evidence that all forecasts available at the hearing exceeded the threshold of 24,701 MW in 2020, which was the lowest forecast analyzed in Applicants' Vision Study. CETF Add., pp. 16, 35, 38, 106 (ALJ Findings 61, 163, 179, Att. E). If forecasted regional demand for the CapX2020 utilities fell below this threshold, there would be no engineering data from which it could be determined that the result of denial of certificates of need would be an effect on regional reliability.

CETF's motion to reopen the record demonstrated a sharp drop in energy demand for Xcel Energy, the utility representing more than 40 percent of the CapX2020 utilities' demand. *Supra*, pp. 10-11. CETF predicted a decline in 2020 overall demand based on this evidence and requested an opportunity to conduct discovery and cross-examination to confirm that declines in forecasted demand conflicted with the ALJ's findings of regional need. *Id.*

In denying the motions of CETF and other parties to reopen the record, MPUC noted that the MPUC must focus on "long-term trends" not just current demand forecasts. CETF Add., p. 118 (May 22, 2009 Order). The MPUC also stated that the standard it was applying to determine accuracy of forecasts was not whether they represented actual events, but whether they contained a "systematic bias." *Id.* The MPUC concluded, "Here parties have alleged grounds for showing a deviation, but they have not alleged grounds for showing a systematic bias." *Id.*

There is nothing in Minnesota certificate of need statutes or rules that permits MPUC to commit ratepayer funds to a large energy facility on the basis that the forecast of need, though inaccurate, does not contain “systematic bias.”

The question whether recent declines in energy demand would influence long-term trends was addressed in CETF’s petition for reconsideration, where CETF presented evidence that Xcel Energy’s own updated budget forecast predicted a drop in 2020 demand by 1,280 MW, sufficient to bring the CapX2020 utilities’ demand below the Applicants’ Vision Study 24,701 MW lowest threshold. *Supra*, p. 11. The MPUC denied CETF’s petition for reconsideration stating that no new issues or evidence had been raised, without commenting on Xcel’s new budget forecast. CETF Add., p. 164 (August 10, 2009 Order).

B. The MPUC erred in failing to reopen the record to consider evidence of demand critical to finding need for the power lines.

The MPUC’s denial of CETF’s motion to reopen the record and petition for reconsideration was arbitrary, erroneous and inconsistent with due process and the ends of justice. MPUC authority to reopen the record to take further evidence is clear. Minn. Stat. § 216B.25(2009). In the Big Stone II transmission case, the MPUC ordered supplemental evidentiary hearings after learning of a change in circumstances -- withdrawal of a utility from the project -- that might affect need for the power lines. Order Recommencing Proceedings, *In re Application of Otter Tail Power Co. and Others for Certification of Transmission Facilities in Western Minn.*, MPUC Docket ET-9/CN-05-619 (October 19, 2007). The MPUC explained, “It is prudent and protective of the

interests of all parties” to recommence proceedings and establish an appropriate record “consistent with due process and the ends of justice.” *Id.* p. 4.

It is appropriate for an agency to void a certificate of need due to downward revisions of energy demand forecasts. In *State by Citizens Against Power Plant Pollution, Inc. v. Minn. Env'tl. Quality Bd.* 305 N.W.2d 575 (Minn. 1981), once a lawsuit was commenced regarding the construction of Sherco 3 and Sherco 4, the Minnesota Energy Agency voided its certificate of need for Sherco 4 based on Northern States Power's downward revisions of energy demand forecasts. *Id.*, at 584-585. The Court noted that reduced demand “increases the possibility that changes in technology, economic factors, load characteristics, fuel options and political and social considerations” are likely to result in a change in the optimal size and type of the facility necessary. *Id.*, at 581.

The Court of Appeals has clear authority to remand the case for further proceedings, reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced. Minn. Stat. § 14.69 (2009). The Court also has authority to reopen proceedings so that additional evidence may be taken. Minn. Stat. § 14.67 (2009).

The record should be reopened to furnish a record that permits a “full understanding of the facts” where material evidence is necessary to a more equitable disposition of the proceedings. *Polk Cty. Welfare Bd. v. State Dep't of Public Welfare*, 234 N.W.2d 799, 801-802 (Minn. 1975). “Remand is an appropriate remedy when the factual record is insufficient.” *Soo L. R. Co. Minn. Dep't of Transp.*, 304 N.W.2d 301, 307 (Minn. 1981).

Even in civil cases where there is more deference to the trial judge, reversal and

remand is appropriate where there is newly-discovered evidence that would have been admissible and is likely to have an effect on the result of a new trial. *Blake v. Denelsbeck*, 170 N.W.2d 337, 340 (Minn. 1969); *Turner v. Suggs*, 653 N.W.2d 458, 467 (Minn. App. 2002). Even if the trier of fact “does not really feel there is that much new or different” presented by the newly-discovered evidence, the Court may reverse and remand for new proceedings. *Disch v. Helary*, 382 N.W.2d 916, 918 (Minn. App. 1986).

Evidence of forecasted demand in 2020 is not only material, but dispositive of whether Applicants have demonstrated a regional reliability for the CapX2020 projects pursuant to Minn. Stat. §216B.243, subd. 3(1) and Minn. R. 7849.0120, subp. A. The Applicants’ Vision Study engineering analysis and the ALJ Report establish a threshold of demand below which regional need has not been demonstrated. Newly-discovered evidence from Xcel Energy’s SEC disclosures and 2009 budget forecast showing demand falling below this threshold is relevant and admissible, as would be additional evidence of demand decline and updated forecasts from the other CapX2020 utilities.

To the extent that the MPUC recognized that there might be “defects in the overall demand forecast,” the MPUC erred in concluding that this would not affect the need for any of the proposed facilities. The Order granting certificates of need stated:

Assuming there were defects in the overall demand forecast, this would affect only the ALJ's conclusions regarding the degree to which the proposed facilities are needed to maintain regional reliability. But this would not undermine the ALJ's conclusions regarding the need for the proposed facilities to maintain community reliability or to provide generation outlet. CETF Add., p. 118.

Defects in overall demand forecast might not, by themselves, eliminate the need for the Brookings and Fargo Projects for generation outlet capacity or community

reliability. However, absent regional need, the MPUC would have to determine on remand whether less costly or less environmentally harmful alternatives would effectively meet the remaining needs asserted in the Application.

The record provides a basis for this inquiry on remand. The OES has testified that dispersed generation is a potential alternative to transmission for generation outlet needs. Ex. 282, p. 27, l. 23 (Rakow Direct). A witness for Applicant testified that acquiring 600 MW of dispersed renewable generation may be the least cost way to secure new generation. Tr. V. 1B, p. 79, ll. 1-5 (Rogelstad). Applicants have conceded that some of the community reliability problems for the Fargo Project will be solved by the construction of a 230 kV transmission line from Bemidji to Grand Rapids, Minnesota. Tr. V. 6, p. 161, ll. 18-24 (Kline). The Environmental Report for these proceedings documented transmission projects with a far lower cost per megawatt of generation outlet capacity than the Brookings and Fargo Projects. Ex. 5, p. 86 (Env. Rep.).

As detailed in the next section of this brief, defects in the finding of regional need for the CapX2020 Projects preclude certification of the La Crosse Project. The La Crosse Project conflicts with applicable laws, and feasible and prudent alternatives meet the need for community reliability in the Project area.

II. THE MPUC ERRED IN CERTIFYING THE LA CROSSE PROJECT.

A. The La Crosse Project conflicts with federal rules, regulations and policies regarding wildlife refuges, and the MPUC failed to consider these conflicts, in violation of law.

Minnesota certificate of need statutes require the MPUC, in assessing need, to consider “the policies, rules, and regulations of other state and federal agencies and

local governments.” Minn. Stat. § 216B.243, subd. 3(7). Minnesota Rules are explicit. To grant a certificate of need, the MPUC must determine that “the record does not demonstrate that the design, construction, or operation of the proposed facility, or a suitable modification of 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 (2009).

The MPUC’s Orders certifying the La Crosse Project and denying CETF’s petition to reconsider failed to consider the policies, rules and regulations of the United States Fish and Wildlife Service pertaining to expansion of right-of-way and fragmentation of habitat within a national wildlife refuge. The May 22, 2009 Order, makes no mention of the Upper Mississippi River National Wildlife and Fish Refuge or USFWS regulations or policies. CETF Add., pp. 108-152. The August 10, 2009 Order, issued after CETF submitted documentation from the USFWS Refuge Manager identifying a conflict with federal regulations and policies, *supra*, pp. 16-17, provided no substantive consideration. In this Order, the MPUC stated, “CETF also asks the Commission to reconsider its choice to issue a Certificate of Need for the La Crosse Project given the legal and environmental complications associated with building a transmission line across the Mississippi.” CETF Add., p. 159. However, the MPUC summarily dismissed this concern, along with all others raised by CETF and other parties challenging the certificates of need, again without mentioning the USFWS concerns or federal regulations and policies. *Id.*, p.164.

As discussed *supra*, pp. 16-17, the USFWS Refuge Manager has made a professional judgment that any of the La Crosse Project routes would expand existing right-of-way, in conflict with federal regulations and policy governing new uses or projects that fragment habitat in national wildlife refuges. Mr. Hultman stated that he would recommend to the USFWS Regional Director that no expansion of existing right-of-way be granted for the La Crosse Project.

Federal regulations provide, “No right-of-way will be approved unless it is determined by the Regional Director to be compatible.” 50 C.F.R. § 29.21-1(a) (2008). Regulations also preclude expansion of a use unless the Refuge Manager has determined compatibility:

The Refuge Manager will not initiate or permit a new use of a national wildlife refuge or expand, renew, or extend an existing use of a national wildlife refuge, unless the Refuge Manager has determined that the use is a compatible use. 50 C.F.R. § 26.41(2008).

Compatibility is defined in federal regulations:

Compatible use means a proposed or existing wildlife-dependent recreational use or any other use of a national wildlife refuge that, based on sound professional judgment, will not materially interfere with or detract from the fulfillment of the National Wildlife Refuge System mission or the purposes of the national wildlife refuge. 50 C.F.R. § 29.21 (2008)(emphasis in original).

The National Wildlife Refuge System mission is also codified in law:

The mission of the [National Wildlife Refuge] System is to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans. 16 U.S.C. § 668.dd (a)(2)(2008).

The purposes of the Refuge, established in the Upper Mississippi River National Wildlife and Fish Refuge Act of 1924, are to serve as a refuge and breeding place for

migratory birds, animals, and aquatic animal life and to provide conservation of plants:

The Refuge shall be established and maintained (a) as a refuge and breeding place for migratory birds included in the terms of the convention between the United States and Great Britain for the protection of migratory birds, concluded August 16, 1916, and (b) to such extent as the Secretary of the Interior by regulations, prescribe, as a refuge and breeding place for other wild birds, game animals, fur-bearing animals, and for the conservation of wild flowers and aquatic plants, and (c) to such extent as the Secretary of the Interior may, by regulations, prescribe a refuge and breeding place for fish and other aquatic animal life.

USFWS Website, Brief Refuge History and Purpose,
<http://www.fws.gov/midwest/UpperMississippiRiver/Documents/purpose>
(last visited Oct. 8, 2009).

According the USFWS Brief Refuge History and Purpose, “The Refuge remains perhaps the most important corridor of fish and wildlife habitat in the central United States, an importance which has increased over time as habitat losses or degradation have occurred elsewhere.” *Id.*

In considering compatibility, the USFWS Refuge Manager also concluded, *supra*, pp. 16-17, that none of the routing options for the La Crosse Project would involve a “minor expansion” of existing rights-of-way. This judgment excludes application of any exception to federal regulations precluding right-of-way expansion in a wildlife refuge:

We will not make a compatibility determination and will deny any request for maintenance of an existing right-of-way which will affect a unit of the National Wildlife Refuge System, unless: the design adopts appropriate measures to avoid resource impacts and includes provisions to ensure no net loss of habitat quantity and quality; restored or replacement areas identified in the design are afforded permanent protection as part of the national wildlife refuge or wetland management district affected by the maintenance; and all restoration work is completed by the applicant prior to any title transfer or recording of the easement, if applicable. Maintenance of an existing right-of-way includes *minor expansion* or minor realignment to meet safety standards. 50 C.F.R. § 26.41(c) (emphasis in original).

The USFWS judgment that any of the routing options for the La Crosse Project would conflict with federal regulations and policies is also supported by explicit USFWS

policy to discourage the types of use embodied in the CapX2020 utilities request:

It is the policy of the Service to discourage the types of uses embodied in right-of-way requests. On areas in the National Wildlife Refuge System (System), if a right-of-way cannot be certified as compatible with the purposes for which a unit was established, it cannot be granted without authorization by Congress. CETF Add., p. 216, USFWS Policy, 340 FW 3.3, Rights-of-Way and Road Closings FMW#105 (July 28, 1993).

General guidance provided for this USFWS policy states, “A determination of compatibility with the purposes for which a unit of the System was established must mean consideration only of wildlife values or project values, not of any broader social or economic concerns.” *Id.* p. 218, 340 FW 3.6, A(3).

As detailed previously, *supra*, pp. 12-15, any of the routes proposed routes for the La Crosse Project would interfere with breeding and refuge of migratory birds, would impact endangered plant and animal species and would fragment wildlife habitat by expanding existing rights-of-way. With transmission towers as tall as a twelve to fifteen-story building and a required clearance of vegetation twenty feet tall along the right-of-way, the Refuge Manager’s professional judgment that the La Crosse Project would not be a compatible use is consistent with substantial record evidence.

Federal regulations and policies pertaining to expansion of right-of-way in a national wildlife refuge, the mission of the National Wildlife Refuge System, the purposes for which the Upper Mississippi River National Wildlife and Fish Refuge was established and the professional judgment of the Refuge Manager submitted to the MPUC with CETF’s petition for reconsideration demonstrate that the La Crosse Project fail to comply with relevant federal policies, rules, and regulations. Minn. R. 7849.0120,

subp. D. It was a reversible error of law for the MPUC to fail to consider this conflict and to certify the La Crosse Project.

B. The MPUC failed to evaluate alternatives to the La Crosse Project that meet community reliability needs, as required by law.

The MPUC was required to evaluate the need for the La Crosse Project pursuant to certificate of need statutes and rules independent of the possible need for other CapX2020 power line projects. It was not disputed on the record that each CapX2020 project was functionally independent and did not depend on another Project to go forward. *Supra*, p. 5.

Once a defect in the accuracy of regional demand forecasts was demonstrated in CETF's motion to reopen the record and petition for reconsideration, the La Crosse Project could only be certified if it were needed to provide either generation outlet capacity or local community reliability, the other two categories of need asserted by Applicants in this proceeding. *Supra*, p. 5. No claim that the La Crosse Project was needed for generation outlet capacity was substantiated on the record or found by the MPUC. *Supra*, p. 17. Certification of the La Crosse Project, thus, depends on whether the 345 kV power line is needed to provide local community reliability in the Rochester and La Crosse areas as discussed *supra*, pp. 17-20.

To certify the La Crosse Project, the MPUC was required to find that Applicants had demonstrated a need for the high voltage transmission line, after assessment of "possible alternatives for satisfying the energy demand or transmission needs including but not limited to potential for increased efficiency and upgrading of existing energy

generation and transmission facilities, load-management programs, and distributed generation.” Minn. Stat. § 216B.243, subd. 3(6). Criteria for granting a certificate of need under Minnesota rules specify that the MPUC must determine that

a more reasonable and prudent alternative to the proposed facility has not been demonstrated by a preponderance of the evidence on the record, considering:

- (1) the appropriateness of the size, the type, and the timing of the proposed facility compared to those of reasonable alternatives;
- (2) the cost of the proposed facility and the cost of energy to be supplied by the proposed facility compared to the costs of reasonable alternatives and the cost of energy that would be supplied by reasonable alternatives;
- (3) the effects of the proposed facility upon the natural and socioeconomic environments compared to the effects of reasonable alternatives; and
- (4) the expected reliability of the proposed facility compared to the expected reliability of reasonable alternatives. Minn. R. 7849.0120, subp. B (2009).

Minnesota rules specify the types of alternatives that must be considered:

in a certificate of need proceeding for a high voltage transmission line, including: (1) new generation of various technologies, sizes, and fuel types; (2) upgrading of existing transmission lines or existing generating facilities; (3) transmission lines with different design voltages or with different numbers, sizes, and types of conductors; (4) transmission lines with different terminals or substations; and (8) any reasonable combinations of the alternatives listed in subitems (1) to (7). Minn. R. 7849.0260, subp. B (2009).

Neither the ALJ nor the MPUC concluded that there were no feasible and prudent alternatives, including new and upgraded generation and transmission of lower voltages to address the community reliability needs met by the La Crosse Project. Both the ALJ and the MPUC focused on the potential that the alternatives might be more costly than the La Crosse Project or might require construction of more facilities.

In preferring the La Crosse Project over the lower voltage transmission lines evaluated in the Applicants' Rochester/La Crosse Study, the ALJ found that the 345 kV option "would be least-cost or require fewer additional lower voltage lines." CETF Add., p. 18 (ALJ Finding 70). In discussing the alternatives in this Study, the ALJ emphasized economic considerations, "OES concurred that a lower voltage alternative to the La Crosse Project would have higher capital costs and higher losses than the 161 kV alternative." *Id.*, p. 26 (ALJ Finding 113). The ALJ did not compare the La Crosse Projects effects upon the natural and socioeconomic environment to those of lower voltage transmission and local generation alternatives as required by Minn. R. 7849.0120, subp. B. The focus of the comparison for the CapX2020 Projects and potential alternatives was economic cost:

297. OES closely evaluated the costs of the three projects, including the cost of energy losses and termination points, to determine if there was a more reasonable and prudent alternative to the CapX projects.

426. No party has demonstrated by a preponderance of the evidence that there is a more reasonable and prudent alternative to the Applicants' proposed project. CETF Add., pp. 59, 84.

The MPUC, in its Order granting certificates of need similarly failed to consider the effects of the La Crosse Project and its alternatives on the natural environment and focused on an assessment of economic cost:

Applicants explored a variety of alternatives for enhancing reliability in the area to be served by the La Crosse Project. These included alternative transmission projects - higher and lower voltage lines, or extending a double-circuit line from the Twin Cities to La Crosse - as well as alternatives that did not rely on new transmission - generation, conservation, and efficiency. Applicants concluded that the La Crosse Project provided the maximum benefits for the minimum price. For example, while a lower-voltage transmission line is less expensive than a 345

kV line, Applicants would need to build so many of them to substitute for a 345 kV line that this alternative would prove to be more expensive. CETF Add., pp. 125-126.

The MPUC did not consider legal and environmental complications raised by CETF regarding the La Crosse Project in denying CETF's petition for reconsideration. CETF Add., pp. 159, 164.

CETF does not concede that the generation and transmission alternatives described in the Statement of Facts, *supra*, pp. 17-20 would be more costly than Applicants \$389 million to \$432 million La Crosse Project. In CETF's exceptions to the ALJ Report and brief in support of reopening the record, we evidence that proposed lower voltage transmission and generation upgrades could be substantially less expensive than the La Crosse Project. *See* CETF App., pp.33-35.

However, evidence of comparative costs is not dispositive. Under certificate of need rules, the MPUC was required to consider comparative environmental impacts of the La Crosse Project and its alternatives. The MPUC failed to do so, and this failure constituted an error of law. The regulation requiring this comparison, Minn. R. 7849.0120, subp. B(3), is clear and capable of understanding, and this Court may make its own judgment about the agency's compliance. *MCEA v. MPCA, supra*, 696 N.W.2d at 108.

The failure to make a comparison of environmental effects is particularly salient, as explained in the sections below, because the proposed La Crosse Project would construct a high voltage power line in an area prohibited under Minnesota rules, would impair the purpose for which a national wildlife refuge was designated and is likely to

cause impairment or destruction of natural resources within the state in violation of MEPA and MERA.

C. The MPUC erred in certifying the La Crosse Project in an area prohibited under Minnesota law.

Minnesota rules prohibit routing of high voltage transmission lines through a national wildlife refuge where there is a feasible and prudent alternative:

No high voltage transmission line may be routed through state or national parks or state scientific and natural areas unless the transmission line would not materially damage or impair the purpose for which the area was designated and no feasible and prudent alternative exists. Economic considerations alone do not justify use of these areas for a high voltage transmission line. Minn. R. 7850.4300, subp. 2 (2009).

The MPUC was required to consider potential conflicts with this Rule in this certificate of need proceeding since all proposed and certified routes for the La Crosse Project would require routing through a national wildlife refuge. *Supra*, p. 12.

Substantial evidence on the record precludes a finding that the La Crosse 345 kV power line would not materially damage or impair the purposes for which the Upper Mississippi River National Wildlife Refuge, including provision of a refuge and breeding place for migratory birds, wild birds, animals, fish and aquatic animal life and conservation of plants, *supra*, pp. 31-32. Each potential crossing of the Wildlife Refuge would impact eagles, egrets, herons, and pelicans that cross back and forth over the Mississippi River as they use the various sloughs and channels on either side of the refuge. Each proposed route would impact active breeding of rare and endangered migratory bird species, *supra*, pp. 12-15. Each crossing of the Wildlife Refuge proposed

for the La Crosse Project would expand existing right-of-way and fragment habitat, potentially impairing areas of high biodiversity significance and rare and endangered plants and animals, *supra*, pp. 16-17.

Neither lower voltage transmission improvements -- the RIGO 161 kV transmission lines, the Rochester-Adams reconductoring, and the completion of lower voltage facilities identified in the Applicants' Rochester/La Crosse Study -- nor upgrades of the French Island power plants to run as system support during summer peak demand, *supra*, pp. 17-20, would require routing high voltage transmission through the Wildlife Refuge. The MPUC failed to analyze whether these improvements provide a feasible alternative to the La Crosse Project to avoid routing in a prohibited area. *Supra*, p. 30.

The MPUC and the ALJ, *supra*, pp. 36-37, focused on the likely costs of these alternatives. CETF disputes that the record demonstrates that costs of these alternatives would be higher. But economic considerations do not justify the use of a national wildlife area for new high voltage transmission. Minn. R. 7850.4300, subp. 2. Certification of the La Crosse Project was an error of law.

D. Approval of the La Crosse Project violated MEPA and MERA, since the Project is likely to impair natural resources and there are feasible and prudent alternatives consistent with the State's paramount concern for the environment.

The Minnesota Environmental Policy Act ("MEPA") prohibits state action likely to impair natural resources when there are feasible and prudent alternatives, as follows:

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).

The Minnesota Environmental Rights Act (“MERA”) specifically prohibits agency approval in administrative proceedings of conduct likely to impair natural resources where there is a feasible and prudent alternative:

In any such administrative, licensing, or other similar proceedings, the agency shall consider the alleged impairment, pollution, or destruction of the air, water, land, or other natural resources located within the state and no conduct shall be authorized or approved which does, or is likely to have such effect 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. § 116B.09, subd. 2 (2009).

High voltage transmission lines are subject to both MEPA and the MERA. *PEER v. MEQB, supra*, 266 N.W.2d at 864; *No Power Line, Inc. v. MEQC, supra*, 262 N.W.2d at 323-324. Once it has been shown that a high voltage transmission line is likely to result in environmental impairment, approval is only justified if the state agency demonstrates that no feasible and prudent alternative exists to the project consistent with the public health, safety and welfare. *PEER v. MEQB, supra*, 266 N.W.2d at 867.

Certificate of need proceedings for large energy facilities are subject to both MEPA and MERA, Minn. Stat. §§ 116D.04, subd. 6, 116B.09, subd. 2. *In re Application for a Certificate of Need for Construction of an Independent Spent Fuel Storage Installation*, 501 N.W. 2d 638, 648-649 (Minn. App. 1993). By statute, economic

considerations alone shall not justify pollution, impairment or destruction of the state's natural resources under MEPA, § 116D.04, subd. 6, and MERA, §116B.09, subd. 2. "The burden of demonstrating that there is no prudent and feasible alternative is on the permit applicant." *MCEA v. MPCA*, *supra*, 696 N.W. 2d at 102. Where there is insufficient record evidence to support rejection of alternatives that would prevent environmental harm, reversal and remand to the agency is appropriate. *Id.*, at 105.

Even if a proposed project "may be more convenient, indeed may be more efficient" than the alternatives, it is still not justified under MERA and applicable case law. *State by Archabal v. Cty. of Hennepin*, 495 N.W.2d 416, 426 (Minn. 1993). In the absence of "unusual or extraordinary factors" environmentally destructive conduct cannot be permitted if a feasible and prudent alternative is shown. *Id.*, at 423.

The Minnesota Supreme Court has determined that, "by definition, the siting of HVTLs (high voltage transmission lines) will cause some impairment of the environment." *PEER v. MEQB*, *supra*, 266 N.W. 2d at 867-868. In this proceeding, the impairment of natural resources by the La Crosse Project is supported by substantial evidence on the record. *Supra*, pp. 12-17. The CapX2020 345 kV transmission projects require taller towers and wider rights-of-way than the lower voltage transmission alternatives. Ex. 1, pp. 2.12-2.15 (Application). As noted previously, *supra*, pp. 19-20, the lower voltage transmission and local generation alternatives to the La Crosse Project would not expand rights-of-way in or impair the Wildlife Refuge or impact view sheds in the Mississippi River bluffs area.

The MPUC failed to analyze local generation and lower voltage transmission alternatives to the La Crosse 345 kV high voltage transmission line under the standards set by MEPA and MERA, which must reflect “the state's paramount concern for the protection of its air, water, land, and other natural resources from pollution, impairment, or destruction.” Minn. Stat. §§ 116D.04, subd. 6; 116B.09, subd. 2. The MPUC’s rejection of alternatives to the La Crosse Project in order to secure “the maximum benefits for the minimum price,” *supra*, p. 36, violates the statutory requirements of MEPA and MERA. Where conduct under administrative permit or approval is likely to impair natural resources, it is clear under both MEPA and MERA, “Economic considerations alone shall not justify such conduct.” Minn. Stat. §§ 116D.04, subd. 6; 116B.09, subd. 2. Certification of the La Crosse Project was an error of law.

III. THE MPUC EXCEEDED ITS AUTHORITY IN CERTIFYING THE CAPX202 UPSIZED ALTERNATIVE GIVEN THE LACK OF EVIDENCE OF NEED FOR THE UPSIZED PROJECTS.

Minnesota statutes provide the MPUC with authority to certify a large energy facility if it is needed to meet a demand for electricity. Minn. Stat. § 216B.243, subd. 3. Once a transmission project is certified, utilities may recover the costs to build that facility from ratepayers. Minn. Stat. § 216B.16, subd. 7b (2009).

The MPUC’s authority to certify energy projects and impose costs on ratepayers is constrained by the statutes, and the MPUC cannot exceed the authority granted. “The PUC is a state agency of statutory origin. As such, it has only that jurisdiction conferred to it by the legislature.” *Senior Citizens Coalition v. Minn. Pub. Util. Comm’n*, 355 N.W.2d 295, 302 (Minn. 1984), *citing* Minn. Stat. § 216A.01; *McKee v. Cty. of Ramsey*,

245 N.W.2d 460, 462 (1976); *State by Spurck v. Civil Service Board*, 32 N.W.2d 583, 586 (1948). The Court in *Senior Citizens Coalition* found the MPUC exceeded its authority in attempting to provide intervenor compensation.

The Court of Appeals held *In re Investigation into the Commission's Jurisdiction*, *supra*, that MPUC exceeded statutory authority in asserting jurisdiction over a municipal utility' pipeline:

As a creature of statute, the MPUC enjoys only the authority granted to it by the legislature. *Minnegasco v. Minnesota PUC*, 549 N.W.2d 904, 907 (Minn. 1996); *Frost-Benco Elec. Ass'n*, 358 N.W.2d at 642; *see also Great N. Ry. v. Pub. Serv. Comm'n*, 284 Minn. 217, 220-21, 169 N.W.2d 732, 735 (1969) (applying same principle in case involving the interstate commerce commission). That authority may be either express or implied. "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." *Peoples Natural Gas Co. v. Pub. Utils. Comm'n*, 369 N.W.2d 530, 534 (Minn. 1985) (holding that the commission lacked express or implied authority to enforce its own orders by ordering a customer refund; noting that other enforcement tools were available in the statutes). 707 N.W.2d at 226.

The MPUC's Order granting certificates of need makes no determination that the "upsized" alternative, with larger power line towers built to support a future second 345 kV circuit, is required to meet the needs asserted in the CapX2020 Application. To the contrary, the Order states:

CETF also argues that the La Crosse, Brookings and Fargo Projects as proposed were designed to meet customer demand through 2020, and that any benefits arising from Upsizing these projects would not accrue until beyond that planning horizon. Applicants again concede the point. CETF Add., p. 136.

The MPUC variously justifies its approval of the "upsized" alternative as "an opportunity to anticipate a longer-term need," a benefit of "increased flexibility and avoided costs associated with building new transmission towers in certain areas," a "standard practice"

in other areas according to the Midwest ISO, and a way, if the single-circuit 345 kV projects are certified, to permit Applicants to make “optimum use of the resulting capital investments.” CETF Add., pp. 136-137.

CETF disputes whether the “upsized” alternatives provides benefits, such as avoided costs, given uncertainties about future demand, the location of generation, the cost of other transmission facilities needed to gain value from the second 345 kV circuit and other uncertainties regarding the energy future documented in the record. *Supra*, pp. 20-21. But even if there were sufficient record evidence to support such benefits, the MPUC would lack the statutory authority to certify the “upsized” version of the CapX2020 projects.

There is no statutory authority, express or implied, that would permit the MPUC to increase the size of a large energy facility beyond what is needed for energy reliability; the justifications offered in the MPUC’s Order have no statutory basis.

If the MPUC cannot expand its jurisdiction to award a few thousand dollars in intervenor compensation to senior citizens, the MPUC certainly has no authority to expand the statutory definition of need and award the CapX2020 utilities \$200 million from ratepayers as a result of the “upsizing” of facilities.

Allowing the MPUC to certify the “upsized” version of the CapX2020 projects in the absence of a determination of need would undermine the central purpose of limits on the MPUC’s authority to issue certificates of need contained in Minn. Stat. §216B.243, subd. 3. Many transmission lines or power plants that are not needed could arguably be

“upsized” under some theory of flexibility or optimum use of capital, placing additional and unpredictable burdens on ratepayers and landowners.

Without a showing of need, the MPUC had no authority to certify the “upsized” version of the CapX2020 projects. This certification was an error of law and should be reversed.

CONCLUSION

For the foregoing reasons and upon the records, files and authorities herein, CETF requests the following relief:

- Remand to the Minnesota Public Utilities Commission to supplement the record and consider newly-discovered evidence regarding regional demand for the CapX2020 Projects and to reconsider certificates of need based on this evidence.
- Reversal of grant of the certificate of need for the CapX2020 high voltage transmission La Crosse Project.
- Reversal of the grant of certificates of need for the “upsized” version of the CapX2020 high voltage transmission projects.

DATED: October 9, 2009

Respectfully submitted,



Paula Goodman Maccabee, Esq. (#129550)
Counsel for Citizens Energy Task Force
1961 Selby Ave.
St. Paul MN 55104
phone: 651-646-8890
fax: 651-646-5754
e-mail: pmaccabee@visi.com