



## I. Statement of the Issues

1. What action, if any, should the Commission take on GRE's letter dated August 26, 2022, filed in docket ET2/TL-20-423?
2. Does GRE's request to transplant Showy Lady's Slipper using an excavator constitute "construction" under Minn. Stat. § 216E.01, Subd. 3?
3. Does GRE's request to transplant the Showy Lady's Slipper require a permit amendment? If so, how should the permit be amended? If not, what procedural treatment is appropriate?

## II. Background

On December 17, 2021, the Minnesota Public Utilities Commission (Commission) issued a Route Permit to Great River Energy (GRE) and Otter Tail Power Company (OTP or, collectively Permittees) for the Frazee to Erie 115-kV Transmission Project (Project) in Becker and Otter Tail Counties, Minnesota.

Under Route Permit Condition 6.6, Permittees are required to make efforts to identify Showy Lady's Slippers and coordinate with landowners to avoid or transplant any plants once identified. The Permittees must then report back to the Commission with documentation of the coordination, locations of any plants, and avoidance measures taken. Route Permit Section 6.6<sup>1</sup> reads as follows:

*Permittees must coordinate with landowners regarding the identification of any showy lady's slipper. To the extent showy lady's slipper is identified, Permittees will coordinate with landowners to avoid or transplant plants. At least 14 days prior to submitting the plan and profile, the Permittees must file with the Commission documentation of landowner coordination that includes the location of identified showy lady's slipper and negotiated avoidance measures.*

On August 26, 2022, GRE submitted a letter to the Commission indicating that it plans to begin construction of its portion of the permitted route in the first half of 2023. The permit requires various filings and notices prior to the start of construction.

In its August 26, 2022 letter, GRE described its efforts to comply with Route Permit Section 6.6. The Permittee explained that in May 2022, it sent letters to landowners along the route asking them to identify and report the location of any Showy Lady's Slippers on their property. However, only when a GRE representative visited a particular site in July 2022 was it notified of Showy Lady's Slipper plants located within the utility right of way on the property of two landowners.

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<sup>1</sup> A condition protecting Showy Lady's Slippers was suggested by the Department of Commerce Energy Environmental Review and Analysis in the environmental assessment (Document ID: [20215-174159-01](#)) at p. 129 and Administrative Law Judge (ALJ) James E. LaFave (Document ID: [20219-177620-01](#)) discussed the flowers at Finding 210 and recommended including a condition in the route permit at Finding 274 of the ALJ Report.

GRE coordinated with the Minnesota Department of Natural Resources (DNR) and the landowners and determined that approximately 75 Showy Lady's Slippers were located on the two properties. GRE, the DNR, and the landowners developed a plan to transport and transplant the plants to other locations. The DNR recommended that these activities occur in the third or fourth week of September and an excavator be used to ensure a large cut of native soil will be transferred along with the plants. GRE's letter indicated that vegetation would need to be cleared in the right-of-way to facilitate the use of an excavator.

On August 30, 2022, the Commission issued a notice of comment period seeking input on the matter. The time period for notice of the Commission meeting and for comments was shortened in light of exigent circumstances associated with the request that work be completed this month.

### **III. Statutes and Rule**

Under Minn. R. 7829.1200, the Commission may use informal or expedited proceedings when a contested case is not required, and the rule lists examples such as when: A) there are no material facts in dispute; B) the parties and the commission have agreed to informal or expedited proceedings; or C) informal or expedited proceedings are authorized or required by statute. The rule also states that written submissions are the preferred method for introducing facts but describes procedures for how oral presentation of facts may be accomplished.

The rules also require at least a 10-day notification before a meeting where the Commission may act on the basis of informal or expedited proceedings. However, under exigent circumstances the Executive Secretary shall reduce the notice period.

Under Minn. R. 7829.2800, the Commission is required to provide 10-day notice before a matter may come before the Commission. However, the Executive Secretary shall reduce this notice period under exigent circumstances.

Under Minn. Stat. § 216E.01, Subd. 3, "Construction" means any clearing of land, excavation, or other action that would adversely affect the natural environment of the site or route but does not include changes needed for temporary use of sites or routes for nonutility purposes, or uses in securing survey or geological data, including necessary borings to ascertain foundation conditions.

Under Minn. R. 7850.4900, the Commission may amend the conditions in a site permit of a large electric generating plant or route permit for a high voltage transmission line issued by the PUC upon the request of any person. The person requesting an amendment of a condition in a site or a route permit must submit an application to the Commission in writing describing the amendment being sought and the reasons for the amendment. Upon receiving the application for a permit amendment, the Commission must provide at least a 10-day period for interested persons to submit comments on the application or to request that the matter be brought to the Commission for consideration. After close of the public comment period, the Commission must decide whether to approve the amendment request or to bring the matter to the Commission for consideration.

Under Minn. R. 7829.3200, Subp. 1, the Commission is authorized to grant a variance to its rules upon determining the following conditions are met: 1) Enforcement of the rule would impose an excessive burden upon the applicant or others affected by the rule; 2) Granting the variance would not adversely affect the public interest; and 3) Granting the variance would not conflict with standards imposed by law.

#### **IV. Comments**

##### **A. Great River Energy (GRE)**

On September 2, 2022, GRE submitted comments updating the Commission on the status of compliance with Route Permit section 6.6. In the letter GRE described that the transplanting of plants would now be done by the Frazee-Vergas chapter of the Future Farmers of America, in coordination with the DNR, and that it does not appear tree clearing will be necessary to transplant the Showy Lady Slippers. GRE stated it believed no further action from the Commission would be required, however GRE stated it supports DOC EERA's proposed permit amendment language in case the transplanting process were to ultimately require additional equipment or tree clearing.

##### **B. Department of Commerce Energy Environmental Review & Analysis (DOC EERA)**

On September 2, 2022, DOC EERA submitted comments stating its belief that the route permit should be amended to allow for compliance with Route Permit Section 6.6. DOC EERA proposed adding the second paragraph below to the existing Section 6.6 (first paragraph) of the permit.

Section 6.6 Showy Lady's Slipper Permittees must coordinate with landowners regarding the identification of any showy lady's slipper. To the extent showy lady's slipper is identified, Permittees will coordinate with landowners to avoid or transplant plants. At least 14 days prior to submitting the plan and profile, the Permittees must file with the Commission documentation of landowner coordination that includes the location of identified showy lady's slipper and negotiated avoidance measures.

Notwithstanding Section 9.1 herein, the Permittees may take actions that would otherwise constitute construction to comply with landowner requests to transplant showy lady's slipper plants. This includes necessary clearing and excavation. The Permittee must coordinate these actions with the Third-Party Monitor identified in Section 6.10 and the Department of Natural Resources.

##### **C. Minnesota Department of Natural Resources (DNR)**

On September 2, 2022, the DNR submitted comments stating that GRE's description of coordination with the DNR in GRE's August 26, 2022 letter is accurate and encouraged GRE to continue coordinating with the DNR to aid in the successful transfer of the Showy Lady's Slippers.

## V. Staff Analysis

The noticed issues for the Commission to consider are what action should the Commission take in response to GRE's August 26, 2022 letter, whether GRE's request to transplant the Showy Lady's Slipper constitute construction under statute, does the request to transplant the plants require a permit amendment; if so, how should the permit be amended; or if not, what is the appropriate procedural treatment.

### A. Construction" under Minn. Stat. § 216E.01, subd. 3.

The Commission may consider whether it needs to reach the question of whether the proposed work (either as originally described or updated) constitutes construction, or simply determine whether the proposed amendment is in the public interest.

If the Commission is inclined to consider the question, staff notes that GRE's description of the extent of excavation and vegetation clearing in the original August 26 letter appears to meet the definition, which includes the word "excavation" and excepts only "temporary use of sites for non-utility purposes." Because the original work described was to clear vegetation in the utility right of way, it may well constitute "construction" under the statute. While GRE's September 2 letter indicated less vegetation clearing would be needed, the fact situation appears fluid as to whether the activities constitute construction.

### B. Amendment to the Route Permit

Under Minn. R. 7850.4900, the Commission has the authority to amend permits it has issued. The rule contemplates that a person would need to request the amendment and describe why it was needed in writing, then a 10-day comment period for public comments or requests for it to be brought before the Commission would occur. Then the Commission decides whether to approve the request or to bring the matter before the Commission.

DOC EERA suggested an amendment to Route Permit section 6.6 to allow for the permittees to comply with that permit section and transplant the Showy Lady's Slippers.

DOC EERA's suggested language is shown below:

Notwithstanding Section 9.1 herein, the Permittees may take actions that would otherwise constitute construction to comply with landowner requests to transplant showy lady's slipper plants. This includes necessary clearing and excavation. The Permittee must coordinate these actions with the Third-Party Monitor identified in Section 6.10 and the Department of Natural Resources.

Staff believes the permit amendment language as suggested by DOC EERA would be appropriate in order to allow GRE to comply with Route Permit Section 6.6.

### C. Rule Variance

In order to amend the route permit and best meet the DNR's recommendation that plants be transplanted in the third or fourth week of September, the Commission would need to vary Minn. R. 7850.4900 to truncate the comment period for a permit amendment. Requiring the applicant to submit a permit amendment application in writing, having the required 10-day comment period, and then scheduling the item for an agenda meeting would take the matter into mid-to-late September, the time period when the DNR recommended the transplanting occur.

If the Commission were inclined to amend the route permit, it has the authority to do so as it could vary the rules. Under Minn. R. 7829.3200, Subp. 1, the Commission is authorized to grant a variance to its rules upon determining the following conditions are met: 1) Enforcement of the rule would impose an excessive burden upon the applicant or others affected by the rule; 2) Granting the variance would not adversely affect the public interest; and 3) Granting the variance would not conflict with standards imposed by law.

If the Commission so chooses, staff believes the three conditions to vary the rule would be met as follows:

1. Enforcement of the rule would impose an excessive burden on the Permittee and those reasonably likely to be affected by the proposed transplanting of the Showy Lady's Slipper by limiting the Permittee's ability to transplant the Showy Lady's Slippers as required under the Route Permit. Not varying the rule may increase the likelihood that the plants would not survive transplanting, which is directly contrary to the purpose of permit section 6.6.
2. Granting the variance would not adversely affect the public interest and would in fact serve the public interest by enabling the Permittees to protect and potentially save the Showy Lady's Slippers through transplanting the plants as required in the Route Permit.
3. Granting the variance would not conflict with standards imposed by law since the process for amending a Commission issued route permit is by rule not statute.

## VI. Decision Options

### Construction

1. Determine that GRE's request to transplant Showy Lady's Slipper using an excavator constitutes "construction" under Minn. Stat. § 216E.01, Subd. 3.
2. Determine that GRE's request to transplant Showy Lady's Slipper using an excavator does not constitute "construction" under Minn. Stat. § 216E.01, Subd. 3.

### Amendment to Route Permit

3. Amend the Route Permit issued to Great River Energy and Otter Tail Power Company to reflect language suggested by DOC EERA. (*Applicant, DOC EERA, Staff*)

### Rule Variance

4. Grant a variance to Minn. R. 7850.4900 and allow an amendment to GRE and Otter Tail Power Company's Route Permit under exigent circumstances for the Frazee to Erie High Voltage Transmission Line. (*Staff*)

**Staff Recommendation:** 3, 4