

## Supplemental Staff Briefing Papers

Meeting Date    December 16, 2021    Agenda Item 4\*\*

Company    All Electric, Electric Transmission and Independent Power Producers

Docket No.    **E,ET,IPP-999/R-12-1246**

**In the Matter of Possible Amendments to Rules Governing Certificates of Need and Site and Route Permits for Large Electric Power Plants and High-Voltage Transmission Lines, Minnesota Rules, Chapters 7849 and 7850; and to Rules Governing Notice Plan Filing Requirements for High-Voltage Transmission Lines, Minnesota Rules, part 7829.2550**

Issues    Should the Commission Authorize Modifications to the Proposed Rules Published in the October 11, 2021 *State Register*

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The attached materials are work papers of the Commission Staff. They are intended for use by the Public Utilities Commission and are based upon information already in the record unless noted otherwise.

## I. Public Hearing on Proposed Rules

A public hearing was held on the proposed rules on December 6, 2021. Administrative Law Judge (ALJ) Middendorf presided over the hearing and heard oral comments from approximately 29 persons via WebEx. Approximately 75 people attended the WebEx.

Anyone wishing to speak was able to do so before the close of the hearing.

The following persons spoke:

- Linda Herron
- Carol Overland
- Kathleen Schuler
- Lisa Crum and Luke Peterson – Hibbing Public Utilities Commission
- Delaney Russell
- Jaci Christenson
- Eamonn Fetherston
- Allan Campbell
- Bonnie Beckel
- Jessica Tritsch – Sierra Club
- Doug Gurian-Sherman
- Samuel Rosemark
- Hudson Kingston – Public Employees for Environmental Responsibility
- Louise Miltich – Department of Commerce, Energy Environmental Review and Analysis
- Heather Westra – Prairie Island Indian Community
- Maggie Schuppert – Clean up the River Environment
- Meghan Hassett – Union of Concerned Scientists
- Betsy Schmiesing – EDF Renewables
- Kevin Pranis – Laborers International Union of North America
- Alex Pouliot, Land and Liberty Coalition
- Stephan Roos – Department of Agriculture
- Allan Muller
- Kathy Hollander
- Tess Dornfeld
- Jami Gaither
- Amanda Bilek – Minnesota Corn Growers Association
- Nookomis Debra Topping

## II. Process for Considering Comments on the Proposed Rules

Once an agency publishes proposed rules, a public comment period offers interested persons the opportunity to comment on the rules, recommend modifications, and request a public hearing if they object to the rules. This comment period is the first formal step of the rulemaking process. Following the close of this comment period, a public hearing is held by an ALJ if the agency receives 25 or more hearing requests. After the close of the public hearing, the

agency has its first opportunity to make modifications in response to written and oral comments. Post-hearing comment periods also offer interested persons the opportunity to file additional comments. After the close of the post-hearing comment periods, the ALJ issues a report on the proposed rules and any modifications authorized by the agency. The agency then has a second opportunity to make changes before adopting the rules. The version of rules finally adopted is then sent to the Governor's Office for approval.

In this case, the Commission could, at this point in the rulemaking process, make its first round of modifications to the proposed rules and send those changes to the ALJ for review. After the ALJ issues her report, the Commission would have a second opportunity to make modifications, consistent with the rulemaking process described above.

While much effort – depending on the scope and volume of changes in any given rulemaking proceeding – is devoted to developing drafts for Commission consideration, the publication of proposed rules is the mechanism for generating input from a broader audience with a subsequent opportunity for an agency to make reasonable modifications in response to comments.

In this case, the proposed rules have generated a breadth of public comment on a wide variety of issues, many outside the scope of this rulemaking. Significant effort was made, however, to develop changes to address the issues identified in written comments. Based on subsequent oral comments at the public hearing, however, it is unlikely that modifications to the proposed rules would fully satisfy the concerns raised, some of which may require legislative policy changes.

### **III. General Comments**

Most comments at the public hearing were general comments that did not identify recommended changes to specific rule provisions. They largely reiterated written comments, which recommended that the Commission's rules address issues such as greenhouse gas emissions, climate change, and environmental justice. Although staff's recommended modifications would require the Commission to consider these factors when evaluating certificate of need and permit applications, many commenters stated that adding criteria for Commission consideration does not sufficiently address these issues. For example, the Sierra Club recommended that the Commission develop rules that would require consideration of emissions, explicitly protect environmental justice communities, and make it clear to the public how they can participate in Commission proceedings.

Some commenters also recommended that climate change and greenhouse gases be elevated over other criteria in the decision-making process. To the extent that commenters recommend that the Commission establish standards for prioritizing some impacts over others, or establish different legal standards for evaluating applications, such changes may exceed the scope of the Commission's existing statutory authority and instead require legislative action.

Comments were also made critiquing the rule changes affecting Tribal notification as inadequate Tribal consultation practices. The agency adopted a Tribal consultation policy in 2019 that directs its Tribal outreach and engagement practices. This policy includes Tribal notification practices and annual consultations and provides for consultations on non-docketed work.

Comments also criticized the lengthy process for developing the rules and lack of public engagement. The timeline for developing and publishing the rules (exceeding 7 years) has caused public concern that the proposed rules are out of date and that there is no longer support for the rule changes. The procedural steps that the agency followed are governed by the Administrative Procedure Act, Minn. Stat. Ch. 14.

Many commenters also recommended that the Commission discontinue this rulemaking proceeding and begin a new proceeding aimed at more significant rule changes to address these issues. They recommended that the Commission appoint an advisory committee that includes members of Tribal nations and environmental justice communities, among others, to address the issues raised. Finally, no comments were made at the public hearing in support of the rules.

Initiating a new rulemaking would likely take significant staff resources. A rulemaking proceeding that is aimed at updating only a portion of a rule chapter takes approximately two years due in large part to the statutory requirements applicable to the rulemaking process but also due to the involvement of other state agencies, such as the Office of the Revisor of Statutes, Minnesota Management and Budget, and the Office of Administrative Hearings. Extensive changes to two rule chapters when working with an advisory committee could take significantly longer. Staff resources may better be used by leaving the existing rules in place, continuing to examine these issues on a case-by-case basis, and granting variances as needed.

#### **IV. Prime Farmland**

At the public hearing, EDF Renewables, Inc., reiterated its recommendation that the Commission modify the prime farmland rule, part 7850.4400, subp. 4, and recommended following the procedures of Minn. R. 1400.2110, an expedited method of adopting a substantially different rule. Using an expedited process is inapplicable, however, if “in light of the nature of the substantially different modification and the course of the rule proceeding, it would not be fair to affected persons to allow the agency to adopt the modification without initiating a new rule proceeding.”

The anticipated engagement of stakeholders such as the Department of Agriculture and the Minnesota Corn Growers Association, which recommended a separate rulemaking proceeding, make it less likely that the use of an expedited process would be authorized by the Chief Administrative Law Judge, who makes that determination. It is unlikely that moving forward with the proposed rules, while also proposing to amend the prime farmland rule, would be an efficient use of staff resources, particularly considering public interest in a new rulemaking proceeding with a much different scope.

## V. The EERA

The EERA was instrumental in developing the proposed rules through the advisory committee process and supported many of the rule changes. The ongoing dialogue between agencies and among stakeholders reflected a process in which committee members identified issues and possible solutions, with many ideas moving forward. The proposed rules were developed to incorporate as many suggested recommendations as possible, and the committee worked extensively to achieve consensus and did so on many issues. The Commission ultimately authorized publication of the proposed rules after taking comment from stakeholders, including extensive input from the EERA.

Since that time, the EERA has stated it will no longer support this rulemaking proceeding. Although staff has attempted to fully address the EERA's recommended modifications, the EERA stated that it prefers not to continue this rulemaking.

Although staff believes that the proposed rules are needed and reasonable and incorporate many useful updates, revisions, and clarifications, stakeholders have ultimately found ways to successfully navigate Commission review of applications without updated rules. Moreover, the issues raised pertaining to climate change, environmental justice, and tribal engagement are matters that have previously been, and may continue to be, addressed in project reviews and approvals under the existing rules. And although many commenters made recommendations that would further increase the quality of the proposed rules, these rules largely affect the EERA's roles and responsibilities in overseeing environmental review and how it manages deadlines. It is unlikely that changes to these rules could be successfully implemented without its support.

## VI. Next Steps

Ordinarily, the next steps of a rulemaking process would be to authorize any modifications to the proposed rules before the ALJ considers the proposed rules and issues her report, after which the Commission would adopt the proposed rule with any additional changes. Considering the input and feedback from stakeholders and members of the public, however, the Commission could instead withdraw the rule and avoid additional use of limited staff and other agency resources that would otherwise be required to continue this proceeding. This approach would leave the existing rules in place, and as stated above, enable the Commission to continue evaluating projects on a case-by-case basis.

## VII. Decision Options

- A. Withdraw the proposed rule and authorize the Executive Secretary to notify the Office of Administrative Hearings of its decision, or
- B. Proceed with the rulemaking and authorize modifications to the proposed rules as reflected in the staff's December 3 briefing paper, with additional modifications, or
- C. Proceed with the rulemaking without modifications to the proposed rules.