MH/DCN-1029

EXHIBIT #
WUSKWATIM GENERATION
& TRANSMISSION PROJECT
CLEAN ENVIRONMENT COMMISSION

STATE OF MINNESOTA
IN COURT OF APPEALS
A03-836

In the Matter of the Petition of Northern States Power Company for Review of its 1999 All source Request for Proposals.

Filed March 30, 2004
Affirmed
Randall, Judge

Minnesota Public Utilities Commission
File No. E-002/M-99-888

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approve a power-purchase agreement between Xcel Energy and Manitoba Hydro. Relator argues that the commission erred in (1) denying its request for a contested case hearing, and (2) failing to adequately consider the environmental and socioeconomic costs associated with the Manitoba Hydro Project. We affirm.

FACTS

Manitoba Hydro is a Crown (Canadian) Corporation owned by the Province of Manitoba, with capital assets in service exceeding $7 billion, making it the fourth largest electrical utility in Canada. Manitoba Hydro has engaged in energy trading with Minnesota utilities since 1970, and has electricity-trading partnerships with several Minnesota utilities, including Xcel Energy, Minnesota Power, Great River Energy, Otter Tail Power Company, and MinnKota Power Cooperative. Virtually all of Manitoba Hydro's existing generation is hydroelectric, consisting of a system of dams, reservoirs and electric generation facilities that were built in connection with the Manitoba Hydro Project.

Construction of the Manitoba Hydro Project (the Project), also known as the Churchill-Nelson Hydroelectric Project, began in the 1960's. This project was a joint undertaking by Canada, the province of Manitoba, and Manitoba Hydro, and constituted an enormous effort that contained three fundamental elements: (1) the Churchill River Diversion; (2) the Lake Winnipeg Regulation; and (3) a series of generating stations on the

quarters of the electricity produced in Manitoba. A twin set of transmission lines, approximately 900 kilometers in length, deliver power from the Nelson River to southern Manitoba. All elements are located within the boundaries of Canada.

Since the inception of the Manitoba Hydro Project in the 1960's, there have been concerns regarding the environmental and socioeconomic consequences the project has had on the surrounding ecosystem. To help alleviate these concerns, the Northern Flood Agreement was signed in 1977. The Northern Flood Agreement (NFA) is an agreement between Manitoba Hydro, the Province of Manitoba, the Government of Canada (collectively known as the "Crown Parties") and five Cree Nations, including Cross Lake Cree Nation, now known as Pimicikamak Cree Nation (relator).[2] Pursuant to the NFA, the Crown Parties are to provide mitigation and compensation to the Cree Nations for adverse effects of the Manitoba Hydro hydroelectric operations, including socioeconomic effects. Because of the uncertainty of these impacts, both at the time of the initial construction of the hydroelectric facilities and into the future, the NFA recognized that it was not possible to foresee all of the impacts or who might be impacted. Thus, the NFA established an arbitration process and fully empowered the Arbitrator "to fashion a just

Manitoba Hydro bid prior to submission of a final PPA.[3] Respondents, Manitoba Hydro, Xcel Energy, Nisichawayasihk Cree Nation, and Split Lake Cree Nation, all filed comments and/or participated in an all-day hearing held on November 30, 2000. At this hearing, respondents recommended that the Commission approve the selection of Manitoba Hydro as a winning bidder, and allow the process to move forward to negotiation of a PPA and submission of that PPA to the Commission for a review and approval.

On February 7, 2001, the Commission issued its Order rejecting requests for further investigation, approving the final bid selections, and opening the docket regarding externality values. In rejecting relator's request to examine further the alleged socioeconomic costs related to Manitoba Hydro's bid, the Commission stated that "proper consideration of the socioeconomic impacts of Manitoba Hydro's current bid does not alter [Xcel Energy's] selection of Manitoba Hydro." The Commission also deemed "the socioeconomic impacts of this generation to be adequately internalized by Manitoba Hydro pursuant to the December 16, 1988 [NFA]." The Commission explained that the NFA provides the framework for its parties to address their grievances and obtain bargained-for compensation. Relator is a signatory to the NFA. Based on its analysis, the Commission concluded that Xcel Energy adequately considered the socioeconomic costs as required by Minn. Stat. § 216B.2422, subd. 3, and no further evaluation of Manitoba Hydro's bid was necessary.

After the Commission issued its February 7, 2001, Bid Selection Order, Xcel Energy negotiated the PPA with Manitoba Hydro. In September 2002, the PPA was submitted to the Commission for approval. Shortly thereafter, relator filed a petition requesting a contested case hearing regarding the Manitoba Hydro PPA.

ISSUES

I. Did the Minnesota Public Utilities Commission err by denying relator's request for a contested case hearing in regard to the Commission's consideration of a Power Purchase Agreement between Xcel Energy and Manitoba Hydro?

II. Did the Commission fail to adequately consider the environmental and socioeconomic costs associated with the Manitoba Hydro Project?

ANALYSIS

I.

The standard of review of an agency decision denying a contested case hearing is governed by Minn. Stat. § 14.69 (2002). This statute provides that a reversal is warranted only if the agency's decision is: (1) in violation of constitutional provisions, (2) in excess of the agency's statutory authority or jurisdiction, (3) made upon unlawful procedure, (4) affected by other error of law, (5) unsupported by substantial evidence, or (6) arbitrary or capricious. *Id.* "Decisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by courts to agencies' expertise and their special knowledge in the field of their technical training, education and experience." *Reserve Mining Co. v. Herbst,* 256 N.W.2d 808, 824 (Minn. 1977). A reviewing court may not substitute its own judgment for that of an administrative agency when the finding is properly supported by the evidence. *Vicker v. Starkey,* 265 Minn. 464, 470, 122 N.W.2d 169, 173 (1963).

Relator argues that it is entitled to a contested case hearing to determine the socioeconomic and environmental effects of the Manitoba Hydro Project. The Minnesota Public Utilities Commission's rules provide that:

> If a proceeding involves contested material facts and there is a right to a hearing under a statute or rule, or if the commission finds that all significant issues have not been resolved to its satisfaction, the commission shall refer the matter to the Office of Administrative Hearings for contested

> the commission establishes environmental cost values under paragraph (a).

Minn. Stat. § 216B.2422, subd. 3.

There is nothing in the plain language of Minn. Stat. § 216B.2422, subd. 3, that provides for the right to a contested case hearing. Had the legislature intended to require a contested case hearing, it could have provided for one. *See In re Deregulation of Installation & Maintenance of Inside Wiring*, 420 N.W.2d 650, 655-56 (Minn. App. 1988) (stating that since the legislature did not require a contested case hearing under the statute, the court could assume that a contested case hearing is not required in the case of a summary investigation by the Commission). The APA specifically states that there is no right to a contested case hearing unless another statute provides such a right. *See* Minn. Stat. § 14.57(a). Because the plain language of section 216B.2422, subd. 3, does not specifically provide for the right to a contested case hearing, a hearing is not created under the statute.

Despite the lack of plain language requiring a contested case hearing, relator asserts that a right to a contested case hearing is created under Minn. Stat. § 216B.2422 subd. 3(a), Minn. R. 7843.0500, subp. 3, claiming these provisions legally require the Commission to make specific findings of fact regarding the extent of uncompensated and unremediated environmental and socioeconomic costs of the Manitoba Hydro Project before approving the pending PPA. Because of the complexity of the factual determinations, relator contends that the only way for the Commission to fulfill this legal obligation is to hold a contested case hearing.

Section 216B.2422, subd. 3(a), states that "[t]he commission *shall, to the extent practicable, quantify and establish a range of environmental costs* associated with each method of electricity generation. Minn. Stat. § 216B.2422, subd. 3(a). But the statute

reliability of utility service;

B. keep the customers' bills and the utility's rates as low as practicable, given the regulatory and other constraints;

C. minimize adverse socioeconomic effects and adverse effects upon the environment;

D. enhance the utility's ability to respond to changes in the financial, social, and technological factors affecting its operations; and

E. limit the risk of adverse effects on the utility and its customers from financial, social, and technological factors that the utility cannot control.

Minn. R. 7843.0500, subp. 3. Based on the plain language of the rule, Minn. R. 7843.0500, subp. 3, only applies to the Commission's consideration of Resource Plans. The proceeding from which this appeal stems relates to Xcel's bid selections and PPA's implementing its bid selections, not its Resource Plans. Consequently, the Commission was not obligated to consider environmental and socioeconomic costs under Minn. R. 7843.0500, subp. 3, and relator is not entitled to a contested case hearing under Minn. Stat. § 216B.2422, subd. 3(a), and Minn. R. 7843.0500, subp. 3.

Relator also contends that a contested case hearing may be implied, even though it is not specifically stated in an agency statute. In support of this argument, relator cites *Minn. Pub. Interest Research Group v. Minn. Envtl. Quality Council*, 306 Minn. 370, 237 N.W.2d 375 (Minn. 1975). In *Minn. Pub. Interest Research Group*, interested parties petitioned Minnesota's Environmental Quality Council (EQC) seeking preparation of an environmental impact statement in connection with the construction of an exploratory copper-nickel mine in northern Minnesota. The EQC denied the request, and the matter was appealed to the district court. The district court held that a contested case hearing was not required, and the matter was not subject to judicial review. On appeal to the

not require a contested case hearing within Minn. Stat. § 237.081, the court could assume that a contested case hearing was not required in the case of a summary investigation by the Commission).

Relator asserts that the Commission has acknowledged that the purpose of the integrated resource planning statute is "to ensure that utilities give adequate considerations of factors whose public policy importance has grown in recent years, such as the environmental and socioeconomic impacts of different mixes." Thus, relator claims that a right to a contested case hearing must be implied to ensure that the purpose of the environmental review provisions of the integrated resource planning statute is accomplished.

In *In re Solid Waste Permit for the NSP Red Wing Ash Disposal Facility*, 421 N.W.2d 398, 405 (Minn. App. 1988) *review denied* (Minn. May 18, 1988), the petitioners argued that the Environmental Rights Act and the Environmental Policy Act guaranteed them a right to a "meaningful hearing" which they claim they were denied. In support of their position, the petitioners cited the broad provisions in Minn. Stat. § 116B.01 (1986) that grants all Minnesota citizens the "right to the protection, preservation, and enhancement of air, water, land, and other natural resources located within the state." *Id.* The petitioners also cited the specific portion of that statute that provides "it is in the public interest to provide an adequate civil remedy." *Id.* The court held that the environmental acts alone do

relator must show that there are "contested material facts." The burden is on the relator, as the party requesting a contested case hearing, to demonstrate the existence of material facts that would aid the agency in making a decision. *In re Solid Waste Permit for the NSP Red Wing Ash Disposal Facility,* 421 N.W.2d at 404. There must be some showing that evidence can be produced that is contrary to the action proposed by the agency. *In re Amendment No. 4 to Air Emission Facility Permit No. 202I-85-OT-1,* 454 N.W.2d 427, 430 (Minn. 1990).

Here, relator argues that its factual affidavits clearly demonstrate that there are material issues of fact in dispute. Relator asserts that the affidavits address the nature, character, and extent of environmental and socioeconomic harms that have been caused by the Manitoba Hydro Project. But, none of the parties involved in the case, including Xcel Energy and the Commission, disputed the proposition that power generation in Manitoba has caused environmental and socioeconomic harm to relator. Thus, any issues concerning the environmental and socioeconomic damages caused by the Manitoba Hydro Project are not disputed material facts. *See In re N. States Power Co. Wilmarth Indust. Solid Waste Incinerator Ash Storage Facility*, 459 N.W.2d 922, 923 (Minn. 1990) (holding that relator

Relator argues that the Commission failed to adequately consider the environmental and socioeconomic costs associated with the Manitoba Hydro Project. We disagree. As stated in the above analysis, section 216B.2422, subd. 3(a), and rule 7843.0500, subp. 3, do not require the Commission to make specific findings of fact regarding the extent of uncompensated and unremediated environmental and socioeconomic costs of the Manitoba Hydro Project before approving the pending PPA. The Commission recognized this, and stated in its March 18, 2003 order that:

> In its February 7, 2001 Order, the Commission did not make, nor did it need to make, findings regarding the specific adverse affects of the Manitoba Hydro Project. Whatever those harms are, they are guaranteed to be paid and/or remedied under the NFA. In that sense, they have been adequately internalized by Manitoba Hydro, evaluated by Xcel and considered by the Commission.

To the extent that the Commission did consider the environmental and socioeconomic effects of the Manitoba Hydro Project, the considerations were adequate under the applicable law and circumstances of this case. The Commission recognized the existence of the NFA, which is intended to address the impacts of hydroelectric projects in Manitoba, both at the time of the initial construction and into the future. The NFA acknowledges that it is not possible to foresee all of the impacts or whom the Manitoba Project might impact. Therefore it sets out programs and principles for compensation or mitigation of Project impacts.

Under the NFA, the Arbitrator has been given a number of plenary powers. Pursuant to Article 24.6, the Arbitrator is given "broad authority and power to make awards capable of implementation and to fashion an appropriate remedy in respect of any and all adverse effects of the Project on any person . . ." The NFA further provides the Arbitrator with the power to make additional orders in respect to failure to comply with

The power purchase agreement between Xcel Energy and Manitoba Hydro does not extend to an examination by a Minnesota agency or Minnesota courts of the 1977 Northern Flood Agreement involving Canadian entities, the government of Canada, and five Canadian Cree nations. Those issues are controlled by the arbitration provisions of the NFA.

Affirmed.

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI § 10.

[1] The Churchill and Nelson Rivers are large rivers that flow in a roughly parallel direction from west to east, and empty into the Hudson Bay in northern Manitoba.

[2] The other four Cree Nations include: respondent Split Lake Cree Nation, respondent Nisichawaysihk Cree Nation, York Factory (Cree tribe) and Norway House (Cree tribe).

[3] Relator is the *only* Cree Nation involved in the NFA that opposed Manitoba Hydro as the winning bidder. The other four Cree Nations are against relator and they support the Minnesota Public Utilities Commission.

[4] Notably the court in *Minn. Pub. Interest Research Group*, did not actually order the agency to hold a contested case hearing because the court held that the hearing that had previously been provided to the aggrieved party by the agency was sufficient. *Minn. Pub. Interest Group*, 306 Minn. at 380, 237 N.W.2d at 381.