

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayner	Chair
Marshall Johnson	Commissioner
Ken Nickolai	Commissioner
Thomas Pugh	Commissioner
Phyllis A. Reha	Commissioner

In the Matter of Minnesota Power's Petition for
Review of an Agreement Between Minnesota
Power and American Transmission Company

ISSUE DATE: June 1, 2005

DOCKET NO. E-015/PA-04-2020

ORDER ASSERTING JURISDICTION AND
REQUIRING FURTHER FACT-FINDING

PROCEDURAL HISTORY

I. The Original Proceeding and Order Requiring the Current Filing

On June 23, 2004, the North American Water Office, Save Our Unique Lands, and 89 individual customers of Minnesota Power filed a Complaint with this Commission regarding Minnesota Power's plans to construct a transmission project known as the "Arrowhead Project," a proposed high-voltage transmission line running from Hermantown, Minnesota to Oliver, Wisconsin.

The Complaint alleged that the Arrowhead Project, for which Minnesota Power had obtained regulatory permits and exemptions and for which it was condemning private property, was in fact being proposed and constructed not for the benefit and ultimate ownership of Minnesota Power, but for the benefit and ultimate ownership of the American Transmission Company (ATC).

The Complaint claimed that Minnesota Power had abused the regulatory process by posing as the real party in interest when it was not, that it was abusing its power of eminent domain by condemning land it did not intend to use for its own facilities, and that it was doing these things as a proxy for the American Transmission Company, which lacked the legal authority to do them.

On September 24, 2004, the Commission issued an Order dismissing the Complaint on two grounds: (1) it related almost entirely to matters outside the Commission's jurisdiction; and (2) the one issue it raised that was clearly within the Commission's jurisdiction – ensuring that no transfer of any portion of the Arrowhead Project took place without Commission review – was not yet ripe.

The Order did, however, require Minnesota Power to file a petition for approval under the utility property transfer statute, Minn. Stat. § 216B.50, before transferring any ownership interest in the project, including rights-of-way, easements, or any related assets. In the alternative, the Order required the Company to make a filing explaining the basis for any conclusion it might reach that a § 216B.50 filing was not required.¹

II. The Current Filing

On December 23, 2004, Minnesota Power filed a petition under the September 24, 2004 Order. The petition argued that the Company did not need Commission approval to transfer the Arrowhead Project to the American Transmission Company (ATC), because ATC would already own it before it became an “operating unit or system” under § 216B.50.

The petition included a copy of a “Design and Construction Services Agreement,” under which Minnesota Power was to design and construct the Arrowhead Project on behalf of ATC, using its eminent domain authority to condemn land for new or expanded right-of-way as necessary, and transferring physical control of the project to ATC when the project was completed and the line energized.

Minnesota Power also claimed that the Commission did not have jurisdiction over its transaction with ATC because, under the terms of the Agreement, the Company was simply acting as ATC’s general contractor – no property that met the statutory standard of “any plant as an operating unit or system” had been, was being, or would be sold, acquired, leased, or rented for consideration in excess of \$100,000.²

III. Parties’ Comments

The following parties filed comments on the Company’s December 23, 2004 filing:

- Minnesota Department of Commerce (the Department)
- Residential and Small Business Utilities Division of the Office of the Attorney General (RUD-OAG)
- North American Water Office (NAWO) and Save Our Unique Lands (SOUL), filing jointly
- World Organization for Landowner Freedom (W.O.L.F.)
- John and Laura Reinhardt

¹ *In the Matter of the Complaint of NAWO and SOUL Against Minnesota Power Regarding the Arrowhead Transmission Line Project*, Docket No. E-015/C-04-955, Order Dismissing Complaint and Requiring Future Filing (September 24, 2004).

² Minn. Stat. § 216B.50.

The Department concurred with the Company that the transaction between Minnesota Power and ATC regarding the Arrowhead Project did not involve the lease or transfer of “plant as an operating unit or system” and that the Commission had no jurisdiction over the transaction. The Department also recommended that the Commission ask ATC, which appears to be exempt from state utility regulation, to voluntarily participate in the biennial transmission planning process in which all regulated transmission owners must participate under Minn. Stat. § 216B.2425.

The Residential and Small Business Utilities Division of the Office of the Attorney General stated that Minnesota Power had not disclosed to the court in the condemnation proceedings that it was condemning the land on behalf of ATC, that Minnesota law might not permit such condemnation, that the transfer of easements secured for public utility use to ATC might not comply with Minnesota law, and that the Commission should assure itself of the legality of the condemnation process and the resulting transfer of easements before proceeding.

The Division also expressed deep concern about permitting a company whose regulatory status was unclear to own critical transmission assets. And it urged the Commission, should the Commission determine that the transaction was legal and the project was necessary, to condition any approval on the specific facts of the case, to avoid setting potentially dangerous precedent.

NAWO and SOUL, W.O.L.F., and the Reinhardts argued that Minnesota Power’s land condemnations on behalf of ATC were or may be invalid, that the transaction was subject to review under Minn. Stat. § 216B.50 under any fair interpretation of its meaning and purpose, that need for the Arrowhead Project has not been established, and that ATC ownership of vital Minnesota transmission assets was contrary to sound public policy.

IV. Commission Proceedings

The Commission heard oral argument in this case on May 5, 2005 and deliberated on the merits on May 11, 2005.

FINDINGS AND CONCLUSIONS

I. Summary of Commission Action

The Commission finds that it has jurisdiction over the transaction between Minnesota Power and the American Transmission Company under Minn. Stat. § 216B.50 and that the record is inadequate for purposes of determining whether that transaction should be approved as consistent with the public interest. The Commission will therefore defer making a determination on the public interest issue until the completion of further fact-finding.

These actions are explained below.

II. Factual Background

A. The Project

The Arrowhead Project consists of a proposed 12.5-mile, 345 kV, high-voltage transmission line, running from Minnesota Power's Arrowhead substation in Hermantown, Minnesota to Oliver, Wisconsin, where it will connect with the 208-mile, 345 kV Arrowhead-Weston high-voltage transmission line. The project includes adding upgraded equipment and capacity to Minnesota Power's Arrowhead substation. And it includes the removal of Minnesota Power's existing 115 kV transmission line, which will be relocated on the towers supporting the new, 345 kV line.

B. The Transaction

Minnesota Power's petition explained that Minnesota Power had originally planned to own the Arrowhead Project and had recorded some \$2,588,877 in its regulated accounts as Construction Work in Progress. As work progressed, however, the Company became convinced that ATC, Minnesota Power, and Minnesota Power ratepayers would all benefit if ATC owned the line, consolidating its costs and their recovery with those of the longer line of which it would be a part. And in January 2004, the Company changed its accounting to reflect non-ownership of the Arrowhead Project.

The 15-page Design and Construction Service Agreement (the Agreement) between Minnesota Power and the American Transmission Company does place responsibility for the design and construction of the Arrowhead Project on Minnesota Power and does contemplate ultimate ownership of the project by ATC. Under the Agreement, Minnesota Power bills ATC monthly for project costs, which include the cost of equipment, supplies, materials, easements, rights-of-way, regulatory costs and fees, and related expenses. Total project costs are expected to amount to some \$48,000,000.

The Agreement provides that title to materials, supplies, and equipment passes to ATC upon delivery to the work site and that title to the project as a whole passes to ATC when the project is completed and has been placed in service.³ The Agreement also provides that its effectiveness is contingent upon receiving all required regulatory approvals.⁴

C. The Legal Standard

The statute requiring Commission review of utility property transfers reads as follows:

³ Article VIII, A.

⁴ Article IX.

No public utility shall sell, acquire, lease, or rent any plant as an operating unit or system in this state for a total consideration in excess of \$100,000, or merge or consolidate with another public utility operating in this state, without first being authorized so to do by the commission. Upon the filing of an application for the approval and consent of the commission thereto the commission shall investigate, with or without public hearing, and in case of a public hearing, upon such notice as the commission may require, and if it shall find that the proposed action is consistent with the public interest it shall give its consent and approval by order in writing. In reaching its determination the commission shall take into consideration the reasonable value of the property, plant, or securities to be acquired or disposed of, or merged and consolidated. The provisions of this section shall not be construed as applicable to the purchase of units of property for replacement or to the addition to the plant of the public utility by construction.

Minn. Stat. § 216B.50.

III. Jurisdiction Found and Asserted

The Arrowhead Project – made up of high-voltage power lines, steel towers, transformers, substation equipment, and related materials required for the transmission of electricity – is clearly “plant” as that term is used in utility regulation. It is also clearly “an operating unit or system” – it has no value or purpose except as a unit or system, and it operates to transmit electrical power.

The project is being constructed as an operating unit or system and it will be transferred to ATC as an operating unit or system. In fact, under the terms of the Agreement the project, called the Minnesota Project in the Agreement, will be energized and fully operational at the time of the final transfer –

- WHEREAS, MP is willing to provide such services, to design and construct the Minnesota Project as specified by and on behalf of ATC and *to transfer the Minnesota Project to ATC on completion of the Minnesota Project*, on all the terms and conditions set forth below. Agreement, page 1, emphasis added.
- *MP shall transfer to ATC a permanent easement in substantially the form of Exhibit E attached hereto and incorporated by reference herein, for the non-exclusive right to enter and occupy the Arrowhead Substation, and title to all other remaining parts of the Minnesota Project when the Minnesota Project Facilities have been completed and placed in service.* Agreement, Article VIII, A., emphasis added.
- *After completion of the construction and energization of the Minnesota*

Project, preparation of assignment documents, assigning, transferring, and assisting ATC in the recording of all assignments and transfers of all permits, licenses, leases, easements or other land rights associated with the Minnesota Project. Agreement, Article I, D. (4), emphasis added.

The Commission rejects the claim that piecemeal transfers of title to parts of the Arrowhead Project somehow defeat Commission authority over the transaction as a whole. While the parties have structured the transaction so that title to materials, supplies, and equipment passes to ATC upon their delivery to the work site, title to the project as a whole passes when it is completed and placed in service, as set forth above.

Similarly, the Commission rejects the claim that Minnesota Power is acting solely as a general contractor for the Arrowhead Project and lacks any ownership interest supporting Commission jurisdiction. Not only does the Agreement not support this interpretation, but ATC, in its May 4 letter to the Commission, refers twice to the fact that it does not yet own the project:

Let me state unequivocally that *if ATC does take ownership of the Minnesota portion of the Arrowhead-Weston 345 kV transmission line*, we will participate in the transmission planning process under Minn. Stat. § 216B.2425 and Minn. R. 7848.0200 . . .⁵

In conclusion, I hope that this letter has clarified ATC's unequivocal commitment to comply with Minnesota's transmission planning requirements and, *to the extent that ATC does take ownership of the Minnesota portion of the Arrowhead-Weston transmission line*, to work with the Commission and other stakeholders on transmission planning in a manner consistent with Minnesota law.⁶

And Minnesota Power, in its December 23 petition, states that, if the Commission disapproves the petition, the Company will continue building the project and may ultimately take title to the completed line.⁷

Finally, although the 345 kV transmission line is the most high-profile component of the Arrowhead Project, other components – such as the upgraded substation capacity, facilities, and equipment that ATC will presumably lease from Minnesota Power; the tower space that Minnesota Power will presumably lease from ATC; and ATC's use of the pre-existing right-of-way – are critical to the project, would appear to involve consideration over the \$100,000 statutory threshold, and may well constitute individual operating units or systems within the statutory definition.

For all these reasons, the Commission concludes that the transaction at issue falls within the

⁵ May 4 letter of Daniel A. Doyle, Vice President and CFO, emphasis added.

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⁷ Petition, page 7.

jurisdictional parameters of Minn. Stat. § 216B.50 and requires Commission approval to proceed.

IV. Further Fact-finding Required

Having found jurisdiction under Minn. Stat. § 216B.50, the Commission concludes that the record is inadequate for determining whether the transaction is consistent with the public interest. The Company's petition focused mainly on its claim that the Commission lacked jurisdiction over the transaction; it did not provide enough information on the public interest issue to support a finding approving the proposed transaction. Rather than disapprove the petition, the Commission will defer any decision on the public interest issue pending further fact-finding.

At least initially, the Commission will delegate the task of record-development to its staff. The Commission will ask staff to begin the process with the questions posed in the May 5 briefing materials and to add questions triggered by oral argument, deliberations, and new information provided as the record develops. Staff will ensure compliance with service requirements, establish procedures and time frames for parties' comments as new material is introduced into the record, and provide interim procedural recommendations to the Commission as appropriate.

The Commission will so order.

ORDER

1. The Commission finds that it has jurisdiction over the transaction that is the subject of the *Design and Construction Services Agreement for Transmission Facilities* between Minnesota Power and the American Transmission Company.
2. The Commission finds the record inadequate to support a determination that the transaction is consistent with the public interest and will conduct further fact-finding before making a determination on the public interest issue.
3. The Commission delegates the tasks associated with developing the record to its staff, who will apprise the Commission as the record develops and provide further procedural recommendations as necessary.
4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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