

November 4, 2010

Via E-Docket Filing

Dr. Burl W. Haar
Executive Secretary
Minnesota Public Utilities Commission
350 Metro Square
121 Seventh Place East
St. Paul, MN 55101

**RE: In the Matter of the Application of Goodhue Wind, LLC for a Site Permit and
Certificate of Need for a 78 MW Large Wind Energy Conversion System in Goodhue
County
Docket Nos. IP-6701/WS-08-1233 and CN-09-1186**

Dear Dr. Haar:

Enclosed please find the following documents that were e-filed today in the above referenced matters on behalf of AWA Goodhue, LLC.

- 1. Petition for Rehearing and Reconsideration of Decision Remanding These Matters to the Office of Administrative Hearings for Additional Hearing;**
- 2. Memorandum of AWA Goodhue, LLC in Support of Petition for Rehearing and Reconsideration of October 21 Decision; and**
- 3. Affidavit of Service.**

Please feel free to contact me if you have any questions.

Sincerely,



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BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

David Boyd
J. Dennis O'Brien
Thomas Pugh
Phyllis Reha
Betsy Wergin

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of the Application of
AWA Goodhue, LLC, for a Certificate of Need
and a Site Permit for a 78 MW Wind Project
and Associated Facilities in Goodhue County

PUC Docket No.IP-6701/CN-09-1186
PUC Docket No.IP-6701/CN-08-1233

**PETITION FOR REHEARING AND RECONSIDERATION OF DECISION
REMANDING THESE MATTERS TO THE OFFICE OF ADMINISTRATIVE
HEARINGS FOR ADDITIONAL HEARING**

INTRODUCTION

By this petition, AWA Goodhue, LLC, hereby requests that the Minnesota Public Utilities Commission reconsider its decision of October 21, 2010, as set forth in its November 2, 2010 Notice of Hearing and Order, in which it remanded the matter of a site permit to the Office of Administrative Hearings for a contested case on whether good cause exist to apply Goodhue County's purported 10 RD setback from non-participating landowners.

Because there is already an extensive record upon which the Commission can determine that AWA Goodhue is entitled to a site permit, and because the statutory time limit for the Commission to act has expired, neither a contested case nor further delay is warranted. Further delay adversely affects the project's viability.

The record supports the granting of a site permit, in the form recommended by OES staff, without the county's 10 RD setback requirement. Good cause exists for the Commission not to require a 10 RD setback – it is not necessary to protect public health, no other wind project in the state has to meet such a requirement, and it effectively makes this project impossible to site in Goodhue County. The imposition of the same 1500 foot setback that the Commission has required of other, similarly-situated projects in the state is the appropriate standard here.

The record also establishes that AWA Goodhue has met all the requirements for granting a certificate of need. The Commission has already approved as in the public interest two power purchase agreements under which AWA Goodhue will provide renewable energy to help Xcel Energy meet its renewable energy obligations. There are no issues of material fact regarding the need for this project.

Included with this Petition is a Memorandum that further addresses each of these issues.

AWA Goodhue requests that the Commission reconsider its October 21 decision and take the following action:

1. Issue a certificate of need as recommended by the Commission and OES staff, and
2. Issue a site permit in the form as recommended by the OES.

Dated: November 4, 2010

Respectfully submitted,

/s/ Alan R. Mitchell
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BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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In the Matter of the Application of
AWA Goodhue, LLC, for a Certificate of Need
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PUC Docket No.IP-6701/CN-09-1186
PUC Docket No.IP-6701/CN-08-1233

**MEMORANDUM OF AWA GOODHUE, LLC IN SUPPORT OF
PETITION FOR REHEARING AND RECONSIDERATION
OF OCTOBER 21 DECISION**

INTRODUCTION

A 10 rotor diameter setback requirement will make the AWA Goodhue wind project, and any other wind project in Goodhue County for that matter, impossible to site and build because there is insufficient space to install wind turbines 10 RD (about one-half mile) from the residences of non-participating landowners.

With the proper interpretation of the term good cause, and under the existing record, a contested case is not required before the Commission can determine that the county's purported setbacks and other more stringent standards should not be applied.

Both the Commission staff and Office of Energy Security staff have reviewed the existing record and concluded that a certificate of need for the project should be issued. The OES staff has also rejected the 10 RD standard as unreasonable and recommended instead that a site permit be issued.

Upon reconsideration, and for the following reasons, AWA Goodhue respectfully requests that the Commission follow staff recommendations and issue the certificate of need and site permit.

DISCUSSION

I. THE STATUTORY REQUIREMENT TO EVALUATE GOOD CAUSE MEANS THE COMMISSION SHOULD CONSIDER THE RECORD AND MAKE A DETERMINATION WITHOUT A CONTESTED CASE.

The Legislature has provided counties with the discretion to adopt more stringent standards for Large Wind Energy Conversion Systems (LWECS), and has directed the Commission to apply those standards “unless the commission finds good cause not to apply the standards.” Minnesota Statutes § 216F.081. The term “good cause” is not defined in the statute, but it essentially means that the pertinent factors be considered and “good common sense” prevail. *See, e.g., Casper v. Itasca County Human Services*, 531 N.W.2d 506 (Minn.Ct.App. 1995).

Good cause is not a factual issue that needs to be determined based on a contested trial-like proceeding. Instead, whether good cause exists is a judgment call, a legislative-type analysis that requires the decision-maker simply to make a reasonable decision based on the existing record. It is not a factual question that lends itself to one answer, such as whether a person has failed to comply with a reporting requirement, or whether the light was green or red at the time of the accident. Instead, it is similar to a rulemaking decision, requiring the Commission to exercise its judgment and make a rational decision.

The Office of Administrative Hearings regularly applies the term “good cause” in its own rules.¹ In Minnesota Rules part 1400.7550, relating to continuances of hearings, for instance, the OAH simply describes a list of factors that it will employ in determining whether there is “good cause” to grant a hearing continuance. The rule does not set forth an objective standard of good cause but instead provides a common sense list of factors that help the ALJ determine whether

¹ *See, e.g.,* Minnesota Rules parts 1400.2400, 1400.6550, 1400.6900, 1400.7500, and 1400.8401.

good cause exists or not. The OAH doesn't require a contested case each time it needs to determine good cause.

The Commission also regularly determines whether good cause exists without the need of a contested case. *See, e.g.*, Minn. Rule part 7829.3000 (also varying time periods). Indeed, with relatively little effort, the Commission granted itself good cause to extend its statutory deadline for making a decision in this case. The Commission has not identified a single material issue of disputed fact that it believes needs to be resolved in a contested case proceeding. Identifying the matters of concern not only would help in understanding what issues need to be litigated, but would, in all likelihood, demonstrate that the issue of concern is a policy or legal issue, not a factual one. Indeed, that is exactly what the Commission said when it denied Goodhue Wind Truth's (GWT) request for a contested case hearing a few months ago.

In its petition for a contested case dated February 12, 2010, GWT argued that a material issue that required a contested case was the impact of the project on local residents and property that cannot otherwise be mitigated, i.e., impact on health and safety.² In its May 3, 2010, Order rejecting GWT's request, however, the Commission held that because of the expanded scope of hearings the Commission required in this case, a contested case would "not aid the Commission in making a final determination."³

The expanded hearings that the Commission ordered have provided the Commission an ample record on which it can determine whether good cause exists not to apply the county's more stringent standards. The Commission has previously determined that material issues of fact

² *Goodhue Wind Truth Petition for Contested Case – Siting, Certificate of Need Docket and Power Purchase Agreement Dockets*, February 12, 2010.

³ *Order Approving Distribution Of Draft Site Permit And Denying Contested Case*, May 3, 2010, PUC Dockets Nos. CN-09-1186 and WS-08-1233.

do not exist for which a contested case is required. That was the right decision then. It remains the right decision.

II. THE COMMISSION CAN DECIDE ON THE BASIS OF THE EXISTING RECORD THAT THERE IS GOOD CAUSE NOT TO APPLY THE COUNTY'S ORDINANCE TO THIS PROJECT.

Goodhue County adopted its ordinance on October 5, 2010, just two weeks before the October 21 hearing. Among other things, it purports to establish a 10 RD setback requirement from the residence of non-participating landowners (approximately 2700 feet),⁴ significantly longer than the 1500 feet recommended by the OES and agreed to by AWA Goodhue, and certainly more stringent than what the Commission has ever applied in any previous site permit.

A number of factors in the record show why common sense dictates that the Commission not apply the county's ordinance, particularly the extreme 10 RD setback.

- A 10 RD setback is unnecessary to protect public health or safety.
- A 10 RD setback makes the project (indeed, any project) impossible to site.
- The OES has recommended that a site permit be issued without the 10 RD setback.
- A delay of even several months will cost the project many millions of dollars and creates a serious risk of failure.
- A delay will result in AWA Goodhue being unable to comply with its obligations under the power purchase agreements approved by the Commission in April.
- A county prohibition on commercial wind development interferes with other important state policies.
- A 10 RD setback results in less efficient use of available wind resources, and higher costs, costs which are ultimately borne by ratepayers.
- A single county should not be allowed to impose a *de facto* moratorium on wind development.

⁴ The rotor diameter of the turbines planned for this project is 270 feet. A 10 RD setback requirement from non participating landowners means that the turbines must be 2700 feet (nearly a half mile) from any landowner who does not agree to a smaller setback.

- A prohibition on wind development interferes with a property owner's right to develop the wind resources on his or her property and to generate income.
- It is arbitrary and capricious to apply a 10 RD setback to this project when no other project in the state has to meet such a requirement.
- The Commission already determined that a contested case hearing in this matter was not warranted.

These points are addressed in more detail below.

A. A 10 RD Separation Is Not Necessary to Protect Public Health and Safety.

At no time has Goodhue County maintained that a 10 RD separation is necessary to protect public health and the Commission fully knows that such a setback is not based on health concerns. If the Commission believed a greater setback was necessary to protect health or welfare, the Commission would not have approved, immediately prior to consideration of this docket on October 21, the final site permit for the 301 MW Pleasant Valley project⁵ in Mower and Dodge counties with a setback requirement of 1500 feet. Nor, if it believed that wind turbines were causing adverse health impacts, would it reasonably allow setbacks at only 1000 feet from participating landowners. Nor would it entertain suggestions that the applicant simply try to work out a settlement with objecting landowners.

In 2009, the Commission opened a separate investigative docket to examine the question of the adequacy of state setbacks.⁶ In that docket, the Commission received thousands of pages of comments on turbine setbacks, including numerous reports from many stakeholders relating to

⁵ *In the Matter of the Application of Pleasant Valley Wind, LLC, for a Large Wind Energy Conversion System Site Permit for the 301 MW Pleasant Valley Wind Project in Dodge and Mower Counties*, Order Issuing Site Permit dated October 27, 2010, MPUC Docket No. IP-6828/WS-09-1197. A Certificate of Need was issued on the same date. MPUC Docket No. IP-6828/CN-09-937.

⁶ *In the Matter of the Commission Investigation into Large Wind Energy Conversion Systems Permit Conditions on Setbacks and the Minnesota Department of Health Environmental Health Division's White Paper on Public Health Impacts of Wind Turbines*, Docket No. E-999/CI-09-845.

sounds, shadow flicker, and other potential impacts of wind turbines on the public. After evaluation of all this information, the Commission has taken no steps to adopt more stringent setbacks. If the Commission believed that more stringent setbacks are necessary to protect the public from wind energy development, that should be the docket in which to do it.

B. A 10 RD Setback Requirement Will Eliminate the Goodhue Wind Project and Prevent Other Wind Development in the County.

The record establishes without doubt this project cannot comply with a 10 RD setback from non-participating landowners. The record also shows that county officials were aware when they adopted the setback that this project could not comply.

It is impossible for AWA Goodhue to site fifty 1.5 MW or 1.6 MW wind turbines a half-mile from the residences of non-participating landowners. With the land presently under control, only seven of the 50 turbines would meet the 10 RD standard. The applicant provided the Commission with a map at the October 21 hearing showing the impact of a 10 RD setback. The same copy of the map is attached to this Memorandum as Exhibit A. The map shows how little area there is that could comply with the 10 RD setback from non-participating landowners.

Goodhue County staff also prepared similar maps analyzing the effect of setbacks. Attached as Exhibit B is a county-prepared map showing the impacts of a 1500 foot setback, a distance AWA Goodhue has voluntarily agreed to meet for non-participating landowners (and which requirement is in the draft site permit recommended for issuance by the OES). Exhibit C, another map prepared by the county, this one with a 10 RD setback, shows a significantly different picture, however. The only land available within the project footprint with a 10 RD setback are a couple of small areas not shown in blue on the map. The blue colored portions, nearly the entire area, would be off-limits to AWA Goodhue because they fall within the 10 RD setback. Moreover, the non-blue areas are only *theoretically* available for development. That is,

it does not show whether those areas are environmentally, economically, or otherwise well-suited for wind turbines.

The ordinance, of course, applies to any wind project in the county. Attached as Exhibit D is the map originally prepared by the county, this time with a much broader view of Goodhue County (the project overlay was added by AWA Goodhue). As Exhibit D shows, there is only a very small amount of land in the county that is presently more than 10 RD away from non-participating landowners. Thus, Exhibit D *vividly* illustrates that the county's 10 RD setback effectively precludes commercial wind development – indeed, likely any wind development – in the entire county.

In its packet for the October 5, 2010 meeting, the county commissioners were provided a memo from the planning advisory committee dated September 28, 2010. The memo states that the ordinance “would significantly impact the potential to develop Large Wind Energy Conversion Systems in Goodhue County if the proposed standards ended up being used by the [MPUC] when permitting Large Wind Energy Projects.” As this document and the maps show, the county was certainly aware that a 10 RD requirement would make this project unviable.

Finally, the Commission should reject the idea that AWA Goodhue, or any wind developer, should just go out and obtain more easements to allow the turbines to be sited closer to residences. Such an approach puts wind projects wholly in the hands of non-participating landowners. Here, AWA Goodhue has approximately 100 parcels under easement, from more than 200 landowners, totaling more than 12,000 acres. Obtaining additional easements to avoid the 10 RD setback requirement from non-participating landowners would require an additional approximate 77,000 acres of land, representing a cost to the project of an additional \$1,000,000 in easement payments alone (assuming the need to hold the easements for a minimum of three years).

C. A Delay in Issuing a Permit for the Goodhue Wind Project Will Cost Millions of Dollars and Create a Serious Risk of Failure.

AWA Goodhue developed and designed this project in accordance with existing law and practice. Wind easements were obtained, power purchase agreements executed, and financing alternatives selected based on the laws in effect and on the reasonable expectation that the project would be reviewed and approved in a timely fashion so construction could begin in 2010, if not earlier.

When AWA Goodhue signed power purchase agreements with Xcel Energy in 2009, AWA Goodhue prepared its *pro forma* financial statements (and therefore the bid price of its PPAs) in reliance on applicable law and Commission precedent. AWA Goodhue made the decision to develop and finance the project utilizing the 30% federal cash grant under the 2009 American Recovery and Reinvestment Act.⁷ The Act provides that eligible projects (like this one) could elect to take the Investment Tax Credit (ITC) in the form of a cash grant, equal to 30% of qualified project costs, provided the project complies with certain eligibility requirements before the end of 2010.

The cash grant is in lieu of the Production Tax Credit (PTC) and the ITC. Wind developers and financiers favor the upfront cash grant over the tax credits because the cash grant is typically of higher value on a net present value basis than the PTC or the ITC. For AWA, utilizing the cash grant over the ITC or PTC represents a difference of \$37.8 million in the net present value. In other words, if the project is unable to qualify for the cash grant this year, which appears certain if this matter has to proceed to a contested case into next year, the delay to the project – if it could go forward at all – will cost the project approximately \$38 million, not including other additional development costs.

⁷ Public Law 111-5

Delay because of a contested case also jeopardizes AWA Goodhue's power purchase agreements with Xcel Energy – approved by the Commission in April as in the public interest – which set a commercial operation date for December 31, 2011.

D. The Commission Has Already Exceeded the Statutory Deadlines for a Final Decision and There Is Not Good Cause to Extend the Deadlines.

Minnesota Statutes § 216F.04(c) states, “[t]he commission shall make a final decision on an application for a site permit for an LWECS within 180 days after acceptance of a complete application by the commission.” The site permit application was submitted on October 19, 2009, and accepted as complete on November 30, 2009, nearly one year ago. No good cause exists for the Commission to further extend this matter, let alone for six or more months.

No party has sought additional hearings (other than GWT, which was denied) nor has any party raised any material issue of fact. Contested case hearings are deemed necessary only when a material issue of fact is identified and the Commission determines that such a hearing would aid the Commission in making its decision. Minn. Rules 7854.0900, subp. 5(B). The fact that the county has recently adopted a new ordinance is not grounds for a contested case.

The Commission's own rules direct the Commission to make a final decision on the basis of the record before it.

Upon completion of the procedures and requirements of this chapter, the matter must be brought to the commission for a final decision. . . . If no contested case hearing has been held, the commission shall compile the record that has been created and make a final decision on the basis of that record.

Minn. Rules part 7854.1000, subp. 1. Having already decided not to hold a contested case, and having already directed that the hearings that were held consider both certificate of need and siting issues, it is unjustified, and prejudicial to AWA Goodhue *in the extreme*, for the Commission to avoid making a decision on the extensive record before it.

E. Allowing a County to Essentially Reject Wind Development in the County Interferes with the State's Renewable Energy Policies.

Minnesota Statutes Chapter 216F makes it clear that the Commission has ultimate authority to “site LWECS in an orderly manner compatible with environmental preservation, sustainable development, and the efficient use of resources.” Minn. Stat. § 216F.03. Requiring unreasonably long setbacks from private landowners who object to having wind turbines in their viewshed can hardly be said to be in furtherance of that policy. Unreasonably long setbacks like those at issue here will make inefficient use of the state's strong wind resource, require additional transmission infrastructure, and drive up the cost of wind power, leading ultimately to higher costs for Minnesota ratepayers.

Nor is it orderly to allow any county to enact setbacks that essentially put wind off limits throughout the county. If applied here, Goodhue County's 10 RD setback requirements, essentially a *de facto* prohibition on wind development, will have implications far beyond its own borders. If given the green light here, it is certain that other counties, responding to objections from project opponents, will adopt similar restrictions. In deciding this case, the Commission has to keep in mind the broader implications at stake.

Indeed, if other counties were allowed to adopt a similar setback, such a standard would essentially eliminate wind development throughout the entire state. Exhibit E, introduced at the October 21 hearing, is a map that shows how little land in Minnesota is not within a half-mile of a residence. It is reasonable to assume that other counties, in responding to project opponents, would also adopt similar setbacks, essentially putting at risk wind development throughout the state, including potentially in areas with the state's best wind resources and available transmission interconnection points. Allowing local officials to prohibit wind development will have another incendiary effect: depriving landowners the right to earn a livelihood through the

responsible, and, what was prior to a decision here to the contrary, a perfectly legal use of their property.

Last, application of the county's standards is inconsistent with Minnesota's Renewable Energy Standard of 25 % renewables by the year 2025, and in the case of Xcel Energy – the purchaser of the energy from this project – 30% by 2020. Minn. Stat. § 216B.1691, subd. 2a. The Commission does not need a contested case, or delay a decision in this case, to know that placing Goodhue County off-limits to wind development, with other counties likely to follow, will be extremely counter-productive to the state's commitment to cost-effective renewable energy.

F. The Goodhue Wind Project Meets Or Exceeds All Standards That the Commission Has Applied to Other Wind Projects.

No other wind project in Minnesota has been required to meet a one-half mile setback from non-participating landowners. The Commission just approved the Pleasant Valley Project with a 1500 foot setback from non-participating landowners' residences. There are over 700 MW of wind now authorized for Mower County and nearby areas.⁸ There is nothing unique about Goodhue County as compared to Mower County, or any other county. Demographic data, for instance, shows that the difference in population density between Mower County (54 persons per square mile) and Goodhue County (58 persons/square mile) is insignificant.⁹ Nor is topography, land use, or other factors unique.

⁸ See *Wapsipinicon* (200 MW) Docket No. WS-07-839; *High Prairie II* (100 MW), Docket No. WS-06-1520; and *High Prairie I* (100 MW) Docket No. WS-06-91. These projects are *in addition to* the 301 MW Pleasant Valley project just approved on October 21, 2010. None of these projects requires a half-mile setback from residences.

⁹ The data is available at <http://www.demography.state.mn.us/resource.html?Id=5238>.

III. THE GOODHUE COUNTY ORDINANCE DOES NOT ACTUALLY ESTABLISH ANY STANDARDS FOR LARGE WIND ENERGY CONVERSION SYSTEMS.

Article 18 of the Goodhue County Zoning Ordinance, as amended by Goodhue County on October 5, 2010, establishes regulations for wind energy conversion systems (WECS). The last sentence of Section 1 of Article 18 states that “standards more stringent than those of the MPUC are to be considered and applied to LWECS per MS 216F.081.” A statement of intent is not enough to establish more stringent standards for LWECS like the instant project.¹⁰ Not only do the specific provisions of the ordinance take precedence over general statements of intent, but a declaration of intent purporting to apply a setback to this project that the county knew is inconsistent with the project is completely at odds with the county’s earlier resolution supporting the project as a C-BED project. Minn. Stat. § 216B.1612, subd. 2(g)(3). The Commission specifically relied on the county’s resolution in support to approve the project’s C-BED status.¹¹

The Goodhue County ordinance (Article 18) does not actually set standards for an LWECS. The 10 RD setback requirement in the table in Section 4 of the ordinance applies to “Commercial WECS.” A “Commercial WECS” is defined in Section 2, subd. 5, as a “WECS of 1 megawatt to 5 megawatts in total name plate generating capacity.” The AWA Goodhue project is not under five megawatts and therefore is not a “Commercial WECS.”

Other counties know how to establish standards that do apply to LWECS. Meeker County, for example, has adopted its own ordinance and passed a resolution indicating that the standards apply to LWECS. Unlike Goodhue County’s ordinance, Meeker County’s ordinance (Section 22.35(5)) plainly states that the more stringent setback of 1000 feet from residences

¹⁰ Where the legislature’s intent is clearly discernable from plain and unambiguous language, statutory construction is neither necessary nor permitted and [we] apply the statute’s plain meaning, *Am Tower, L.P., v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001).

¹¹ *Order Approving Power Purchase Agreements, Approving Contract Amendments, and Requiring Further Filings*, April 28, 2010, PUC Dockets Nos. 09-1349 and 09-1350, at page 6 (“the county board of the only county in which the project is to be located has adopted a resolution supporting it.”)

applies to “Commercial WECS,” defined as any WECS over 100 kW. Similarly, Meeker County’s ordinance establishes no upper limit, so a project of 78 MW or even more will still fall within the county’s standards. In addition, Meeker County has taken responsibility for permitting wind projects up to 25 MW, which Goodhue County deliberately refrained from doing. A similar example is the Stearns County ordinance, which also established standards for WECS 5 MW and larger.¹²

Because the County’s 10 RD standard does not, on its terms, apply to this project, the Commission has no LWECS standard to even consider applying.

IV. GOODHUE COUNTY DOES NOT HAVE THE AUTHORITY TO PRECLUDE DEVELOPMENT OF WIND RESOURCES THROUGHOUT THE COUNTY.

The county’s 10 RD setback essentially precludes the development of wind resources in the county and prevents individual landowners from installing turbines on their property. A county ordinance that is preempted by state law, or directly in conflict with a state law, is invalid.

Minnesota Statutes § 216F.07 provides:

A permit under this chapter is the only site approval required for the location of an LWECS. The site permit supersedes and preempts all zoning, building, or land use rules, regulations, or ordinances adopted by regional, county, local, and special purpose governments.

The question presented is whether Goodhue County can prohibit wind development in the county in light of a statute that says that a state permit preempts local zoning and land use regulations. The courts have recognized that a setback requirement is essentially a zoning and land use regulation. In *Canadian Connection v. New Prairie Township*, 581 N.W.2d 391,

¹² The Meeker County ordinance and the Stearns County ordinance and other county ordinances and resolutions announcing an intent to permit WECS up to 25 MW in size are available in the MPUC Docket No. E-G999/M-07-1102, *In the Matter of Establishment of General Permit Standards for the Siting of Wind Generation Projects Less than 25 Megawatt*. A simple perusal of the various county ordinances in the docket will reveal that none of these counties has imposed a setback requirement approaching a 10 RD distance. Instead, the setback requirements from homes and dwellings are more along the lines of 750 or 1000 feet.

(Minn.Ct.App. 1998), the Court of Appeals recognized that under that statutory scheme, a township could establish setback requirements for feedlots, but importantly, the Court also said, “[t]he township contends . . . that the ordinance addresses the concerns of township residents to minimize odor through *zoning* setback requirements.” *Id.* at 394 (emphasis added). A setback requirement for wind turbines is also an attempt to regulate through zoning. Zoning is precisely an area that the counties are preempted from regulating under § 216F.08. Counties may have authority to set more stringent standards for LWECS, but they cannot zone them out of existence. The Commission should act to restrict such efforts by finding good cause not to apply the county’s standards.

The Goodhue County 10 RD setback requirement is not only preempted as an invalid zoning attempt, but it is equally invalid because it prohibits what state law specifically allows. State law allows wind turbines to be installed in Goodhue County. The Goodhue County ordinance effectively prohibits them. In *Blue Earth County Pork Producers, Inc. v. County of Blue Earth*, 558 N.W.2d 25, 29 (Minn.Ct.App. 1997), the Minnesota Court of Appeals held that a conflict exists when a local ordinance forbids what the state law expressly permits.

Moreover, in *Pork Producers*, the Court recognized that counties actually have responsibility for issuing feedlot permits. Here, Goodhue County has no authority to permit a project the size of this one (78 MW), and Goodhue County has not even indicated an intent to take over permitting of the smaller ones it could otherwise seek responsibility for under Minn. Stat. § 216F.08. By its adoption of standards which prohibit any commercial wind development, the county is essentially telling the Commission that it has no authority to permit LWECS in Goodhue County.

The Legislature’s authorization allowing counties to set standards for LWECS must be read in concert with the intent to make the Commission the ultimate arbiter of wind site permits.

Goodhue County has done more than just set a standard; it has effectively zoned wind turbines out of existence throughout the county. The Legislature surely did not intend for counties to have that authority, when the same counties have no authority to even permit these larger projects in the first place.

V. THE EXISTING RECORD ESTABLISHES THAT AWA GOODHUE IS ENTITLED TO A CERTIFICATE OF NEED.

A. There Are No Issues of Fact or Questions of Law That Require Additional Time or Hearings Prior to Issuing a Certificate of Need.

Both the OES and the Commission staff reviewed the extensive record and determined that AWA Goodhue had complied with the criteria for a certificate of need and recommended approval. *See* the May 28, 2010 OES comments and the Commission staff briefing papers prepared for the October 21 meeting. The Commission is well aware of Minnesota's Renewable Energy Standards and the need for more renewable energy, and, indeed, has already approved the power purchase agreements¹³ between AWA Goodhue and Xcel Energy. There are no material issues of fact relating to the question of need that require additional hearings. Accordingly, the Commission should act on the record before it and grant the certificate.

B. There Is Not Good Cause to Extend the Time for Making a Final Decision on the Certificate of Need.

Minnesota Statutes § 216B.243, subd. 5 provides that a decision on a certificate of need application shall be made "within 12 months of the submission of the application." The certificate of need application was submitted on October 15, 2009, more than one year ago. No good cause has been demonstrated to extend the time to make a decision for another six months or longer. The Commission staff did not have difficulty deciding on the basis of this record that a certificate of need should be issued, and neither should the Commission.

¹³ *Order Approving Power Purchase Agreements, Approving Contract Amendments, and Requiring Further Filings*, April 28, 2010, PUC Dockets Nos. 09-1349 and 09-1350.

VI. THE COMMISSION SHOULD ACT ON THE PETITION EXPEDITIOUSLY.

Pursuant to Minn. Stat. § 216B.27, subd. 4, the Commission has sixty days to reach a decision on petitions for reconsideration. Sixty days is wholly unnecessary here. The parties have ten days after service to file responses. Minn. R. 7829.3000, subp. 4. Reply comments are not permitted without Commission authorization. *Id.*, subp. 5. The parties know the issues very well, which are essentially policy and legal, not factual ones. Commission staff and OES staff are familiar with the record and have already determined that the certificate of need and the site permit should be issued, and will unlikely require significant time to prepare additional briefing papers. This matter should easily come before the Commission before Thanksgiving.

In the *CapX Brookings-Hampton* matter, Docket No. ET2/TL-08-1474, the Commission acted on a reconsideration request within three weeks from the date of the request, showing that it can act expeditiously on matters when timing is critical. Timing is critical here, and AWA Goodhue respectfully requests that the Commission act with equal expedition.

CONCLUSION

Minnesota Statutes § 216B.27, subd. 3 provides that the Commission may, upon rehearing, “reverse, change, modify, or suspend the original action” if the determination was “in any respect unlawful or unreasonable.” Subdivision 5 states the Commission has not completely exercised its duties until the Commission has acted upon the application for rehearing. Minn. Stat. § 216B.27, subd. 5.

For the reasons discussed above, the Commission should absolutely take another look at this matter and reverse its decision to remand this matter for a contested case hearing, which will cause a six-month or longer delay. Ample information exists in the record upon which the Commission can determine that good cause exists not to apply a 10 RD setback – health and

safety concerns do not justify it; it effectively kills this project; it sets an extremely bad precedent; it interferes with other public policy goals; it has never been applied to any other wind project; and a delay caused by further hearings increases costs considerably.

AWA Goodhue respectfully requests the Commission reconsider its October 21 decision and decide instead that there is good cause not to apply the more stringent county standards. The Commission should instead issue both a certificate of need, as recommended by Commission and OES staff, and a site permit in the form recommended by OES staff.

Dated: November 4, 2010

Respectfully submitted,

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