

Minnesota Public Utilities Commission
Staff Briefing Papers

Meeting Date: November 23, 2010.....Agenda Item # **11

Company: AWA Goodhue Wind, LLC

Docket Nos. IP-6701/CN-09-1186 and WS-08-1233

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

Issue(s): What action should the Commission take in response to AWA Goodhue's petition for reconsideration of the October 21 decisions? If the Commission decides to reconsider, how should the Commission proceed?

The Commission has the authority to accept or decline a petition for reconsideration with or without a hearing or oral argument (Minnesota Rules 7829.3000, Subpart 6).

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Relevant Documents

OES Staff Comments and Recommendation (Docket 08-1233) October 13, 2010
Commission Staff Briefing Papers (Docket 09-1186) October 14, 2010
OES Staff Supplemental Comments and Recommendations (Docket 08-1233) October 20, 2010
Order – Notice and Order for Hearing (Docket 08-1233)..... November 2, 2010
Order – Deferring Consideration of Application for CN (Docket 09-1186) November 5, 2010
AWA Goodhue’s Petition for Reconsideration¹ November 5, 2010
Wind on the Wires Comments November 15, 2010
Public Comments (Schofield, Gadiant) November 15, 2010
Office of Energy Security (ERP) Comments (09-1186) November 15, 2010
Office of Energy Security (EFP) Reconsideration Letter (08-1233) November 15, 2010
Goodhue Wind Truth Comments (Docket 08-1233) November 15, 2010
GE Energy Letter (*Filed out of comment period*) November 16, 2010
GE Energy Brochure (*Filed out of comment period*)..... November 16, 2010
Goodhue County – Memorandum (*Filed after of comment period*) (08-1233) November 17, 2010

The attached materials are workpapers 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.

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¹ Relevant documents without a docket reference are available in both dockets 08-1233 and 09-1186.

Statement of the Issue

What action should the Commission take in response to AWA Goodhue's petition for reconsideration of the October 21 decisions? If the Commission decides to reconsider, how should the Commission proceed?

Background

On November 2, 2010 the Minnesota Public Utilities Commission (Commission) in the AWA Goodhue siting docket (08-1233) issued NOTICE AND ORDER FOR HEARING which referred the Goodhue Large Wind Energy Conversion System (LWECS) siting docket to the Office of Administrative Hearings.

On November 5, 2010 the Commission in the Goodhue Wind certificate of need docket (09-1186) issued ORDER DEFERRING CONSIDERATION OF APPLICATION FOR CERTIFICATE OF NEED.

On November 5, 2010 the applicant, AWA Goodhue, LLC filed the *Petition for Rehearing and Reconsideration of Decision Remanding These Matters to the Office of Administrative Hearings for Additional Hearing* (Petition) in both the siting and the certificate of need dockets.

On November 15, 2010 several comments were received in response to the Petition from the Office of Energy Security, Wind on the Wires, Goodhue Wind Truth and two members of the public.

The Commission received comments from GE Energy and Goodhue County after the deadline; those comments are listed as relevant documents and are listed as such.

Statutes and Rules

Reconsideration

Minnesota Rules 7829.3000, subp. 1., states that parties or persons directly affected by a commission decision or order are allowed 20 days to petition for rehearing, amendment, vacation, reconsideration, or reargument. Subp. 2. states that a petition for reconsideration or amendment must set forth specifically the grounds relied upon or the errors claimed. A request for amendment must set forth the specific amendments desired and the reasons for the amendments. Subp. 4 allows parties ten days to answer the Petition.

Furthermore, Minn. Rule 7829.3000, subp. 6. states that:

The Commission shall decide a petition for rehearing, amendment, vacation, reconsideration, or reargument with or without a hearing or oral argument. The Commission may vacate or stay the order, or part of the order, that is the subject of the petition, pending action on the petition.

In addition, the standard that would be applied by the appellate courts in review of a Commission's decision is:

In a judicial review under Minnesota Statute sections 14.63 to 14.68, the court may affirm the decision of the agency, remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitions may have been prejudiced because of administrative findings, inferences, conclusions, or decisions are:

- a. In violation of constitutional provisions; or
- b. In excess of the statutory authority or jurisdiction of the agency; or
- c. Made upon unlawful procedure; or
- d. Affected by other error of law; or
- e. Unsupported by substantial evidence in view of the entire record as submitted; or
- f. Arbitrary and capricious.
(Minn. Stat. §14.69)

Petition for Reconsideration

AWA Goodhue, LLC

AWA Goodhue, LLC (AWA, or the Applicant) requested reconsideration of the Commission's October 21 decision and requests the Commission issue a certificate of need and a site permit. The applicant provides a lengthy argument for their position in their Petition, and here, staff only provides a high-level summary. Staff recommends the Commission use the Petition itself for the proper representation of the applicant's position.

In the Petition, AWA indicates that a determination of good cause is not a factual issue that warrants a contested case hearing but instead is a judgment call to be made by the Commission. AWA does not believe that the Commission has identified a material issue of fact.

It is AWA's opinion that the record, as it stands, provides ample cause not to apply the county's more stringent standards generally, but in particular, the 10 rotor diameter (RD) setback.

The applicant provides the following factors for the Commission to consider:

- a 10 RD setback is not necessary to protect human health or safety;
- a 10 RD setback would make the project impossible to site;
- a 10 RD setback is not recommended by the OES;
- a delay in scheduling would cost the project millions of dollars and create a risk of failure;
- a delay would make AWA unable to comply with the terms of their Commission approved power purchase agreement;
- a county prohibition on wind development would interfere with state policies,
- a 10 RD setback results in inefficient use of wind resources and higher costs (ultimately borne by ratepayers);
- a county should not be able to impose a *de facto* moratorium on wind development;

- a prohibition on wind development interferes with a property owner's right to develop the resources on their property;
- a 10 RD setback is arbitrary and capricious when it has not been applied elsewhere in the state; and,
- the Commission has already determined that a contested case is not warranted.

In the Petition the applicant provides further rational for each of these factors.

The applicant argues that the Goodhue County Ordinance does not actually establish more stringent standards for LWECS since the only reference to Minn. Stat. §216F.081 indicates "standards more stringent than those of the MPUC are to be considered and applied to LWECS per MS 216F.081". The applicant argues that this language is simply a statement of intent and that a statement of intent is not sufficient to pertain to this proceeding. The applicant further argues that the county ordinance's standards, as written, would not apply to their project.

AWA believes the county's 10 RD setback would essentially preclude development of wind resources in the county and the county does not have the authority to do so. AWA further argues that the Legislature's authorization, which enables counties to set standards for LWECS, needs to be read in conjunction with the intent that the Commission is the ultimate decision-maker of wind site permits. In this instance, Goodhue County has effectively zoned wind turbines out of existence in their county and the applicant argues that 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."

Regarding the certificate of need, the applicant argues that they have complied with the criteria for certificate of need issuance, the OES and Commission staff have recommended approval in their briefing papers, the power purchase agreements have been approved, and since there is no material issue of fact relating to need, the Commission should act on the record and grant the certificate of need to AWA Goodhue. The Petition further argues that there is not good cause to delay the issuance of the certificate of need beyond the 12-months provided in Minnesota Statute.

The applicant concludes that the Commission should reverse the decision to remand the matter for a contested case hearing which would cause a six-month (or longer) delay since the record is sufficient to determine that there is good cause not to apply the 10 RD setback. Additionally, the applicant requests that the Commission decide there is not good cause to apply any of the Goodhue County standards that are more stringent than the state standards and the Commission should issue the certificate of need and site permit (in the form recommended by the OES siting staff).

Answers to Petition

Relevant filings in response to AWA Goodhue's Petition were received from the Office of Energy Security Energy Regulation and Planning, Office of Energy Security Energy Facilities Permitting,

Goodhue Wind Truth, Wind on the Wires, Jennifer Schofield, Dennis Gadiant, GE Energy and Goodhue County².

The filings are included as relevant documents to this briefing paper.

Staff Comment

The Commission should consider whether the arguments presented in the applicant's petition provide cause for the Commission to reconsider the decisions made on October 21, 2010. If the Commission does not believe there is sufficient cause, then it should deny the petition. If the Commission decides that it would like to further consider the issues, it can hear from parties at the meeting or it can order that further information be provided in a manner they see fit.

As noted previously, if, in the Commission's judgment, it shall appear that the original decision, order, or determination is in any respect unlawful or unreasonable it may reverse, change, modify, or suspend the original action accordingly.

Decision Alternatives

If the Commission believes that this issue is properly before them, the Commission could:

In Docket CN-09-1186:

- 1) Consider and make a decision on the Applicant's Petition for a Certificate of Need (see staff briefing paper decision options from Oct. 21, 2010)
- 2) Take no action on the certificate of need matter

In Docket WS-08-1233:

- 1) Move to reconsider their November 2, 2010 NOTICE AND ORDER FOR HEARING
- 2) Deny the petition

If the Commission elects to consider and issue a CN in docket 09-1186, and subsequently elects to reconsider 08-1233, how would the Commission like to proceed³? The Commission may hear from parties or persons at this agenda meeting or elect to consider this matter at a later date.

In Docket WS-08-1233:

- 1) Make a decision on WS-08-1233 (see OES staff briefing papers and supplemental briefing papers from Oct. 21, 2010)
- 2) Schedule the matter for a later date

²The Commissioners should note that the filing by GE Energy and Goodhue County was outside of the time allotted (by rule) for answers to the petition for reconsideration.

³Please note: per Minn. R. 7854.0500 Subp. 2, the Commission shall not issue a site permit for an LWECS for which a certificate of need is required until applicant obtains the certificate.