

March 11, 2011

Judge Kathleen Sheehy
Minnesota Office of Administrative Hearings
P.O. Box 64620
600 North Robert Street
St. Paul, Minnesota 55164-0620

Re: In the Matter of the Application of AWA Goodhue, LLC for a Site Permit for a 78 MW Large Wind Energy Conversion System in Goodhue County, Minnesota MPUC Docket Nos. IP6701/WS-08-1233 and OAH Docket No. 3-2500-21662-2

Dear Judge Sheehy:

AWA Goodhue, LLC respectfully brings a motion to exclude the information filed by Coalition for Sensible Siting and the City of Goodhue filed on February 24, and by Goodhue Wind Truth and Goodhue County filed on March 4. The reasons for the motion are set forth in the enclosed memorandum. AWA Goodhue respectfully requests that the ALJ rule on this motion promptly, subject of course to an opportunity for parties' replies.

In addition, I write to respond to a request filed yesterday with your office by Mr. Conrad. Mr. Conrad seeks to have the official transcripts from the July 2010 public meetings as part of the site permit in Docket No. IP6701/WS-08-1233 included in the record here. The transcripts from last summer's public hearing do not need to, and should not be admitted into the record *in this contested case*. Those transcripts are already in the record that the MPUC will have available to it when it makes its final decision on the merits of this case. The record that is being created here, however, is more limited in scope than the panoply of issues that the MPUC will consider in May. To have those transcripts entered into this record will only lead to confusion and waste time.

Given the approach of the Tuesday hearing, AWA Goodhue also writes to seek clarification about how the ALJ intends to handle the public participation aspect of the hearing.

The First Prehearing Order, paragraph 2, provides that members of the public may offer "either oral or written testimony; may offer exhibits for inclusion in the record; and they may ask questions of persons testifying."

Attorneys & Advisors	Fredrikson & Byron, P.A.
main 612.492.7000	200 South Sixth Street, Suite 4000
fax 612.492.7077	Minneapolis, Minnesota
www.fredlaw.com	55402-1425

AWA Goodhue supports public involvement. We are concerned, however, on two levels. First is timing. There are only three days scheduled for this matter. At this point, we are uncertain how many members of the public intend to participate in the hearing through testimony, cross-examination, etc. But it is critically important to AWA Goodhue that the hearing record close at the end of this three-day period, and AWA Goodhue is prepared to move expeditiously through the hearing in order to accomplish this. We expect that to the extent members of the public testify, offer exhibits, or cross-examine witnesses, such involvement not delay or otherwise interfere with ending this hearing on March 17.

Second, and related to the first point, it is equally important that all parties and members of the public understand the ground rules going into next week's hearing. This means, for instance, that if a member of the public seeks to testify or introduce an exhibit, the scope of that evidence will be limited to the issues in this contested case – i.e., the effect of the County's ordinance and the health or safety basis supporting the ordinance. The same can be said for cross-examination. While AWA Goodhue welcomes the opportunity to answer questions, we expect the questions to be limited to the scope of the witnesses' testimony. It would be improper and prejudicial to essentially allow this contested case to be a redo, for instance, of the public hearing presided over last summer by Judge Lippman, which itself covered more than two days.

Given the limited time and scope of this hearing, AWA Goodhue respectfully requests that Your Honor clarify at the outset of the hearing that members of the public who intend to participate in the hearing be held to the same rules that govern each of the parties in this proceeding.

Thank you for your consideration.

Sincerely,

/s/ Todd J. Guerrero

Todd J. Guerrero

Attorney

Direct Dial: 612.492.7370

Email: tguerrero@fredlaw.com

c: Service List (w/attachments)

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE PUBLIC UTILITIES COMMISSION

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

**AWA GOODHUE'S NOTICE OF
MOTION AND MOTION TO EXCLUDE**

NOTICE OF MOTION

PLEASE TAKE NOTICE that AWA Goodhue, LLC moves the Honorable Kathleen Sheehy, of the Minnesota Office of Administrative Hearings, as set forth below, to strike the rebuttal testimony and exhibits of Coalition for Sensible Siting, the City of Goodhue, Goodhue Wind Truth, and Goodhue County.

MOTION

This motion is brought under Minn. Rules parts 1400.6600, and 1400.7300 and is based upon the Memorandum Supporting AWA Goodhue's Motion to Exclude and upon the entire file and proceedings herein.

Dated: March 11, 2011

Respectfully submitted,

/s/ Todd J. Guerrero

Todd J. Guerrero (#0238478)

Christina K. Brusven (#0388226)

FREDRIKSON & BYRON, P.A.

200 South Sixth Street, Suite 4000

Minneapolis, Minnesota 55402-1425

Telephone: (612) 492-7370

Fax: (612) 492-7077

Attorneys for AWA Goodhue, LLC

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE PUBLIC UTILITIES COMMISSION

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

**MEMORANDUM IN SUPPORT
OF MOTION TO EXCLUDE**

I. INTRODUCTION

AWA Goodhue respectfully submits this memorandum in support of its motion to strike (1) the YouTube videos submitted by counsel for Coalition for Sensible Siting (CSS) and the City of Goodhue, and (2) the information submitted by Marie McNamara on behalf of Goodhue Wind Truth (GWT). In addition, AWA Goodhue asks that the County be required to demonstrate the relevance of the more than 5,000 pages comprising the County's WECS ordinance record before it is admitted in this record.

CSS' YouTube videos are (1) not competent evidence, and (2) irrelevant. In addition, the exhibits filed by GWT should be excluded because they are (1) unduly repetitious, and (2) irrelevant or otherwise not material to the issues to be decided in this case. As currently filed, the County WECS ordinance record lacks relevance to the limited issues in this contested case.

II. DISCUSSION

A. Standard for Admissible Evidence.

Minnesota Rule 1400.7300 provides the standard for the admissibility in this case. That rule provides as follows:

The judge may admit all evidence which possesses probative value, including hearsay, if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs. The judge shall give effect to the rules of privilege recognized by law. Evidence which is incompetent, irrelevant, immaterial, or unduly repetitious *shall be* excluded.

(Emphasis added). While the formal rules of evidence do not govern administrative contested cases, the rules of evidence are frequently applied by ALJs to distinguish evidence that does not possess “probative value.”¹

B. The CSS’ YouTube Videos Should be Excluded.

1. The videos are not competent evidence.

Minnesota Rule 1400.7300 excludes from being admitted any “incompetent” evidence. The YouTube videos offered by CSS’ counsel are incompetent.

The YouTube videotapes offered by CSS are classified as photographs for the purposes of being received in evidence. Minn. R. Evid. 1001(2). As such, videotapes can be admissible as competent evidence where they accurately portray anything that is competent for a witness to describe in words, or where they are helpful as an aid to a verbal description of objects and conditions, provided they are relevant to a material issue in the case. *State v. Alten*, 432 N.W.2d 754 (Minn. 1988).

In order to be considered competent evidence, however, videotapes, like photographs, must be authenticated by a witness who has *personal knowledge* concerning their correctness. *See* Minn. R. Evid. 602 (a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter).

In re Welfare of S.A.M., 570 N.W.2d 162 (Minn. Ct. App. 1997), provides the two methods for authenticating a videotape. *S.A.M.* involved the admissibility of a surveillance videotape from a city bus. 570 N.W.2d at 163. The state could not provide a witness with personal knowledge that the video was “what it is claimed to be.” *Id.* at 164. The court explained that Rule 901(b)(9) provides an alternative authentication method, the “silent witness theory,” under which a proponent offers evidence of the reliability of the process by which the videotape was made. *Id.* at 165. The evidence must both describe the process or

¹ *See e.g.*, Minnesota Administrative Procedure, Beck, Chapter 10, Second Ed., 1998.

system and show that it produces an accurate result. *Id.* Unable to produce a witness with personal knowledge of the video, the state offered the testimony of a video technician who explained how the video was made, stated that the video produced an accurate result, and provided some evidence on the chain of custody. *Id.* at 166. The court concluded that “[t]he videotape was properly admitted because it was authenticated according to a method listed in 901(b) and consistent with the broad guideline for authentication set out in rule 901(a): that is, evidence was produced showing that the tape is what its proponent claimed.” *Id.* at 166-67.

Here, the only attempt at authentication is counsel for CSS’ statement that he “reviewed and downloaded” the videos. CSS’ counsel provided no information on how the videos were made, who made the videos, under what circumstances or conditions the videos were made, no chain of custody for the videos, or any other information verifying the videos. In addition, it is improper for Counsel to essentially “testify” on behalf of his client. Given that Mr. Schleck has attempted to provide foundation for the videos, is AWA Goodhue expected to *voir dire* Mr. Schleck for purposes of an offer of proof or otherwise? The “foundation” offered by CSS and the City of Goodhue falls far short of the standard of admissibility under Rule 901 or for an administrative contested case. Because the YouTube videos are not competent evidence, Minn. Rule 1400.7300 requires they be excluded.

2. The videos are irrelevant.

The YouTube videos should be excluded for another reason: they fail the test of relevancy.

Paragraph 6 of the Second Prehearing Order is straightforward. It requires intervenors to file rebuttal testimony on two things: (1) whether they agree or disagree with the impacts on the project caused by application of the County’s ordinance, as described in Applicant’s direct testimony, and (2) the County’s basis for concluding that public health, safety, or public policy

considerations support application of the County's standards to the project. CSS' YouTube videos do neither.

It is impossible to understand, for instance, how a YouTube video of a single bird strike some place on the planet is in any way relevant to the County's purported 10 RD setback for LWECS, or how a video regarding wind turbine "failure" is relevant to the County's standard regarding stray voltage.

Not only do the YouTube videos not have any tendency to make the existence of any fact that is of consequence to the determination of this case "more probable or less probable than without the evidence" (Minn. R. Evid. 401, defining relevant evidence), any probative value of the videos is substantially outweighed by the danger that the videos will only confuse the issues, be misleading, and waste time.

In short, the unauthenticated YouTube videos being offered by CSS and the City of Goodhue, through an affidavit of counsel, are not the type of evidence on which reasonable, prudent persons rely in the conduct of their serious affairs.

Because the videos fail to satisfy even the simple test of relevancy and are not probative, Minn. Rule 1400.7300 requires that they be excluded.

C. The Information Submitted by GWT Is Unduly Repetitious and/or Irrelevant.

The Fourth Prehearing Order required the County and GWT to have delivered to all parties, no later than March 4, paper copies of the voluminous and unorganized exhibits both parties had attached to its limited February 24 rebuttal testimony.

On Saturday, March 5, AWA Goodhue received a box of information which Goodhue Wind Truth's Marie McNamara testifies are "the documents that Goodhue Wind Truth provided to ... the Subcommittee, Planning Advisory Committee and County Board to use in its deliberations of the Goodhue County Ordinance." All told, GWT is proposing to introduce into the record more than 600 pages of documents which are already a matter of public record.

On Monday, March 7, Goodhue County provided AWA Goodhue with a CD that contained an “Index to Goodhue County Exhibit A” and more than 5,000 pages of what appears to be the County’s entire record, including the information received by the County’s Planning Advisory Commission and the PAC’s sub-committee, in adopting the County’s WECS ordinance. AWA Goodhue received a paper copy, unorganized, on March 11. The information filed by the County includes the same information filed by GWT.

Here, GWT seeks to introduce the more than 600 pages of information which it provided to the County as part of the County’s overall WECS ordinance record. Because the record which the County seeks to introduce includes the information provided by GWT to the County (as well as additional information), there is no need to have the *identical* information offered or admitted twice. Minnesota Rule 1400.7300 bars the admission of “unduly repetitious” evidence. Because the GWT information is already contained within the County record, which the County seeks to introduce, AWA Goodhue respectfully asks that to the extent the County record is admitted here, the GWT information be excluded as unduly repetitious.

As discussed below, however, AWA Goodhue also believes that the County record, including the GWT, is not relevant to limited issues in this case. As a result, AWA Goodhue is asking that the County demonstrate the relevance of its record before this ALJ admits more than 5,000 pages of public record into this proceeding. To the extent that the County is unable to show why it is necessary or appropriate to include the County record in this record, AWA Goodhue likewise requests that the GWT information be excluded.

D. The County Record Fails the Test of Relevance.

Ordinarily, AWA Goodhue would not object to the admissibility in a contested case of information that is a matter of public record. But here, the County has simply packaged up its entire 5,000+ pages of record without any effort to demonstrate any part of the record’s relevance to this more limited proceeding. As the ALJ has already concluded, this contested

case is not a due process challenge to the County's adoption of its WECS standard. Instead, the County's (and other parties') obligation, as stated in paragraph 6 of the Second Prehearing Order, was straightforward: in their rebuttal testimony, intervenors, including the County, were required ("shall") to describe (1) whether it agrees or disagrees with the impacts that application of the County ordinance would have on the project, as described by the Applicant in its direct testimony, and (2) the evidence on which the County relied to adopt standards more stringent than the MPUC's standards.

The County provided no testimony rebutting or otherwise qualifying the impacts to the project as described by AWA Goodhue. Having reviewed the County testimony and record, it is also now readily apparent that there is no credible health or safety evidence underlying the County's standards. More importantly at this juncture, however, is that because the record developed here is the *exclusive* source of factual information on which the MPUC's decision on the issue of "good cause" can be based, it is difficult to overstate the importance to AWA Goodhue that a clear, concise record be developed. *See, e.g.*, Minn. Stat. § 14.62, subd. 1 (all agency decisions in a contested case to be based in writing and on the record). In contested cases under the Administrative Procedure Act, admissible evidence is limited only to that which is probative. Where evidence is not probative, is irrelevant or immaterial, or unduly repetitious, Minn. Rule 1400.7300 requires ("shall") that it be excluded.

Here, it cannot reasonably be stated that all 5,000+ pages which the County appears intent on submitting is either relevant or material to the limited question presented: the specific health, safety or other basis supporting the County's standards. The principles underlying the Minnesota Rules of Evidence, particularly Rule 102 regarding their purpose and construction, and rule 403 regarding the exclusion of irrelevant evidence, ought to be heeded here. Read together, these rules are intended to secure the fairness in administration of proceedings, the elimination of unjustifiable expense and delay, and the exclusion of even relevant evidence if its

probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, is misleading, or if the information is likely to cause undue delay, a waste of time, or is cumulative.

The prospect of admitting into this contested case record more than 5,000 pages of public record without the County demonstrating the information's relevance to the limited issues in this case is inconsistent with the principles underlying the rules of evidence and the promotion of justice. Without any explanation as to its relevance, the information lacks foundation (and therefore is incompetent evidence), is unduly repetitious and cumulative, will likely result in confusion of the issues, waste time, and most important, it is not probative to the issues at hand.

Accordingly, AWA Goodhue objects to the admissibility of the County's record *in toto* into the record in this case, and specifically requests that absent a showing of relevance as to each of the record documents in the County record, that it be excluded.

III. CONCLUSION

For the above reasons, AWA Goodhue respectfully requests that the information the subject matter of this memorandum be ruled inadmissible according to Rule 1400.7300.

Dated: March 11, 2011

Respectfully submitted,

/s/ Todd J. Guerrero

Todd J. Guerrero (#0238478)

Christina K. Brusven (#0388226)

FREDRIKSON & BYRON, P.A.

200 South Sixth Street, Suite 4000

Minneapolis, Minnesota 55402-1425

Telephone: (612) 492-7000

Fax: (612) 492-7077

Attorneys for AWA Goodhue, LLC

First Name	Last Name	Email	Company Name	Address	Delivery Method	View / Trade Secret	Service List Name
Julia	Anderson	Julia.Anderson@state.mn.us	Office of the Attorney General-DOC	1400 BRM Tower 445 Minnesota St St. Paul, MN 551012131	Electronic Service	Yes	OFF_SL_8-1233_CC-SL1-08-1233
Stephen	Betcher	Steve.Betcher@co.goodhue.mn.us	County of Goodhue	Goodhue County Justice Center 454 West Sixth Street Red Wing, Minnesota 55066	Electronic Service	No	OFF_SL_8-1233_CC-SL1-08-1233
Christina	Brusven	cbusven@redlaw.com	Fredrikson & Byron, P.A.	200 S 6th St Ste 4000 Minneapolis, MN 554021425	Electronic Service	No	OFF_SL_8-1233_CC-SL1-08-1233
Bob	Cupit	bob.cupit@state.mn.us	Public Utilities Commission	Suite 350 121 7th Place East St. Paul, MN 551012198	Electronic Service	No	OFF_SL_8-1233_CC-SL1-08-1233
Patricia	DeBleekere	tricia.debleekere@state.mn.us	Public Utilities Commission	Suite 350 121 Seventh Place East St. Paul, MN 55101	Electronic Service	Yes	OFF_SL_8-1233_CC-SL1-08-1233
Sharon	Ferguson	sharon.ferguson@state.mn.us	Department of Commerce	85 7th Place E Ste 500 Saint Paul, MN 551012198	Electronic Service	Yes	OFF_SL_8-1233_CC-SL1-08-1233
Todd J.	Guerrero	tguerrero@redlaw.com	Fredrikson & Byron, P.A.	Suite 4000 200 South Sixth Street Minneapolis, MN 554021425	Electronic Service	No	OFF_SL_8-1233_CC-SL1-08-1233
Burl W.	Haar	burl.haar@state.mn.us	Public Utilities Commission	Suite 350 121 7th Place East St. Paul, MN 551012147	Electronic Service	Yes	OFF_SL_8-1233_CC-SL1-08-1233
Karen Finstad	Hammel	Karen.Hammel@state.mn.us	Office of the Attorney General-DOC	1400 BRM Tower 445 Minnesota Street St. Paul, MN 551012131	Electronic Service	Yes	OFF_SL_8-1233_CC-SL1-08-1233
Patrick	Hynes	phynes@strobelhanson.com	Strobel & Hanson, P.A.	406 W Third Street Suite 200 Red Wing, MN 55066	Electronic Service	No	OFF_SL_8-1233_CC-SL1-08-1233

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Jack	Levi		Goodhue Wind LLC	Suite 525 3033 Excelsior Blvd. Minneapolis, MN 55416	Paper Service	No	OFF_SL_8-1233_CC-SL1-08-1233
John	Lindell	agorud.ecf@state.mn.us	Office of the Attorney General-RUD	900 BIRM Tower 445 Minnesota St St. Paul, MN 551012130	Electronic Service	Yes	OFF_SL_8-1233_CC-SL1-08-1233
Carol	Overland	overland@legalelectric.org	Legalelectric, Inc.	P.O. Box 176 Red Wing, MN 55066	Paper Service	No	OFF_SL_8-1233_CC-SL1-08-1233
Laura	Schlatter	Laura.Schlatter@state.mn.us	Office of Administrative Hearings	P.O. 64620 Saint Paul, MN 55164	Paper Service	Yes	OFF_SL_8-1233_CC-SL1-08-1233
Daniel	Schleck	dschleck@mansfieldtanick.com	Mansfield, Tanick and Cohen P.A.	220 South Sixth Street Suite 1700 Minneapolis, MN 55402	Paper Service	No	OFF_SL_8-1233_CC-SL1-08-1233
Kathleen D.	Sheehy	kathleen.sheehy@state.mn.us	Office of Administrative Hearings	PO Box 64620 St. Paul, MN 551640620	Electronic Service	Yes	OFF_SL_8-1233_CC-SL1-08-1233
Leon	Steinberg	N/A	Goodhue Wind, LLC	3033 Excelsior Boulevard Suite 525 Minneapolis, MN 55416	Paper Service	No	OFF_SL_8-1233_CC-SL1-08-1233