

**STATE OF MINNESOTA  
COURT OF APPEALS  
File No. A112229**

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**In the Matter of the Application of AWA  
Goodhue Wind, LLC for a Large Wind  
Energy Conversion System Site Permit  
for the 78 MW Goodhue Wind Project in  
Goodhue County.**

**MINNESOTA PUBLIC UTILITIES  
COMMISSION DOCKET NUMBER:  
IP-6701/WS-08-1233**

**OFFICE OF ADMINISTRATIVE  
HEARING DOCKET NUMBERS:  
8-2500-21395-2 AND 3-2500-21662-2**

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**APPELLANT COALITION FOR SENSIBLE SITING'S  
BRIEF AND ADDENDUM**

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## STATEMENT OF ISSUES

**Issue Number 1:** *Did the Minnesota Public Utilities Commission err in granting a permit to construct and operate a Large Wind Energy Conversion System in Goodhue County with wind turbine setback requirements less stringent than those contained in a validly enacted Goodhue County ordinance on the subject without showing the deference to that ordinance required by Minnesota Statutes Section 216F.081?*

**How Issue Was Raised Below:** The issue was raised by the Coalition for Sensible Siting and other parties on the record at several points in the administrative process while the permit was being considered by the Minnesota Public Utilities Commission and in CSS's Request for Reconsideration of the final order granting the permit.

**Ruling Below:** The Minnesota Public Utilities Commission granted the permit at issue and without including the more stringent setback requirements contained in a validly enacted Goodhue County ordinance on the subject.

**How Issue Was Preserved for Appeal:** The issue was raised by the Coalition for Sensible Siting and other parties on the record at several point in the administrative process while it was being considered by the Minnesota Public Utilities Commission and in its Request for Reconsideration of the final order granting the permit. It was also raised in the Coalition for Sensible Siting's Statement of the Case.

### **Apposite cases:**

*Frost-Benco Electric Association v. Minnesota Public Utilities Commission*, 358 N.W.2d 639, 642 (Minn. 1984).

*Langfield v. Department of Public Safety*, 449 N.W.2d 738, 740 (Minn. Ct. App. 1990).

\* \* \* \* \*

**Issue Number 2:** *Did the Minnesota Public Utilities Commission err in granting a permit to construct and operate a Large Wind Energy Conversion System in Goodhue County with wind turbine setback requirements less stringent than those contained in a validly enacted Goodhue County ordinance on the subject in the absence of "good cause" to overrule that ordinance pursuant to Minnesota Statutes Section 216F.081?*

**How Issue Was Raised Below:** The issue was raised by the Coalition for Sensible Siting and other parties on the record at several points in the administrative process while the permit was being considered by the Minnesota Public Utilities Commission and in CSS's Request for Reconsideration of the final order granting the permit.

**Ruling Below:** The Minnesota Public Utilities Commission granted the permit at issue without including the more stringent setback requirements contained in a validly enacted Goodhue County ordinance on the subject.

**How Issue Was Preserved for Appeal:** The issue was raised by the Coalition for Sensible Siting and other parties on the record at several point in the administrative process while it was being considered by the Minnesota Public Utilities Commission and in its Request for Reconsideration of the final order granting the permit. It was also raised in the Coalition for Sensible Siting's Statement of the Case.

**Apposite cases:**

*Averbeck v. State*, 791 N.W.2d 559, 561 (Minn. Ct. App. 2010).

*Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 825 (Minn. 1977).

## STATEMENT OF THE CASE

This case is before the Court pursuant to a certiorari appeal brought by the Coalition for Sensible Siting (“the CSS”), an organization representing a group of local landowners who will be negatively impacted by the grant of a permit (“the Permit”) by the Minnesota Public Utilities Commission (“the PUC”) to AWA Goodhue Wind, LLC (“AWA Goodhue”) in connection with its proposed Large Wind Energy Conversion System (“LWECs”) project in Goodhue County, Minnesota (“the AWA Project”).

CSS appeals the PUC’s grant of the Permit because of that agency’s misinterpretation and failure to adhere to the terms of Minnesota Statutes Section 216F.081, and its resulting disregard of a validly enacted, stricter Goodhue County ordinance mandating a setback for wind turbines from non-participating dwellings within the County of 10 rotor-diameters (“RD”). Instead of deferring to the County’s considered judgment on this issue, the PUC substituted its judgment, unsupported by the record and in violation of the Minnesota Statutes Section 216F.081, and issued AWA Goodhue the Permit requiring a setback of only 6 RD.

In reaching this conclusion in its Order dated August 23, 2011, the PUC invented a standard for reviewing Goodhue County’s ordinance that is totally at-odds with the standard explicitly set forth by the Legislature in Minnesota Statutes Section 216F.081. Instead of adopting the County’s more stringent setback standards unless presented with “good cause” to overrule that standard, the PUC overstepped its authority and declared that it would ignore the County’s setback ordinance unless *the County* could prove that its ordinance was “necessary” and that the County’s goals could not be achieved by “less stringent standards.”

Based on this flawed conception of its authority in this area, the PUC granted AWA Goodhue’s requested Permit. CSS and other interested parties subsequently requested that the PUC reconsider its Order, on this basis and other grounds. The PUC summarily rejected these requests. This appeal has followed.

## **STATEMENT OF THE FACTS**

### **A. The Parties**

The PUC is an administrative agency created by the State of Minnesota for the purpose of regulating public utilities, among other things. Minn. Stat. §§ 216A.03-.05. As such, it was tasked with deciding whether the AWA Project would be given a permit to proceed with its operation, and if so, what limitations would be placed on the AWA Project’s operation vis-à-vis turbine setback requirements. Minn. Stat. § 216F.01, *et seq.*

The CSS is an organization of local individuals in Goodhue County who are concerned about the proposed AWA Project for a variety of reasons, including the setback requirements contained in the Permit. App. 0001-0003.<sup>1</sup> CSS believes that local residents would be directly harmed if the AWA Project were to go forward with the setback requirements currently contained in the Permit issued by the PUC. App. 0001-0003.

On November 12, 2010, CSS petitioned the PUC for permission to intervene as a full party to the permit proceedings – with appeal rights – pursuant to Minnesota Rules 1400.6200, subp. 1 and 1405.0900, subp. 1. App. 0001-0003. CSS’s petition was

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<sup>1</sup> “Add. \_\_\_\_” refers to the Addendum. “App. \_\_\_\_\_” refers to the Appendix hereto.



unopposed, and was granted by the PUC in its First Prehearing Order dated December 8, 2010. App. 0005.

**B. The AWA Project.**

This dispute involves an LWECS project proposed by AWA Goodhue to be located on various individual parcels within a 32,684-acre project footprint of agricultural land located in southeastern Goodhue County. Add. 0004. The AWA Project will include up to 50 1.5 MW xle and 1.6MW xle wind generators mounted on 262-foot towers with a rotor diameter of 271 feet. Add. 0004. The Project will ultimately have a total capacity of 78 MW. Add. 0004. Because of its size, the AWA Project is classified as an LWECS pursuant to Minn. Stat. 216F, *et. al.*, and as such its permitting is governed by Minnesota Statutes Chapter 216F. Add. 0006.

**C. The PUC Permitting Process for the AWA Project.**

On October 19, 2009, AWA Goodhue filed its revised site permit application for the AWA Project with the PUC. Add. 0003. On November 30, 2009, the PUC accepted the permit application for the AWA Project. Add. 0003.

Between July 21 and 22, 2010, four public hearings were held at the Goodhue High School in the City of Goodhue. Add. 0003. Administrative Law Judge Eric L. Lipman presided over the hearings and submitted his Summary of Public Testimony on September 7, 2010. Add. 0003.

On November 2, 2010, the Commission issued a Notice and Order for Hearing, referring the matter of the applicability of Goodhue County's ordinance standards on the Goodhue Wind Project to the Office of Administrative Hearings (“OAH”) for contested

case proceedings. Add. 0003. Shortly thereafter, OAH assigned the contested case to Administrative Law Judge Kathleen D. Sheehy. Add. 0003-0005. The contested case proceedings were held in early 2011 with various information entered into the PUC docket on this matter and several days of live testimony. Add. 0003-0005. On April 29, 2011, Administrative Law Judge Kathleen D. Sheehy made findings of fact and issued her report to the PUC. Add. 0003.

On May 16, 2011, exceptions to the Judge Sheehy's Report were filed by the project applicant, Goodhue County, CSS, and a number of other intervenors. Add. 0003. The Commission also received exceptions to the ALJ's Report from the Department of Natural Resources and from members of the public. Add. 0003.

On June 20, 2011, the Energy Facilities Permitting Unit of the Department of Commerce (EFP, formerly known as the Office of Energy Security (“OES”)) filed comments and recommended that the Commission adopt the ALJ's report and issue a site permit to the Applicant for the project; the EFP's filing also included its proposed Findings and Conclusions to be used by the PUC in issuing the Permit. Add. 0004. On June 30, 2011, the Commission met to consider the matter, and the record closed under Minn. Stat. § 14.61, subd. 2. Add. 0004.

**D. The Goodhue County Setback Ordinance.**

On October 5, 2010, after consultation with PUC and OES Staff, Goodhue County's Board of Commissioners adopted an amendment to Article 18 of the County Zoning Ordinance for Wind Energy Conversion System Regulations and governing wind projects. App. 0009-0019, 0024. The new amended Wind Energy System ordinance specifically

provides, in its very first section, that, with regard to LWECS projects in the County: “any standards [in the ordinance] more stringent than those of the MPUC are to be considered and applied to LWECS per MS 216F.081.” App. 0009.

Relevant to this appeal, the Goodhue County ordinance requires all commercial wind turbine projects, including the AWA Project, to incorporate a 10 RD setback from any non-participating dwellings – i.e., dwellings owned by individuals that are not receiving any financial compensation from the project operator. App. 0014. The ordinance allows for a shorter setback for landowners that negotiate consideration for the waiver of this right. App. 0014. In the context of the wind turbines originally proposed by the applicant for the AWA Goodhue Project, a 10 RD setback would amount to approximately 2,707 feet (about ½ mile). Add. 0011.

The setback requirements in this ordinance were adopted by the County to protect the health and safety of Goodhue County’s residents, property, and environment from the dangers associated with close proximity to commercial-size LWECS as detailed in the County record for adoption of its ordinance and entered into the PUC record for the Permit. App. 0023; Add. 0012, 0015. The County also presented evidence to the PUC that its setback requirements were intended to protect the quality of life of the County’s residents, and that this determination is supported by reports issued by the Minnesota Department of Health in 2009 and the World Health Organization in 2009. App. 0023, 0027-0242; Add. 0012, 0015.

**E. The PUC Overrules the Goodhue County Setback Ordinance and Grants a Permit to the AWA Project.**

On August 23, 2011, the PUC issued the Site Permit As Amended granting the AWA Project its requested permit, and essentially adopted the Judge Sheehy's factual and legal findings. Add. 0003-0092. Relevant to this appeal, the PUC specifically found that "good cause" existed to ignore Goodhue County's 10 RD setback standard for non-participating dwellings. Add. 0015-0016.

In analyzing setbacks in light of the "good cause" requirement contained in Minnesota Statutes Section 216F.081, the PUC decided that it had authority to ignore the valid County ordinance where the Permit interveners could not show that the ordinance's requirements were "necessary" and that "less stringent standards are sufficient to effectively address the concerns raised." Add. 0009.

Applying this standard, which appears nowhere in the statute or in any previous PUC order or finding, the PUC essentially adopted Judge Sheehy's findings and justified this determination with support found in reports on the health and safety impacts of LWECs presented by AWA Goodhue, the OES, and even a lobbying group funded by wind energy advocates. Add. 0010-0016. In so doing, the PUC privileged this evidence and testimony over valid, scientifically supported contrary evidence presented by the County, CSS and others. In the end, the PUC adopted a setback standard of 6 RD, which it admits is a compromise, without any sort of scientific support or justification. Add. 0015-0016.

Perhaps recognizing that it had trampled on the prerogatives and authority granted to the County by the Legislature in Minn. Stat. § 216F.081, the PUC also noted in its Order that: “the Legislature clearly envisioned county governments playing a meaningful role in the orderly siting of LWECS, consistent with environmental preservation, sustainable development, and the efficient use of resources.” Add. 0016. In a non-enforceable nod to the County’s “meaningful role,” the PUC exhorted AWA Goodhue to “make a good-faith effort to meet to the 10-RD standard.” Add. 0016.

In the wake of the Permit, Goodhue County, CSS, and many other parties formally requested that the PUC reconsider its position on these issues. By an order dated November 14, 2011, the PUC summarily rejected those reconsideration requests. Add. 0001-0002. This appeal followed.

### **SUMMARY OF ARGUMENT**

The PUC erred as a matter of law when it granted the AWA Project Permit. Specifically, it invented and used a standard for its review of the more stringent County setback standards found nowhere in the relevant statute. Instead of deferring to the County’s ordinance on setbacks as mandated by Minn. Stat. 216F.081, the PUC chose to fabricate a standard and find that such requirements were not “necessary” under the circumstances and that “less stringent” alternatives would sufficiently address the concerns of the County and its residents.

Since the PUC applied the wrong legal standard, and since it granted the Permit in the absence of “good cause,” its decision should be reversed by this Court and the Permit

should be voided and the matter sent back to the PUC for a determination using the proper “good cause” standard.

### STANDARD OF REVIEW

As a general matter, decisions made by administrative agencies such as the PUC are reversed only when they reflect an error of law, the findings are arbitrary and capricious, or their findings are unsupported by substantial evidence. *Sunstar Foods, Inc. v. Uhlendorf*, 310 N.W.2d 80, 84 (Minn. 1981); *Crookston Cattle Co. v. Minnesota Dep't of Natural Resources*, 300 N.W.2d 769, 777 (Minn. 1980); *Signal Delivery Service, Inc. v. Brynwood Transfer Co.*, 288 N.W.2d 707, 710 (Minn. 1980). The court has endorsed the following definition of “substantial evidence”:

1. Such relevant evidence as a reasonable mind might accept as adequate to support a conclusion;
2. More than a scintilla of evidence;
3. More than some evidence;
4. More than any evidence; and
5. Evidence considered in its entirety.

*Cable Communications Bd. v. Nor-West Cable Communications P'ship*, 356 N.W.2d 658, 668-669 (Minn. 1984); *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 825 (Minn. 1977). The substantial evidence test requires a reviewing court to evaluate the evidence relied upon by the agency in view of the entire record as submitted. *Minnesota Power & Light Co. v. Minnesota Public Utilities Commission*, 342 N.W.2d 324, 332 (Minn. 1983). If an administrative agency engages in reasoned decision-making, the

court will affirm, even though it may have reached a different conclusion had it been the fact-finder. *First Nat'l Bank v. Department of Commerce*, 350 N.W.2d 363, 368 (Minn. 1984); *Reserve Mining*, 256 N.W.2d at 825. The Court will intervene, however, where there is a “combination of danger signals which suggest the agency has not taken a ‘hard look’ at the salient problems” and the decision lacks “articulated standards and reflective findings.” *Reserve Mining*, 256 N.W.2d at 825.

When agency conclusions are based on legal rather than factual considerations, the reviewing court is not bound by the agency's decision and need not defer to the agency's expertise. *Frost-Benco Electric Association v. Minnesota Public Utilities Commission*, 358 N.W.2d 639, 642 (Minn. 1984). Moreover, an agency's interpretation of legislative intent, while influential, cannot bind a court. *Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Authority*, 464 U.S. 89, 98 n. 8 (1983); *Langfield v. Department of Public Safety*, 449 N.W.2d 738, 740 (Minn. Ct. App. 1990). When a statute is unambiguous, its wording controls over agency interpretations. *Id.*; *Matter of Kern Grain Co.*, 369 N.W.2d 565, 570 (Minn. Ct. App. 1985).

## **ARGUMENT**

### **I. The PUC Applied the Wrong Standard to its Review of the Goodhue County Setback Ordinance.**

The PUC erred as a matter of law in applying a contrived standard when determining whether to incorporate the County's more stringent 10 RD setback standards into the AWA Goodhue Permit. This error of law by the PUC was at odds with the specific statutory requirement that it defer to those more stringent County standards

absent “good cause.” In light of this legal error, which this Court reviews *de novo*, the PUC’s decision to issue the Permit should be reversed and the PUC should be ordered to incorporate the more stringent Goodhue County 10 RD setback standards into any future permit for this project. *Frost-Benco*, 358 N.W.2d at 642.

When it enacted Chapter 216F to comprehensively regulate the permitting process for prospective LWECs, the Legislature made a conscious decision to give a substantial amount of regulatory authority not to the PUC, but instead to the local counties within which the projects would be located. Specifically, the Legislature mandated that the PUC, in making its permitting decisions, is required to defer to the policy judgments of counties on certain permit standards for which the Legislature felt local determinations were warranted:

**216F.081 APPLICATION OF COUNTY STANDARDS.** A county may adopt by ordinance standards for LWECs that are more stringent than standards in commission rules or in the commission's permit standards. The commission, in considering a permit application for LWECs in a county that has adopted more stringent standards, shall consider and apply those more stringent standards, unless the commission finds good cause not to apply the standards.

The Legislature could have chosen not to give counties any role in making policy in this area. Instead, it made the affirmative, unequivocal, and unambiguous decision to limit the PUC’s permitting discretion by giving county authorities, who are presumably closer and more responsive to local constituencies and local interests, primary regulatory authority in this arena. Under this framework, the PUC takes a secondary role in the process, its discretion limited by the statutory command that it not substitute its judgment for that of the local county. In this way, the PUC’s role in the process is not unlike that of an appellate court



reviewing a factual decision made by a court or agency below, in that it can only overrule the existing decision below under extraordinary circumstances.

The only statutory mechanism for overruling a validly-enacted county ordinance mandating more stringent LWECS permitting standards is a finding of “good cause” by the PUC.

Here, it is undisputed that Goodhue County through its Board of Commissioners enacted a valid setback ordinance requiring a 10 RD setback for wind turbines from a dwelling. Add. 0006-0008; App. 0009-0019. As set forth above, the PUC was required to defer to that requirement absent a finding of “good cause” to overrule it. Minn. Stat. § 216F.081.

Instead, the PUC unilaterally decided to apply a much different standard. According to its Order granting the Permit, the PUC chose to assess the application of the County’s setback requirements by deciding “whether applying the County’s standards to this Project is necessary and whether less stringent standards are sufficient to effectively address the concerns raised.” Add. 0009. Herein lies the core of the PUC’s legal error.

The standard adopted by the PUC forces the County (and citizens groups such as the CSS) to provide justification to the PUC that its ordinance is “necessary” under the circumstances and that “less stringent” alternatives are not sufficient to address the concerns which led to the enactment of the ordinance in question.

If this contrived standard seems familiar to the Court, it is probably because it bears an uncanny resemblance to the “strict scrutiny” standard applied by state and federal courts in cases where a law burdens certain fundamental constitutional rights or

particularly disadvantaged classes of citizens. *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995) (racial classifications by the government “must serve a compelling governmental interest, and must be narrowly tailored to further that interest”); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (time, place, and manner restrictions on speech are constitutional “provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information”); *Hennepin County v. Perry*, 561 N.W.2d 889, 897 n. 7 (Minn. 1997) (for a law to pass strict scrutiny under the Minnesota Constitution, it must be “narrowly tailored and reasonably necessary to further a compelling governmental interest”).

Needless to say, the strict scrutiny standard is designed to require an extremely high level of justification by the government for a law, and is reserved for cases where a law seeks to take away an individual’s core constitutional freedoms. A standard like that has no place in the PUC’s review of Goodhue County’s setback ordinance to determine if has found “good cause” to ignore a more stringent county standard.

Instead, the PUC should have simply applied the law as it is unambiguously written. The PUC is required to defer to the judgment of the elected representatives of Goodhue County on the setback issue, and to follow the statutory process of compelling the applicant (here, AWA Goodhue) to satisfy the burden of presenting the PUC with “good cause” for overruling the County’s ordinance. Minn. Stat. § 216F.081; *see also*

*Langfield*, 449 N.W.2d at 740 (when a statute is unambiguous, its wording controls over agency interpretations); *Matter of Kern Grain Co.*, 369 N.W.2d at 570 (same).

By inverting this analysis and shifting the burden to *the County* to convince the PUC that the County's adopted setback standards were "necessary," the PUC erred as a matter of law. The Court should correct this error by voiding the Permit, or, in the alternative, remanding this matter to the PUC with instructions that it grant the appropriate amount of deference to the County's setback ordinance.

## **II. "Good Cause" Does Not Exist to Ignore the Setback Standards Contained in the Goodhue County Ordinance.**

As set forth above, the only circumstances under which the PUC is statutorily allowed to substitute its judgment for the judgment of a County with regard to wind turbine setback requirements is where "good cause" exists to ignore those locally adopted county standards. Since the record demonstrates that the "good cause" standard has not been met and that the County's ordinance was validly adopted and well-supported by the available evidence in the record, the PUC's Order granting the Permit should be reversed.

"Good cause" for this purpose is not statutorily defined. However, it is clear that the Legislature intended to give deference to local, county level governments when it adopted Minnesota Statutes Section 216F.081 because it provided that local land use controls could be stricter than the PUC's requirements. The Legislature would have given no deference to more restrictive county standards at all if it did not intend to give county governments the chance to promote local values with more restrictive standards.

While not defined in this statute, definitions of “good cause” are found elsewhere in Minnesota Statutes and should be used for guidance here. Recently, the Minnesota Court of Appeals wrestled with the undefined meaning of “good cause” within the context of firearm possession laws. *Averbeck v. State*, 791 N.W. 2d 559, 561 (Minn. Ct. App. 2010). The Court of Appeals looked at a number of definitions, and made the general statement that “good cause is a reason for taking an action that, in legal terms, is legally sufficient, and, in ordinary terms, is justified in the context of surrounding circumstances.” *Id.* The Court also relied upon the definition of “good cause” contained in Black’s Law Dictionary: “a legally sufficient reason” or “the burden placed on a litigant ... to show why a request should be granted or an action excused.” *Black’s Law Dictionary*, 251 (9th ed. 2009).

In cases where, as here, the Legislature imposes, but fails to define a term, a court must examine “the purpose and intent of the statute to determine when good cause could be found.” *Matter of Welfare of D.C.M.*, 443 N.W.2d 853, 854 (Minn. Ct. App. 1989) (quoting *In re Welfare of Alle*, 304 Minn. 254, 230 N.W.2d 574 (1975)).

This intent can be readily ascertained from Chapter 216F itself. It contains a declaration of public purpose that promotes development of only responsible, environmentally sensitive projects:

The legislature declares it to be the policy of the state to site LWECs in an orderly manner compatible with environmental preservation, sustainable development, and the efficient use of resources.

Minn. Stat. § 216F.03. *See also* MN ADC 7854.0200; MN ADC 7854.1000 (conditioning LWECS permitting on Commission determination “that the project is compatible with environmental preservation, sustainable development, and the efficient use of resources”).

Underscoring the centrality of the Legislature’s concern for human and environmental impacts, it went on to mandate that the PUC issue LWECS siting rules that address, *inter alia*, “the impact of LWECS on humans and the environment.” Minn. Stat. § 216F.05(1). The PUC, in its Order, conceded that setbacks of some distance are required to “protect the health and safety of residents and the environment.” Add. 0009.

As the record amply demonstrates, the County’s ordinance requiring a 10 RD setback from non-participating dwellings for any commercial wind turbines was based upon valid, scientifically supported concerns raised by Goodhue County’s citizens following the issuance of reports by two reputable groups concerning the health and safety impact of wind turbines on people living among them. App. 0023; Add. 0012, 0015. The first, and perhaps most important, of these reports was issued by the Minnesota Department of Health (“DOH”) in 2009 and entitled “Public Health Impacts of Wind Turbines.” App. 0027-0058. That report is billed as the DOH’s “white paper” on the subject of “evaluating possible health effects associated with low frequency vibrations and sound arising from [LWECS].” App. 0030. By its terms, the report was supposed to provide “general application and usefulness in guiding decision-making for future wind projects.” App. 0030.

The DOH report relied upon the latest national and international scientific testing and applies it to the particular regulatory and natural environment in Minnesota. The report's authors ultimately concluded that the health and safety impacts of various types of noises and shadow flicker generated by LWECS were best addressed by setback requirements of ½ mile from a dwelling. App. 0054. Not coincidentally, ½ mile closely corresponds to the setback distance provided by a 10 RD setback in the AWA Goodhue project. App. 0014; Add. 0011.

The second reputable report on wind turbine safety relied upon by the County and presented to the PUC was issued by the World Health Organization (“WHO”) in 2009, and entitled “Night Noise Guidelines for Europe.” Add. 0059-0242. Like the DOH report, the WHO report involves an exhaustive review of existing scientific evidence on the issue at hand, specifically with regard to the impact of LWECS on the sleep patterns of those who live near to the wind turbines. App. 0069. Its findings include a recommendation that noise levels be kept under 30 decibels in order to avoid injurious impacts on human health. App. 0186.

In light of this scientific evidence, it was entirely reasonable and prudent for Goodhue County to conclude that a 10 RD setback requirement was appropriate to meet the needs of citizens in the County. As a result, using the power specifically granted to it by Minnesota Statutes Section 216F.081, it enacted its setback ordinance, and expected that its exercise of authority in this area would not be ignored absent “good cause.”

In the face of the ordinance's enactment and the scientific evidence which informed Goodhue County's decision, AWA Goodhue failed to meet its burden of proof

and present decisive evidence – scientific or otherwise – on the record showing conclusively that people or animals living closer than 10 RD from a wind turbine will not be negatively impacted by noise, flicker, vibration, or stray voltage. AWA Goodhue also failed to present any unquestionable evidence that property values are maintained or enhanced by the close proximity of wind turbines.

To be sure, AWA Goodhue presented the PUC with a variety of reports, hired expert testimony, and other types of evidence indicating that the problems sought to be addressed by Goodhue County setback ordinance were not actually as bad as the County’s evidence might suggest and that compliance with the ordinance would allegedly impose substantial additional costs on AWA Goodhue. Add. 0011-0012. However, in light of the deference which must be given to the Goodhue County setback ordinance and the substantial evidence used, analyzed, and presented by the County and others in support of that ordinance, the PUC cannot even approach the “burden” of “good cause” which must be met to overrule the County’s considered judgment on this issue. *See Black's Law Dictionary*, 251 (9th ed. 2009).

In sum, since the Goodhue County setback ordinance is reasonably supported by substantial evidence, and since AWA Goodhue has failed to present indisputable facts showing “good cause” on the record before the PUC showing that the setback ordinance should be ignored, the Court should reverse the PUC’s Order granting the Permit.

### **CONCLUSION**

For the foregoing reasons, CSS respectfully requests that the setback standards contained in the Goodhue County Zoning Ordinance be added to the AWA Goodhue

Permit and the PUC's showing of good cause for not adopting the same be voided. In the alternative, the Court should remand this matter to the PUC with instructions that it grant the appropriate amount of deference to the County's setback ordinance.

**MANSFIELD, TANICK & COHEN, P.A.**

Dated: February \_\_\_\_, 2012

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