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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2229**

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

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

**Filed June 25, 2012
Affirmed
Bjorkman, Judge**

Minnesota Public Utilities Commission
File No. IP-6701/WS-08-1233

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Considered and decided by Halbrooks, Presiding Judge; Worke, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges the Minnesota Public Utilities Commission's (MPUC's) determination that there is good cause to disregard one of Goodhue County's setback ordinances for wind energy projects. Because substantial evidence supports the MPUC's factual findings and those facts constitute good cause to disregard the setback, we affirm.

FACTS

In 2009, respondent AWA Goodhue Wind, LLC (AWA) filed a revised site permit application to construct a large wind energy conversion system (LWECS) in Goodhue County. Pursuant to a contract with Xcel Energy, AWA sought to generate 78 megawatts (MW) of power, using 50 wind turbines, each 397 feet tall with a 271-foot rotor diameter (RD). Respondent MPUC approved the contract under Minn. Stat. § 216B.1612 (2010).

An administrative-law judge (ALJ) presided over the permit hearings in July 2010 and submitted a summary of public testimony to the MPUC the following September. Less than one month later, the county adopted a stringent LWECS ordinance, which would prohibit the siting of all 50 turbines in AWA's proposed project. Among other things, the ordinance requires that turbines be set back at least the length of 10 RDs from each residence not participating in the project, absent a waiver from the owner of the residence.

The MPUC referred the matter of the ordinance's applicability to an ALJ for contested-case proceedings. The ALJ presided over a three-day public hearing that included oral testimony from 56 witnesses and thousands of pages of exhibits and expert reports. The ALJ issued findings, conclusions, and recommendations, including the determination that there is good cause to disregard the 10-RD setback ordinance and instead apply AWA's proposed 1,500-foot setback. The county and numerous intervenors, including relator Coalition for Sensible Siting (CSS) and amicus curiae Goodhue Wind Truth (GWT), filed exceptions to the ALJ's report.

In August 2011, the MPUC issued a site permit to AWA. In doing so, the MPUC concurred with the ALJ that there is good cause not to apply the 10-RD setback and instead imposed a 6-RD (1,626-foot) setback. Additionally, the MPUC required AWA to make a good-faith effort to comply with the 10-RD setback and accommodate the county's concerns about turbine noise and shadow flicker (alternating changes in light intensity caused by moving rotor blades). The county, CSS, and GWT filed petitions for reconsideration, which the MPUC denied. This certiorari appeal follows.

D E C I S I O N

The MPUC is the exclusive permitting authority for LWECSs that exceed a 25-MW capacity. Minn. Stat. §§ 216F.04, .07, .08 (2010). But the MPUC must apply a county's LWECS ordinance unless it finds good cause not to do so:

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.*

Minn. Stat. § 216F.081 (2010) (emphasis added). Whether a permit applicant has shown good cause to disregard an ordinance is a mixed question of fact (what facts have been shown) and law (whether the facts constitute good cause). *See Averbek v. State*, 791 N.W.2d 559, 560-61 (Minn. App. 2010) (describing the good-cause standard); *In re Minn. Pub. Utils. Comm'n*, 365 N.W.2d 341, 343 (Minn. App. 1985) (describing the burden of proof), *review denied* (Minn. May 31, 1985). We therefore review the MPUC's factual findings for substantial evidence but review its good-cause determination de novo. *See In re Excelsior Energy, Inc.*, 782 N.W.2d 282, 289-90 (Minn. App. 2010).

I. Substantial evidence supports the MPUC's factual findings.

The MPUC based its determination that there is good cause to disregard the 10-RD setback on the following facts: (1) the 10-RD setback is unnecessary to protect human health, safety, and quality of life, and the proposed project presents “no reasonable likelihood of adverse health impacts”; (2) the 10-RD setback is designed to eliminate all human exposure to noise and shadow flicker; (3) the 10-RD setback “may preclude the entire project”; and (4) the application of a 10-RD setback “could severely hinder the implementation of state renewable energy policies.”

CSS does not argue that any particular factual finding is unsupported by substantial evidence, and our review of the record reveals ample support for each finding. First, AWA presented modeling studies performed by an engineering consulting firm

demonstrating that the anticipated turbine noise and shadow flicker would be minimal: no more than 43 decibels of noise (below state noise standards) and 33 hours and 11 minutes of shadow flicker per year (less than 1% of daylight hours). Second, AWA submitted expert testimony and scientific reports from the Minnesota Commissioner of Public Health, the Wisconsin State Health Officer, the Ontario Chief Medical Officer of Health, the Wisconsin Public Service Commission, and the American Wind Energy Association, indicating that there is no reliable scientific research demonstrating that noise generated by wind turbines or shadow flicker cause adverse health conditions. Third, county officials testified that the county adopted the 10-RD setback to eliminate all noise and flicker exposure in order to avoid the costs of modeling and measuring actual noise and flicker effects. Fourth, AWA representatives testified that the 10-RD setback would preclude the placement of 43 out of the 50 proposed turbines, effectively prohibiting the project, and alternative project designs are not geographically or economically feasible. And fifth, modeling studies show that the 10-RD setback would essentially prevent all wind energy projects in Goodhue County—an ideal location for wind development—and, if applied throughout the state, would preclude wind development in the vast majority of Minnesota and thereby drive up the cost of wind power.

In the face of this substantial evidentiary support for the MPUC's findings of fact, CSS advances what is essentially a legal argument. It maintains that the MPUC erred in basing its findings of fact on the evidence presented in the contested-case proceeding because Minn. Stat. § 216F.081 requires the MPUC to accept and defer to the facts the county relied on in establishing the ordinance, namely, reports from the Minnesota

Department of Health and the World Health Organization that allegedly recommend a 10-RD setback. We disagree. Section 216F.081 creates a presumption in favor of applying the county's ordinance; it does not require the MPUC to adopt or defer to the factual allegations the county accepted in passing the ordinance. Indeed, an "agency decision-maker owes no deference to any party in an administrative proceeding" and must "weigh all of the evidence presented and come to an independent decision." *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001). Based on our independent review of the record, we conclude that the MPUC correctly relied on evidence developed in the contested-case proceeding and that substantial evidence supports the MPUC's fact-finding.

II. The MPUC correctly determined that there is good cause to disregard the 10-RD setback.

The permit applicant—in this case, AWA—has the burden of establishing that there is good cause to disregard the county's ordinance standards. *See In re Minn. Pub. Utils. Comm'n*, 365 N.W.2d at 343. Good cause is a "reason for taking an action that . . . is justified in the context of surrounding circumstances." *See Averbek*, 791 N.W.2d at 561.

CSS and GWT argue that the MPUC shifted the burden of proof to the county to justify the 10-RD setback and show that it was necessary to protect human health and safety. We are not persuaded. The MPUC did not base its decision on the county's failure to produce evidence to justify the 10-RD setback. Instead, the MPUC based its decision on evidence produced by AWA not only that the 10-RD setback is unnecessary

to protect human health, but also that such an extensive setback requirement would likely prevent the proposed project and hinder the development of renewable energy in Minnesota. This analysis correctly placed the burden of proof on AWA.

Additionally, CSS asserts that the MPUC failed to give proper deference to the county's authority to set LWECS standards. Again, we disagree. Although the legislature gave counties the opportunity to establish siting standards through ordinances, it vested the MPUC with the ultimate authority to issue permits for LWECSs of the capacity involved here. Minn. Stat. §§ 216F.04, .07, .08, .081. In doing so, the legislature did not require the MPUC to defer to the county's process of setting standards but instead charged the MPUC with determining whether, as a substantive matter, there is good cause to disregard those standards. The MPUC's conclusion that the good-cause standard was met here does not undermine the county's authority to establish LWECS standards.

Finally, CSS argues that the state's policy of promoting renewable energy cannot be the only factor in the MPUC's good-cause determination. We agree. The good-cause determination involves a multi-factor analysis of all relevant considerations, including health, safety, and the legislative policy goals of encouraging county participation in LWECS siting, increasing the use of wind energy, and "sit[ing] LWECS in an orderly manner compatible with environmental preservation, sustainable development, and the efficient use of resources." Minn. Stat. §§ 216B.1691, 216F.03, .081 (2010). Application of this multi-factor analysis of the surrounding circumstances, as found by the MPUC, reveals good cause to disregard the 10-RD setback. As noted above,

substantial evidence demonstrates that AWA’s proposed siting does not present adverse health or safety impacts due to turbine noise or shadow flicker.¹ Accordingly, the 10-RD setback—based on a zero-exposure standard—is unnecessary. And on the other hand, imposition of the county’s 10-RD setback threatens AWA’s private interest in wind development and the state’s public interest in promoting wind development as a sustainable source of energy. On this record, there is good cause to disregard the 10-RD setback.

Affirmed.

¹ CSS argues that there was no “decisive” evidence that the proposed project would not pose stray voltage risks or diminish property values. But because CSS makes this point without any analysis or indication that the 10-RD setback addresses these concerns, CSS has waived the argument. *See In re Irwin*, 529 N.W.2d 366, 373 (Minn. App. 1995) (deeming issues waived because they were not adequately argued or briefed), *review denied* (Minn. May 16, 1995).