

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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

ISSUE DATE: March 20, 2013

DOCKET NO. IP-6701/CN-09-1186

DOCKET NO. IP-6701/WS-08-1233

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

DOCKET NO. E-002/M-09-1349
E-002/M-09-1350

In the Matter of Northern States Power
Company's Request for Approval of Power
Purchase Agreements with Goodhue Wind, LLC

ORDER REOPENING CASE UNDER
MINN. STAT. § 216B.25, SETTING
PROCEDURES, AND REQUIRING
FILINGS

PROCEDURAL HISTORY

I. The Project; Earlier Commission Action

This case involves four closely related dockets – an application for a certificate of need to build a 78-megawatt wind farm (now called New Era Wind Farm) in Goodhue County, an application for a site permit for the wind farm, and a request for approval of two contracts to sell the electricity from the wind farm to Xcel Energy. In three earlier orders the Commission granted the certificate of need,¹ issued a site permit,² and approved the contracts.³

All three orders based their determinations on the project owner's anticipated in-service date of December 31, 2011. The wind farm was not built on schedule, however, and on December 31, 2012,

¹ Order Granting Certificate of Need, docket IP-6701/CN-09-1186, August 23, 2011.

² Order Issuing Site Permit as Amended, docket IP-6701/WS-08-1233, August 23, 2011.

³ Order Approving Power Purchase Agreements, Approving Contract Amendments, and Requiring Further Filings, dockets E-002/M-09-1349 and E-002/M-09-1350, April 28, 2010.

the project owner filed a Notice of Delayed In-Service Date under the certificate of need rules, asking the Commission to let the certificate of need stay in effect without further hearings despite a delay exceeding the twelve-month delay the rules allow without further Commission review.⁴

Also pending at that point was the project's request for approval of its Avian and Bat Protection Plan, which, under the terms of the site permit, must be approved before construction can begin. The project's first Avian and Bat Protection Plan had been denied approval based on a need for further study of the incidence and activity of bats, bald and golden eagles, and trumpeter swans in and near the project footprint.⁵ The new Plan was filed November 2, 2012, and supplemented in December 2012 and January 2013 with further data on bat activity and the Fall 2012 eagle migration.

II. New Issues Raised

After the certificate of need and site permit were issued, scores of local residents and organizations opposed to the wind farm filed comments. Some comments went to issues that had, in large part, been examined earlier, but many contained new claims that, if true, appeared to undermine the factual foundations of the order granting the wind farm a certificate of need.

For example, commenters claimed that all the original owners of the limited liability company that owned the wind farm had sold their interests to a single, out-of-state owner, eliminating the local ownership that had played a critical role in the finding that the project was a Community-Based Energy Development (C-BED) project under Minn. Stat. § 216B.1612. Since the project's C-BED status had been central to the approval of its power purchase contracts with Xcel and the issuance of its certificate of need,⁶ these commenters urged investigation or rescission of the certificate of need.

Similarly, commenters claimed that the project had lost the financing and turbine purchase agreements it had cited in support of its certificate of need application and no longer had adequate site control, since it was now in litigation with several landowners who had earlier signed leases to host wind turbines. Loss of site control, they pointed out, could require reconfiguration of the wind turbines or even force resizing of the wind farm. They also alleged that the data gathered and supplied in the Avian and Bat Protection Plan was compromised by deficiencies in the methodology and execution of the underlying studies.

Four legislators representing Goodhue County and surrounding areas – Representative Steve Drazkowski, Representative Tim Kelly, Senator John Howe, and Senator Matt Schmit – filed comments urging the Commission to reexamine the project's C-BED eligibility. The

⁴ Minn. R. 7849.0400, subp. 2 A.

⁵ Order Denying Approval of Avian and Bat Protection Plan, site permit docket, IP-6701/WS-08-1233, April 6, 2012.

⁶ See the Order Granting Certificate of Need, which found the cost of the project's power to be reasonable because the project qualified as a C-BED project. See the Order Approving Power Purchase Agreements, Approving Contract Amendments, and Requiring Further Filings, which found the prices Xcel agreed to pay under those contracts to be reasonable in light of its status as a C-BED project.

Goodhue County Board of Commissioners filed a request that the Commission reexamine the project's C-BED status before the Board took final action on a pending resolution to rescind an earlier resolution expressing County support for the project.

III. Further Information Sought

Following receipt of these public comments, the Commission served Information Requests on the project owner to gather more information on the issue of ownership, the status of the project's purchased power contracts with Xcel Energy, and related issues. Among other things, the project's responses confirmed that a single, out-of-state limited liability company now owned the limited liability company that owned the wind farm and that there was no current local ownership. Also, the project developer had changed, as had development financing and construction financing.

The responses also stated that Xcel had served default notices under the purchased power contracts, that the project intended to cure all defaults, and that the project and Xcel were actively engaged in negotiations to that end.

On January 9, 2013, the Commission issued a notice requesting comments on four issues:

- Could the Commission's August 23, 2011 need determination for the AWA Goodhue, LLC [now New Era Wind Farm] project have reasonably resulted in a different decision under the criteria listed in Minn. Rule 7849.0120 if the relevant changed circumstances were known at the time of the decision?
- Should New Era Wind Farm, LLC's request for an in-service date delay to December 31, 2013 be approved without recertification? [New Era Wind Farm is the new project name adopted by the project's new owner.]
- Is the equity sale of 100 percent of New Era Wind Farm, LLC (from American Wind Alliance, LLC to Peter J. Mastic Holdings II, LLC) acceptable without recertification?
- Do the recent project changes, including changes outlined in New Era Wind, LLC's December 17, 2012 information request response, impact the Community Based Energy Development status of this project?

IV. The February 28 Hearing

On February 28, 2013, the Commission took up the project's request for approval of the delayed in-service date, the project's request for approval of the Avian and Bat Protection Plan, and the comments filed by members of the public, local residents and organizations, and public officials.

New Era Wind Farm, LLC (New Era) and the Minnesota Department of Commerce (the Department) appeared as parties in the certificate of need case. Numerous members of the public and three legislators also appeared.

New Era argued, among other things, that the complexities of wind-farm financing had produced the current ownership situation, that some local ownership would eventually be restored, and that the changes that had occurred were permissible under revisions made to the C-BED statute after the project received its C-BED certification. The project stated that it was working with Xcel energy to cure defaults under the purchased power contracts and argued that substantial economic benefits would accrue to the local economy when the wind farm began operating.

The Department stated that it considered the effect of the ownership change on the project's C-BED status to be a policy issue committed to Commission discretion and that it took no position on it.

Senator Matt Schmit, Representative Steve Drazkowski, and Representative Tim Kelly offered public comments urging careful scrutiny of the project's C-BED status, emphasizing their commitment to ensuring that projects granted C-BED status have the strong local connections and local benefits state policymakers intended.

Nineteen members of the public spoke. Two argued that the wind farm would bring substantial local economic benefits in the form of investment opportunities, new jobs, and purchases of goods and services. They emphasized that some portion of the wind farm would be locally owned by the time construction begins.

The other members of the public urged re-examination of the project's potential benefits based mainly on the project's performance in evaluating and responding to environmental issues. They claimed that project consultants on wildlife issues had often undercounted – or failed to count entirely – eagles, bats, loggerhead shrikes, trumpeter swans, and other wildlife.

Some claimed there was a history of mistrust and conflict between local residents and the project on wildlife protection issues, land lease issues, and other issues. They claimed that the project was unwilling to commit to following the recommendations of the Minnesota Department of Natural Resources and the U.S. Fish and Wildlife Service. One speaker stated he had witnessed project wildlife consultants disregard monitoring protocols by significantly shortening an observation session.

Having reviewed the entire record and having heard the arguments of the parties and other interested persons, the Commission makes the following findings, conclusions, and order.

FINDINGS AND CONCLUSIONS

I. Certificate of Need Case Reopened

Under Minn. Stat. § 216B.25, the Commission may reopen any case for the taking of further evidence or for any other reason:

The commission may at any time, on its own motion or upon motion of an interested party, and upon notice to the public utility and after opportunity to be

heard, rescind, alter, or amend any order fixing rates, tolls, charges, or schedules, or any other order made by the commission, and may reopen any case following the issuance of an order therein, for the taking of further evidence or for any other reason. Any order rescinding, altering, amending, or reopening a prior order shall have the same effect as an original order.

The Commission finds that the circumstances under which it issued the certificate of need to New Era Wind Farm have changed and that further factual clarification and analysis are required to determine whether it should remain in effect.

First, the original certificate of need was based on a finding that the project was a C-BED project. This determination was critical because the cost of the project's power – and the price in the purchased power contracts with Xcel – was understood to exceed the cost of similar supplies from non-C-BED wind projects. C-BED projects are permitted a reasonable price premium to advance statutory directives encouraging the development of locally owned renewable energy, assuming standard reliability and minimal impact on rates.⁷ Without C-BED status, the project may well have failed the “more reasonable and prudent alternative” standard of Minn. R. 7849.0120 B. (2):

A more reasonable and prudent alternative to the proposed facility has not been demonstrated by a preponderance of the evidence on the record, considering:

(2) the cost of the proposed facility and the cost of energy to be supplied by the proposed facility compared to the costs of reasonable alternatives and the cost of energy that would be supplied by reasonable alternatives. . . .

In fact, the Department, which intervened in the case under its statutory charge to represent the public interest in Commission proceedings,⁸ recommended denying the certificate of need unless the project was found to be a C-BED project. The Commission found that it was a C-BED project and granted the certificate of need on that basis.

Similarly, the certificate of need was granted based on New Era's representations that financing was in place, enforceable power purchase contracts were in effect, necessary land and wind rights were acquirable, county support for the project was present, and wildlife protection and similar environmental concerns would be readily addressed. The size, type, and timing of the project appeared to have been settled. These circumstances may now have changed and require reexamination.

The Commission will therefore request comments and analysis from the parties and participants in the certificate of need case, and from members of the public, on the issues set forth below and will invite them to raise any other issues they consider relevant to the certificate of need determination.

⁷ Minn. Stat. § 216B.1612, subd. 5 (a).

⁸ Minn. Stat. § 216A.07, subd. 3.

II. Issues to be Addressed

C-BED Status

- Has New Era Wind Farm, due to ownership changes or for any other reason, lost the C-BED status the Commission found to exist in its April 28, 2010 order?⁹
- If New Era does not meet the criteria for C-BED status at this time, what is its factual basis for asserting that it will meet the standard by its proposed in-service date?
- Does the project meet the requirements of the certificate of need statute and certificate of need rules without C-BED status?¹⁰
- Do the revisions to the C-BED statute enacted in 2010 affect the project's ability to meet the requirements of the certificate of need statute and rules without current C-BED status?
- Did the change in ownership of the limited liability company that owns the project violate the anti-transfer provisions applicable to C-BED projects under Minn. Stat. § 216B.1612, subd. 3 (c)? If so, what action should the Commission take?

Other Changes in Circumstances

- Does the project's loss of financing, the absence of turbine purchase agreements, or the unsettled status of the power purchase contracts affect the certificate of need determination?
- Does the project currently have in hand the land leases, easements, and wind rights required to construct the 78-megawatt wind farm for which it received a certificate of need? How does the answer to this question affect the certificate of need determination?
- If the project currently lacks the land leases, easements, and wind rights required to construct the wind farm as originally certificated, what alternatives are available for consideration? What is the likelihood of changes to the size of the wind farm or the size, type, or configuration of the turbines? What is the project's projected time frame for making these determinations and then for proceeding? How do the answers to these questions affect the certificate of need determination?
- How would changes in the size of the wind farm or in the size, type, or configuration of the turbines affect the environmental and wildlife protection considerations made in the certificate of need determination? How would they affect the certificate of need determination itself?

⁹ Order Approving Power Purchase Agreements, Approving Contract Amendments, and Requiring Further Filings, dockets E-002/M-09-1349 and E-002/M-09-1350.

¹⁰ Minn. Stat. § 216B.243 and Minn. R. 7849.0120.

- Would accommodating the concerns of the Minnesota Department of Natural Resources or the U.S. Fish and Wildlife Service require changes in the size, type, or timing of the wind farm or in any of the substantive provisions of the certificate of need or the site permit? If so, does the project intend to make these accommodations? How do the answers to these questions affect the certificate of need determination?
- If changes in the size of the wind farm or in the size, type, or configuration of the turbines were proposed – raising new environmental considerations – how would the project engage and collaborate with the Minnesota Department of Natural Resources and the U.S. Fish and Wildlife Service?
- What is the current in-service date for the project? What is the expected in-service date, or, if the date is not known, when do the parties anticipate the conclusion of the negotiations between the Applicant and Xcel regarding the power purchase agreements?
- Does the new project owner stand behind all representations made in the application for the certificate of need and in the application for the site permit? Is the new owner willing and able to comply with all terms and conditions in the certificate of need and the site permit?

Other Issues

The list above does not include every issue that could affect this certificate of need decision, and the Commission invites parties, participants, and members of the public to raise any other issues they consider material during the initial comment period established below. Newly raised issues will then be addressed during the reply comment period.

Finally, the Commission requests comments on what process it should use going forward to resolve the issues identified above and any additional issues raised in the course of this proceeding.

III. Comment Periods

Initial comments on the issues listed above must be filed within 14 days of the date of this order, and new issues must be raised within the same period. Reply comments must be filed within 14 days of the final day of the initial comment period.

The Commission will then reconvene and determine whether it can make a final decision on the basis of the existing record or must refer the case to the Office of Administrative Hearings for contested case proceedings for evidentiary development of contested material facts.

IV. Request for Extension, Avian and Bat Protection Plan Tabled

The Commission will table the project's request for an extension of the wind farm's in-service date, since that issue cannot be considered without examining the other issues discussed above.

Similarly, the Commission will table the project's request for approval of its new Avian and Bat Protection Plan. Besides general challenges to the adequacy of the Plan, the record contains numerous complaints and comments from local residents and organizations, making unanswered and often serious factual allegations. These include accounts of specific incidents in which project wildlife consultants allegedly undercounted or failed to count wildlife or failed to follow monitoring protocols.

The Commission cannot investigate these fact-intensive claims unilaterally and must have responses from the project to sort out their accuracy and import. The new plan will therefore remain tabled until New Era has investigated and filed responses to these claims.

V. Purchased Power Contracts

Finally, New Era's purchased power contracts with Xcel play a key role in this case, since the certificate of need was based on Xcel's need for the project's power. Those contracts are apparently being renegotiated. Any new terms, especially pricing terms or in-service dates, could clearly affect this certificate of need determination. Similarly, a significant change in the size of the project could affect contract terms in a manner requiring further examination.

The Commission will therefore require the project and Xcel to file any amended contracts as soon as they are finalized, specifically highlighting any new in-service date(s) they may contain, and to promptly file notice should the status of the contracts change.

ORDER

1. The Commission hereby reopens its August 23, 2011 order granting a certificate of need in this case.
2. Within 14 days of the date of this order, parties, participants, and members of the public choosing to comment on the issues identified in this order, or choosing to raise other issues for Commission consideration in this case, shall file initial comments.
3. Within 14 days of the final day of the initial comment period, parties, participants, and members of the public choosing to respond to the initial comments shall file reply comments.
4. New Era Wind Farm and Xcel Energy shall file any amended purchased power contracts as soon as they are finalized, specifically highlighting any new in-service date(s) they may contain, and shall promptly file notice if their purchased power contracts are terminated.
5. New Era Wind Farm's request to extend the in-service date in its certificate of need is tabled.

6. New Era Wind Farm's request for approval of the new Avian and Bat Protection Plan is tabled until New Era has (a) responded to the comments made by the public challenging factual representations made in the Plan and challenging the Plan's adequacy in protecting bat and avian species, and (b) addressed whether any mitigation measures required to meet the concerns of the Minnesota Department of Natural Resources and the U.S. Fish and Wildlife Service would have an impact on the size, type, or timing of the project or on any substantive provisions of the site permit.
7. This order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary



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