

Minnesota Public Utilities Commission
Staff Briefing Papers

Meeting Date: **June 20, 2013** Agenda Item #10**

Company: New Era Wind Farm, LLC

Docket No. IP6701/CN-09-1186 and WS-08-1233

Subject: **In the Matter of AWA Goodhue, LLC's Certificate of Need and Site Permit for a 78 Megawatt Large Energy Facility in Goodhue County**

E002/M-09-1349 and M-09-1350

In the Matter of Northern States Power d/b/a Xcel Energy's Power Purchase Agreements with Goodhue Wind, LLC

Issue(s): What action should the Commission take regarding the New Era Wind Project?

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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 otherwise noted.

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I. Relevant Documents

Commission and Party Filings

Initial Comments

Commission – Order Granting Certificate of Need	August 23, 2011
Staff Briefing Papers – February 28, 2013 Agenda.....	February 21, 2013
Commission Order – Reopening Case Under Minn. Stat. 216B.25 Setting Procedures, and Requiring Filings	March 20, 2013
Goodhue County – Comments.....	April 3, 2013
Department of Commerce – Energy Resources and Planning (ERP or DER) – Comments	April 3, 2013
Goodhue Wind Truth – Comments.....	April 3, 2013
New Era Wind Farm, LLC – Comments	April 3, 2013
Goodhue Wind Truth – Objection to (New Era Request) for Reply Comment Extension.....	April 8, 2013

Reply Comments

Department EFP – Reply Comments.....	April 17, 2013
Goodhue Wind Truth – Reply Comments	April 17, 2013
New Era Wind Farm – Reply Comments	April 17, 2013
Goodhue Wind Truth – Reply Comments to New Era Correspondence	April 17, 2013
Xcel Energy – IR: Supplemental Information to PUC #2 IR	May 8, 2013
Xcel Energy – IR: Response to MPUC Data Request #3	May 24, 2013

Public Comments

Initial Comments

Barbara Stussy – Public Comment (2 Comments)	April 3, 2013
Bob Rosenquist – Public Comment (2 Comments).....	April 3, 2013
Mary Hartman – Public Comment.....	April 3, 2013
Marie McNamara – Public Comment.....	April 3, 2013
Thomas Gale – Public Comment.....	April 3, 2013
Paul Reese – Public Comment.....	April 3, 2013
Kristi Rosenquist – Public Comment (5 Comments).....	April 3, 2013
Judy O’Reilly – Public Comment.....	April 3, 2013
Belle Creek Township – Public Comment	April 3, 2013
Belle Creek Township – Public Comment	April 3, 2013
Erin Logan – Public Comment	April 3, 2013
Ann Buck – Public Comment	April 3, 2013
Rochelle Nygaard – Public Comment	April 3, 2013

Reply Comments

Rochelle Nygaard – Public Comment: Reply.....	April 9, 2013
Bruce and Marie McNamara – Public Comment: Reply.....	April 17, 2013
Barbara Stussy – Public Comment: Reply.....	April 17, 2013

II. Statement of the Issues

What action should the Commission take regarding the New Era Wind Project?

III. Background

For the project history up to February 28, 2013 – see staff’s briefing paper for the February 28, 2013 Commission meeting (listed as a relevant document).

On February 28, 2013, the Commission met to consider several matters including 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 (ABPP), and the comments filed by the members of the public, local residents, organizations, and public officials.

On March 20, 2013 the Commission issued its *Order Reopening Case Under Minn. Stat. § 216B.25 Setting Procedures, and Requiring Filings*. The March 20 Order provided for a 14-day initial comment period and a 14-day reply comment period for parties to comment on the questions provided in the Order (listed below).

On March 1, 2013 and April 3, 2013, both Goodhue Wind Truth and Goodhue County (respectively) filed petitions for intervention, both were accepted by the Commission as no objections were received.

On or before April 3, 2013, initial comments were received from New Era Wind Farm, LLC (New Era), the Department of Commerce – Energy Regulation and Planning (the Department or ERP), Goodhue Wind Truth, Goodhue County, as well as from several members of the public. In its initial comments, New Era provided brief responses and requested that the reply comment period be extended for a time uncertain to allow for further development on the Power Purchase Agreement (PPA) between New Era and Xcel.

On April 9, 2013, the Commission’s Executive Secretary issued a letter to New Era indicating that the comment period deadlines were established by Order and therefore, could not be modified without Commission action and would not be extended at that time.

On or before April 17, 2013, reply comments were received from New Era, the Department ERP, the Department of Commerce – Energy Facilities Permitting (EFP), Goodhue Wind Truth and several members of the public.

On May 8 and May 24, Xcel Energy filed answer to Commission Information Request (IR) regarding updates on the PPA negotiations.

IV. March 20, 2013 - Commission Order

The Commission’s March 20, 2013 *Order Reopening Case Under Minn. Stat. 216B.25 Setting Procedures, and Requiring Filings* noted that Information Request (IR) responses provided by the project owner 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. Further, the IR responses stated that Xcel had served default notices under the power

purchase contracts, that the project intended to cure all defaults within the allowed time periods, and that the project and Xcel were actively engaged in negotiations to that end.

The Order summarized that at the February 28 meeting:

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 [community based energy development] 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.

The Commission's Order found 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. The Order highlighted that the original Certificate of Need determination was 1) based on a finding that the project was a C-BED project, 2) that during the process the Department recommended that the Commission deny the Certificate of Need unless the project was found to be a C-BED project, and 3) 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.

To that end, the Commission requested that the parties comment on:

C-BED Status

1. 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?
2. 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?
3. Does the project meet the requirements of the certificate of need statute and certificate of need rules without C-BED status?
4. 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?

5. 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

6. 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?
7. 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?
8. 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?
9. 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?
10. 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?
11. 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?
12. 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?
13. 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?

Further, the Commission Order stated:

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.

Last, the Commission ordered that Xcel Energy and New Era file with the Commission any update or amendment to the PPAs as soon as they are finalized.

V. Initial Comments

A. New Era Wind Farm, LLC – Initial Comments

New Era filed initial comments and noted their comments were limited. New Era stated that the Commission's March 20 Order mentioned the importance of the PPA between New Era and Xcel and therefore, since PPA negotiations are still underway between the two parties (including negotiations on the proposed new in-service date), New Era requested that the Commission delay the reply comment period and any further action on these matters pending resolution of the New Era proposals to Xcel.

B. Department of Commerce, Division of Energy Resources – Energy Regulation and Planning – Initial Comments

The Department addressed select issues outlined in the Commission's Order (due to the nature of some of the questions, they could not be addressed by anyone but the Applicant).

In response to the five questions posed regarding the community based energy development (C-BED) status, the Department reiterated its February 8, 2013 comments:

[T]here is an existing Order from the Commission issued on April 28, 2010 in Docket Nos. E002/M-09-1349 and E002/M-09-1350 regarding the Project's community-based energy development (C-BED) status. New Era's responses to Commission discovery state that the Company may seek in the future another determination of C-BED status that, it appears, may constitute a change to or amendment of the Commission's Order. Due to the Company's own uncertainty and the fact of a current Commission Order on the issue of C-BED status, it would be premature at this time [for the Department] to address possible changes to the Commission's Order on the C-BED status of the Project.

The Department also referenced their February 12, 2010 comments which provided that the Department only found the price for the Goodhue Wind (New Era) project reasonable if the project was found to be a C-BED project.

The Department responded to several of the questions outlined in the section regarding 'Other Changes in Circumstances' and focused on the portions of the questions that asked how the

changes would or could affect the certificate of need (CN) determination. The Department's comments stressed Minnesota Rule 7849.0400 which outlines what type of project changes and at what magnitude, those changes should be considered as 'significant' once a certificate of need has been issued.

The Department noted that uncertain financing, absence of turbine purchase agreements and the unsettled nature of the PPA are not directly covered by Minn. Rule 78949.0400. More specifically, the uncertain nature of the financing and turbine agreements are typically not known at the time of the Commission's decision - what matters at the point of the final decision is the overall project, its overall cost, impact and so forth. The Departments acknowledged that estimates are used to derive the projected costs and impacts, but what matters is the reasonableness of those estimates (rather than knowledge of a specific funding source). In regard to the unsettled nature of the PPAs, the Department notes that a terminated or void PPA would require a reevaluation of Minn. Rule 7949.0120 (Certificate of Need criteria), however, the lack of a PPA is not a criteria outlined in Minn. Rule 7849.0400 (changed circumstances thresholds).

The Department noted that land and wind easements are not necessary for the issuance of a CN and changes to those leases are not a criterion listed in Minn. Rule 7849.0400. The Department notes that only if the changes were greater than the thresholds listed in Minn. Rule 7849.0400 would a review need to occur.

Regarding the question posed on how the potential project changes could affect the environmental and wildlife protection considerations made in the CN determination, the Department cited Minn. Rule 7849.0120 C. which provides:

... by a preponderance of the evidence on the record, the proposed facility, or a suitable modification of the facility, will provide benefits to society in a manner compatible with protecting the natural and socioeconomic environments, including human health considering:

- (1) the relationship of the proposed facility, or a suitable modification thereof, to overall state energy needs;
- (2) the effects of the proposed facility, or a suitable modification thereof, upon the natural and socioeconomic environments compared to the effects of not building the facility;
- (3) the effects of the proposed facility, or a suitable modification thereof, in inducing future development; and
- (4) the socially beneficial uses of the output of the proposed facility, or a suitable modification thereof, including its uses to protect or enhance environmental quality.

The Department noted that since the environmental review document (ER) for the project had not yet been issued at the time of the DOC's comments, the DOC recommended that the Commission consider the ER in its final decision on whether to issue a CN. The Department further cited Minn. Rule 7849.0400 (changed circumstances thresholds) that indicates that design changes required by other state agencies in the permitting process is not subject to review by the Commission, unless the change contradicts the basic type determination specified by the CN (or if the change is greater

than the thresholds listed in Rule). The Department noted its understanding that the Commission is not bound by previous Commission's decisions, and therefore, pursuant to Minn. Stat. § 216B.25 the Commission can change the CN determination.

The Department concluded that it would be premature at this time to address possible changes to the Commission's Order on the C-BED status of the project, that changes to the project's financing, turbine purchase agreements, power purchase contracts, possession of leases, easements and wind rights are not required to be known at the time of a CN determination; therefore, changes in these areas are only required to be considered by the Commission to the extent that they result in the criteria found in Minnesota Rules 7849.0400. Last, the Department noted that while Minn. Rule 7849.0400 sets forth the thresholds for Commission recertification of certificates of need, the Commission has broad authority to rescind or amend its past Orders at any time and for any reason.

C. Goodhue Wind Truth Initial Comments

Goodhue Wind Truth (GWT) provided comment and noted that many of the questions were not able to be answered by anyone but New Era, and therefore, GWT only provided limited responses.

1. 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?

Regarding C-BED status, GWT provided a lengthy history of the project (and project changes) and indicated why it believes the project should no longer be found to be a C-BED project, however it noted that as long as the Commission Order is in existence finding the project to be a C-BED project, the project would remain classified as a C-BED project.

2. 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?

GWT indicated that it is doubtful that New Era could provide any factual basis that it could meet the new in-service date.

3. Does the project meet the requirements of the certificate of need statute and certificate of need rules without C-BED status?

GWT stated that the project, as it stands, does not meet the CN criteria if it is not a C-BED project.

4. 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?

GWT provided that the Applicant's own statement reflects that the project no longer qualifies as a C-BED project, but regardless of which Statute is elected, the project is not able to show it is a C-BED project as proposed under 2007 law and as was determined by the Commission. GWT indicated that the Applicant had raised the issue of choice of laws and the possibility of choosing which law to utilize to gain C-BED status. GWT took that statement of the Applicant to mean that the project no longer qualifies as a C-BED project and noted it believed this statement was purely a distraction from the key point that whatever Statute is to be utilized, the project is not able to show that it is a C-BED project as proposed by the 2007 law as found by the Commission.

5. 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.1612¹, subd. 3 (c)? If so, what action should the Commission take?

GWT believes that New Era violated the anti-transfer provisions set forth in Minn. Statute § 216B.1612, Subd. 3(c); combined with the failure to disclose material changes to the Commission (loss of financing, turbines and a PPA) these reasons are enough for the Commission to revoke the CN.

6. 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?

GWT stated that all the items listed affect the CN determination and each individually are sufficient cause to revoke the CN.

Further comments are provided by GWT regarding questions that only the Applicant could address and therefore are not summarized here.

Regarding the question on other issues to be addressed, GWT provided that new eagle nests may be present and should be considered by the Commission.

GWT summarized that the record is thorough and sufficient to support a decision by the Commission and requested that the Commission revoke the CN, or in the alternative, take no action and let the CN in-service date, and project, expire.

Last, GWT believes that Minn. Stat. § 216B.1612, Subd. 3(c) is sufficient alone to negate the Commission's determination of C-BED status.

D. Goodhue County Initial Comments

Goodhue County provided comments which referred the Commissioners to their November 30, 2012 letter to the Commission requesting that the Commission review the C-BED status of the Goodhue Wind Project. The November 30, 2012 letter from Goodhue County relayed that project opponents had requested that the County rescind its 2008 Resolution in Support of C-BED Status for the Goodhue Wind Project on policy grounds. The request to rescind was considered by the County Commissioners (in 2012) and it was tabled. Prior to taking final action on a resolution to rescind county support for the project, the Goodhue County Commissioners requested that the (Minnesota Public Utilities) Commission consider several issues which they summarized. Points they wish the Commission to consider (and provided supporting information on) are: 1) the ownership and management of Goodhue Wind, LLC as of March 23, 2012, and 2) the ownership and management of Goodhue Wind, LLC as of October 12, 2012.

¹ Subd. 3. **Tariff rate.** (c) The commission shall require that C-BED projects provide sufficient security to secure performance under the power purchase agreement, and shall prohibit transfer of a C-BED project during the initial term of a power purchase agreement if the transfer will result in the project no longer qualifying under subdivision 2, paragraph (h).

Goodhue County's November 30 letter requested that the Commission review the C-BED status of the project and order contested case proceedings as it deems necessary to establish the record of facts.

E. Public Comments - Initial

Public comments were received by 11 members of the public and Belle Creek Township. The comments responded to the Commission's request in its Order that persons address certain questions and other material issues that may not have been defined by the Commission. Staff did not summarize public comments that answered questions that only the Applicant could respond to, for those responses please see the public comments available as relevant documents to this briefing paper.

Members of the public provided comment on several areas including:

- The failure of the developer to make a good faith effort to comply with the terms and conditions of the site permit as shown by incomplete bird and bat surveys, a broken meteorological tower, incomplete data, and lack of site control.
- White Noise Syndrome and its effects on bats and why that should be considered in the Commission's process. The comments called for complete bat surveys in the project area.
- Information on what may be potential new raptor nests.
- A request for further evaluation of wind turbine noise in light of recent DOC EFP statements in Docket WS-10-119.
- Evidence of migrating swans, northern harriers and great horned owls in the project area.
- A request that the Commission reevaluate the site permit and need decision with respect to the Goodhue County Ordinance since changed circumstances have made the Commission's determination that "good cause exists to not apply the County standards" will have most likely changed².
- Concerns regarding misrepresentation of facts and data outlined in the original applications.
- Incomplete archeological information including lack of family cemetery considerations and potential Viking Mooring Stones in the project footprint.
- The lack of response provided by New Era to the Commissioners questions.
- Concerns regarding the harassment of citizens in the project area.
- Lack of road agreements with Belle Creek Township.

VI. Reply Comments

A. New Era Reply Comments

First, New Era provided reply comments regarding its Avian and Bat Protection Plan. New Era indicated that its ABPP reflected three years of work and collaboration between residents, project participants, and agencies. New Era made a significant effort to address deficiencies outlined by the Commission in its latest draft. New Era believes that the final comments made by the DOC EFP, DNR and the FWS were all items that can be incorporated into an updated ABPP. New Era stresses that the habitat will continue to evolve in the project area. In response to the claims made

² Doc ID. [20134-85354-03](#) – Further analysis is provided on four good cause findings made by ALJ Sheehy and adopted by the Commission and the analysis on why Mr. Reese does not believe those findings would be made today.

by residents at the February 2012 hearing of new nests in the project area, field biologists from the DNR, USFWS and EFP Staff conducted an investigation of each and every one of those nests and locations, and found no new eagle nests nor any other items that the agencies warranted inclusion in the ABPP. New Era believes that the most current round of comments and complaints make similar claims to those of a year ago all of which can be managed through the ABPP; the ABPP plan contemplates changes in habitat, since it is intended to be a document that changes with the project site. New Era believes that the ABPP, as would be amended for final agency comments, more than meets the requirements set forth in the site permit for an ABPP and is more than sufficient for Commission approval. Due to the lengthy record, New Era is unaware of how new evidence would help.

Regarding the Certificate of Need extension request, New Era noted that this process has been lengthier and more expensive than other wind projects and due to delays caused by two separate force majeure events, making the Certificate of Need extension request necessary. New Era stated that it agrees with the DOC EFP staff that the Certificate of Need extension is unrelated to the ABPP and should be granted based on the demonstrated need for additional wind energy in the state.

In response to the question regarding C-BED status, New Era indicated that following the change in upstream ownership of the project in October 2012, New Era formed an Advisory Board comprised of eight families in the project footprint. If the project is allowed to proceed, the Board members will become significant co-owners of the project and will continue to direct and manage the project. New Era indicated it remains committed to seeking a final C-BED determination once its financing is structured and prior to the start of construction, just as the C-BED regulations allow.

In response to the March 20, 2013 Order, New Era relayed that they have no confidence that due process for this project will ever end, nor that an ABPP will ever be approved. Therefore, New Era initiated discussions with Xcel Energy to allow for assignment of its power contracts to a third-party wind project developer and site. Those discussions began in December 2012 and New Era proposed several options to Xcel, backed by three different project owners. Each developer has one or more projects that could receive assignment of the Goodhue power contracts and be operational in 2013 or 2014 and each is situated in a community far more receptive to wind energy than Goodhue County. New Era believes that each of the proposals would cure all of the defaults in the PPAs and would result in a power purchase rate substantially below the rate in the current contracts. New Era noted that for reasons unknown to them, Xcel Energy rejected all of the proposals, and at the same time, issued a Request for Proposal (RFP) for more wind energy. New Era indicated that in a letter from Xcel Energy dated April 12, 2013, Xcel allowed New Era 30-days to cure the power contract defaults. As of the writing of the reply comments (April 17) New Era indicated it would continue to attempt to cure the defaults.

Due to the current state of the PPA negotiations, New Era requested that the Commission hold any further evidentiary proceedings on the ABPP approval, CN extension and the project's C-BED status in abeyance.

B. Department of Commerce – Energy Facility Permitting Reply Comments

DOC EFP staff provided reply comments in response to the comments made by GWT and the public. DOC EFP staff believes that the references to their comments in the Oak Glen Docket

were misconstrued by these entities and provided clarification. First, DOC EFP took issue with GWT's statement that: "The Department is working on guidance for siting regarding noise levels, acknowledging that the MPCA noise protocols are not specifically designed to address wind turbine noise..." and provided clarification that the guidance document under development is not siting guidance but guidance related to the measurement of noise. Second, DOC EFP disagreed that their statements in the Oak Glen docket "confirm and support the Goodhue Ordinance" and provided that:

"EFP's comments related exclusively to approaches for measuring noise from wind turbines and are not relevant to questions concerning the standards that are to be applied to such facilities or the Goodhue County ordinance."

C. Goodhue Wind Truth – Reply Comments

GWT provided that New Era did not answer the questions posed by the Commission in its March 20 Order, questions GWT believes could only be answered by New Era. In addition to the lack of response, GWT noted that New Era requested additional time to respond to the initial comments of others. GWT concluded that since New Era failed to respond to the Commission's questions, New Era's request to extend the CN should be denied.

In response to the DOC DER comments, GWT believed that the DOC DER addressed a few questions posed by the Commission's Order and narrowly interpreted Minn. Rule 7849.0400 (changed circumstances). GWT believes the questions still exists whether the CN and Site Permit Applications were reviewed in light of all the project changes, whether those approvals would still be given.

GWT concluded that violations of security and ownership provisions of Minn. Stat. § 216B.1612, Subd. 3 (c) alone are sufficient to negate the Commission's determination of C-BED status.

D. Public Comments – Reply

Three members of the public filed reply comments. Ms. Nygaard indicated that she did not believe that the Applicant's reply comment period extension request should be granted. The McNamara's provided comments on the Commission's Order and stressed that New Era did not provide initial comments. The McNamara's provided comments on the questions outlined in the March 20 Order and are not repeated here. Last, Ms. Stussy provided reply comments regarding the DOC ERP's reference to Minn. Rule 7849.0120 (C)³ which was not in response to the comment being made by the DOC ERP, and therefore those comments are not repeated here but are available as relevant documents to this briefing paper.

³ **7849.0120 CRITERIA. A certificate of need must be granted to the applicant on determining that:**

C. by a preponderance of the evidence on the record, the proposed facility, or a suitable modification of the facility, will provide benefits to society in a manner compatible with protecting the natural and socioeconomic environments, including human health, considering:

- (1) the relationship of the proposed facility, or a suitable modification thereof, to overall state energy needs;
- (2) the effects of the proposed facility, or a suitable modification thereof, upon the natural and socioeconomic environments compared to the effects of not building the facility;
- (3) the effects of the proposed facility, or a suitable modification thereof, in inducing future development; and
- (4) the socially beneficial uses of the output of the proposed facility, or a suitable modification thereof, including its uses to protect or enhance environmental quality; and...

VII. Supplemental Updates on PPA Negotiations

A. April 19, 2013 Update

On April 8, 2013, Commission staff issued an IR to Xcel asking for an update as to the status of AWA Goodhue's PPA with Xcel Energy, including:

- 1) whether Xcel Energy is in negotiations with New Era regarding a revised PPA;
- 2) the status of negotiations with New Era, if on-going;
- 3) the status of New Era's Turbine Commitment;
- 4) whether New Era has cured each event of default;
- 5) what actions have been taken by New Era to cure each event of default;
- 6) the amount of delay damages accrued by New Era to date;
- 7) the amount of delay damages collected by Xcel to date;
- 8) the status and summary of the discussion between New Era and Xcel regarding the interpretation of the deadlines by which New Era has to cure the events of default;
- 9) Xcel's position on what the cure date deadline is for each event of default;
- 10) the status of New Era's notification to Xcel regarding the transfer of ownership of AWA Goodhue Wind, LLC and the ultimate parent entity; and,
- 11) whether Xcel has issued a notification of PPA termination to New Era.

In its April 19, 2013 response, Xcel indicated that the PPAs were still in force. That in December 2012, Xcel provided New Era with a Notice of Events of Default. In December 2012, New Era offered proposals to Xcel to reassign the PPA to a different vendor, but all the proposals 1) revolved around terminating the existing PPA and replacing them with a new PPA at a different site, 2) included prices higher than current wind generation pricing, 3) provided for terms and conditions that were different than those already negotiated, 4) did not include a full and unconditional cure of the Seller's defaults, and 5) could not provide evidence that the replacement vendors could provide the funds necessary to effect a complete and unconditional cure prior to the replacement transaction.

Therefore, on April 12, 2013, Xcel provided a letter to New Era advising that Xcel declined to pursue any of the proposals, informed New Era that it remained in default and all cure periods have expired. Xcel allowed New Era an additional 30-days (until May 11, 2013) to cure its defaults.

Xcel noted that the amount of delay damages is still under dispute and no settlement has been reached and that Xcel has not yet issued a notification of termination of the PPA.

B. May 24, 2013 Update

Staff issued an IR to Xcel Energy on May 17, 2013 which requested:

- 1) any written communications provided by New Era in response to Xcel's April 12, 2013 letter (or any other relevant New Era correspondence);
- 2) any written communications provided by Xcel to New Era following Xcel's April 12, 2013 letter (or any other relevant New Era correspondence);
- 3) an update on any further action taken or proposed to be taken on the PPAs by Xcel; and,
- 4) an update on the current status of the PPAs with New Era Wind.

Xcel indicated that there had been no change since the April 12, 2013 letter was issued to New Era and Xcel had received no response to that letter. Xcel believed that waiting through the cure periods was the appropriate action and now determined that the best course of action is to seek New Era's voluntary agreement to terminate the PPAs. Xcel provided that if New Era does not respond to this request, Xcel will seek a declaratory judgment in Minnesota District Court. The purpose of the court action is to resolve the controversy over whether the magnitude and quality of New Era's defaults are sufficient to justify termination for default. Xcel believes that this will insulate the Company and their customers from adverse legal consequences if the court ultimately determines the termination for default is not legally justified.

VIII. Staff Discussion

First, staff believes that the staff discussion provided in the briefing papers for the February 28, 2013 Commission meeting are still important and refer Commissioners to that document in lieu of repeating those comment here.

A. No Action Request by New Era

New Era has the outstanding request to hold all decisions stemming from their project in abeyance. New Era requested in their initial comments that additional time be permitted for reply comments (which was not granted at that time as the deadline was set by Commission Order). In its reply comments, New Era requested that the Commission hold all action related to their project in abeyance until the PPA cure negotiations between New Era and Xcel were further along or had come to some resolution.

With the updates provided by Xcel, it appears that a resolution on the PPAs may be far off. Xcel stated it has requested a voluntary termination of its PPA from New Era and did not indicate that it provided New Era with a deadline to do so. If New Era does not provide a voluntary termination, then Xcel intends to bring the issue to District Court. Neither action is bound by any timeframe and it is anticipated that a District Court decision would take at least several months, if not potentially much longer.

Further, the New Era Site Permit has a condition that requires construction to commence within two years of site permit issuance. The site permit was issued in August of 2011, therefore further action by the Commission and a request for a site permit amendment will most likely be necessary if construction has not yet commenced in August of 2013.

Staff believes all these factors should be considered when determining how to proceed on New Era's request to hold these issues in abeyance. No update has been provided by New Era since the request for a voluntary termination by Xcel and since New Era's last comments regarding the evaluation of other sites and the potential move from the Goodhue County location (note that no update has been requested of New Era).

B. Intent to Pursue the Goodhue Project

Next, staff believes an update at the Commission meeting on the status of the project as a whole from New Era is important in light of its comments which included mention of the proposals to cure the defaults of its PPA with Xcel by relocating the project and assigning a new developer.

Those proposals call into question New Era's intent to proceed with this project location. The answer to those questions may change how the Commission elects to proceed.

C. Certificate of Need and Power Purchase Agreement Dockets

The Commission found in its March 20 Order which reopened the CN:

“that circumstances under which it issued the certificate of need to New Era had changed and that further clarification and analysis are required to determine whether it should remain in effect.”

As several commenters and the DOC indicated, whether the project is a C-BED project continues to rely on the Commission Order (in the PPA docket) finding the project to be a C-BED project.

Staff believes there are several central questions that if answered by the Commission, would help determine how to proceed.

- 1) Does the Commission believe that this project, at this time, is a C-BED project?
- 2) Does the Commission believe that the change in Statute allows New Era to obtain a future determination of C-BED status, and if so, what effect if any, does the election to have a future determination made have on the Commission's previous determination that the project qualified as a C-BED project?
- 3) If the Commission believes that the project no longer qualifies as a C-BED project at this time, does that change the Commission's decision in the CN Docket?
- 4) Does the Commission believe that these issues have not been sufficiently examined and further analysis by the Office of Administrative Hearings is necessary?

Staff believes that the Department provided an important clarification at the February 28th Agenda Meeting. Their comments prior to the February 28th meeting noted that it was their belief that it was premature to review the C-BED status of the project since it will be reviewed at final financing. The Department clarified that their statement was intended to mean that they believed it was premature for *the Department* to review the C-BED status of the project.

Staff believes that there is sufficient information to conclude that New Era cannot confirm its C-BED eligibility at this time, but the questions of whether 1) the Commission believes that would change (or update) their previous finding (that the project is a C-BED project) in the PPA docket and 2) what effect that may have on the CN docket, are questions only the Commission can determine.

Staff believes if the Commission finds that the project no longer qualifies as a C-BED project, it should make that finding in both the PPA and CN dockets and following, then at a minimum, further analysis of the CN should be conducted to examine how the project conforms to Minn. Rule 7849.0120 B(2)⁴. However, staff believes that the Commission could also find that there is already sufficient information in the record to find that the project could *not* meet that Rule

⁴ **7849.0120 CRITERIA.** A certificate of need must be granted to the applicant on determining that:

B. 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;

provision and therefore request parties show cause why the CN should not be revoked, or simply revoke the CN.

D. Questions Posed by the March 20 Order

Regarding questions posed by the Commission in its March 20 Order, the Commission requested input on many questions that it viewed as unanswered as of the last agenda meeting. Most of the questions were only answerable by New Era, however, New Era did not specifically respond to every question. The Department DER provided input generally on what it believes should be reviewed regarding changed circumstances of a project, clarifying that several of the questions discussed factors that should not be considered by the Commission unless the changes resulted in meeting the thresholds outlined in Minn. Rule 7849.0400⁵.

Therefore, staff believes that the magnitude of some of the changes (known and potential) are currently unknown, which may be why New Era elected to not answer the questions. Minn. Rule 7849.0400 provides that once it is expected that a change in circumstance reaches a threshold outlined in Rule, the Applicant would need to inform the Commission. So, staff can only assume that if the project changes reach one of the thresholds outlined in Minn. Rule 7849, New Era will bring those changes before the Commission. Staff believes the Commission should also consider how New Era's election to not provide comprehensive comments on the questions posed by the Commission aligns with the requirement that they must carry the burden of proof in order to obtain a CN (or recertification thereof).

E. Minn. Stat. § 216B.1612 Subd. 3(c)

Whether the ownership changes violated the Minn. Stat. § 216B.1612 3(c) provision and what effect that may have on the PPA approval still remains an open question. GWT was the only party that commented on this issue and it is their belief that New Era *did* violate this provision and that alone is sufficient to find that the project no longer qualifies as a C-BED project.

F. Site Permit and Avian and Bat Protection Plan

How the Commission elects to proceed in the CN and PPA Docket will affect what may occur in the Site Permit docket.

If there is no action in the CN and PPA dockets, then the only remaining questions in the Site Permit docket is 1) whether to approve the ABPP and 2) in light of comments of New Era regarding the relocation of the project site, whether this project site will be pursued.

Regarding the ABPP, New Era provided response comments that indicated their belief that their ABPP was sufficient and that New Era conducted a site visit on March 27, 2013 to evaluate the claims of new eagles nests. No documentation has been provided to the Commission by any attendee of this meeting and therefore, staff is unaware of exactly what the site visit was intended to address and what the outcomes were. Staff believes whether the statement by New Era that this site visit occurred and that no new eagles nests were present is sufficient to meet the Commission's statement in its March 20 Order:

⁵ See Appendix A to this briefing paper for the Minn. Rule 7849.0400.

“...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....The Commission cannot investigate these fact-intensive claims unilaterally and must have responses from the project to sort out their accuracy and import.”

New Era also noted that the Commission approved an ABPP similar to theirs shortly after the February 28th Agenda Meeting. Staff understands that this ABPP has undergone more process than other ABPPs and the comments remaining about plan improvement from the DNR, DOC and FWS are limited. However, staff is concerned with New Era’s refusal to address the comments made most recently by the public. At a minimum, a filing outlining why New Era believes the claims are invalid or how each concern would be addressed (or already is addressed) by the ABPP would have assisted staff in tying up what appeared to be loose ends on the ABPP approval. Instead, staff (and the record) is left with a pile of unanswered claims and concerns.

IX. Commission Decision Alternatives

1. Abeyance Request by New Era

- A. Grant the request, take no action on any Goodhue matter and request that New Era file a monthly update on the status of the project overall, PPA negotiations, or any other project developments.
- B. Deny the request to hold the matters in abeyance.

2. Power Purchase Agreement and the Certificate of Need

Approve and Recertify

- A. Approve the in-service change without further rehearing or recertification and close the Certificate of Need Docket.

Options to Request Further Analysis on the PPA and CN Dockets

- B. Refer the PPA and Certificate of Need dockets to the OAH for a contested case hearing on outstanding issues for further record development, including:
 - i. Whether the Project currently qualifies as a C-BED project.
 - ii. Whether the election to have a C-BED determination conducted at final financing changes the ability of the Project to conform to the Certificate of Need criteria in Statute and Rule.
 - iii. Whether the Certificate of Need should be recertified.
 - iv. Whether the Project changes would affect the Project’s ability to conform to the Certificate of Need criteria in Statute and Rule.
- C. Manage the outstanding issues in the reopened Certificate of Need through a comment and reply process.

Make a Finding on the Project’s CBED Status, and Options to Request Further Analysis on the Remaining Issues in the PPA and CN Dockets

- D. Determine that enough information exists today to find the project is currently not a

- C-BED project and therefore, request parties show cause why the CN should not be revoked.
- E. Determine that enough information exists today to find the project is currently not a C-BED project and therefore, find that New Era no longer fulfills 7849.0120 (C) and revoke the CN without prejudice.
 - F. Determine that enough information exists today to find the project is currently not a C-BED project and request additional analysis be conducted on the Certificate of Need docket.
 - i. Refer the matter to the OAH for further development on whether a Certificate of Need should be recertified.
 - ii. Manage the question of whether a Certificate of Need should be recertified through the comment and reply process.

Transfer Provision Findings

- G. Find that the project changes violated the 216B transfer provision and invalidate the PPA.
- H. Take no action on whether the project violated 216B.1612 Subd. 3 (c)

3. Site Permit and the Avian and Bat Protection Plan

- A. Find that the responses provided by New Era are sufficient and approve the ABPP.
- B. Request New Era provide a more comprehensive response to the request by the Commission in its March 20 Order that required New Era to investigate and file responses to the claims made by the public.
- C. Request a summary of the March 27, 2013 site visit be provided by New Era.
- D. Request a summary of the March 27, 2013 site visit be provided by the DOC EFP staff.
- E. Suspend the site permit.
- F. Initiate a revocation process.
- G. Revoke the site permit.
- H. Take no action.
- I. Take some other action.

Appendix A - 7849.0400 CERTIFICATE OF NEED CONDITIONS AND CHANGES.

Subpart 1. Authority of commission. Issuance of a certificate of need may be made contingent upon modifications required by the commission. When an application is denied, the commission shall state the reasons for the denial.

Subp. 2. Proposed changes in size, type, and timing. Changes proposed by an applicant to the certified size, type, or timing of a proposed facility before the facility is placed in service must conform to the following provisions:

- A. A delay of one year or less in the in-service date of a large generation or transmission facility previously certified by the commission is not subject to review by the commission.
- B. A power plant capacity addition or subtraction smaller than the lesser of 80 megawatts or 20 percent of the capacity approved in a certificate of need issued by the commission does not require recertification.
- C. A change in power plant ownership smaller than the lesser of 80 megawatts or 20 percent of the capacity approved in a certificate of need issued by the commission does not require recertification.
- D. The applicant shall notify the commission as soon as it determines that a change described in item A, B, or C is imminent, detailing the reasons for the change.
- E. A large transmission line length addition or subtraction made as a result of the route length approved by the Minnesota Environmental Quality Board for projects previously certified does not require recertification.
- F. A design change required by another state agency in its permitting process for certified facilities is not subject to review by the commission, unless the change contradicts the basic type determination specified by the certificate of need.
- G. If a utility applies to the Minnesota Environmental Quality Board for a transmission line route that is not expected to meet the definition of LHVTL in part 7849.0010, but at some time in the routing process it becomes apparent that the board may approve a route that meets the definition, the utility may apply for a certificate of need as soon as possible after that time. The length of a route is determined by measuring the length of its center line.
- H. If an applicant determines that a change in size, type, timing, or ownership other than specified in this subpart is necessary for a large generation or transmission facility previously certified by the commission, the applicant must inform the commission of the desired change and detail the reasons for the change. A copy of the applicant's submission to the commission must be sent to each intervenor in the certificate of need hearing proceeding on the facility. Intervenors may comment on the proposed change within 15 days of being notified of the change. The commission shall evaluate the reasons for and against the proposed change and, within 45 days of receipt of the request, notify the applicant whether the change is acceptable without recertification. The commission shall order further hearings if and only if it determines that the change, if known at the time of the need decision on the facility, could reasonably have resulted in a different decision under the criteria specified in part 7849.0120.