

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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Chair  
Commissioner  
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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: July 26, 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

ORDER DECLINING TO EXTEND  
CERTIFICATE OF NEED, FINDING  
STATUTORY VIOLATION, REQUIRING  
FURTHER FILINGS, AND GIVING NOTICE  
OF INTENT TO REVOKE SITE PERMIT

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

**PROCEDURAL HISTORY**

**I. Factual Background; Request to Extend Certificate of Need**

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,<sup>1</sup> issued a site permit,<sup>2</sup> and approved the contracts.<sup>3</sup>

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

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<sup>1</sup> *Order Granting Certificate of Need*, Docket No IP-6701/CN-09-1186, August 23, 2011.

<sup>2</sup> *Order Issuing Site Permit as Amended*, Docket No. IP-6701/WS-08-1233, August 23, 2011.

<sup>3</sup> *Order Approving Power Purchase Agreements, Approving Contract Amendments, and Requiring Further Filings*, Docket Nos. E-002/M-09-1349 and E-002/M-09-1350, April 28, 2010.

2012 – the last day of the one-year grace period provided under the certificate of need rules – the project owner filed a request to extend the certificate of need’s in-service date for another year, until December 31, 2013.<sup>4</sup>

## **II. Comments on the Extension Request**

The Commission issued a notice that it would take up the extension request at its February 28 hearing, together with the project’s request for approval of the Avian and Bat Protection Plan required under the terms of its site permit.<sup>5</sup>

Scores of local residents and organizations filed comments opposing both requests. 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 to the issuance of its certificate of need, these commenters urged investigation or rescission of the certificate of need.

Four local legislators also filed comments urging the Commission to reexamine the project’s C-BED eligibility. And the 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.

Other 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 claimed project consultants on wildlife issues had often undercounted – or failed to count entirely – eagles, bats, loggerhead shrikes, trumpeter swans, and other wildlife. They 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.

On February 28, 2013, the Commission heard oral argument and public comments on the case.

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<sup>4</sup> Minn. R. 7849.0400, subp. 2. A.

<sup>5</sup> Site Permit, § 6.7, Docket No. IP-6701/WS-08-1233.

### III. The March 20 Order

On March 20, 2013, the Commission issued an order reopening the certificate of need case, tabling the Avian and Bat Protection Plan, and requiring prompt notice if the project’s purchased power contracts with Xcel were amended or terminated. The Commission determined that it needed more detailed information to proceed, and that much of it could come only from the project.

#### A. Certificate of Need Case Reopened

The Commission reopened the certificate of need case under Minn. Stat. § 216B.25, finding as follows:

*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. Without C-BED status, the project may well have failed the “more reasonable and prudent alternative” standard of Minn. R. 7849.0120 B. (2).*

\* \* \* \* \*

*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.*

#### **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?*

- *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?*
- *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?*
- *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?*

#### **B. Avian and Bat Protection Plan Tabled**

Besides posing the questions listed above, the March 20 order stated that the project’s Avian and Bat Protection Plan would be tabled pending detailed responses to residents’ complaints regarding the project’s performance on environmental and wildlife protection issues:

*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.*

#### **C. Prompt Notice of Contract Developments Required**

Finally, the March 20 order required prompt notice of any amendments to or termination of the purchased power contracts between New Era and Xcel:

*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.*

#### **IV. Responses to the March 20 Order**

##### **A. Goodhue Wind Truth**

Goodhue Wind Truth filed initial and reply comments under the March 20 order. The organization argued that the project had long since lost the C-BED status that was critical to its eligibility for a certificate of need, that the project had no reasonable likelihood of moving forward, and that the community had a right to repose. Goodhue Wind Truth urged the Commission not to grant an extension of the in-service date set in the certificate of need.

##### **B. Goodhue County**

Goodhue County reiterated its request that the Commission determine 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.

##### **C. Minnesota Department of Commerce**

The Department of Commerce did not take a position on the merits of the project's extension request.

The agency did note that the original need determination rested on findings that the project had enforceable purchased power contracts with Xcel (whose need for wind power formed the basis for the need finding) and on the project's C-BED status (which validated the essentially above-market prices in the contracts, satisfying the reasonable-cost requirements of the certificate of need rules). Both premises have now been called into question.

##### **D. New Era Wind Farm**

On April 3, the due date for initial comments, New Era filed a request to extend the comment periods, pending renegotiation of its purchased power contracts with Xcel. Commission staff responded that the request could only be granted by Commission order, since the due date had been set by order.

On April 17, New Era filed reply comments. Those comments did not address the detailed questions laid out in the March 20 order, but stated that the project intended to become C-BED eligible before construction began and that its Avian and Bat Protection Plan was detailed, comprehensive, and based on a more detailed record than plans filed by other projects.

The crux of the comments, though, was a request to hold all activity in all four dockets in abeyance while New Era tried to secure Xcel's consent to sell its purchased power contracts to other wind farms, apparently abandoning – or deferring indefinitely – its plans to build a wind farm in Goodhue County:

*At this point, given the Commission's March 20, 2013 Order, New Era has no confidence that due process for this project will ever end, nor that an ABPP will ever be approved, however comprehensively and carefully drafted.*

*For that reason, and in an effort to reach a more practical solution that would benefit NSP and its ratepayers, fulfill the objectives of the power contracts approved by this Commission, and allow New Era to recover at least a portion of its investment, New Era initiated discussions with NSP to assign its power contracts to a third-party wind project developer and site.*

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*Therefore, during the remainder of this 30-day period and pending completion of an assignment under Section 19 of the power contracts, New Era respectfully requests that any further evidentiary procedures with respect to the ABPP approval, the Certificate of Need extension, and the project's C-BED status be held in abeyance.*

**E. Xcel Energy**

Xcel Energy made a filing under the provisions of the March 20 order requiring prompt notification of changes in the status of its purchased power contracts with the project.

Xcel stated that on June 14, 2013, it had filed a declaratory judgment action in Minnesota district court requesting a declaration that it could terminate the contracts based on four alleged contract violations: (1) failure to establish a security fund protecting Xcel from non-performance; (2) failure to meet construction milestones, including one for securing project financing; (3) failure to pay liquidated damages for delays in completing the project; and (4) failure to secure Xcel's consent before transferring ownership or control of the project to another entity.

**V. Request to Continue June 20 Hearing Date**

On June 7, 2013, the Commission issued notice to all parties and published notice on its website calendar that the case was set for hearing before the full Commission on June 20.

On June 18, 2013, New Era filed a request for a two-week extension, stating it had changed attorneys on June 17 and that the additional time would be very helpful in preparing the case. New Era explained that the change in counsel was necessitated by Xcel's declaratory judgment action, which, under the Minnesota Rules of Professional Conduct, created a conflict of interest that required earlier counsel to withdraw.

On June 19, Goodhue Wind Truth filed an objection to a continuance, stating that the delay in the case had been excessive and that New Era's new counsel had previously represented the project for an extended period of time. No other party commented on the extension request.

On June 20, the case came before the Commission.

## **FINDINGS AND CONCLUSIONS**

### **I. Summary of Commission Action**

The Commission will not grant the abeyance requested by the project in its reply comments nor the continuance requested by its new counsel, finding that further delay is inconsistent with the public interest and unnecessary to ensure due process and informed decision-making.

The Commission will not extend the in-service date in the certificate of need because there appears to be no reasonable likelihood that the project will move forward in the time frame proposed or in one consistent with the public interest in reasonable land-use planning and community stability.

The Commission will give notice of its intent to revoke the project's site permit upon failure to comply with the permit's August 23 deadline to begin construction, again for the purpose of ending the protracted uncertainty experienced by the affected community.

The Commission finds that the transfer of the project and its associated purchased power agreements to the current owner is prohibited under Minn. Stat. § 216B.1612, subd. 3 (c).

These actions are explained below.

### **II. Abeyance and Continuance Denied**

New Era has filed a request under Minn. R. 7849.0400, subp. 2 to extend the in-service date for its wind farm from December 31, 2011 to December 31, 2013. In response to this request the Commission issued its March 20 order, seeking the detailed information needed to determine if the new proposed in-service date was realistic enough to justify prolonging the uncertainty the community has been experiencing since the project first applied for a site permit in 2008.

The project did not provide any of the information requested under the order, nor did it request an extension of time to provide the information. Instead, it filed a letter stating that it had concluded that the soundest course of action would be to continue its ongoing efforts to sell its purchased power contracts to other wind farms, assuming it could secure Xcel's consent under the assignment provisions of those contracts. It requested that all proceedings in all four dockets be held in abeyance while it pursued that strategy.

The project's new counsel did not withdraw these statements, did not commit to providing the information required under the March 20 order (despite promising to try to provide some additional information), and confirmed that New Era remained committed to trying to sell its purchased power contracts with Xcel. He also confirmed that New Era has been continuously represented by counsel throughout this proceeding.

Requests to continue proceedings or hold them in abeyance are committed to the Commission's discretion. Under the circumstances in this case, the Commission concludes that neither due process nor informed decision-making requires the abeyance or continuance requested by the project. The ultimate issue before the Commission is straightforward – is New Era so likely to



bring its wind farm on line by December 31, 2013 that it is reasonable to subject the host community to the continued uncertainty that extension of the in-service date would bring?

There is a strong legal and policy basis for proceeding with this determination expeditiously. Certificates of need and site permits are not issued in perpetuity; they are conditioned on developers meeting construction deadlines because the public interest requires providing as much certainty as possible for residents, landowners, and communities likely to be affected by proposed large energy facilities.

For this reason, the certificate of need rules require the developers of large energy facilities to notify the Commission and all parties if their in-service dates slip by more than a year, and to detail the reasons for the delay. The Commission must then determine whether the change in in-service date, if known at the time of the need decision, could reasonably have resulted in a different decision.<sup>6</sup> In short, the rules recognize a public interest in the timely completion of certificated projects.

New Era's interest in deriving financial benefit from its purchased power contracts is understandable, but – unlike the timely completion of certificated projects – it is not an interest recognized under the certificate of need rules. It cannot take priority over the adjudication of issues arising under those rules, such as the requirement to reexamine projects whose in-service dates have been delayed by more than one year. It cannot justify imposing further delay and uncertainty on the host community.

For all these reasons, the Commission will deny the abeyance and continuance requests made by New Era.

### **III. Recertification Denied**

#### **A. Introduction and Background**

On March 20, the Commission reopened its 2011 order granting New Era a certificate of need, finding that the circumstances under which it had been issued had changed, that it was not clear that the project remained viable, and that further factual clarification and analysis were required to determine whether the certificate of need should remain in effect.<sup>7</sup>

New Era did not answer the questions in the March 20 order intended to clarify the factual basis for permitting the certificate to remain in effect, such as whether the project has secured the financing, wind turbines, wind rights, and land easements required to build the wind farm; whether ownership changes since the April 2010 finding of C-BED status have affected that status or the status of the purchased power contracts; or whether the project's current owner stands behind the representations made in the application for the certificate of need and in the application for the site permit.

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<sup>6</sup> Minn. R. 7849.0400, subps. 2. A, and 2. H.

<sup>7</sup> March 20 Order, this docket, at 5.

Instead, the project repeatedly stated that its main concern at this point is to recoup its investment in the wind farm, at least in part, by selling its purchased power contracts with Xcel to another wind developer. This intention, taken together with the absence of any evidence of ability to proceed with construction, compels a finding that there is no reasonable likelihood that New Era will meet its new proposed in-service date of December 31, 2013 or that it is prepared to move forward with the project under any definable time frame.

The Commission therefore will not extend the in-service date in New Era's certificate of need – and will not recertify the certificate of need, permitting it to lapse – because the record does not demonstrate any reasonable likelihood that the project will move forward in a time frame consistent with the public interest.

### **B. The Project Cannot Be Recertified Without a Specific and Credible In-Service Date**

As discussed above, large energy facilities impose costs on host communities, beginning with the disruption of settled expectations during their planning stages. Protracted uncertainty about the future development of these facilities can complicate land use planning, affect property values, and fray consensus within a community on the nature and pace of its future development. For this reason, certificates of need for large energy facilities are never issued for open-ended time periods or for tentative or speculative projects – they are issued to viable projects with specific in-service dates and must be reexamined if those in-service dates slip by more than one year.<sup>8</sup>

Eighteen months after its certificated in-service date New Era still has no plans and no ability to begin construction, let alone operations. Local residents have been subjected to some five years of uncertainty as to whether their community will be hosting a wind farm.<sup>9</sup> Further, the project has declined to provide the information required to support a finding that its proposed new in-service date – or any in-service date within the reasonably foreseeable future – is credible. In fact, the project has stated that its primary goal at present is to sell the purchased power contracts associated with the project and exit the regulatory process.

The Commission will not extend the in-service date in the certificate of need because there appears to be no reasonable likelihood that the project will move forward in the time frame proposed or in any time frame consistent with the public interest. Further, the absence of a credible in-service date makes the project fail the baseline need criteria set forth in the certificate of need rules.

### **C. The Project Cannot Be Recertified Because It Fails the Need Criteria of Minn. R. 7849.0120**

Whether a large energy facility is needed is a factual issue that turns on empirical evidence, such as forecasts of state, local, and regional need for electricity over a specific planning period and forecasts of available supplies during that same period. The need criteria in the certificate of need rules reflect that empirical emphasis:

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<sup>8</sup> Minn. R. 7849.0400, subp. 2. A.

<sup>9</sup> The project filed its initial application for a site permit in October 2008.

**7849.0120 CRITERIA.**

*A certificate of need must be granted to the applicant on determining that:*

- A. the probable result of denial would be an adverse effect upon the future adequacy, reliability, or efficiency of energy supply to the applicant, to the applicant's customers, or to the people of Minnesota and neighboring states . . .*
- B. a more reasonable and prudent alternative to the proposed facility has not been demonstrated by a preponderance of the evidence on the record . . .*
- 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 . . .*
- D. the record does not demonstrate that the design, construction, or operation of the proposed facility, or a suitable modification of the facility, will fail to comply with relevant policies, rules, and regulations of other state and federal agencies and local governments . . .*

The project fails the need criteria of Minn. R. 7849.0120 A., because, without a credible in-service date to provide a relevant time frame, it is impossible to find that denying the certificate of need would adversely affect the future adequacy, reliability, or efficiency of the state or regional energy supply.

In fact, granting a certificate of need without a credible in-service date would itself adversely affect the energy supply. It would inject additional uncertainty into the forecasting process and compromise forecasting accuracy, both as to state and regional supplies and as to Xcel's supplies, since Xcel has signed contracts agreeing to buy the project's power. Indeed, since signing those contracts, Xcel has been including the project's power in its resource planning process and related filings, compromising their integrity and usefulness.

The project also fails the need criteria of 7849.0120 B., because identifying and analyzing potential alternatives to the proposed facility requires knowing the time frame within which those alternatives – and the project – will be operational. The analysis of alternatives is a fact-intensive process, and in this case at least one crucial fact is missing.

Similarly, the need criteria of 7849.0120 C. and 7849.0120 D., which pertain to environmental and socioeconomic effects and to compliance with the rules and regulations of other jurisdictions, cannot be meaningfully applied to a project with no specific time frame.

**D. Conclusion**

Finally, while the empirical evidence in the record compels the decision not to extend the certificate of need, the Commission notes that the project's failure to fully comply with Commission orders seeking information critical to its ability to move forward – and critical to the

community's ability to move forward – in itself raises doubts about the prudence of extending the certificate of need, with its ongoing obligations of outreach, collaboration, and regulatory compliance.

For all these reasons, the Commission concludes that it would be inconsistent with the certificate of need rules and with the public interest to extend the project's in-service date and recertify the project.

#### **IV. Notice of Intent to Revoke Site Permit**

Under the terms of the site permit issued to the project on August 23, 2011, construction of the wind farm must begin within two years, by August 23, 2013. On this record, compliance appears unlikely, and the Commission will therefore act to clarify the situation and prevent extended uncertainty for the affected community.

The Commission will require the project to make a filing within 14 days in which it either surrenders its site permit or states that it intends to begin construction by August 23. If the project states that it intends to begin construction by August 23, it must demonstrate its ability to do so.

If the project states that it intends to begin construction by August 23, it must also provide by that date a more comprehensive response to the Commission's request in section IV of the March 20 order that it investigate and respond to comments by members of the public alleging deficiencies in its performance on wildlife monitoring and protection issues. It must also file a summary of the March 27, 2013 site visit, referred to in its April 17 letter, conducted by the U.S. Fish and Wildlife Service, the Minnesota Department of Natural Resources, and the Energy Facility Permitting Staff of the Minnesota Department of Commerce.

The Commission has declined to extend the certificate of need for this project for the reasons set forth above; therefore, any construction of the project must proceed under the exemption provisions of Minn. Stat. § 216B.243. The Commission hereby gives notice of its intent to revoke the site permit if the project has neither surrendered its site permit nor filed an exemption petition by August 23, 2013.

#### **V. Transfer of Project Ownership Prohibited by C-BED Statute**

##### **A. Legal and Factual Background**

On April 28, 2010, the Commission issued an order at the project's request finding that it was a "community-based energy development" or "C-BED" project under Minn. Stat. § 216B.1612, the C-BED statute.<sup>10</sup> The C-BED statute was passed in 2005 "to optimize local, regional, and state benefits from renewable energy development and to facilitate widespread development of

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<sup>10</sup> *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.

community-based renewable energy projects throughout Minnesota.”<sup>11</sup>

The statute requires utilities to develop special tariffs for the purchase of wholesale generation from renewable energy projects that qualify as C-BED projects. In brief, to qualify, projects must (a) meet threshold levels of in-state economic benefit, measured by revenues flowing to specific categories of in-state individuals and organizations; (b) have resolutions of support from all county boards and tribal councils in the project area; and (c) have no single in-state owner whose ownership interest exceeds 15%. At the time the order was issued, the project met these criteria.

The C-BED statute operates in conjunction with other state policy initiatives encouraging renewable generation, especially the Renewable Energy Standards, which require utilities to generate or procure specific percentages of their total retail sales using eligible renewable technologies by specific deadlines.<sup>12</sup>

Both the Renewable Energy Standard statute and the C-BED statute require utilities to demonstrate that they have carefully considered C-BED purchases to help meet their renewable energy obligations.<sup>13</sup> The C-BED statute also requires utilities to include in their statutorily required resource plans an explanation of their efforts to purchase C-BED supplies and a list of C-BED projects under contract and amounts of C-BED power purchased.<sup>14</sup>

The project’s designation as a C-BED project was central to the issuance of the certificate of need, because the cost of the project’s power exceeded the cost of similar supplies from non-C-BED projects. Because C-BED projects are permitted a price premium to advance statutory directives encouraging community-based renewable energy, the Commission found the cost of the project and its power to be reasonable under the cost criteria of Minn. R. 7849.0120 B. (2).<sup>15</sup> The project was also included in Xcel’s resource plan filings in its list of C-BED projects under contract, as evidence of compliance with its obligation to seek out and secure C-BED supplies.

When the project received its designation as a C-BED project, it had significant local ownership and met the statutory requirement that “at least 51 percent of the gross revenues from a power purchase agreement over the life of the project will flow to qualifying local owners and other local entities.”<sup>16</sup> Since that time, its ownership has changed.<sup>17</sup>

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<sup>11</sup> Minn. Stat. § 216B.1612, subd. 1.

<sup>12</sup> Minn. Stat. § 216B.1691, subd. 2a.

<sup>13</sup> Minn. Stat. §§ 216B.1691, subd. 10; 216B.1612, subd. 5.

<sup>14</sup> Minn. Stat. § 216B.1612, subd. 5 (b).

<sup>15</sup> *Order Granting Certificate of Need*, docket IP-6701/CN-09-1186, August 23, 2011, pp. 6-7.

<sup>16</sup> *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.

<sup>17</sup> The statutory in-state economic benefit threshold has also been refined, but those refinements do not factor in to the controversies in this case. The threshold essentially remains at 51% of net present value of gross revenues flowing to qualifying in-state persons and entities.

The project is now owned by a limited liability company that is owned by a limited liability company that is owned by one person, Peter Mastic, who is not a Minnesota resident. There is a local advisory board, which the project states includes local residents who may eventually hold ownership interests, but there is no local ownership.

The loss of local ownership appears to have reduced the project's in-state economic benefits below the statutory threshold. Even the project does not contend that it currently meets the statutory threshold for in-state economic benefit required for C-BED designation, but states that it will meet that threshold when financing is finalized and before construction begins.

Local residents and organizations opposed to the project claimed that the transfer of project ownership to a single, out-of-state resident violated the anti-transfer provision of the C-BED statute, which reads as follows:

*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).*

*Minn. Stat. § 216B.1612, subd. 3 (c).*

They claimed that the extinguishment of all local ownership resulted in the project no longer qualifying under subdivision 2, paragraph (h) – i.e., qualifying for C-BED designation – and that the transfer was therefore prohibited by statute.

The Commission sought comments on this issue in section II of the Findings and Conclusions of the March 20 order. While the project did not address the issue in written comments, it had addressed it in earlier responses to Commission information requests, and it addressed it in oral argument at both the February 28 and June 20 hearings before the full Commission.

## **B. Positions of the Parties**

### **1. The Project**

The project pointed out that the C-BED statute has been amended since the project received its C-BED designation, and that it now permits projects to seek C-BED designation based on their final financing terms.<sup>18</sup> The project stated that it would meet the statute's in-state economic benefit threshold once its financing was finalized.

It also argued that statutory amendments requiring the C-BED eligibility of current C-BED projects to be based on the law in effect at the time their eligibility was determined – and permitting those projects to elect to have their continuing eligibility based on that law – granted a corresponding right for current C-BED projects to elect to have their continuing eligibility

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<sup>18</sup> Minn. Stat. § 216B.1612, subd. 10.

determined under the new law. The project argued that this “choice of law” option made the anti-transfer provision of the statute inapplicable to the ownership change at issue.

## **2. Goodhue Wind Truth**

Goodhue Wind Truth argued that the ownership transfer that extinguished all local ownership violated the anti-transfer provisions of the statute by definition, because it “result[ed] in the project no longer qualifying under subdivision 2, paragraph (h),” i.e., it resulted in the project no longer meeting the C-BED eligibility requirements, specifically the in-state economic benefit threshold.

Goodhue Wind Truth contended that the anti-transfer provisions of the statute were unaffected by the statutory amendments permitting projects to apply for C-BED designation at the time of final financing or by the grandfathering provisions applicable to projects found to be C-BED eligible prior to the amendments.

### **C. Commission Action**

#### **1. Introduction**

The Commission finds that the transfer of the project and its associated purchased power agreements to the current owner is prohibited under Minn. Stat. § 216B.1612, subd. 3 (c), which reads as follows:

*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).*

The project does not claim that it currently meets the threshold level of in-state economic benefit required under subdivision 2, paragraph (h), due to ownership transfers completed since its designation as a C-BED project. It argues that the anti-transfer prohibition is inapplicable, however, because under the statute’s new subdivision 10, the project can now seek C-BED certification when it finalizes its financing, at which time it will be able to meet the in-state economic benefit threshold.

It also points to grandfathering provisions which it interprets as choice-of-law provisions, invalidating the application of the anti-transfer provisions to New Era.

The Commission disagrees, for the reasons set forth below.

#### **2. The Ownership Transfer Violates the Plain Language of the Anti-Transfer Statutory Provision**

First, the ownership transfer violates the plain meaning of subdivision 3 (c) of the C-BED statute. It eliminated local ownership, apparently reducing the in-state economic benefits below the threshold required for the project to qualify under subdivision 2, paragraph (h).

The project does not contend that it currently meets the in-state economic benefits threshold essential to qualifying under subdivision 2, paragraph (h); it argues however, that new subdivision 10, permitting later applications for C-BED designation and grandfathering already designated projects, makes the prohibition against the transfer inapplicable.

The Commission disagrees.

### **3. Subdivision 10 Does Not Make the Anti-Transfer Provision of Subdivision 3 (c) Inapplicable to New Era**

New subdivision 10 of the C-BED statute reads as follows:

*(a) A developer of a C-BED project may seek a predetermination of C-BED eligibility from the commissioner of commerce at any time, and must obtain a determination of C-BED eligibility from the commissioner of commerce, based on the project's final financing terms, before construction may begin. In seeking a determination of eligibility under this subdivision, a developer of a C-BED project must submit to the commissioner of commerce detailed financial projections demonstrating that, based on a net present value analysis, and applying the discount rate to qualifying revenues and gross revenues from a power purchase agreement, the project meets the requirements of subdivision 2, paragraph (h), clause (2).*

*(b) A project is not required to obtain a determination of C-BED eligibility under paragraph (a) if it has received, prior to May 18, 2010, an opinion letter from the commissioner indicating that the project qualifies as a C-BED project under this section.*

*(c) The commissioner's determination of C-BED eligibility of a project that obtained its initial opinion letter regarding C-BED eligibility from the commissioner or written notification from the Midwest Independent Systems Operator (MISO) that the project retains a position in the interconnection queue before May 18, 2010, must be based on the laws applicable at the time the initial opinion letter of C-BED eligibility was issued or the Midwest Independent System Operator interconnection queue position was obtained. A project subject to this paragraph may elect to have the determination of eligibility governed by the law in effect at the time of the determination.<sup>19</sup>*

This subdivision does not repeal subdivision 3, and its provisions do not conflict with the anti-transfer provision subdivision 3 contains. It does not invalidate or otherwise free existing C-BED projects from the statutory prohibition on ownership transfers that result in existing C-BED projects failing to qualify under the eligibility criteria of subdivision 2, paragraph (h).

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<sup>19</sup> Minn. Stat. § 216B.1612, subd. 10.



New Era was found to be a C-BED project.<sup>20</sup> It reaped the benefits of being a C-BED project in its contract negotiations with Xcel and in its receipt of a certificate of need. As a C-BED project, it was subject to the anti-transfer provision of subdivision 3 (c).

This is a straightforward application of the statute. The plain meaning of subdivision 3 (c) requires no recourse to extra-textual analysis or second-guessing as to legislative intent. It is the reading required under Minn. Stat. § 645.16, which requires laws to be construed to give effect to all their provisions and to be construed according to their plain meaning in the absence of ambiguity. Subdivision 3 prohibits transfers during the initial term of a purchased power agreement, and nothing in subdivision 10 contradicts this prohibition or renders it ambiguous.

For all these reasons, the Commission finds that New Era was and is subject to the anti-transfer provision of C-BED statute and that the transfer of the project and its associated purchased power contracts to the current owner is prohibited under Minn. Stat. § 216B.1612, subd. 3 (c).

### **ORDER**

1. The Commission denies the project's April 17 request to hold the case in abeyance and its June 18 request for an extension of time.
2. The Commission finds that the project violated the anti-transfer provision of Minn. Stat. § 216B.1612, subd. 3 (c) and that the transfer of power purchase agreements that occurred is prohibited.
3. The Commission declines to recertify the certificate of need due to New Era's failure to demonstrate that it will comply with the Commission's orders and due to its failure to show that it is prepared to move forward with the project for which the certificate of need was obtained, including the failure to specify a current in-service date.
4. Within 14 days of the date of this order, New Era shall either surrender its site permit or show cause that it intends to begin construction by August 23 and that its site permit should not be revoked. If the project states that it intends to begin construction by August 23, it shall demonstrate that it is able to begin construction by that date.
5. If New Era makes a filing stating that it intends to begin construction by August 23, it shall provide by that date a more comprehensive response to the Commission's request in section IV of the March 20 order that it investigate and respond to comments by members of the public alleging deficiencies in its performance on wildlife monitoring and protection issues.
6. If New Era makes a filing stating that it intends to begin construction by August 23, it shall provide by that date a summary of the March 27, 2013 site visit, referred to in its April 17

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<sup>20</sup> To avoid confusion, the Commission clarifies that this project was found to be a C-BED project by the Commission, in its April 28, 2010 order in Dockets E-002/M-09-1349 and E-002/M-09-1350. The Commissioner of Commerce normally determines C-BED eligibility, but in this case asked the Commission to make the determination because it required a statutory interpretation the Commissioner thought should be made by the Commission.

letter, conducted by the U.S. Fish and Wildlife Service, the Minnesota Department of Natural Resources, and the Energy Facility Permitting Staff of the Minnesota Department of Commerce.

7. The Commission gives notice of its intent to revoke the project's site permit if it has neither surrendered its site permit nor filed a certificate of need exemption petition by August 23, 2013.
8. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar  
Executive Secretary



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