

**Minnesota Public Utilities Commission**  
*Staff Briefing Papers*

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Meeting Date: January 22, 2015 .....Agenda Item \*\*4

Company: Black Oak Wind, LLC and Getty Wind Company, LLC

Docket No. IP6853/WS-10-1240 and IP6866/WS-11-831

In the Matter of the Application of Black Oak Wind, LLC for a Site Permit for a 42 MW Large Wind Project in Stearns County, Minnesota

In the Matter of the Application of Getty Wind Company, LLC for a Site Permit for a 40 MW Large Wind Project in Stearns County, Minnesota

Issues: Should the Commission reconsider either of its November 18, 2014 Order Amending Site Permits?

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**Relevant Documents**

Docket WS-10-1240 (Black Oak)  
Commission – Order Amending Site Permit .....November 18, 2014

Docket WS-11-831 (Getty Wind)  
Commission – Order Amending Site Permit .....November 18, 2014

Joint Documents – Docket WS-10-1240 and WS-11-831  
Residents of Getty & Raymond Townships – [Request for] Reconsideration .... December 8, 2014  
Black Oak and Getty – Answer to Motion for Reconsideration..... December 18, 2014

*The attached materials are work papers of the Commission staff. They are intended for use by the Minnesota Public Utilities Commission and are based upon information already in the record unless noted otherwise.*

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## **I. STATEMENT OF THE ISSUES**

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Should the Commission reconsider either of its November 18, 2014 Orders Amending Site Permit?

## **II. STATUTES AND RULES**

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Under Minn. Stat. § 216B.27 and Minn. R. 7829.3000, a party or a person aggrieved and directly affected by a Commission decision or order may file a petition for reconsideration within 20 days of the date the decision or order is issued. A petition for reconsideration must set forth the specific grounds relied upon or the errors claimed. Other parties to the proceeding may file answers to the petition within ten days of filing the petition. The Commission has the authority to decide a petition for reconsideration with or without a hearing or oral argument. The Commission may reverse, change, modify, or suspend its original decision if it finds its decision unlawful or unreasonable.

Additionally, under Minn. Stat. § 216B.25, the Commission may on its own motion, or upon motion of an interested party, rescind, alter or amend any order made and may reopen any case for any reason.

## **III. PROCEDURAL HISTORY**

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On November 18, 2014, the Commission issued its Order(s) Amending Site Permit in each docket to Black Oak Wind, LLC and Getty Wind Company, LLC (jointly, Permittees).<sup>1</sup> Specifically, in each docket, the Commission issued an amended Site Permit with modifications to permit conditions and the preliminary turbine layouts (to reflect the revised turbine type). The motion passed 4-0, with Commissioner Boyd absent.

On December 8, 2014, Residents of Getty and Raymond Townships (Residents) filed for reconsideration of the Commission's November 18, 2014 Order.<sup>2</sup>

On December 18, 2014, the Permittees filed their answer to the request for reconsideration.

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<sup>1</sup> See October 30, 2014 Commission Meeting Minutes, eDocket ID [201412-105845-03](#).

<sup>2</sup> Counsel for the Residents clarified at the October 30, 2014 Agenda meeting that its representation was not on behalf of Getty and Raymond Townships in its entirety, but instead on a subset of those Townships' residents who sought representation.

#### IV. PETITION FOR RECONSIDERATION AND PERMITTEES' RESPONSE

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The Residents requested reconsideration of the Commission's Orders claiming that the decisions were not well contemplated, were arbitrary and capricious, improperly restricted the issues for discussion and failed to consider all evidence before it. Specifically, the Residents raised three points which it believes warrants a rehearing, as outlined below.

The Permittees responded to each claim, and argued that the Commission decisions were not arbitrary or capricious, and rather, as the Commission's Orders stated, there was good cause to amend the site permits as it would allow the projects to use the turbines of its choice, while continuing to act in a manner compatible with environmental preservation, sustainable development, and the efficient use of resources. The Permittees provided that the Residents' request failed to present any new issues, evidence, errors, or ambiguities requiring rehearing.

##### 1) Recusal

The Residents claimed that Chair Heydinger failed to disclose (as required under Minn. Rule 7845.0600, Subp. 1 (B)) that she was an Administrative Law Judge initially assigned to the docket and therefore request rehearing. The Rule requires Commissioners to disqualify themselves from a proceeding if before employment with the Commission, they served or participated as a lawyer or material witness in the pending proceeding.<sup>3</sup> Minn. Rule 7845.0600 provides:

##### 7845.0600 DISQUALIFICATION.

**Subpart 1.** Disqualifying factors. Commissioners and employees shall disqualify themselves if they:

- A. have a personal bias or prejudice concerning a party;
- B. before employment with the commission, served or participated as a lawyer or material witness in the pending proceeding; or
- C. have an interest, other than that of the general public, that could be substantially affected by the outcome of the proceeding

In response, the Permittees argued that Chair Heydinger was not required to disqualify herself under Minn. Rule 7845.0600 as she was not a lawyer or material witness in the proceeding. The Permittees argued that *even if* the Chair had served as the ALJ in these proceedings as an impartial-third-party evaluator, that participation would not constitute a

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<sup>3</sup> As outlined in the record, during the permitting process Chair Heydinger (*ALJ* Heydinger at the time) was noticed as the Judge to preside over the summary proceeding public hearing for both the site permit and the certificate of need. Prior to the date of the hearing, ALJ Heydinger was appointed as the Chair to the Commission. Therefore, ALJ Johnson ultimately conducted the summary proceeding. The ALJ role in the docket development was summary in nature and no material facts were evaluated by anyone at the Office of Administrative Hearings.

conflict of interest, would not require disqualification and therefore Residents claims are without merit.

Staff agrees with the Permittees, first, that the Chair as the ALJ was only *initially* assigned (and did not ultimately serve as the ALJ), and therefore did not participate as a lawyer or material witness. Second, the hearing was summary in nature only (no facts were evaluated or conclusions drawn) there was no ability to materially participate regardless of the aforementioned reassignment.

## 2) Public Participation

The Residents argued that the Commission unreasonably limited public comments at the agenda meeting to the modified turbine size only and not the new layout proposed for the project though the issue of turbine layout was noticed to the public. The Residents argued that parties concerns regarding the layout of the project should have been heard from. Instead, they were unreasonably restricted from doing so, and therefore, a rehearing is appropriate to thoroughly consider issues regarding layout.

The Permittees responded that the Commission appropriately provided opportunities for public comment on the requested amendments by way of the noticed comment period. The Permittees agreed with the Commission that found many of the issues raised by the Residents were related to the merits of the project and not to the amendment under consideration. These issues were previously evaluated and addressed as part of the site permit process. Therefore it was reasonable for the Commission to limit the consideration of public comments to issues relevant to the matter at hand.

The Permittees agreed with the Commission that it was reasonable to find that the revised turbine models and layout were acceptable since they were sited in a manner consistent with the site permit and within the project boundaries. Furthermore, the Permittees agreed with the Commission that the Residents' concerns did not specifically allege that the revised turbine models or layout would result in inconsistencies with or violation of the conditions of the site permits but instead, the concerns questioned the adequacy of the site permit conditions themselves, and therefore were untimely.

Staff believes the opportunity for public participation was sufficiently provided by way of the noticed comment period and the comment period was a greater level of participation than what is contemplated by rule. Minn. Rules address wind site permit amendments under Minn. Rules 7854.1300. This rule provides that a site permit amendment can occur at any time if there is good cause to do so and no permit may be amended without providing notice

and affording due process to the permit holder.<sup>4</sup> The rules do not provide for public participation for site permit amendments, however, the Commission has found it beneficial to provide an opportunity for public comment, as was done here.

Further, staff believes the issues regarding turbine layout and the Commission's view of the amendment in relation to the turbine layout (and other factors) were already known and well contemplated in its November 18 Order – see page 4, C. Denial of Other Relief.

### 3) Neglected Evidence and Factual Changes

The Residents argued that the Commission improperly considered evidence brought before it, and new information could have led to a different outcome, including:

- ownership of the project and recent acquisition of Getty Wind by Black Oak Wind,
- uncertainty regarding the parties to the PPA and the delay in Commission notification of execution of the PPA,
- the Permittees' Petition for Certificate of Need In-Service Date Extension,
- the projects' Community Based Energy Development (C-BED) status, and
- the impacts of the revised layouts to the natural resources and the environment – including eagle nests.

The Permittees argued that information regarding the certificate of need and the power purchase agreements was known at the time of the Commission decision on these matters. The Permittees further provided that the acquisition of Getty Wind by Black Oak is irrelevant to the site permit amendment petition, that the approval of these projects were not conditioned on them being C-BED projects and that the Commission appropriately found that the turbine layouts were reasonable in that they were sited in a manner consistent with the site permit and within project boundaries.

Staff believes that no new information has been provided that would have resulted in a different decision – as no information has been provided that was not contemplated at the time of the October 31 decision (and resulting November 18 Order). Staff agrees that the joint ownership of the projects was always put forth as a potential outcome by the Permittees throughout the entire process and doesn't materially affect the issuance of the site permits – as no site permit transfer has been requested. Further, staff of the Department of Commerce and Commission reviewed the PPA filing when submitted as a compliance filing. The Commission issued a compliance response on November 26, 2014 that found the PPA submission met the compliance requirement.

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<sup>4</sup> [Minn. Rule 7854.1300](#)

As the Permittees noted, the certificate of need in-service date delay petition was filed prior the Commission decision on this matter, and since, the Commission has verbally approved the certificate of need extension and an Order is pending. Regardless, the certificate of need in-service date extension would not have impacted the Commission's decision on whether to amend the site permit to allow a different turbine type to be utilized.

Regarding the C-BED status of the project – no project permitted by the Commission has ever been conditioned on its C-BED status. The Goodhue Wind case was the only wind project that had any C-BED tie as that docket had - in effect - a *certificate of need* conditioned on its C-BED status. However that is not the case in this site permit docket.

Last, as noted above, the Commission thoroughly considered the requested amendments to the site permits, including the preliminary turbine layouts – and their consistency with the site permit conditions.

## **V. STAFF SUMMARY**

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Based on its review, staff believes the Commission's decisions are consistent with the facts, the law, and public interest. The petitions for reconsideration do not raise new issues, do not point to new and relevant evidence, and do not disclose mistakes or uncertainties in the Commission's November 18, 2014 Orders.

## **VI. COMMISSION DECISION ALTERNATIVES**

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1. Grant reconsideration or rehearing of the November 18, 2014 Orders Amending Site Permits.
2. Deny reconsideration or rehearing of the November 18, 2014 Orders Amending Site Permits.
3. Take some other action deemed appropriate.