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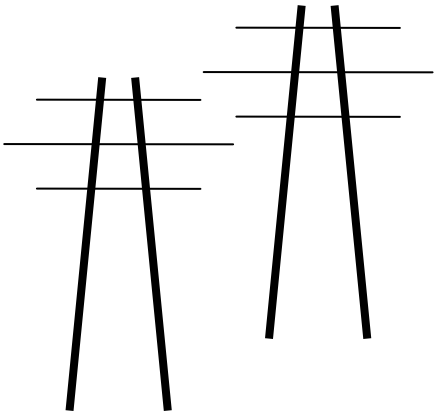

March 30, 2017

Kate Kahlert, Staff Attorney
Dan Wolf, Executive Secretary
Public Utilities Commission
121 East 7th Place
St. Paul, MN 55101

via eFiling and email: kate.kahlert@state.mn.us

RE: Comments of No CapX 2020, United Citizens Action Network, North Route Group and Goodhue Wind Truth
PUC Docket 12-1246, Rulemaking, Minn. R. Ch. 7849 & 7850
Notice of Comment Period Issued March 23, 2017

Dear Ms. Kahlert and Mr. Wolf:

Thank you for the opportunity to comment on the Draft rules, Minn. R. Ch. 7849 and 7850. These Comments are filed on behalf of NoCapX 2020 (No CapX) and United Citizens Action Network (U-CAN). Not only am I representing these two repeat intervenors in this rulemaking, but two client groups have participated through this process, the North Route Group, intervenor in the CapX 2020 Hampton – La Crosse transmission routing docket (TL-09-1448), and Goodhue Wind Truth, intervenor in the Goodhue Wind Project's numerous dockets (WS-08-1233; CN-09-1186; PPA 09-1349 & 09-1350). I am, therefore, also filing these Comments on behalf of North Route Group (NRG) and Goodhue Wind Truth (GWT), in addition to any Comments these groups may file independently. These intervenors have participated for years and experienced all manner of notice failure, procedural improprieties, and misfeasance and malfeasance. Goodhue Wind Truth is participating in large part to learn about rulemaking in time to effectively participate in the oft-promised upcoming rulemaking for wind siting, Minn. R. Ch. 7854.

First, I want to remind the Commission that this rulemaking is updating from the 2005 legislative changes to the Certificate of Need and Power Plant Siting Act statutes. That was 12 years ago. Twelve years ago, and we have been slogging through this rulemaking now for five years. As an individual, I submitted a Petition for Rulemaking on or about March 8, 2011, after so many frustrating years of offering comments at the Power Plant Siting Act annual hearing, after watching major infrastructure projects, such as CapX 2020 and the Mesaba Project, then Hiawatha and Hollydale, go through Certificate of Need and/or permitting without updated

rules, and then followed by ITC's MISO MVP 3 transmission project. The horse is already out of the barn and starved to death, or glue, but let's get this done… better late than never.

A point the Commission should take into account is that the Commission is the "Public" Utilities Commission, and the "public" is an important stakeholder in this rulemaking. A docket was established on December 7, 2012. However, in the ensuing years, the drafts under consideration were not posted by the Commission staff to the docket until March 2, 2017, at the very end of the Advisory Group's work. Because this is a public process, and something that affects the general public, I took to publishing these draft rules on the 12-1246 docket, as "No CapX," "Public," "The Public" and "General Public" to assure they would be there for interested persons to review. The public shouldn't have to go to the trouble of finding posts on my Legalectric blog to review proposed rules! Publication of drafts on the Commission docket, and also elsewhere, i.e., a link on the Commission's home page, in the EQB Monitor, and other resources, should be done as a matter of course.

Regarding the draft rules, based on the February, 2017 version, and the addition specified at the Commission meeting, we offer these comments:

I. ANY ISSUE ARISING FROM FEBRUARY 2017 DRAFTS AND ANY RECOMMENDED CHANGE TO THE DRAFTS, ALONG WITH THE RULE PART AFFECTED AND THE REASON FOR THE CHANGE

No CapX 2020, U-CAN, North Route Group, and Goodhue Wind Truth have been participating in various infrastructure issues and Commission dockets for over a decade, in PPSA annual meetings for as long, and in this rulemaking for over 5 years. There are so many issues arising from these drafts, consistently raised in draft comments over the years – please see the docket listings at the end of this Comment.

Now, for specifics – specific additions and/or ~~deletions~~ are in **red**:

A. Definition of "Utility" Must Mirror Statutory Definition.

A primary concern is the definition of "utility" in 7849.0100, Subp. 32, and 7850.1000, Subp. 19. Both of these definitions go beyond that authorized by the statute. Minn. Stat. §216B.02, Subd. 4 and 10 draw the distinction between public utility and transmission companies, and there is no definition of "utility." The 7849 rules should define "public utility" and "transmission company" separately and not combine them under a definition of "utility" not authorized by statute.

Similarly, Minn. Stat. 216E.01 does not define "public utility" or "transmission company" and does define "utility."

> **Subd. 10. Utility.**
>
> "Utility" shall mean any entity engaged or intending to engage in this state in the generation, transmission, or distribution of electric energy including,

but not limited to, a private investor-owned utility, cooperatively owned utility, and a public or municipally owned utility.

This is particularly important because where a Certificate of Need is granted, this "utility" definition could be conflated and/or misrepresented as "public service corporation" which has access to the power of eminent domain. Minn. Stat. §117.025, Subd. 11. Eminent domain is available only to "public service corporations" and is expressly NOT available for a private purpose. Minn. Stat. §117.012, Subd. 2.

The 7849 rules should define "public utility" and "transmission company" separately and not combine them under a definition of "utility" not authorized by statute.

The 7850 rules should also not define "utility" beyond that of the statutory definition. There is no statutory authorization for expanding the definition of utility.

B. Important Clarifications of Notice for Landowners and Meetings

The rule draft provides improvement in notice for landowners and to the public. In several places in Ch. 7849 and Ch. 7850 there are more specific requirements of notice that correct issues encountered in previous proceedings, specifically Minn. R. 7849.1000; 7850.1610; 7850.1620; 7850.1650; 7850.1680; 7850.2530, Subp. 2; 7850.3740.

C. Notice to Landowners on Scoping Alternative Routes and Sites

The draft rules also provide a crucial notice requirement – that those affected by alternative routes and sites that were developed in scoping receive notice. In the past, landowners who are on alternative routes and sites added in scoping are not provided notice – there is no requirement that they be notified that their land may be affected by a project, no notice of comment, intervention, and other participation opportunities, and they're subject to surprise infrastructure on their land, particularly where a project promoter is searching for a way to get the project through but encounters routing/siting obstacles, such as DOT easements (CapX Brookings, Docket TL-08-1474; CapX Hampton-LaX, Docket TL-09-1448). Notice of the scoping decision should be provided to all potentially affected landowners, local governments, and the general service list, both in CoN and Routing/Siting dockets. Draft Minn. R. 7849.1425; 7850.2540, Subp. 2.

D. No Changes to Scoping Decision after Determination

Another important clarification in the draft rules is that the scope of the EIS must not be changed after the scoping determination/decision has been made, "except upon decision by the department that substantial changes have been made in the project or substantial new information has arisen…" Draft Minn. R. 7850.2530, Subp. 4.

No CapX 2020 ask that this language be strengthened:

Subp. 4. **Changes to scoping decision**. Once the department has determined the scope of the environmental impact statement, the scope must not be changed except upon decision by the department**, and approved by the Commission,** that substantial changes have been made in the project or substantial new information has arisen significantly affecting the potential environmental effects of the project or the availability of reasonable alternatives.

E. Public Advisor's Role Must Be Clarified

The Draft language should clarify the role of the Public Advisor – in practice the Public Advisor has not advised the public sufficiently regarding the varying levels of participation open to the public. No CapX 2020, after observation of more public hearings and meetings, and so many confused and seeking landowners and members of the public, recommends the following language:

7850.2200 PUBLIC ADVISOR.

Upon acceptance of an application for a site or route permit, the commission shall designate a staff person to act as the public advisor on the project. The public advisor must volunteer information and be available to answer questions from the public about the permitting process, project schedules and opportunities for public participation such as comments, membership in advisory task force, intervention and contested case, and exceptions to ALJ recommendation and reconsideration for affected parties, and shall present such information in process flow charts, handouts and presentations at public meetings and hearings and to members of the public. The public advisor shall not give legal advice or other advice or omit information regarding participation opportunities that may affect the legal rights of the person being advised, and the public advisor shall not act as an advocate on behalf of any person.

Statutory Authority: *MS s 116C.66; 216E.16*

F. Agency Comments must be filed in eDockets

The Draft Rules provide that agency comments be filed in eDockets. Draft Minn. R. 7849.1600; 7850.2110. This is an important improvement due to a frequent and problematic lack of iterative process in building the routing/siting record, and a lack of incorporating determinative information in agency environmental review comments into the need and/or siting/routing record. See, e.g., CapX 2020 Brookings (record and remand – DOT easement issues) PUC Docket TL-08-1474; CapX 2020 Hampton-LaX (public hearings, deliberation, and appeal, both DOT easement issues and DNR comments) PUC Docket TL-09-1448.

Draft Rule 7850.2675 also provides for an additional agency comment option – very helpful. Agency comments are often determinative of a siting and routing issue, and must be also filed in eDockets, as above.

G. Public Comment Opportunities

The Draft rules provide several additional public comment opportunities, and No CapX 2020 encourages and supports these clarifications and additions. See e.g., Draft rule 7849.1530; 7850.1620; 7850.1650; 7850.1680; 7850.2110; 7850.2550; 7850.2650.

II. ECONOMIC EFFECTS OF THE DRAFT, INCLUDING IDENTIFYING ANY OTHER FEDERAL OR STATE REGULATIONS THAT MAY HAVE A CUMULATIVE EFFECT.

Economic effects of the draft are something not analyzed by the Advisory Committee, and not provided nor suggested for consideration. If economic impacts are to be considered, both costs and benefits should be addressed, and the recipient of the costs and benefits should be identified.

Presumably, economic impacts are to be addressed in the SONAR, at which time there will be an opportunity for review and comment. If not, when? How? Economic impacts, costs and benefits, and identification of the recipients, should be disclosed, and an opportunity provided for review and comments.

III. THE EFFECT OF EXISTING LAW ON THE DRAFT RULE CHANGES.

This question in the PUC's notice is confusing. The statutory "existing law" ostensibly triggering this rulemaking was amendment of the Certificate of Need statute and PPSA, which was, again, 12 years ago, in 2005, and there have been no rule updates since 2001. The horse is long out of the barn, has been shipped to the glue factory… but here we are…

Existing law that should be incorporated more solidly into the draft rule changes is the Minnesota Environmental Policy Act and the Minnesota Environmental Rights Act. It will likely be argued that the environmental laws are what they are, there's no need to incorporate, and it has been argued that it's not clear what aspects of MEPA would apply to the draft rule changes. However, in light of the Sandpiper ruling regarding environmental review and the need for an Environmental Impact Statement or a Certificate of Need docket where there is a lag between granting of a Certificate of Need and a Routing permit, and the similar situation in the CapX 2020 transmission case and the several routing dockets for that project, incorporating of language referencing MEPA and MERA, and noting the need for compliance with these fundamental Minnesota precepts is necessary. FYI, one of the more bizarre statements by a judge, and subsequent court order, when challenging a list of documented blatant violations of environmental law, was "they know the law, I'm not going to issue an order telling them to follow the law!." Unfortunately, local, state, and federal units of government do indeed need to be told to follow the law. The rules, these rules, should be a primary instance of that notice.

Regarding existing law that should be referenced, as above, the most important laws that have an impact on to MEPA and use of EIS in Certificate of Need dockets is crucial in light of existing case law and statutes:

- First, an EIS is necessary for Certificate of Need where there is a time lag between CoN and routing/siting.

- Second, environmental documents must "accompany the project" under MEPA, and not appear after public and evidentiary hearings, where there would be no opportunity to comment on adequacy.

- MEPA 116D.04 – references should be incorporated into 7849.1200; 7849.1800; 7850.1000.

IV. WHETHER PRE-APPLICATION MEETINGS UNDER PART 7850.1620 SHOULD BE REQUIRED ONLY FOR ROUTE PERMIT APPLICATIONS OR ALSO FOR SITE PERMIT APPLICATIONS.

Why draw a distinction? Why not uniformly and consistently require pre-application meetings? The more notice, the more information, the earlier, the better. Utilities may argue that this should be up to them, but for routing/siting, the earlier the better. Utilities often meet with local decision makers, but landowners are often left out of those meetings. Presentations to local governments are frequently made but there is no opportunity for comment and questions from the public. These public pre-application meetings are very helpful for the public and landowners, and how else will they receive information and have an opportunity to respond?

These meetings should be meetings with a presentation, and with opportunity for people to ask questions publicly, because most people will not talk at a public meeting, but they have questions, and hearing someone else ask those questions, and listening to the answers, can help them determine whether they should be concerned or not, what issues are important, and help them learn to speak up, ask their questions, and evaluate the answers. This step could eliminate a lot of grief in the permitting process.

V. ANY ISSUE ARISING FROM CHANGING THE DEFINITION OF "ASSOCIATED FACILITIES" IN BOTH RULE CHAPTERS.

Additions to definitions should be discussed and should be reviewed for potential of "unintended consequences" or intended. This proposed change to include "natural gas pipelines directly associated with a large electric generating facility that is necessary to interconnect the plant to the transmission line" could be a problem. Why is this change needed? Why is this change requested? I'm thinking of the Rochester gas pipeline now before the Commission, bringing operating gas to the Rochester Public Utilities "Westside" gas plant.

The term "associated facilities" has been misused previously, i.e., nuclear waste dry cask storage facility," which was improperly deemed an "associated facility" to the Prairie Island nuclear plant. In permitting of the Prairie Island nuclear plant, there was no disclosed anticipation of an "associated facility" in the form of the dry cask storage facility on site at the plant. There was no exemption from a Certificate of Need in the 1994 Prairie Island legislation, and yet some felt it was implied.

If the claimed "associated facility" is logically contemplated as part of the applied for facility, included in the application, and would not separately require a Certificate of Need and/or Site/Route permit, then it'd be acceptable, otherwise, no, it's not an acceptable addition to the definition.

VI. ANY ISSUE ARISING FROM THE NEW LANGUAGE IN PART 7850.1640, SUBPART 1(P),(Q) AND (R) CONCERNING LOCAL ZONING AND USE OF EMINENT DOMAIN AND IN PART 7850.1640 SUBPART 2 (Q) AND (R) CONCERNING USE OF EMINENT DOMAIN.

??? "7850.1640, subpart 1 (P), (Q), and (R) concerning local zoning and use of eminent domain I don't have any P, Q, or R in Subp. 1.

I do see language regarding Subp. 2 (Q) and (R):

> Q. whether the applicant intends to waive its right to exercise eminent domain; and
> R. if the applicant is retaining the option to exercise eminent domain:
> (1) the percentage of property within each proposed site that the applicant has obtained under contract; and
> (2) the percentage of contiguous land within each proposed site that is subject to a fee interest by condemnation under Minnesota Statutes, section 216E.12, subd. 4.

The purpose of this is not clear. Q presumes applicant has right to eminent domain, which is problematic because not all applicants do have that right! Whether they do have that right, and intend not to use it would be handy to know, as one representing landowners in these proceedings, but I can't imagine circumstances where they would announce a waiver.

Regarding R(1), typically a utility won't secure a new easement prior to permitting because if they do that, it's at their own risk that the route won't be permitted as they want. If this means "the percentage of property under an existing easement agreement" or some such, that might make more sense. In other contexts, this is something that is not to be considered, as it could improperly and/or unduly influence a routing decision.

Regarding R(2), this requires a determination that land parcels are contiguous, which utilities often challenge, i.e., Cedar Summit Farm. There should be consideration of Buy the Farm at the routing stage, in the routing docket (separate from environmental review) because it has an impact on cost, and perhaps a determinate impact on cost (though under MERA, economic impacts alone should not be determinative).

These additions should go to the Commission and go forward for public consideration and comment.

VII. ANY ISSUE ARISING FROM THE NEW LANGUAGE IN PARTS 7849.0208 AND 7850.1710 ON APPLICATION COMPLETENESS TO REQUIRE THAT INCOMPLETE APPLICATIONS BE CONSIDERED AT "THE EARLIEST

POSSIBLE COMMISSION AGENDA MEETING FOR FURTHER REVIEW BY THE COMMISSION, *CONSIDERING THE APPLICANT'S AVAILABILITY AND REQUEST FOR ADDITIONAL TIME."*

Applications are rarely delayed for incompleteness, they are typically deemed complete with directions to provide additional information. If an application is incomplete, it is the applicant's choice to make such an application, and the Commission should not be rushed in making any decision based on applicant's choice of providing an incomplete application, nor should the applicant's availability and request for additional time be a factor.

VIII. ANY ISSUE ARISING FROM THE NEW LANGUAGE IN PARTS 7849.0250 AND .0260 REQUIRING AN APPLICANT TO CONSIDER "ENERGY STORAGE" AS AN ALTERNATIVE TO THE PROPOSED FACILITY.

No issue. This is a reasonable request. Energy storage is approaching feasibility, and should receive due consideration.

IX. ANY ISSUE ARISING FROM THE NEW LANGUAGE IN PART 7850.1500, SUBP. 1(C)(4) TO EXEMPT FROM THE PERMIT REQUIREMENTS MODIFICATION OF SOLAR-POWERED PLANT "THAT IS EXEMPT FROM A CERTIFICATE OF NEED UNDER MINN. STAT. §216B.243, SUBD. 8(7), AS LONG AS THE PLANT IS NOT EXPANDED BEYOND THE DEVELOPED PORTION OF THE PLANT SITE."

If the modification raises project as a whole over exemption requirements, then no, this is not acceptable. "[T]he developed portion of the plant site" is a physical description, and not a legal threshold for exemption, and is not an appropriate measure for determining exemption.

X. ANY ISSUE ARISING FROM THE NEW LANGUAGE IN PART 7850.4400(B) AUTHORIZING USE OF PRIME FARMLAND FOR SOLAR-POWERED PLANTS ONLY IF THE COMMISSION APPROVES A FARM MITIGATION PLAN DEVELOPED IN CONSULTATION WITH THE DEPARTMENT OF AGRICULTURE AND IF THERE IS NO LOCAL ZONING ORDINANCE PROHIBITING THE CONSTRUCTION OF SOLAR-POWERED PLANTS ON PRIME FARMLAND.

I believe this is Subp. 4(B). Regarding (1), farmland mitigation plans have little impact.

Regarding (2), "at the time of the application, there is no local zoning ordinance prohibiting the construction of a solar-powered LEPGP on prime farmland." This would erode local control. Look at the record regarding Minn. Stat. 216F.081[1] and how the local ordinance was disregarded despite focused and detailed ordinance regarding wind projects. Further, most local governments do not have a solar zoning ordinance and have not specifically considered impacts

[1] In the Matter of the Application of AWA Goodhue Wind, LLC for a Certificate of Need for a 78 MW Wind Project and Site Permit; attached and online at : //mn.gov/law-library-stat/archive/ctapun/1206/opa112229-062512.pdf

on prime agricultural land. Siting on prime ag land should only be allowed where a local government has affirmatively adopted a solar zoning ordinance, distinct from a general solar ordinance, and has expressly considered and adopted a zoning ordinance regarding construction of solar-powered plants on prime farmland, affirmatively allowing construction of solar on prime farmland. The same should also apply to wind projects. This appears to be an end run around local governments, which would be caught unaware by this proposed change. Local control was an issue with wind, and this would set it up to be an issue for solar.

XI. ANY ISSUE ARISING FROM THE NEW LANGUAGE IN PART 7850.4925 GIVING AUTHORITY TO A LOCAL UNIT OF GOVERNMENT TO FILE A COMPLAINT ABOUT ALLEGED PERMIT VIOLATIONS ON BEHALF OF ITS CONSTITUENTS.

As long as authorizing complaints by local units of government does not eliminate option of individuals, no issue.

Again, on behalf of No CapX 2020, United Citizens Action Network, North Route Group, and Goodhue Wind Truth, thank you for the opportunities to comment, now and forthcoming.

Very truly yours,

Carol A. Overland
Attorney at Law

20131-83096-01	PUBLIC	12-1246	☐	R	NO CAPX 2020 AND UNITED CITIZENS ACTION NETWORK	COMMENTS--COMMENT AND ADVISORY COMMITTEE REQUEST - NOCAPX 2020 AND UNITED CITIZEN ACTION NETWORK	01/23/2013
20132-83740-01	PUBLIC	12-1246	☐	R	OVERLAND - LEGALECTRIC	COMMENTS--ADDED TO 12-1246 PER KATE O	02/01/2013
20135-87560-01	PUBLIC	12-1246	☐	R	NO CAPX 2020 AND UNITED CITIZENS ACTION NETWORK	LETTER--DATA PRACTICES ACT REQUEST TO ALJ LIPMAN FOR COMMENTS ON 1400 AND 1405 RULEMAKING	05/30/2013
20135-87560-02	PUBLIC	12-1246	☐	R	NO CAPX 2020 AND UNITED CITIZENS ACTION NETWORK	LETTER--OAH 1400 AND 1405 REQUEST FOR COMMENTS DUE OCTOBER 31 2012	05/30/2013
20135-87560-03	PUBLIC	12-1246	☐	R	NO CAPX 2020 AND UNITED	LETTER--OAH 1400 AND 1405 DRAFT REVISIONS	05/30/2013

					CITIZENS ACTION NETWORK		
20137-88832-01	PUBLIC	12-1246	☐	R	NO CAPX 2020 AND UNITED CITIZENS ACTION NETWORK	COMMENTS--PSA FORM AND NON-TRANSMISSION ALTERNATIVES ARTICLE BY SCOTT HEMPLING	07/03/2013
20137-88834-01	PUBLIC	12-1246	☐	R	NO CAPX 2020 AND UNITED CITIZENS ACTION NETWORK	COMMENTS--PUC 7849 JUNE 5 DRAFT FOR PUBLIC REVIEW	07/03/2013
201310-92863-01	PUBLIC	12-1246	☐	R	NO CAPX 2020 AND UNITED CITIZENS ACTION NETWORK	COMMENTS--OCTOBER 2 MEETING SYNOPSIS	10/23/2013
201310-92863-02	PUBLIC	12-1246	☐	R	NO CAPX 2020 AND UNITED CITIZENS ACTION NETWORK	COMMENTS--OCTOBER 16 7849 DRAFT RULES FOR PUBLIC REVIEW AND COMMENT	10/23/2013
201310-92863-03	PUBLIC	12-1246	☐	R	NO CAPX 2020 AND UNITED CITIZENS ACTION NETWORK	COMMENTS--OCTOBER 18 7850 DRAFT RULES FOR PUBLIC REVIEW AND COMMENT	10/23/2013
201310-92036-01	PUBLIC	12-1246	☐	R	NO CAPX 2020 AND UNITED CITIZENS ACTION NETWORK	COMMENTS--OVERLAND COMMENTS ON 7849 DRAFT	10/01/2013
201310-92036-02	PUBLIC	12-1246	☐	R	NO CAPX 2020 AND UNITED CITIZENS ACTION NETWORK	COMMENTS--PUC AUGUST 28 SYNOPSIS - FOR PUBLIC REVIEW	10/01/2013
201310-92036-03	PUBLIC	12-1246	☐	R	NO CAPX 2020 AND UNITED CITIZENS ACTION NETWORK	COMMENTS--PUC SEPTEMBER 10 7829 DRAFT FOR PUBLIC REVIEW	10/01/2013
20138-90607-01	PUBLIC	12-1246	☐	R	NO CAPX 2020 AND UNITED CITIZENS ACTION NETWORK	REPORT--AUGUST 12 PUC DRAFT RULES FOR PUBLIC REVIEW AND COMMENT	08/27/2013
20138-90607-02	PUBLIC	12-1246	☐	R	NO CAPX 2020 AND UNITED CITIZENS	REPORT--PUC JULY 31 SYNOPSIS OF MEETING	08/27/2013

					ACTION NETWORK		
20138-90634-01	PUBLIC	12-1246	☐	R	NO CAPX 2020 AND UNITED CITIZENS ACTION NETWORK	COMMENTS	08/27/2013
20137-89695-01	PUBLIC	12-1246	☐	R	NO CAPX 2020 AND UNITED CITIZENS ACTION NETWORK	COMMENTS--COMMENTS OF NOCAPX AND U-CAN	07/30/2013
20137-89606-01	PUBLIC	12-1246	☐	R	NO CAPX 2020 AND UNITED CITIZENS ACTION NETWORK	MINUTES--PUC JUNE 26 SYNOPSIS	07/29/2013
20137-89606-02	PUBLIC	12-1246	☐	R	NO CAPX 2020 AND UNITED CITIZENS ACTION NETWORK	MINUTES--PUC JULY 8 DRAFT FOR PUBLIC REVIEW	07/29/2013
20143-97431-01	PUBLIC	12-1246	☐	R	NO CAPX 2020 AND U-CAN AND CETF	COMMENTS	03/19/2014
20143-97405-01	PUBLIC	12-1246	☐	R	NO CAPX 2020 AND U-CAN AND CETF	COMMENTS--7850 COMMENTS OF NO CAPX 2020 AND U-CAN AND CETF	03/18/2014
20143-97405-02	PUBLIC	12-1246	☐	R	NO CAPX 2020 AND U-CAN AND CETF	COMMENTS--PUC EFP WORKING DRAFT MARCH 10 2014 FOR PUBLIC REVIEW	03/18/2014
20143-97405-03	PUBLIC	12-1246	☐	R	NO CAPX 2020 AND U-CAN AND CETF	COMMENTS--PUC PROCESS OUTLINE FOR PUBLIC REVIEW	03/18/2014
20143-97405-04	PUBLIC	12-1246	☐	R	NO CAPX 2020 AND U-CAN AND CETF	COMMENTS--PUC MEMO RE DRAFT PROVISIONS MARCH 10 2014 FOR PUBLIC REVIEW	03/18/2014
20145-100026-01	PUBLIC	12-1246	☐	R	NO CAPX AND U-CAN	OTHER--CH 7850 MAY 20 PUC DRAFT FOR PUBLIC REVIEW	06/02/2014
20145-99851-01	PUBLIC	12-1246	☐	R	NO CAPX AND U-CAN	COMMENTS--LIMITED 7850 COMMENTS OF NO CAPX 2020 AND U-CAN	05/28/2014
20148-102375-01	PUBLIC	12-1246	☐	R	NO CAPX AND U-CAN	COMMENTS--AUGUST 20 2014 MEETING	08/19/2014
20149-103217-01	PUBLIC	12-1246	☐	R	CAROL A. OVERLAND	COMMENTS--COMMENTS OF NO CAPX 2020	09/23/2014

20158-113514-01	PUBLIC	12-1246	☐	R	NO CAPX 2020 AND UNITED CITIZEN ACTION NETWORK	COMMENTS--COVER	08/25/2015
20158-113514-02	PUBLIC	12-1246	☐	R	NO CAPX 2020 AND UNITED CITIZEN ACTION NETWORK	COMMENTS--COMMENTS DRAFT	08/25/2015
20159-114212-01	PUBLIC	12-1246	☐	R	NO CAPX 2020 AND UNITED CITIZEN ACTION NETWORK	COMMENTS--COMMENTS CH 7850 ENVIRONMENTAL ASSESSMENT	09/23/2015
20159-114036-01	PUBLIC	12-1246	☐	R	NO CAPX 2020 AND UNITED CITIZEN ACTION NETWORK	REPORT--RULEMAKING OF LEGISLATIVE AUDITOR MARCH 1993	09/16/2015
20159-113980-01	PUBLIC	12-1246	☐	R	NO CAPX 2020 AND UNITED CITIZEN ACTION NETWORK	LETTER--RE APPELLATE COURT DECISION EIS REQUIRED FOR CERTIFICATE OF NEED	09/14/2015
20172-129359-01	PUBLIC	12-1246	☐	R	NOCAPX 2020 AND U-CAN	COMMENTS--REQUEST FOR ORAL COMMENT FOR ADVISORY GROUP AND PUBLIC AT COMMISSION MEETING	02/27/2017
20173-129802-01	PUBLIC	12-1246	☐	R	NOCAPX 2020 AND U-CAN	COMMENTS--ON DEFINITIONS AND NEED SHOWING AND CRITERIA	03/10/2017

STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2229

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

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

Filed June 25, 2012
Affirmed
Bjorkman, Judge

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

Daniel S. Schleck, Natalie Wyatt-Brown, Halleland Habicht P.A., Minneapolis, Minnesota; and

Brian N. Niemczyk, Mansfield, Tanick & Cohen, P.A., Minneapolis, Minnesota (for relator Coalition for Sensible Siting)

Lori Swanson, Attorney General, Anna E. Jenks, Gary R. Cunningham, Assistant Attorneys General, St. Paul, Minnesota (for respondent Minnesota Public Utilities Commission)

Todd Guerrero, Sten-Erik Hoidal, Christina K. Brusven, Fredrikson & Byron, P.A., Minneapolis, Minnesota (for respondent AWA Goodhue Wind, LLC)

Carol A. Overland, Legalectric, Red Wing, Minnesota (for amicus Goodhue Wind Truth)

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

U N P U B L I S H E D O P I N I O N

BJORKMAN, Judge

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

FACTS

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

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

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

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

D E C I S I O N

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

> A county may adopt by ordinance standards for LWECS that are more stringent than standards in commission rules or in the commission's permit standards. The commission, in considering a permit application for LWECS in a county that has adopted more stringent standards, shall

> consider and apply those more stringent standards, *unless the commission finds good cause not to apply the standards.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Affirmed.

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