

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Nancy Lange
Dan Lipschultz
Matthew Schuenger
Katie J. Sieben
John A. Tuma

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of the Application of the
Application of Freeborn Wind Farm, LLC for
a Large Wind Energy Conversion System Site
Permit for the 84 MW Freeborn Wind Farm
in Freeborn County

ISSUE DATE: August 31, 2017

DOCKET NO. IP-6946/WS-17-410

ORDER FINDING APPLICATION
COMPLETE AND VARYING TIME
LIMITS; NOTICE AND ORDER FOR
HEARING

PROCEDURAL HISTORY

On June 15, 2017, Freeborn Wind Farm, LLC (Freeborn Wind or Applicant) filed a site permit application for an up to 84 megawatt Large Wind Energy Conversion System (LWES) project in Freeborn County.¹ Freeborn Wind is an affiliate of Invenergy, LLC.

On June 21, 2017, the Commission issued a request for comments on the matter, with initial comments to be filed by July 6, and reply comments to be filed by July 13. Stakeholders filed some 50 separate comments by the initial deadline.

On July 6, 2017, the Department of Commerce Energy Environmental Review and Analysis unit (EERA) filed comments and recommendations on the site permit application.

On July 6, 2017, the Association of Freeborn County Landowners, an informal association of landowners in and adjacent to the project, filed a petition requesting that the matter be referred to the Office of Administrative Hearings for contested case proceedings.

On July 13, Freeborn Wind filed reply comments.

On August 10, 2017, the Commission met to consider the matter.

¹ On August 2, 2017, Applicant submitted revised information in the site permit application.

FINDINGS AND CONCLUSIONS

I. Summary

In this Order the Commission finds that Freeborn Wind's application is substantially complete.

The Commission will vary timelines, refer this matter for contested case proceedings, and take other procedural steps to enable a full consideration of the issues raised in this proceeding.

II. Freeborn Wind's Application

Freeborn Wind has requested a site permit for construction of an up to 200 megawatt LWECS, 84 MW of which will be located in Freeborn County.² The project includes construction of an up to 42 2.0-MW nameplate capacity wind turbines, an electrical and fiber optic communication system, associated equipment, gravel access roads, an operations and maintenance facility, a substation, and a permanent high-voltage transmission line.³

The project is located in Hayward, London, Oakland, and Shell Rock Townships. The project boundary encompasses approximately 26,273 acres.⁴

The project was selected through a Commission-approved bidding process; therefore, under Minn. Stat. Ch. 216B.2422 subdivision 5, it is exempt from the Certificate of Need requirements. In addition, Freeborn Wind has entered into power-purchase agreements with Xcel Energy (Xcel) and Invenergy Wind Development North America LLC. Xcel will purchase the project following permitting and prior to construction. Xcel will construct, own, and operate the project.

At the Commission hearing, the Applicant agreed with the Association of Freeborn County Landowners that a contested case proceeding is appropriate in this matter.

III. Commission Jurisdiction

The Commission has jurisdiction over requests for site permits for LWECS under Minn. Stat. §§ 216F.03 and 216F.04. Because Freeborn Wind's project qualifies as a LWECS, Freeborn Wind is required to file a site permit application.

The Commission finds that material issues of fact have been raised, and that a contested case hearing would aid the Commission in making a final determination on the site permit application.

IV. Application Completeness

A. Comments of the EERA

The EERA reviewed the site permit application for completeness under Minn. R. Ch. 7854 and stated that the application included the information required under Minn. R. 7854.0500, but

² The remainder will be located in Iowa.

³ Applicant stated it will file a separate route permit application in Docket No. IP-6946/RL-17-322 to cover the transmission line.

⁴ Applicant stated that additional lands may be leased or an easement obtained as necessary to complete the project.

stated that two issues need to be addressed before the preliminary determination on a draft site permit is made. First, the Department stated that the application does not meet certain of the standards of the Freeborn County Ordinance.⁵

Second, the table in Section 5.1.1 of the Application should indicate that the Site Permit Conditions will consider Public Conservation Lands as non-participating landowners, and will require up to five times the rotor diameter setback depending on the location of the lands in relation to the location of the turbine.

The EERA recommended that the Commission delay a decision on whether to refer the project to the Minnesota Office of Administrative Hearings for a contested case hearing until the draft site permit stage. Finally, the EERA recommended that the Commission vary the procedural requirement of Minn. R. 7854.0800, to allow additional time to schedule public meetings and for public comment to be considered.

B. Public Comments

Most of the public comments addressed the merits of the Freeborn Wind's proposal but did not allege any defect in the application's completeness. And where parties did allege shortcomings in the application, Freeborn Wind's reply comments addressed many of the concerns raised.

C. Commission Action

The Commission concurs with the EERA that the application is substantially complete. The Commission will, however, direct Freeborn Wind to respond to all reasonable requests regarding the project and to facilitate in every reasonable way the continued examination of the issues by the EERA and Commission staff.

V. Timelines Varied

Under Minn. R. 7829.3200, the Commission may vary any of its rules upon making the following findings:

- 1) Enforcement of the rule would impose an excessive burden upon the applicant or others affected by the rule;
- 2) Granting the variance would not adversely affect the public interest; and
- 3) Granting the variance would not conflict with standards imposed by law.

⁵ The EERA stated that the proposed Project does not appear to meet some of the standards set forth in the Freeborn County Ordinance, which are more stringent than standards identified within the State LWCS Site Permit. Specifically, EERA noted that Turbine 31 is closer than three rotor diameters from what has been identified as a type III wetland, which does not meet the Freeborn County Ordinance of a three rotor-diameter turbine setback from Type III, IV, and V wetlands.

A. Minn. R. 7854.0600, subp. 1

Under Minn. R. 7854.0600, subp. 1, the Commission must make a decision on the completeness of the site permit application within 30 days of its filing. This timeline does not allow sufficient time to review the application, solicit comments, schedule a Commission meeting, and prepare a written order. The Commission will therefore vary the 30-day time line making the following findings:

- 1) Enforcing the 30-day time line would impose an excessive burden on the public, and on the Commission and Department, because it would not allow adequate time to review the application, schedule a Commission meeting, and prepare a written order;
- 2) Varying the 30-day time line would not adversely affect the public interest, and would instead serve the public interest by allowing more time for public comment on, and Commission consideration of, the application; and
- 3) Varying the 30-day time line would not conflict with any other standards imposed by law.

B. Minn. R. 7854.0800, subp. 1

Under Minn. R. 7854.0800, subp. 1, the Commission must make a preliminary determination on whether to issue a site permit within 45 days of accepting an application. To ensure sufficient time to accommodate public input, the Commission will vary the 45-day time line, making the following findings:

- 1) Enforcing the 45-day time line would impose an excessive burden on the public, on parties to the proceeding, and on the Commission, by jeopardizing the thoroughness of the Commission's decision-making process;
- 2) Varying the 45-day time line would not adversely affect the public interest, and would in fact serve the public interest by protecting the Commission's decision-making process; and
- 3) Varying the 45-day time line would not conflict with any other standards imposed by law.

VI. Referral for Contested Case Proceedings

The Association of Freeborn Landowners has requested a contested case hearing and identified contested issues of fact. The Applicant also recommended that the case be referred to the Office of Administrative Hearings for contested case proceedings.

The Commission finds that it cannot satisfactorily resolve all issues raised by the application on the basis of the record before it. Those issues turn on specific facts that are best developed in proceedings conducted by an Administrative Law Judge. The Commission agrees that referral is appropriate in order to develop a full record upon which to make a final determination on the site permit application.

The Commission will therefore refer the matter to the Office of Administrative Hearings for full contested case proceedings and a public hearing conducted by the ALJ. The Commission requests the ALJ to identify the issues and determine the appropriate scope and conduct of the hearing according to applicable law, due process, and fundamental fairness.

Finally, to facilitate the review process, the Commission will require certain additional process steps as set forth in the ordering paragraphs below.

VII. Issues to be Addressed

The ultimate issue in this case is whether Freeborn Wind's proposed site permit application meets the criteria set forth in Minn. Stat. § 216F and Minn. R. Ch. 7854. This turns on numerous factors that are best developed in formal evidentiary proceedings.

The Commission will refer the merits of the site permit application to the Office of Administrative Hearings for contested case development of the record consistent with Minn. R. 7854.0900, and request that the ALJ identify the issues and determine the appropriate scope and conduct of the hearing according to applicable law, due process, and fundamental fairness.

VIII. Procedural Outline

A. Administrative Law Judge

The Administrative Law Judge assigned to this case is LauraSue Schlatter. Her address and telephone number are as follows: Office of Administrative Hearing, 600 North Robert Street, St. Paul, Minnesota 55101 and (651) 361-7900. Her mailing address is P.O. Box 64620, St. Paul, Minnesota 55164-0620. Her Legal Assistant is Katie Lin, at 651-361-7911.

B. Hearing Procedure

- *Controlling Statutes and Rules*

Hearings in this matter will be conducted in accordance with the Administrative Procedure Act, Minn. Stat. §§ 14.57 – 14.62; the rules of the Office of Administrative Hearings, Minn. Rules, parts 1400.5100 to 1400.8400; and, to the extent that they are not superseded by those rules, the Commission's Rules of Practice and Procedure, Minn. Rules, parts 7829.0100 to 7829.3200.

Copies of these rules and statutes may be purchased from the Print Communications Division of the Department of Administration, 660 Olive Street, St. Paul, Minnesota 55155; (651) 297-3000. These rules and statutes also appear on the Office of the Revisor of Statutes State of Minnesota's website at www.revisor.mn.gov/pubs.

The Office of Administrative Hearings conducts contested case proceedings in accordance with the Minnesota Rules of Professional Conduct and the Professionalism Aspirations adopted by the Minnesota State Bar Association.

- *Right to Counsel and to Present Evidence*

In these proceedings, parties may be represented by counsel, may appear on their own behalf, or may be represented by another person of their choice, unless otherwise prohibited as the unauthorized practice of law. They have the right to present evidence, conduct cross-examination, and make written and oral argument. Under Minn. Rules, part 1400.7000, they may obtain subpoenas to compel the attendance of witnesses and the production of documents.

Parties should bring to the hearing all documents, records, and witnesses necessary to support their positions.

- *Discovery and Informal Disposition*

Any questions regarding discovery under Minn. Rules, parts 1400.6700 to 1400.6800 or informal disposition under Minn. Rules, part 1400.5900 should be directed to Michael Kaluzniak, Energy Facilities Permitting Unit, Minnesota Public Utilities Commission, 121 7th Place East, Suite 350, St. Paul, Minnesota 55101-2147, (651) 201-2257.

- *Protecting Not-Public Data*

State agencies are required by law to keep some data not public. Parties must advise the Administrative Law Judge if not-public data is offered into the record. They should take note that any not-public data admitted into evidence may become public unless a party objects and requests relief under Minn. Stat. § 14.60, subd. 2.

- *Accommodations for Disabilities; Interpreter Services*

At the request of any individual, this agency will make accommodations to ensure that the hearing in this case is accessible. The agency will appoint a qualified interpreter if necessary. Persons must promptly notify the Administrative Law Judge if an interpreter is needed

- *Scheduling Issues*

The times, dates, and places of public and evidentiary hearings in this matter will be set by order of the Administrative Law Judge after consultation with the Commission and intervening parties.

- *Notice of Appearance*

Any party intending to appear at the hearing must file a notice of appearance (Attachment A) with the Administrative Law Judge within 20 days of the date of this Notice and Order for Hearing.

- *Sanctions for Non-compliance*

Failure to appear at a prehearing conference, a settlement conference, or the hearing, or failure to comply with any order of the Administrative Law Judge, may result in facts or issues being resolved against the party who fails to appear or comply.

C. Parties and Intervention

The Company is currently the only party to this case.⁶ Other persons wishing to become formal parties shall promptly file petitions to intervene with the Administrative Law Judge. They shall serve copies of such petitions on all current parties and on the Commission. Minn. Rules, part 1400.6200.

D. Prehearing Conference

A prehearing conference will be held on September 14, 2017 at 9:00 a.m. in the Small Hearing Room at the offices of the Public Utilities Commission, 121 Seventh Place East, Suite 350, St. Paul, Minnesota 55101-2147.

Persons participating in the prehearing conference should be prepared to discuss time frames, scheduling, discovery procedures, and similar issues. Potential parties are invited to attend the pre-hearing conference and to file their petitions to intervene as soon as possible.

E. Application of Ethics in Government Act

The lobbying provisions of the Ethics in Government Act, Minn. Stat. §§ 10A.01 et seq., apply to site permit contested cases. Persons appearing in this proceeding may be subject to registration, reporting, and other requirements set forth in that Act. All persons appearing in this case are urged to refer to the Act and to contact the Campaign Finance and Public Disclosure Board, telephone number (651) 539-1180, with any questions.

F. Ex Parte Communications

Restrictions on ex parte communications with Commissioners and reporting requirements regarding such communications with Commission staff apply to this proceeding from the date of this Order. Those restrictions and reporting requirements are set forth at Minn. Rules, parts 7845.7300 – 7845.7400, which all parties are urged to consult.

IX. Public Advisor

Upon acceptance of an application for a site permit, the Commission is to designate a staff person to act as public advisor on the project under Minn. R. 7854.0700. The public advisor is available to answer questions from the public about the permitting process. In this role, the public advisor may not act as an advocate on behalf of any person.

The Commission will designate Bret Eknes as the public advisor. His contact information is: Bret Eknes, Public Advisor, Minnesota Public Utilities Commission, 121 Seventh Place East, Suite 350, Saint Paul, Minnesota 55101-2147. He can be reached at 651-201-2236, and by email at publicadvisor.puc@state.mn.us.

⁶ Pursuant to Minn. Stat. § 216E.03, subd. 11, the Department of Commerce's Energy Environmental Review and Analysis Unit is participating in this matter as a consultant to the Commission, providing technical and other assistance.

ORDER

1. The Commission hereby accepts Freeborn Wind Farm, LLC's site permit application as substantially complete.
2. The Commission hereby refers the matter to the Office of Administrative Hearings for a contested case proceeding and public hearing to be conducted by an ALJ.
3. The Commission requests that the ALJ identify the issues and determine the appropriate scope and conduct of the hearing according to applicable law, due process, and fundamental fairness.
4. The Commission requests that the ALJ consider timely comments received to date in evaluating the merits of the application.
5. The Commission hereby delegates administrative authority, including timing issues, to the Executive Secretary.
6. The Commission requests that the Department continue to study the issues and indicate during the hearing process, through testimony or comment, its position on the reasonableness of granting a site permit.
7. The Commission requests that the Department conduct a public information meeting to collect information from the public and others to prepare a draft site permit for the Commission's consideration.
8. Applicant shall facilitate in every reasonable way the continued examination of the issues by the Department and Commission staff.
9. Applicant shall place a print and electronic copy of the site permit application in the government center and/or public library located closest to the proposed project site.
10. Applicant shall work with Commission staff and the Administrative Law Judge to arrange for publication of the notice of hearing in newspapers of general circulation at least ten days prior to the hearing, that such notice be in the form of visible display ads, and that proof of publication be obtained from the newspapers selected.
11. All notice requirements in these matters provided for under Minn. Stat. Ch. 216F and Minn. R. Ch. 7854 shall include delivery to all affected landowners. An affected landowner is any landowner or designee that is within or adjacent to the proposed LWECS site boundary.
12. The Commission hereby varies Minn. R. 7854.0600, subp. 1, to extend the 30-day time frame for Commission decision on application completeness.

13. The Commission hereby varies Minn. R. 7854.0800, subp. 1, to extend the 45-day time frame for Commission decision on the issuance of a draft site permit.
14. This order shall become effective immediately.

BY ORDER OF THE COMMISSION

Daniel P. Wolf
Executive Secretary



This document can be made available in alternative formats (e.g., large print or audio) by calling 651.296.0406 (voice). Persons with hearing loss or speech disabilities may call us through their preferred Telecommunications Relay Service.

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

121 Seventh Place East Suite 350
St. Paul, Minnesota 55101-2147

In the Matter of an Application of Freeborn Wind Farm, LLC for a Large Wind Energy Conversion System Site Permit for the 84 MW Freeborn Wind Farm in Freeborn County

OAH Docket Number: _____

NOTICE OF APPEARANCE

TO: Administrative Law Judge LauraSue Schlatter,
600 North Robert Street. PO Box 64620, St.
Paul, MN 55164

PLEASE TAKE NOTICE that:

1. The party/agency named below (Party/Agency) will appear at the prehearing conference and all subsequent proceedings in the above-entitled matter.
2. By providing its email address below, the Party/Agency acknowledges that it has read and agrees to the terms of the Office of Administrative Hearings' e-Filing policy and chooses to opt into receiving electronic notice from the Office of Administrative Hearings in this matter. **Note: Provision of an email address DOES NOT constitute consent to electronic service from any opposing party or agency in this proceeding.**
3. The Party/Agency agrees to use best efforts to provide the Office of Administrative Hearings with the email address(es) for opposing parties and their legal counsel.

Party's/Agency's Name: _____

Email: _____ Telephone: _____

Mailing Address: _____

Party's/Agency's Attorney: _____

Firm Name: _____

Email: _____ Telephone: _____

Mailing Address: _____

Respondent's/Opposing Party's Name: _____

Email: _____ Telephone: _____

Mailing Address: _____

Dated: _____

Signature of Party/Agency or Attorney