

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE
MINNESOTA PUBLIC UTILITIES COMMISSION**

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

**OAH Docket No. 80-2500-34633
MPUC Docket No. IP-6946/WS-17-410**

**FREEBORN WIND ENERGY LLC'S RESPONSE TO MOTION OF ASSOCIATION OF
FREEBORN COUNTY LANDOWNERS FOR CERTIFICATION TO PUBLIC
UTILITIES COMMISSION OF ITS PETITION, AND PETITION TO THE
COMMISSION, FOR APPOINTMENT OF AN ADVISORY TASK FORCE AND A
SCIENCE ADVISORY TASK FORCE**

I. INTRODUCTION

Whether to appoint a task force is solely within the jurisdiction of the Minnesota Public Utilities Commission ("MPUC") and the issue would be moot if decided at the end of this proceeding. To that end, Freeborn Wind Energy LLC ("Freeborn Wind") agrees that the Motion for Certification of its Petition ("Motion" or "Motion to Certify") should be certified to the MPUC for decision. The petition submitted by the Association of Freeborn County Landowners ("AFCL") for the appointment of an Advisory Task Force and a Scientific Advisory Task Force ("Petition"), however, is untimely, lacks merit, and should be denied by the MPUC.

II. BACKGROUND

On August 2, 2016, Ms. Overland, in her individual capacity, submitted a petition with the Minnesota Pollution Control Agency ("MPCA") requesting that the MPCA commence a rulemaking and appoint a rulemaking advisory committee regarding wind turbine noise. A copy of that petition is included here as Attachment A.

On September 16, 2016, MPCA Commissioner John Linc Stine denied Ms. Overland's request.¹

On June 15, 2017, Freeborn Wind filed an application for a site permit for the up to 84 MW Freeborn Wind Farm in Freeborn County ("Application").²

On June 21, 2017, the MPUC issued a Notice of Comment Period seeking input on whether the Application was complete and whether a contested case proceeding should be held.³

On July 6, 2017, AFCL submitted a "Petition for Contested Case Comment on Contested Material Issues of Fact."⁴ In that 133-page petition (with attachments), AFCL argued, among other things, that the applicable rules did not require landowners to receive notice of Xcel Energy's wind generation acquisition docket (E002/M-16-777)⁵ and because of this lack of notice, the Acquisition Docket should be put on hold.⁶ AFCL alleged 10 issues of fact in support of its petition for a contested case, but did not mention the need for or request any task force.

On July 11, 2017, AFCL submitted a letter again asserting that the acquisition docket should have required landowner notice.⁷ AFCL did not cite any statute or rule requiring such notice or mention the need for or request any task force.

¹ The denial letter is attached to the AFCL Motion.

² See Edockets No. 20176-132805-01.

³ Edockets No. 20176-132986-01.

⁴ Edockets No. 20177-133591-01.

⁵ *In the Matter of Petition of Xcel Energy's Petition for Approval of the Acquisition of 1,550 MW of Wind Generation*, MPUC Docket E0002/M-16-777 ("Acquisition Docket").

⁶ Edockets No. 20177-133591-01, at 3. To the extent AFCL raises notice issues relating to the Xcel Energy Acquisition Docket, they are outside the scope of this proceeding. All notice requirements contained in the statutes and rules applicable to this siting proceeding have been met.

⁷ Edocket No. 20177-133715-01.

On July 13, 2017, AFCL submitted 19 pages of Reply Comments on Completeness, again raising concerns about notice in the separate Xcel Energy Acquisition Docket.⁸ AFCL did not cite any statute or rule requiring such notice or mention the need for or request any task force.

On August 10, 2017, the MPUC orally determined that the Application was complete. AFCL did not address the MPUC to request a task force.

On August 31, 2017, the MPUC issued an order finding the Application complete and referring the Application to the OAH for a contested case proceeding.⁹

On September 1, 2017, AFCL filed a Petition for Intervention.¹⁰ AFCL listed more than a dozen issues of concern, but did not mention the need for or request any task force. AFCL's intervention petition was granted on September 12, 2017.¹¹

On September 20, 2017, three months after Freeborn Wind submitted its Application and two months after the MPUC issued a Notice of Comment Period, AFCL filed its motion asking the Administrative Law Judge to certify a motion seeking the appointment of an Advisory Task Force under Minn. Stat. § 216E.08, subd. 1 and a Scientific Advisory Task Force under Minn. Stat. § 216E.08, subd. 4. To Freeborn Wind's knowledge, this is the first time any type of task force has been requested in the siting of a Large Wind Energy Conversion System ("LWECS") and none has ever been appointed.

In its Petition, AFCL asserts that "[b]oth task forces are needed in this docket to address the multiple matters of material fact in this proceeding, about which there is insufficient

⁸ Edockets No. 20177-133859-01 , at 2.

⁹ Edockets No. 20178-135140-01.

¹⁰ Edocket No. 20179-135229-01.

¹¹ Edockets No. 20179-135455-01.

information available.”¹² AFCL requests that the charge to the Advisory Task Force “include material issues raised including wildlife habitat and foraging range, designated wetlands on private property, wind turbine sound, potential for shadow flicker and adequacy of setbacks in the interests of health, environment, and public safety.”¹³ AFCL requests that a Scientific Advisory Task Force be “targeted to address the areas identified by Commissioner Stine as insufficient, including public health impacts of wind turbines...”¹⁴

III. LEGAL STANDARDS

The Motion for Certification is made under Minn. R. 1405.2200. Minn. R. 1405.2200 lacks any standards for determining whether to certify a question to the MPUC. It is the Office of Administrative Hearings’ practice to apply the factors contained in Minn. R. 1400.7600 in determining whether to certify a question to the MPUC.¹⁵ Minn. R. 1400.7600 provides, in relevant part:

Any party may request that a pending motion or a motion decided adversely to that party by the judge before or during the course of the hearing . . . be certified by the judge to the agency. In deciding what motions should be certified, the judge shall consider the following:

A. whether the motion involves a controlling question of law as to which there is substantial ground for a difference of opinion; or

B. whether a final determination by the agency on the motion would materially advance the ultimate termination of the hearing; or

¹² Motion at p. 2.

¹³ *Id.* at p. 4.

¹⁴ *Id.* at p. 6.

¹⁵ *In the Matter of the Exemption Application by Minnesota Power for a 345/230 kV High Voltage Transmission Line Known as the Arrowhead Project*, Order on Motion to Certify, MEQB Docket No. MP-HVTL-EA-1-99, 2000 WL 35498875 at 2 (Reha, P. Feb. 7, 2000).

C. whether or not the delay between the ruling and the motion to certify would adversely affect the prevailing party; or

D. whether to wait until after the hearing would render the matter moot and impossible for the agency to reverse or for a reversal to have any meaning; or

E. whether it is necessary to promote the development of the full record and avoid remanding; or

F. whether the issues are solely within the expertise of the agency.

The Motion seeks the appointment of two task forces: (1) an Advisory Task Force and (2) a Scientific Advisory Task Force. The provisions relating to these task forces are contained in Minn. Stat. § 216E.08, subs. 1 and 4. The provisions in Section 216.08 apply to the siting of LW ECS^[16] and provide:

216E.08 PUBLIC PARTICIPATION.

Subdivision 1. Advisory task force. The commission may appoint one or more advisory task forces to assist it in carrying out its duties. Task forces appointed to evaluate sites or routes considered for designation shall be comprised of as many persons as may be designated by the commission, but at least one representative from each of the following: Regional development commissions, counties and municipal corporations and one town board member from each county in which a site or route is proposed to be located. No officer, agent, or employee of a utility shall serve on an advisory task force. Reimbursement for expenses incurred shall be made pursuant to the rules governing state employees. The task forces expire as provided in section 15.059, subdivision 6. At the time the task force is appointed, the commission shall specify the charge to the task force. The task force shall expire upon completion of its charge, upon designation by the commission of alternative sites or routes to be included in the environmental impact statement, or upon the specific date identified by the commission in the charge, whichever occurs first.

* * * *

¹⁶ Minn. Stat. § 216F.02 (a) (providing: “a) The requirements of chapter 216E do not apply to the siting of LW ECS, except for sections 216E.01; 216E.03, subdivision 7; 216E.08; 216E.11; 216E.12; 216E.14; 216E.15; 216E.17; and 216E.18, subdivision 3, which do apply.”)

Subd. 4. Scientific advisory task force. The commission may appoint one or more advisory task forces composed of technical and scientific experts to conduct research and make recommendations concerning generic issues such as health and safety, underground routes, double circuiting and long-range route and site planning. Reimbursement for expenses incurred shall be made pursuant to the rules governing reimbursement of state employees. The task forces expire as provided in section 15.059, subdivision 6.¹⁷ The time allowed for completion of a specific site or route procedure may not be extended to await the outcome of these generic investigations.¹⁸

(Emphasis added.)

IV. ANALYSIS

A. CERTIFICATION

There is no reason for AFCL's delay in requesting a task force after making multiple filings consisting of hundreds of pages in this docket over a two-month period. Despite this tardiness, however, AFCL correctly notes that only the MPUC has the authority to appoint an Advisory Task Force. In addition, the question of whether to appoint an Advisory Task Force would be moot if decided at the end of the proceeding. Therefore, certification is appropriate pursuant to Minn. R. 1400.7600 (D) and (F). Substantively, however, the Petition should be denied for the reasons set forth below.

¹⁷ Minn. Stat. § 15.059, subd. 6 provides: "Advisory task forces. If the existence of an advisory task force is mandated by statute, the task force shall expire on the date specified in the enabling legislation. If no expiration date is specified, the task force shall expire two years after the effective date of the act creating the advisory task force. If the existence of a task force is authorized but not mandated by statute, the task force shall expire at the pleasure of the person or group which creates the task force, or two years after the first members of the task force are appointed, whichever is sooner. A person or group mandated or with discretionary authority to create a task force may create another task force to continue the work of a task force which expires, unless the enabling legislation specifies an expiration date or creation of another task force is prohibited by other law."

¹⁸ Minn. Stat. § 216E.08, subds. 1 and 4.

B. ADVISORY TASK FORCE PURSUANT TO MINN. STAT. § 216E.08, SUBD. 1

The traditional purpose for an advisory task force is to convene a group of local stakeholders, including local government officials, to help identify alternative locations and issues associated with infrastructure proposals to be evaluated in the environmental review document, either an Environmental Assessment (“EA”) or an Environmental Impact Statement (“EIS”). The work of such task force is limited by the charge the MPUC establishes, and its term terminates upon the issuance of a scoping decision by the Department of Commerce, Energy Environmental Review and Analysis (“EERA”) or an earlier date if set by the MPUC.¹⁹ Advisory task forces, therefore expire (1) upon completion of its charge, (2) upon designation by the commission of alternative sites or routes to be included in the EA or EIS, or (3) upon the specific date identified by the commission in the charge, whichever occurs first. AFCL’s request for an Advisory Task Force is contrary to both the purposes of a task force and to the statutory timing restrictions. (Emphasis added.)

Advisory task forces assist with scoping. In this docket, no EA or EIS will be prepared and there will be no scoping process. Apparently, aware that a task force could not meet its traditional statutory duties, AFCL argues for the creation of a new purpose—that such task force should be appointed to help resolve contested factual issues. AFCL requests that an advisory task force be appointed “to address the multiple matters of material fact in this proceeding,” including wildlife habitat, shadow flicker and setbacks.²⁰ Such fact-finding is outside the scope of an Advisory Task Force and was the same basis upon which AFCL based its request for a

¹⁹ Minn. Stat. § 216E.08, subd. 1 (“The task force shall expire upon completion of its charge, upon designation by the commission of alternative sites or routes to be included in the environmental impact statement, or upon the specific date identified by the commission in the charge, whichever occurs first.”)

²⁰ Motion at p. 2.

contested case, which request was granted. The appointment of an Advisory Task Force in this docket would not meet its scoping purpose or serve any other purpose that cannot be served through the contested case process. The contested case proceeding provides an opportunity for expert witnesses to provide information and be subject to cross-examination. The issues AFCL raises can be addressed through testimony and hearing.

AFCL's request for an Advisory Task Force also fails to comport with the timing constraints on an Advisory Task Force. Per statute, the term of an Advisory Task Force terminates no later than the end of scoping. There is no scoping here, but if there were, it would long precede the contested case. AFCL appears to be seeking an Advisory Task Force that would persist through the contested case proceeding. There is no authority under Minn. Stat. § 216E.08 to do so.

The MPUC should, therefore, decline to appoint an Advisory Task Force.

C. SCIENTIFIC ADVISORY TASK FORCE PURSUANT TO MINN. STAT. § 216E.08, SUBD. 4

AFCL's request for a Scientific Advisory Task Force is, quite transparently, a second try to commence a rulemaking relating to wind turbine noise. The Petition, noting there are no Minnesota rules on infrasound, expressly state that such Scientific Advisory Task Force should be "targeted to address the areas identified by [MPCA] Commissioner Stine as insufficient, including public health impacts of wind turbines..."²¹ The agency with the expertise and responsibility for regulating noise in the state has already considered and rejected Ms. Overland's request. There is no justification for the MPUC to review the issue, particularly within a specific docket. The concerns AFCL raises relating to noise as well as other issues

²¹ Motion at p. 6.

relating to setbacks, land values and shadow flicker are the same types of issues presented in other wind siting proceedings. There is nothing new or unique about the Freeborn Wind Farm that would warrant the appointment of a Scientific Advisory Task Force.²² Therefore, AFCL's request should be denied.

V. CONCLUSION

Based on the foregoing, Freeborn Wind respectfully requests that the OAH certify the Motion for Certification to the MPUC for decision and that the MPUC deny the Petition in its entirety.

Dated: October 4, 2017

/s/ Lisa Agrimonti

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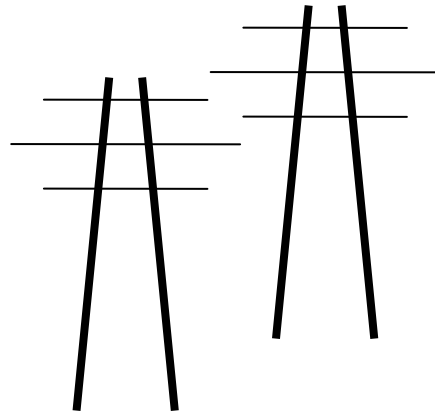
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²² For example, the Project proposes to use Vestas V116 and V110 wind turbine models. These are the same or similar to the turbine models that the MPUC approved for the Blazing Star Wind Farm. *See* Order Issuing Site Permit for Large Wind Energy Conversion System, *In the Matter of the Application of Blazing Star Wind Farm, LLC for a Site Permit for the up to 200 Megawatt Blazing Star Wind Project in Lincoln County*, MPUC Docket No. IP-6961/WS-16-686 (Aug. 3, 2017) (issuing Site Permit pursuant to Minn. R. Ch. 7854 for wind project with the following four potential turbine models: Gamesa G126, Acciona 3.0-132, GE 2.5-116, and Vestas V110).

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August 2, 2016

Commissioner John Linc Stine
Minnesota Pollution Control Agency
520 Lafayette Road N
St. Paul, MN 55155-4194

RE: Petition for Rulemaking for Wind Turbine Noise Standards, Minn. R. Ch. 7030

Dear Commissioner Stine:

Enclosed for filing please find **Petition for Rulemaking**. The Public Utilities Commission has recently initiated wind turbine noise studies that can be utilized to develop MPCA wind turbine noise standards.

I am making this Petition as an individual, and not in the course of representation of any specific party, although for at least 12 years I have been representing landowners and citizen groups in wind project siting dockets where wind turbine noise has been at issue, and have gleaned these concerns from that extensive experience.

At this time, I request that a rulemaking advisory committee be appointed, as provided by Minnesota statute:

14.101 ADVICE ON POSSIBLE RULES.

Subd. 2. Advisory committees.

Each agency may also appoint committees to comment, before publication of a notice of intent to adopt or a notice of hearing, on the subject matter of a possible rulemaking under active consideration within the agency.

Please refer to the testimony of Rick James, INCE, which he provided live and in writing in the

Goodhue Wind Project docket (PUC Docket 08-1233).¹ This testimony explains why the MPCA’s noise standards are not applicable to wind projects, and why wind turbine specific noise standards are needed.

It is my understanding that you’ve also had the opportunity to meet with concerned citizens who have raised these issues at the Public Utilities Commission while participating in various siting dockets, including some who live within a project and are suffering from wind turbine noise. A docket was initiated seven years ago by the Minnesota Department of Public Health (PUC Docket 09-845) based on the DoH report, “Public Health Impacts of Wind Turbines,” but the Commission has taken no action regarding that report. Please note that wind turbines are inexplicably exempted from environmental review under Minn. Stat. Ch. 216F and associated Minn. R. Ch. 7854.

If you have any questions or require anything further, please let me know.

Very truly yours,



Carol A. Overland
Attorney at Law

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20107-52680-09	PUBLIC	08-1233	<input type="checkbox"/>	WS	GOODHUE WIND TRUTH	TESTIMONY--EXHIBIT RJ 14	07/19/2010
20107-52680-13	PUBLIC	08-1233	<input type="checkbox"/>	WS	GOODHUE WIND TRUTH	TESTIMONY--EXHIBITS RJ 6-7	07/19/2010
20107-52680-03	PUBLIC	08-1233	<input type="checkbox"/>	WS	GOODHUE WIND TRUTH	TESTIMONY--EXHIBITS RJ 16 TO 23	07/19/2010
20107-52680-07	PUBLIC	08-1233	<input type="checkbox"/>	WS	GOODHUE WIND TRUTH	TESTIMONY--EXHIBIT RJ 11	07/19/2010
20107-52680-01	PUBLIC	08-1233	<input type="checkbox"/>	WS	GOODHUE WIND TRUTH	TESTIMONY--DIRECT TESTIMONY OF RICHARD R JAMES INCE	07/19/2010
20107-52680-15	PUBLIC	08-1233	<input type="checkbox"/>	WS	GOODHUE WIND TRUTH	TESTIMONY--EXHIBITS RJ 1-5	07/19/2010
20107-52680-05	PUBLIC	08-1233	<input type="checkbox"/>	WS	GOODHUE WIND TRUTH	TESTIMONY--EXHIBITS RJ 8 TO 14	07/19/2010
20107-52680-11	PUBLIC	08-1233	<input type="checkbox"/>	WS	GOODHUE WIND TRUTH	TESTIMONY--EXHIBIT RJ 15	07/19/2010
20108-53310-09	PUBLIC	08-1233	<input type="checkbox"/>	WS	GOODHUE WIND TRUTH	COMMENTS--PROPOSED SOUND STANDARDS	08/06/2010
20108-53310-07	PUBLIC	08-1233	<input type="checkbox"/>	WS	GOODHUE WIND TRUTH	COMMENTS--RJ-16 - PHILLIPS REFUTATION OF CMOH REPORT	08/06/2010
20108-53310-05	PUBLIC	08-1233	<input type="checkbox"/>	WS	GOODHUE WIND TRUTH	COMMENTS--- ADDITIONAL TESTIMONY OF RICK JAMES	08/06/2010

PETITION FOR RULEMAKING
TO THE
MINNESOTA POLLUTION CONTROL AGENCY

Name: Carol A. Overland

Group Represented or Title: Petition made as an individual

Address: Legalectric, 1110 West Avenue, Red Wing, MN 55066

I request that the Minnesota Pollution Control Agency amend Minnesota Rules Chapter 7030 by adopting a new rule section, i.e., Minn. R. 7030.2000, et seq., regarding Noise Pollution Control setting standards for regulating wind turbine noise.

The need or reasons for the wind turbine noise rulemaking are detailed in the testimony of Rick James, INCE, at the Goodhue Wind public hearing and written testimony, attached, with specific issues to be addressed including, but not limited to the following specific concerns:

1. MPCA Noise Standards are not applicable to wind turbine noise. Public Utilities Commission has acknowledged this and has begun studies of wind noise.
2. There is no basis or supporting data to show that L50 is acceptable for night time noise, and there is no basis or supporting data to show any acceptable level for infrasound.
3. Modeling assumptions for noise perception is inappropriate for rural areas, where a quiet bedroom at night is 20dB in summertime.
4. Data shows that 40 dB is the point at which adverse health effects start to occur.
5. Cadna-A model software, often used for modeling wind turbine noise, was designed for modeling traffic noise, and is not appropriate for wind turbine noise.
6. Modeling based on ISO 9613.2 standards is not appropriate for wind turbine noise as it excludes any noise sources more than 30 meters above the ground.
7. ISO 9613.2 has known errors or tolerances for distances beyond 1,000 feet and many “receptors” are at a distance greater than 1,000 feet.
8. A 3dB tolerance at this distance is often added in, and a 3dB difference is a doubling in sound levels. The tolerance range should be more narrow.
9. Turbine manufactures often allows a 2dB tolerance variable which is not identified or disclosed in modeling results.

10. Wind turbine noise must address turbulent weather conditions, where sound levels can be 10-15dB higher than “normal.”
11. Consideration of the above issues in modeling means that a 43dBA estimate, adding in known tolerances (arguably 5dbA) and adding for weather conditions (arguably 10-15dbA) to noise model estimates, results in levels of 58dbA-63dbA. These levels have been confirmed in after construction and during operation of wind turbines.
12. Wind turbine modeling should not be modeled presuming area as flat and using the turbine as the “point source.” Such models do not include topography of the land.
13. Because a NASA study which identifies **low frequency noise** from wind turbines, and found that it does not propagate spherically, but instead cylindrically, point source modeling for wind turbines is inappropriate, and modeling must be designed to address this characteristic.
14. In the case of wind turbine noise, low frequency noise must be identified and regulated, which, as PUC noted, is different than the regulation found in Minn. R. 7030.
15. Wind turbine noise standards must also address ground absorption, in varying conditions, where a model such as that for AWA Goodhue Wind used assumption of .7 for ground absorption of sound, where frozen ground the assumption should be “0”, which would raise levels another 2-3 dBA, doubling the expected sound levels.

This new rule will require testing, review of modeling, and consulting with experts to draft rule language to address these concerns.

Proposed language – Proposed language should be formatted based on existing noise rules, as below, and expanded to incorporate the specifics, to be based on sound studies and testimony.

7030.0020 DEFINITIONS

(new) **C Weighted.** “C Weighted” means...

(new) **Infrasound.** Infrasound means

7030.2020 DEFINITIONS.

7030.2030 NOISE CONTROL REQUIREMENT.

7030.2040 NOISE STANDARDS.

7030.2050 NOISE AREA CLASSIFICATION.

7030.2060 MEASUREMENT METHODOLOGY.

7030.2070 SOUND ATTENUATION MEASUREMENT METHODOLOGY.

7030.2080 VARIANCE.

This petition is being filed via email and is also filed as required by Minn. R. 1400.2020 and 1400.2500 to you, as the Commissioner of the Minnesota Pollution Control Agency, by United States mail.



Date: August 2, 2016

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