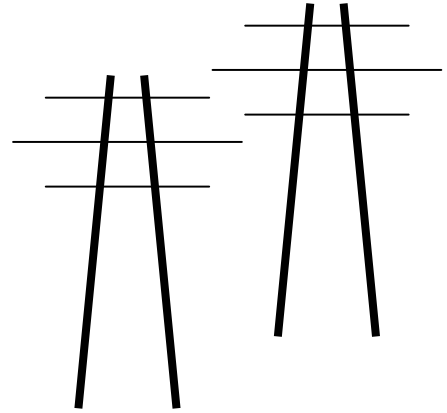


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January 29, 2018

LauraSue Schlatter
Administrative Law Judge
OAH
P.O. Box 64620
St. Paul, MN 55164-0620

via eFiling and US mail

RE: AFCL Response to EERA Motion to Exclude Bent Tree Data
OAH Docket: 80-2500-34633
MPCU Docket: IP-6946/WS-17-410

Dear Judge Schlatter:

On behalf of Association of Freeborn County Landowners, enclosed please find Response to EERA Motion to Exclude Bent Tree Data. A hard copy will follow by US mail as directed in the Prehearing Order.

Please let me know if you have any questions or require anything further.

Very truly yours,

Carol A. Overland
Attorney at Law

cc: Parties served via eFiling and eService
Association of Freeborn County Landowners

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
for the
MINNESOTA PUBLIC UTILITIES COMMISSION**

CERTIFICATE OF SERVICE

ASSOCIATION OF FREEBORN COUNTY LANDOWNERS

**In the Matter 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.**

PUC Docket No. IP-6946/WS-17-410

I, Carol A. Overland, hereby certify that I have this day eFiled the attached AFCL Response to EERA Motion to Exclude Bent Tree Data and have eServed parties via eDockets.



January 28, 2018

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OAH Docket: 80-2500-34633**

ASSOCIATION OF FREEBORN COUNTY LANDOWNERS

RESPONSE TO COMMERCE EERA MOTION TO EXCLUDE BENT TREE DATA

The Association of Freeborn County Landowners offers this response to the Department of Commerce Energy Environmental Review and Analysis' Motion to Exclude Bent Tree Wind Farm Data, specifically objecting to inclusion of the Bent Tree Noise Monitoring and Noise Monitoring Report¹ and email between DNV-GL consultant and EERA staff² obtained by a Data Practices Act Request, Subpoena, and Subpoena Duces Tecum.³

I. THE BENT TREE EXHIBITS SHOULD NOT BE EXCLUDED AS EVIDENCE

EERA leaves the most important rules for last, quoting Minn. R. 1405.1700, subp. 8, which states:

Written submissions that are not subject to cross-examination shall be given such weight as the administrative law judge deems appropriate.

¹ AFCL Hansen's Direct Testimony, Attachment 11; Rebuttal Schedule D; Bent Tree Noise Study, ID# [20179-135856-01](#), Bent Tree Docket IP-6946/WS-08-573.

² AFCL Hansen's Rebuttal Testimony, Schedule F, Letter – Show Cause, Public Utility Commission, Big Blue Wind Project, IP-6851/WS-10/1238.

³ AFCL notes that the Affidavit accompanying the Motion is that of a biologist, not a wind engineer or technical expert, and that statements are inconsistent, i.e., "it is generally understood that turbine noise output increases with higher blade tip speeds," that statement that the turbine blades are longer (82 v. 110 & 116), and yet no statement whether RPM has changed, leaving presumption that tip blade of 110 & 116 is faster than 82, hence noisier!

EERA Motion, p. 4. Further, under the heading of “Public Participation,” the rule is:

B. Offering direct testimony or other material in written form at or following the hearing. However, testimony which is offered without benefit of oath or affirmation, or written testimony which is not subject to cross-examination, shall be given such weight as the administrative law judge deems appropriate.

It is the administrative law judge that will decide the weight to be given evidence, and in this case, the testimony of AFCL’s Dorene Hansen will be given under benefit of oath or affirmation, and will be subject to cross-examination. Further, the Bent Tree Noise Monitoring and Noise Monitoring Study was ordered by the Commission, performed under contract by DNV GL for Commerce, and eFiled by Commerce in the Bent Tree docket (08-753) and is publicly available.

The rules of evidence are less restrictive in an administrative proceeding, such as this site permit

docket, than rules of evidence in the District Court:

Minn. R. 1405.1700, Subp. 3. Admissible evidence.

The administrative law judge may admit all evidence which possesses probative value, including hearsay, if it is the type of evidence on which prudent persons are accustomed to rely in the conduct of their serious affairs. The administrative law judge shall give effect to the rules of privilege recognized by law. Evidence which is incompetent, irrelevant, immaterial, or unduly repetitious may be excluded.

EERA does not argue that this evidence, either the Bent Tree Wind Study or the email between the study consultant and Commerce EERA staff, is incompetent, irrelevant, immaterial, or unduly repetitious.

EERA instead argues that:

[I]t would be misleading and prejudicial to informed decision-making for decision-makers to rely on the Bent Tree Wind Farm acoustic testing for purposes of drawing analogies or making inferences about possible noise impacts of this Freeborn Wind Farm.

EERA Motion, p. 2.

EERA is apparently confused about the purpose of this evidence when it states “*purposes of drawing analogies or making inferences about possible noise impacts...*” Instead, the purpose is to establish notice, which the Public Utilities Commission and Commerce EERA has, and which the judge in this case should have, actual and constructive notice that the siting process is fatally flawed. There are wind projects sited by EERA and the Commission which are the subject of many complaints, one for which post-construction noise studies have been ordered, and another which must show cause why the permit should not be revoked.

AFCL requests that the EERA Motion be denied and the Bent Tree exhibits be given such weight as the administrative law judge deems appropriate.

II. THE BENT TREE EXHIBITS ARE NOTICE THAT THE SITING PROCESS OF EERA AND THE COMMISSION HAS FATAL FLAWS

The siting of wind projects by EERA and the Commission is fatally flawed and not in compliance with Minnesota law:

- The siting process is flawed because the wind projects sited thus far have all produced developer performed wind noise modeling, and yet noise has been a problem and complained about and demonstrated to be in violation of the permit – noise modeling has not been sufficiently reliable or predictive;
- The siting process is flawed because wind projects have been sited using standards and setbacks developed in 2008 using small wind project standards and not promulgated in a rulemaking proceeding, and projects sited using those standards and setbacks have problems sufficient to require Commission action – setbacks are not sufficient protective; and
- The siting process is flawed because not one wind project has been sited utilizing the statutory criteria. A generous assessment would be that EERA and the Commission have not sufficiently reviewed the law pertaining to wind siting.
- The process is flawed because the Complaint process, as evidenced in Bent Tree and Big Blue, is dysfunctional, and yet that same Complaint process is proposed in the Freeborn Draft Site Permit, Attachment A.

Two projects sited and operating are generating not only electricity, but are generating many complaints from nearby residents, sufficient to also generate Commission orders for noise studies (Bent Tree⁴) and a letter to show cause (Big Blue⁵). Both EERA and the Commission are on notice that the siting process is flawed. AFCL enters the Bent Tree study and emails that are the subject of EERA's Motion to provide evidence not to prove any matter asserted by the Bent Tree study and related emails, but to provide notice that siting must be done carefully, because once a project is built and operating, revoking a permit and removing turbines, or buying out landowners, is all that is available to mitigate the permit violations and harms. It would be foolhardy to permit a project without mindful consideration of existing siting issues. The purpose of entry of these exhibits is to trigger prudent, precautionary, and protective siting.

Is that true that wind projects have not been siting using applicable siting criteria? Yes, unfortunately.

- This is the first contested case proceeding for a wind project siting permit EVER in Minnesota.
- This is the first wind project siting docket EVER to utilize the applicable siting criteria of Minn. Stat. §216E.03, Subd. 7, which under the wind siting chapter, is specifically not excluded and which specifically does apply. Minn. Stat. §216F.02, Exemptions.
- ALL wind projects thus far were sited under Minnesota Statutes Ch. 216F and Minn. R. 7854, and were sited ONLY utilizing Minnesota Statutes Ch. 216F and Minn. R. 7854.

For each wind permit issued, Minnesota Statutes Ch. 216F and Minn. R. 7854 are listed under “Regulatory Process and Procedure” of the Commerce “Comments and Recommendations” and in the “Site Permit” typically on the first page of the permit. The Draft Site Permit for this

⁴ Order Requiring Noise Monitoring, Noise Study, and Further Study, [20168-124382-01](#) August 24, 2016; Bent Tree Noise Monitoring and Noise Monitoring Report [20179-135856-01](#), 9/28/2017.

⁵ AFCL Hansen's Rebuttal, Schedule F, Big Blue Letter – Show Cause [20181-139210-01](#)

Freeborn Wind Project is no exception.⁶ The Freeborn Draft Site Permit lists only Minn. Stat. Ch. 216F and Minn. R. Ch. 7854 as the regulatory process, procedures, and authority.⁷ Not one wind siting permit has been sited using the statutory criteria of Minn. Stat. §216E.03, Subd. 7.

AFCL requests that these exhibits giving notice of flaws in siting standards, setbacks, and process not be excluded and that they be given such weight as the administrative law judge deems appropriate.

III. THE EXHIBITS EERA SEEKS TO EXCLUDE ARE RELEVANT TO THIS FREEBORN WIND DOCKET

The Association of Freeborn Count Landowners (AFCL) negotiated in good faith with Commerce’s EERA and reached an agreement, eFiled, based on EERA’s statements that this would provide foundation for entry of the documents in question, and that EERA would likely have a relevance objection. EERA chose to negotiate this agreement rather than have Ms. Miltich appear for cross-examination and entry of the exhibits.

However, the Motion of EERA is not a relevance objection.

AFCL’s subpoena request made this relevance argument and offer of proof:

Offer of Proof - Relevancy of Testimony to be Subpoenaed

Testimony and documents directly relevant because wind turbine noise, compliance with noise standards and Commission siting permit, and adequate setbacks are material issues in this case. Louise Miltich, as Principal Planner, Energy Environmental Review and Analysis, Dept. of Commerce, is in charge of the Bent Tree Noise Monitoring and Monitoring Report. This report was ordered after numerous complaints by nearby residents, as directed in the siting permit. The report has demonstrated that Bent Tree wind project’s noise levels exceed that permitted by the PUC siting permit and MPCA noise regulations (Minn. R. Ch. 7030) at the two locations monitored. These monitoring locations are further from complainants homes than the 1,000 foot Bent Tree setbacks and the proposed 1,000 foot setback for Freeborn wind project (Langrud home at 1150

⁶ Commerce EERA Comments and Draft Site Permit [201712-137950-01](#) . Written Commission Order on Draft Site Permit, from January 4, 2018 meeting, has not yet been issued.

⁷ Even the Applicant has recognized the correct statutory criteria, and, in another Minnesota first, states that “The Wind Siting Act also requires an application for an LWECs site permit to meet the criteria in Minn. Stat. Ch. 216E.03, Subd. 7. AFCL notes, however that it isn’t the “application,” but the project, that must meet the criteria.

feet, and Hagen home at 1525 feet, per Bent Tree report, p. 33.). Wind turbine setback standard establishes the setback distance as that necessary required to meet the noise standard plus 500 feet. The Freeborn Wind noise map, Figure 6, shows the modeled 50 dB noise level contours, but does not show the additional 500 foot distance necessary to comply with the state's siting standards. Attached Figure 6, and state siting standards, App. A (07-1102).

This noise study is particularly relevant to the Freeborn case because the Bent Tree wind project is also in Freeborn County, in an area with similar environmental and topographic setting. Freeborn Wind will be expected to comply with permit conditions and MPCA noise regulations (Minn. R. Ch. 7030). The Bent Tree noise study calls into question whether the Freeborn Wind project with 1,000 foot setbacks will be in compliance. Development of the record and careful review and analysis is needed at this point because once a project is permitted and sited, if there are complaints and verification of exceedences, mitigation and remediation would require removal of the turbines and siting in a different location – that is not practical.

Miltich's testimony is necessary to address the Bent Tree noise study, noise concerns, setback distances of Bent Tree complainants and turbines monitored, and other noise related issues addressed in the Bent Tree monitoring and report and subsequent "2nd monitoring report" now underway that are applicable to siting the Freeborn wind project.

Testimony regarding Commerce handling of the Bent Tree wind noise complaints, Commerce review and analysis, the noise monitoring report, study protocol, and conclusions, and the ongoing monitoring is crucial to address the issues of material fact regarding potential for noise of wind turbines present in this docket.

This information is particularly important because there is no mandated environmental review document (Environmental Assessment/Environmental Impact Statement) for a wind project.

AFCL Subpoena Request, November 28, 2017. The subpoena request was granted.

EERA also argues that “[t]he results of acoustic monitoring for the Bent Tree Wind Farm were affected by specific things that are not present at the Freeborn Wind Farm.” Motion, p. 2.

That is assuredly true. Obviously there are no operating wind turbines at the Freeborn Wind Farm, and there are turbines operating at Bent Tree. It's not too late for careful siting.

Conversely, there are things at Bent Tree Wind Farm that are also present in the instant docket:

- Pre-construction noise modeling has been performed;

- The developer has requested 1,000 foot setbacks;
- The projects are locate very near to each other;
- The environmental setting is similar if not identical.

But it is not the purpose to show that “because Bent Tree, therefore Freeborn.” AFCL’s proffer of these Bent Tree exhibits is to raise known issues with the siting process and to demonstrate that caution should be used, that pre-construction noise modeling is not necessarily predictive, that 1,000 foot setbacks are not necessarily sufficient, and that similar environmental settings should be weighed for impacts.

AFCL requests that EERA’s Motion be denied.

IV. EERA’S MOTION TO EXCLUDE BENT TREE WIND FARM DATA SHOULD BE DEINED

The Association of Freeborn County Landowners requests that EERA’s Motion to Exclude Bent Tree Wind Farm Data, specifically the Bent Tree Noise Monitoring and Noise Monitoring Study and emails, be denied, and as provided for by administrative rules, that the exhibits be given such weight as the administrative law judge deems appropriate.

January 29, 2018



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