

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE 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

**ORDER DENYING MOTIONS BY
MINNESOTA DEPARTMENT
OF NATURAL RESOURCES
TO QUASH SUPBOENAS**

An evidentiary hearing is scheduled to be held in this matter before Administrative Law Judge LauraSue Schlatter on February 21 and 22, 2018, at the Albert Lea Armory, 410 Prospect Avenue, Albert Lea, Minnesota.

Christina Brusven and Lisa Agrimonti, Fredrikson & Byron, P.A., represent the Applicant, Freeborn Wind Energy LLC (Freeborn Wind).

Carol Overland, Attorney at Law, Legalectric, Inc., represents the Association of Freeborn County Landowners (AFCL).

Richard Savelkoul, Martin & Squires, P.A., represents KAAL-TV (KAAL).

Linda Jensen, Assistant Attorney General, represents the Minnesota Department of Commerce, Energy Environmental Review and Analysis (DOC-EERA).

Nur Ibrahim, Assistant Attorney General, represents the Minnesota Department of Natural Resources (DNR) for purposes of this Motion.

Mike Kaluzniak appears on behalf of the staff of the Public Utilities Commission (Commission).

On February 9, 2018, the DNR filed Motions to quash subpoenas issued by the undersigned Administrative Law Judge in this proceeding. The subpoenas, requested by AFCL, are for two DNR employees to provide hearing testimony at the evidentiary hearing scheduled for February 21 and 22, 2018. The subpoenas were issued on December 5, 2017, and served on the two DNR employees on December 11, 2017, and December 15, 2017.¹

¹ DNR Memorandum in Support of Motion to Quash Subpoena for Kevin Mixon (Memorandum to Quash-Mixon) (Feb. 9, 2018), Exhibits (Exs.) A and B; DNR Memorandum in Support of Motion to Quash Subpoena for Lisa Joyal (Memorandum to Quash-Joyal) (Feb. 9, 2018), Exs. A and B (jointly referred to as Memoranda to Quash).

On February 12, 2018, AFCL filed a Response to the DNR's Motions to Quash.

Based upon the all of the records and the proceedings in this matter, and for the reasons discussed in the Memorandum that follows, the undersigned Administrative Law Judge makes the following:

ORDER

1. The DNR's Motion to Quash a Hearing Subpoena for Kevin Mixon is **DENIED**.
2. The DNR's Motion to Quash a Hearing Subpoena for Lisa Joyal is **DENIED**.
3. The DNR will make Mr. Mixon and Ms. Joyal available to testify at the hearing in this proceeding beginning at 10:00 a.m. on Thursday, February 22, 2018. If AFCL, Freeborn Wind, KAAL, and DOC-EERA have no objections, then either or both of the DNR witnesses may testify by telephone. In the event that telephone testimony is acceptable to all parties, DNR will provide telephone numbers where each of the DNR witnesses can be reached beginning at 10:00 a.m. on Thursday, February 22, 2018.
4. The DNR will provide AFCL with the information necessary for AFCL to make witness fee and mileage payments pursuant to Minn. Stat. § 357.22 (2016) to DNR for the testimony of its employees in their official capacities.

Dated: February 15, 2018



LAURASUE SCHLATTER
Administrative Law Judge

MEMORANDUM

I. Applicable Legal Standard

Minn. R. 1405.1300, subp. 1 (2017) requires parties requesting subpoenas to include as part of the request “a brief statement demonstrating the potential relevance of the testimony or evidence sought” A motion to quash a subpoena must be brought “promptly, and in any event at or before the time specified in the subpoena for compliance therewith”²

² Minn. R. 1405.1300, subp. 3 (2017).

II. DNR Motions

The DNR argues that each of the subpoenas served upon its employees, Mr. Mixon and Ms. Joyal, is unreasonable and oppressive. The DNR reasons that the subpoenas require state employees “to act as . . . uncompensated witness[es] for Intervenor” and subject them to the burdens of traveling to “a county different than the counties” where they live and work in a case where the DNR is not a party.³

The DNR states that travel to and from the hearing, along with the time to testify, will likely take a full work day for each of the witnesses, and asserts that the testimony is “on behalf of a private party.”⁴ The DNR cites case law that encourages the conservation of “the time and energies of public officials . . . for the public’s business to as great an extent as may be consistent with the ends of justice in particular cases.”⁵

DNR is very concerned about losing employee time without compensation. DNR also argues that its employees are non-party expert witnesses and should be compensated as such. The DNR asserts that “it would be improper for a DNR employee to be compelled to testify as a witness for the benefit of a non-state party in litigation not involving DNR.” Mr. Mixon’s limited role in this proceeding, according to the DNR, was to provide “his experience and knowledge on the appropriate wildlife surveys for the project area.”⁶ Similarly, Ms. Joyal provided “her experience and knowledge on the environmental review as it related to the potential impacts to rare features.”⁷ The DNR objects to a private party using DNR employees “for free expert opinions.”⁸

III. AFCL Response

AFCL contends that the DNR’s motions to quash are untimely and should be dismissed. Furthermore, AFCL argues that the Mixon and Joyal subpoenas are neither oppressive nor burdensome.

AFCL points out that DNR’s General Counsel contacted AFCL on January 30, 2018, approximately six weeks after the subpoenas were served, to discuss the subpoenas. After some discussion, according to AFCL, DNR’s counsel expressed concern that DNR staff not be required to just sit and wait for their time to testify, but instead be provided with a time certain for testifying. During the January 30, 2018, conversation, AFCL denies that DNR raised any concern about compensation for the

³ Memoranda to Quash at 2.

⁴ Memoranda to Quash at 3.

⁵ Memoranda to Quash at 3, *citing Ellingson & Assoc. Inc. v. Keefe*, 396 N.W. 2d 694, 697 (Minn. Ct. App. 1986).

⁶ Memorandum to Quash-Mixon at 4.

⁷ Memorandum to Quash-Joyal at 4.

⁸ Memoranda to Quash at 5.

agency or staff being required to travel excessively.⁹ Based on the January 30, 2018, conversation, AFCL filed a letter asking the Administrative Law Judge to address the DNR's request to set a time certain for their employees to testify during the February 7, 2018, prehearing conference.¹⁰ During the February 7, 2018, prehearing conference, the Administrative Law Judge ordered the time for the DNR witnesses to appear at 10:00 a.m. on February 22, 2018.¹¹ DNR did not participate in the prehearing conference. AFCL points out that it was two days after the prehearing conference, ten days after the January 30, 2018, telephone conversation between the DNR General Counsel and AFCL's attorney, and approximately seven weeks after the second of the two DNR employee subpoenas was served, that the pending Motions to Quash were served.¹² AFCL contends that the DNR should be required to fulfill its agreement to provide the witnesses at a time certain, as its General Counsel discussed with AFCL on January 30, 2018.

AFCL points out that Mr. Mixon and Ms. Joyal have submitted comments to Freeborn Wind concerning this project.¹³ AFCL argues that DNR's testimony is a public benefit in this matter, "with the DNR testifying regarding the comments made in its review of the project, with those comments benefitting the environment, wildlife, water, wetlands, etc." rather than AFCL, the private party.¹⁴

Because participating in matters such as this site permit process is within the scope of the DNR's mission "to work with citizens to conserve and manage the state's natural resources . . ."¹⁵ and because AFCL believes that the DNR should be willing to provide testimony regarding its position on issues where the DNR has appropriately submitted comments, AFCL objects to paying witness fees. AFCL also notes that DNR witnesses could testify by telephone if travel is overly burdensome.

IV. Analysis

This proceeding is primarily a matter of public concern. Whether and where to site large energy generation projects is a matter of significant concern to the legislature, as reflected by the responsibilities it has delegated to the Public Utilities Commission, the Department of Commerce, and other state, local, and private participants in the site permit process.¹⁶ Specifically, the Commission must consider, in cases such as the proposed Freeborn Wind Farm involving a large wind energy conversion system, or LWECs, a variety of factors in determining whether and under what conditions to grant a site

⁹ AFCL Response to Motions to Quash Subpoenas (Feb. 12, 2018) (AFCL Response), Affidavit (Aff.) of Carol Overland at p. 2.

¹⁰ AFCL Response, Aff. of Carol Overland, Att. C (Letter from C. Overland to Administrative Law Judge (Jan. 30, 2018)).

¹¹ AFCL Response, Aff. of Carol Overland at 3.

¹² AFCL Response, Aff. of Carol Overland at 3-4.

¹³ AFCL Response, Aff. of Carol Overland at Ex. A.

¹⁴ AFCL Response at 5.

¹⁵ AFCL Response at 4.

¹⁶ See Minn. Stat. ch. 216E and 216F (2016) and Minn. R. ch. 7854 (2017).

permit.¹⁷ Some of the factors to be considered include the effects of the proposed LWECS on vegetation and animals.¹⁸ In this case, the DOC-EERA's recommended draft site permit referenced a DNR comment letter including specific recommendations regarding utility crossing licenses issued by the DNR, potential native prairie within the project area, development of a prairie protection and management plan, and edits to the draft avian and bat protection plan.¹⁹

DNR staff submitted comments to Freeborn Wind directly, and to the DOC-EERA. It is not unreasonable for a party, whether public or private, to ask for the hearing presence of DNR employees who submitted comments in this case on behalf of the DNR so that those employees can answer questions the parties and the Administrative Law Judge may have regarding those comments. Making these employees available in this way will inform the record and enable the Administrative Law Judge, and the Commission, to make a more informed decision.

If the DNR as an agency chooses to require a subpoena and standard witness fees to make its employees available, it is entitled to do so.²⁰ However, there is nothing to support the DNR's contention that AFCL is attempting to take advantage of the DNR's employees in order to use them as AFCL's free expert witnesses. Mr. Mixon and Ms. Joyal will only be asked about comments they have made to Freeborn Wind or which they may have submitted as comments in this case. Because it would be inappropriate to pay the fees directly to Mr. Mixon or Ms. Joyal, the DNR should contact AFCL with the information necessary for AFCL to direct payment of witness fees to the DNR.

Finally, the extent to which Mr. Mixon, Ms. Joyal, and the DNR are burdened by these subpoenas may be lessened if the DNR witnesses are allowed to testify by telephone. AFCL has already suggested this solution, and the Administrative Law Judge will approve such an arrangement, provided the other parties agree.

L. S.

¹⁷ Minn. Stat. § 216E.03, subd.7.

¹⁸ Minn. Stat. § 216E.03, subd.7 (b)(1).

¹⁹ Comments and Recommendations of the DOC-EERA at 6 (Dec. 4, 2017).

²⁰ See Minn. Stat. § 357.22.

February 15, 2018

See Attached Service List

Re: *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*

**OAH 80-2500-34633
MPUC IP-6946/WS-17-410**

To All Persons on the Attached Service List:

Enclosed and served upon you is the Administrative Law Judge's **ORDER DENYING MOTIONS BY MINNESOTA DEPARTMENT OF NATURAL RESOURCES TO QUASH SUBPOENAS** in the above-entitled matter.

If you have any questions, please contact my legal assistant Lisa Armstrong at (651) 361-7888 or lisa.armstrong@state.mn.us, or facsimile at (651) 539-0310.

Sincerely,



LAURASUE SCHLATTER
Administrative Law Judge

LSS:la
Enclosure