BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Nancy Lange	Chair
Dan Lipschultz	Commissioner
Matthew Schuerger	Commissioner
Katie J. Sieben	Commissioner
John A. Tuma	Commissioner

In the Matter of the Application of Freeborn Wind Energy LLC for a Route Permit for the Freeborn Wind Project in Freeborn County	DOCKET NO. IP-6946/TL-17-410

ASSOCIATION OF FREEBORN COUNTY LANDOWNERS

RESPONSE TO FREEBORN WIND ENERGY LLC'S

REQUEST FOR CLARIFICATION/ MOTION FOR RECONSIDERATION

Association of Freeborn County Landowners (AFCL), intervenor in this above-captioned wind siting docket and participant in the related transmission docket (IP6946/TL-17-322), bring this Response to Freeborn Wind Energy's Motion for Reconsideration/Request for Clarification.

Freeborn Wind's most recent pleading discloses an agreement made between Applicant, Dept. of Commerce, and the Pollution Control Agency. Language purported to be agreed to by those, and only those, parties was provided to the Commission on September 19, 2018, with the Commission meeting held on the following day. The manner in which this sleight of hand was attempted, and the substance of the illegitimate agreement are appalling. There's been no demonstration that Freeborn Wind can comply with noise regulations, and there is nothing in the record to support the language or the proposed, not provided, modeling to be based on a "0.5 ground factor" in Freeborn Wind's deal. This is a flagrant abuse of process – the Commission should not enable deal-making against the public interest.

I. THE COMMISSION ACTIONS ARE IMPROPER

Whether caught unawares in Freeborn Wind's machinations, or whether participating knowingly, the Commission's Order and the Agreement leading to it flies in the face of Commission ethics and integrity rules:

> **7845.0400 CONFLICT OF INTEREST; IMPROPRIETY.**
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> Subpart 1. General behavior.
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> A commissioner or employee shall respect and comply with the law and shall behave in a manner that **promotes public confidence in the integrity and impartiality of the** commission's decision making process.
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> Subp. 2. Actions prohibited.
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> Commissioners and employees shall avoid any action that might result in or create a conflict of interest or the appearance of impropriety, including:
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> A. using public office for private gain;
>
> **B. giving preferential treatment to an interested person or entity;**
>
> C. impeding the efficiency or economy of commission decision making;
>
> **D. losing independence or impartiality of action;**
>
> **E. making a commission decision outside official channels; and**
>
> **F. affecting adversely the confidence of the public in the integrity of the commission.**

Minn. R. 7845.0400 (emphasis added).

The Commission knew or should have known that something was afoot. At the table were Bill Grant, Deputy Commissioner, and Frank Kohlasch, MPCA Air Permits, neither of whom typically appear before the Commission in a site permit deliberation and decision.

Bill Grant was for decades the head of Izaak Walton League Midwest, and Commission Chair Lange was his second in command. Commissioner Schuerger was a frequent contractor with Izaak Walton in the decade that Wind on the Wires was a program of Izaak Walton League before

spinning off after Grant's appointment as Deputy Commission. Grant is no stranger to deal-making, deals which often have "unintended consequences" or worse, are not in the public interest. Grant's career has examples of "agreements" including but not limited to the 1994 and 2003 Prairie Island agreements and bills, the TRANSLink agreement, the 2005 Transmission Omnibus Bill paving the way for CapX 2020, and his organization was a recipient of funding for lobbying efforts associated with those agreements. His attempts to force agreements was evidenced in Commerce's meeting with parties regarding Hollydale transmission, an unneeded transmission "solution" to a distribution issue, where he and his agent made a very awkward push for agreement on that project. Now comes this "agreement" with Freeborn Wind, a clear conflict as Commerce is the enforcer of Commission permit violations. Grant's lack of specific knowledge of the docket was evident in his immediate referral to John Wachtler when very basic questions were asked and he could not provide answers. If not directly communicated, Grant's appearance sends a signal to Chair Lange, Commissioner Schuerger, and those aware of Grant's career.

Frank Kohlasch, MPCA, was present, odd in itself because although noise rules are MPCA rules, the agency issuing the permit is the enforcer of permits, in this case, Commerce is the enforcer of noise rules for permits issued by the Commission.[1] The MPCA has no role in enforcement. Kohlasch's appearance and position taken was odder yet, given Kohlasch's letter of September 11, 2018, stating:

> First, Freeborn and other wind developers contend that LWECS projects meet the state noise standards in Minn. Rules Ch. 7030.0040 as long as the noise generated from any individual turbine, or a combination of turbines, is below the applicable noise standard, absent the consideration of other sound or noise sources. The MPCA disagrees with this position. The plain language of the adopted standards support the MPCA's position, as the scope of the standards reads "These standards describe the limiting levels of sound established .. .for the preservation of public health and welfare." (Minn. Rule 7030.0040, emphasis added). This position is consistent with the letter sent from the MPCA to the Department of Commerce (DOC) on October 8, 2012, where the MPCA states our interpretation of standards as health-based standards for total, ambient sound. Thus, the MPCA recommends that the Commission should determine compliance of LWECS

[1] See e.g., Bent Tree complaints, noise measurement studies, and enforcement action, PUC Docket WS-08-573.

projects under the state noise standards by determining if total sound levels at nearby residences or other receptors-that is, existing sound levels plus the additional noise from a given turbine or LWECS project-exceed the standards in Minn. Rules Ch. 7030.0040.[2]

The Commission's Order and the "Agreement" are the essence of impropriety.

That letter's statement is consistent with the MPCA's Comment on Commerce's 2012 "Guidance for Large Wind Energy Conversion System Noise Study Protocol and Report"[3]

One of the purposes of EFP guidance document is to "assess the modeling as a predictor of probably compliance with Minnesota noise standards". Related to this is the need to "confirm the validity of the noise modeling…" These comments are related to the use of data for measuring compliance of noise from wind turbines with Minnesota Rules chapter 7030. …

a) *Modeling.* Developers should not propose projects where total noise is estimated to exceed the noise standards at receptor property. Modeling wind farms before construction should include total noise – turbine noise and background noise as datasets. Then the total monitored noise can be compared to the total modeled noise. If only turbine noise were modeled, then monitored background noise must be applied to adjust the measured noise in order to compare the noise from turbines to the modeled estimates. The monitored noise values are used to compare to the model estimates. They are also used to measure compliance.
b) *Compliance.* Although the noise rules apply to total noise measured at a wind farm, the culpability of the wind turbines depends on attribution. If noise exceedances are recorded, it is necessary to determine the increment due to the turbine noise. Background noise information is very important to this effort. This is where background data might be "subtracted". Compliance is based on the inclusion of background in total noise, whereas attribution depends on the use of the background information to adjust the measured noise to the source (turbines).

   In all cases, the separate datasets should be retained. Future applications of the data for compliance determination may require the use of all three – total, turbine only, and background. The integrity of separate background measurements is also important for communicating with residents (or other receptors) about the noise from the wind farm and the addition (large or small) to the pre-existing non-turbine noise.

Id., EERA-9, Appendix A, MPCA Comments on the draft OC-EFP Guidance for LWECS Noise Study Protocol.

During the Freeborn Wind evidentiary hearing, it was discerned that Freeborn Wind had not produced the requisite background modeling, and the ALJ Ordered Freeborn Wind to produce that

[2] Kohlasch Letter to Commission, September 12, 2018 (eDockets # 20189-146351-01).
[3] Freeborn Wind hearing exhibit EERA-9, Appendix A, "Guidance for Large Wind Energy Conversion System Noise Study Protocol and Report " eDocket # 20183-140949-02

ambient modeling within one week of the close of the hearing. Freeborn Wind did indeed produce the modeling, and produced it within one week.[4] However, it was after the hearing, there was no opportunity to vet this information in the contested case proceeding.

The ALJ's Conclusions and Recommendation were clear, and offered an opportunity for Freeborn Wind to demonstrate it can meet the noise requirements of Minn. R. 7030.0040:

> 5. The Applicant failed to demonstrate, by a preponderance of the evidence, that the Project complies with Minn. R. 7030.0040. Therefore, the Project does not comply with criteria set forth in chapter 216F and section 216E.03, subdivision 7 of the Minnesota Statutes and chapter 7854 of the Minnesota Rules.
>
> 9. **Should the Applicant demonstrate that it can meet the requirements of Minn. R. 7030.0040,** the Project, with the Draft Site Permit conditions and the amended and additional Permit Conditions and Special Conditions to sections 4.2, 5.2, 5.2.25, 7.2, 7.4, and 11.1, as described at paragraphs 543 through 550 of this Report, would satisfy the site permit criteria for an LWECS in Minn. Stat. § 216F.03 and meet all other applicable legal requirements.
>
> **RECOMMENDATION**
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> Based upon these Conclusions of Law, the Administrative Law Judge respectfully recommends that the Commission deny the site permit to Freeborn Wind Energy, LLC to construct and operate the up to 84 MW portion of the Freeborn Wind Farm in Freeborn County, Minnesota. In the alternative, the Administrative Law Judge respectfully **recommends that the Commission provide Freeborn Energy, LLC with a period of time to submit a plan** demonstrating how it will comply with Minnesota's Noise Standards at all times throughout the footprint of the Freeborn Wind Project.

ALJ Recommendation, pps. 118-119. Paragraph 9 above would require the demonstration that it would satisfy the criteria prior to issuance of a permit. The above Recommendation was issued May 14, 2018, and the Commission's deliberation and decision was not until September 20, 2018, over four months after the Recommendation was issued. Freeborn Wind produced nothing in those 4+ months, produced no demonstration it could meet the requirements of Minn. R. 7030.0040, in fact, it produced nothing at all.

That was May 14, 2018. **FOUR MONTHS LATER**, having done nothing to "demonstrate that it can meet the requirements of Minn. R. 7030.0040," and at the 11th hour before the

[4] FR-18, Affidavit of Mike Hankard and Noise Tables, 20183-140712-03.

Commission meeting, Freeborn Wind filed its "proposal." Then in January, **EIGHT MONTHS LATER**, Freeborn Wind announces there was an agreement between Freeborn Wind, the Dept. of Commerce, and the MPCA. Freeborn Wind then complains that the written Order did not completely adopt their agreement. The full agreement and its terms have not been made public, and AFCL agrees that clarification is in order, and more correctly, disclosure that should have been made by Freeborn Wind, Commerce, and MPCA prior to the Commission meeting.

II. INFORMATION REQUEST AND DATA PRACTICES ACT REQUESTS ARE PENDING.

AFCL has filed an Information Request to Freeborn Wind, and has filed Data Practices Act Requests to the Dept. of Commerce and MPCA seeking disclosure of the details of the agreement. Exhibit A, IR and DPA Requests. Commerce and MPCA have acknowledged receipt of the Data Practices Act Requests and are working on responses. There's been no word from Freeborn Wind.

Freeborn Wind seems to be complaining that it did not get all it wanted, all that was agreed to by Freeborn and two agencies, neither of which are parties in this docket. The Dept. of Commerce does not intervene in siting dockets, and though the Minnesota noise standard/rules are "hosted" by the MPCA, the MPCA has no role in wind noise evaluation or enforcement. On what authority are these three making this agreement? On what authority do they make an agreement, unsupported by the record? On what authority would Commerce, "the enforcer" for the Commission make an agreement to give Freeborn Wind latitude to violate the state's black letter noise standards? What was the Commission's involvement? Was this agreement related to unreported ex parte contact? What did the Commissioners and staff know, and when?

III. THE COMMISSION'S DECISION AND "AGREEMENT" MAKE A MOCKERY OF PUBLIC PROCESS.

The Commission's decision is contrary to the Administrative Law Judge's Recommendation, and is unsupported by the record. The Commission's shift of noise modeling and development of a decommissioning plan to post-permit activities outside of public view are

contrary to the Commission's mission and rules regarding impropriety.

Freeborn Wind's Request/Motion states that:

> Freeborn Wind's September 19, 2018, Late-Filed proposal for Special Conditions Related to Noise outlines the agreement reached between Freeborn Wind, the Department and the MPCA on this issue.

Freeborn Wind Request/Motion, p. 3. **The letter did not disclose an agreement.**

Freeborn Wind goes on to complain about sections 4.3, 6.0-6.2, and 7.4, and is stating that the Commission's decision was not what they had agreed to, saying it:

> … proposed replacing Sections 7.4.1 and 7.4.2 from Staff Briefing Papers with Sections 6.1 and 6.2, which provided that wind turbine-only sound levels at receptors not exceed 47 dB(A) L_{50}-one hour, and reinstating language from Section 7.4 of the Draft Site Permit, which calls for any post-construction noise mitigation to be conducted in consultation with the Department. During oral argument, both the Department and MPCA supported Freeborn Wind's proposed special conditions.

Freeborn Wind Request/Motion, p. 3, eliminating Section 7.4.1 and most of Section 7.4.2. What is the result of gutting the "Noise Studies" section of the Permit? What is the result of setting up Noise Modeling and Post-Construction Noise Monitoring as a "Special Condition" rather than a standard condition of compliance with noise standards? **Again, Freeborn Wind, Commerce, and the MPCA didn't disclose an agreement or that their support was part of an agreement.**

At the September 20, 2018 Commission meeting, Freeborn Wind produced a chart, not in the hearing record, not verified, and not eFiled until October 3, 2018 after an Information Request:

Special Condition – Example

Turbine Level (dBA)	Ambient Level (dBA)	Total Level (dBA)	Turbine Contribution (dBA)	Total Above 50 dBA?	AND Turbines Cont >3 dB?
47	40	48	7.8	---	---
47	41	48	7.0	---	---
47	42	48	6.2	---	---
47	43	48	5.5	---	---
47	44	49	4.8	---	---
47	45	49	4.1	---	---
47	46	49.5	3.5	---	---
47	47	50.0	3.0	YES	---
47	48	51	2.5	YES	---
47	49	51	2.1	YES	---
47	50	52	1.8	YES	---
47	51	52	1.5	YES	---
47	52	53	1.2	YES	---
47	53	54	1.0	YES	---
47	54	55	0.8	YES	---
47	55	56	0.6	YES	---

Invenergy

The chart above is an "example," and not evidence. There is no indication of the origin of this chart, there is no indication of distance, no map of sound contours, it is just numbers put in a column with the inexplicable "Turbine Level (dBA)" set at 47. This chart has no meaning, contains numbers pulled out of the air, yet it was put on the screen (though not visible, check the video), discussed as if it were meaningful, not eFiled until after the fact, only after a request.

Those that are formal parties devoting much time and effort to this docket, i.e., AFCL and KAAL, were not notified of discussions, were not notified of an agreement, and had no opportunity to participate, review or meaningfully comment on the proposal, much less be informed that it was an agreement.

Who knew about this agreement? At what time and when? Was this agreement the result of prohibited ex parte contact? Were Commissioners and Commission staff as surprised as parties were? Who will be privy to and review the noise modeling? Who will be privy to and review the decommissioning plan? Apparently not the public, and apparently not the parties to this proceeding -- we're left in the dark. That is shameful.

"The commission shall adopt broad spectrum citizen participation as a principal of operation." Minn. Stat. §216E.08. This deliberation, decision, and written order is a blatant example of the Commission enabling Freeborn Wind, Commerce, and the MPCA to go behind closed doors and pervert the process. The Commission failed in its statutory duty, threw its rules of conflict and impropriety out the window, and at best enabled this abuse of process on the part of Applicants, Commerce, and the MPCA, at worst, knowingly allowed this perversion of process.

A. Noise modeling and review is a part of the public permitting process.

Noise modeling and review is to be part of the public process, part of the record, not a post-permit activity. Agencies play an important part of this review, in this case, the work of the Dept. of Commerce. The MPCA's view of ambient/background noise is in the record, attached to Commerce's 2012 Guidance, a Commerce exhibit, discussed at length in the record. EERA-7.

MPCA's comment states that ambient noise is to be included in the modeling... See EERA 7, and Transcript surrounding that discussion. A 180 reversal on the part of the MPCA and Commerce is not consistent with the record. In September, after the February hearing and entry of EERA 7 and testimony, after the hearing record had closed, and not long before the Commission deliberation and decision September 20, 2018, MPCA's Frank Kohlasch submitted a letter, also noting that ambient noise was to be included:

> First, Freeborn and other wind developers contend that LWECS projects meet the state noise standards in Minn. Rules Ch. 7030.0040 as long as the noise generated from any individual turbine, or a combination of turbines, is below the applicable noise standard, absent the consideration of other sound or noise sources. The MPCA disagrees with this position. The plain language of the adopted standards support the MPCA's position, as the scope of the standards reads "These standards describe the limiting *levels of sound* established...for the preservation of *public health and welfare*." (Minn. Rule 7030.0040, emphasis added). This position is consistent with the letter sent from the MPCA to the Department of Commerce (DOC) on October 8, 2012, where the MPCA states our interpretation of standards as health-based standards for *total, ambient* sound. Thus, the MPCA recommends that the Commission should determine compliance of LWECS projects under the state noise standards by determining if *total* sound levels at nearby residences or other receptors – that is, existing sound levels plus the additional noise from a given turbine or LWECS project – exceed the standards in Minn. Rules Ch. 7030.0040.

Exhibit B, Kohlasch Letter, 9/12/2018. Freeborn Wind moved that the letter be stricken.

Just one week later at the Commission meetin, there was a 180 degree reversal on the part of MPCA from this September 12, 2018 letter. The MPCA's position at the September 20, 2018 Commission meeting is not consistent – it is not consistent with MPCA statements in comments in the record, either the MPCA Comment attached to the 2012 Guidelines, or the post-hearing September 12, 2018 MPCA/Kohlasch letter. The back-room in-the-dark "agreement" between Freeborn Wind, Commerce, and MPCA must be rejected.

B. Decommissioning information and plan is to be part of the public process.

Decommissioning information is to be provided in the Application, but wasn't provided by Freeborn Wind, and Commerce and the Commission let that omission slide. The Commission has been developing expertise in decommissioning, from decommissioning plans to the actual decommissioning of wind turbines, now occurring in southwest Minnesota. What has the

Commission learned about decommissioning? In this case, the Commission has disregarded its expertise and acted against interest in permitting a project that has not provided information on decommissioning – a "build now – worry later" stance. As has been said before, there is usually great deference to an agency's expertise, but that deference only goes so far.

The decommissioning information to be included in an application:

> **Subp. 13. Decommissioning and restoration.**
>
> The applicant shall include the following information regarding decommissioning of the project and restoring the site:
>
> A. the anticipated life of the project;
> B. the estimated decommissioning costs in current dollars;
> C. the method and schedule for updating the costs of decommissioning and restoration;
> D. the method of ensuring that funds will be available for decommissioning and restoration; and
> E. the anticipated manner in which the project will be decommissioned and the site restored.

Minn. R. 7854.0500, Subp. 13.

Despite the Commission's and Commerce's disregard for the rule, and despite failure of the Applicants to provide the required information in the course of the proceeding, the Commission granted the permit with language amendment in the permit regarding decommissioning. Freeborn Permit, p. 23-24. The language acknowledges Minn. R. 7854.0500, Subp. 13. The Commission did not establish a requirement that the information and decommissioning plan be provided to parties or the public, there is no process for review for adequacy, and no specifics on requirements for financial assurance.

No permit should be granted until a thorough decommission plan has been vetted and financial assurance has been provided, opened for comment, and reviewed by Commerce, the public, and the Commission, as contemplated by the requirement that decommissioning information be in the application.

IV. A CHANGE IN GROUND FACTOR FROM 0.0 TO 0.5 IS AN MATERIAL

AND IMPERMISSIBLE CHANGE, UNSUPPORTED BY EVIDENCE.

The September 19, 2018 proposal from Freeborn Wind contained terms that likely had no meaning to the Commission, in particular the shift in the "ground factor" assumption. The Commission should have expertise in this area, but lack of expertise shows in the Commission's failure to address the changed ground factor from 0.0 to 0.5, which will result in a material change in modeling results.

The "ground factor" is an input in modeling that represents the character of the ground under the project, and the predicted absorption of sound by ground with that characteristic. The record in the Freeborn Wind docket was at all times based on the "conservative" ground factor of 0.0, an assumption of high reflectivity, and no absorption.[5] This was an often repeated assumption, with Freeborn Wind pointing out over and over that it was good modeling because it was modeling based on a conservative primary assumption. Testimony of Freeborn's expert Hankard stated repeatedly how important use of that 0.0 ground factor assumption was, that the conservative nature of the modeling was to assure that the standard would be met. The testimony, discovery, cross examination, briefing, and the ALJ's Recommendation regarding noise were all based on this 0.0 ground factor assumption.

In testimony in Wisconsin's Badger Hollow docket, on January 16, 2019, Invenergy's noise expert Hankard was asked why a ground factor of 0.5 was used for a solar project, and not a 0.0 ground factor, considering frozen winters and reflective nature of solar panels.[6] He answered that 0.0 was used for wind projects, because they are so high off the ground. He also testified that gradients may be used, 0.0, 0.1, 0.2, 0.3. 0.4, 0.5, etc., that it is not binary, either 0.0 or 0.5.

On September 19, 2018, Freeborn Wind unexpectedly proposes changing that ground factor assumption to 0.5 for this wind project. **No modeling has been produced in the record with that**

[5] See Tr. Vol 1 and 2, search for" 0.0", "conservative", and "ground factor" for repeated references.
[6] The transcript of this exchange with Hankard will be released Friday, January 18, and will be eFiled when released.

ground factor of 0.5, **NONE**. No modeling was produced for the Commission meeting. It is not an issue of "substantial" evidence. There is **no** evidence in the record showing the difference in modeling results with that significant change. The record does not support adoption of this sudden and arbitrary change. Why is 0.5 used as ground factor in the proposed Freeborn Wind condition? Why not 0.0, 0.1, 0.2, 0.3, or 0.4? The inference is that Freeborn Wind can only "demonstrate" a potential to comply by using a much higher ground factor, and by using the arbitrary dB(A) number of 47 dB(A), which would allow noise above the black letter limits of the MPCA's noise rule. Freeborn Wind has made no demonstration of an ability to comply.

V. FREEBORN WIND'S DID NOT PROVIDE MODELING TO SHOW IT COULD COMPLY WITH NOISE STANDARDS – THE INFERENCE IS THAT IT CAN NOT DEMONSTRATE COMPLIANCE.

Freeborn Wind had from May until the September Commission meeting to produce modeling, and Freeborn did not. Instead, Freeborn Wind, Commerce, and the MPCA joined in private applicant and agency subterfuge to give Freeborn Wind what it wants, and to push modeling out beyond the Commission Order, not requiring it before the Order to assure Freeborn can and will comply. There would be no public review, no vetting of the modeling, and far too many assumptions with no support in the record for these changes. Freeborn Wind had from May, 2018 until September 20, 2018, to produce modeling, and Freeborn did nothing.

Freeborn Wind's failure to produce modeling showing it can comply with the standards is something that should not be minimized. The inference in Freeborn Wind's failure to produce modeling in the four months between the ALJ's Recommendation and the Commission meeting, despite its ability to produce modeling as it did in just one week after the ALJ's order in February 2018, is that Freeborn Wind can only demonstrate a potential to comply by using a materially higher ground factor and increasing the dB(A) numbers allowed. The inference is that Freeborn Wind can only demonstrate it can comply when the modeling assumption for ground factor is shifted higher than the 0.0 for wind projects, and can only comply by impermissibly raising the

noise limits above that of the rule. The Commission should not enable this skirting of the rules.

At this time, AFCL requests that the Commission Reconsider its September 20, 2018 decision and December 19, 2018 written order, and remand the siting docket to the Administrative Law Judge for fact-finding and a Recommendation regarding decommissioning, noise modeling and use of a 0.5 ground factor, all for review in public and eFiled, and a rehearing to vet the filings with discovery and cross-examination, and in the alternative, at minimum, an opportunity for review, information requests, and public comment and briefing by parties on these issues by Commission and Commerce staff, parties, and the public.

Respectfully submitted,

January 18, 2019

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