

**STATE OF MINNESOTA
IN COURT OF APPEALS**

No. A19-1195

**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**

**RELATOR’S RESPONSE TO
RESPONDENT FREEBORN WIND
ENERGY LLC’S
MOTION TO DISMISS**

**Association of Freeborn County
Landowners,**

Relator,

vs.

Minnesota Public Utilities Commission,

and

Freeborn Wind Energy, LLC,

Respondents

I. INTRODUCTION

Respondents Freeborn Wind Energy LLC (hereinafter “Freeborn Wind”) brings a Motion to Dismiss Association of Freeborn County Landowners (hereinafter “AFCL”) Appeal for Lack of Jurisdiction, and Respondent Public Utilities Commission (hereinafter “Commission”) “agrees with the arguments made by Freeborn Wind.”

The procedure in this Commission docket is admittedly messy, not unlike the Enbridge Pipeline dockets and appeals, and it will get messier with the change in ownership from Invenergy to Xcel Energy and the anticipated permit amendment request from Freeborn Wind through its new owners, Xcel Energy, which is now expected in

September. However, Freeborn Wind misrepresents the procedural events thus far, stating that the May 10, 2019 Commission Order is the “Final Order.” This is not correct. It was the December 19, 2018 Order that was the “Final Order,” and the May 10, 2019 was an “Amended Order,” as clearly stated in the caption of the Commission’s Amended Order. The Commission accepted AFCL’s Petition for Reconsideration, and denied it in the meeting of July 1, 2019, and issued its written Order denying the Petition on July 2, 2019. Following a Petition for Reconsideration on the Amended Order, and denial of that Petition, an appeal of the Amended Order may be taken as provided by statute.

The Respondents’ notion that an appeal of an Order amending a permit may not be had, that the Court does not have jurisdiction, is erroneous— that would mean that an Amended Order could not be appealed! Freeborn Wind cites the statutes regarding Reconsideration, but has no applicable case law that reconsideration may not be requested for an Amended Order, or that an Amended Order may not be appealed. The leading case cited by Applicants held that an appeal of an Order is limited to those issues addressed within the Order appealed, as AFCL’s appeal of the Amended Order is limited to those issues of the Amended Order, and that an appeal cannot be used to bootstrap onto a prior Order. More importantly, they fail to note or cite the statutory subdivision authorizing appeal of “any order,” which is what AFCL is doing in this appeal.

The May 10, 2019 Amended Order is “any order,” AFCL is a party, and the Amended Order of May 10, 2019 did address different issues than the Final Order – had

it not, Freeborn Wind would not have requested the changes. Freeborn Wind's position that AFCL cannot and has not appealed the Amended Order is not supported by law or fact. AFCL requests that the court deny Freeborn Wind's Motion to Dismiss.

II. **RESPONDENT RELIES ON OFFPOINT STATUTE, IGNORING
"APPLYING FOR REHEARING" SUBDIVISION.**

Respondents cite Minn. Stat. §216B.27, subd. 3, and Minn. R. 7829.3000, subp. 7 as authority that for an Order of the Commission, only one rehearing is allowed.

Only one rehearing shall be granted by the commission; but this shall not be construed to prevent any party from filing a new application or complaint.

Minn. Stat. §216B.27, Subd. 3 (in pertinent part). This subdivision would apply to any individual order, i.e., one rehearing per Order, but it would not operate to eliminate the provisions of Minn. Stat. §216B.27, Subd. 1, providing for a request for rehearing after any decision constituting an order, such as this Amended Order:

Applying for rehearing. Within 20 days after the service by the commission of **any decision constituting an order** or determination, any **party to the proceeding** and any other person, **aggrieved by the decision** and directly affected thereby, may apply to the commission **for a rehearing in respect to any matters determined in the decision.**

Minn. Stat. §216B.27, Subd. 1 (emphasis added).

The Order of May 10, 2019 is not simply "largely housekeeping—fixing typos, headings, and resolving potential discrepancies between the Commission Order and the language in the Site Permit and making one change to the obligation to report and work with the Department." Freeborn Wind, p. 8. The matters were sufficiently material for Freeborn Wind to file a "Request for Clarification," in which it disclosed that its "Special

Conditions” proposed were based on a previously secret agreement between Freeborn Wind, the Department of Commerce, and the MPCA, and which excluded AFCL, a party in the proceeding:

Freeborn Wind requests the Commission clarify its Site Permit to adopt Section 7.4, **as proposed by Freeborn Wind and agreed to by the Department and MPCA**, in place of the current Sections 7.4.1 and 7.4.2, to both ensure consistency with the Order and avoid ambiguity in permit compliance.

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.** [fn omitted] The letter indicated that Freeborn Wind had carefully reviewed the proposed Sections 7.4.1 and 7.4.2 from the Staff Briefing Papers, and was concerned they “create[d] ambiguity and would lead to significant compliance challenges.” [fn omitted] Instead, Freeborn Wind offered “proposed alternative language addressing pre-construction noise modeling and postconstruction noise monitoring special conditions” which is “specific to this case” and would “achieve a similar level of noise regulation, but in a manner that can actually be measured following the applicable rules and standards.” [fn omitted]

Freeborn Wind 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 47dB(A) L50-one hour, and reinstating the 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. [fn omitted] **During oral argument, both the Department and MPCA supported Freeborn Wind’s proposed special conditions.**

Request for Clarification, Declaration of Huyser, Exhibit 2. (emphasis added).

This late-filed letter was the first admission in this docket that there was an agreement on which the Commission’s issuance of the permit was based. No agreement was provided for the record. AFCL, a party, was not in the room, much less at the table. Freeborn Wind’s efforts to assure that all terms of the agreement were included in the

permit brought them back to the Commission, a demonstration that these are material terms, particularly where terms of the permit are eliminated and the applicant proposed “special conditions” take precedence over other terms of the permit, those terms not deleted on applicant’s request.

III. REHEARING MAY BE REQUESTED FOR “ANY DECISION CONSTITUTING AN ORDER”

As clearly stated in the statute, rehearing may be requested for “any decision constituting an order.” Minn. Stat. §216B.27, Subd. 1; see also Minn. R. 7829.3000. The meaning of Subdivision 1 of the statute is unambiguous, and there is no need for consideration of a tortured or conflicting interpretation. See *Am. Family Ins. Group v. Schroedl*, 616 N.W. 2d, 273, 277 (Minn. 2000). To argue that the court lacks jurisdiction by calling AFCL’s May 30, 2019 reconsideration request, based on Minn. Stat. §216B.27, Subd. 3, ignores Minn. Stat. §216B.27, Subd. 1. The statute provides for a rehearing request for “any decision constituting order.” This definition of order includes the Commission’s Amended Order of May 10, 2019. Further, a failure to seek rehearing precludes judicial review. Minn. Stat. §216B.27, Subd. 2.

There is no question that AFCL could have filed an appeal following the “Final Order” of December 19, 2018. AFCL did not, and that December 19, 2018 Order is not at issue in this appeal. Again, the option to appeal “any... order” makes available a Petition for Rehearing to address the May 10, 2019 Order. Minn. Stat. §216B.27, Subd. 1. The statute and rule limiting rehearing applies to “orders,” not “dockets,” as does the

requirement of requesting rehearing on a specific Order – again, if there is no rehearing petition, judicial review is precluded.

AFCL requested rehearing for the May 10, 2019 Amended Order as provided in statute. Minn. Stat. 216B.27, Subd. 1. The Commission accepted that AFCL filing. The Commission did not reject it as prohibited under Minn. Stat. 216B.27, Subd. 3, despite Freeborn Wind's request to strike, and as procedurally provided, the Commission denied rehearing on July 2, 2019. AFCL Addendum 1.

There have now been two Orders regarding the Site Permit in this docket, the Final Order of December 19, 2018, and the Amended Order of May 10 2019, and there will likely be another amendment to the Order and Site Permit following the announced Freeborn Wind plan to request a permit amendment.¹ See e.g., AFCL Addendum, p. 55, PUC Comment Period re: Acquisition of Freeborn Wind by NSPM, July 8, 2019. To preclude appeal of amended Orders such as this May 10, 2019 Amended Order is an interpretation of Minn. Stat. §216B.27, Subd. 1 and Subd. 3 that is contrary to law.

IV. AFCL APPEALS THE MAY 10, 2019 ORDER

Freeborn Wind claims that this appeal of the May 10, 2019 Order should be dismissed because it is not an appeal of the December 19, 2018 Order:

To initiate proceedings for review of a final agency order in the Minnesota Court of Appeals, a petition for writ of certiorari must be served on the agency and filed with the Minnesota Court of Appeals within 30 days after the appealing party receives the order. Minn. Stat. §§ 216B.52, 14.63, 14.64. For a decision of the Commission, the agency decision is not final

¹ AFCL Addendum, Exhibit A. AFCL noted that this May 10, 2019 Amendment is likely not the last Order to grace this docket, as Freeborn Wind, now owned by Xcel, has stated publicly in several meetings that a permit request is forthcoming.

and “no cause of action arising out of any decision . . . shall accrue” unless the specific grounds have been raised through a timely application for rehearing to the Commission. Minn. Stat. § 216B.27, subds. 2, 5.

Freeborn Wind Motion to Dismiss, p. 6.

This conflation is contrary to AFCL’s Statement of the Case and Petition for Writ of Certiorari specifying the May 10, 2019 Commission Order.

Freeborn Wind claims that AFCL’s rehearing request of May 30, 2019 is a “legal nullity,” citing Minn. Stat. §216B.27, subd. 3 that “[o]nly one rehearing shall be granted by the commission.” This is off point. Even if there had been a second rehearing request on the December 19, 2018 Order, and there was none, there was no “second rehearing” **granted** regarding the December 19, 2018 Order. Freeborn Wind filed an opposition to AFCL’s request for rehearing as a “second petition.” Exhibit 1, Response in Opposition, Declaration of Overland. The Commission accepted the AFCL filing. In the May 10, 2019 Order, it denied all AFCL and Freeborn Wind motions filed and denied the AFCL rehearing petition. The request for rehearing was not rejected, it was “entertained,” and it was denied.

The Commission’s Order of May 10, 2019 was an “Amended Order,” not a Final Order. The “Final Order” was issued December 19, 2018. This subdivision above authorizes application for rehearing for “any decision constituting an order.” Association of Freeborn County is a party to the proceeding aggrieved by the decision and directly affected thereby, and as provided by the statute, AFCL “may apply to the Commission for a rehearing in respect to any matters determined in the decision.” *Id.* The Order

Amending Site Permit addressed and determined many matters, and most importantly, amended the permit.

AFCL is appealing the Amended Order of May 10, 2019, and timely filed its Petition for Rehearing regarding that May 10, 2019 Order, as stated in the July 2, 2019 Order of the Commission. This was not a Petition for Rehearing of the December 19, 2018 Final Order, nor is this an appeal of the December 19, 2018 Final Order.² This is an appeal of the Amended Order of May 10, 2019, “any order,” as provided by Minn. Stat. §216B.27, Subd. 1. The distinct issues addressed and decided in the Amended Order are appealable, laid out in the Statement of the Case, in particular the elimination of material terms of the Permit Section 7, Sections 7.4.1 and 7.4.2 specifically, where the Section 6 “special conditions shall take precedence over other conditions of this permit.” Those special conditions the result of the not yet fully disclosed agreement between Freeborn Wind/Invenergy and the Dept. of Commerce and Minnesota Pollution Control Agency, and pushing provision of modeling demonstrating compliance and development of decommission plans and financial assurance to post-permitting activities. A particularly troubling section of the Order is regarding what the Commission characterized as “Ex Parte Meetings.” See p. 4-5, May 10, 2019 Order, AFCL Addendum p. 8-9. AFCL raised not an “ex parte” issue but one of the Applicants meeting behind closed doors with agencies, presumably not with the Commissioners or Commission staff, and excluding party AFCL, to facilitate granting of the site permit without the demonstration of ability

² Freeborn Wind claims that AFCL’s Petition for Rehearing was not acted on by the Commission. However, the AFCL Petition for Reconsideration was acted on, it was considered and denied in the July 2, 2019 Order.

to comply with state regulations as was recommended by the Administrative Law Judge.

Freeborn Wind cites a decision in a similar procedural posture of multiple Orders:

See also Order, In the Matter of Minnesota Power's Revised Petition for a Competitive Rate or Energy-Intensive Trade-Exposed (EITE) Customers and an EITE Cost Recovery Rider and In the Matter of the Application of Minnesota Power for Authority to Increase Rates for Electric Service in the State of Minnesota, Docket Nos. A18-0382 and A18-1029, at 2 (Minn. App. July 25, 2018) (holding that appeal of issues decided in Commission's earlier final order that had not been timely appealed were not reviewable) ("*EITE Order*"),

Freeborn Wind Motion to Dismiss, p. 7. That court did reject review of issues from a prior separate order, not allowing bootstrapping to a prior Order, and yet did proceed with review of issues presented in the appealed "EITE" Order.³

AFCL's appeal of the May 10, 2019 Commission Order addresses those issues addressed in that Order, and is not bootstrapping to a separate Order, as was attempted by Minnesota Power. See AFCL Statement of the Case. The court, in its review, can assure that that is the case.

As above, the Court's review is limited to those specific matters addressed in the Order Amending Site Permit of May 10, 2019. *Id.* There is no basis to dismiss this appeal of the May 10, 2019 Amended Order for lack of jurisdiction.⁴

³ See *In the Matter of Minnesota Power's Revised Petition for a Competitive Rate or Energy-Intensive Trade-Exposed (EITE) Customers and an EITE Cost Recovery Rider and In the Matter of the Application of Minnesota Power for Authority to Increase Rates for Electric Service in the State of Minnesota*, Docket Nos. A18-0382 and A18-1029, Ex. 11, Declaration of Huyser.

⁴ On p. 8 of its Motion, in a footnote, Freeborn Wind raises an issue with party service. Fn. 2, p. 8, which was characterized as "Project Owner Permittee" and "Former Owner Permittee" when served by Certified Mail. Notably, Freeborn Wind characterized parties similarly in its Notice of Appearance where attorneys "hereby notice their appearances as counsel for Respondent Northern States Power Company dba Xcel Energy as the owner of Freeborn Wind Energy LLC." The E-MACS filing service states "Representing" "Xcel Energy, Inc. Respondent."

Freeborn Wind's characterization of AFCL's request for rehearing of May 30, 2019 as a "Second Reconsideration" is a mischaracterization. AFCL requested reconsideration of the Commission's May 10, 2019, and as reflected and acknowledged in the AFCL Statement of the Case laying out issues addressed in that Order, the AFCL appeal is limited to those issues. The Court is limited to review those issues in the May 10, 2019 Commission Order. AFCL is not bootstrapping to the prior Order. The Freeborn Wind Motion to Dismiss should be denied.

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