

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

Association of Freeborn County
Landowners,

Relator,

vs.

Minnesota Public Utilities Commission,

and

Freeborn Wind Energy LLC

Respondents.

**RESPONDENT FREEBORN WIND
ENERGY LLC'S MOTION TO DISMISS
APPEAL FOR LACK OF JURISDICTION**

INTRODUCTION

Respondent Freeborn Wind Energy LLC (“Freeborn Wind”) files this motion to dismiss the above-captioned appeal for lack of subject matter jurisdiction.

Relator Association of Freeborn County Landowners (“Relator” or “AFCL”) purports to appeal from a July 2, 2019 Order of the Minnesota Public Utilities Commission (the “Commission”) pursuant to the Minnesota Administrative Procedures Act (“MAPA”). Appeals of a Commission order may only be had if 1) a petition for reconsideration is filed within 20 days of the order and 2) the appeal is filed and served within 30 days of a final written Commission order or decision on reconsideration.

Moreover, only one reconsideration petition is allowed. Minn. Stat. § 216B.27, subd. 3; Minn. R. 7829.3000, subp. 7.

Contrary to the requirements of MAPA and § 216B.27, Relator did not file and serve the petition within the required time period. The Commission issued its Order granting a Site Permit to Freeborn Wind on December 19, 2018. Relator sought reconsideration. On May 10, 2019, the Commission denied Relator's petition for reconsideration, but made certain limited modifications to the Site Permit on its own motion. This constituted the final Order of the Commission and any appeal of its terms would have been required to be filed and served by June 10, 2019.

Relator did not file and serve a writ, but instead filed a *second* petition for reconsideration, which Minnesota statute and regulation does not allow. Furthermore, the second petition for reconsideration re-asserted arguments made in Relator's first petition. Indeed, comparing the headings in the Commission's May 2019 Order with AFCL's first and second petitions for reconsideration shows that all issues raised by AFCL's reconsideration petitions were addressed and denied by the May 2019 Order. This Court, therefore, lacks jurisdiction to hear the appeal.

PROCEDURAL HISTORY

On June 15, 2017, Freeborn Wind filed a Site Permit Application for an up to 84 megawatt large wind energy conversion system project in Freeborn County (the "Project") with the Commission. *See In the Matter of Freeborn Wind Energy LLC for a Large Wind Energy Conversion System Site Permit for the 84 MW Freeborn Wind Farm in Freeborn County*, Docket No. IP-6946/WS-17-410. Following a contested case

proceeding, the Commission issued an Order Issuing Site Permit and Taking Other Action on December 19, 2018 (“December 2018 Order”). Declaration of Alethea M. Huyser (Huyser Decl.), at Exhibit 1. The December 2018 Order authorized construction of the Project and provided a Site Permit with conditions governing construction and operation of the Project. *Id.*

On January 8, 2019, Freeborn Wind filed a timely request for clarification of the December 2018 Order seeking corrections and clarifications to certain provisions, including Section 7.4, of the Site Permit. *Id.*, Ex. 2.

On January 9, 2019, AFCL filed a petition for reconsideration of the December 2019 Order (“First Reconsideration”). *Id.*, Ex. 3. AFCL’s First Reconsideration sought rehearing on issues including: application of the Commission’s General Permitting Standards for wind projects greater than 25 MW, *id.* at 6; the Site Permit special conditions on noise, including use of a 0.5 ground factor, *id.* at 7-12; and Site Permit conditions regarding shadow flicker and decommissioning, among other issues, *id.* at 12-14.

On February 15, 2019, the Commission met to consider the request for clarification and petitions for reconsideration, including AFCL’s First Reconsideration.

On February 26, 2019, the Commission issued an Order Continuing Proceedings, Tolling Deadline, and Soliciting Comments (“February 2019 Order”). In the February 2019 Order, the Commission purported to “grant rehearing for purposes of tolling this deadline [under Minn. Stat. § 216B.27, subd. 4]. This action is unrelated to the merits of the petitions, which will be addressed in a subsequent order.” *Id.*, Ex. 4. Additionally,

the Commission asked the parties to submit additional information related to Section 7.4 of the Site Permit issued in the December 2018 Order. *Id.* at 2.

In a motion filed on February 13, 2019, AFCL also challenged the fact that discussions occurred between Freeborn Wind and the Minnesota Department of Commerce (“Department”) regarding special conditions on noise. *Id.*, Ex. 5 at 4-5. Freeborn Wind and AFCL also filed additional comments on March 4, 2019 and March 12, 2019, respectively. *Id.*, Exs. 6, 7.

The Commission met again on April 1, 2019 to consider the supplemental information and issues raised regarding the December 2018 Order. On May 10, 2019, the Commission issued an Order Amending Site Permit (“May 2019 Order”) in which the Commission denied the prior petitions for reconsideration and, on its own motion, modified the Site Permit to incorporate the certain specific changes recommended by Freeborn Wind and the Department. *Id.*, Ex. 8.

On May 30, 2019, AFCL filed a petition for reconsideration of the May 2019 Order (“Second Reconsideration”). In the Second Reconsideration, AFCL again raised issues presented in its First Reconsideration. *Id.*, Ex. 9.

On July 2, 2019, the Commission issued an order summarily denying AFCL’s Second Reconsideration (“July 2019 Order”). *Id.*, Ex. 10.

On August 1, 2019, AFCL filed and served its Petition for Writ of Certiorari (“Writ”). In doing so, AFCL did not purport to serve Permittee Freeborn Wind Energy LLC, but rather served “Xcel Energy” and “Invenergy,” the current and former owners of Freeborn Wind Energy LLC, respectively. AFCL also attempted to serve the Commission

by mailing copies to attorneys for the Commission that have left or changed employment (Tom Bailey and Lisa Crum) and, as such, no longer represent the Commission.

STANDARD OF REVIEW

Appeal from an administrative decision to the court of appeals is available only by writ of certiorari. Minn. Stat. § 14.63. “Such an appeal is not a common-law writ, but is a statutory remedy the provisions of which are strictly construed.” *Brustad v. Rosas*, No. CX-99-1041, 1999 WL 1256352, *2 (Minn. App. 1999) (citing *In re License Applications of Polk County Ambulance Serv.*, 548 N.W.2d 300, 301 (Minn. App. 1996)); *see also In re J.M.T.*, 759 N.W.2d 406, 407 (Minn. 2009) (requiring strict compliance with statutory service requirements).

“Subject-matter jurisdiction is ‘a court’s power to hear and determine cases of the general class or category to which the proceedings in question belong.’” *Bode v. Minnesota Dept. of Natural Resources*, 594 N.W.2d 257, 259 (Minn. App. 1999) (quotation omitted), *review granted* (Minn. Aug. 18, 1999). Subject matter jurisdiction relies on the “authority to hear and determine a particular class of actions and the particular questions which the court assumes to decide.” *Id.* (quoting *Robinette v. Price*, 8 N.W.2d 800, 804 (Minn. 1943)).

ARGUMENT

I. THE COURT LACKS JURISDICTION BECAUSE AFCL DID NOT TIMELY APPEAL THE DENIAL OF ITS FIRST RECONSIDERATION.

Timely appeal of a petition for rehearing is a condition precedent to this Court's jurisdiction. AFCL did not seek court review following its First Reconsideration. As such, this Court lacks subject matter jurisdiction to consider the Writ.

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 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, subs. 2, 5.

The Commission's December 2018 Order decided the merits of Freeborn Wind's Site Permit Application. AFCL filed its First Reconsideration on January 9, 2019. Through its February 2019 Order, the Commission granted rehearing “for purposes of tolling [the rehearing] deadline.”¹ The Commission considered and denied AFCL's First Reconsideration in its May 2019 Order. *See* Huyser Decl., Ex. 8 at 13-14. The

¹ Pursuant to Minn. Stat. § 216B.27, subd. 4, “[a]ny application for a rehearing not granted within 60 days from the date of filing thereof, shall be deemed denied.” The Commission elected to toll the statutory sixty days by granting a rehearing “for purpose of tolling the deadline.” The statute does not provide for tolling, and to the extent the Commission lacked authority to toll the 60-day deadline, AFCL's First Reconsideration was denied by operation of law on March 11, 2019.

Commission stated that it “has reviewed the entire record and the arguments presented in the comments and petitions for reconsideration The Commission concludes that its decision is consistent with the facts, the law, and the public interest, and will therefore deny the comments and petitions.” *Id.*, (emphasis added); *see also* Minn. Stat. § 216B.27, subd. 3 (noting that an application for rehearing may be denied “expressly or by implication”). This finally disposed of the issues raised in AFCL’s First Reconsideration. *See In Re Investigation Into IntraLata Equal Access and Presubscription*, 532 N.W.2d 583, 588 (Minn. App. 1995). A timely appeal of the May 2019 Order had to be filed by June 10, 2019.

Because AFCL did not timely appeal the May 2019 Order, the Court lacks subject matter jurisdiction to consider this appeal and dismissal is required. *In the Matter of a Complaint Against Northern States Power Co.*, 447 N.W.2d 614 (Minn. App. 1989) (holding that the requirements of Minn. Stat. Ch. 216B are jurisdictional); *Kearns v. Juliette Originals Dress Co.*, 126 N.W.2d 266, 268-69 (1964) (holding that a statutory time limitation is mandatory and jurisdictional in governing the authority to consider an appeal). *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*”), attached to Huyser Decl. as Ex. 11.

II. AFCL's SECOND RECONSIDERATION WAS PROHIBITED BY LAW AND DOES NOT CONFER JURISDICTION.

AFCL asks the Court to review the Commission's denial of its Second Reconsideration, but Minnesota law prohibits a second reconsideration. As such, AFCL cannot premise jurisdiction on a Commission Order denying its Second Reconsideration.²

In the May 2019 Order, the Commission denied the First Reconsideration and “on its own motion, the Commission reconsider[ed]” the language in the Site Permit and made a handful of narrow changes suggested by Freeborn Wind and the Department. The changes were 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. Huyser Decl., Ex. 8.

Following that decision, AFCL filed its Second Reconsideration, which sought to reassert and reargue the same subject matter of the First Reconsideration. One need only compare the headings in the Commission's May 2019 Order to the issues raised in AFCL's First Reconsideration and Second Reconsideration to see that all issues raised by AFCL's reconsideration petitions were addressed and denied by the May 2019 Order. *Compare id.*, Ex. 8 *with id.*, Exs. 3, 9.

² In addition, the Petition was not served on the Permittee, Freeborn Wind Energy LLC. *See* Writ of Cert. at 2. *See* Minn. Stat. § 14.64 (requiring that copies of the writ be served, personally or by certified mail, upon all *parties* to the proceeding before the agency . . .) (emphasis added). As such, the Petition also must be dismissed because it was not properly served. *In re J.M.T.*, 759 N.W.2d 406, 407 (Minn. 2009) (requiring strict compliance with statutory service requirements).

AFCL's Second Reconsideration, however, is a legal nullity. Under Minnesota law, "[o]nly one rehearing shall be granted by the commission." Minn. Stat. § 216B.27, subd. 3. "A second petition for rehearing, amendment, vacation, reconsideration, or reargument of a commission decision or order by the same party or parties and upon the same grounds as a former petition that has been considered and denied, will not be entertained," (emphasis added) Minn. R. 7829.3000, subp. 7. As such, AFCL's attempt to obtain certiorari review of the Commission's denial of the Second Reconsideration fails.³

³ Furthermore, even if AFCL had some basis to seek reconsideration of the Commission's May 2019 Order, that Order was very narrow in scope. AFCL's Second Reconsideration, and their current Writ of Certiorari, instead seeks review of matters decided in the Commission's December 2018 Order. *See EITE Order* at 3-5, Huyser Decl., Ex. 11. As stated in Section I, those matters were not timely appealed and thus dismissal is appropriate. *Id.*

CONCLUSION

Respondent Freeborn Wind Energy LLC requests that this Court dismiss Relator's appeal with prejudice for lack of jurisdiction.

Respectfully submitted,

Dated: August 14, 2019

/s/ Alethea M. Huyser
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