

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 REPLY IN SUPPORT
OF MOTION TO DISMISS APPEAL FOR
LACK OF JURISDICTION**

In its Response To Freeborn Wind Energy LLC's Motion to Dismiss, Relator Association of Freeborn County Landowners' ("Relator" or "AFCL") fundamentally misunderstands the statutory process for obtaining appellate review of orders issued by the Minnesota Public Utilities Commission (the "Commission"). Under Minn. Stat. § 216B.27, the Commission's December 19, 2018, decision ("December 2018 Order") on the Site Permit for the Freeborn Wind project could not be appealed until after the Commission acted on a request for rehearing, which it did on May 10, 2019 ("May 2019 Order"). At that time, the Commission's decision concerning the Site Permit became final for purposes of the Minnesota Administrative Procedures Act. Relator failed to timely appeal the May 2019 Order and instead made an impermissible second request for

rehearing. Because Relator failed to timely appeal the final determination by the Commission, jurisdiction is lacking and dismissal is required.

Alternatively, Relator also improperly attempts to bootstrap issues decided prior to May 2019 into this appeal. Relator admits that it did not appeal the December 19, 2018 Order (“December 2018 Order”). But, contrary to Relator’s contention, neither the Commission’s May 2019 Order, nor Relator’s appeal, raise new and different issues from those decided in the Commission’s December 2018 Order. Dismissal is warranted for this reason as well.

ARGUMENT

I. THE COURT LACKS JURISDICTION BECAUSE RELATOR DID NOT TIMELY APPEAL.

Under Minn. Stat. § 216B.27, subd. 2, parties are prohibited from appealing Commission orders or determinations until after a rehearing has been requested and either acted on by the Commission or denied by implication. After the Commission takes such action, a party has “not more than 30 days,” under Minn. Stat. § 14.63, to file a petition for a writ of certiorari. Relatedly, under Minn. Stat. § 216B.27, subd. 3 and Minn. R. 7829.3000, subp. 7, parties are limited to one petition for rehearing of a particular order. This means that the appropriate time to file an appeal of a Commission decision is between the time the Commission acts on a request for rehearing (or denies rehearing by implication) and 30 days thereafter. Relator failed to file its appeal within that timeframe and, therefore, it should be dismissed.

As set forth in Respondent’s moving papers, the Commission issued its substantive order on the Site Permit sought by Freeborn Wind Energy LLC (“Freeborn Wind”) on December 19, 2018. Huyser Decl., Ex. 1. However, contrary to Relator’s contention, this decision was not and could not be as a matter of law “final” and subject to appeal until after a request for rehearing was made and acted upon. Under Minn. Stat. § 216B.27, subds. 2 and 5, a decision of the Commission “shall not accrue” and is not “completely exercised” until the Commission has “acted upon an application for rehearing, as provided for by this section and by the rules of the commission”

Here, Relator requested reconsideration of the December 2018 Order. The Commission resolved that request in its Order Amending Site Permit, issued on May 10, 2019 (“May 2019 Order”):

ORDER

1. The motions of the parties and participants are denied.
2. The Commission, on its own motion, reconsiders its Order Issuing Site Permit and Taking Other Action (December 19, 2018) to make corrections in the permit language.
3. The Commission hereby modifies the Site Permit for a Large Wind Energy Conversion System issued on December 19, 2018, to incorporate all the changes recommended by Freeborn Wind Energy LLC as modified by the Minnesota Department of Commerce, and set forth in the revised Site Permit, attached.
4. This order shall become effective immediately.

Huyser Decl., Ex. 8. *See also infra* at II (discussing how the amendments addressed issues previously raised and ruled upon).

As such, upon issuing the May 2019 Order, the Commission’s determination regarding the Site Permit became final for purposes of appellate review. Minn. Stat. §§ 216B.52, 14.63, 14.64. *See also In Re Investigation Into IntraLata Equal Access and Presubscription*, 532 N.W.2d 583, 588 (Minn. App. 1995) (“Agency action is final and reviewable when the agency completes its decision making process and the result of that process directly affects a party” and it becomes “final and conclusive” if no appeal is taken); 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). A writ of certiorari had to be filed within 30 days of that Order. Because no such appeal was filed, this Court is without jurisdiction.

Relator’s contentions to the contrary are without merit. First, Relator argues that an appeal lies because Minn. Stat. § 216B.27, subd. 1 allows for rehearing of “any order.” This conflates the right to seek rehearing on an order of the Commission under § 216B.27, with the right to seek appeal under the Minnesota Administrative Procedures Act. *See* Minn. Stat. § 237.25; Minn. Stat. Ch. 14. Relator’s position also suggests a party could repeatedly petition for reconsideration, which is directly prohibited by statute and rule. Minn. Stat. § 216.27, subd. 3 (stating that “[o]nly one rehearing shall be granted by the commission” and “[a]ny decision, order, or determination made after the rehearing reversing, changing, modifying, or suspending the original determination shall

have the same force and effect as an original decision, order, or determination); Minn. R. 7829.3000, subp. 7.

Relator also contends that Respondent's position is incorrect because the Commission "accepted" and "did not reject" her Second Motion for Reconsideration as "prohibited." AFCL Resp. at 6. The Commission does not agree. In documents filed with this Court, the Commission has stated that Relator is without jurisdiction for the reasons stated in Respondent's motion. *See* Statement of the Case of Respondent Minnesota Public Utilities Commission at 2 ("The Commission agrees with the arguments made by Freeborn Wind [in its motion to dismiss the appeal]."); Letter from Minnesota Public Utilities Commission to Clerk of Appellate Courts (Aug. 15, 2019) ("The Commission has reviewed Respondent Freeborn Wind Energy LLC's [] Motion to Dismiss [and] agrees that this case should be dismissed for the reasons articulated by Freeborn Wind.")

II. IN ANY EVENT, THE MAY 2019 ORDER DID NOT RAISE OR ADDRESS NEW ISSUES.

In the alternative, for the reasons identified in Respondent's moving papers, Relator's attempt to "bootstrap" the Commission's substantive decision related to Freeborn Wind's Site Permit also fails. Resp.'s Mot. to Dismiss at 9, n.3. Relator's claim that their appeal seeks to raise new and different issues from those decided in the December 2019 Order is belied by review of AFCL's reconsideration motions and filings

made before May 2019 Order, which address the same substantive legal issues asserted in the Statement of the Case.¹

AFCL attempts to deflect from this defect, claiming that there was a “new agreement” between the Department of Commerce, Minnesota Pollution Control Agency, and Freeborn Wind during the reconsideration period. This is not only irrelevant for the reasons stated *supra* at I, it is also factually incorrect. The “agreement” was actually presented during oral argument to the Commission on September 20, 2018, and the outcome was reflected in the text of the Commission’s December 2018 Order. *See* Huyser Decl., Ex. 8, at 13-15 (setting forth Freeborn Wind’s proposed special conditions related to noise monitoring and noting that, at oral argument, both the Department of Commerce and Minnesota Pollution Control Agency stated support for the conditions); *see also* Huyser Decl., Ex. 5 (showing that AFCL raised the same objections to “private” meetings and agreements *prior to* the May 2019 Order.) Indeed, the special conditions cited by Relator are identical to those included in the filing Freeborn Wind made in September, which the Commission adopted in its December 2018 Order. Huyser Decl., Ex. 8, at 16.

¹ For example, the list of specific issues at pages 4-5 of Relator’s Statement of the Case corresponds with arguments made by AFCL prior to the May 2019 Order, including arguments dealing with the Commission’s reliance on a prior siting order, Huyser Decl. Ex. 3, at 6; arguments regarding discussions on the proposed “Special Conditions,” *id.*, Ex. 5, at 2; the ground factor assumptions used in noise modeling, *id.*, Ex. 3, at 7; timing of various modeling information required by the Commission, *id.* Ex. 3 at 2; objections to complaint procedures, *id.* at 13, 19; complaints about public participation, *id.*, Ex. 3.

In short, the May 2019 Order did not involve new issues but rather sought to clean up discrepancies and typos from the Commission's December 2018 Order and Site Permit.

CONCLUSION

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

Respectfully submitted,

Dated: August 22, 2019

S/ Alethea M. Huyser

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