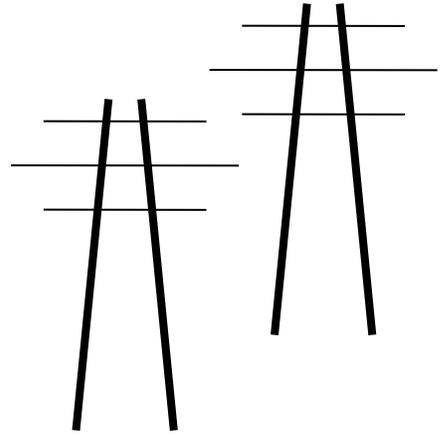


# Legalelectric, Inc.

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January 28, 2020

Ryan Barlow  
Acting Executive Secretary and General Counsel  
Public Utilities Commission  
121 – 7<sup>th</sup> Place East, Suite 350  
St. Paul, Mn 55101

via email: ryan.barlow@state.mn.us  
and eDockets

RE: False statement about Petition Signatures and issues in Staff Briefing Papers  
Petition for an EAW – Association of Freeborn County Landowners  
**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**  
PUC Docket: IP-6946/WS-17-410

Dear Mr. Barlow:

In reviewing the staff Briefing Papers, I note the statement that Association of Freeborn County Landowners did not submit at least 100 signatures of residents/landowners with our Petition:

### **EAW Petition Deficiency**

Staff notes that AFCL's petition as filed with the EQB is deficient as it does not appear to satisfy the requirements of Minnesota Rule 4410.1100, Subpart 1 in that the petition did not include the signatures and mailing addresses of at least 100 individuals who reside or own property in the state. The Commission may elect to dismiss the petition on that basis. Staff will continue its analysis to examine procedural and substantive items for the Commission's consideration.

First, our Petition for Environmental Assessment Worksheet had far more than 100 signatures, 97 pages of the plus a cover sheet. The full Petition, signature pages, and all exhibits were provided to the Commission in a zip file, with the request to notify the EQB when all had been downloaded. It is on the Commission to download the files, and to notify the EQB when downloaded or if there were any issues with any files. The assertion that AFCL did not have signatures of "at least 100 individuals who reside or own property in the state" is absurd and

grossly offensive. Please count them.<sup>1</sup> I am filing them in eDockets, though it's not credible that the PUC did not receive these pages.

Secondly, regarding the above statement, the EQB found the AFCL Petition for Environmental Assessment Worksheet sufficient, both in number of signatures and in content, and forwarded it to the Commission as the Responsible Governmental Unit (RGU). See process as provided by Minn. R. 4410.1100. This is not a determination for the Commission to make, it is the job of the Environmental Quality Board. Minn. R. 4410.1100, Subp. 5. The EQB has determined that the AFCL Petition for EAW did comply with Minn. R. 4410.1100, Subp. 1, that AFCL had provided sufficient names and addresses of Minnesota residents and landowners, and that AFCL had provided sufficient content as required by Minn. R. 4410.1100, Subp. 2, A-E. That's done. The sufficiency of the Petition for EAW is not a decision for the Commission, it's been deemed sufficient by the EQB.

Staff takes issue with the matter of filing, noting that the Petition had not been filed on the Commission's eDockets system. Briefing Papers, p. 6; RoD para. 5. The EQB is a separate agency with its own requirements and standards and process for EAW petitions, which were followed and the Petition deemed sufficient by the EQB. The EQB transmitted the Petition to

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<sup>1</sup> See attached emails from EQB and PUC and signature pages filed with EQB. The Petition was filed with EQB and then transmitted by the EQB, as required by EQB rules, and PUC staff acknowledges receipt of Petition. Minn. R. 4410.1100; RoD, p. 1, #3. Looking at eDockets, I see that staff did not eFile the 97 signature pages and cover sheet. This transmittal is an EQB process, and there is no requirement that AFCL provide copies or file with eDockets, only that project proposers be notified – PUC notice and filing is accomplished by the EQB in its transmittal letter. Procedurally, Petitioners are to file a Petition for EAW with the EQB and the project proposers, in this case, counsel for Xcel Energy, and then EQB determines the RGU, in this case, the PUC. I also elected to send a complimentary copy, not required, to Ryan Barlow, PUC General Counsel, and Linda Jensen, Commerce Asst. A.G., but had repeated problems with their emails bouncing due to their lower server size limits than the EQB. My own server would only allow one large email per hour. Sending began at 11:28 p.m., January 1, 2020, with emails sent through the night. At 10:23 a.m. January 2, 2020, I emailed Ryan Barlow and Linda Jensen to let them know that I'd finish sending the EQB documents and would then send them the balance. At 11:14 a.m., January 2, 2020, Katrina Hapka, EQB, confirmed receipt of the Petition for EAW\_the 98 page signature attachment including 1 page cover sheet, and most other Exhibits, but not all. Due to PUC server limits, most of the complimentary filings to the PUC and Commerce continued to bounce, and at 11:26 I sent a link to Ryan Barlow, PUC and others of my Legalectric post, [Petition for EAW – Freeborn Wind](#) including the Petition and signature pages, and all exhibits to the parties, to help determine what if anything, had not been received. At 12:40 p.m., January 2, 2020, I received verification from Katrina Hapka, EQB, that all the attachments had been received, and then I completed sending several bounced exhibits to Xcel counsel. At 3:29 p.m., I started resending the entire set beginning again with the Petition narrative and the signature pages, to Ryan Barlow, PUC, and Commerce A.G. Linda Jensen, with notice to them that EQB had received all documents, and also sent a link to my Legalectric post. At approximately 4:30 p.m., I had a conversation with Linda Jensen, and we determined that the most efficient way to get the documents to her was to use the Legalectric posting, and I memorialized this agreement in an email at 4:35 p.m., and asked Ryan Barlow if that would work for him, again linking each of the documents as well as the site's page link. At 12:14 on January 3, 2020, Katrina Hapka, EQB, sent Bret Eknes, PUC, the RGU Transmittal Letter, together with a link with all the filings, and a request to **“Please send a confirmation email once you have downloaded the files from the ftp site.”** At 3:32 p.m. on January 3, 2020, I received an email from Ryan Barlow, PUC General Counsel, stating, “Ms. Overland, we have arranged to get a copy of your petition directly from the EQB.” No further emails regarding the EAW Petition were received until the Request for Extension in Time – EAW Decision and granting of that request on January 21, 2020. PUC's Ryan Barlow, speaking as the Commission's General Counsel, stated agreement for receipt of the Petition. Ryan Barlow, PUC, and Linda Jensen, Asst. A.G., Commerce-EERA will have copies of these emails.

the EQB electronically. PUC Counsel agreed to receipt of the Petition via the EQB provided link, and EQB did request confirmation upon downloading. I've seen no reports of any difficulties downloading, and I've not had any inquiry regarding any supposedly missing signature pages which were received by the EQB, receipt I have confirmation from the EQB at 12:40 p.m. January 2, 2020, and enough signatures were received for EQB to have deemed the Petition sufficient. The rule clause requiring actual documents, not a reference or citation, governs the Petition to the EQB, and has no bearing on the EQB transmittal to the Commission. Minn. R. 4410, Subp. 2(e). The process here is similar to the Office of Legislative Auditor's investigation of the Commission and public engagement – it is under the jurisdiction of a separate state entity and not a matter to be filed on eDockets, instead a matter to be handled in the manner provided for in that entity's rules and policies.

Another issue is found regarding “Finality of Commission’s Previous Decisions,” noting that “second petitions for reconsiderations by the same grounds that have been previously considered and denied and are not permitted.” Briefing Papers, p. 6. This is not a “Reconsideration” request, it is not a second Reconsideration petition, and there has been no “first” Reconsideration request for the Xcel amendment. This is a Petition for EAW made to the Environmental Quality Board. Recall that on December 19, 2019, the Commission considered AFCL’s request to the Commission for environmental review, a request similar to ones made before by AFCL, and one made by Honor the Earth regarding the Nemadji Trail Energy Center (Petition for MEPA review [20186-144412-01](#), PUC Docket E-015/AI-17-568).<sup>2</sup> Also as with Honor the Earth’s request to the Commission for environmental review, the Commission denied AFCL’s request at its meeting of December 19, 2019. Similarly, after denial by the Commission of an environmental review request to the Commission, AFCL then filed a Petition for EAW with the Environmental Quality Board, a separate entity with jurisdiction over environmental review. The EQB found, as it did with Honor the Earth’s Petition, that AFCL’s Petition for EAW was sufficient, that enough signatures had been provided (Minn. R. 4410.1100, Subp. 1) and that sufficient information had been provided, including “a brief description of the potential environmental effects which may result from the project; and “material evidence indicating that, because of the nature or location of the proposed project, there may be potential for significant environmental effects. The material evidence must physically accompany the petition.” Minn. R. 4410.1100, Subp. 2.<sup>3</sup> Staff noted receipt of over 1,500 pages of material evidence accompanying the Petition to the EQB.<sup>4</sup>

Staff also makes another problematic statement in the Briefing Papers, saying:

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<sup>2</sup> Staff Briefing Papers in that docket stated that: “The EAW is distributed with public notice of its availability for review and comment. The comment period is 30 calendar days. Certain state, federal, and local agencies always receive EAWs for review. Any person may review and comment in writing on an EAW. A public meeting to receive oral comments is optional at the discretion of the RGU, but is not commonly held.”

<sup>3</sup> The rule also notes that “It is not sufficient to merely provide a reference or citation to where the evidence may be found.” This is the rule governing the material evidence necessary for a Petition for EAW to the EQB, and staff appears to incorrectly conflate this rule as applicable to the EQB’s transmittal to the Commission.

<sup>4</sup> Staff claims that exhibits B and K were not included – the EQB requested confirmation of downloading all the links. Apparently the EQB was not contacted regarding the “missing” exhibits, or erroneously confirmed that all had been received, or did not confirm as requested by the EQB.

A plain reading of the statutes and rules provided in Section II above demonstrates that the Minnesota Legislature considered and rejected establishing a requirement for preparation of EISs for LWECS site permit application.

Briefing Papers, p. 7 (emphasis added). Staff may assert that the Exemptions of Min. Stat. §216F.02 was intended to exempt wind from environmental review, but environmental review was specifically intended to be addressed in another section of that contemporaneous session law, now Minn. Stat. §216F.05. The legislature instructed that rules be developed to address **“criteria that the commission shall use to designate LWECS sites, which must include the impact of LWECS on humans and the environment,”** which has NOT been done, and to address **“requirements for environmental review of the LWECS,”** which also has NOT been done. Instead, environmental review was circumvented. See AFCL Petition for EAW, Exhibit V, SONAR September 20, 2001. Granted that rulemaking was nearly 20 years ago, and the Commission inherited those rules with 2005 legislative transfer of siting authority, but since that time, two wind rulemaking petitions have been filed with the Commission and have been denied.

The rule that uses the words “environmental review” doesn’t establish criteria or requirements, and instead states the opposite, inferring that an application is environmental review:

The analysis of the environmental impacts required by this subpart satisfies the environmental review requirements of chapter 4410, parts [7849.1000](#) to [7849.2100](#), and Minnesota Statutes, chapter 116D. No environmental assessment worksheet or environmental impact statement shall be required on a proposed LWECS project.

Minn. R. 7854.0500, Subp. 8. Staff assumes that the proposed ROD paragraph 13, the 2001 SONAR and Minn. R. 7854.0700, and Minn. R. ch. 7854 generally are compliant with the Minnesota Environmental Policy Act, despite failure by the EQB and since the 2005 transfer of siting authority, the Commission, to promulgate rules addressing “criteria that the commission shall use to designate LWECS sites, which must include the impact of LWECS on humans and the environment” and “requirements for environmental review of the LWECS,” as mandated by the legislature circa 1995. Minn. Stat. §216F.05(1),(4). Staff also presumes that siting using Minn. Stat. §216E.03, Subd. 7, is sufficient to be MEPA compliant, but under the PPSA, projects require a full Environmental Impact Statement. Minn. Stat. §216E.03, Subd. 5. Siting wind using the PPSA criteria found in Minn. Stat. §216E.03, Subd. 7 is not a substitute for the Environmental Impact Statement required under Minn. Stat. §216E.03, Subd. 5.

It is AFCL’s position that this that circumvention of environmental review, the blanket exemption of Minn. Stat. §216F.02, and the failure to promulgate rules regarding siting criteria and environmental review as mandated by Minn. Stat. §216F.05, does not comply with the Minnesota Environmental Policy Act, that an Environmental Impact Statement is necessary, and that an EAW must be prepared as a step in the determination of the necessity of an EIS.

Staff Briefing Papers regard evaluation of whether an EAW is necessary using Minn. R. 4410.1700, Subp. 7 as “an additional analysis.” Staff Briefing Papers, p. 8. This is a misguided notion. It is the EQB’s required analysis, not “an additional analysis,” for consideration and

determination of need for an EAW. The EQB has jurisdiction over Petitions for EAW and determination of the RGU which must make the decision.

At this point, the Commission's sole task is that set forth in Minn. R. 4410.1100, Subp. 6:

The RGU shall order the preparation of an EAW if the evidence presented by the petitioners, proposers, and other persons or otherwise known to the RGU demonstrates that, because of the nature or location of the proposed project, the project may have the potential for significant environmental effects. The RGU shall deny the petition if the evidence presented fails to demonstrate the project may have the potential for significant environmental effects. In considering the evidence, the RGU must take into account the factors listed in part [4410.1700](#), subpart 7. The RGU shall maintain, either as a separate document or contained within the records of the RGU, a record, including specific findings of fact, of its decision on the need for an EAW.

I recognize that the Commission does not often deal with Petitions for Environmental Review filed through the Environmental Quality Board, and likely is not familiar with the process. I believe the last one filed with the Commission was in MP's EnergyForward docket, for environmental review regarding the Nemadji Trail Energy Center, and I cannot recall any other. See *In the Matter of Minnesota Power's Petition for Approval of the EnergyForward Resource Package*, PUC Docket E-015/AI-17-568. This docket was remanded to the Commission because "[t]he commission erred by denying the EAW petition and approving the affiliated-interest agreements without substantively addressing the criteria that govern whether an EAW is necessary.<sup>5</sup> Regarding environmental review, see also *In re Applications of Enbridge Energy, Limited Partnership, for a Certificate of Need and a Routing Permit for the Proposed Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border*.<sup>6</sup> See also *In the Matter of the Application of North Dakota Pipeline Company LLC for a Certificate of Need for the Sandpiper Pipeline Project in Minnesota; In the Matter of the Application of North Dakota Pipeline Company LLC for a Pipeline Routing Permit for the Sandpiper Pipeline Project in Minnesota*, PUC Dockets PL-6668/CN-13-473, PL-6668/PPL-13-474.<sup>7</sup> The Commission's perspective on environmental review has been found by the courts to be too narrow and not compliant with MEPA.

Material and significant issues have been raised throughout the Freeborn Wind project docket by AFCL and the public, and even the applicant, most recently in the reams of new information provided by Xcel Energy in its amendment request, including but not limited to a change in site plan and larger turbines, shadow flicker impacts, and provision of new noise modeling using 0.5 ground factor after Administrative Law Judge recommended permit be denied where applicant had not demonstrated that it would comply with noise standards. The information provided by Xcel Energy has been shuffled off into a private "pre-construction meeting" process, with no public review and comment and no public hearing, despite the Commission's commitment to a public process with Findings 243 and 244 in the initial "Final Permit" Order of December 19,

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<sup>5</sup> <https://mn.gov/law-library-stat/archive/ctappub/2019/OPa190688-122319.pdf>

<sup>6</sup> <https://mn.gov/law-library-stat/archive/ctappub/2019/OPa181283-060319.pdf>

<sup>7</sup> <https://mn.gov/law-library-stat/archive/ctappub/2015/opa150016-091415.pdf>

2018. The private nature of these reports and filings, the failure of the Commission to grant a contested case or public hearing for the Xcel permit amendment proceeding, the overt exclusion of AFCL from the first pre-construction meeting, the apparent intent to exclude AFCL from other pre-construction meetings, and failure of Commerce-EERA to produce documents including EERA claim emails are deleted after 90 days is anything but transparent or compliant with the Commission's "broad spectrum public participation" required by statute. Minn. Stat. §216E.08, Subd. 2. The Power Plant Siting Act is environmental law in Minnesota, and this is another example of the Commission's failure to comply with MEPA.

In the draft "Record of Decision," staff claims in paragraph 16 that "the totality of Commission Docket 17-410" ... "comprise a comprehensive evaluation of potential impacts and mitigation substantially equivalent to, or more granular than would be provided in an EAW, despite their procedural differences." The Xcel Energy amendment application and information provided by Xcel in "compliance filings" have not been subjected to a contested case hearing or public hearing, and the reams of documents filed in November, just before public comments were due, have not been adequately vetted. Paragraph 16 flies in the face of the process of Xcel Energy's acquisition circumventing Certificate of Need environmental review (PUC Docket M-16-777) and the application for amendment – there has been no comprehensive evaluation of potential impacts and mitigation of those impacts for the project as proposed by Xcel Energy.

The recent Xcel Energy filings reveal that the noise study was modeled using the improper ground factor of 0.5, which results in modeling significantly understating the noise the project will generate. The shadow flicker shows that many homes will receive more than 30 hours annually of shadow flicker (and under what rule or standard is the 30 hours annually set as the acceptable level of shadow flicker?). The turbines proposed are larger turbines and there is no certainty adequate setbacks (and under what rule or standard is any setback determined?). The maps provided are so vague that Commerce had to ask for better maps in the pre-construction meeting. It's impossible to identify potential impacts with the maps as they are.

At the very least, the Freeborn Wind project requires an Environmental Assessment Worksheet, the process of which includes a public comment period and hearing,<sup>8</sup> and then a decision by the Commission, based on the public hearing and comments, as to whether an EIS is necessary. This is the purpose of an Environmental Assessment Worksheet process. And yes, it is AFCL's position that this project has sufficient impacts to warrant a full iterative EIS.

In addition to the recent cases remanded to the Commission for environmental review, there are statements in the Staff Briefing Papers and many documents filed in this and other wind dockets, that show the Commission has little regard for the Minnesota Environmental Policy Act, and for the people of Minnesota who would have to live with the substantial impacts of this project in particular. The people have spoken loudly, frequently, and with sufficient detail for the Commission to recognize that there are significant human and environmental impacts.

The Commission has a decision to make regarding environmental review. Minn. R. 4410.1100,

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<sup>8</sup> A public meeting has been held in every one of the many EAW Petitions and comment periods I've participated in over the last 25 years. Whether to hold a public meeting is at the RGU discretion, but these public meetings are anything but rare. Minn. R. 4410.1600(C).

Subp. 6. The sufficiency of AFCL's Petition for EAW is not at issue, it's been determined adequate by the Environmental Quality Board.

At this time, AFCL requests immediate correction of the false statements regarding the adequacy of the Petition for EAW, the "missing" 97 signature pages, the "missing" Exhibits B and K, and the improper framing the issue before the Commission as anything other than a decision regarding an EAW under the criteria of Minn. R. 4410.1700, Subp. 7, and a statement of clarification at the meeting, so that the Commissioners will not have misleading information before them as they make their decision regarding environmental review and this Petition for an EAW.

At this time, AFCL also requests oral argument before the Commission at the February 6, 2020 meeting regarding our Petition for an Environmental Assessment Worksheet.

Very truly yours



Carol A. Overland  
Attorney at Law

cc: All parties via eDockets  
Association of Freeborn County Landowners  
Katrina Hapka, Environmental Quality Board