

**STATE OF MINNESOTA
IN COURT OF APPEALS**

CASE TITLE:

**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**

Court of Appeals Case No. _____

PETITIONER’S STATEMENT OF THE CASE

PUC Docket: IP-6946/WS-17-410
OAH Docket. 80-2500-34633

Date of Decision:

Order Approving Amendment of Site Permit

May 10, 3019

Order Approving Siting Permit

December 19, 2019

Date of Decision Triggering Appeal Time:

July 2, 2019

Relator Association of Freeborn County Landowners, for its Statement of the
Case, states as follows:

1. Agency of case origination:

This case originated with the Minnesota Public Utilities Commission (hereinafter
“PUC”). The Commission referred the wind project site application to Office of
Administrative Hearings for a Contested Case Hearing and Public Hearing, and the
Administrative Law Judge issued a Recommendation to the PUC that the site permit be
denied. The PUC then made its decision of December 19, 2019, granting the permit,

Reconsidered and Amended Site Permit with Order of May 10, 2019, and then denied Motion for Reconsideration on July 2, 2019.

2. Jurisdictional statement

a. Statute, Rule, or Other Authority Authorizing Certiorari Appeal.

Certiorari appeal of Public Utilities Commission decisions are taken pursuant to Minn. Stat. §216B.52 and §216E.15. The Administrative Procedures Act authorizes review in the Court of Appeals by writ of certiorari. Minn. Stat. §14.6-683; Minn. R. Civ. App. P. 103.03(g) and 115.01.

b. Authority Fixing Time Limit for Obtaining Certiorari Review.

Relators appeal the PUC's second "final" decision on the matter, its May 10, 2019 Order granting a Site Permit for the Freeborn Wind project and the PUC's July 2, 2019 denial of AFCL's Motion. This appeal is timely filed no more than 30 days after the PUC's July 2, 2019 Order (Minn. Stat. §14.64).

c. Finality of Order or Judgment.

This Order amending the site permit is likely not final, as the docket is very active now. The Commission issued its first Order Granting Site Permit on December 19, 2018, and then issued this Amended Site Permit with its Order of May 10, 2019. The Commission denied Reconsideration on July 2, 2019. The Commission's action on Reconsideration would be "final" except that a material amendment request is expected. Xcel Energy has purchased Freeborn Wind and has requested approval of its acquisition from the Public Utilities Commission. The Commission will address the acquisition sometime after the comment period ends on July 29, 2019. Xcel Energy has stated that it

will file a petition to amend the site permit “in July,” and plans to substitute 32 larger turbines, and file a minimum of new noise and shadow flicker studies and a modified site plan. On the closing date of the sale, the seller, Invenergy, filed Notice of Termination of land leases and agreement affecting over 4,451 acres of the 17,435 acres of leased land, significantly altering the project from that permitted. AFCL has filed a Motion for Order to Show Cause requesting that the Commission stay the permit until the new Xcel siting information and plan is reviewed.¹

AFCL is filing this appeal within the statutory window for appeal. AFCL requests stay of consideration of this appeal until the Commission addresses Xcel Energy/NSPM’s acquisition and planned site permit amendment.

3. State type of litigation and designate any statutes at issue.

This is a case of first impression -- the first contested case held in Minnesota to address a wind site permit application under the wind siting statutes. Minn. Stat. Ch. 216F; Minn. R. Ch. 7854, including 7854.0500, Subp. 13; the Power Plant Siting Act statutes not exempted under Minn. Stat. §216F.02, including siting criteria of Minn. Stat. §216E.03, Subd. 7, and public participation as afforded by Minn. Stat. §216E.08; the Minnesota Administrative Procedures Act, Minn. Stat. Ch. 14 and rules of Minn. Ch. 1400 and 1405; and Minnesota Pollution Control Agency’s noise standards, Minn. R. 7030.0400 and Dept. of Commerce wind siting noise guidelines.

4. Brief description of claims, defenses, issues litigated and result below.

¹ In its Addendum, AFCL has included Xcel’s request for approval of acquisition, the Commission’s Notice of Comment Period, and AFCL’s Motion for Order to Show Cause.

This appeal will address whether the Public Utilities Commission made errors of law when it amended the Freeborn Wind Site Permit in its May 10, 2019 Order; specifically the Commission's approval and amendment of the site permit, and omitting other permit language, based on a private agreement excluding parties; the Commission's approval and amendment of the site permit changing material terms not supported by the record; the Commission's approval and amendment of the site permit that improperly utilized siting standards developed for small (under 25MW) wind; the Commission's approval and amendment of the site permit based on a change of the ground factor noise modeling assumption from 0.0 to 0.5, a substantive change, when there is no modeling in the record that utilizes ground factor of 0.5; whether the Commission's approval and amendment of the site permit authorizing delay of production of noise studies until after approval of the permit is an error of law in the absence of any demonstration prior to approval that Freeborn Wind could comply with state noise standards; approval and amendment of the site permit where homes are expected to experience shadow flicker and relies on a permit term of "abnormal level of complaints" to trigger monitoring; failure to require production of decommissioning information and postponing production of decommissioning planning to post-permit stage without public review; and disregard of public opposition and approving the project based on private agreement between Freeborn Wind and Commerce-EERA and MPCA violates the Commission's public participation mandate under Minn. Stat. §216E.08.

5. List specific issues proposed to be raised on appeal.

The errors of law and arbitrary and capricious acts to be raised include:

- Whether a Siting Order that relies on “Order Establishing General Wind Permit Standards” (Docket No. E, G-999/M-07-1102) for siting of a Large Wind Energy Conversion System, wind projects greater than 25MW constitutes legal error.
- Where secret meetings are held, excluding parties, and Commission by its Order adopts terms, conditions and “Special Conditions” of that private agreement, and amends permit Order, does that constitute legal error, a violation of the Commission’s public participation and public interest mandate of Minn. Stat. §216E.08.
- Where the Commission deletes project specific noise conditions in Permit section 7.4 and gives the project specific “Special Conditions” of section 6, stemming from a private agreement between Applicant and agencies, express precedence over other conditions of the permit, and inserting conditions which delay timing of Applicant’s production until after permit is issued, does that constitute legal error and violation of Minn. R. 7030.0400.
- Where all wind noise modeling provided by applicant in the record is based on a 0.0 ground factor assumption, upon which the ALJ Recommended the permit be denied due to failure to demonstrate compliance, is issuing a site permit utilizing 0.5 ground factor, where there is no modeling provided by applicant with 0.5 ground factor, does this constitute an arbitrary and capricious action, unsupported by the record, and legal error?
- Where the Commission relieves applicant of burden of proof and production to demonstrate that it can comply with statutory and regulatory requirements, i.e., noise, shadow flicker, decommissioning, and issues permit for a project and delays proof and production until after permit issued, does that constitute legal error.
- Where permit complaint procedures and enforcement are demonstrably ineffective and burdensome, as reflected in the record, and Commission failed to develop revised complaint procedures and incorporate into permit, and relied on “abnormal level of complaints” to trigger monitoring, does that constitute legal error.
- Where the Commission disregards strong public participation, intervention, and party and public testimony showing substantive issues and that the community does not consent to the project encroaching on the community, is issuance of a site permit arbitrary and capricious and constitutes legal error.

6. Related appeals.

There are no prior or pending appeals in separate actions raising similar issues. At this time it is not known whether any other party will intervene.

In this case, the Commission's decision here appealed is likely not "final." The permit has already been amended once, and an amendment request is anticipated in the immediate future. As above, Xcel Energy has purchased Freeborn Wind and has requested approval of its acquisition from the Public Utilities Commission. The Commission will address the acquisition sometime after the comment period ends July 29, 2019. Xcel Energy has stated in emails and at public and governmental meetings that it will file a petition to amend the site permit "in July," and has publicly announced plans to substitute 32 larger turbines and to file new noise and shadow flicker studies and a modified site plan. A decommissioning plan is also due to be filed. On the closing date of the sale, the seller, Invenergy, filed Notice of Termination of land leases and agreement affecting over 4,451 acres of the 17,435 acres of leased land, significantly altering the site plan of the project from the site plan permitted (see Site Permit, Section 2). AFCL has filed Motion for Order to Show Cause and stay permit until the new siting information is reviewed, vetted, and approved.² Thus, with an amendment forthcoming and these changes in the project over the last month, it is doubtful that Public Utilities Commission's "final" decision in this matter.

AFCL is filing this appeal so as not to miss the statutory window for appeal of the PUC's Amendment Order. It would be prudent to hold this appeal in abeyance and not

² In its Addendum, in addition to PUC Orders, AFCL has included AFCL's letters to Commission with actual notice of planned changes to project, PUC's Notice of Comment Period regarding Xcel/NSPM acquisition of Freeborn Wind, and AFCL's Motion for Order to Show Cause.

waste the court's and others' time and resources pending the Commission's consideration of Xcel Energy/NSPM's pending amendment request. AFCL requests stay of consideration of this Siting Permit appeal until after the Commission addresses Xcel Energy/NSPM's acquisition and the immediately forthcoming site permit amendment request.

7. Contents of record.

There is an extensive record in this proceeding. For the purposes of Rules 115.04, subd. 1 and 110.02, subd. 1(c), Relator provides notice that a separate transcript is not necessary to review the issues on appeal because the transcript has been prepared in this matter, and the original transcript is part of the record, on file with the PUC. These transcripts, and the record, will be transmitted to the Court of Appeals under Rule 111.01 and 115.04.

8. Is oral argument requested? Yes. At another location? No.

9. Identify the type of brief to be filed. Formal brief under [Rule 128.02](#).

10. Names, addresses, zip codes telephone numbers and emails of attorneys:

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