

STATE OF MINNESOTA
IN COURT OF APPEALS

A20-0410

In the Matter of the Application of
Freeborn Wind Energy, LLC for a Large
Wind Conversion System Site Permit for
the 84 MW Freeborn Wind Farm in
Freeborn County

MN PUC Docket No IP6946/WS-17-410
OAH Docket No. 80-2500-34633

Association of Freeborn County
Landowners,

Relators,

**RESPONDENT MINNESOTA
PUBLIC UTILITIES COMMISSION'S
RESPONSE TO RELATOR'S
MOTIONS TO CONSOLIDATE
AND TO STAY**

vs.

The Minnesota Public Utilities
Commission,

Respondent.

INTRODUCTION

The Minnesota Public Utilities Commission (“PUC”) provides this response to the combined motions of Relator the Association of Freeborn County Landowners (“AFCL”), filed on March 29, 2020. In the first motion, AFCL asks the Court to consolidate Appellate Court Files A19-1195 and A20-0410. In the second, it asks the Court stay the proceedings in A20-0410 and allow AFCL to amend its Statement of the Case thirty days after the PUC’s written order. AFCL also asks that, as an alternative to its request for a stay, the Court remand its Petition for an Environmental Assessment Worksheet (“EAW”) “for a decision regarding AFCL’s Petition as required by the

Environmental Quality Board's rules, and that the Commission issue a timely Order and Record of Decision.”

The PUC agrees that all of the appeals regarding the Freeborn Wind project should be consolidated into one appeal and follow the same schedule. AFCL's appeal in this docket (A20-0410), however, is premature. As AFCL stated, the PUC had not issued a final order when AFCL filed its appeal. Rel's Mot. at 2. This means that AFCL has not requested rehearing of the PUC's order, and the PUC has not ruled on a petition for rehearing. These steps are required before any party may seek review of a PUC decision. Minn. Stat. § 216B. 27, subd. 2. In addition, the PUC's written order in this matter was not untimely, as AFCL claims, and AFCL's time to appeal did not expire 30 days after notice was published in the EQB Monitor. Accordingly, AFCL's appeal should be dismissed without prejudice, because the Court lacks jurisdiction to hear it.¹

PROCEDURAL POSTURE

On December 19, 2018, the PUC granted approval of a permit to construct a collection of wind turbines in Freeborn County, capable of generating up to 84 megawatts.² On May 10, 2019, the PUC amended the permit. After the PUC denied

¹ Counsel for the PUC previously agreed with AFCL that the A19-1195 and A20-0410 should be consolidated. *See* Rel's Mot. at 2. This is consistent with the PUC's position that all appeals regarding the Freeborn Wind project should be heard together. This does not change the fact, however, that the current appeal is premature, and that the Court does not have jurisdiction to hear it.

² The Commission dockets are public record and may be accessed here: <https://www.edockets.state.mn.us/>.

AFCL's request to reconsider³ its order amending the permit, AFCL appealed. (Appellate Court File A19-1195).

On August 20, 2019, the permit holder, Xcel Energy, filed an application with the PUC requesting additional amendments. On December 19, 2019, the PUC met and granted Xcel's request. On January 1, 2020, AFCL filed a petition with the Environmental Quality Board ("EQB"), requesting that the PUC complete an Environmental Assessment Worksheet ("EAW") on the project. The PUC met on February 6, 2020 and verbally denied AFCL's request. On February 13, 2020, the PUC sent notice of its decision to the EQB. *See* Minn. R. 4410.1100, subp. 8. The PUC's decision was published in the EQB Monitor on February 18, 2020. On March 18, 2020 AFCL appealed the PUC's decision to deny an EAW. On March 31, 2020, the Commission issued its written order denying an EAW.

ANALYSIS

AFCL's appeal of the Commission's decision to deny an EAW is premature and should be dismissed. In addition, AFCL's claim that the PUC's Order was untimely is incorrect.

³ As discussed below, Minn. Stat. § 216B.27 allows parties to request a "rehearing" of a Commission decision. In practice, these requests are typically framed by parties as requests for "reconsideration." There is no legal distinction between a request for rehearing and a request for reconsideration.

I. AFCL'S APPEAL IS PREMATURE.

AFCL's current appeal is premature because it was filed before the PUC issued its order denying AFCL's request for an EAW. In order to appeal a PUC decision, a party must first request rehearing within 20 days of the PUC's written order.

No cause of action arising out of any decision . . . of the commission or any proceeding for the judicial review thereof shall accrue . . . unless the plaintiff or petitioner in the action or proceeding within 20 days after the service of the decision, shall have made application to the commission for a rehearing in the proceeding in which the decision was made.

Minn. Stat. § 216B.27, subd. 2. When rehearing is requested, the PUC has 60 days to rule on the request. *Id.* at subd. 4. This means that the entire process for rehearing required by statute can last up to 80 days. Once the Commission has ruled on a petition for rehearing, a party may seek review of the decision within 30 days. Minn. Stat. §§ 216B.52, 14.63. This process provides the PUC with the opportunity to rectify any purported problems with its decisions. It also limits the scope of permissible appeals, since the issues that may be raised on appeal are limited to those that were first raised in a petition for rehearing. Minn. Stat. § 216B.27, subd. 2.

AFCL's appeal, however, did not follow this process. Instead, AFCL filed its appeal before the PUC issued its order denying its request for an EAW. As a result, the PUC did not have the opportunity to consider a rehearing request, and the PUC has not yet issued an order that can be subject to appeal.

AFCL claims that it was required to appeal the PUC's decision within 30 days of publication in the EQB Monitor. *See* Minn. Stat. § 116D.04, subd. 10 (allowing 30 days to appeal decision on EAW after notice is provided in the EQB Monitor). This

interpretation appears to have also lead AFCL to incorrectly conclude that the PUC was required to issue its written order on the day that it notified the EQB of its decision—an issue addressed below. *See* Rel’s Mot. at 4 (“Although this appeal was timely, the Commission has not made timely provision of the substantive basis for its decision, and an appeal cannot reasonably go forward without that Order and Record of Decision.”). AFCL’s interpretation of its deadline is not correct.

The problem with AFCL’s interpretation of its appeal deadline is that it disregards entirely the rehearing process set forth in Minn. Stat. § 216B.27, subd. 2. Even if the PUC had issued a written order on the day AFCL claims it should have, it would not have been able to complete the 80-day statutory rehearing process within the 30 days provided in Minn. Stat. § 116D.04, subd. 10. Since the rehearing process is required before a PUC decision can be appealed, the timeline established in Minn. Stat. § 216B.27 governs AFCL’s appellate rights of PUC decisions, rather than the timeline established in Minn. Stat. § 116D.04, subd. 10. *See, e.g., Minn. Center for Env’tl. Advocacy v. Minn. Pub. Utilities Comm’n*, No. A10-812, 2010 WL 5071389 (Minn. App. Dec. 14, 2010) (unpublished) (applying requirements of Minn. Stat. § 216B.27, subd. 2 to appeals brought under Minnesota Environmental Rights Act). AFCL did not have 30 days to appeal from publication of the PUC’s decision in the EQB Monitor. It had to first request a rehearing, and proceed under the process set forth in Minn. Stat. §§ 216B.27, 216B.52, and 14.63. For this reason, AFCL’s appeal is premature.

II. THE PUC'S WRITTEN ORDER WAS NOT UNTIMELY.

AFCL also argues that the PUC violated EQB rules by not issuing a written order of its decision within five days of the meeting where it denied AFCL's request. This argument appears to be based in part on AFCL's attempt to align its interpretation of its appeal deadline with the need for a written decision to review. This issue was addressed above. But AFCL's argument also fails because it misreads the EQB rules.

AFCL's argument misreads the EQB rules by inappropriately combining the timing requirements of Minn. R. 4410.1100 subp. 8 ("Subpart 8") with the substantive requirements of Minn. R. 4410.1100 subp. 6 ("Subpart 6"). These different subparts relate to different actions that a responsible government unit ("RGU") must take after it receives a request for an EAW. Subpart 6 governs the substantive standards that RGUs must apply when deciding whether to prepare an EAW. It also requires the RGU to maintain a record of its decision, including specific findings of fact. There is no timing requirements included in Subpart 6. Rather, Minn. R. 4410.1100, subp. 7 states that the RGU must decide a petition for an EAW within 30 days; it does not state when the RGU must issue a written order.⁴

⁴ It would not have been possible for the PUC to issue its *written order* by the deadline that it was required to make a *decision* under Minn. R. 4410.1100, subp. 7—and AFCL has not argued that it should have. The PUC is subject to Minnesota's Open Meetings Law, meaning that it could not have decided whether or not to grant the EAW request until it convened an open meeting. *See* Minn. Stat. § 13D.01. To prepare for that meeting, the PUC needed to develop and analyze the record—including AFCL's filing of more than 1500 pages—and provide at least 10-day notice of its meeting. Minn. R. 7829.2800. It would not have been possible to review these materials, provide proper legal notice and hold a meeting to make a decision, *and then* write specific findings of fact within 30 days. Regardless, Minn. R. 4410.1100, subp. 7 does not establish a

In contrast, Subpart 8 governs when a RGU must provide *notice of its decision* to the EQB. Specifically, notice must be provided five days after a RGU decides on a petition for an EAW. The PUC complied with this requirement when it provided notice of its decision to the EQB on February 13, 2020. Subpart 8 does not address when the RGU must draft a record of its decision with specific findings of fact. AFCL's claim that the written order and findings of fact required by Subpart 6 must comply with the notice timeline in Subpart 8 has no basis, and should be rejected.

CONCLUSION

The PUC agrees that all appeals related to the Freeborn Wind project should be consolidated into one case. AFCL's appeal in this matter, however, is premature. AFCL's decision to file its appeal when it did is not consistent with Minn. Stat. § 216B.27, and it subverts the PUC's rehearing process. In addition, AFCL's claim that the PUC's written order was untimely is incorrect, because it misreads the EQB's rules. For these reasons, AFCL's appeal should be dismissed without prejudice. In the alternative, the PUC would agree that dockets A19-1195 and A20-0410 should be consolidated, and

timeline for the PUC's written order, and AFCL's time to appeal did not begin until the written order was issued on March 31, 2020.

that parties should have the opportunity to amend their Statements of the Case to reflect the Commission's written order.

Dated: April 2, 2020

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