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April 30, 2020

—Via Electronic Filing—

Will Seuffert
Executive Secretary
Minnesota Public Utilities Commission
121 7th Place East, Suite 350
St. Paul, MN 55101

RE: RESPONSE IN OPPOSITION TO AFCL'S PETITION FOR RECONSIDERATION
SITE PERMIT AMENDMENT
FREEBORN WIND ENERGY PROJECT
DOCKET NO. IP-6946/WS-17-410

Dear Mr. Seuffert:

Northern States Power Company, doing business as Xcel Energy, submits this Response in Opposition to the April 20, 2020 Petition for Reconsideration filed by the Association of Freeborn County Landowners (AFCL). AFCL's Petition fails to identify any reason why the Commission should overturn its March 31, 2020 Order (March 31 Order) dismissing AFCL's improper request for an Environmental Assessment Worksheet (EAW) and making relatively minor changes to the Site Permit for the Freeborn Wind Farm project. It should be denied.

Petitions for reconsideration are governed by Minn. Stat. § 216B.27, Subd. 3, which permits reconsideration of Commission decisions if they are "in any respect unlawful or unreasonable." Minn. R. 7829.3000 sets forth additional procedural requirements for petitions for reconsideration, and requires that petitions "set forth specifically the grounds relied upon or errors claimed." Generally, the Commission will review petitions for reconsideration "to determine whether the petition (i) raises new issues, (ii) points to new and relevant evidence, (iii) exposes errors or ambiguities in the underlying order, or (iv) otherwise persuades the Commission that it should rethink its decision."[1] As set out below, AFCL's petition fails to satisfy this standard.

The Commission properly denied AFCL's improper requests for an EAW and an Environmental Impact Statement (EIS), finding that environmental review had been satisfied under Minn. R. 7854.0500. It properly granted the Company's request for an amended Site Permit for good cause, under Minn. R. 7854.1300. And, it properly

[1] ORDER DENYING RECONSIDERATION, DENYING STAY, AND APPROVING COMPLIANCE FILINGS, Oct. 7, 2019, Docket No. E002/M-18-643, at 3.

denied AFCL's repeated requests for a second referral for a contested case, under Minn. R. 7829.1000. These decisions were neither erroneous nor ambiguous, and AFCL has not raised any new issues or identified any new evidence requiring reconsideration. AFCL notes that the Company has made numerous compliance filings over the past few months, as required by the Site Permit, but these are unrelated to the Commission's March 31 Order and are not new evidence. Having failed to identify any reason why the Commission should reconsider the March 31 Order, AFCL's Petition for Reconsideration should be denied.

I. The Commission's Decisions to Deny AFCL's Requests for an EAW and an EIS Were Appropriate.

In its March 31 Order, the Commission concluded that no further environmental review—beyond that conducted by the Commission in connection with its December 19, 2018 Order (December 2018 Order), May 10, 2019 Order (May 2019 Order), and March 31 Order issuing and amending the site permit for the Freeborn Wind Farm—was required. This conclusion is entirely consistent with Minnesota law.

Minnesota Rule 7854.0500, subp. 7, controls the information required to be provided in connection with requests for site permits for LWECS so that the Commission may conduct its environmental review of such projects. That rule states, in relevant part:

> The analysis of the environmental impacts required by this subpart satisfies the environmental review requirements of chapter 4410 and Minnesota Statutes, chapter 116D. No environmental assessment worksheet or environmental impact statement shall be required on a proposed LWECS project.

Contrary to AFCL's contentions, this rule is consistent with the Minnesota Environmental Policy Act (MEPA). Among other things, MEPA requires the Environmental Quality Board (EQB) to "establish categories of actions for which environmental impact statements and for which environmental assessment worksheets shall be prepared as well as categories of actions for which no environmental review is required under this section."[2] The EQB did just that when it adopted the precursor to Minn. R. 7854.0500 in 2001 and determined that LWECS projects did not require EAWs or EISs, and instead would be subject to a different environmental review process.

The EQB reinforced this determination recently, when it amended Minn. R. 4410.4300. Subpart 3.D. of that rule now states:

[2] Minn. Stat. § 116D.04, Subd. 2a(b).

> For construction of a wind energy conversion system, as defined in Minnesota Statutes, section 216F.01, designed for and capable of operating at a capacity of 25 megawatts or more, the PUC is the RGU, and environmental review must be conducted according to chapter 7854.

The EQB's rules have been and are clear: neither an EAW nor an EIS is required for an LWECS. Instead, environmental review of an LWECS is to be conducted pursuant to Minn. R. 7854.0500, as the Commission did here.

AFCL argues the Commission's March 31 Order was improper because it did not follow the directions in the EQB's letter referring AFCL's request for an EAW to the Commission.[3] In support of this, AFCL cites to Minn. R. 4410.1700, Subp. 7, in which the EQB has laid out criteria for deciding whether a generic project has the potential for significant environmental effects. But, the Freeborn Wind Farm is not a generic project. It is an LWECS for which—as noted above—the EQB adopted specific rules governing environmental review, exempting such projects from the generic EAW or EIS requirements.[4] The generically-applicable rule does not apply, and the Commission's decision that its review of the project was subject to the requirements of chapter 7854 rather than chapter 4410 is mandated by law and is neither arbitrary and capricious nor an error of law.

AFCL also argues the Commission's reliance on review pursuant to chapter 7854 is not compliant with MEPA, namely Minn. Stat. § 116D.04, Subd. 2a(a), because that statute requires EISs to be prepared "[w]here there is potential for significant environmental effects resulting from any major governmental action[.]"[5] But, as discussed above, the very next section of the statute, Minn. Stat. § 116D.04, Subd.2a(b) states that the EQB shall through rulemaking exempt certain actions from the EIS and EAW process. As noted above and in the Commission's Order, the EQB established the review of environmental impacts related to LWECS as such a category of action for which environmental review is conducted through an different mechanism and therefore is not required under Minn. Stat. Chapter 116D.

Consistent with Minn. R. 7854.0500, the Company updated the required environmental information in connection with its request for a permit amendment, which the Commission reviewed. Based on this record—including its own and stakeholders' review of the information filed by the Company—the Commission concluded "that the potential effects of Xcel's proposed permit amendments and turbine layout (including cumulative potential effects) are not significant, even when

[3] Petition for Reconsideration at 4, 6-10.

[4] Minn. R. 7854.0500, subp. 7.

[5] Petition for Reconsideration at 7.

viewed in connection with other factors."[6] That review, in addition to the Commission's prior reviews of environmental information related to Freeborn Wind Farm, satisfied its obligations under MEPA and all applicable rules. The decision to deny AFCL's request for an EAW, therefore, was not erroneous, and reconsideration of this aspect of the Order is not appropriate.

II. The Commission's Decision to Amend the Site Permit was Appropriate.

The Commission appropriately amended the Site Permit per the requirements of Minn. R. 7854.1300 and the applicable terms of the Site Permit itself. Its decision to do so was not an error and was not ambiguous, and therefore reconsideration of this issue also is not appropriate.

Minn. R. 7854.1300, Subp. 2 governs amendment of an LWECS site permit: "The commission may amend a site permit for an LWECS at any time if the commission has good cause to do so." Section 13.0 of the Site Permit reinforces that this is the appropriate standard for review: "This permit may be amended at any time by the Commission in accordance with Minn. R. 7854.1300, subp. 2."

In amending the Site Permit in its March 31 Order, the Commission found the Company had "persuasively demonstrate[d] good cause to grant the proposed amendments."[7] The specific amendments ordered by the Commission were narrow: modifying Section 2.0 to reflect a change in turbine technology, modifying Section 3.0 to reflect a change in land under contract within the project area, and modifying the site maps under Section 3.1 to reflect a slightly updated project layout. In support of these changes, the Company provided updates to the original Site Permit Application, including supplemental environmental information—augmenting what already was in the record. This information reflected the specific impacts caused by the change in turbine technology and project layout, including updated noise modeling, visual impacts, and assessments of the project's impacts on cultural and archeological resources, recreation, and public health and safety, among other things. The Company further provided an assessment of how the proposed amendments to the Site Permit were consistent with other applicable provisions of the Site Permit.

The Department of Commerce – Energy Environmental Review and Analysis (DOC-EERA) staff thoroughly reviewed the application for amendment, including all of the environmental information provided by the Company. Based on that analysis, in comments filed November 12, 2019, DOC-EERA recommended

[6] March 31 Order at 12.

[7] March 31 Order at 14.

approval of the amendment, concluding that the amendment's consequences for people and the environment appeared "comparable, or less than, the potential impacts associated with the originally permitted wind turbine and infrastructure layouts."

Having reviewed this record, as well as comments in opposition to the amendment, the Commission determined there was good cause for amending the permit. As discussed below, nothing AFCL points to suggests this decision was in error.

III. The Commission Appropriately Decided to not Refer this Matter to a Second Contested Case.

The Commission appropriately denied AFCL's repeated requests for a contested case, both in its November 12, 2019 Comments and in a separate December 12, 2019 Motion. In general, referral of a proceeding for a contested case is appropriate only if "a proceeding involves contested material facts and there is a right to a hearing under statute or rule, or if the commission finds that all significant issues have not been resolved to its satisfaction."[8] The two requests for a contested case fail this standard because neither identified any contested material facts or an applicable statute or rule providing a right to a hearing.

Instead, AFCL's requests were made up of general statements and a list of issues that already had been the subject of a contested case, and that were finally decided in the Commission's December 2018 Order and May 2019 Order.[9] Because these requests failed to identify a right to a contested case and to raise issues of disputed material fact particular to the Amendment Request or identify issues that the Commission could not otherwise satisfactorily resolve, the Commission properly denied them.

Apparently, lacking any credible argument that its requests for a contested case identified issues of disputed material fact or a legal right to a hearing, AFCL argues instead that the Commission improperly determined "that all significant issues have been resolved to its satisfaction."[10] AFCL points to compliance filings made by the Company following the Commission's decision to amend the Site Permit. Compliance filings are required under the terms of the amended Site Permit, do not relate to the Company's request to amend the Site Permit, and certainly do not provide a right to a contested case. The Commission properly exercised its authority

[8] Minn. R. 7829.1000.

[9] December 2018 Order at 9-10, 21, 25-26, 28; May 2019 Order at 9-12.

[10] Petition for Reconsideration at 21.

to deny a second referral to the OAH, and its decision was well-supported by the record. There is no reason to reconsider it.

IV. AFCL Fails to Identify New Issues or New Evidence Requiring Reconsideration.

In support of its Petition for Reconsideration, AFCL also lays out a panoply of issues it claims demand reconsideration because they either are new issues or new evidence. As discussed below, they are neither. Many of these issues were previously and finally decided by the Commission, and others are misleading characterizations of the record.

First, AFCL claims there "was no consideration of substantive relevant information in the record and presented by AFCL."[11] This argument fails to account for the nearly three years of record development in this case and the Commission's consideration of that information in numerous orders. By and large, the issues AFCL claims the Commission fails to have considered already have been the subject of a contested case and were finally decided in the Commission's December 19, 2018 Order Issuing Site Permit and Taking Other Action (December 2018 Order) and May 10, 2019 Order Amending Site Permit (May 2019 Order). For example, AFCL's issue with the Company's noise modeling is that it uses a 0.5 ground factor authorized by the Commission in the December 2018 Order and reiterated in the May 2019 Order, but does not note any issue with the modeling itself.[12] Similarly, AFCL generally complains about shadow flicker, an issue addressed previously by the Commission, but does not find any failure in the Company's modeling or mitigation plan.[13]

Second, AFCL argues that the Commission's complaint process needs improvement, and complains that the Company "dropped its 'complaint process' in a Compliance Filing, and despite AFCL's request to initiate a review and improvement of this process, AFCL and the public have had no opportunity to comment on or improve the Complaint process."[14] This statement ignores the record. On November 8, 2019,

[11] Petition for Reconsideration at 10.

[12] Petition for Reconsideration at 11, 15. Cryptically, AFCL also claims the Company submitted "subsequent thousand or more pages of Compliance filings, including a new noise study[.]" Although not entirely clear, this appears to be referring to the nineteen page March 12, 2020 Compliance filing which includes a proposed methodology for post-construction noise study, required under Section 7.4 of the Site Permit. Attachment E to the Company's Site Permit Amendment Application, submitted on August 20, 2019, included the Pre-Construction Noise Analysis reviewed by the Commission in connection with its decision to amend the Site Permit.

[13] Petition for Reconsideration at 11, 15. AFCL also claims the Company submitted "hundreds of pages of shadow flicker information with presumed impacts" after the Commission's decision on the permit amendment. We do not know what this is referring to; the only shadow flicker analysis submitted by the Company was on August 20, 2019 in Attachment F to the Company's Site Permit Amendment Application.

[14] Petition for Reconsideration at 16.

the Company made a compliance filing that included the Complaint Procedures satisfying the requirements of Section 9.0 of the Site Permit, and on December 6, 2019, the Company filed a minor revision to the Complaint Procedures, updating the contact person for complaints. These procedures are entirely consistent with those required by Section 9.0, and included as Attachment A, to the Site Permit. AFCL has repeatedly raised its concerns with the Site Permit's complaint process, starting with a letter filed on December 29, 2017, in which AFCL requested time to comment on the Site Permit at a January 4, 2018 Commission meeting. Both the ALJ and Commission heard and considered AFCL's arguments regarding the complaint process, and both rejected them.[15]

Third, AFCL complains that it has been excluded from pre-construction meetings and argues that, having intervened in this docket, it should be entitled to attend them.[16] On September 1, 2017, AFCL petitioned to intervene, pursuant to Minn. R. 1405.0900, in the siting hearings held by the Office of Administrative Hearings under Chapter 1405. On September 12, 2017, the ALJ granted AFCL's petition to intervene. That Order granted AFCL all the rights and responsibilities of a party in connection with the contested case hearing held in this matter pursuant to Chapter 1405.[17] There is no dispute that AFCL was given the opportunity to participate in that hearing with full party rights. Party status in a contested case does not, however, authorize parties to participate in the construction and operation of a LWECS following the grant of a permit, and the Commission's Orders do not provide AFCL such a right. Section 10.1 of the Site Permit, which governs the pre-construction meeting, states that "[p]rior to the start of any construction, the Permittee shall participate in a pre-construction meeting with the Department of Commerce and Commission staff to review pre-construction filing requirements, scheduling, and to coordinate monitoring of construction and site restoration activities." Nothing therein requires the inclusion of a party other than the Permittee, and no statute or rule requires otherwise.

In sum, AFCL's request for reconsideration failed to raise any new issues, point to new or relevant evidence, or expose errors or ambiguities in the underlying order, and it should be denied.

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[15] *See, e.g.,* Findings of Fact, Conclusions of Law, and Recommendation at 113-14, May 14, 2018; Order Issuing Site Permit and Taking Other Action at 24-26, December 19, 2018.

[16] Petition for Reconsideration at 24-25.

[17] *See* Minn. R. 1405.0300, noting that rules in Chapter 1405 are limited to procedures governing the conduct of hearings "involving the siting of large electric power generating plants, the routing of high voltage transmission lines, and to the site and route exemption processes contained in Minnesota Statutes, section 116C.57[.]"

We have electronically filed this document with the Minnesota Public Utilities Commission, and copies have been served on the parties on the attached service lists. Please contact me at (612) 330-6064 or bria.e.shea@xcelenergy.com, or Jennifer Roesler at (612) 330-1925 or jennifer.roesler@xcelenergy.com, if you have any questions regarding this filing.

Sincerely,

/s/

BRIA SHEA
DIRECTOR, REGULATORY AND STRATEGIC ANALYSIS

c: Service List

CERTIFICATE OF SERVICE

I, Lynnette Sweet, hereby certify that I have this day served copies of the foregoing document or a summary thereof on the attached lists of persons:

xx by depositing a true and correct copy or summary thereof, properly enveloped with postage paid, in the United States Mail at Minneapolis, Minnesota; or

xx via electronic filing

Docket No. IP-6946/WS-17-410

Dated this 30th day of April 2020

/s/

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Lynnette Sweet
Regulatory Administrator

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