STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF RAMSEY | SECOND JUDICIAL DISTRICT

Association of Freeborn County Landowners,

Plaintiff,

vs.

Minnesota Public Utilities Commission,

Defendant.

Case Type: Civil Other
Court File No. 62-CV-20-3674
The Honorable Sara Grewing

DEFENDANT'S MEMORANDUM OF LAW OPPOSING PLAINTIFF'S MOTION FOR A TEMPORARY INJUNCTION

INTRODUCTION

Defendant Minnesota Public Utilities Commission ("MPUC or Commission") opposes the Association of Freeborn County Landowner's ("AFCL") Motion for Temporary Injunction. AFCL seeks to enjoin four specific wind projects in the State of Minnesota at various stages of the permitting process, including one project for which AFCL has already appealed the MPUC's permitting decision to the Minnesota Court of Appeals. AFCL's motion fails for several reasons. First, AFCL has failed to exhaust administrative remedies as required for injunctive relief. Second, AFCL fails to demonstrate that it will suffer irreparable harm in absence of its requested injunctive relief. Third, even if AFCL could demonstrate irreparable harm, the remaining factors the Court must consider, including AFCL's likelihood of success on the merits, weigh against the issuance of an injunction. AFCL's motion for temporary injunction should therefore be denied, and AFCL's Complaint should be dismissed in its entirety as described in the MPUC's previously filed Memorandum of Law in Support of its Motion to Dismiss.

FACTUAL BACKGROUND

AFCL seeks to enjoin the MPUC from further permitting (and any subsequent construction) of four Large Wind Energy Conversion Systems ("LWECS") in the State of Minnesota: (1) Freeborn Wind Project, MPUC Docket IP-6946/WS-17-410 ("Freeborn Docket"); (2) Plum Creek Wind Project, MPUC Docket IP-6997/WS-18-700 (Plum Creek Docket"); (3) Buffalo Ridge Wind Project, MPUC Docket IP-7006/WS-19-394 ("Buffalo Ridge Docket"); and Three Waters Wind Project, MPUC Docket IP-7002/WS-19-576 ("Three Waters Docket"). The MPUC's authority and process for permitting LWECS, as well as an overview and procedural posture of the specific projects that AFCL seeks to enjoin, is extensively detailed in the MPUC's Memorandum of Law in Support of its Motion to Dismiss filed with this Court on August 5, 2020.[1] The MPUC will not repeat this factual background in-depth here. However, for purposes of this response, a brief recap of the procedural posture of these four wind projects is helpful.

The Freeborn Wind application for a site permit for a 84 MW wind project in Freeborn County has been proceeding in front of the MPUC since June of 2017. AFCL intervened in the action and participated as a party, taking part in contested case proceedings and public hearings in front of the MPUC. As detailed in MPUC's Memorandum in Support of its Motion to Dismiss, AFCL raised the same arguments and litigated the same issues in front of the MPUC that now form the basis of the instant Complaint. AFCL has filed two appeals related to the

[1] The MPUC hereby incorporates by reference its Memorandum of Law in Support of its Motion to Dismiss and attached exhibits as if fully set forth herein.

MPUC's permitting decisions in the Freeborn Docket, and the appeals have been consolidated and are currently pending at the Minnesota Court of Appeals.[2]

The other three wind projects Plaintiff seeks to enjoin are each active projects at various stages of adjudication before the MPUC. The MPUC has referred the Plum Creek matter to the Office of Administrative Hearings ("OAH") for contested case proceedings. Similarly, in both the Buffalo Ridge and Three Waters dockets, the MPUC has referred the matters to the OAH to conduct public hearings. Jurisdiction for these matters is currently with the OAH. The procedural schedule for the Three Waters Project is currently suspended due to a change in ownership. Importantly, all three of these wind projects are still proceeding through the administrative process at the MPUC and there is no final agency decision on whether to issue the requested permits, or on what permit conditions may be imposed.

LEGAL STANDARD

A temporary injunction is an extraordinary remedy. *In re Commitment of Hand*, 878 N.W.2d 503, 509 (Minn. App. 2016). The party seeking a temporary injunction must meet the threshold requirement to show "that the legal remedy is not adequate and that the injunction is necessary to prevent great and irreparable injury." *Pac. Equip. & Irr., Inc. v. Toro Co.*, 519 N.W.2d 911, 914 (Minn. App. 1994), *review denied* (Minn. Sept. 16, 1994). The failure to demonstrate irreparable harm is, "by itself, a sufficient ground upon which to deny a preliminary injunction." *Morse v. City of Waterville*, 458 N.W.2d 728, 730 (Minn. App. 1990).

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[2] *See 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 Cty.* A19-1195 (Minn. App.) (filed July 20, 2019); *see also 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 Cty.* A20-0947 (Minn. App.) (filed July 10, 2020).

If irreparable injury is found, then the court is to consider five factors to determine whether a temporary injunction is warranted: (1) the nature and relationship of the parties, (2) the balance of relative harm to the parties, (3) the likelihood of success on the merits, (4) public-policy considerations, and (5) any administrative burden involving judicial supervision and enforcement. *Dahlberg Bros. v. Ford Motor Co.*, 137 N.W.2d 314, 321–22 (Minn. 1965). "A primary factor in determining whether to grant a . . . temporary injunction is the likelihood that the party will prevail on the merits." *In re Commitment of Hand*, 878 N.W.2d at 509 (internal quotation marks omitted).

In addition, it is a "long-settled rule that no one is entitled to injunctive protection against the actual or threatened acts of an administrative agency until" all administrative remedies have been exhausted, unless exhaustion of administrative remedies will cause "imminent and irreparable harm." *Thomas v. Ramberg*, 60 N.W.2d 18, 20 (Minn. 1953); *City of Richfield v. Local No. 1215*, 276 N.W.2d 42, 51 (Minn. 1979) (stating "[i]t is fundamental that before judicial review of administrative proceedings will be permitted, the appropriate channels of administrative appeal must be followed").

ARGUMENT

I. AFCL Has Failed to Exhaust Its Administrative Remedies And Therefore Cannot Bring An Action For Temporary Injunction.

AFCL must exhaust the available administrative remedies before bringing an action for injunctive relief. *Uckun v. Minnesota State Bd. of Medical Practice*, 733 N.W.2d 778, 786 (Minn. App. 2007). This requirement has several purposes, including to protect the autonomy of administrative agencies created by the legislature to resolve particular problems, to promote judicial efficiency, to produce a record during the administrative process that facilitates judicial review, and to potentially reduce the need to resort to judicial review. *Id* (citing *Zaluckyj v. Rice*

Creek Watershed Dist., 639 N.W.2d 70, 74–75 (Minn. App. 2002), *rev. denied* (Minn. Apr. 16, 2002)). The only exception to this rule is where exhaustion of administrative remedies would be futile. *McShane v. City of Faribault*, 292 N.W.2d 253, 256 (Minn. 1980), *abrogated on other grounds by DeCook v. Rochester Int'l Airport Joint Zoning Bd.,* 811 N.W.2d 610 (Minn. 2012).

As noted above, each of the four projects AFCL seeks to enjoin is currently at some step of the administrative process before the MPUC or the Court of Appeals, and thus AFCL has not exhausted its administrative remedies. These cases well illustrate the policy reasons behind the requirement identified by the court in *Uckun*—the MPUC has the statutory authority to evaluate wind projects for their environmental effects based on a fully developed administrative record, and to establish permit terms specific to the conditions of the site, all subject to judicial review through Minn. Stat. §§ 14.69, 216B.27. Allowing an action for injunctive relief interrupts the development of an administrative record for the three projects for which permits have yet to issue, interferes with the Court of Appeals' review of the Freeborn project, and thwarts the legislative intent reflected in Minnesota Statutes Chapter 216F that the MPUC evaluate and if appropriate, issue wind permits in Minnesota.

AFCL cannot show that following the administrative process would be futile. The Court of Appeals has yet to hear its appeal of the Freeborn permit, and the MPUC has yet to evaluate the applications for permits and, if and as appropriate, issue permits with appropriate terms for the Plum Creek, Buffalo Ridge and Three Waters projects. *See Uckun,* 733 N.W.2d at 786 (holding exhaustion of administrative remedy not futile where agency had not committed itself to a particular standard of proof and litigant had an opportunity to make argument). AFCL cannot simply assume an adverse result in these cases in order to obtain the extraordinary remedy of injunctive relief. *See Ramberg*, 60 N.W.2d at 20 ("Injunctive relief cannot be given for what is

merely assumed to be a possible result."). AFCL's failure to exhaust administrative remedies in this case requires that the motion for temporary injunction be denied.

Administrative exhaustion is even more important where, as here, there are specific provisions to seek injunctive relief from the administrative agency in question. Minn. Stat. § 216B.53 establishes the procedures for requesting a stay from the MPUC—which AFCL has not requested in this matter. If AFCL had requested a stay, the MPUC would have considered it and, if it were denied, AFCL could have appealed that denial to the Court of Appeals. Because AFCL has failed to exhaust the available administrative remedies, its motion should be denied without further analysis.

II. AFCL CANNOT SHOW IRREPARABLE HARM TO SUPPORT ISSUANCE OF A TEMPORARY INJUNCTION.

The party seeking a temporary injunction must meet the threshold requirement to show "that the legal remedy is not adequate and that the injunction is necessary to prevent great and irreparable injury." *Pac. Equip.* 519 N.W.2d at 914. The threatened injury must be "real, substantial, and irreparable." *Hotel & Rest. Employees' Union, Local No. 556-C v. Tzakis*, 33 N.W.2d 859, 861 (Minn. 1948). The failure to demonstrate irreparable harm is, "by itself, a sufficient ground upon which to deny a preliminary injunction." *Morse v. City of Waterville*, 458 N.W.2d at 730. Here, AFCL has not made the requisite showing of irreparable harm necessary for the extraordinary remedy it requests in this case—the injunction of further permitting or construction of four specific LWECS in the State of Minnesota.

In its motion, AFCL specifically alleges two threatened irreparable injuries: (1) potential noise violations causing annoyance and making residents' sleep difficult; and (2) shadow flicker[3]

[3] "Shadow flicker" is the effect of the sun, when low on the horizon, shining through the rotating blades of a turbine, casting a moving shadow.

requiring installation and use of window blinds in daylight hours. AFCL's Mem. at 11. Because the projects have not yet been constructed, AFCL's complaint regarding noise is based on its assertion that the four wind projects "use improper inputs for modeling noise that understates the noise the project is expected to produce." Complaint ("Compl.") at ¶13; *see also* AFCL's Mem. at 2. As to shadow flicker, it is unclear whether AFCL is arguing that exposure to any shadow flicker constitutes irreparable harm, or whether it is arguing that the developers' modeling of shadow flicker is flawed—resulting in more shadow flicker than expected.

As a preliminary matter, these issues were litigated before the MPUC in the Freeborn Docket. Noise and shadow-flicker have been extensively modeled by the developer[4], and the MPUC has reviewed the studies and analyzed potential impacts to all landowners within proximity of the project—carefully considering AFCL's arguments regarding such. Based on that record, the MPUC determined that limiting shadow flicker to 30 hours *per* year for any residence, and requiring compliance with the Minnesota Pollution Control Agency's ("MPCA") noise standards would reasonably protect landowners.[5] To the extent AFCL is arguing that these conditions cause irreparable harm, AFCL's assertion is incorrect and unreasonable. As for the other projects, the MPUC has not issued any permits for them and parties will have an

[4] *See*, *e.g.*, Site Permit Amendment Application, Attachment E, Pre-Construction Noise Analysis for the proposed FreebornWind Farm (Aug. 20, 2019, Doc ID 20198-155331-04), Freeborn Docket, attached to the Declaration of Jeffrey Boman in Support of MPUC's Memorandum of Law Opposing Motion for Temporary Injunction ("Boman Dec."), Ex. 1; *see also* Site Permit Amendment Application, Attachment F, Final Report Freeborn Wind Farm Shadow Flicker Study (Aug. 20, 2019, Doc ID 20198-155331-04), Freeborn Docket, this 324 page report can be accessed at https://www.edockets.state.mn.us/; *see also* Compliance Filing Re: Section 7.2 Shadow Flicker Management Plan (July 14, 2020, Doc ID 20207-164893-01), Freeborn Docket, Boman Dec., Ex. 2.

[5] The permit condition limiting shadow flicker to 30 hours *per year* is consistent with Freeborn County's local ordinance, found at Freeborn County, Minn., Code of Ordinances § 26-56 (stating that shadow flicker should not exceed 30 hours per year).

opportunity to raise concerns about appropriate permit conditions in the proper forum—in front of the MPUC. Given the existence of permit conditions that protect landowners, AFCL fails to carry its burden to show the alleged harms are real or substantial.

However, even if AFCL could establish the threatened harm was real and substantial, the alleged harm certainly is not irreparable. AFCL's motion is based on the assertion that the developer's preconstruction *modeling* is incorrect. However, preconstruction modeling is simply a predictive exercise to anticipate actual operation. The MPUC maintains continuing jurisdiction over the project and, once constructed, the project must *actually comply* with the established permit conditions. For example, section 4.3 of the Freeborn Site Permit specifically states that, "[t]urbine operation shall be modified or turbines shall be removed from service if necessary to comply with . . . noise standards."[6] If the permit conditions for shadow flicker and noise are not satisfied, the Site Permit requires turbine operation to be curtailed, or turbines to be removed. Because AFCL's alleged harms, i.e. noise and shadow flicker, are all tied to operating turbines—and because turbines can always be curtailed—AFCL simply cannot establish irreparable harm.

In support of its assertion of irreparable harm, AFCL cites to the Bent Tree wind project, MPUC Docket ET-6657/-08-573. In fact, this docket cuts against AFCL's assertions of irreparable harm. There, upon review of a post-construction noise assessment identifying alleged non-compliance with MPCA noise standards, the MPUC issued a show cause order to the developer, ordering curtailment of the allegedly out-of-compliance turbines, and requiring the developer to show cause why the project's site permit should not be suspended or revoked for

[6] *See* Revised Site Permit, Section 4.3, Order Denying AFCL's Petitions and Amending Site Permit (March 31, 2020), Freeborn Docket, Attached to Affidavit of Jeffrey Boman in Support of MPUC's Motion to Dismiss Complaint, Ex. 4 at 23.

noncompliance with the MPCA noise standards.[7] The Bent Tree developer denied that there had been any exceedances caused by the wind turbines.

However, prior to the MPUC hearing the matter, the developer and the affected landowners entered into confidential settlement agreements transferring the residents' properties to the developer in exchange for monetary compensation (with no party making admissions of law and/or fact).[8] The fact that landowners chose to voluntarily enter into settlement agreements prior to the MPUC taking final action does not establish that there was an irreparable injury. To the contrary, the Bent Tree docket shows the MPUC taking action to enforce the permit conditions—including potentially shutting down the turbines—pursuant to its continuing jurisdiction. The landowners voluntarily availing themselves of a different legal remedy, i.e. money damages in exchange for transfer of their properties, does not establish that their complaints could not have been resolved through the permit enforcement process and the subsequent curtailment of any out-of-compliance turbines.

Finally, it should be noted that AFCL—a collection of landowners in Freeborn County—will not be harmed at all, much less irreparably, by projects permitted or constructed in other counties. As addressed above, AFCL's sole alleged harms are related to noise and shadows produced by operating turbines. AFCL's Mem. at 11. Despite the localized nature of these asserted harms, AFCL seeks to shut down further permitting and any eventual construction of three other wind farms spanning locations in Cottonwood, Murray, Redwood, Lincoln, and

[7] *See* Order to Show Cause, Requiring Further Review By The Department of Commerce, And Continuing Curtailment (March 23, 2018), MPUC Docket ET-6657/WS-08-573, Boman Dec., Ex. 3.

[8] *See* Order Dismissing Complaint And February 18, 2018 Motion With Conditions (June 5, 2018), MPUC Docket ET-6657/WS-08-573, Boman Dec., Ex. 4.

Jackson counties. The closest of these counties, Jackson, is approximately 100 miles from Freeborn County. It is an odd assertion, indeed, for landowners located hundreds of miles away to claim irreparable harm based on alleged noise they will not hear, and alleged shadows they will not see. Because AFCL has not made the requisite showing of irreparable harm necessary for the extraordinary remedy it requests in this case—the injunction of further permitting or construction of four specific LWECS—its motion should be denied.

III. THE REMAINING FACTORS ALSO WEIGH AGAINST A TEMPORARY INJUNCTION.

As noted above, if the court determines a plaintiff will suffer irreparable harm, then the court is to consider the five *Dahlberg* factors to determine whether a temporary injunction is warranted. Here, AFCL cannot establish that any of the remaining factors weigh in favor of granting its motion for temporary injunction. AFCL's motion should therefore be denied. Each of the *Dahlberg* factors are addressed, in turn, below.

A. The Nature and Relationship of the Parties

The first *Dahlberg* factor requires the court to consider the relationship of the parties. AFCL spends a considerable portion of its memorandum detailing what it describes as the "adversarial" nature of its relationship with the MPUC. Although AFCL ultimately concedes that the relationship of the parties is likely not a "significant factor in a decision regarding an injunction" in this case, *see* AFCL's Mem. at 7, AFCL's description of the parties' relationship warrants clarification because AFCL appears to fundamentally misunderstand the nature and role of the MPUC. The MPUC acts in a quasi-judicial capacity—maintaining neutrality and serving as an impartial decision-maker. *See* Minn. Stat. § 216A.05; Minn. R. 7845.0500. The MPUC is not an adversary to the parties that appear before it in administrative proceedings—just as this Court is not an adversary of the parties that appear before it. Rather, the MPUC considers the input of all participants and parties in its proceedings and makes impartial, informed decisions

based on the facts and the law. Often, in exercise of its delegated duties, the MPUC is asked to resolve difficult, complex, highly-disputed issues. When the MPUC does not grant a party its requested relief, such as AFCL in the Freeborn Docket, this does not somehow transform the relationship into an adversarial relationship. Even here, where AFCL has sued the MPUC in district court (part of our adversarial legal *system*), the MPUC's interest is merely in defending its lawfully issued orders, as well as the important public interests supported by such. Regardless, this factor does not weigh in favor of injunctive relief. If anything, the quasi-judicial nature of the MPUC and the statutes describing how to seek judicial review weigh against AFCL.

B. The Balance of Relative Harm to the Parties

The second *Dahlberg* factor examines the relative harm to the parties should a temporary injunction issue. As noted above, the party seeking an injunction must show irreparable harm. *Pac. Equip.* 519 N.W.2d at 915. In contrast, the party opposing the issuance of the injunction need only show substantial harm to bar the injunction. *Pac. Equip.* 519 N.W.2d at 915. In addition to balancing the relative harm to the *parties*, the Court may also consider the potential harm to the *public* in determining whether to grant a temporary injunction. *Metro. Sports Facilities Comm'n v. Minnesota Twins P'ship*, 638 N.W.2d 214, 219 (Minn. App. 2002). Here, the balance of relative harm to the parties and the public weigh heavily against the issuance of AFCL's requested injunction.

As addressed in Argument, Section II, AFCL has failed to show irreparable harm. It is undeniable, however, that there will be substantial harm to the projects and to the public if an injunction is issued. First, as admitted by AFCL, "the capital costs of the four wind projects are large and delay in operation could influence project eligibility for and the amount of the Production Tax Credit." AFCL Mem. at 11. The Production Tax Credit ("PTC") is a per-

kilowatt-hour (kWh) tax credit for electricity generated using qualified energy resources, such as wind.[9] The credit currently expires at the end of 2020, so that only projects that begin construction before the end of 2020 qualify for tax credits (which then can be claimed for the following 10 years of electricity generation). Failure to qualify for the PTC based on the requested injunction could have two potential debilitating effects. First, without the PTC, a project may no longer make financial sense, resulting in termination of the project. Second, even if the project moves forward, it would be at an increased cost which would ultimately be borne by Minnesota ratepayers in the form of higher electric rates.

Second, if these projects are delayed or fail, the harm is not limited to the developers and their shareholders and/or investors. Instead, local communities will be negatively impacted. Wind developments pay millions of dollars a year in local property taxes, helping to fund schools, roads, parks, libraries and emergency services.[10] By example, in 2018, Jackson County (the location of the proposed Three Waters wind project), received $2.2 million in property tax revenues from wind projects—making up 21 percent of the County's total property taxes collected.[11] The Freeborn project estimated that the project would pay a Wind Energy Production Tax to the local units of government an annual tax payment of approximately $9,400

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[9] See *The Renewable Electricity Production Tax Credit*, Congressional Research Service, (April 29, 2020), https://fas.org/sgp/crs/misc/R43453.pdf (last visited August 17, 2020).

[10] Andrew Twite, *How Local Governments Benefit From Wind and Solar.* Fresh Energy, (April 18, 2018), https://fresh-energy.org/how-local-governments-benefit-from-wind-and-solar/ (last visited August 17, 2020).

[11] *Id.*

per turbine per year.[12] Local participating landowners would also likely receive annual lease payments from the developers, payments which could be delayed or eliminated by a temporary injunction. The Plum Creek Permit Application summarized the economic benefits of LWECS to local communities as follows:

> LWECS projects have the potential to impact the socioeconomic conditions of an area in the short term through an influx of construction personnel expenditures, creation of construction jobs, construction material and other purchases from local businesses, and expenditures on temporary housing and other items by construction personnel. In the long term, LWECS projects provide beneficial impacts to the local tax base in the form of revenues from wind production tax payments and the development of a community fund. Additionally, permanent job creation or relocation of project personnel to the area for operation of a wind farm project could provide additional tax revenue in the form of income taxes and property taxes.[13]

The benefits of LWECs to local economies are substantial, and will be lessened or eliminated if AFCL's requested temporary injunction is issued.

Third, the injunction will negatively impact Minnesota's goals to providing clean, reliable, and affordable energy—goals which rely on new wind energy being developed and added to the system to meet Minnesota's energy needs. Utilities plan for future electrical generation through a process called Integrated Resource Planning ("IRP"). During this process, a utility, the MPUC, and stakeholders examine a utility's current and planned electricity generation for the next 15 years. Minn. R. 7843.0300 subp. 2. The MPUC reviews these plans to ensure utilities have sufficient generation resources to cost-effectively meet their customers' needs, while considering important policy factors, such as environmental and socioeconomic

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[12] See excerpt of Site Permit Application (June 14, 2017), at 66, Freeborn Docket, Boman Dec., Ex. 5.

[13] See excerpt of Site Permit Application (November 2019), at 76, Plum Creek Docket, Boman Dec., Ex. 6.

costs. *See* Minn. Stat. § 216B.2422; Minn. R. ch. 7843. Addition of renewable energy sources is a key component in Minnesota's goal of reducing carbon emissions.[14] At best, AFCL's requested injunction slows the addition of renewable resources onto Minnesota's electric grid. At worst, the injunction may result in projects being terminated—impacting utilities' resource planning and Minnesota's goals to provide clean, reliable, and affordable energy to the state.

Finally, the sole purpose of a temporary injunction is "to preserve the status quo until the matter can be adjudicated on its merits." *Morse v. City of Waterville*, 458 N.W.2d 728, 729 (Minn. App. 1990). But here, rather than preserve the status quo, AFCL asks the Court to issue an unprecedented temporary injunction that fundamentally changes the status quo—nullifying, on only a temporary injunction record, Minnesota's wind permitting laws which have been used to site wind projects for decades. The public interest is not served by a temporary injunction that seeks to dramatically change, rather than "merely . . . preserve the relative positions of the parties until a trial on the merits can be held." *Benisek v. Lamone*, 138 S. Ct. 1942, 1945 (2018).

C. The Likelihood of Success on the Merits

The third *Dahlberg* factor looks at the likelihood of success on the merits. AFCL makes an unpersuasive argument that it is likely to succeed on the merits because "MERA undeniably provides the right to sue state agencies for relief," AFCL's Mem. at 16, citing Minn. Stat § 116B.10 and *White Bear Lake Restoration Asso. ex rel State v Minnesota Department of Natural Resources*, 946 N.W.2d 373 (Minn. 2020). But the mere fact that AFCL may have the right to sue a state agency under MERA in some circumstances does not equate to a likelihood of success on the merits in this case. *See Dahlberg*, 137 N.W.2d at 321 (court evaluates whether one party will prevail on the merits when fact situation is viewed in light of established precedents fixing

[14] *See* Minn. Stat. § 216B.1691 (setting forth renewable energy objectives and standards for utilities).

the limits of equitable relief). As noted in the MPUC's Memorandum in Support of its Motion to Dismiss, AFCL cannot succeed on the merits because its claims in this Court are barred procedurally by the doctrines of collateral estoppel and ripeness. In fact, AFCL's memorandum actually supports the application of collateral estoppel—admitting that "the issues overlap," and detailing its substantial participation litigating the issues in front of the MPUC. AFCL's Mem. at 9. Because AFCL's Complaint must be dismissed for all of the reasons set forth in the MPUC's Memorandum of Law in Support of its Motion to Dismiss, fully incorporated herein, AFCL has failed to show that it will likely prevail in this litigation.

Even if AFCL's Complaint survives the Motion to Dismiss, AFCL has not shown that it is likely to prevail. Although AFCL continues to blindly assert that there is "no requirement of environmental review" for LWECS, this simply is not true. MEPA generally requires state agencies to prepare an EIS where there is potential for significant environmental effects resulting from major government action. Minn. Stat. § 116D.04, subd. 2a(a). However, through Minn. Stat. § 116D.04, subd. 4a, the Minnesota Legislature has authorized the Environmental Quality Board ("EQB") to provide alternative methods of environmental review besides an EIS. Minn. R. 7854.0500 provides just such an alternative for LWECS. This rule directs the MPUC to analyze the environmental impacts of the proposed LWECS on eighteen separate substantive areas. 7854.0500, subp. 7. The rule states that the analysis of these environmental impacts "satisfies the environmental review requirements of chapter 4410, parts 7849.1000 to 7849.2100, and Minnesota Statutes, chapter 116D" and that "*[n]o environmental assessment worksheet or environmental impact statement shall be required on a proposed LWECS project.*" Minn. R. 7854.0500, subp. 7. (emphasis added).

AFCL argues that this process is not "alternative review," because it was never specifically declared to be so by the EQB. This argument is without merit. MEPA allows the EQB provide alternative methods of environmental review besides an EIS. Here, the EQB promulgated rules detailing how environmental review would proceed for LWECS, and specifically stating that *no environmental assessment worksheet or environmental impact statement shall be required on a proposed LWECS project.* Having expressly and unequivocally followed the process for establishing alternative environmental review, AFCL cannot seriously argue that Minn. R. 7854.0500, subp. 7 is something other than a duly authorized form of alternative environmental review.[15]

D. Public Policy Considerations

Under the fourth *Dahlberg* factor, the court examines "whether there have been legislative expressions which manifest a public policy on the subject." *Dahlberg Bros*., 137 N.W.2d at 324. Here, Minnesota public policy mandates support for renewable energy sources and weighs heavily against the issuance of the injunction—which seeks to halt important renewable energy projects from moving forward in the permitting process. In fact, AFCL concedes the public policy support for renewable energy, stating that "the legislature has been clear in establishing public policy favoring 'renewable energy,' going back to 1994, when the legislature initially directed that wind generation be built as part of the first 'Prairie Island' bill." AFCL Mem. at 16.

Moreover, Minnesota's 2007 Next Generation Energy Act, Minn. Stat. Ch. 216H, mandates significant reductions in greenhouse gases across all sectors. Specifically, the act sets

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[15] While Minn. R. Chapter 7854 is currently organized under the MPUC's authority, that chapter was originally promulgated by the EQB itself. The authority for LWECS siting, and the corresponding rules, were transferred to the MPUC in 2005.

the goal of the state to reduce greenhouse gas emission to a level at least 15 percent below 2005 levels by 2015, to a level at least 30 percent below 2005 levels by 2025, and to a level at least 80 percent below 2005 levels by 2050. The development of renewable energy, including wind, has been a key component of meeting the electrical sector's emission goals under the Next Generation Energy Act, and will play an important role moving forward.[16]

Legislative support for renewable energy is also expressed in several statutes applicable to the MPUC. Specifically, when setting just and reasonable rates for utility service, the MPUC is specifically directed, "to the maximum reasonable extent . . . set rates to encourage energy conservation and *renewable energy use*." Minn. Stat. § 216B.03 (emphasis added.) Furthermore, Minn. Stat. § 216C.05 declares that the state "has a vital interest in providing for. . .the development of renewable energy resources wherever possible." To effectuate this vital interest, Minn. Stat. § 216C.05, subd. 2(3), requires that 25 percent of the total energy used in the state to be derived from renewable energy resources by the year 2025. Finally, Minn. Stat. § 216B.1691 sets forth renewable energy objectives for utilities, requiring every public utility to generate or procure sufficient electricity generated by eligible renewable energy sources to provide its retail customers so that at least 20 percent of its total retail electric sales are generate by renewable sources by 2020, and at least 25 percent by 2025. These Legislative mandates weigh heavily against the requested injunction.

Finally, it should be noted that AFCL's requested injunction seeks not only to enjoin projects that have been permitted by the MPUC and are set to begin construction, but also seeks to prevent the MPUC from *even considering* whether to issue permits for three projects. The

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[16] Minnesota Pollution Control Agency and Minnesota Department of Commerce, "Greenhouse gas emissions in Minnesota: 1990-2016,"(January 2019), https://www.pca.state.mn.us/sites/default/files/lraq-2sy19.pdf (last visited August 17, 2020).

MPUC has been delegated authority from the Legislature to permit LWECS, and the MPUC is statutorily directed to make a final decision on an application for site permit within 180 days after acceptance by the MPUC. Minn. Stat. § 216F.04. The public interest is not served by a temporary injunction which halts the MPUC from exercising these important duties.

E. Any Administrative Burden Involving Judicial Supervision and Enforcement.

Under the fifth *Dahlberg* factor, the court considers whether it will face administrative burdens, in the form of judicial supervision and enforcement, if the injunction is issued. Although this Court need not supervise the MPUC and the parties should an injunction issue, this factor is, at most, neutral and does not weigh in either direction.

CONCLUSION

Because AFCL has failed to exhaust administrative remedies and has failed to demonstrate that it will suffer irreparable harm in absence of its requested injunctive relief, and because the remaining relevant factors the Court must consider weigh against the issuance of an injunction, AFCL's motion should be denied. The MPUC respectfully request that the Court deny Petitioner's motion for a temporary injunction.

Dated: August 19, 2020

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MINN. STAT. § 549.211 ACKNOWLEDGMENT

The party on whose behalf the attached document is served acknowledges through its undersigned counsel that sanctions, including reasonable attorney fees and other expenses, may be awarded to the opposite party or parties pursuant to Minn. Stat. § 549.211.

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