

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

CASE TYPE: Other Civil

Association of Freeborn County Landowners,
Plaintiff,

Judge: Hon. Sara Grewing
Court File No. 62-CV-20-3674

vs.

Minnesota Public Utilities Commission,
Defendant.

**MEMORANDUM OF LAW IN
SUPPORT OF DEFENDANT
MINNESOTA PUBLIC
UTILITIES COMMISSION'S
MOTION TO DISMISS**

INTRODUCTION

Plaintiff the Association of Freeborn County Landowners (“AFCL”) brings this action under the Minnesota Environmental Rights Act (“MERA”) against the Minnesota Public Utilities Commission (“MPUC” or “Commission”). AFCL alleges that the MPUC failed to conduct environmental review when permitting various wind projects, that the MPUC has failed to promulgate wind specific siting rules and standards, and that the MPUC excluded public participation in administrative proceedings related to wind projects. AFCL seeks to enjoin further permitting or construction of four large wind energy projects in the State of Minnesota.

As explained below, AFCL’s claims should be dismissed for at least seven reasons: (1) AFCL’s claims are barred by collateral estoppel; (2) AFCL brings claims that are not ripe; (3) AFCL cannot in this lawsuit duplicate its claims currently pending on appeal; (4) AFCL’s claim of inadequate environmental review must be brought under a different statutory scheme in a different court; (5) AFCL otherwise fails to state a claim under MEPA related to alleged inadequate public participation; (6) AFCL’s MERA claims regarding inadequate environmental

review fail as a matter of law; and (7) the decision on whether to commence a rulemaking is appropriately left to the expertise and discretion of the MPUC. For these reasons, MPUC respectfully requests that the Court dismiss AFCL’s Complaint in its entirety.

BACKGROUND

I. MPUC AUTHORITY GENERALLY

The Legislature has delegated authority to the MPUC to regulate electric, gas, and telecommunication service, and to review applications for siting and routing permits of large energy facilities. *See generally* Minn. Stat. Chs. 216-216H. The MPUC is comprised of five experienced Commissioners who are appointed by the Governor with the advice and consent of the Senate. Minn. Stat. § 216A.03, sub. 1. The Commission is supported by technical staff with expertise in regulatory matters, including law, economics, finance, and energy permitting. Minn. Stat. § 216A.04.¹ In exercising its delegated authority, the MPUC acts in both quasi-judicial and quasi-legislative capacities. As a quasi-judicial body, it engages in traditional fact-finding and resolves disputed claims. As a quasi-legislative body, MPUC applies its institutional expertise and judgment to resolve issues that turn on both factual findings and policy judgments. *See* Minn. Stat. § 216A.05. Decisions of the MPUC are subject to judicial review through certiorari appeal. Minn. Stat. § 216B.27; Minn. Stat. § 216B.52; Minn. Stat. § 14.63.

II. SITING AND PERMITTING OF LARGE WIND ENERGY CONVERSION SYSTEMS

As part of its delegated duties, the MPUC is the exclusive permitting authority for Large Wind Energy Conversion Systems (“LWECS”), colloquially known as wind farms. Minn. Stat. §§ 216F.01, 04, .07, .08. The MPUC permits LWECS pursuant to Minn. Stat. Ch. 216F and

¹ *See also* <https://mn.gov/puc/about-us/our-team/> (last viewed Aug. 5, 2020).

Minn. R. Ch. 7854. Pursuant to statute, LWECS must be sited in an orderly manner compatible with environmental preservation, sustainable development, and the efficient use of resources. Minn. Stat. § 216F.03. When deciding whether to issue a site permit for a LWECS, the MPUC considers the factors set forth in Minn. Stat. § 216E.03, subd. 7, which include various environmental, economic, and land use considerations. *See* Minn. Stat. § 216F.02, sub. a (exempting LWECS from the requirements of chapter 216E, which applies to other types of large energy facilities, but specifying specific sections that do apply, including Minn. Stat. § 216E.03, subd. 7). Moreover, permit applicants must include, and the MPUC must subsequently analyze, the project’s potential consequences, proposed mitigation measures, and any environmental harms that cannot be avoided, with respect to eighteen specific enumerated categories. Minn. R. 7854.0500, subp. 7.² After review and analysis of the required considerations and potential environmental impacts of the proposed project, the MPUC has the authority to establish reasonable permit conditions for protecting the environment, enhancing sustainable development, and promoting the efficient use of resources. Minn. Stat. § 216F.04(d); Minn. R. 7854.1000, subp. 4.

III. ENVIRONMENTAL REVIEW OF LWECS

In general, the Minnesota Environmental Protection Act (“MEPA”), Minn. Stat. §§ 116D *et seq*, requires state agencies to prepare an Environmental Impact Statement (“EIS”) “where

² These factors include: (A) demographics, including people, homes, and businesses; (B) noise; (C) visual impacts; (D) public services and infrastructure; (E) cultural and archaeological impacts; (F) recreational resources; (G) public health and safety, including air traffic, electromagnetic fields, and security and traffic; (H) hazardous materials; (I) land-based economics, including agriculture, forestry, and mining; (J) tourism and community benefits; (K) topography; (L) soils; (M) geologic and groundwater resources; (N) surface water and floodplain resources; (O) wetlands; (P) vegetation; (Q) wildlife; and (R) rare and unique natural resources.

there is potential for significant environmental effects resulting from any major governmental action.” Minn. Stat. § 116D.04, subd. 2a(a). An EIS is an analytical tool that “describes the proposed action in detail, analyzes its significant environmental impacts, discusses appropriate alternatives to the proposed action and their impacts, and explores methods by which adverse environmental impacts of an action could be mitigated.” *Id.* If an agency is unsure whether an EIS is needed, it can prepare an Environmental Assessment Worksheet (“EAW”), which is “a brief document which is designed to set out the basic facts necessary to determine whether an [EIS] is required for a proposed action.” *Id.* at subd. 1a(d).

However, through Minn. Stat. § 116D.04, subd. 4a, the Legislature has authorized the EQB to provide alternative methods of environmental review besides an EIS. LWECS are one of the projects for which an alternative form of environmental review exists. Specifically, the MPUC’s environmental review of LWECS is governed by Minn. R. 7854.0500. 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). The MPUC follows this duly authorized and EQB approved alternative environmental review when permitting and siting LWECS.

IV. SPECIFIC LWECS PROCEEDINGS BEFORE THE MPUC

In this lawsuit, AFCL seeks to enjoin the MPUC from permitting (and any subsequent construction) of four LWECS: (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”).³ A brief overview of these MPUC dockets, including their current procedural posture, is helpful in understanding the legal issues presented in the current lawsuit. An overview of the MPUC’s recent rulemaking docket, MPUC docket E-999/R-18-518 (“LWECS Rulemaking Docket”), where it addressed whether to amend the rules governing site permits for LWECS, is also helpful. These five dockets are addressed, in turn, below.

A. Freeborn Wind Project (MPUC Docket IP-6946/WS-17-410)

The Freeborn Wind Energy LLC’s (“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 2017.⁴ 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 *Section I of the Argument* below, AFCL raised the same arguments and litigated the same issues in front of the MPUC that now form the basis of the instant Complaint.

³ The Commission dockets are public record and may be accessed here: <https://www.edockets.state.mn.us/>. In ruling on a motion to dismiss, a court may consider documents attached to or referenced in the complaint, as well as public records, without converting a motion to dismiss into a motion for summary judgment. *N. States Power Co. v. Metropolitan Council*, 684 N.W.2d 485, 490 (Minn. 2004); *In re Hennepin Cty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 497 (Minn. 1995). The Commission dockets discussed herein are referenced in AFCL’s Complaint and contain public documents that are central to the claims alleged. Accordingly, the Court may properly consider the documents attached to the Affidavit of Jeffrey K. Boman (“Boman Aff.”) upon this Motion to Dismiss.

⁴ See Order Issuing Site Permit (December 19, 2018), at 1, Freeborn Docket, Boman Aff., Ex. 1.

On December 19, 2018, after oral argument in front of the MPUC and consideration of the record, including the report of an Administrative Law Judge (“ALJ”)⁵, and relevant testimony, evidence, and filings submitted by the parties, the MPUC issued a site permit for the Freeborn project. Subsequently, several parties, including AFCL, moved for reconsideration and/or clarification of the permit. On May 10, 2019, the MPUC denied the petitions for reconsideration and amended the permit on other grounds.⁶ AFCL again moved for reconsideration. After denial of the AFCL’s second petition for reconsideration, AFCL appealed the MPUC’s May 10, 2019 order amending the site permit to the Minnesota Court of Appeals.⁷

The A19-1195 appeal was subsequently stayed while additional permit amendments requested by the permit holder were being considered by the MPUC. On December 19, 2019, the Commission met and considered Xcel’s requested amendments.⁸ Prior to the Commission issuing its written order, AFCL filed a petition with the EQB for an EAW related to the project, which the EQB referred to the MPUC as the responsible government agency. The MPUC met

⁵ The ALJ held a public hearing on February 20, 2018, and two days of evidentiary hearings on February 21 and 22, 2018. In the ALJ’s 166-page Findings of Fact, Conclusions of Law, and Recommendation, the ALJ made detailed findings of fact relative to the environmental factors in Minn. R. 7854.0500, subp. 7. Contrary to Plaintiff’s assertion, the ALJ recommended that the MPUC *either* deny the application *or* provide the applicant a period of time to demonstrate how it would comply with the noise standards throughout the footprint of the wind project. *See* ALJ Report (May 14, 2018), Freeborn Docket, Boman Aff., Ex. 2.

⁶ *See* Order Amending Site Permit (May 10, 2019), Freeborn Docket, Boman Aff., Ex. 3.

⁷ *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).

⁸ *See* Order Denying AFCL’s Petitions and Amending Site Permit (March 31, 2020), Freeborn Docket, Boman Aff., Ex. 4.

on February 6, 2020 and denied AFCL's request for an EAW on the record. On March 31, 2020, the PUC issued its written order denying AFCL's Petition for an EAW and granting Xcel's requested permit amendments. On July 10, 2020, AFCL filed an appeal of the MPUC's March 31, 2020 Order with the Minnesota Court of Appeals.⁹ On July 16, 2020, the Court of Appeals dissolved the stay of A19-1195 and consolidated that appeal with A20-0947. AFCL's challenge to the Freeborn wind project is currently pending in front of the Court of Appeals and is proceeding under the applicable appellate deadlines.

B. Plum Creek Wind Project (MPUC Docket IP-6997/WS-18-700); Buffalo Ridge Wind Project (MPUC Docket IP-7006/WS-19-394); Three Waters Wind Project (MPUC Docket IP-7002/WS-19-576)

The other three wind projects Plaintiff seeks to enjoin are each active projects at various stages of adjudication before the MPUC. On January 30, 2020, the MPUC referred the Plum Creek matter to the Office of Administrative Hearings ("OAH") for contested case proceedings pursuant to Chapter 14, requesting that the ALJ prepare a report setting forth findings of fact, conclusions of law, and a recommendation on the merits of the proposed project.¹⁰ The ALJ's report and recommendation in Plum Creek is expected in April of 2021, with the matter returning to the jurisdiction of the MPUC shortly thereafter for consideration of the merits of the project.¹¹

⁹ 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.* A20-0947 (Minn. App.) (filed July 10, 2020).

¹⁰ See Order Accepting Applications, Establishing Procedural Framework, Varying Rules, and Notice of And Order for Hearing (January 30, 2020), Plum Creek docket, Boman Aff., Ex. 5.

¹¹ See First Prehearing Order, (July 23, 2020), Plum Creek docket, Boman Aff., Ex. 6.

Similarly, in both the Buffalo Ridge and Three Waters dockets, the MPUC has referred the matters to the OAH to conduct public hearings and prepare reports setting forth findings of fact, conclusions of law, and recommendations on the merits of the site permit applications, and provide recommendations, if any, on conditions and provisions of the proposed site permits.¹² The MPUC anticipates making a final decision regarding its review of the Buffalo Ridge site permit in late November or early December 2020.¹³ The procedural schedule for the Three Waters Project is currently suspended due to a change in ownership.¹⁴

In each of these three cases, AFCL's undersigned counsel filed a letter in the dockets objecting to the specific inputs utilized in the noise modeling studies.¹⁵ However, this letter appears to be filed in the undersigned attorney's personal capacity rather than on behalf of AFCL or any other party. AFCL has not sought to intervene in any of these three dockets. 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.

¹² See Order Accepting Applications, Establishing Procedural Framework, and Varying Rules, (November 12, 2019), Buffalo Ridge docket, Boman Aff., Ex. 7.; See Order Accepting Application, Establishing Procedural Framework, and Varying Rules, (December 23, 2019), Three Waters docket, Boman Aff. Ex. 8.

¹³ See Revised Scheduling Order, (June 10, 2020), Buffalo Ridge docket, Boman Aff., Ex. 9.

¹⁴ See Second Continuance Order, (July 23, 2020), Three Waters docket, Boman Aff., Ex. 10.

¹⁵ See Letter from Carol Overland Re Improper Ground Factors (December 18, 2019), Plum Creek docket; Buffalo Ridge docket, Three Waters docket, Boman Aff., Ex. 11.

C. Petition for Rulemaking (MPUC Docket E-999/R-18-518)

On July 31, 2018, Goodhue Wind Truth, a citizen group that had previously opposed construction of a LWECS in Goodhue County¹⁶, filed a Petition for Rulemaking under Minn. Stat. § 14.09 with the MPUC, requesting that the MPUC initiate a rulemaking to amend Minn. R. Ch. 7854, the rules governing the permitting of LWECS. The petition was based on the same arguments advanced in this lawsuit—that the MPUC had failed to promulgate siting criteria and that there was no requirement for environmental review for LWECS.¹⁷ The MPUC issued a notice seeking comments on the petition, and subsequently received robust comments from numerous stakeholders, including governmental agencies, utilities, wind developers, environmental advocacy groups, and citizens.¹⁸ Many industry wind advocates, wind developers, and environmental organizations opposed the proposed rulemaking.

¹⁶ See *In re AWA Goodhue Wind, LLC*, No. A11-2229, 2012 WL 2369004, at *1 (Minn. Ct. App. June 25, 2012). Goodhue Wind Truth was represented by AFCL's current counsel in this lawsuit, Carol Overland.

¹⁷ See Petition for Rulemaking for Wind Turbine Siting and Standards, Minn. R. Ch. 7854, (July 30, 2018), LWECS Rulemaking docket, Boman Aff., Ex. 12.

¹⁸ Specifically, the Commission received comments on the petition from: Dodge County Concerned Citizens; Kristi Rosenquist; Goodhue Wind Truth; Rochelle Nygaard; Marie McNamara; Dorene Hansen; Xcel Energy; Wind on the Wires; the Department of Commerce, Energy Environmental Review and Analysis staff (EERA); Clean Energy Economy Minnesota; Geronimo Energy, LLC (Geronimo Energy); EDF Renewables; Sean Gaston; Invenergy Wind Development North America LLC (Invenergy); Minnesota Center for Environmental Advocacy (MCEA); and Avangrid Renewables, LLC (Avangrid).

The comments of the Minnesota Center for Environmental Advocacy’s (“MCEA”) comments are illustrative.¹⁹ First, MCEA cautioned reopening a rulemaking based solely on one party’s dissatisfaction with current rules. Second, MCEA explained that Goodhue Truth’s claim that “there are no rules regarding criteria for siting LWECS” was simply not true. MCEA explained that the EQB published rules for the siting of LWECS in 2002, which are now housed in Minnesota Rules chapter 7854. Third, to the extent Goodhue Truth was attempting to declare the applicable rules invalid, MCEA explained that the siting criteria contained in the rule were adopted from and consistent with statutes. Fourth, MCEA explained that again, contrary to Goodhue Truth’s assertion, there are requirements for environmental review of LWECS contained in Minn. R. 7854.0500. Fifth, MCEA noted that Goodhue Truth had not alleged new evidence, technological developments, or unaddressed changes to the existing regulatory framework such that re-opening a rulemaking at this time was warranted. Finally, MCEA explained that to the extent Goodhue Truth believed the existing regulatory law was being misapplied, such were the grounds for a legal challenge to specific MPUC siting decisions, rather than a rulemaking.

On September 26, 2018, the MPUC denied the rulemaking petition.²⁰ The MPUC determined that it was not the correct time to consider possible amendments to its wind siting rules in Chapter 7854. The MPUC noted it had a current open and ongoing rulemaking proceeding concerning power plant siting, and that the outcome of that rulemaking would inform

¹⁹ Comments of the MCEA, (August 24, 2018), LWECS Rulemaking docket, Boman Aff., Ex. 13.

²⁰ Order Denying Petition (September 26, 2018), LWECS Rulemaking docket, Boman Aff., Ex. 14.

any future rulemaking proceedings on the Commission’s other siting rules. Moreover, the MPUC noted that case-by-case adjudication in individual cases provided a better forum for identifying and addressing project-specific issues.

V. THE CURRENT COMPLAINT

On June 10, 2020, AFCL filed the instant Complaint seeking declaratory and equitable relief against the MPUC, asserting three claims under MERA. (*See generally* Complaint (“Compl.”)) First, AFCL asserts that the MPUC has failed to conduct environmental review and has failed to require the preparation of an EIS when siting LWECS. (*Id.* at ¶¶ 7, 28-44.) Second, AFCL alleges that the MPUC has failed to develop rules regarding siting and environmental review of LWECS as directed by Minn. Stat. § 216F.05. (*Id.* at ¶¶ 45-57.) Third, AFCL alleges that the MPUC excluded public participation during administrative proceedings pertaining to wind projects. (*Id.* at ¶¶ 58-73.) Although AFCL attempts to frame its Complaint as challenges to general MPUC practices, AFCL seeks to enjoin four specific LWECS 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. (*Id.* at ¶¶ 1.)

STANDARD ON MOTION TO DISMISS

Minnesota Rule of Civil Procedure 12.02(e) provides that a complaint may be dismissed “for failure to state a claim upon which relief can be granted.” Dismissal of a claim is appropriate where it is clear from the face of the complaint that the claim is legally deficient. *N. States Power Co. v. Franklin*, 122 N.W.2d 26, 29 (Minn. 1963). In evaluating a motion to dismiss, the Court “accept[s] the facts alleged in the complaint as true and construe all reasonable inferences in favor of the nonmoving party.” *Id.* at 606. Unsupported legal

conclusions are not accepted as true on a motion to dismiss. *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010). Furthermore, “[a] plaintiff must provide more than labels and conclusions” to survive a motion to dismiss. *Id.* Moreover, an action must be dismissed if the court lacks subject matter jurisdiction. Minn. R. Civ. P. 12.08(c); 12.02(a). Whether the district court has subject matter jurisdiction over an action is a question of law. *See, e.g., World Championship Fighting, Inc. v. Janos*, 609 N.W.2d 263, 264 (Minn. App. 2000). In ruling on a motion to dismiss, a court may consider documents attached to or referenced in the complaint, as well as public records, without converting a motion to dismiss into a motion for summary judgment. *N. States Power Co.*, 684 N.W.2d at 490; *In re Hennepin Cty. 1986 Recycling Bond Litig.*, 540 N.W.2d at 497.

ARGUMENT

I. AFCL’S COMPLAINT IS BARRED BY COLLATERAL ESTOPPEL WITH RESPECT TO THE FREEBORN WIND PROJECT.

Plaintiff’s three MERA claims in this lawsuit relative to the Freeborn project are barred by the doctrine of collateral estoppel. Collateral estoppel, or issue preclusion, precludes litigants from raising issues that are identical with issues previously litigated. *Zander v. State*, 703 N.W.2d 845, 854 (Minn. App. 2005). The purpose of collateral estoppel is to prevent needless consideration of matters decided in earlier litigation. *Saint Paul Fire & Marine Ins. Co. v. Cent. Nat. Ins. Co. of Omaha*, 480 N.W.2d 681, 684 (Minn. App. 1992). Collateral estoppel may be applied to an agency’s quasi-judicial decisions. *Graham v. Special Sch. Dist. No. 1*, 472 N.W.2d 114, 116 (Minn. 1991); Collateral estoppel bars MERA claims brought in district court when the issues have been previously adjudicated by an administrative agency. *See State ex rel. Friends of Riverfront v. City of Minneapolis*, 751 N.W.2d 586, 594

(Minn. App. 2008).

Five elements must be satisfied for collateral estoppel to apply to an agency decision: (1) the issue to be precluded must be identical to the issue raised in the prior agency adjudication; (2) the issue must have been necessary to the agency adjudication and properly before the agency; (3) the agency determination must be a final adjudication subject to judicial review; (4) the estopped party was a party or in privity with a party to the prior agency determination; and (5) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue. *Graham*, 472 N.W.2d at 116. Here, all five elements of collateral estoppel are satisfied, operating to bar AFCL's current lawsuit.

A. The issues to be precluded are identical to the issues raised in the prior agency adjudication.

As addressed *supra* in Background, Section IV, AFCL raises three issues in this lawsuit. As addressed below, each of these issues are identical to the issues raised and adjudicated in the Freeborn Docket. Each adjudicated issue is addressed, in turn, below.

1. Alleged Failure to Conduct Environmental Review and Order an EIS

AFCL's first claim in this case is that the MPUC failed to conduct environmental review. Specifically, AFCL argues that an EIS is required by MEPA, and that the MPUC erred in not requiring such. This specific issue was raised and adjudicated in the Freeborn docket. In its initial brief filed at the OAH, AFCL cited to the provision of MEPA that requires an EIS (Minn. Stat. § 116D.04, subd. 2a) and argued that LWECS were not exempted from environmental review.²¹ The ALJ, however, rejected any notion that additional environmental review

²¹ AFCL Initial Brief (March 20, 2018) at 1-8, Freeborn docket, Boman Aff., Ex. 15.

documents were needed for permitting LWECS, citing to Minn. R. 7854.0500, subp. 7, and specifically holding that:

The Commission's rules require the applicant to provide information regarding any potential impacts of the proposed project, potential mitigation measures and any adverse effects that cannot be avoided as part of the application process. *No separate environmental review document is required for an LWECS project.*²²

(emphasis added). On December 19, 2018, after review of the ALJ's report and the submission of the parties, the MPUC analyzed the environmental factors contained in Minn. R. Ch. 7854 and approved the permit.²³

As described *supra* in Background, Section IV(A), AFCL also filed a petition with the EQB for an EAW pertaining to the Freeborn project, which was referred to the MPUC as the responsible government agency. In its petition, AFCL argued that a mandatory EAW and EIS was required under MEPA—the exact issue raised in the current lawsuit.²⁴ The MPUC met on February 6, 2020 and verbally denied AFCL's request for an EAW. On March 31, 2020, the PUC issued its written order denying AFCL's Petition for an EAW. The MPUC found that environmental review for LWECS was governed by Minn. R. 7854 and rejected AFCL's request for additional environmental review.

AFCL subsequently appealed the MPUC's March 31, 2020 order. In its Statement of the Case, AFCL lists the failure to perform environmental review and denial of its Petition for EAW

²² ALJ Report (May 14, 2018) at 8, Freeborn Docket, Boman Aff., Ex. 2.

²³ See Order Issuing Site Permit (December 19, 2018), at 1, Freeborn Docket, Boman Aff., Ex. 1.

²⁴ Petition for Environmental Assessment Worksheet (January 1, 2020), Freeborn Docket, Boman Aff., Ex. 16.

as issues to be raised on the pending appeal.²⁵ Accordingly, AFCL’s claim in this case regarding lack of environmental review is identical to the issue raised and adjudicated before the MPUC.

2. Systemic Failure to Develop Rules Regarding Siting and Environmental Review.

AFCL’s second claim is that the MPUC failed to develop rules regarding siting and environmental review of LWECS as directed by Minn. Stat. § 216F.05. (Compl. ¶¶ 45-57.) This issue was also raised and adjudicated in the Freeborn Docket. In its initial brief filed at the OAH, AFCL raised this specific issue stating:

The State of Minnesota has systemic flaws in its wind siting process and mandated rules have not been promulgated, resulting in projects sited with inadequate and incomplete consideration of criteria, siting which violates permit conditions, puts landowners and residents at risk, and steals landowners’ use and enjoyment of their property. The Commission must address these systemic problems in issuing any wind permits, and must determine corrective action for previously permitted projects.²⁶

As in this lawsuit, AFCL specifically argued that Minn. Stat. § 216F.05 required the promulgation of rules regarding siting and environmental review of LWECS, which it argued had not been done. *Id.* at 5. This argument was not accepted by the ALJ, and the ALJ applied the applicable rules pertaining to permitting and environmental review of LWECS found in Minn. R. 7854.²⁷ AFCL continued to raise its objections to what it characterized as “systemic flaws in the wind siting process” in its exceptions to the to the ALJ report.²⁸ After the MPUC issued the initial site permit, AFCL sought reconsideration, continuing to argue that “there are no

²⁵ Relator’s Statement of the Case (July 10, 2020), A20-0947, Boman Aff., Ex. 17.

²⁶ AFCL Initial Brief (March 20, 2018), at 1, Freeborn docket, Boman Aff., Ex. 15.

²⁷ ALJ Report (May 14, 2018), at 19, Freeborn docket, Boman Aff., Ex. 2.

²⁸ AFCL’s Exceptions to ALJ Report (June 8, 2018), at 2, Freeborn docket, Boman Aff., Ex. 18.

statutory siting criteria or rules for siting”—the exact issue it seeks to litigate again in this lawsuit.²⁹ The MPUC denied AFCL’s request for reconsideration. AFCL did not timely appeal the MPUC’s initial site permit order. Given the above, AFCL’s claim alleging a systemic failure to promulgate rules under Minn. Stat. § 216F.05 in this case is identical to the issue raised and adjudicated before the MPUC.

3. Alleged Exclusion of Public Participation

AFCL’s third claim is that the MPUC excluded public participation during the administrative proceedings in violation of Minn. Stat. § 216E.08. (Compl. ¶¶ 58-73.) This issue was also raised and adjudicated in the Freeborn docket. AFCL first raised issues pertaining to public participation under Minn. Stat. § 216E.08, when it petitioned the MPUC to appoint advisory and scientific task forces.³⁰ The MPUC denied AFCL’s request, finding that contested case proceedings would provide a full and fair opportunity for all parties to develop the issues raised.³¹ After the MPUC issued the initial site permit, AFCL sought reconsideration, again arguing that the MPUC removed the project from public scrutiny and process in violation of Minn. Stat. 216E.08.³² The MPUC denied AFCL’s request for reconsideration. As noted above, AFCL appealed the MPUC’s May 10, 2019 and March 31, 2020 Orders to the Minnesota Court

²⁹ See Petition for Reconsideration (January 8, 2019), at 6, Freeborn docket, Boman Aff., Ex. 19.

³⁰ Motion of AFCL for Appointment of an Advisory Task Force and A Science Advisory Task Force (September 20, 2017), Freeborn Docket, Boman Aff., Ex. 20.

³¹ Order Denying Petition for Advisory Task Forces (December 22, 2017), Freeborn Docket, Boman Aff., Ex. 21.

³² AFCL’s Petition for Reconsideration (January 8, 2019), at 12, Freeborn Docket, Boman Aff., Ex. 19.

of Appeals. In its Statements of the Case, AFCL raises multiple issues on appeal related to its allegations of lack of public participation, specifically framing the issues on appeal as:

- 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.
- Whether withholding and failure to offer public participation opportunities is a violation of the Commission’s public participation and public interest mandate of Minn. Stat. §216E.08, Minn. R. 7854.0600, and the Order and Initial Permit (December 19, 2018 Site Permit, FoF 243 and 244 (requiring a hearing and summary report)).
- Where the Commission is faced with robust public participation, intervention, and party and public testimony to extent allowed, showing that the community has raised material issues of fact and does not consent to the project encroaching on the community, is issuance of a site permit arbitrary and capricious and legal error in violation of the Power Plant Siting Act, Minn. Stat. §216E.08, Minn. Ch. §216F, and Minn. R. Ch. 7854.³³

The claims regarding lack of public participation, adjudicated in front of the MPUC and expressly included in AFCL’s pending appeal, are identical to those raised in this lawsuit.

B. The issue was necessary to the Commission’s adjudication and properly before the MPUC.

As addressed *supra* in Background, Section I, the MPUC is the exclusive permitting authority for LWECS. Minn. Stat. §§ 216F.01, 04, .07, .08. The adjudicated issues, all related to substantive or procedural objections to the LWECS permit issued by the MPUC, were properly within the MPUC’s authority and jurisdiction. By law, the MPUC must analyze the project’s potential consequences, proposed mitigation measures, and any environmental harms that cannot be avoided. After repeatedly raising the claims in AFCL’s current Complaint before the MPUC

³³ Relator’s Statement of the Case (July 10, 2020), A20-0947, at 6, Boman Aff., Ex. 17; Relator’s Statement of the Case (July 30, 2019), at 5, Boman Aff., Ex. 22.

and requesting that the MPUC grant them relief, AFCL cannot now argue those issues were not properly before the MPUC. Accordingly, the second element of collateral estoppel is satisfied.

C. The agency determination was a final adjudication subject to judicial review.

The MPUC has issued several final orders (for purposes of judicial review) in the Freeborn Wind docket, including the *Order Issuing Site Permit and Taking Other Action (December 19, 2018)*; *Order Amending Site Permit (May 10, 2019)*; *Order Denying AFCL's Petitions and Amending Site Permit, (March 31, 2020)*. Certiorari appeal of MPUC decisions is authorized by Minn. Stat. §§ 216B.27, 216B.52, 14.63. Not only were all the MPUC orders subject to judicial review, but AFCL has, in fact, appealed the May 10, 2019 and March 31, 2020 orders, with appeals of these orders currently pending at the Court of Appeals. Although subject to judicial review, AFCL failed to timely appeal the MPUC's December 19, 2018 order.³⁴ The third element of collateral estoppel is therefore satisfied.

D. AFCL was a party to the prior agency determination.

AFCL was a formal party to the prior adjudication in the Freeborn Wind docket. Specifically, AFCL filed a Notice of Appearance and Petition to Intervene in the contested case proceedings pursuant to Minn. R. 1405.0900.³⁵ In its petition, AFCL asserted that its members' legal rights, duties and their privileges would be determined or affected by the contested case. The petition was not opposed by any party, and the ALJ granted the petition to intervene

³⁴ Despite the limited scope of the appeals, AFCL raises numerous issues in its Statements of the Case that appear to be outside of the scope of the orders on appeal. Accordingly, the actual scope of AFCL's appeals remains disputed.

³⁵ See Order Granting Intervention to Association of Freeborn County Landowners, (September 12, 2017), Freeborn Docket, Boman Aff., Ex. 23.

conferring full party rights to AFCL. The fourth element of collateral estoppel is therefore satisfied.

E. AFCL was given a full and fair opportunity to be heard on the adjudicated issues.

As a formal party to the proceeding with full party rights, AFCL was given a full and fair opportunity to be heard on the adjudicated issues, both during the contested case proceedings at the OAH and at the hearings in front of the MPUC. AFCL made over 100 filings in the docket over a three-year period.³⁶ In addition to the numerous comments, letters, and briefs filed by AFCL over the course of the litigation, AFCL also participated in the contested case proceedings at the OAH. Specifically, counsel for AFCL appeared at the public hearing on February 20, 2018, as well as the evidentiary hearings held on February 21 and 22, 2018.³⁷ At the evidentiary hearings, counsel for AFCL examined and cross-examined numerous witnesses.³⁸ After the issuance of the ALJ's report, AFCL filed exceptions to the ALJ's report and appeared and presented oral argument at the MPUC's hearing to consider the site permit. Counsel for AFCL also appeared at subsequent MPUC hearings at which the MPUC considered permit amendments, AFCL's request for environmental review, and reconsideration and/or clarification requests. At every stage of the proceeding, AFCL was given a full and fair opportunity to be heard on the adjudicated issues. The MPUC simply did not rule in AFCL's favor, which, as noted above, is the subject of consolidated appeals pending at the Minnesota Court of Appeals. The final element of collateral estoppel is therefore satisfied.

³⁶ <https://www.edockets.state.mn.us/>, Freeborn Docket.

³⁷ See ALJ Report (May 14, 2018), at 1, Freeborn Docket, Boman Aff., Ex. 2.

³⁸ See Transcript Indexes of Evidentiary Hearings, Boman Aff., Ex. 24.

Because all five elements of collateral estoppel are satisfied, AFCL is precluded from re-litigating the decisions of the MPUC relative to the Freeborn Wind project in this lawsuit.³⁹ Accordingly, AFCL’s current lawsuit must be dismissed.

II. AFCL CANNOT DUPLICATE ITS CLAIMS ON APPEAL IN THIS LAWSUIT.

As addressed above, AFCL has two consolidated appeals pending at the Minnesota Court of Appeals arising out of the Freeborn docket. As addressed above, these claims are barred by collateral estoppel regardless of whether judicial review was actually sought. Here, however, AFCL has exercised its right to judicial review and has perfected its appeals. Accordingly, it cannot now duplicate its claims in this lawsuit. AFCL’s decision to intervene in the MPUC docket and proceed with an appeal was an election for an exclusive remedy under the Minnesota Administrative Procedures Act (“MAPA”), Minn. Stat. Ch. 14. *See Lam v. City of St. Paul*, 714 N.W.2d 740, 743 (Minn. App. 2006) (finding certiorari jurisdiction was proper to review quasi-judicial act); *Mowry v. Young*, 565 N.W.2d 717, 719-21 (Minn. App. 1997) (finding certiorari was exclusive means to review a quasi-judicial decision); *Naegele Outdoor Adver., Inc. v. Minneapolis Cmty. Dev. Agency*, 551 N.W.2d 235, 236-37 (Minn. App. 1996) (finding “sole remedy” for review of quasi-judicial decision is to appeal by writ of certiorari).

This is not to say that a different party under different facts and circumstances could not have a MERA claim to challenge a MPUC permit or order. But, having intervened in the docket

³⁹ Because the issues raised by AFCL and adjudicated by the MPUC in the Freeborn Docket were alleged systemic issues that were not specific and/or unique to the Freeborn Docket, collateral estoppel arguably bars the relitigation of these issues relative to the Buffalo Ridge, Plum Creek, and Three Waters Dockets as well. However, because AFCL’s claims involving these three wind dockets are not yet ripe for judicial review, as discussed *infra* at Argument, Section III, the Court may properly dismiss the Complaint without reaching this issue.

and perfected an appeal of relevant portions of the MPUC's permitting decisions, AFCL does not get to bring a parallel challenge in district court on the same issues. MERA does not provide AFCL with two bites at the apple. The prospect of conflicting decisions, confusion of the issues, and potential gamesmanship—along with the need for judicial economy—require this Court to dismiss this action and allow the Freeborn appeal to run its course.

III. AFCL'S CLAIMS INVOLVING PLUM CREEK, BUFFALO RIDGE, AND THREE WATERS ARE NOT RIPE AND MUST BE DISMISSED.

AFCL's claims involving Plum Creek, Buffalo Ridge, and Three Waters are not ripe and must be dismissed. The ripeness doctrine is based on the general principle that Minnesota courts will consider only redressable injuries. *Friends of Riverfront*, 751 N.W.2d at 592; *see also State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 321 (Minn. App. 2007). The doctrine bars suits brought before a redressable injury exists. *Friends of Riverfront*, 751 N.W.2d at 592.

AFCL portrays its Complaint as a systemic challenge to the MPUC's wind siting process. However, AFCL seeks to enjoin four specific wind projects at various stages of the permitting process. As addressed *supra* at Background, Section VI(B), the MPUC has made no final decisions regarding the requested permits in the Plum Creek, Buffalo Ridge, and Three Waters dockets. It is still unknown whether the MPUC will grant the permits, or what conditions the MPUC may impose for protecting the environment, enhancing sustainable development, and promoting the efficient use of resources as directed under Minn. Stat. §. 216F.04 (d); Minn. R. 7854.1000, subp. 4. Because the MPUC has not granted the permits, there is no redressable injury.

Moreover, once there is a final agency decision, AFCL would still have to satisfy the jurisdiction requirements of section 216B.27, which provides that “*no cause of action arising out*

of any decision constituting an order or determination of the commission or any proceeding for judicial review thereof shall accrue in any court to any person unless the plaintiff or petitioner in the action or proceeding . . . shall have made application to the commission for rehearing in the proceeding in which the decision was made.” (emphasis added.) Without a final decision, and a subsequent timely filed petition for reconsideration, any challenges to MPUC decisions or related causes of action are barred by section 216B.27. See, e.g., *Minnesota Ctr. for Envtl. Advocacy v. Minnesota Pub. Utilities Comm’n*, No. A10-812, 2010 WL 5071389, at *1 (Minn. Ct. App. Dec. 14, 2010).⁴⁰

IV. AFCL’S CLAIM OF INADEQUATE ENVIRONMENTAL REVIEW IS NOT ACTIONABLE UNDER MERA.

AFCL asserts a claim under MERA that the MPUC has failed to conduct environmental review and has failed to require the preparation of an EIS when siting LWECS. This claim fails to state a claim under which relief may be granted and must be dismissed. Claims challenging an agency’s determinations regarding the need for environmental review are not properly challenged under MERA. See *Nat’l Audubon Soc. v. Minnesota Pollution Control Agency*, 569 N.W.2d 211, 219 (Minn. App. 1997); see also *State ex rel. Rice Cty. Land Use Accountability, Inc. v. Rice Cty.*, No. A06-1041, 2007 WL 1470417, at *1 (Minn. App. May 22, 2007)⁴¹; *Minn. Ctr. for Envtl. Advocacy v. Minn. Pub. Utilities Comm’n*, No. A10-812, 2010 WL 5071389, at *1 (Minn. App. Dec. 14, 2010); Minn. Stat. § 116D.04, subd. 10. Rather, such claims are properly

⁴⁰ A true and correct copy of this unpublished Minnesota Court of Appeals opinion is attached to Boman Aff., Ex. 25.

⁴¹ A true and correct copy of this unpublished Minnesota Court of Appeals opinion is attached to Boman Aff., Ex. 26.

reviewed under MEPA through a petition for writ of certiorari. *Id.*

In *National Audubon*, the Court of Appeals held that environmental review was an information gathering process and, the lack thereof, could not result in “pollution, impairment, or destruction” of the environment as defined by MERA. 569 N.W.2d at 218. Furthermore, the court held that MEPA expressly provides for judicial review of an agency’s decision regarding the need for environmental review, and that such challenges “must be brought pursuant to MEPA.” *Id.* at 219. Similarly, in *MCEA v. MPUC*, the Court of Appeals held that MERA claims related to the alleged failure of the MPUC to conduct environmental review must be brought under MEPA and not MERA. 2010 WL 5071389, at *10.

Not only does MEPA provide an express (and exclusive) avenue for obtaining judicial review of an agency’s environmental review decisions, *see* Minn. Stat. § 116D.04, subd. 10, but AFCL has actually availed itself of that remedy relative to the Freeborn project. Specifically, as addressed *supra* in Background, Section IV(A), AFCL has perfected an appeal specifically challenging the MPUC’s decisions regarding environmental review and the failure to order an EAW in the Freeborn Docket. With respect to the three other wind projects sought to be enjoined, certiorari review is the required method of review of environmental review decisions once those decisions are ripe for judicial review. Accordingly, AFCL’s MERA claims in this lawsuit must be dismissed with respect to each of the wind projects.

V. AFCL’S CLAIM OF INADEQUATE PUBLIC PARTICIPATION FAILS TO STATE A CLAIM UNDER MERA.

AFCL alleges that the MPUC has excluded public participation during administrative proceedings in violation of Minn. Stat. § 216E.08. To show a prima facie case under MERA, AFCL must show (1) the existence of a natural resource protectable under MERA, and that (2)

the MPUC's conduct will or is likely to cause pollution, impairment, or destruction of that natural resource. *Rice City*, 2007 WL 1470417, at *1.

Just as the lack of environmental review cannot constitute “pollution, impairment, or destruction” as defined by MEPA (as discussed *supra* at Argument, Section IV), neither can the alleged lack of public participation. Both environmental review and public participation are information gathering tools that, while very important, do not constitute “pollution, impairment, or destruction” of the environment under MERA. Although the MPUC denies that it limited public participation in violation of Minn. Stat. § 216E.08, the proper avenue for challenging the MPUC's process is through an appeal of the specific decisions by writ of certiorari. *See* Minn. Stat. § 14.69(c) (authorizing judicial review at the Court of Appeals of agency decisions made upon unlawful procedure). This is a process that AFCL has, in fact, pursued—with a pending appeal at the Court of Appeals on the same issues in the Freeborn appeal. AFCL's claims about lack of public participation simply do not state a claim under MERA and the claim must be dismissed.

VI. AFCL'S MERA CLAIMS FAIL AS A MATTER OF LAW.

AFCL's MERA claims regarding inadequate environmental review also fail as a matter of law. AFCL's allegations that “there is no environmental review for wind site permits and there are no wind specific wind siting rules and siting criteria,” (Comp. ¶ 9.), are unsupported legal conclusions, contradicted by the applicable statutes and rules. As such, this Court is not required to accept AFCL's legal conclusions for purposes of this motion to dismiss. *See Bahr*, 788 N.W.2d at 80 (unsupported legal conclusions are not binding on the court). As such, even if the MPUC's environmental review decisions were properly before this court (which they are

not), such claims would fail because the MPUC's environmental review procedures are compliant with MEPA as a matter of law. *See, e.g., State by Smart Growth Minneapolis v. City of Minneapolis*, 941 N.W.2d 741, 744 (Minn. Ct. App. 2020), *review granted* (May 27, 2020) (affirming district court's dismissal of a MERA claim as a matter of law, where the agency action was exempt from environmental review under MEPA.)

As discussed *supra* at Background, Section III, 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 EQB to provide alternative methods of environmental review besides an EIS. LWECS are one of the projects for which an alternative form of environmental review exists. Specifically, the MPUC's environmental review of LWECS is governed by Minn. R. 7854.0500. 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).

The predecessor to this rule, then numbered 4401.0450, was proposed and adopted by the EQB in 2002 as an alternative method of environmental review.⁴² In adopting the rule, the EQB stated:

Because the environmental and human consequences of wind turbines are relatively minor and can be minimized by appropriate permit conditions, the EQB is not requiring in these rules that an Environmental Assessment Worksheet or an Environmental Impact Statement be prepared on a proposed LWECS. It is sufficient that the environmental impacts and mitigative measures be discussed in the application itself. If an issue of concern were to be raised specific to a particular wind project, the EQB could ask for additional examination of those impacts and could address the concern through permit conditions or by moving some of the turbines.

See EQB's Statement of Need and Reasonableness, at 20 (2001).⁴³ The MPUC follows this duly authorized and EQB approved alternative environmental review when permitting and siting LWECS. AFCL's continued legal assertion that there are no rules for environmental review of LWECS, or that LWECS requires an EAW or EIS, is false as a matter of law. Although AFCL dislikes the current rules; they exist and are consistent with MEPA.

Moreover, the legislative intent to exempt LWECS from the requirement to prepare an EIS is clear. In addition to LWECS, the MPUC also has authority to site and permit large electric power facilities, including large generating plants and high-voltage transmission lines under the Minnesota Power Plant Siting Act, Minn. Stat. Ch. 216E. The siting and permitting of large electric power facilities specifically requires that an EIS be prepared. Minn. Stat. 216E.03,

⁴² *See* Environmental Quality Board's Adopted Permanent Rules Relating to Wind Siting, 26 SR 1394 (April 22, 2002). The rules became subject to the MPUC's jurisdiction, and were renumbered, after a subsequent change in statutory authority that transferred environmental review obligations for energy facilities from the EQB to the Department of Commerce in 2005. Laws of Minnesota 2005, ch. 97, art 3.

⁴³ Attached to Boman Aff., Ex. 27.

subd. 5. In contrast, when the Legislature enacted Minn. Stat. Ch. 216F governing wind projects, it specifically and unambiguously stated that the requirements of chapter 216E did not apply to LWECS, except for a few select limited provisions. *See* Minn. Stat. § 216F.02, subp. a. The EIS provision in section 216E.03, subd. 5 is not included in this list, which clearly demonstrates the Legislature’s intention to exclude LWECS from this requirement. Accordingly, the requirement to prepare an EIS for LWECS was specifically exempted under the plain unambiguous language of Minn. Stat. § 216F.02, subp. a.

Interestingly, AFCL has previously admitted in filings with the MPUC that what it continues to construe as “no environmental review,” was the product of a legislative choice. Specifically, AFCL stated, “[i]t is not AFCL’s fault that there is no environmental review for a siting wind project – *that was the doing of the legislature* and those who lobbied for the passage of the wind siting statutes.” (emphasis added.)⁴⁴ AFCL simply dislikes the process the Legislature established for environmental review of LWECS. However, AFCL’s argument about what the law *should be* is appropriately directed to the Legislature—not this Court. Because, as explained above, the MPUC’s alternative environmental review process for LWECS is compliant with MEPA, AFCL’s MERA claim fails as a matter of law and must be dismissed.

VII. THE DECISION WHETHER TO COMMENCE A RULEMAKING IS APPROPRIATELY LEFT TO THE EXPERTISE AND DISCRETION OF THE MPUC.

As a preliminary matter, the MPUC notes that AFCL does not need an order from this Court to seek a rulemaking at the MPUC. The Minnesota Administrative Procedures Act

⁴⁴ Reply of AFCL to Freeborn’s Response to Motion for Certification to PUC for Appointment of an Advisory Taskforce and Science Advisory Task Force (October 4, 2017) at 4, Freeborn Docket, Boman Aff., Ex. 28.

(“MAPA”) provides an avenue to petition an agency for a rulemaking. *See* Minn. Stat. § 14.09 and Minn. R. 1400.2040 and 1400.2500. Under the statute, the agency has 60 days from the date of the filing to make a decision on the petition. MAPA also contains a process for challenging the validity of rules through judicial review. *See* Minn. Stat. § 14.44 (providing for petitions for declaratory judgment to the Court of Appeals to challenge the validity of rules).

As discussed *supra* Background, Section IV(C), the MPUC recently considered a petition for rulemaking based on the same grounds asserted in this lawsuit. After robust public comment and arguments from stakeholders, the MPUC declined to initiate a rulemaking, noting the agency would be informed by the large power plant siting rules then being promulgated, as well as the advantages of case-by-case adjudication when siting LWECS. AFCL did not intervene or seek judicial review of this rulemaking decision, and AFCL admits in its Complaint that the statutory appeal period has expired. (Compl. ¶ 20).

AFCL now seeks to circumvent the rulemaking procedures in MAPA and the expertise of the MPUC, by asking this Court to order the MPUC to initiate a rulemaking. AFCL’s request is legally inappropriate. In declining the most recent rulemaking petition, the MPUC expressed the advantages of case-by-case adjudication when permitting LWECS, a decision which is left to the informed decision of the agency. *Matter of Investigation into Intra-LATA Equal Access & Presubscription*, 532 N.W.2d 583, 590 (Minn. App. 1995) (“Whether to proceed by rulemaking or adjudication is a decision left to the informed discretion of the agency.”).

Here, the MPUC, with expertise in permitting LWECS, knowledge of the unique issues that can arise in specific projects, and the ability to tailor an individual permit to address environmental concerns, specifically found a rulemaking was not appropriate. This decision

reflected a policy decision to apply the criteria set forth in Minn. R. 7854.0500, subd. 7 on a case by case basis, modifying the permit conditions as appropriate. Well established case law leaves this decision to the discretion of the MPUC. *See Bunge Corp. v. Commissioner of Revenue*, 305 N.W.2d 779, 785 (Minn. 1981) (holding agency has discretion to decide whether to promulgate rules or use case-by-case determination); *Matter of Proposal by Lakedale Telephone Company to Offer Three Additional Class Services*, 561 N.W.2d 550, 555 (Minn. App. 1997) (same; noting that as regulator MPUC can revisit ruling at any time).

Even if the request for rulemaking was not otherwise barred and properly before this Court, it would be an extraordinary remedy indeed for this Court to order the MPUC to initiate a rulemaking outside the procedures established in MAPA. This is especially true where, as here: (1) the agency recently declined to initiate a rulemaking on the same issue; and (2) AFCL has not actually petitioned the MPUC for a rulemaking. Only in the rarest and most compelling of circumstances should a court overturn an agency judgment not to institute a rulemaking. *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 921 (D.C. Cir. 2008); *see also, WildEarth Guardians v. EPA*, 751 F.3d 649, 651 (D.C. Cir 2014).

CONCLUSION

Based on the foregoing, MPUC respectfully requests that the Court dismiss AFCL's Complaint in its entirety.

Dated: August 5, 2020

KEITH ELLISON
Attorney General
State of Minnesota

s/ Jeffrey K. Boman
JEFFREY K. BOMAN
Assistant Attorney General
Atty. Reg. No. 0396253
445 Minnesota Street, Suite 1400
St. Paul, Minnesota 55101-2131
(651) 757-1013 (Voice)
(651) 282-5832 (Fax)
jeffrey.boman@ag.state.mn.us

#4768018-v1