

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.

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

**INTRODUCTION**

This reply memorandum is submitted on behalf of the Minnesota Public Utilities Commission (“MPUC” or “Commission”). The MPUC’s initial memorandum established that it is entitled to dismissal of all of the Association of Freeborn County Landowners’ (“AFCL”) claims. AFCL’s opposition memorandum fails to rebut MPUC’s well-supported grounds for dismissal. Accordingly, dismissal remains appropriate.

**ARGUMENT**

**I. THE COURT LACKS SUBJECT MATTER JURISDICTION OVER AFCL’S CLAIMS**

As established in MPUC’s initial memorandum, AFCL’s claims in this lawsuit are barred by the doctrine of collateral estoppel, are not ripe, and cannot be duplicated in this lawsuit when pending on appeal. (MPUC’s Mem. at 12-19.) AFCL is silent as to these procedural bars save for a single sentence in the *Legal Standard* section of its brief where it states: “Yes, these claims have been raised repeatedly in individual permitting dockets, to no avail, and largely because individual dockets are not the venue to address these systemic problems.” (AFCL Mem. at 4.)

This admission—that AFCL has raised and litigated these issues in prior dockets before the MPUC—is fatal to its claims in this lawsuit. The entire premise of collateral estoppel is to prevent litigants from raising issues that are identical to issues previously litigated—what AFCL is admittedly doing here.

Moreover, AFCL’s subsequent assertion that “individual dockets are not the venue to address these systemic problems,” does not defeat the application of collateral estoppel. First, even if there were an alternative venue for AFCL to litigate the “systemic” issues it previously raised in front of the MPUC, this does not change the fact that AFCL *actually* raised and litigated these issues. Second, after repeatedly raising these specific issues in front of the MPUC and asking for the MPUC to decide the issues, it is disingenuous for AFCL to now argue that the MPUC was “not the venue to address these systemic problems.” Third, if AFCL actually believed that the MPUC was not the proper place to litigate “systemic” issues—it would have an ethical obligation to withdraw its currently pending appeals out of the Freeborn Docket where it continues to assert alleged systemic errors as a basis of its pending appeals. Fourth, individual dockets are, in fact, a proper place to litigate the legality of the MPUC’s general processes that impact individual permitting decisions. *See, e.g., In re N. Dakota Pipeline Co. LLC*, 869 N.W.2d 693 (Minn. App. 2015).

Rather than address the elements of collateral estoppel or ripeness directly, AFCL appears to make two misguided arguments. First, AFCL seems to suggest that collateral estoppel, or any other procedural bar, is somehow inapplicable because the plain language of MERA provides the district court with subject matter jurisdiction. (AFCL’s Mem. at 5.) No one disputes that the district court has subject matter jurisdiction over legally sufficient MERA

claims that are not otherwise barred. But, like any other claim, the existence of subject matter jurisdiction does not exempt MERA claims from procedural bars, such as collateral estoppel, when the claim has previously been raised and adjudicated in a different proceeding.

Second, rather than address the elements of collateral estoppel, AFCL simply asks the Court to ignore many of the public documents attached to Defendants' affidavits. AFCL's request should be rejected for multiple reasons. First, AFCL concedes that many of the documents attached to the Affidavit of Jeffrey K. Boman are specifically referenced in (and therefore incorporated into) AFCL's Complaint. Second, although AFCL argues it did not specifically reference the remaining documents by name, AFCL referenced the entire MPUC dockets in which the public filings are found. There can be no dispute that the MPUC dockets, and public filings therein, are central to the claims alleged—as AFCL seeks to enjoin further permitting in the four dockets as part of this lawsuit. The MPUC dockets and filings therein are necessarily embraced by the Complaint and are properly considered by this Court in determining whether collateral estoppel bars AFCL's claims. AFCL cannot avoid the application of collateral estoppel by making a strategic decision not to plead facts regarding the prior adjudication.

## **II. AFCL'S COMPLAINT OTHERWISE FAILS TO STATE A CLAIM UNDER MERA.**

As established in the MPUC's initial memorandum, AFCL's MERA claims fail as a matter of law because the MPUC's environmental review of wind projects, conducted through an Environmental Quality Board ("EQB") approved form of alternative review under Minn. R. 7854.0500, subp. 7, is compliant with MEPA. (MPUC's Mem. at 24-27.) AFCL does not dispute that a MERA claim fails as a matter of law when an agency's review is compliant with

MEPA. Instead, AFCL makes several arguments as to why the MPUC's process is not MEPA compliant. These arguments fail.

First, AFCL argues that no court has determined that Minn. R. 7854.0500, subp. 7 is MEPA-compliant alternative review. The fact that there is not specific appellate law on point is irrelevant. The statutory scheme is clear and unambiguous. As authorized by Minn. Stat. § 116D.04, subd. 4a, the EQB promulgated rules detailing how environmental review would proceed for LWECS. Given that the EQB expressly 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.

AFCL next argues that, although the potential environmental impacts must be listed in the permit application, there is no requirement that the MPUC analyze the information. (AFCL Mem. at 11-12.) This argument belies common sense. The MPUC is directed to consider the information in permit applications, *see* Minn. R. 7854.0200, .1000, and does so. The Administrative Law Judge made detailed findings of fact relative to the environmental factors in Minn. R. 7854.0500, subp. 7, and the MPUC subsequently approved, adopted, modified, or rejected these findings as appropriate. Finally, AFCL cites to inapplicable provisions of Minn. Stat. Ch. 216E providing for a different form of alternative environmental review for large electric power facilities, other than wind projects. (AFCL Mem. at 13.) The fact that there is a different form of alternative review for other types of projects under chapter 216E does not invalidate the EQB approved form of environmental review for LWECS under chapter 216F.

Moreover, as established in the MPUC's initial memorandum, AFCL's MERA claims regarding the MPUC's environmental review process also fail because such claims must be

brought under MEPA. (MPUC Mem. at 22-23.) Although AFCL attempts to draw a distinction between claims brought under Minn. § Stat. 116B.10 versus Minn. Stat. § 116B.03, both statutes' causes of action are premised on protection of the environment from "pollution, impairment, or destruction"—and Minnesota Courts have consistently held that environmental review does not constitute "pollution, impairment, or destruction" of the environment as defined by MERA. (MPUC's Mem. at 22.) MERA claims related to the alleged failure of the MPUC to conduct environmental review must be brought under MEPA and not MERA, *see Minn. Ctr. for Env'tl. Advocacy v. Minn. Pub. Utilities Comm'n*, No. A10-812, 2010 WL 5071389 (Minn. App. Dec. 14, 2010), and the rationale is equally applicable to claims under section 10 and section 3 of MERA.

### CONCLUSION

For all the reasons stated in this and MPUC's initial memorandum, MPUC respectfully requests that the Court dismiss AFCL's Complaint in its entirety.

Dated: August 26, 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

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