

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE PUBLIC UTILITIES COMMISSION

In the Matter of the Application of Flying Cow Wind, LLC for a Certificate of Need for the 150 MW Large Wind Energy Conversion System in Yellow Medicine County, Minnesota

**ORDER ON THE REQUEST FOR
CONTESTED CASE HEARING AND
PETITION FOR INTERVENTION BY
LABORERS DISTRICT COUNCIL OF
MINNESOTA AND NORTH DAKOTA**

In the Matter of the Application of Flying Cow Wind, LLC for a Site Permit for the up to 150 MW Large Wind Energy Conversion System in Yellow Medicine County

On March 14, 2018, Laborers District Council of Minnesota and North Dakota (LDC) filed a Request for Contested Case Hearing and Petition for Intervention. Flying Cow Wind, LLC (Flying Cow) filed a response on March 21, 2018, opposing the request for contested case hearing. Flying Cow did not object to LDC's participation in this matter, but noted that formal intervention is unnecessary in light of the procedural devices already available to LDC under the specific review process ordered by the Minnesota Public Utilities Commission (Commission). The Minnesota Department of Commerce Division of Energy Resources (DOC-DER) also opposed the request for contested case hearing. DOC-DER took no position on LDC's Intervention Petition, but also noted that even without a contested case proceeding, LDC's participation is readily allowed.

On April 5, 2018, the Minnesota Public Utilities Commission Staff (Staff) requested permission to file a letter to provide background material and comments regarding the informal contested case review process and consideration of requests for contested cases as they apply to Flying Cow's certificate of need proceeding. The Administrative Law Judge granted the Staff's request on April 5, 2018. On April 6, 2018, the Staff filed a letter. The record on the request for contested case hearing closed that day.

Based on all of the files and proceedings of the matter, the Administrative Law Judge makes the following:

ORDER

1. LDC's Request for a Contested Case Hearing is **DENIED**.
2. LDC's Petition for Intervention is **GRANTED**.

Dated: May 7, 2018


JAMES E. LAFAVE
Administrative Law Judge

MEMORANDUM

I. Background

On October 19, 2017, Flying Cow filed an application for a certificate of need with the Commission for an up to 152 megawatt (MW) large wind energy conversion system (LWECS) known as the Bitter Root Wind project, to be located in Yellow Medicine County, Minnesota (the Project).¹ The Commission requested comments on the completeness and procedural treatment of the certificate of need application, including whether the matter should be referred to the Office of Administrative Hearings for a contested case hearing.² The initial comment period lasted 20 days and closed on November 22, 2017.³

On November 9, 2017, Flying Cow filed an application for a LWECS site permit for the Project.⁴ The Commission requested comments on the completeness of the site permit application, including whether it should be referred to the Office of Administrative Hearings on November 28, 2017.⁵ The initial comment period closed on December 19, 2017.⁶

After the close of the comment periods in the certificate of need and siting dockets, the Commission issued orders in each matter that accepted the applications of Flying Cow and established the process for reviewing the

¹ Certificate of Need Application (Oct 19, 2017) (eDocket No. 201710-136649-02).

² Notice of Comment Period (Nov. 2, 2017) (eDocket No. 201711-137138-01).

³ *Id.*

⁴ Initial Filing (Nov. 9, 2017) (eDocket No. 201711-137275-04).

⁵ Notice of Comment Period (Nov. 28, 2017) (eDocket No. 201711-137714-01).

⁶ *Id.*

applications.⁷ The Order in the certificate of need docket noted that “[n]o person has identified any contested issue of material fact or recommended that the case be referred to the Office of Administrative Hearings for contested case proceedings.”⁸ The Commission therefore ordered the “informal comment and reply process for developing the record.”⁹ The Order in the siting docket directed the Administrative Law Judge to conduct public hearings in accordance with certain applicable rules.¹⁰

Under Minnesota law, the public hearings in the certificate of need and siting dockets should be held jointly unless it is “not feasible or more efficient, or otherwise not in the public interest” to do so.¹¹ A joint public hearing on the certificate of need and siting dockets will be held on May 31, 2018.¹²

As previously noted, on March 14, 2018, the LDC filed a Request for Contested Case Hearing and Petition for Intervention in both the certificate of need and siting dockets.¹³ LDC is a democratic labor organization that, together with its five affiliated Local Unions, represents more than 12,000 construction workers in Minnesota and North Dakota. LDC represents hundreds of members who live in Southwest Minnesota who could be affected by the 150-plus construction jobs Flying Cow projects would be created by the Project.

II. Request for a Contested Case Hearing

LDC claims there are contested issues of fact that need to be resolved by a contested case hearing in four areas:

- (1) the number of construction jobs to be filled by Minnesota workers;
- (2) the lack of a power purchase agreement for the Project and how approval by the Commission may impact competing proposals and existing power suppliers;

⁷ See Order Accepting Application as Substantially Complete and Directing the Use of Informal Review Process (Jan. 12, 2018) (eDocket No. 20181-138845-01); Order Accepting Application, Establishing Procedural Framework, and Varying Rules (Jan. 30, 2018) (eDocket No. 20181-139534-01).

⁸ Order Accepting Application as Substantially Complete and Directing the Use of Informal Review Process at 3 (Jan. 12, 2018) (eDocket No. 20181-138845-01).

⁹ *Id.* at 3-4.

¹⁰ Order Accepting Application, Establishing Procedural Framework, and Varying Rules (Jan. 30, 2018) (eDocket No. 20181-139534-01).

¹¹ Minn. Stat. § 216B.243, subd. 4 (2016).

¹² Scheduling Order (Mar. 28, 2018) (eDocket No. 20183-141470-01).

¹³ Request for Contested Case Hearing and Petition for Intervention (Mar. 14, 2018) (eDocket No. 20183-141004-04); (eDocket No. 20183-141004-01).

- (3) the Project's impact on local construction employment, local economic activity, competing proposals and existing power suppliers; and
- (4) potential safety hazards associated with construction.¹⁴

A. Procedural Posture

As a threshold matter, Flying Cow asserts that LDC's request is procedurally flawed. Flying Cow points out that LDC failed to request a contested case hearing during the comment periods on the completeness and procedural treatments of the certificate of need and siting applications and therefore is untimely. Because, as discussed below, the Administrative Law Judge finds there are no genuine issues of material fact that would require a contested case hearing, it is unnecessary to address whether the request for contested case hearing was timely filed.

B. Analysis

To prevail in its request for a contested case hearing, LDC must show there are material issues of fact and show that a hearing would aid the Commission in making a final determination on the permit application.¹⁵ They failed to do this.

First, LDC argues there is a question of fact as to the number of construction jobs to be filled by Minnesota workers. LDC concedes, however, that Flying Cow is not required to hire Minnesota workers.¹⁶ In addition, LDC has not demonstrated that there is an actual factual dispute as to how many jobs are likely to result from the project or how that affects whether the Project meets the statutory criteria. There is no question of fact that requires a contested case hearing.

Second, LDC asserts the lack of a power purchase agreement or interconnection agreement raises important questions regarding both the benefits of the project to Minnesota ratepayers and how approval by the Commission may impact competing proposals and existing power suppliers. But the Commission's process specifically contemplates that a site permit may be issued before the applicant obtains a power purchase agreement.¹⁷ A power purchase agreement

¹⁴ *Id.* at 3-4.

¹⁵ Minn. R. 7854.0900, subp. 5 (2017); *In re Northern States Power*, 674 N.W.2d 326, 335 (Minn. Ct. App. 2004) ("The burden is on the relator . . . to demonstrate the existence of material facts that would aid the agency in making a decision.").

¹⁶ Reply to Flying Cow, LLC Regarding Request for Contested Case Hearing and Petition for Intervention at 2-3, Mar. 28, 2818) (eDocket No. 20183-141494-01).

¹⁷ See Minn. R. 7854.1100, subp. 3 (2017).

must be obtained before the applicant begins construction.¹⁸ The absence of a power purchase agreement or interconnection agreement at this stage does not create a fact issue that necessitates a hearing.

Third, LDC maintains there is a fact issue as to the Project's impact on local construction employment, local economic activity, competing proposals, and existing power suppliers. This argument is related to LDC's first issue, the number of jobs to be filled by Minnesota workers. That argument was rejected. LDC offers no other facts or argument as to why a contested case hearing is necessary to determine facts as it relates to these concerns that will help the Commission make a decision.

Finally, LDC argues that are fact issues regarding the potential safety hazards associated with construction of the Project. Those concerns, however are addressed in the Commission's Generic Large Wind Energy Conversion System Site Permit Template, which establishes requirements related to public safety,¹⁹ safety codes and design requirements,²⁰ compliance with applicable permits and regulations,²¹ and the process and information to be submitted for pre-construction review.²² There was no showing that material fact issues exist regarding the safety of the Project.

LDC must prove there is some evidence that can be produced that is contrary to the action proposed by the Commission.²³ In addition, the Commission, based on the comments received, determined a contested case hearing was not necessary.

In summary, LDC failed to demonstrate a contested case hearing is necessary to produce facts that would aid the Commission in determining whether to issue the certificate of need or the site permit. The request for a contested case hearing must be denied.

III. Petition for Intervention

LDC seeks to intervene to ensure that the development of the wind energy infrastructure can proceed in a way that benefits the Southwest Minnesota's skilled construction workers and local communities. They claim no other party can adequately represent the interests of their members or provide their unique insights on the Project.

The standards for intervention are set out in Minn. Rules 1400.6200 and 1405.0900 (2017). The latter rule states in part:

¹⁸ *Id.*

¹⁹ Generic Large Wind Energy Conversion System Site Permit Template, § 5.2.25.

²⁰ *Id.* at § 5.5.1.

²¹ *Id.* at § 5.5.2.

²² *Id.* at §§ 10.1-10.3, 10.10, 10.11.

²³ See *In re Northern States Power Co.*, 676 N.W.2d 326, 335.

Subp. 1. **Petition.** Any person desiring to intervene in the hearing as a party shall submit a timely petition to intervene to the administrative law judge and shall serve the petition upon all existing parties. Timeliness will be determined by the administrative law judge in each case based on the circumstances at the time of filing. The petition shall show how the petitioner's legal rights, duties, or privileges are not otherwise represented, and shall set forth the grounds and purposes for which intervention is sought and shall indicate petitioner's statutory or legal right to intervene, if one should exist. The administrative law judge, with the consent of all the parties, may waive the requirement that the petition be in writing.²⁴

The Commission ordered the Administrative Law Judge to "clarify that people may participate in these proceedings without intervening as a party."²⁵ The Commission, however, also noted that while the DOC-DER and Flying Cow are the parties to this matter, "other persons may participate as public participants or as otherwise prescribed."²⁶ The above rule prescribes when a person is allowed to intervene. LDC identified specific interests and concerns that are not already represented in this proceeding. Flying Cow and DOC-DER do not object to LDC's intervention petition. Admitting LDC as a party to this matter will ensure that its interests are adequately represented in this informal proceeding. The petition for intervention, is therefore, granted.

J. E. L.

²⁴ Minn. R.1405.0900, subp. 1 (2017).

²⁵ Order Accepting Application, Establishing Procedural Framework, and Varying Rules at 6 (Jan. 30, 2018) (eDocket No. 20181-139534-01).

²⁶ *Id.* at 3.

May 7, 2018

See Attached Service List

Re: *In the Matter of the Application of Flying Cow Wind, LLC for a Certificate of Need for the 150 MW Large Wind Energy Conversion System in Yellow Medicine County, Minnesota*

In the Matter of the Application of Flying Cow Wind, LLC for a Site Permit for the up to 150 MW Large Wind Energy Conversion System in Yellow Medicine County, Minnesota

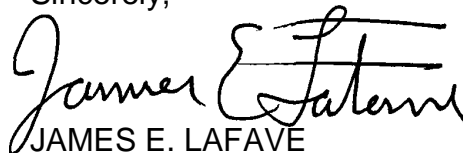
**OAH 60-2500-35035
MPUC IP-6984/CN-17-676
MPUC IP-6984/WS-17-749**

To All Persons on the Attached Service List:

Enclosed and served upon you is the Administrative Law Judge's **ORDER ON THE REQUEST FOR CONTESTED CASE HEARING AND PETITION FOR INTERVENTION BY LABORERS DISTRICT COUNCIL OF MINNESOTA AND NORTH DAKOTA** in the above-entitled matter.

If you have any questions, please contact my legal assistant Sheena Denny at (651) 361-7881 or sheena.denny@state.mn.us, or facsimile at (651) 539-0310.

Sincerely,


JAMES E. LAFAVE
Administrative Law Judge

JEL:la
Enclosure
cc: Docket Coordinator

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
PO BOX 64620
600 NORTH ROBERT STREET
ST. PAUL, MINNESOTA 55164

CERTIFICATE OF SERVICE

<p>In the Matter of the Application of Flying Cow Wind, LLC for a Certificate of Need for the 150 MW Large Wind Energy Conversion System in Yellow Medicine County, Minnesota</p> <p>In the Matter of the Application of Flying Cow Wind, LLC for a Site Permit for the up to 150 MW Large Wind Energy Conversion System in Yellow Medicine County, Minnesota</p>	<p>OAH 60-2500-35035 MPUC IP-6984/CN-17-676 MPUC IP-6984/WS-17-749</p>
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Lisa Armstrong certifies that on May 7, 2018, she served the true and correct **ORDER ON THE REQUEST FOR CONTESTED CASE HEARING AND PETITION FOR INTERVENTION BY LABORERS DISTRICT COUNCIL OF MINNESOTA AND NORTH DAKOTA** by eService, and U.S. Mail, (in the manner indicated below) to the following individuals:

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret
Generic Notice	Commerce Attorneys	commerce.attorneys@ag.state.mn.us	Office of the Attorney General-DOC	445 Minnesota Street Suite 1800 St. Paul, MN 55101	Electronic Service	Yes
Ian	Dobson	residential.utilities@ag.state.mn.us	Office of the Attorney General-RUD	1400 BRM Tower 445 Minnesota St St. Paul, MN 551012130	Electronic Service	Yes
Sharon	Ferguson	sharon.ferguson@state.mn.us	Department of Commerce	85 7th Place E Ste 280 Saint Paul, MN 551012198	Electronic Service	No
Sean	Flannery	sean.flannery@res-americas.com	Renewable Energy Systems Americas Inc.	12 South 6th Street Suite 930 Minneapolis, MN 55402	Electronic Service	No
Andrew	Gibbons	andrew.gibbons@stinson.com	Stinson Leonard Street	50 S 6th St Ste 2600 Minneapolis, MN 54002	Electronic Service	No
Anne Marie	Griger	anne-marie.griger@res-group.com	Flying Cow Wind, LLC	11101 W 120th Ave Broomfield, Colorado 80021	Electronic Service	No
James	LaFave	james.lafave@state.mn.us	Office of Administrative Hearings	PO Box 64620 St. Paul, MN 55164-0620	Electronic Service	No
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Janet	Shaddix Elling	jshaddix@janetshaddix.com	Shaddix And Associates	7400 Lyndale Ave S Ste 190 Richfield, MN 55423	Electronic Service	No
Daniel P	Wolf	dan.wolf@state.mn.us	Public Utilities Commission	121 7th Place East Suite 350 St. Paul, MN 551012147	Electronic Service	Yes