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January 14, 2019

**Via Electronic Filing**

Daniel P. Wolf  
Executive Secretary  
Minnesota Public Utilities Commission  
121 7th Place East, Suite 350  
St. Paul, MN 55101

**Re: Request by Flying Cow Wind, LLC for Reconsideration and Rehearing**

*In the Matter of the Applications of Flying Cow Wind, LLC for a Certificate of Need and Site Permit for the up to 152 MW Large Wind Energy Conversion System in Yellow Medicine County, Minnesota.*

OAH Docket Number: 60-2500-35035  
MPUC IP-6984/CN-17-676  
MPUC IP-6984/WS-17-749

Dear Mr. Wolf:

Enclosed for filing in the above-referenced dockets is the Request by Flying Cow Wind, LLC for Reconsideration of the Minnesota Public Utilities Commission's January 3, 2019 Order Deferring Action and Initiating Negotiations; Notice and Order for Rehearing.

Please do not hesitate to contact me with any questions or concerns.

Sincerely,

Stinson Leonard Street LLP

*Andrew Gibbons*

Andrew Gibbons

Enclosures



Order, the Commission erred in concluding that the labor hiring practices of *construction contractors* are relevant to the criteria for issuance of a Certificate of Need or LWECS Site Permit, a significant departure from Commission precedent. Additionally, the Commission did not identify the issues to be analyzed in the contested case with respect to either the Certificate of Need or LWECS Site Permit. Finally, the Commission departed from the recommendations of its staff, the Administrative Law Judge, and the Department of Commerce, and otherwise completely ignored the record evidence developed during the robust informal process that **require** approval of both a LWECS Site Permit and Certificate of Need for the Project.

First, the January 3 Order erred in concluding that general labor practices of construction contractors are relevant to the Certificate of Need or LWECS Site Permit processes. With respect to the Certificate of Need, the Commission concluded that the evaluation of whether the Project provides beneficial socioeconomic impacts when compared to the effects of not building the facility under Minn. R. 7849.0120(C)(2) turns on the local labor hiring practices of a construction contractor. Such a conclusion is unsupported in the Commission's rules, and unsupported by years of Commission precedent.

That an analysis of construction contractor labor practices is relevant to the LWECS Site Permit process is also an error of law. The LWECS Site Permit process is a more limited evaluation of the particular location of the Project – the site. Setting aside whether the potential socioeconomic impacts of Flying Cow Wind's labor practices are relevant to the Certificate of Need analysis, they are not pertinent to the Commission's analysis on whether to grant a LWECS Site Permit. Instead, in evaluating whether to issue an LWECS Site Permit, the Commission must evaluate the specific factors set forth in statutes and rules, each of which calls

for an analysis of the Project as it relates to one common thing – *the site*.<sup>2</sup> The Commission's economic analysis is viewed in this same way. In particular, when determining whether to issue a LWECS Site Permit, the Commission analyzes the direct and indirect economic impact of the designated site. As the issues raised by the Laborers District Council of Minnesota and North Dakota ("LDC") are not related in any way to the proposed site, these issues are not relevant to the LWECS Site Permit analysis.

Additionally, even if the Commission determines that construction contractor labor practices are relevant to the Certificate of Need process, it does not justify also including the LWECS Site Permit as part of the contested case. The Commission's decision to include the LWECS Site Permit Application in the contested case proceeding was based in part, if not entirely, on the Commission's need to defer action on the LWECS Site Permit pending resolution of the Certificate of Need.<sup>3</sup> But the Commission can defer action on the LWECS Site Permit without reaching the erroneous conclusion that a contested case is necessary.

Furthermore, the Commission need not wrestle with the procedural considerations of bifurcation because of Flying Cow Wind's recent Request to Withdraw Application for Certificate of Need ("Withdrawal Request"),<sup>4</sup> in which it notified the Commission that the Project is now exempt from Certificate of Need requirements under the statutory IPP Exemption, Minn. Stat. § 216B.243, subd. 8(a)(7). As described in the Withdrawal Request, Flying Cow Wind has entered into a long-term power purchase agreement ("PPA"). The counterparty under the PPA is not an entity that provides retail service in Minnesota or

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<sup>2</sup> Minn. Stat. §§ 216E.02, subd. 1; 216E.03, subd. 7; 216F.03; Minn. R. 7850.1900; 7850.4000; 7850.4100; 7854.0500.

<sup>3</sup> January 3 Order at 5.

<sup>4</sup> Flying Cow Wind, LLC's Request to Withdraw Its Application for a Certificate of Need, MPUC Docket Nos. IP-6984/CN-17-676, IP-6984/WS-17-749, OAH Docket No. 60-2500-35035 (Dec. 28, 2018), eDocket ID 20182-148750-02.

wholesale electric service in Minnesota, and, accordingly, Flying Cow Wind is exempt from obtaining a Certificate of Need. Because the Project is exempt, the January 3 Order is moot as it relates to the Certificate of Need Application, deferral on the LWECS Site Permit is no longer necessary and no contested case on the LWECS Site Permit Application is warranted.<sup>5</sup>

Second, even if the Commission determines that labor practices of construction contractors are relevant to the Certificate of Need and/or LWECS Site Permit processes, the Commission's decision in the January 3 Order is unsupported by record evidence. The Commission's decision is unsupported by record evidence because evaluation of the record shows that no contested case proceeding is necessary to evaluate socioeconomic impacts associated with labor practices. The Project meets the statutory criteria for issuance of a Certificate of Need and LWECS Site Permit, including criteria related to socioeconomic issues even when considering LDC's evidence regarding labor practices. The January 3 Order is therefore arbitrary because it fails to provide a reasoned explanation for its departure from the ALJ's recommendation to deny a contested case and to issue a LWECS Site Permit.

This is further supported by the fact that the Commission failed to identify any material issues of fact requiring further development of the record as required pursuant to Minn. R. 7854.0900, subp. 5(B) and 7829.1000, which is particularly relevant in light of the robust proceedings that already took place with respect to the Project. Although the January 3 Order states that contested material factual issues exist regarding the Project's socioeconomic impacts, the order does not identify what those disputed facts are, nor does it explain how those unidentified facts are material to the Commission's decision on a LWECS Site Permit or Certificate of Need. The January 3 Order also does not identify any new evidence or

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<sup>5</sup> As of the date of this filing, the Department of Commerce, Division of Energy Resources filed a request for additional time to conduct discovery to evaluate whether the IPP Exemption applies on January 11, 2019. LDC also filed an objection to the withdrawal and information requests on January 11, 2019.

information that could be developed through a contested case. Instead, the January 3 Order states only that “facts regarding how Flying Cow’s employment practices might influence the project’s socioeconomic consequences” require further development, but then requests the issues and appropriate scope and conduct of the hearing all be determined by the Office of Administrative Hearings.<sup>6</sup> The January 3 Order therefore suffers from the same deficiencies that caused Administrative Law Judge (“ALJ”) James LaFave to deny the multiple requests for a contested case proceeding brought by the LDC.

A contested case at this late stage serves no purpose other than to impose an unnecessary procedural burden on Flying Cow Wind, in hopes of prompting settlement. This is contrary to the Commission's obligation to site wind projects "in an orderly manner" compatible with "the efficient use of resources."<sup>7</sup> Flying Cow Wind respectfully requests that the Commission reconsider its January 3 Order, find that a Certificate of Need is not required, and promptly issue a LWECS Site Permit for the Project. In the alternative, if the Commission determines that a contested case is warranted, Flying Cow Wind requests that those proceedings be limited to its Certificate of Need application, recognizing that labor-related socioeconomic issues are not relevant to a LWECS Site Permit analysis. Due to the importance of the issues to be decided, Flying Cow Wind also requests oral argument on the matters asserted herein.

## **II. BACKGROUND.**

### **A. Procedural Background.**

The LDC was provided its first opportunity to request a contested case in November 2017, over one year ago. In its November 2, 2017 and November 28, 2017 orders and notices

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<sup>6</sup> January 3 Order at 3.

<sup>7</sup> Minn. Stat. § 216E.02, subd. 1; Minn. Stat. § 216F.03.

of comment periods regarding Flying Cow Wind's Certificate of Need and LWECS Site Permit applications, respectively, the Commission requested comments regarding the completeness of and appropriate procedural treatment to evaluate the Applications, including whether the Applications should be referred to the Office of Administrative Hearings ("OAH") for a contested case.<sup>8</sup> The LDC did not file any comments in response.

On January 12, 2018, the Commission issued an order that accepted the Certificate of Need Application as substantially complete and directed that the informal comment and reply process be used to develop the record.<sup>9</sup> The Commission observed that no person had identified any contested issue of material fact or recommended that the application be referred to OAH for a contested case.<sup>10</sup> On January 30, 2018, the Commission accepted the LWECS Site Permit Application as substantially complete and referred the matter to the OAH for a public hearing and review under the informal process.<sup>11</sup> The order stated that formal intervention was not necessary for persons to participate in the proceedings, and set forth the methods of developing the record under Minn. R. Ch. 1405 that would be available as part of the informal process, if the ALJ concluded they were appropriate.<sup>12</sup>

The LDC was thereafter given numerous opportunities to comment, produce evidence, and question Flying Cow Wind regarding the Project's potential labor-related socioeconomic impacts, and LDC was an active participant, as is described below. For example, on February 2, 2018, the Commission and Department of Commerce – Energy and Environmental Review and Analysis ("DOC-EERA") issued a Notice of Public Information and Scoping Meeting

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<sup>8</sup> Notice of Comment Period, Docket No. IP-6984/CN-17-676 (Nov. 2, 2018), eDocket ID 20181-138656-02; Notice of Comment Period, Docket No. IP-6984/WS-17-749 (Nov. 28, 2017), eDocket ID 201711-137714-01.

<sup>9</sup> Order Accepting Application as Substantially Complete and Directing Use of Informal Review Process, MPUC Docket No. IP-6984/CN-17-676 (Jan. 12, 2018), eDocket ID 20181-138845-01.

<sup>10</sup> *Id.* at 3.

<sup>11</sup> Order Accepting Application, Establishing Procedural Framework, and Varying Rules, MPUC Docket No. IP-6984/WS-17-749 (Jan. 30, 2018), eDocket ID 20181-139534-01.

<sup>12</sup> *Id.* at 3.

requesting comments on, among other things, the Project's potential human and environmental impacts, and possible methods to minimize, mitigate, or avoid those potential impacts.<sup>13</sup> Commission staff and DOC-EERA held a joint public information and environmental report scoping meeting on February 27, 2018. The LDC was also present at the Prehearing Conference held before ALJ LaFave on March 16, 2018,<sup>14</sup> but it did not make any request that pre-filed testimony or any forms of discovery be utilized during the informal process.

On March 28, 2018, Flying Cow Wind filed a LWECS Site Permit addendum with a revised layout for the project.<sup>15</sup> The Commission solicited additional written comments in response to the addendum by notice issued on April 3, 2018.<sup>16</sup> On June 12, 2018, the Commission issued a Notice of Joint Public Hearing and a Notice of Draft Site Permit Availability.<sup>17</sup> That notice provided that a public hearing would be held on June 28, 2018, and it solicited comments on (1) whether the Commission should issue a Certificate of Need and a LWECS Site Permit for the Project; (2) whether the Project is needed and in the public interest; (3) the costs and benefits of the Project; (4) the environmental and human impacts of the Project and how those impacts can be addressed; and (5) whether there are other Project-related concerns.<sup>18</sup> A public hearing was held on June 28, 2018, and written comments were solicited through July 18, 2018.

The LDC was later given an opportunity to comment on Flying Cow Wind's Proposed

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<sup>13</sup> Notice of Public Information and Environmental Scoping Meeting, Docket Nos. IP-6984/CN-17-676, IP-6984/WS-17-749 (Feb. 2, 2018), eDocket ID 20182-139712-01.

<sup>14</sup> See Scheduling Order, MPUC Docket Nos. IP6984/CN-17-676, IP-6984/WS-17-749, OAH Docket No. 60-2500-35035, eDocket ID 20183-141469-01 (noting a Prehearing Conference was held on March 16, 2018). The scheduling order does not reference the LDC's presence at the hearing. The LDC did not note a formal appearance as a party at the hearing, but its representatives were present.

<sup>15</sup> Addendum to Site Permit Application for Bitter Root Wind Project, Docket No. IP-6984/WS-17-749 (Mar. 28, 2018), eDocket ID 20183-141493-01.

<sup>16</sup> Notice of Additional Comment Period, Docket No. IP-6984/WS-17-749 (Apr. 3, 2018), eDocket ID 20184-141655-01.

<sup>17</sup> Notice of Joint Public Hearing and Draft Site Permit Availability, Docket Nos. IP-6984/CN-17-676, IP-6984/WS-17-749 (June 12, 2018), eDocket ID 20186-143766-01.

<sup>18</sup> *Id.* at 2.



Findings of Fact, Conclusions of Law, and Recommendations.<sup>19</sup> The LDC submitted comments and proposed modifications on August 6, 2018, arguing that the evidence already introduced in the record showed that the Project should be rejected due to labor-related socioeconomic concerns.<sup>20</sup> The LDC did not explain what, if any, concerns required further development, or what it thought was left out that would aid the Commission in making any decision.

On September 5, 2018, ALJ LaFave issued his Summary of Public Testimony, Findings of Fact, and Conclusions of Law ("Report") in which he found that Flying Cow Wind had satisfied the criteria for a LWECS Site Permit for the Project, and recommended that the LWECS Site Permit be issued.<sup>21</sup> The LDC was given the opportunity to file exceptions to ALJ LaFave's Report,<sup>22</sup> and again, as explained further below, its exceptions did not note what, if any information was left out of the informal proceedings in which it had participated and only calling into question the conclusions reached based on the information LDC submitted.

#### **B. Participation by the LDC and Similar Interested Groups.**

The LDC, and other persons representing labor interests, participated fully in the informal proceedings ordered by the Commission. They made oral and written comments and arguments, challenged information from Flying Cow Wind, and submitted extensive evidence and other information into the record regarding the positive socioeconomic impacts that would result from using local labor on the Project. This included dozens of oral and written comments, written reports, and eyewitness evidence. The LDC also introduced information

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<sup>19</sup> See Comments and Proposed Findings of Fact, Conclusions of Law, and Recommendations (July 18, 2018), eDocket ID 20187-145014-01.

<sup>20</sup> Laborers District Council of Minnesota & North Dakota Proposed Findings, MPUC Docket Nos. IP-6984/CN-17-676, IP-6984/WS-17-749, OAH Docket No. 60-2500-35035 (Aug. 6, 2018), eDocket ID 20188-145571-03.

<sup>21</sup> Summary of Public Testimony, Findings of Fact, Conclusions of Law, and Recommendation, MPUC Docket Nos. IP-6984/CN-17-676, IP-6984/WS-17-749, OAH Docket No. 60-2500-35035 (Sept. 5, 2018), eDocket ID 20189-146225-01.

<sup>22</sup> Laborers District Council of Minnesota & North Dakota Exception to Administrative Law Judge's Report, MPUC Docket Nos. IP-6984/CN-17-676, IP-6984/WS-17-749, OAH Docket No. 60-2500-35035 (Sept. 19, 2018), eDocket ID 20189-146511-04.

regarding labor practices that were implemented for other projects by affiliates of Flying Cow Wind's corporate affiliates, most notably from the *construction* arm of RES Americas. Flying Cow Wind has not contested this information.

The LDC was also granted intervener status, though as explained multiple times by the Commission, ALJ LaFave, and Flying Cow Wind, this status did not confer any additional procedural rights on the LDC that were not already available to it in the informal process. Importantly, those procedural rights were nearly identical to what is offered through a contested case. As the Department of Commerce – Division of Energy Resources ("DOC-DER") explained, the LDC was provided the opportunity to, among other things, offer oral and written direct and rebuttal testimony, cross-examine and question all parties and non-parties who testify, submit written questions to the ALJ, request that testimony be taken by deposition, present arguments and data, present witnesses, review and comment on the environmental impact assessment, and provide oral and written comments.<sup>23</sup> In other words, "without a contested case, participation [by the LDC was] readily allowed,"<sup>24</sup> but LDC failed to fully avail itself of the procedural opportunities that they now seek.

### **C. The LDC's Multiple Requests for a Contested Case Hearing.**

Notwithstanding the LDC's participation in these proceedings, and the procedural devices already available to it, the LDC made multiple requests for contested case hearings. It filed its first request on March 14, 2018, asking for the opportunity to "present evidence and witness testimony, to fully cross-examine [Flying Cow Wind's] witnesses, and to conduct discovery on the issues raised in this petition" – procedural devices that were already available

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<sup>23</sup> Department of Commerce, Division of Energy Resources (DOC DER) Response Regarding Request for Contested Case Hearing, MPUC Docket Nos. IP-6984/CN-17-676, IP-6984/WS-17-749, OAH Docket No. 60-2500-35035 (Mar. 28, 2018), eDocket ID 20183-141492-01.

<sup>24</sup> *Id.* at 1.

in the informal process.<sup>25</sup> It thereafter withdrew the contested case request, recognizing "that the chance to seek contested case proceedings may have passed, and that, as FCW observes in its brief, the opportunity to request for a contested case proceeding for the Site Permit has not yet arrived."<sup>26</sup> The LDC stated it was "willing, therefore, to withdraw [its] request for a contested case proceeding for the CON, while reserving [its] right to petition for contested proceedings for the Site Permit at the appropriate time."<sup>27</sup> The LDC further acknowledged that Flying Cow Wind "has the legal right to build the project with an entirely out-of-state workforce that is paid no more than the state minimum wage if the company wishes to do so."<sup>28</sup> ALJ LaFave then denied the request, noting that the LDC failed to demonstrate a material factual dispute and failed to "prove there is some evidence that can be produced that would aid the Commission in determining whether to issue a Certificate of Need or the LWECS Site Permit."<sup>29</sup> Judge LaFave also observed that the LDC conceded that Flying Cow Wind is not required to hire Minnesota workers.<sup>30</sup>

The LDC filed its second request for a contested case on July 18, 2018, the last day of the public comment period and three weeks after completion of the joint public hearing.<sup>31</sup> Judge LaFave denied this request as well, noting that it raised largely the same issues in the first

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<sup>25</sup> Request for Contested Case Hearing and Petition for Intervention at 4, MPUC Docket Nos. IP-6984/CN-17-676, IP-6984/WS-17-749, OAH Docket No. 60-2500-35035 (Mar. 14, 2018), eDocket ID 20183-141004-01.

<sup>26</sup> Reply at Flying Cow, LLC Regarding Request for Contested Case Hearing and Petition for Intervention at 1–2, MPUC Docket Nos. IP-6984/CN-17-676, IP-6984/WS-17-749, OAH Docket No. 60-2500-35035 (Mar. 28, 2018), eDocket ID 20183-141494-02.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 2–3.

<sup>29</sup> Order on the Request for Contested Case Hearing and Petition for Intervention by Laborers District Council of Minnesota and North Dakota at 5, MPUC Docket Nos. IP-6984/CN-17-676, IP-6984/WS-17-749, OAH Docket No. 60-2500-35035 (May 7, 2018), eDocket ID 20185-142798-01.

<sup>30</sup> *Id.* at 4.

<sup>31</sup> Request for Contested Case Hearing Laborers District Council of Minnesota & North Dakota, MPUC Docket Nos. IP-6984/CN-17-676, IP-6984/WS-17-749, OAH Docket No. 60-2500-35035 (July 18, 2018), eDocket ID 20187-145016-04.

request.<sup>32</sup> He found that the LDC again "failed to identify any new evidence or information that could be developed in a contested case hearing that would help the Commission make its decision."<sup>33</sup> The LDC then moved to certify their request to the Commission, which Judge LaFave also denied, noting that granting this late motion would unduly prejudice Flying Cow Wind.<sup>34</sup>

Notwithstanding repeated misrepresentations by LDC, Flying Cow Wind has cooperated with and did not object to the LDC's participation within the established process throughout these proceedings. Additionally, Flying Cow Wind has agreed to the only substantive condition that LDC raised regarding the Project – that Flying Cow Wind provide a report to the Commission regarding Flying Cow Wind's efforts to hire local labor and resulting use of local labor in construction of the Project.<sup>35</sup> DOC-EERA endorsed a similar approach.<sup>36</sup>

#### **D. LDC Acknowledges the Robust Record Evidence Regarding Local Labor.**

The LDC's September 19, 2018 exceptions to ALJ LaFave's Report acknowledge that the LDC was able to introduce robust evidence into the record regarding the socioeconomic impacts associated with using local labor on wind projects:

The Laborers Union, together with fellow labor unions and community stakeholders, has provided in the record extensive evidence that variations in the use of local and non-local construction labor can significantly alter a project's socioeconomic impact. We have shown that use of largely local labor to build

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<sup>32</sup> Amended Order Denying the Second Request for a Contested Case Hearing by the Laborers District Council of Minnesota and North Dakota, MPUC Docket Nos. IP-6984/CN-17-676, IP-6984/WS-17-749, OAH Docket No. 60-2500-35035 (Aug. 14, 2018), eDocket ID 20188-145705-01.

<sup>33</sup> *Id.* at 2.

<sup>34</sup> Order Denying the Joint Motion for Certification of Request for Contested Case Hearing and Intervention to Public Utilities Commission, MPUC Docket Nos. IP-6984/CN-17-676, IP-6984/WS-17-749, OAH Docket No. 60-2500-35035 (Aug. 30, 2018), eDocket ID 20188-146109-01.

<sup>35</sup> See Flying Cow Wind, LLC's Comments and Proposed Findings of Fact at 2, MPUC Docket Nos. IP-6984/CN-17-676, IP-6984/WS-17-749, OAH Docket No. 60-2500-35035 (July 18, 2018), eDocket ID 20187-145014-01.

<sup>36</sup> See Energy Environmental Review and Analysis Comments and Recommendations at 2–3, MPUC Docket Nos. IP-6984/CN-17-676, IP-6984/WS-17-749, OAH Docket No. 60-2500-35035 (Aug. 6, 2018), eDocket ID 20188-145537-01.

Minnesota wind energy is both beneficial and feasible, and that reliance on non-local labor can impose significant opportunity costs. And despite the company's refusal to provide basic data on its labor practices, we have shown that RES Americas' reliance on non-local labor could hurt area workers and communities that might have been better served by competing projects.<sup>37</sup>

The LDC exceptions to ALJ LaFave's Report did not identify any additional information, or any material factual dispute, to be further developed or resolved through a contested case. Instead, the LDC took issue with ALJ LaFave's consideration of the labor-related evidence and information that *the LDC had already introduced into the record*, claiming the Report "makes no effort to grapple with any of this argument or evidence . . . ." <sup>38</sup> The LDC claimed "there is still an opportunity for the Bitter Root proceedings to get back on track through a contested case hearing on a discrete set of contested facts," <sup>39</sup> but in actuality, it hopes to send the Bitter Root proceedings far off course in hope of gaining leverage for its interests and achieving what would constitute a more favorable result from its narrow perspective. Notably, apart from its proposed reporting requirement, which Flying Cow Wind has agreed to implement, the LDC has not even hinted at what a more favorable outcome would look like in the proceedings outside reaching a settlement agreement with LDC.

#### **E. Flying Cow Wind Executes a PPA, Qualifying for the Statutory IPP Exemption.**

On October 23, 2018, Flying Cow Wind provided notice to the Commission that it had entered into a long-term Power Purchase Agreement ("PPA") for the Project.<sup>40</sup> On December 28, 2018, Flying Cow Wind filed a request to withdraw its Certificate of Need application, noting that the Project qualified for the statutory IPP Exemption under Minn. Stat. § 216B.243,

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<sup>37</sup> Laborers District Council of Minnesota & North Dakota Exception to Administrative Law Judge's Report at 2, MPUC Docket Nos. IP-6984/CN-17-676, IP-6984/WS-17-749, OAH Docket No. 60-2500-35035 (Sept. 19, 2018), eDocket ID 20189-146511-04.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 3.

<sup>40</sup> Notice of Power Purchase Agreement and Revised Project Schedule, MPUC Docket No. IP-6984/CN-17-676 (Oct. 23, 2018), eDocket ID 201810-147252-01.

subd. 8(7), which applies to independent power producers that execute PPAs with purchasers who do not provide retail electric service in Minnesota or wholesale electric service to another entity in Minnesota.<sup>41</sup> Accordingly, a Certificate of Need is no longer required for the Project.

#### **F. The Commission Defers Action on the Applications.**

In the January 3 Order, the Commission departed from the recommendations of Commission staff and DOC-EERA and declined to consider whether to adopt ALJ LaFave's Report recommending the issuance of a LWECS Site Permit for the Project.<sup>42</sup> Instead, the Commission found that "there are material facts in dispute that require further development—in particular, facts regarding how Flying Cow Wind's employment practices might influence the project's socioeconomic consequences."<sup>43</sup> Notwithstanding the robust public participation and procedures available under the informal process that the Commission ordered, and the extensive information already introduced into the record regarding socioeconomic impacts and the use of local labor, the January 3 Order states that issues surrounding "the socioeconomic consequences of Flying Cow Wind's labor practices" are "best developed in formal evidentiary proceedings."<sup>44</sup> The Commission did not specify the material facts that it thought were in dispute, nor what additional information could be presented through a contested case proceeding that had not been, or could not have been, introduced into the record already through the informal process.

### **III. DISCUSSION.**

#### **A. The Commission Erred as a Matter of Law in Concluding that Labor Hiring Decisions of Construction Contractors Are Part of the Certificate of Need and LWECS Site Permit Processes.**

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<sup>41</sup> Flying Cow Wind, LLC's Request to Withdraw Its Application for a Certificate of Need, MPUC Docket Nos. IP-6984/CN-17-676, IP-6984/WS-17-749, OAH Docket No. 60-2500-35035 (Dec. 28, 2018), eDocket ID 201812-148753-02.

<sup>42</sup> January 3 Order at 7.

<sup>43</sup> *Id.* at 3.

<sup>44</sup> *Id.*

The Commission’s conclusion that the labor practices of construction contractors is relevant to the Certificate of Need and LWECS Site permitting processes is an error of law. The January 3 Order represents a significant departure from Commission precedent in applying the Certificate of Need criteria, a departure that is unsupported in the January 3 Order. Additionally, The Commission’s review of LWECS Site Permit applications requires the Commission to evaluate the Project as it relates to the proposed site. In particular, the economic impact analysis is tied to the direct and indirect economic impacts of the Project's proposed site. Those considerations are limited to site-specific concerns, not the broader hiring practices of potential construction contractors that LDC does not allege are in any way tied to this particular location. This limitation is made apparent through the plain language and legislative history of the Power Plant Siting Act, as well as recent comments from Commissioners regarding the LWECS Site Permitting criteria. Because the LWECS Site Permit analysis is not concerned with broader socioeconomic impacts, it is unnecessary to have a contested case on the socioeconomic impacts of those labor practices.

- a. The January 3 Order is a Significant Departure from Commission Precedent Regarding the Application of the Certificate of Need Criteria.

The conclusion to order a contested case on the Certificate of Need is an error as a matter of law. The Certificate of Need criteria establish that “the effect of the proposed facility, or a suitable modification of it, upon the natural and socioeconomic environments compared to the effect of not building the facility” is merely one factor to weigh in analyzing the benefits to society of the proposed facility, which in turn is one element to consider in determining whether a Certificate of Need must be granted.<sup>45</sup> The Commission has never found that, or even considered whether, the labor practices of a construction contractor are relevant to the issuance

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<sup>45</sup> Minn. R. 7849.0120(C)(2).

of a Certificate of Need.<sup>46</sup> Yet, the January 3 Order concludes that the Certificate of Need analysis not only includes analysis of these labor hiring practices of construction contractors, it assigns such significant weight to that factor as to be dispositive on the question of whether Flying Cow Wind qualifies for a Certificate of Need.

b. The Question of Whether the Labor Practices of Construction Contractors is Relevant to a Certificate of Need Process is Irrelevant Because the Project Qualifies for the IPP Exemption for Certificates of Need.

Even if the Commission were to conclude that labor practices of construction contractors are an appreciate part of the Certificate of Need analysis, Flying Cow Wind's December 28, 2018 request to withdraw its Certificate of Need application establishes that a Certificate of Need is no longer required for the Project, pursuant to the IPP Exemption under Minn. Stat. § 216B.243, subd. 8(7). The IPP Exemption provides that a Certificate of Need is not required for a wind project that (1) is owned and operated by an independent power producer; and (2) the electric output of the project is not sold to an entity that provides retail electric service in Minnesota or wholesale electric service to another entity in Minnesota (other than a federally recognized RTO or ISO). Flying Cow Wind is an independent power producer, and it has entered into the PPA. The purchaser under the PPA is a commercial and industrial customer that is not a Minnesota utility (i.e., a regulated utility, non-regulated utility, or a distribution

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<sup>46</sup> See e.g., *In the Matter of the Application of Blazing Star Wind Farm, LLC for a Certificate of Need for the 200 Megawatt Blazing Star Wind Project in Lincoln County*, Docket No. IP-6961/CN-16-215, Order Granting Certificate of Need (Aug. 3, 2017); *In the Matter of a Joint Request of Black Oak Wind, LLC and Getty Wind, LLC for a Determination Regarding Whether a Certificate of Need is Required for Two Large Wind Energy Conversion Systems in Stearns County, Minnesota*, Docket No. IP-6853,6866/CN11-471, Order Granting Certificate of Need and Finding Environmental Report Adequate (Dec. 31, 2012); *In the Matter of the Application of Prairie Rose Wind, LLC for a Certificate of Need for up to 200 MW wind project in Rock and Pipestone Counties*, Docket No. IP6838/CN-10-80, Order Granting a Certificate of Need (Sept. 16, 2011); *In the Matter of the Application of Elm Creek Wind, LLC, for a Certificate of Need for a Large Energy Facility, the Elm Creek Wind Project in Jackson and Martin Counties*, Docket No. IP6631/CN-07-789, Order Granting Certificate of Need (Jan. 15, 2008); *In the Matter of the Application for a Certificate of Need for the Trimont Area Wind Farm*, Docket No. IP6339/CN-03-1841, Order Granting Certificate of Need (June 2, 2004).



utility), and it and its affiliates do not own any transmission assets or have a franchise service area. Additionally, all sales of wholesale power that the purchaser makes are to a federally-recognized RTO or ISO. Thus, the purchaser does not provide retail service in Minnesota or wholesale electric service to another entity in Minnesota and Flying Cow Wind is exempt from obtaining a Certificate of Need under the IPP Exemption.

c. The Economic Considerations Under the Site Permitting Criteria Pertain Only to the Designation of the Particular Site Chosen for the Project.

The Commission's evaluation of the Project's economic impacts is limited to those criteria provided under the LWECS Site Permitting statute. This criteria is set forth in Minn. Stat. § 216E.03, subd. 7, a section of the Power Plant Siting Act ("PPSA"). The statute states in part that the Commission "shall be guided by, but not limited to . . . [an] analysis of the direct and indirect economic impact of proposed sites and routes including, but not limited to, productive agricultural land lost or impaired." Minn. Stat. § 216E.03, subd. 7(b)(5).<sup>47</sup>

"The aim of statutory interpretation is to ascertain and effectuate the intent of the legislature." *In re Excelsior Energy*, 782 N.W.2d 282, 289 (Minn. Ct. App. 2010) (citing Minn. Stat. § 645.16). A statute is interpreted by looking to its plain language, taking into account its structure and context. *In re Robledo*, 612 N.W.2d 67, 69 (Minn. Ct. App. 2000). "When the language of a statute is plain and unambiguous, that plain language must be followed." *City of Lake Elmo v. Metropolitan Council*, 674 N.W.2d 191, 195–96 (Minn. Ct. App. 2003).

The plain language of Minn. Stat. § 216E.03, subd. 7(b)(5) makes clear that the economic impacts to be considered for the Project are site-specific. The statute provides that the Commission must consider the direct and indirect economic impact "of proposed sites." It then goes on to give an example of a site-specific impact to be considered; namely, whether

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<sup>47</sup> This statute provided the basis for the Commission to order a contested case for the LWECS Site Permit application. See January 3 Order at 3 (quoting Minn. Stat. § 216E.03, subd. 7).

selecting the particular site will cause "productive agricultural land" to be "lost or impaired." Although the LDC may argue that this statute authorizes the Commission to consider the economic impacts of the Project more broadly, that interpretation nullifies this site-specific language and is contrary to the rule that a "statute should be interpreted, whenever possible, to give effect to all of its provisions; no word, phrase, or sentence should be deemed superfluous, void, or insignificant." *Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000).

The legislative history surrounding the PPSA also confirms that these economic considerations, and indeed any considerations under Minn. Stat. § 216E.03, are meant to be site-specific. The PPSA was enacted in 1973, along with two other pieces of environmental legislation to complement the Minnesota Environmental Rights Act. *See People for Envtl. Enlightenment & Responsibility (PEER), Inc. v. Minn. Envtl. Quality Council*, 266 N.W.2d 858, 865 (Minn. 1978). The other legislation included the Minnesota Environmental Policy Act and the legislation that created the Minnesota Environmental Quality Council. *Id.* Together, these laws formed "a coherent legislative policy, one of whose aims is to harmonize the need for electric power with the equally important goal of environmental protection." *Id.*

The PPSA was enacted specifically to address the haphazard manner in which utilities were selecting sites to locate new plants and transmission lines. Before the PPSA was enacted, the location of plants and transmission lines were regulated at the local rather than state level. *See No Power Line, Inc. v. Minn. Envtl. Quality Council*, 262 N.W.2d 312, 317 (Minn. 1977). At this time, "holders of eminent domain rights could simply decide to construct new generating and transmission facilities, decide on a route, and go ahead acquire the rights of way." *Id.* at 331. "By enacting the PPSA, the legislature sought to ensure that the future siting of power plants and transmission lines would be carried out in an orderly fashion according to a rational

design, rather than haphazardly, and possibly unnecessarily, at the whim of individual public utilities whose decisions might fail to consider or comport with the public interest." *Id.* at 317.

The legislature also intended the PPSA to make siting processes more efficient. "The two crucial concepts that permeate the entire act are that the process should be orderly and that there should be public participation in all stages of agency decisionmaking." *Id.* at 321. The legislature contemplated that, when siting facilities, the Commission "must weigh the benefits that will accrue from the gathering of additional information against the detrimental effects of dragging on the course of this [proceeding]." *PEER*, 266 N.W.2d at 875.

Recent orders from the Commission in wind siting dockets also confirm the site-specific nature of this economic analysis. Chapter 216F, which the Commission also applies when siting wind projects, mirrors language from the PPSA by requiring wind projects to be sited "in an orderly manner compatible with environmental preservation, sustainable development, and the efficient use of resources."<sup>48</sup> Commission decisions make clear that, under this criteria, the Commission must evaluate whether the particular site for a wind project and conditions to be placed on the project would allow the Project and future projects to efficiently use the state's wind resource and would not preclude other economic activity in and around the project area. For example, in one proceeding the Commission observed that a buffer setback requirement between two adjacent projects "provide[s] for the efficient use of the wind resource."<sup>49</sup> The Commission has also observed that these buffer requirements are consistent with Minn. Stat. § 216F.03 because "[u]pholding the future wind rights of wind developers of all sizes and types provides certainty in their planning and ensures the orderly and sustainable development of

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<sup>48</sup> Minn. Stat. § 216F.03.

<sup>49</sup> *In the Matter of the Site Permit Application of Community Wind South, LLC for a 30.75 Large Wind Energy Conversion System in Nobles County*, MPUC Docket No. IP-6871/WL-11-863, 2012 WL 1564216, at \*8 (Minn. P.U.C. May 1, 2012).

wind resources."<sup>50</sup>

Lastly, comments from Commissioners Tuma and Lipschultz in a recent Certificate of Need docket also show that, although broader labor-related socioeconomic considerations may be appropriate for determining whether to issue a Certificate of Need, they are not relevant to the LWECS Site Permit analysis. At the December 20, 2018 hearing regarding the Certificate of Need application for the Nobles 2 Wind Project,<sup>51</sup> Commissioner Tuma questioned why the applicant was continuing to apply for a Certificate of Need in light of its qualification for a statutory exemption from that requirement.<sup>52</sup> Commissioner Tuma suggested that labor-related considerations; namely, whether the company should be required to file reports on the use of local labor, "flow out socioeconomic aspects of the certificate of need and should be addressed in the certificate of need order . . . as opposed to [the] permitting docket."<sup>53</sup> Commissioner Lipschultz stated that he shared Commissioner Tuma's thoughts and recognized that "there's an argument that labor issues like this might be more appropriately addressed in certificates of need as part of the cost-benefit analysis."<sup>54</sup>

As a result, the plain language of the PPSA, its legislative history, and Commission practice all reveal that the economic considerations of the criteria under the statute are site-specific. The Commission should therefore not consider broader economic considerations, such as weighing the socioeconomic impacts of using local or non-local labor for a wind project, when determining whether to issue a LWECS Site Permit.

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<sup>50</sup> *In the Matter of the Application of New Ulm Public Utilities Commission for a Large Wind Energy Conversion System Site Permit for the New Ulm Wind Project in Nicollet County*, Docket No. E-383/WS-09-178, 2010 WL 239236, at \*6 (Minn. P.U.C. Jan. 19, 2010).

<sup>51</sup> Hearing on Application for Certificate of Need, *In the Matter of the Application of Nobles 2 Power Partners, LLC for a Certificate of Need for the up to 260 MW Nobles 2 Wind Project and Associated Facilities in Nobles County, Minnesota*, Docket No. IP-6964/CN-16-289 (Dec. 20, 2018).

<sup>52</sup> Hearing on Application for Certificate of Need, Docket No. IP-6964/CN-16-289 (Dec. 20, 2018) (statement from Commissioner Tuma at 1:49:38), *available at* <https://minnesotapuc.legistar.com/Calendar.aspx>.

<sup>53</sup> *Id.* (statement from Commissioner Tuma at 1:53:56).

<sup>54</sup> *Id.* (statement from Commissioner Lipschultz at 1:59:31).

The legislature's emphasis on orderly processes also stresses that the Commission should not order additional burdensome processes to evaluate issues that were not intended to be considered under the PPSA. This is particularly true where the parties who supposedly would benefit from those processes have already had ample opportunity to develop the record. But the LDC has not raised site-specific arguments. They have not contested that the particular site chosen by Flying Cow Wind will have a different impact on local labor than any other hypothetical site that could be used for the Project. Accordingly, it is not appropriate to hold a contested case hearing to explore the broader labor-related socioeconomic impacts of the Project.

**B. A Contested Case on the Socioeconomic Impacts of the Project from Labor Practices is Unsupported in the Record Evidence.**

A contested case hearing is still not appropriate even if the Commission finds that labor practices of construction contractors are relevant to the Certificate of Need and LWECS Site Permit processes, as the record evidence supports granting both permits. The Project meets the statutory criteria for issuance of a Certificate of Need and LWECS Site Permit, including those related to socioeconomic impacts. And although the January 3 Order provides that there are material factual disputes regarding Flying Cow Wind's labor practices that need to be resolved and further developed, the order does not identify those factual issues. The order also fails to identify any new evidence or information that could be developed through a contested case hearing, particularly in light of the informal process that the LDC has fully utilized. Thus, the Commission should still reconsider its January 3 Order and promptly issue a Certificate of Need and LWECS Site Permit for the Project, without a contested case hearing.

a. The Project Qualifies for a Certificate of Need and Site Permit.

Flying Cow Wind has shown that the Project meets all statutory criteria for issuance of a

Certificate of Need and LWECS Site Permit. Assuming the IPP Exemption does not apply, the Commission must grant Flying Cow Wind a Certificate of Need if the Project meets the criteria under Minn. Stat. § 216B.243, subd. 3 and Minn. R. 7849.0120. These criteria require the Commission to analyze whether the Project is needed; whether there is a more reasonable and prudent alternative considering the size, type, timing, cost, natural and socioeconomic impacts, and expected reliability of the Project; whether the Project will provide benefits compatible with protecting the natural and socioeconomic environments, including human health; and whether the Project will comply with federal, state, and local policies, rules, and regulations.<sup>55</sup>In particular, as provided in the January 3 Order, when determining whether to issue a Certificate of Need the Commission must consider "the effect of the proposed facility, or a suitable modification of it, upon the natural and socioeconomic environments compared to the effect of not building the facility . . . ." <sup>56</sup> This is one of the many factors that the Commission must consider when evaluating whether "the proposed facility, or a suitable modification of the facility, will provide benefits to society in a manner with protecting the natural and socioeconomic environments, including human health."<sup>57</sup>

A consideration of these factors shows that a Certificate of Need must be issued. DOC- DER and Commission Staff recommend that the Commission issue a certificate.<sup>58</sup> . The Environmental Report from DOC-EERA found that the Project will have a positive impact on the tax base and local economy, in part because local contractors and suppliers would be used

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<sup>55</sup> See Minn. R. 7849.0120; Minn. Stat. § 216B.243, subd. 3.

<sup>56</sup> January 3 Order at 2. The order erroneously quotes the regulations applicable to Certificates of Need for petroleum facilities, Minn. R. 7853.0130(C)(2). However, identical language is provided in a similar, though not identical, subpart under the rule applicable to Large Electric Generating Facilities, Minn. R. 7849.0120(C)(2).

<sup>57</sup> Minn. R. 7849.0120(C).

<sup>58</sup> See Comments of the Minnesota Department of Commerce Division of Energy Resources, MPUC Docket Nos. IP-6984/CN-17-676, IP-6984/WS-17-749, OAH Docket No. 60-2500-35035 (Mar. 12, 2018), eDocket ID 20183-140957-02; Staff Briefing Papers, MPUC Docket Nos. IP-6984/CN-17-676, IP-6984/WS-17-749, OAH Docket No. 60-2500-35035 (Nov. 30, 2018), eDocket ID 201811-148157-01.

for portions of the construction.<sup>59</sup> Commission staff agreed that "the project will provide benefits to society in a manner compatible with protecting the natural and socioeconomic environments, including human health."<sup>60</sup> Thus, the Department of Commerce and Commission staff have determined that the Project will have a positive socioeconomic impact, warranting issuance of a Certificate of Need.

The LDC even admits that the Project will provide socioeconomic benefits regardless of the amount of local labor used, which on its own warrants reconsideration of the January 3 Order and issuance of a Certificate of Need. The LDC argues that the Project will harm the economy. But it relies on a June 2018 report<sup>61</sup> and related press release<sup>62</sup> from the North Star Policy Institute that studied and commented on the relative socioeconomic impacts associated with the use or non-use of local labor on wind projects in southern Minnesota. The report clearly explains that wind projects produce significant benefits to the local economy, regardless of whether local labor is used. The report notes that, "in 2017, wind farm projects in Minnesota provided annual land lease payments of between \$10 million and \$15 million, generated \$7.1 billion in total capital investment and supported between 3,000 and 4,000 direct and indirect jobs."<sup>63</sup> The report projects the comparative cumulative impact of seven wind projects, including Bitter Root, on the southern Minnesota economy, based on the amount local labor used. According to the report: "If local workers comprise between 10% and 30% of the

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<sup>59</sup> See Environmental Report at 63, MPUC Docket No. IP-6984/CN-17-676 (May 4, 2018), eDocket ID 20185-143223-01.

<sup>60</sup> Staff Briefing Papers at 13, MPUC Docket Nos. IP-6984/CN-17-676, IP-6984/WS-17-749, OAH Docket No. 60-2500-35035 (Nov. 30, 2018), eDocket ID 201811-148157-01.

<sup>61</sup> *Catching the Wind: The Impact of Local vs. Non-Local Hiring Practices on Construction of Minnesota Wind Farms*, North Star Policy Institute (June 2018), Public Hearing Ex. 502 at 1-19, eDocket ID 20187-144798-01.

<sup>62</sup> Katie Hatt, *A Tale of Two Wind Farms: How Southwest Minnesota Communities Stand to Gain or Lose Jobs and Economic Investment Based on Local Hiring on Wind Projects*, North Star Policy Institute (June 28, 2018), Public Hearing Ex. 502 at 20-24, eDocket ID 20187-144798-01.

<sup>63</sup> Public Hearing Ex. 502 at 3 (citing *Wind Energy in Minnesota*, American Wind Energy Association, available at <http://awea.files.cms-plus.com/FileDownloads/pdfs/Minnesota.pdf>).

workforce, the economic benefit to Southern Minnesota communities will be between approximately \$41 million and \$57 million. If, however, local workers comprise 50% to 70% of the workforce, the economic benefit will be between approximately \$73 and \$89 million."<sup>64</sup> Even if 0% local workforce, the cumulative impact of construction labor alone for these proposed projects will be over \$33 million.<sup>65</sup> And for an individual wind farm project, that number, again not considering any other economic benefits of the project, is over \$3.6 million.<sup>66</sup>

The LDC's unsubstantiated argument that the Project will have negative socioeconomic impacts is therefore contradicted by the very information on which it relies. Although this information shows that the use of local labor would increase a wind project's positive socioeconomic impacts, a finding Flying Cow Wind does not dispute, there also can be no dispute that, taking all the evidence and information submitted by LDC, the Project will have a positive socioeconomic impact when compared to the effect of not building the Project even if no local labor is used. This is true even without considering the additional recognized positive Project impacts that will result from lease payments and contributions to the local tax base. As a result, because the Project will have a positive socioeconomic impact, the Commission must reconsider its January 3 Order and it must issue a Certificate of Need.<sup>67</sup>

Flying Cow Wind has also shown that the Project meets the LWECS Site Permit criteria, which as discussed require that facilities be sited "in an orderly manner compatible with environmental preservation and the efficient use of resources." Minn. Stat. § 216E.02, subd. 1; *see also* Minn. Stat. § 216F.03. The Commission's LWECS Site Permitting analysis is guided by the criteria included in Minn. Stat. § 216E.03, subd. 7(b)(1)-(7), which in part directs the

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<sup>64</sup> *Id.* at 17.

<sup>65</sup> *Id.* at 14, Table 9.

<sup>66</sup> *Id.* at 13, Table 7.

<sup>67</sup> *See* Minn. R. 7849.0120 (stating a "certificate of need *must* be granted" if, among other things, the Project will provide socioeconomic benefits) (emphasis added).



Commission to consider the direct and indirect economic impacts of the proposed site. DOC-EERA recommended that a draft LWECS Site Permit be issued for the Project, with amendments to incorporate reporting on the use of local labor (to which Flying Cow Wind consented).<sup>68</sup> Commission staff also recommended issuance of a LWECS Site Permit, with amendments not pertinent to the socioeconomic concerns advanced by the LDC.<sup>69</sup> ALJ LaFave agreed.<sup>70</sup> He specifically found that the Project would "result in short- and long-term benefits to the local economy" including the creation of "approximately 150 temporary jobs during construction and approximately four to six permanent jobs."<sup>71</sup> He also found that local contractors and suppliers would be used for portions of the construction.<sup>72</sup> Again, however, the exact number of local laborers used for the Project does not need to be established to demonstrate a positive socioeconomic impact, because, as the LDC has shown with its own information, there is a net positive economic impact even when no local labor is used.

There is therefore no dispute that the Project will provide benefits to society in a manner compatible with protecting the natural and socioeconomic environments, and Flying Cow Wind has shown it is entitled to both a Certificate of Need and LWECS Site Permit.

b. The January 3 Order Fails to Identify a Disputed Material Fact or Any New Evidence or Information to Be Developed Through a Contested Case.

Contested case hearings serve two purposes. They are used to resolve material factual disputes, if any exist, and they are used to develop the record to aid the Commission in making

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<sup>68</sup> See Energy Environmental Review and Analysis Comments and Recommendations at 5, MPUC Docket Nos. IP-6984/CN-17-676, IP-6984/WS-17-749, OAH Docket No. 60-2500-35035 (Aug. 6, 2018), eDocket ID 20188-145537-01.

<sup>69</sup> Staff Briefing Paper at 17, MPUC Docket Nos. IP-6984/CN-17-676, IP-6984/WS-17-749, OAH Docket No. 60-2500-35035 (Nov. 30, 2018), eDocket ID 201811-148158-01.

<sup>70</sup> Summary of Public Testimony, Findings of Fact, Conclusions of Law, and Recommendation, MPUC Docket Nos. IP-6984/CN-17-676, IP-6984/WS-17-749, OAH Docket No. 60-2500-35035 (Sept. 5, 2018), eDocket ID 20189-146225-01.

<sup>71</sup> *Id.* ¶ 198.

<sup>72</sup> *Id.* ¶ 199.

a final decision.<sup>73</sup> As shown above, the LDC has made repeated requests for a contested case hearing, but it has failed to point to any material disputed fact or any new evidence or information that could be developed through a contested case, let alone any disputed fact or new information that could not be addressed through the informal process that was ordered.

After ALJ LaFave denied the LDC's contested case requests on three separate occasions, the LDC took its arguments to the Commission. The LDC claimed that ALJ LaFave failed to properly consider certain evidence and information regarding the positive socioeconomic impacts stemming from the use of local labor on wind projects. Again, however, the LDC did not point to any material factual dispute or any new evidence regarding these socioeconomic impacts that it believes should be in the record. Instead, it argued that ALJ LaFave did not give proper consideration to information and evidence *that the LDC had already introduced in the record and that Flying Cow Wind does not dispute.*

The January 3 Order is deficient for the same reasons. The Commission claims that "there are significant factual issues that have not been resolved to the Commission's satisfaction" that pertain to "how Flying Cow Wind's employment practices might influence the project's socioeconomic consequences."<sup>74</sup> But the Commission does not explain what those material factual issues are, because there are none. Flying Cow Wind agrees that increased use of local labor would have positive socioeconomic impacts, and it is committed to using local labor for the Project where it is feasible to do so. However, as explained the LDC also conceded that Flying Cow Wind is not required to use local labor and that the Project will have positive socioeconomic impacts even if no local labor is used. Thus, there is no dispute, let alone a material factual dispute, on these issues.

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<sup>73</sup> See Minn. R. 7829.1000; Minn. R. 7854.0900, subp. 5(B).

<sup>74</sup> January 3 Order at 3.

The LDC acknowledges in its exceptions to ALJ LaFave's Report that the LDC and others with aligned interests have submitted extensive evidence, comments, testimony, and other information into the record regarding socioeconomic impacts associated with local labor. But the LDC claims that a contested case is warranted because the ALJ "ignor[ed] dozens of public comments, expert testimony (including two published reports!), eyewitness evidence, and the testimony of Applicant's own witness" regarding these impacts, not that the LDC has additional information regarding those impacts that has not been entered into the record.<sup>75</sup> The January 3 Order appears to accept this argument. But a contested case will do nothing to cure the deficiencies that the LDC and the Commission find in the ALJ's Report. Instead, because neither the Commission nor the LDC has identified any material factual dispute or additional evidence to be entered into the record, the Commission can and should address any deficiencies in ALJ LaFave's Report simply through modifying the Report. A contested case proceeding is not necessary or appropriate simply because the LDC does not like the weight given to the information it submitted or the conclusions reached in the ALJ's Report.

The conclusory nature of the January 3 Order – in particular its failure to explain what material factual disputes or new evidence renders a contested case appropriate – is fatal. An agency decision must "be supported by written findings and reasons, in more than just a conclusory fashion, before expecting the order or decision to be sustained on appeal." *Reserve Mining Co. v. Minn. Pollution Control Agency*, 364 N.W.2d 411, 415 (Minn. Ct. App. 1985). Failure to do so suggests that the decision "represents the agency's will rather than its judgment" and is therefore arbitrary. *Pittman v. Dakota Cnty. Comm'y Development Agency*, No. A07-2063, 2009 WL 112948, at \*4 (Minn. Ct. App. Jan. 20, 2009) (quoting *Reserve Mining*, 364

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<sup>75</sup> Laborers District Council of Minnesota & North Dakota Exception to Administrative Law Judge's Report at 2, MPUC Docket Nos. IP-6984/CN-17-676, IP-6984/WS-17-749, OAH Docket No. 60-2500-35035 (Sept. 19, 2018), eDocket ID 20189-146511-04.

N.W.2d at 414). Although there "is no hard-and-fast rule as to how detailed and specific findings should be[,]" an agency "should state with clarity and completeness the facts and conclusions essential to its decision so that a reviewing court can determine from the record whether the facts furnish justifiable reasons for its action." *Matter of Authority to Provide Alternative Operator Servs. in Minn.*, 490 N.W.2d 920, 924 (Minn. Ct. App. 1992). A reasoned explanation is even more important because the January 3 Order rejects ALJ LaFave's recommendations. See *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001) ("Rejections of the ALJ's recommendations without explanation . . . may suggest that the agency exercised its will rather than its judgment and was therefore arbitrary and capricious."); *CUP Foods, Inc. v. City of Minneapolis*, 633 N.W.2d 557, 565 (Minn. Ct. App. 2001) (concluding that an agency decision was arbitrary and capricious when the agency significantly deviated from the ALJ's recommendations without explanation or additional findings to support its disposition).

c. The Informal Process Already Provided the LDC Ample Opportunity to Develop the Record and Raise Factual Disputes.

The January 3 Order also fails to recognize that a contested case will not provide the LDC with any meaningful procedural rights that it did not have under the informal process that the Commission ordered over a year ago. On March 28, 2018, DOC-DER provided a detailed explanation to the LDC of the procedural avenues that were available to it, in response to the LDC's first request for a contested case hearing:

Chapter 1405 proceedings offer participants nearly all the rights and opportunities that are available in Chapter 1400 contested case proceedings regarding development of the evidentiary record on which the Commission bases its decisions. In Chapter 1405 proceedings, interested persons can engage in contested case-like processes.<sup>76</sup>

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<sup>76</sup> Department of Commerce, Division of Energy Resources (DOC DER) Response Regarding Request for Contested Case Hearing at 3, MPUC Docket Nos. IP-6984/CN-17-676, IP-6984/WS-17-749, OAH Docket No. 60-

DOC-DER explained that interested persons may, among other things (1) offer oral direct and rebuttal testimony; (2) offer written direct and rebuttal testimony; (3) orally cross-examine and question all parties and non-parties who testify, or submit written questions to the ALJ, who will then ask the questions of the witness; (4) may be represented by legal counsel; (5) may request that the ALJ order a witness's testimony to be taken by deposition; (6) may present arguments, memoranda, and other data to the record; (7) may present witnesses on the non-party's behalf at the hearings; (8) may request a transcript of the hearing; and (9) are entitled to the opportunity to review and comment on any environmental impact assessment.<sup>77</sup>

Thus, the LDC was aware of these procedural rights at an early stage, and a contested case will not allow any further factual development that could not have already occurred during the informal proceedings. It therefore appears that the contested case required by the January 3 Order serves no purpose other than to impose significant procedural burdens on Flying Cow Wind, in an apparent attempt to encourage settlement with the LDC. That is not a valid reason for a contested case, nor is it consistent with the Commission's obligation to site wind projects "in an orderly manner" compatible with "the efficient use of resources"<sup>78</sup> and to "weigh the benefits that accrue from the gathering of additional information against the detrimental effects of dragging on the course of this [proceeding]." *PEER*, 266 N.W.2d at 875.

### **C. Requested Relief on Reconsideration.**

As set forth above, the Project no longer requires a Certificate of Need, and a contested case hearing is not required to determine whether to issue a LW ECS Site Permit. As a result, Flying Cow Wind requests that the Commission reconsider its January 3 Order, find that a

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2500-35035 (Mar. 28, 2018), eDocket ID 20183-141492-01.

<sup>77</sup> *Id.* at 3–4.

<sup>78</sup> Minn. Stat. § 216E.02, subd. 1; Minn. Stat. § 216F.03.

Certificate of Need is not required, and promptly issue a LWECS Site Permit for the Project. However, if the Commission determines that a Certificate of Need is necessary, the Commission should also promptly issue a Certificate of Need because a contested case hearing is not required on the issue of local labor, and the record establishes that the Project meets socioeconomic and all other criteria for a Certificate of Need. Lastly, if the Commission determines that a Certificate of Need is necessary and a contested case is still required, the contested case should be limited only to the Certificate of Need analysis, and should not further complicate the Commission's LWECS Site Permit analysis by conducting a contested case that is not relevant and then having to reconcile findings of fact, conclusions of law, and recommendations of two different Administrative Law Judges. The Commission therefore has three avenues available to it upon granting reconsideration:

1. Issue a LWECS Site Permit and determine that a Certificate of Need is not required;
2. Issue a LWECS Site Permit and Certificate of Need; or
3. Order a contested case proceeding to further explore the labor related socioeconomic considerations identified in the January 3 Order, but limit the contested case to the Certificate of Need docket.

Flying Cow Wind believes that Minnesota Statutes require the Commission to follow the first decision option.

#### **IV. CONCLUSION.**

For the reasons discussed above, Flying Cow Wind respectfully requests that the Commission grant reconsideration of its January 3 Order, find that a Certificate of Need is no longer necessary, and promptly issue a LWECS Site Permit for the Project. In the alternative, Flying Cow Wind requests that the Commission issue both a Certificate of Need and LWECS Site Permit. Lastly, if the Commission determines both that a Certificate of Need is still

required and that a contested case is warranted, Flying Cow Wind respectfully requests that any contested case be limited solely to the question of whether the Project meets the requirements for a Certificate of Need. Again, due to the importance of the issues to be decided, Flying Cow Wind respectfully requests the opportunity to provide oral argument on the matters set forth herein.

Dated: January 14, 2019

Respectfully submitted,

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*Attorneys for Flying Cow Wind, LLC*

**STATE OF MINNESOTA  
BEFORE THE  
MINNESOTA PUBLIC UTILITIES COMMISSION**

<i>In the Matter of the Application of Flying Cow Wind, LLC for a Certificate of Need for the 152 MW Large Wind Energy Conversion System in Yellow Medicine County, Minnesota</i>	)	Docket No. IP-6984/CN-17-676 Docket No. IP-6984/WS-17-749 OAH Docket No. 60-2500-35035
	)	
	)	<b>CERTIFICATE OF SERVICE</b>
<i>In the Matter of the Application of Flying Cow Wind, LLC for a Site Permit for the up to 152 MW Large Wind Energy Conversion System in Yellow Medicine County, Minnesota</i>	)	
	)	
	)	
	)	
	)	

The undersigned hereby certifies that true and correct copies of the **Flying Cow Wind, LLC’s Request for Reconsideration or Rehearing** have been served on this day by e-filing/e-serving to the following:

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Dated this 14<sup>th</sup> day of January, 2019

*/s/ Susan A. Hartinger*

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