

Minnesota Public Utilities Commission
Staff Briefing Papers

Meeting Date: **February 26, 2015**Agenda Item #_6 **

Company: Sibley Wind Substation, LLC

Docket No. IP6666/WS-08-208

In the Matter of the Application of Sibley Wind Substation, LLC for a Large Wind Energy Conversion System in Sibley County

Issue(s): What action should the Commission take regarding the alleged site permit violations?

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Background Documents

PUC – Notice of Comment Period.....November 21, 2014
Sibley Citizen – Comment: Letter in Favor of Site Permit (31) December 1, 2014
Harry Slood – Comments..... December 3, 2014
Mary Hartman – Comments: Sibley Wind Substation – Eagles..... December 3, 2014
Barb Wenniger – Comments: Sibley Wind FOIA Results December 3, 2014
Glenn Gruenhagen and Others – Comments: SWS Permit Violations Cmt..... December 3, 2014
DOC EERA – Comments on Alleged Site Permit Violations December 15, 2014
Sibley Wind Substation – Reply Comments December 15, 2014

The attached materials are work papers of the Commission staff. They are intended for use by the Minnesota Public Utilities Commission (Commission) and are based upon information already in the record unless noted otherwise.

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I. Statement of Issues

What action should the Commission take regarding the alleged site permit violations?

II. Docket History

The Commission issued a Large Wind Energy Conversion Site Permit to Sibley Wind Substation, LLC (Sibley Wind or SWS) in 2008 for a 20 megawatt (MW) facility in Sibley County.

During the 2008 permitting process, three comments were filed: two comments regarding road use and access from Sibley County and the Minnesota Department of Transportation and one comment from a citizen objecting to the siting of a specific turbine.¹

In October of 2011, the Commission authorized an amendment to the site permit to allow Sibley Wind an additional two years to obtain a power purchase agreement (PPA) and to construct the project. Public comment was solicited on the request, but no comments were received. The Commission found in this and other dockets that, due to uncertainty surrounding interconnection and upgrade costs for projects within the MISO Group 5 study process, amendments allowing additional time to obtain power purchase agreements and begin construction were reasonable.

In Sibley Wind's case, the 2011 permit amendment authorized three changes from the 2008 Permit - two changes relating to the extensions (PPA and construction deadlines) and a third amendment, a requirement to file additional project information on shadow flicker impacts and mitigation measures. Generally, as the Commission amends permits to allow additional time to obtain PPAs and commence construction it has evaluated whether any new permit conditions have been applied to subsequent projects or permits and whether those conditions should be applied to the amended permits.

Between the 2011 amendment and the October 2013 commencement of construction, Sibley Wind submitted required compliance and preconstruction filings. In October 2013, both the Department of Commerce (DOC) and Commission staff reviewed the preconstruction filings and found that they sufficiently met the preconstruction requirements. The Commission sent Sibley Wind a letter confirming this evaluation.

The project commenced construction in October 2013.

Concurrently, beginning in May 2013, public comments (outside of comment periods) were filed by members of the public regarding various general wind energy-related concerns and claims of permit violations.² The concerns were largely related to issues that were considered during the

¹ Comments filed during permitting process, Document ID [5487904](#).

² Topics included in these filings were: turbine setbacks, turbine noise, underground substation stray voltage, distribution line interference with telecommunication systems, county road agreement concerns, proximity of project to underground pipeline systems, site permit transfer, ownership, avian impacts, bat impacts, bee impacts, lack of construction progress, failure to comply with local or other governmental authorization or requirements, unauthorized project changes, and questions regarding the project's community based energy status (C-BED).

initial permitting process and were not open for comment. Sibley Wind reviewed each concern and provided responses in their monthly complaint reports and in response to inquiries from the DOC Energy Environmental Review and Analysis (EERA). Both the DOC EERA and the Commission monitored all filings.

In November 2014, as the allegations and citizens' complaints continued, Commission staff issued a notice of comment period requesting comments on whether a material violation of the site permit had occurred. Staff requested that commenters provide the specific statute, rule or permit condition alleged to be violated, details about the violation and whether remedies were available or whether the site permit should be revoked.

As summarized by the DOC EERA in their comments:

Thirty-six comments were received by the close of comment period on December 3, 2014. The majority of the comments filed were short letters of support for the project.

On December 3, 2014, Representative Glenn Gruenhagen and others filed comments (eDocket ID: [201412-105150-01](#)) alleging numerous violations of Statute, Rules and terms of the site permit:

- Misrepresentation of Community Based Energy Development (C-BED) status;
- Ownership transfer of the Permit;
- Failure to commence continuous construction;
- Changes to the Project without Commission approval;
- Failure to comply with county and township requirements;
- Failure to meet statutory permit update and submittal requirements

Also on December 3, 2014, Barbara Wenniger filed the response to a Freedom of Information Act (FOIA) request made to the United States Fish and Wildlife Service (USFWS) (eDocket ID: [201412-105126-01](#)). Ms. Wenniger also filed comments on December 1, 2014 (eDocket ID: [201412-105057-01](#)), indicating the presence of eagle nests within 10 miles of the Project. Neither filing alleged specific violations. The filings appear to have been filed to provide the Commission with background information related to the USFWS review of the Project and the presence of eagles within 10 miles of the Project.

On December 2, 2014, Mary Hartman filed comments related to the lack of data on potential wildlife impacts, particularly related to avian and bat impacts, for the Project. Ms. Hartman's filing does not allege specific violations of Statute, Rules or the terms of the permit. The filing does, however, recommend the permit be amended to require development of a "Bird and Bat Conservation Survey" and "Acoustical Bat Monitoring Protocols."

III. Parties Positions

Department of Commerce – Energy Environmental Review and Analysis Unit

The DOC EERA noted that the December 3, 2014 comments from Gruenhagen et.al. was the only filing to allege specific violations. The DOC EERA evaluated each of the alleged violations in their comments and drew conclusions and/or provided options for the Commission to consider.

The DOC EERA concluded at page 11 of its filing:

EERA staff makes no recommendation on whether the Commission finds that the project is in violation of Minnesota Statute or Rule with respect to Construction Status. EERA staff does not believe that the Project's C-BED status is relevant to the LWECS permit issued by the Commission.

EERA staff does not believe that the record supports allegations that SWS has materially violated the terms of the Permit with respect to:

- permit transfer;
- changes to project without Commission approval;
- failure to obtain, maintain or comply with necessary local, state and federal permits;
- failure to comply with Cornish Township environmental review rules; or
- failure to meet statutory permit update and environmental submittal requirements.

EERA staff believes that much of the confusion over what is required for the Project to comply with the LWECS Site permit stems from the relative age of the permit. With the exception of the 2011 amendment, which was issued as an adjunct to be used in combination with the 2008 permit, the permit has not been updated since 2008. Permits and permit amendments issued by the Commission more recently are, in general, more descriptive about what the Commission finds is necessary to comply with the permit and ensure that an LWECS is constructed and operated in a manner consistent with environmental preservation, sustainable development, and the efficient use of resources.

In order to better align the requirements of the permit for the Sibley Wind Project with more recently issued permits, EERA staff suggests that the Commission consider directing SWS to:

- Inform the Commission of any changes in project ownership going forward;
- Develop an ABPP to document the work done to date and identify procedures to mitigate potential impacts to avian and bat species during construction and operation of the Project;
- Provide the Commission with an update of the status of Project permits with Sibley County; and
- Provide regular construction status reports, perhaps on a monthly basis.

Sibley Wind Substation, LLC

Sibley Wind provided that work to date on the project has included excavation for the substation and operation and maintenance facility, roads to approximately 40 percent of the wind turbine sites and beginning of the electrical grid update for the interconnection of the facility. Sibley Wind indicated that the work conducted was permanent and not temporary in nature as alleged. Further, Sibley Wind noted that adverse weather conditions slowed progress during the winter of 2013 and spring of 2014, and further, the additional, voluntary study of potential avian risks was conducted in the spring and fall of 2014 which affected the project schedule and funding.

Sibley Wind provided an updated project schedule indicating that the project would be commercially operational by the end of 2015 in order to meet the expiration of the federal investment tax credit (ITC).

Sibley Wind evaluated and provided responses to each alleged violation or complaint and concluded that they were not in violation of any material statute, rule or permit condition.

IV. Staff Discussion

Staff has reviewed the record and filings to date and agrees with the DOC EERA that no material violations of statute, rule or permit condition have been identified or established. Staff also believes that the additional requirements outlined by the DOC EERA (and repeated below) with one additional requirement regarding filing of Sibley Wind's PPA with Minnesota Municipal Power Agency (MMPA), would be a reasonable approaches to resolving the issues before the Commission. Staff believes information contained in the PPA would help staff monitor milestones of the project to ensure that the project is meeting appropriate milestones and Commission compliance obligations.³

Therefore, absent the remaining issue regarding the 'commencement of construction' discussed later in this section, staff believes the Commission could reasonably find that there has not been a material violation of the site permit and Sibley Wind should be required to [as modified by Commission staff for procedural clarity and PPA information]:

- File with the Commission notification of any changes in project ownership going forward;⁴

³ Staff acknowledges that information contained in the PPA may be trade secret and portions may need to be redacted. Staff requests if trade secret portions are redacted, both a public and trade secret version are filed with the Commission.

⁴ *Language from the most recently issued site permit – Odell Wind Farm, Commission Docket No. IP9614/WS-13-843 [modified by staff to fit the specifics of this case]:*

The Permittee within 20 days of the Commission's order shall file a notice describing its ownership structure, identifying, as applicable:

- a) the owner(s) of the financial and governance interests of the Permittee;
- b) the owner(s) of the majority financial and governance interests of the Permittee's owners; and
- c) the Permittee's ultimate parent entity (meaning the entity which is not controlled by any other entity).

The Permittee shall notify the Commission of:

- Develop and submit to the Commission by April 15, 2015 an ABPP to document the work done to date and identify procedures to mitigate potential impacts to avian and bat species during construction and operation of the Project;
- Provide the Commission by April 15, 2015 with an update of the status of Project permits with Sibley County;
- Provide construction status reports on a monthly basis beginning upon issuance of the Commission's order; and,
- File the MMPA-PPA with the Commission within 90 days of the order.

If the Commission agrees with the DOC EERA's conclusions, the Commission has one issue left to consider – whether Sibley Wind has – or to what extent needs to - meet the definition of *continuous* construction pursuant to Minnesota Statute and Rule.

As noted by the DOC EERA, “the question of what level of efforts over what period of time is necessary to ensure compliance with Minnesota Statute, Rule or permit terms, has not been an issue previously before the Commission.”

The statutory definition of construction is (Minnesota Statutes 216E.01, subdivision 3):

"Construction" means any clearing of land, excavation, or other action that would adversely affect the natural environment of the site or route but does not include changes needed for temporary use of sites or routes for nonutility purposes, or uses in securing survey or geological data, including necessary borings to ascertain foundation conditions.

Minnesota Rules 7854.0100 defines construction as:

“Construction” means to begin or cause to begin as part of a continuous program the placement, assembly, or installation of facilities or equipment or to conduct significant site preparation work for installation of facilities or equipment. Entering into binding power purchase contracts or obtaining wind easements from property owners or gathering wind data is not construction.”

Sibley Wind's Site Permit at K. 2. required:

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- a) A change in owner(s) of the majority* financial or governance interests in the Permittee;
 - b) A change in owner(s) of the majority* interest financial or governance interests of the Permittee's owners, or,
 - c) A sale which changes the parent entity of the Permittee.
- *When there are only co-equal 50/50 percent interests, any change shall be considered a change in majority interest.

2. FAILURE TO COMMENCE CONSTRUCTION

If the Permittee has not completed the pre-construction surveys required in paragraph III.D., and commenced construction of the LWECS within three years of the issuance of this Permit, the Permittee must advise the PUC of the reason construction has not commenced. In such event, the PUC may determine whether this Permit should be revoked. No revocation of this Permit may be undertaken except in accordance with applicable statutes and rules, including Minnesota Statute section 216F.05 and Minnesota Rule 7836.1300.

Below is an excerpt from the Statement of Need and Reasonableness for Minnesota Rule 7854 (previously 4401) regarding the definition of construction:

Subpart 5. Construction. The EQB does not want project proposers to begin construction of their proposed projects until after a permit has been issued. Part 4401.0300 provides that it is against the law to commence construction of an LWECS until the board has issued a site permit. The reason for prohibiting construction until the permit is issued is so that the applicant will not engage in conduct that irreversibly impairs the environment or make financial commitments that will make it difficult for the EQB to openly evaluate the project. It is common practice for permitting agencies to insist that projects not begin until a decision on the permit has been made. See, for example, the Minnesota Pollution Control Agency's rules for water permits. Minnesota Rules part 7001.1020, subpart 8.

The question, of course, is what does it mean to commence construction. The kinds of commitments and activities described in the proposed rule – starting a continuous program of construction or site preparation - are the kinds of commitments and activities that would make it difficult for the EQB to deliberate to the extent it must on a permit request and to decide on the permit in accordance with the requirements of the law. These kind of efforts not only put pressure on the EQB to allow the conduct to go forward, but they can result in damage to the environment that could have and should have been avoided.

The proposed definition does not prohibit entering into power purchase agreements and obtaining wind rights from property owners and gathering wind data prior to obtaining a permit. Obviously, these kinds of tasks can be completed without impacting the permit process or the environment. Indeed, the EQB wants developers to negotiate and enter into power purchase agreements with utilities and negotiate and obtain wind rights from property owners. Certainly there is no objection to gathering wind data without applying for and obtaining a permit.

Nor does the rule make any mention of restricting the right to enter into contractual commitments related to the wind project. The EQB considered limiting the ability of a permit applicant to make binding contractual agreements to purchase facilities or equipment in advance of receiving a permit, but wind developers must be able to arrange for delivery of the turbines well in advance of applying for and receiving a permit from the EQB.

Staff Analysis Regarding Continuous Construction

Staff believes this explanation is helpful in that it describes the intent of the word ‘continuous’ added in rule. It appears to staff that the word continuous was added to help clarify what the EQB would *not* want to see occur, continuous activity that would be too far progressed that ‘stopping’ construction may lead to an argument that the project had proceeded too far and that permitting or environmental review were no longer relevant as the damage had occurred. In this docket, the issue is the reverse - the developer started, and then delayed construction. From staff’s understanding, generally, beginning construction on portions of a project, then ‘delaying’ further construction is common in several scenarios – including conducting work sufficient to qualify for tax incentives, delaying construction due to winter conditions, among others. And notably, Commission site permits allow for preconstruction filings on portions of projects so that developers can commence construction on turbines in an incremental manner (however, staff does see a distinction between initial construction steps and iterative, but complete turbine construction).

Staff believes that this issue does not have a clear, generally applicable answer. Therefore, projects and the specific circumstances surrounding a project need to be evaluated on their individual merits. Short term ‘stoppages’ of construction are likely occurrences in projects. A stoppage of a day, or two, should not be considered non-continuous construction. However, in some situations - a delay of several years – or more – without a justifiable intent to continue construction – should not be authorized either.

In this instance, we have a company that continues to have a valid PPA, a valid MISO interconnection agreement, and a valid site permit. The developer has stated its intent to continue construction in the spring. The developer has been continually responsive to DOC EERA inquiries, met preconstruction filing requirements, and continues to fulfill on-going compliance obligations. These factors lead staff to conclude that (with the additional provisions outlined by the DOC EERA staff and as modified by staff) a finding that the developer has sufficiently met the terms and conditions of statute, rule and its LWECS Site Permit would be reasonable.

V. Commission Decision Option

1. Permit Violations

- A. Find that Sibley Wind has violated a specific statute, rule or permit condition and revoke its LWECS Site Permit.
- B. Find that Sibley Wind *has not* violated a specific statute, rule or permit condition.
- C. Take no action on the alleged site permit violations.

2. Additional Permit Requirements

- A. Require Sibley Wind to:
 - File with the Commission notification of any changes in project ownership (as outlined in the footnote, above);
 - Develop and submit to the Commission by April 15, 2015 an ABPP to document the work done to date and identify procedures to mitigate potential impacts to avian and bat species during construction and operation of the Project;
 - Provide the Commission by April 15, 2015 with an update of the status of Project permits with Sibley County; and,
 - Provide construction status reports on a monthly basis beginning upon issuance of the Commission's order; and,
 - File the MMPA-PPA with the Commission within 90 days of the order.
- B. Take some other action.

Staff recommends options 1B OR 1C and 2A.