

Staff Briefing Papers

Meeting Date September 29, 2022 Agenda Item 2**

Company Xcel Energy

Docket No. **IP-6946/WS-17-410**

In the Matter of the Application of Freeborn Wind Energy LLC for a Large Wind Energy Conversion System Site Permit for the 84 MW Freeborn Wind Farm in Freeborn County

Issue Should the Commission reconsider its August 8, 2022 Order Accepting Post-Construction Noise Monitoring Report and Compliance Review?

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Relevant Documents

Date

Order Accepting Post-Construction Noise Monitoring Report and Compliance Review	August 8, 2022
Sue Madson Petition for Reconsideration	August 29, 2022
Xcel Reply to Petition	September 8, 2022

The Commission has the authority to accept or decline a petition for reconsideration with or without a hearing or oral argument (Minnesota Rules 7829.3000, Subpart 6). In other words, a decision on a petition for reconsideration can be made without taking oral comments at the Commission meeting.

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

I. Statement of the Issues

Should the Commission reconsider its August 8, 2022 Order Accepting Post Construction Noise Monitoring Report and Compliance Review?

II. Project Backgrounds

The Freeborn Wind Farm (Project) is a Large Wind Energy Conversion System (LWECS) constructed to generate up to 200 megawatts (MW) total nameplate capacity of wind energy, with 48 MW being generated in Minnesota and 152 MW being generated in Iowa. The Minnesota portion of the Project consists of up to 24 2.0 MW wind turbines.

On October 22, 2019, the Commission issued its Order Granting Request to Transfer the Site and Route Permits for the Freeborn Wind Project from Freeborn Wind Energy LLC to Xcel Energy (Xcel).¹

On March 31, 2020, the Commission issued its Order Denying the Association of Freeborn County Landowner's (AFCL's) and Petitions and Amending Site Permit.²

On February 1, 2022, Xcel filed its Freeborn Wind (MN) Post-Construction Sound Monitoring Report in accordance with the provisions of the site permit.³

On May 2, 2022, the Department of Commerce Energy Environmental Review and Analysis staff (EERA) filed its Noise Monitoring Compliance Review.⁴

On May 13, 2022, the Commission issued a notice soliciting comments on EERA's report.⁵

Upon reviewing the comments received, the Commission issued its August 8, 2022 order.

¹ *Order Granting Request to Transfer Site and Route Permits*, e-Dockets No. [201910-156851-02](#), and *Certificate of Service*, e-Dockets No. [201910-156851-04](#), October 22, 2019.

² *Order Denying AFCL's Petitions and Amending Site Permit*, e-Dockets No. [20203-161639-01](#), March 31, 2020.

³ *Compliance Filing – Post Construction Noise Study*, e-Dockets Nos. [20222-182341-01](#), [20222-182341-02](#), and [20222-182341-03](#), February 1, 2022.

⁴ *Post-Construction Noise Monitoring Compliance Review*, e-Dockets No. [20225-185479-01](#), May 2, 2022.

⁵ *Notice of Comment Period*, e-Dockets No. [20225-185773-01](#), May 13, 2022.

III. Statutes and Rules

Under Minn. Stat. § 216B.27 and Minn. R. 7829.3000, a party or a person aggrieved and directly affected by a Commission decision or order may file a petition for reconsideration within 20 days of the date the decision or order is issued. A petition for reconsideration must set forth the specific grounds relied upon or the errors claimed. Other parties or persons to the proceeding may file answers to the petition within ten days of the reconsideration petition.

When considering whether to grant reconsideration, the Commission examines whether the petition raises new issues, points to new and relevant evidence, exposes errors or ambiguities in the prior order, or otherwise persuades the Commission that it should rethink its decision. The Commission may reverse, change, modify, or suspend its original decision if it finds its decision unlawful or unreasonable.

The Commission has the authority to decide a petition for reconsideration with or without a hearing or oral argument.

IV. Procedural History

A. Commission Order

On August 8, 2022, the Commission issued an order accepting Xcel Energy's post-construction noise study and the subsequent review by EERA. The Commission determined that the methodologies applied reliably assessed the Project's noise levels, and the record did not demonstrate that the noise consultant's approach to collecting data and assessing results was improper. The Commission concluded Xcel's compliance with the noise standards and the site permit is well supported and additional noise monitoring is not necessary.

B. Petition for Reconsideration

On August 29, 2022, Carol Overland of Legalectric, on behalf of Sue Madson (Petitioner), filed a petition for reconsideration of the Commission's August 8, 2022, Order. The Petitioner noted this matter is in the Commission's jurisdiction and was filed within 20 days as required under Minn. Stat. § 216B.217 and Minn. R. 7829.3000.

Petitioner argued that the Commission's decision should not be provided deference because it lacks a presumption of expertise. Petitioner alleged the Commission "excluded" certain facts, reasonable inferences, and evidence available. According to the Petitioner, the Commission

erred in multiple ways in the August 8 Order, and in some instances relied upon previous errors in Commission orders:

- The Commission failed to require Xcel to provide noise monitoring information collected between June 22, 2021, and July 1, 2021 in response to Sue Madson's request.
- The Commission failed to order replication, and/or utilization of Xcel's noise monitoring conducted between June 22, 2021, and July 1, 2021, for comparison to the November post- construction noise monitoring.
- The Commission failed to require replication of the post-construction noise monitoring that, pre-binning, demonstrated noise exceedances.
- The Commission erred when it failed to address the discrepancies between the pre-construction noise modeling based on flawed "noise parameters," and the post-construction noise monitoring.
- The Commission erred when it accepted the February 1, 2022, noise monitoring, performed in November, 2021, and falsely claimed that noise modeling prior to Xcel's August 19, 2019, noise modeling had utilized a 0.5 ground factor.
- The Commission accepted a noise report falsely claiming that the August 19, 2019, pre-construction noise assessment was prior to the issuance, when the initial Site Permit was issued December 19, 2018, and the Amended Site Permit was issued by Order on May 10, 2019, months prior to Xcel's filing of the August 19, 2019, Xcel site permit application including updated noise modeling.
- The Commission erred when it failed to infer exceedances when Xcel Energy repeatedly refused to produce and eFile monitoring results from noise monitoring conducted between June 22, 2021, and July 1, 2021, after multiple assurances that it would provide those results to Sue Madson.
- The Commission erred when it failed to infer exceedances when Xcel changed its post-construction protocol, simultaneous to monitoring, to include "binning" if exceedances were demonstrated in monitoring.

The Petitioner requested the Commission reconsider its August 8, 2022, Order and amend it to incorporate the following provisions:

- Order Xcel to provide the results of 3-hour noise monitoring filed in May 2021 and conducted between June 22, 2021, and July 1, 2021, on the Madson's property;
- Order corrections to errors in the post-construction noise monitoring report, including, but not limited to, false statements that the modeling conducted prior to the August 19, 2019 noise modeling had used a 0.5 ground factor, and that the August 19, 2019, noise modeling was submitted prior to issuance of the Freeborn Permit (in December 2018 and amended May 10, 2019);
- Order immediate mitigation through curtailment of turbines nearest the Madsons' home;
- Order Permit Condition 6.2 discussions of mitigation, specifically to include Madson, not just Xcel Energy and the Department of Commerce;
- Order post-construction noise monitoring at each receptor location within the project to determine post-construction noise levels and to compare post-construction noise levels to pre-construction modeled levels; and
- Such other relief and mitigation necessary to address noise exceedances throughout and adjacent to the Freeborn Wind project.

B. Xcel Reply to Petition

On September 8, 2022, Xcel filed its response to the petition. According to Xcel, Petitions for reconsideration are governed by Minn. Stat. § 216B.27, Subd. 3, which permits reconsideration of Commission decisions if they are "in any respect unlawful or unreasonable." Minn. R. 7829.3000 sets forth additional procedural requirements for petitions for reconsideration and requires that petitions "set forth specifically the grounds relied upon or errors claimed."

Generally, the Commission will review petitions for reconsideration "to determine whether the petition (i) raises new issues, (ii) points to new and relevant evidence, (iii) exposes errors or ambiguities in the underlying order, or (iv) otherwise persuades the Commission that it should rethink its decision." Xcel asserted the petition fails to satisfy the operative criteria of Minn. Stat. § 216B.27, Subd. 3 or Minn. R. 7829.3000. Xcel noted the petition provided no new issues or relevant facts nor identifies any errors or ambiguities in the Commission's Order weighing in favor of reconsideration. Xcel emphasized that the petition provides no legal justification or

other grounds for reaching a conclusion that the Commission erred in its decision. Xcel stated the petition has not provided any persuasive information that would warrant reconsideration.

Xcel noted the petition repeated many of the allegations and arguments from Ms. Madson's May 24, 2022 comments that were previously addressed in Xcel's July 7, 2022, reply comments. Similarly, Xcel noted the Commission has previously denied the request for informal noise screening measurements collected between June 22, 2021, and July 1, 2021.

Xcel emphasized there is no evidence that the Project is out of compliance with the Noise Standards or the Site Permit, and that the Petitioner failed to demonstrate any discrepancies between the Monitoring Study and the Freeborn Wind Post-Construction Sound Monitoring Protocol approved by the Department of Commerce staff.

In summary, Xcel stated that the petition fails to raise any new issues, point to new or relevant evidence, or expose errors or ambiguities in the underlying order, and it should be denied.

V. Staff Analysis

The Commission must decide whether the arguments and information presented in the Petition for Rehearing provide sufficient cause for the Commission to reconsider its August 8, 2022, decision finding the post-construction noise monitoring established an absence of noise exceedance. If the Commission does not believe the Petition for Rehearing provides sufficient justification to reconsider that determination, it should deny reconsideration.

Alternatively, if the Commission decides there is sufficient cause to reconsider, it can hear additional argument from the Petitioner and other stakeholders at the meeting, order that additional information be provided through written submissions, or refer the matter to an Administrative Law Judge of the Office of Administrative Hearings with direction on how to proceed. Ultimately, the Commission may reverse, change, modify, or suspend its original decision if it finds its decision unlawful or unreasonable.

In previous petitions, the Commission has applied a standard of review based on whether a petition raises new issues, points to new and relevant evidence, exposes errors or ambiguities in the original Order, or otherwise persuades the Commission that it should rethink its original decision.⁶

⁶ See also *Order Denying Reconsideration*, Commission Dockets 10-1240 and 11-831, e-Dockets No. [20151-106539-01](#), January 23, 2015, *Order Denying Reconsideration*, Commission Dockets Nos. 09-1110 and 10-49, e-Dockets No. [20114-60880-02](#), April 1, 2011, and *Order Denying Reconsideration*,

Based on its review and the record, staff concludes that the Commission's original decision is the most consistent with the facts, the law, and public interest. First, the arguments regarding deference would be more appropriately directed to a reviewing court, not the Commission. Second, there is no permit or other requirement that the permittee replicate the results of a noise study. Third, despite Petitioner's concern regarding the "binning" approach, there is no information from a qualified professional in the record countering the noise study methodology. Finally, Petitioner's arguments regarding production of test results from June and July 2021 were addressed in a previous order and petition for reconsideration and were not addressed in the August 8, 2022 Order at issue in this matter.

Staff agrees with both Xcel and EERA that the comments received do not merit further action by the Commission, and recommends the Commission take no further action on the matter.

VII. Decision Options

1. Grant reconsideration or rehearing of the Commission's August 8, 2022 Order Accepting Post-Construction Noise Monitoring Report, and:
 - a. Ask for additional written comments
 - b. Refer the matter to OAH for a contested case hearing
 - c. Amend the August 8, 2022 Order Accepting Post-Construction Noise Monitoring Report *(Petitioner)*
2. Deny reconsideration or rehearing of the August 8, 2022 Order Accepting Post-Construction Noise Monitoring Report and Compliance Review. *(Staff, Xcel, EERA)*

Staff Recommendation: Option 2.