

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

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

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

**DEPARTMENT OF COMMERCE, DIVISION OF ENERGY RESOURCES (DOC DER)
RESPONSE REGARDING REQUEST FOR CONTESTED CASE PROCEEDINGS**

SUMMARY

The DOC DER takes no position regarding the pending request for intervention if ALJ LaFave determines that a contested case is necessary, but believes that, because these wind siting (WS) and certificate of need (CN) proceedings will include joint hearings that the Minnesota Public Utilities Commission has ordered to be conducted pursuant to Minn. Rules Ch. 1405 for siting and the informal review process for CNs, an evidentiary record illuminating the interests and issues of concern can be fully developed and addressed by the Commission without the need for a separate contested case proceeding on the CN docket. As discussed further below, without a contested case, participation is readily allowed.

PROCEDURAL HISTORY

On January 12 and January 30, 2018 respectively, the Minnesota Public Utilities Commission (Commission) issued Orders in the CN and siting dockets, respectively, that

accepted the applications of Flying Cow Wind, LLC and established the procedural framework for further review of the applications.

The Commission's Order of January 30, 2018 in the 17-749 siting docket (the WS Order) requested that an Administrative Law Judge (ALJ) conduct public hearings, and directed the ALJ to conduct the public hearings in accordance with rules of the Office of Administrative Hearings (OAH) Chapter 1405, and specifically, in accordance with Minn. Rules 1405.0500, 1405.0600, 1405.0800, 1405.1900, and 1405.2200. The WS Order asked the ALJ to make findings of fact, conclusions of law, and recommendations on the merits of the site application, and provide recommendations, if any, on conditions and provisions regarding the proposed site permit.

In the 17-676 certificate of need (CN) docket, the Commission's Order of January 12, 2018 (the CN Order) directed use of the Commission's "informal comment and reply process for developing the record."¹ The CN Order designated a Commission employee to facilitate non-party citizen participation in the hearing process. The CN Order also noted that the enabling statute for the CN proceeding is Minn Stat. § 216B.243 subd. 4, which specifies that siting and CN hearings generally should be held jointly.² Both Minn Stat. § 216B.243 subd. 4 and the corresponding siting statute, Minn. Stat. § 216E.03, subd. 6, encourage public participation in the CN and siting proceedings.

¹ CN Order at 3. (The CN Order stated: "No person has identified any contested issue of material fact or recommended that the case be referred to the [OAH] for contested case proceedings. The Commission will therefore direct use of the informal comment and reply process for developing the record.")

² Minn Stat. § 216B.243 subd. 4 states that public hearings should be held jointly unless it is "not feasible or more efficient, or otherwise not in the public interest" to do so. At the prehearing conference, parties and the Movant indicated their agreement that the ALJ had authority to conduct the CN public hearing, and to do so jointly with the siting public hearing.

On March 14, the Laborers District Council of Minnesota & North Dakota (Movant) filed a motion requesting a contested case hearing and a petition seeking intervenor status.

The ALJ convened a prehearing conference (PHC) on March 15, 2018. At the March 15 PHC, among other things, the ALJ identified a proposed schedule, the parties and the representatives present noted their agreement with that schedule (subject to the pending request for a contested case hearing),³ and the ALJ set a schedule for briefing the Movant's requests.⁴

DISCUSSION

Minn. Rules Chapter 1405, which governs the joint public hearings for these dockets, generously accommodates engagement by non-parties, and provides a venue in which issues can be rigorously developed, using processes that mirror almost all of the processes available in Chapter 1400 contested case proceedings. 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 decision. In Chapter 1405 proceedings, interested persons can engage in contested case-like processes. Specifically, they:

- Are “allowed and encouraged to participate,” which includes, but is not limited to, the rights to:
 - offer oral direct and rebuttal testimony, without the necessity of pre-filing, with or without benefit of oath or affirmation;
 - offer written direct and rebuttal testimony or other material in written form at or following the hearing; and
 - orally cross-examine and question all parties and non-parties who testify, or to submit written questions to the ALJ, who will then ask the questions of the witness.

³ Movant's representative appeared at the hearing.

⁴ As the ALJ noted at the PHC, Minn. Rule 1405.2200 specifies that, subsequent to the appointment of an ALJ and absent certification to the Commission, motions are to be decided by the ALJ.

Minn. Rule 1405.0800, 1405.1400 and 1405.1700 subp. 1.

- May be represented by legal counsel, but representation is not mandatory. Minn. Rules 1405.1400, 1405.0600 and 1405.1700 subp. 1.
- May request that the ALJ order a witness's testimony to be taken by deposition, to preserve the testimony, in the same manner as for depositions in civil actions. Minn. Rule 1405.1200.
- May present arguments, memoranda and other data to the record with respect to the issues. Minn. Rules 1405.1400 (A), 1405.1700 subp. 1, 1405.1800 subp. 2.
- May present witnesses on the non-party's behalf at the hearings. Minn. Rule 1405.1700 subp. 2.
- May request a transcript of the hearing. Minn. Rule 1405.1800 subp. 4.
- Are entitled to the opportunity to review and comment on any environmental impact assessment prepared pursuant to parts 4400.1210 and 4400.3210, which environmental documents must be entered into the record at a point during the hearing process which will allow that opportunity. Minn. Rule 1405.1800 subp. 5.
- Because every witness who prefiled (under Minn Rule 1405.1900⁵) direct testimony on behalf of a party proposing a site or route must be available for cross-examination and questioning by non-parties at every hearing date and place, non-parties in larger proceedings can choose which hearings they will attend to cross-examine witnesses and present their evidence. Minn. Rule 1405.2000.⁶
- The comments and responses to comments of members of the public must be entered into the record. Minn. Rule 1405.1800 subp. 5.

⁵ Minn Rule 1405.1900 subp. 2 states that “[p]refiled testimony will be part of the record in each proceeding as if read, but all of the witnesses shall be available for cross-examination and questioning at each and every hearing subject to the provisions of part 1405.2000. Objections to such direct testimony may be made by any person, any time during the hearings conducted pursuant to parts 1405.0200 to 1405.2800....”

⁶ 1405.2000 states that “[a]ll witnesses who offer prefiled direct testimony in compliance with part 1405.1900 shall be available for questioning by interested persons at each hearing....” Note that, Chapter 1405 does not specify whether, in a joint CN and siting hearing, there is any exception under which a party proposing a site can refuse to make available for cross-examination by members of the public its witnesses regarding the CN; the ALJ may wish to clarify which witnesses must be made available, in light of the Commission Order directing use of Chapter 1405, and the requirement to hold joint public hearings on need and siting.

In this way, Chapter 1405 proceedings can function very like Chapter 1400 contested case proceedings, making it unnecessary to consider an untimely reconsideration of the Commission's January 12, 2018 Order that designated use of a comment process for the CN rather than a contested case.

Perhaps the principal difference between a Chapter 1405 public/evidentiary hearing on siting that is conducted in conjunction with : A) an informal review of a CN; and, B) a contested case proceeding for the CN, is that, under the former arrangement with an informal CN review process, Chapter 1405 makes the filing of written testimony optional for non-parties; non-parties may file written testimony if they wish, but it is not mandatory that they pre-file written testimony if they wish to offer testimony, as is required of parties in Chapter 1400 contested cases. In addition, non-parties can participate in the former arrangement, with the informal CN review process; although they may wish to exercise the various rights listed above, they may also choose to simply file comments, (or even to file sworn comments, such as an affidavit, which are evidentiary in nature.⁷)

This lack of a requirement to engage in the filing of a series of formal "rounds" of pre-filed direct, rebuttal and surrebuttal testimony, as is employed in Chapter 1400 contested case proceedings, relieves parties and non-parties alike of the need to devote significant time and resources to development of written adversarial filings, which would be required if the CN were subject to Chapter 1400 contested case procedures. Further, under the informal review of a CN, parties who did not propose a site or route (such as the DOC DER) need not devote additional

⁷ Under Minn.Rule 1405.0800 (B), non-parties may offer direct testimony or other material in written form at or following the hearing, and testimony offered without benefit of oath or affirmation, or written testimony that is not subject to cross-examination, is given such weight as the ALJ deems appropriate.

resources to attending any combined public/evidentiary hearings that may be scheduled as part of the Chapter 1405 hearings.

Another important difference between contested case proceedings and informal reviews of CNs is that, in the informal review process, the ALJ prepares a report to the Commission about the facts in the evidentiary record, but does not make a separate recommendation to the Commission pursuant to Minn. Stat. § 14.50, to which parties may take exception. In the view of the DOC DER, in this case, the Commission should be capable of weighing and assessing the record that the Movant and others may make in the Chapter 1405 process regarding Movant's concerns, without the need for a separate ALJ recommendation and parties' formal written exceptions, if any.

The Commission appears to share the view that a Chapter 1405 hearing and informal review of the CN is appropriate for this project. As noted above, the CN Order was issued on January 12, 2018, after the Commission's November 2, 2017 Notice of Comment Period⁸, which requested comment on "[w]hat procedural treatment should the Commission direct for review of the application," and after the Commission's December 8, 2017 Notice of Meeting⁹ stated that the Commission would decide, at its December 21, 2017 agenda meeting, whether the Commission should "direct that the application be evaluated using the informal review process or refer the application to the Office of Administrative Hearings for a contested case proceeding?" Having noticed this issue, the Commission's January 12, 2018 CN Order specifically directed that the Commission's "informal comment and reply process" would be

⁸ <https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=201711-137138-01>

⁹ <https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=201712-138036-04>

used for “developing the record.”¹⁰ Again, as noted above, non-parties may file comments in the CN proceeding.

CONCLUSION

Because the siting and CN hearings are to be conducted jointly under the provisions of Minn. Rules Ch. 1405, an evidentiary record illuminating the interests and issues of concern to the Movant can be fully developed and addressed by the Commission, without the need for a separate Chapter 1400 contested case proceeding on need.

March 28, 2018

Respectfully submitted,

/s/ Linda S. Jensen

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ATTORNEY FOR MINNESOTA
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¹⁰ See above fn. 1 and related text.



STATE OF MINNESOTA

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March 28, 2018

The Honorable James LaFave
Administrative Law Judge
Office of Administrative Hearings
600 North Robert Street
P.O. Box 64620
St. Paul, MN 55164-0620

**Re: In the Matter of the Application of Flying Cow Wind, LLC for a Certificate of Need for the 150 MW Large Wind Energy Conversion System in Yellow Medicine County, Minnesota
OAH 60-2500-35035, MPUC IP-6984/CN-17-676**

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

Dear Judge LaFave:

Enclosed please find the MINNESOTA DEPARTMENT OF COMMERCE, DIVISION OF ENERGY RESOURCES (DOC DER) RESPONSE REGARDING REQUEST FOR CONTESTED CASE PROCEEDINGS.

Sincerely,

/s/ Linda S. Jensen

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AFFIDAVIT OF SERVICE

Re: In the Matter of the Application of Flying Cow Wind, LLC for a Certificate of Need for the 150 MW Large Wind Energy Conversion System in Yellow Medicine County, Minnesota OAH 60-2500-35035, MPUC IP-6984/CN-17-676

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 OAH 60-2500-35035, MPUC IP-6984/WS-17-749

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

I, Jean-Anne Gates, hereby state that on this 28th day of March, 2018, I filed by electronic eDockets the attached MINNESOTA DEPARTMENT OF COMMERCE, DIVISION OF ENERGY RESOURCES (DOC DER) RESPONSE REGARDING REQUEST FOR CONTESTED CASE PROCEEDINGS, and eServed or sent by US Mail, as noted, to all parties on the attached service list.

See attached service list.

/s/ Jean-Anne Gates
JEAN-ANNE GATES

Subscribed and sworn to before me
on this 28th day of March, 2018.

/s/ LaTrice Denise Woods
Notary Public – Minnesota
My Commission Expires January 31, 2020.

SERVICE LIST for
OAH 60-2500-35035
MPUC IP-6984/WS-17-676

| First Name | Last Name | Email | Company Name | Address | Delivery Method | View Trade Secret |
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