



August 20, 2019

Via Electronic Filing

The Honorable James Mortenson
Administrative Law Judge
Office of Administrative Hearings
P.O. Box 64620
St. Paul, MN 55164-0620

Re: In the Matter of the Application of Dodge County Wind LLC for a Certificate of Need and Site Permit for the Dodge County Wind Project and Associated Facilities in Dodge, Steele, and Olmsted Counties, Minnesota, and a Route Permit for the 345 kV High-Voltage Transmission Line Associated with the Dodge County Wind Project in Dodge and Olmsted Counties

MPUC DOCKETS IP-6981/CN-17-306
IP-6981/WS-17-307
IP-6981/TL-17-308

OAH Docket Number: 5-2500-35668
Our File No.: 59.028

Dear Judge Mortenson:

Enclosed is the Notice of Appearance of Brendan D. Cummins, Esq. on behalf of Laborers District Council of Minnesota and North Dakota (LIUNA Minnesota & North Dakota) and its Motion to Certify the Motion to Compel Discovery and Order Denying the Motion to Compel Discovery to the Minnesota Public Utilities Commission.

We have electronically filed these documents through eDockets, and copies have been properly served on the parties on the attached service list.

Thank you for your attention to this matter.

Sincerely,

CUMMINS & CUMMINS, LLP

/s/Brendan D. Cummins

Brendan D. Cummins

Enclosures

c: Kevin Pranis, Marketing Manager, LIUNA Minnesota & North Dakota

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

In the Matter of the Application of Dodge County Wind LLC for a Certificate of Need and Site Permit for the Dodge County Wind Project and Associated Facilities in Dodge, Steele, and Olmsted Counties, Minnesota, and a Route Permit for the 345 kV High-Voltage Transmission Line Associated with the Dodge County Wind Project in Dodge and Olmsted Counties

**MPUC DOCKET NOS. IP-6981/CN-17-306
IP-6981/WS-17-307
IP-6981/TL-17-308**

OAH DOCKET NO. 5-2500-35668

Motion of LIUNA Minnesota & North Dakota to Certify Motion and Order Denying Motion to Compel Discovery to the Minnesota Public Utilities Commission

I. INTRODUCTION

The Laborers District Council of Minnesota and North Dakota (“LIUNA Minnesota & North Dakota” or “the Organization”) respectfully requests that the Administrative Law Judge (“ALJ”) certify its Motion to Compel Discovery and Extend Deadlines for Submission of Pre-Filed Testimony (“Motion”) and the ALJ’s related August 7, 2019 Order (“Order”) to the Minnesota Public Utilities Commission (“Commission”) for further review.

The Order denied LIUNA Minnesota & North Dakota’s request that Dodge County Wind LLC (“Applicant”) be ordered to make reasonable efforts to produce requested information that is necessary to the Organization’s case and directly relevant to the Commission’s decision criteria for granting a Certificate of Need and Site Permit for the proposed Dodge County Wind project. The Order also “puts the organization on notice” that use of a non-attorney manager of the Organization as a representative may constitute unauthorized practice of law under Minn. Stat. §

481.02, and directs that LIUNA Minnesota & North Dakota “may not be represented in these proceedings by a non-attorney.”

LIUNA Minnesota & North Dakota respectfully disagrees with the Order’s interpretation of the Commission’s November 1, 2018 Order referring Certificate of Need, Site Permit, and HVTL Route Permit dockets to contested case hearings and the statute and rules governing the Commission’s decision criteria as well as the ALJ’s application of Minn. Stat. § 481.02 to prohibit the Organization from representing itself through one of its managers in these proceedings. LIUNA Minnesota & North Dakota requests that the ALJ expeditiously certify the Order to the Commission for a determination concerning whether denial of the Organization’s Motion is warranted, and whether the ALJ acted properly in barring the Organization from representing itself through one of its managers in these proceedings.

II. PROCEDURAL HISTORY

On November 1, 2018, the Commission issued an Order referring the Certificate of Need, Site Permit, and HVTL Route Permit dockets to contested case hearings.¹ In the Findings that accompany the Order, the Commission articulated an expectation, that, through the proceedings, “the parties will *develop a full record addressing issues raised that are relevant to the Commission’s certificate of need and permit decisions.*”²

On December 7, 2018, the ALJ issued the first pre-hearing order in the contested case proceedings covering the applications for a Certificate of Need, Site Permit, and HVTL Route Permit for Dodge County Wind. The order established a schedule and hearing procedures, including procedures for service, responses, and disputes resolution for discovery requests.³

¹ Order (Nov. 1, 2019) (eDocket No. 201811-147516-03).

² *Id.* (emphasis added).

³ First Prehearing Order (Dec. 7, 2018) (eDocket No. 201812-148321-01).

On December 27, 2018, LIUNA Minnesota & North Dakota filed a Petition to Intervene in the above-mentioned proceedings.⁴ No objections to the petition were filed, and on January 10, 2019, the organization was admitted as a full party to the case by Order of the ALJ to “protect the rights and welfare of its members, their families, and their communities... [and to] ensure that this project benefits the skilled construction workers it represents.”⁵

On July 1, 2019, the ALJ issued an Order establishing the Second Amended Schedule for Dodge County Wind contested case proceedings, which requires that non-applicant direct testimony be pre-filed by August 6, 2019; rebuttal testimony by August 30, 2019; and surrebuttal testimony by September 13, 2019.⁶

On July 22, 2019, LIUNA Minnesota & North Dakota filed a Motion to Compel Discovery and Extend Deadlines for Submission of Pre-Filed Testimony in accordance with the procedures established in the ALJ’s First Pre-Hearing Order for discovery service, responses, and dispute resolution.⁷ The Motion argued that Applicant failed to make reasonable efforts to produce requested information that was 1) essential to the development of LIUNA Minnesota & North Dakota’s case; and 2) directly relevant to the Commission’s decision criteria for granting a Certificate of Need and Site Permit for the project. The Motion cited and attached recent Commission Orders affirming the potential relevance of the subject matter covered by the information request to the applicable statutory and rule criteria for such decisions;⁸ explained why

⁴ Petition to Intervene by LIUNA Minnesota (Dec. 27, 2018) (eDocket No. 201812-148731-06).

⁵ Order Granting Petition to Intervene by LIUNA Minnesota, p.3 (Jan. 10, 2019) (eDocket No. 20191-149032-02).

⁶ Order - Second Amended Schedule (Jul, 1, 2019) (eDocket No. 20197-154066-01).

⁷ Motion to Compel Motion to Compel Discovery and Extend Deadlines for Submission of Pre-Filed Testimony (July 22, 2019) (eDocket No. 20197-154551-01).

⁸ *Id.* at 3-4 and as attached: Order Deferring Action and Initiating Negotiations; Notice and Order for Hearing; In the Matter of the Application of Flying Cow Wind, LLC for a Certificate of Need for the up to 152 MW Bitter Root Wind Project and Associated Facilities in Yellow Medicine County, Minnesota, MPUC Docket No. IP6984/CN-17-676 (January 3, 2019) (eDocket No. 20197-154551-19); and Order Adopting Findings of Fact and Issuing Amended

the requested information was needed to assess the likely impact of the project and the feasibility of employing local construction workers; and provided evidence of Applicant's willful refusal to provide such information, including data Applicant indicated did not exist *despite the fact that similar data had already been provided to the Department of Commerce*.⁹

On July 26, 2019 Applicant filed a Reply to Motion to Compel in which Applicant argued that the information sought by LIUNA Minnesota & North Dakota was not needed for the proper presentation of the Organization's case or relevant to the proceedings.¹⁰ The Reply also asserted that the purpose of LIUNA Minnesota & North Dakota's request was not to develop the record but supposedly to seek commercial advantage, and that the Motion to Compel was part of "an intentional attempt to leverage the threat of delay in this proceeding for its own commercial interests".¹¹

On August 7, 2019, the ALJ issued an Order denying LIUNA Minnesota & North Dakota's Motion and barring the Organization from continuing to represent itself through a non-attorney manager, citing Minn. Stat. § 481.02.¹²

III. LEGAL STANDARD

Minnesota Rule 1400.7600 sets forth the standard for certifying the Motion to the Commission and provides, in relevant part:

Any party may request that a pending motion or a motion decided adversely to that party by the judge before or during the course of the hearing . . . be certified by the judge to the agency. In deciding

Site Permit; In the Matter of Lake Benton Power Partners II, LLC for a Site Permit Amendment for the 100.2 MW Lake Benton Wind II Repowering Project and Associated Facilities in Pipestone County, MPUC Docket No. IP-6903/WS-18-179 (March 14, 2019) (eDocket No. 20197-154551-16).

⁹ Motion to Compel and at E-mail from John Wachtler to Kevin Pranis (Jul. 18, 2019) (eDocket No. 20197-154551-13); and at Attachment to E-mail from John Wachtler to Kevin Pranis (Jul. 18, 2019) (eDocket No. 20197-154551-10).

¹⁰ Dodge County Wind LLC's Reply to Laborers District Council of Minnesota & North Dakota's Motion to Compel (July 26, 2019) (eDocket No. 20197-154703-01) ("DCW Reply to Motion to Compel").

¹¹ *Id.* at 3 and at 6.

¹² Order Denying Motion to Compel (Aug. 7, 2019) (eDocket No. 20198-155010-03).

what motions should be certified, the judge shall consider the following:

- A. whether the motion involves a controlling question of law as to which there is substantial ground for a difference of opinion; or
- B. whether a final determination by the agency on the motion would materially advance the ultimate termination of the hearing; or
- C. whether or not the delay between the ruling and the motion to certify would adversely affect the prevailing party; or
- D. whether to wait until after the hearing would render the matter moot and impossible for the agency to reverse or for a reversal to have any meaning; or
- E. whether it is necessary to promote the development of the full record and avoid remanding; or
- F. whether the issues are solely within the expertise of the agency.

Consideration of these factors strongly supports certification to the Commission.

IV. THE MOTION AND ORDER SHOULD BE CERTIFIED TO THE COMMISSION FOR A DETERMINATION CONCERNING WHETHER DENIAL OF LIUNA MINNESOTA & NORTH DAKOTA'S MOTION IS WARRANTED

As explained in this section, the factors identified in Minn. R. 1400.7600 support certifying the Motion and Order to the Commission.

A. The motion involves controlling questions of law as to which there are substantial grounds for differences of opinion.

There are substantial disputes in the Dodge County Wind case over the proper scope of these proceedings and related discovery based on differing interpretations not only of the Commission's order referring the matter to contested case hearings, but also of the meaning of the statutes and rules that establish decision criteria and govern the process. The ALJ's Order denying LIUNA Minnesota & North Dakota's Motion to Compel discovery adopts Applicant's view that

the Organization's discovery requests are irrelevant to, and fall outside of, decision criteria established by statute and rule, as discussed below.¹³

LIUNA Minnesota & North Dakota's position is that the analysis in the Order misinterprets the applicable statute and rule. The Organization has consistently argued, in both the instant case and past wind energy cases, that use of local and non-local labor to build Large Wind Energy Conversion Systems ("LWECS") has *potential* relevance to the Commission's statutory determination that granting a Certificate of Need is more favorable than denial, and that the granting of a Site Permit is consistent with sustainable development and efficient use of resources.¹⁴

The word "potential" is emphasized because the Organization recognizes that use of local and non-local labor is an issue with varying relevance from case to case, and therefore is a factual matter that must be established in the record for a given proceeding. It is precisely to facilitate such record development that LIUNA Minnesota & North Dakota has participated as both a party

¹³ While the Order is based on the interpretations of statute and rule discussed below, it does reference several other justifications provided by Applicant for the failure to provide information sought by LIUNA Minnesota & North Dakota. These other justifications evidently are not cited as part of the basis for the decision, except where the Order questions why the Organization would need information from the company on an issue where the Organization has "expertise". Although the Order quotes LIUNA Minnesota & North Dakota's explanation of the Organization's need to "marry [our] expert knowledge" to the requested information, the Order truncates the remainder of the sentence where the Organization summarizes the information needed and why it is necessary to perform an adequate analysis – in other words, "marriage" requires a partner.

Applicant's other objections are refuted in LIUNA Minnesota & North Dakota's original Motion to Compel. The Motion is incorporated herein by reference and not reiterated here, except to observe that the arguments cited by the Order are unsubstantiated and have been refuted. For example, Applicant's claim that producing requested information would require "development of information from confidential personal information" is not only undercut by the fact that Applicant's parent company has already agreed to similar reporting for the Lake Benton II project, but was also not verified with the General Contractors in question according to Applicant's response to the Organization's second information request.

¹⁴ See for example LIUNA Minnesota Reply to Motion for Reconsideration of Commission Order Deferring Action and Initiating Negotiations; Notice and Order for Hearing; In the Matter of the Application of Flying Cow Wind, LLC for a Certificate of Need for the up to 152 MW Bitter Root Wind Project and Associated Facilities in Yellow Medicine County, Minnesota, MPUC Docket No. IP6984/CN-17-676 (January 24, 2019) (eDocket No. 20191-149548-02).

and non-party in wind permitting cases, and it is for this reason that the Organization seeks information on use of local and non-local labor in wind energy, both generally, in the form of labor statistics reporting for permitted projects, and in particular proceedings for which the Organization has identified reasons for concern.

The ALJ's Order and Applicant's Reply reject this premise. Each addresses the question differently but both argue that LIUNA Minnesota & North Dakota seeks information that is irrelevant to the case. The ALJ's Order seeks to differentiate between subjects that are necessary considerations under statute and rule, and subjects such as the employment of local construction labor which the Order deems to be "nonstatutory or regulatory".¹⁵ The Order recognizes the employment of local construction labor as a subject that the Commission may designate for consideration in a particular case, but not as a matter that is intrinsically relevant to determinations of suitability for a Certificate of Need or Site Permit, or appropriate for discovery, absent specific guidance from the Commission. The Order effectively relegates LIUNA Minnesota & North Dakota and the Organization's concern over local jobs to a sideshow where "expertise" may be offered, but will not be seriously considered (as is implied by the Order's use of quotation marks around the word "expertise").

Beyond designating the use of local labor as a "nonstatutory or regulatory matter," the Order also justifies denial of the Motion based on a misapplication of Minn. R. 7849.0320, which specifies the information that must be included in an application for a Large Electric Generation Facility.¹⁶ The Order reads the rules to mean that Applicant may only be asked to provide an

¹⁵ Order Denying Motion to Compel at 5.

¹⁶ Minn. R. 7849.0220 Subp. 1, "Each application for a certificate of need for an LEGF shall include all of the information required by parts 7849.0240, 7849.0250, and 7849.0270 to 7849.0340."

estimate of the total workforce needed for construction and operation -- narrowing the scope of inquiry into construction workforce to a single statistic of “230 to 240 temporary employees”.¹⁷

It should be self-evident, however, that the rules governing the contents of an *application* do not circumscribe the issues to be considered or information needed to develop the *full record* in contested case proceedings. Such an interpretation of the rules would not only unduly narrow the scope of these proceedings, but would seem to release any applicant from all discovery obligations once an application is deemed complete. The question of whether Minn. R. 7849.0320 limits the scope of discovery in this manner is a controlling question of law that should be addressed by the Commission.

Further, the Order refers to Minn. Stat. § 216E.03, subd. 7(b)(5) to conclude that “There are no statutory or regulatory provisions requiring Applicant to address who will be doing the work.”¹⁸ There are two flaws with this conclusion and application of the above-cited statute. First, this conclusion is not consistent with the plain language of the statute referring to “direct and indirect economic impact of proposed sites and routes including, but not limited to . . .,” which grants broad latitude for the consideration of economic impacts including the impact on local economies and local workforce.

Second, the Order fails to address the policy statement that specifically governs LWECS, which is not included in Minn. Stat. § 216E.03, but rather is found in Minn. Stat. § 216F.03, and which reads: “The legislature declares it to be the policy of the state to site LWECS in an orderly manner compatible with environmental preservation, sustainable development, and the efficient use of resources.” LIUNA Minnesota & North Dakota contends that “who will be doing the work”

¹⁷ *Id.* at 4.

¹⁸ *Id.* at 5.

is directly relevant to sustainable development and efficient use of resources and seeks the opportunity to make this case in the instant proceedings. Here, too, there is a controlling question of law that should be addressed by the Commission.

Applicant's Reply to LIUNA Minnesota & North Dakota's Motion and responses to information requests similarly dispute the relevance of the information the organization seeks, and asserts that rather than a legitimate inquiry into issues relevant to the case, the inquiry supposedly serves alleged "commercial interests" and is part of a purported strategy to leverage the process for commercial gain with irrelevant information requests and threats of delay.¹⁹ Applicant asserts repeatedly in the response to LIUNA Minnesota & North Dakota's first information request that the requested information is purportedly "not reasonably calculated to lead to the discovery of evidence that is relevant to the above-referenced dockets".²⁰

Applicant makes the further assertion that LIUNA Minnesota & North Dakota supposedly does not seek information "needed to conduct a socioeconomic impact assessment" but is engaged instead in "an intentional attempt to leverage the threat of delay in this proceeding for its own commercial interests".²¹ Applicant bases its refusal to make reasonable efforts to provide requested information, in part, on this theory that LIUNA Minnesota & North Dakota is purportedly engaged in a proscribed effort to leverage the regulatory process to advance commercial interests. This is a very serious, though entirely baseless, accusation, and it suggests a fundamental legal disagreement that threatens to cloud these proceedings going forward unless it is addressed directly by the Commission. The ALJ's Order neither endorses nor disputes Applicant's accusations,

¹⁹ DCW Reply to Motion to Compel

²⁰ Motion to Compel Discovery at Response of Dodge County Wind LLC to LIUNA Minnesota & North Dakota's First Information Request (Jul. 17, 2019) (eDocket No. 20197-154551-22).

²¹ DCW Reply to Motion to Compel at 6.

leaving these reckless allegations to hang over LIUNA Minnesota & North Dakota's participation in this proceeding.

B. A final determination by the agency on the motion would materially advance the ultimate termination of the hearing.

A final determination by the Commission will materially advance the ultimate termination of the hearing by eliminating the possibility of substantial delays if the record is not sufficiently developed when it reaches the Commission following the hearing process. Such a determination will also advance the ultimate termination of the hearing by clarifying the purposes of the proceedings so all parties can focus on the issues the Commission expects to be addressed rather than becoming sidetracked in disputes over the proper scope of the hearings.

If these issues are not addressed by the Commission until after the hearing, in the event that LIUNA Minnesota & North Dakota ultimately prevails on either of the issues in dispute, the matter will either be rendered moot and impossible for the Commission to address, or the Commission will be forced to remand the matter to the ALJ and delay the ultimate termination of the hearing. This is not merely a theoretical possibility, but rather precisely the situation created when the ALJ in the Bitter Root case declined to certify decisions on the scope of the inquiry to the Commission.²² In that case, the Commission elected to order additional hearings for the purpose of addressing the issues that the ALJ did not see fit to address in the informal hearing process — a decision that would have delayed the ultimate termination of the process by many months had the applications not been withdrawn after the developer exited the project. This factor, too, weighs in favor of certification.

²² Order Deferring Action and Initiating Negotiations; Notice and Order for Hearing; In the Matter of the Application of Flying Cow Wind, LLC for a Certificate of Need for the up to 152 MW Bitter Root Wind Project and Associated Facilities in Yellow Medicine County, Minnesota, MPUC Docket No. IP6984/CN-17-676 (January 3, 2019) (eDocket No. 20197-154551-19).

C. The delay between the ruling and the motion to certify would not adversely affect the prevailing party.

LIUNA Minnesota & North has moved expeditiously to certify this question to the Commission precisely in order to avoid delays that might adversely affect either party.

D. To wait until after the hearing would render the matter moot and impossible for the Commission to reverse or for a reversal to have any meaning.

As observed in the discussion of Section IV.B. above, failure to address the issues raised herein will render the matter moot, prejudicing LIUNA Minnesota & North Dakota's interests and preventing the full development of the record unless the Commission opts to remand the matter for additional hearings

E. It is necessary to promote the development of the full record and avoid remanding.

LIUNA Minnesota & North Dakota's procedural right to obtain information on construction workforce plans beyond "the estimated workforce" cited by the ALJ is essential to the Organization's ability to assess the project, build a case, and develop the record with respect to issues that are directly relevant to decision criteria. The Order in question goes beyond a denial of the Organization's instant request and effectively shuts down all discovery on the question of construction workforce by narrowing the Applicant's obligations to supplying one solitary number representing total estimated workforce.

Even statements made by Applicant's witnesses in pre-filed direct testimony and at a Commission-sponsored public information meeting, which were the subject of as-yet unmet information requests, have evidently been designated as outside the scope of discovery based on the Order.²³ It will be impossible for LIUNA Minnesota & North Dakota to develop the record on this issue based solely on information supplied by the Organization itself because Applicant holds

²³ Motion to Compel Discovery at 6.

nearly all of the cards with respect to defining the project and its requirements, and is being allowed to release information that puts the application in a favorable light, while withholding information that could provide a more complete picture of the project.

F. The issues are solely within the expertise of the agency.

The Motion addresses two issues that are solely within the expertise of the Commission. While the ALJ is generally responsible for determining the scope of the issues considered and discovery conducted through the contested hearing process, the scope set by the ALJ must be consistent with the Commission's Order referring the matter for contested case proceedings. The Order in question does not meet this standard because it severely restricts the scope of inquiry into the use of local and non-local construction labor.

The ALJ's Order specifically cites the Commission's Order referring the Dodge County Wind docket to contested case proceedings and its failure to explicitly mention local labor as the basis for the conclusion that LIUNA Minnesota & North Dakota's discovery requests fall outside the scope of the proceedings, and for the decision to deny the Organization's Motion to Compel. In its analysis, the ALJ's Order further concludes that Applicant's obligations to provide information on this matter are limited to the requirements established by the Commission for the filing of a complete application. It is clearly within the expertise of the Commission to clarify the meaning of its own order and the underlying statute and rule.

V. THE MOTION AND ORDER SHOULD FURTHER BE CERTIFIED TO THE COMMISSION FOR A DETERMINATION CONCERNING WHETHER THE ALJ ACTED PROPERLY IN BARRING LIUNA MINNESOTA & NORTH DAKOTA FROM REPRESENTING ITSELF THROUGH A NON-ATTORNEY MANAGER

As explained in this section, the factors identified in Minn. R. 1400.7600 and outlined in Section III herein, support certifying the Motion and Order to the Commission.

A. The Order involves controlling questions of law as to which there are substantial grounds for differences of opinion.

Pursuant to the Public Utilities Commission’s Notice and Order for Hearing (Order) at 5 (Nov. 1, 2018), “In these proceedings, parties may be represented by counsel, *may appear on their own behalf*, or may be represented by another person of their choice, unless otherwise prohibited as the unauthorized practice of law.” (Emphasis added). LIUNA Minnesota & North Dakota has consistently represented itself in these proceedings, as in other proceedings before the Commission, through its Marketing Manager, Kevin Pranis, who is not an attorney. It is routine for non-attorneys to appear on behalf of their organizations in agency proceedings in Minnesota, and the PUC’s Order explicitly authorized parties to represent themselves in these proceedings. Indeed, appearances by a non-attorney party in agency proceedings do not involve the “unauthorized practice of law” under Minn. Stat. § 481.02 because (1) a party is not practicing law in representing itself and (2) such hearings are administrative and do not constitute “court” within the meaning of the statute. Given that the ALJ’s Order took a contrary position, it is clear that there are substantial grounds for differences of opinion on this matter.

As quoted by the ALJ, Minnesota Statutes § 481.02 forbids a non-attorney “to appear as attorney or counselor at law in *any action or proceeding in any court* in this state to maintain, conduct, or defend the same . . . or to prepare legal documents.” (emphasis added). These agency proceedings do not constitute “court” within the meaning of the statute. *See* <https://www.leg.state.mn.us/lrl/agencies/detail?AgencyID=19> (“The Office of Administrative Hearings (OAH) is a quasi-judicial agency in the Executive Branch.”).

Executive branch administrative proceedings are a different type of forum from judicial branch court proceedings. Administrative proceedings such as these are intended to be more accessible, less formal, and allow for citizen participation by non-lawyers. Therefore,

restrictions regarding non-attorney participation in a contested case proceeding “should be significantly less stringent” than those in a judicial branch court. See In the Matter of Beacon Builders, Inc., OAH Case No. 2-1005-8350-2, 1994 WL 929637 at *6 (MN OAH, 1994).

In the Matter of Beacon Builders, the ALJ, in applying Minn. Stat. § 481.02, explained that “the general prohibition in the statute against a person other than an attorney appearing in any action or proceeding or otherwise holding himself or herself out as qualified to give legal advice or counsel, *relates to actions or proceedings in courts of the State.*” *Id.* at *4 (emphasis added).

Indeed, “*the Minnesota Court of Appeals has repeatedly recognized the right of non-attorney representatives to appear in administrative proceedings.*” *Id.* at *5-6 (emphasis added), citing Gonsior v. Alternative Staffing, Inc., 390 N.W.2d 801 (Minn. App. 1986) (the court did not invalidate a proceeding before a referee in an unemployment compensation matter and a review by a Commissioner’s representative even though that employee was represented by her boyfriend, a non-attorney); Hermann v. Viereck Fireplace Sales, Inc., 406 N.W.2d 603, 604 (Minn. App. 1987) (the court did not invalidate a proceeding before an unemployment compensation referee or a commissioner's representative even though the employee was represented by his mother); Contemporary Systems v. Commissioner of Jobs, 431 N.W.2d 133, 134 (Minn. App. 1988) (“In proceedings before the Department of Jobs and Training, a party may be represented by a non-attorney agent; however, in court proceedings such agent must be an attorney at law.”); Wicker Enterprises, Inc. v. Dahler, 347 N.W.2d 543 (Minn. App. 1984) (the court did not invalidate administrative proceedings before a referee and the Commissioner's representative when the employer's corporate president represented the employer at the administrative proceedings).

In the Matter of Beacon Builders the ALJ found that the Department of Commerce's argument "applying in toto the judicial model to administrative proceedings, is completely unrealistic" because "[a]dministrative agencies were meant to be an alternative to a judicial branch court, not an alter ego." *Id.* at *8. Thus, the ALJ found that an officer of a corporation did not engage in the unauthorized practice of law in an administrative proceeding. Accordingly, the ALJ's Order errs in applying the rules regarding participation by non-attorneys in "court" to executive branch administrative proceedings.

Notably, the Minnesota Office of Administrative Hearing's own standard "Notice of Appearance" form, which the undersigned legal counsel submitted in this proceeding, calls for the form to be signed by the "Party/agency or attorney." If non-attorneys cannot appear in OAH proceedings, then it would make no sense for the Notice of Appearance form to permit them to sign and enter notices of appearance.

The circumstances of this case are clearly distinct from those in which Minnesota courts have found the unauthorized practice of law. See, e.g., In re Disciplinary Action Against Ray, 452 N.W.2d 689, 693 (Minn. 1990) (advising clients in a legal matter and attempting to negotiate a settlement on their behalf is the practice of law); Matter of Discipline of Jorissen, 391 N.W.2d 822 (Minn. 1986) (finding unauthorized practice of law where a non-attorney acts in a representative capacity in protecting, enforcing or defending the legal right *of another*, and advises and counsels that person in connection with those rights); Fitchette v. Taylor, 254 N.W. 910, 911 (Minn. 1934) (giving advice regarding legal status and rights *of another* is the practice of law).

The case cited by the ALJ, Nicollet Restoration, Inc. v. Turham, 486 N.W.2d 753, 754 (Minn. 1992), is distinguishable because in that case the non-attorney appeared on behalf of a corporation in federal court, whereas in this case Mr. Pranis has appeared in administrative

proceedings where the applicable rule and case law authorizes parties to appear on their own behalf. In addition, Nicollet Restoration is inapposite because the Court held that even though the statutory language arguably authorizes corporations to represent themselves in court, the separation of powers precludes that interpretation because “legislative enactments which purport to authorize certain classes to practice law in the courts of this state are *not controlling upon the judiciary.*” *Id.* at 756. No such constitutional concern about protecting the authority of the judiciary applies in this case.

Moreover, the applicable rule on the right to counsel in contested case proceedings makes clear that parties may represent themselves, as the Organization has done here, or may be represented by the person of their choice as long as the person is not practicing law:

Parties may be represented by an attorney throughout the proceedings in a contested case, by themselves, or by a person of their choice if not otherwise prohibited as the unauthorized practice of law. . . .

Minn. R. 1400.5800 (emphasis added). Mr. Pranis’s role in these proceedings on behalf of his Organization cannot reasonably constitute practicing law. Mr. Pranis has never provided or purported to provide legal advice or legal services to another, nor has he ever held himself out to be a licensed attorney with the ability to do so. Letters and other papers in these proceedings signed by Mr. Pranis clearly indicate his title as “Marketing Manager” of LIUNA Minnesota & North Dakota, a party to the proceedings. Furthermore, Mr. Pranis specifically indicated in the original Motion that it was being filed by a party as a citizen intervenor not represented by counsel.

Finally, the ALJ’s interpretation of Minn. Stat. § 481.02 is inconsistent with the established practice of both the Commission and ALJs who have overseen contested case proceedings in which LIUNA Minnesota & North Dakota has participated as a party. LIUNA Minnesota & North Dakota represented itself through Mr. Pranis before three Administrative Law Judges in three such

proceedings pertaining to the Sandpiper and Line 3 Replacement pipeline projects and the Bitter Root Wind project.²⁴ Based on information and belief, Mr. Pranis's status as a non-attorney was well known to the Commissioners, Commission Staff, and Administrative Law Judges in each case. Further, LIUNA Minnesota & North Dakota is one of several organizations that have elected not to be represented by attorneys in such proceedings, including Youth Climate Intervenors which participated alongside LIUNA Minnesota & North Dakota in the Line 3 Replacement proceedings. If allowed to stand, the ALJ's prohibition on a party representing itself through a non-attorney in a Commission proceeding could set a troubling precedent for future cases where potential citizen intervenors may be effectively barred or deterred from exercising party rights as a consequence.

B. A final determination by the agency on the motion would materially advance the ultimate termination of the hearing.

A final determination by the Commission on this issue will materially advance the ultimate termination of the hearing by eliminating the possibility that the Commission will later make a determination that the proceedings were not conducted properly and in accordance with the applicable rules and law because LIUNA was not allowed to represent itself through a non-attorney and was therefore effectively excluded from the proceedings. This would ultimately lead to the need to redo the process. If this issue can be decided now, it will help ensure timely termination of these proceedings.

C. The delay between the ruling and the motion to certify would not adversely affect the prevailing party.

LIUNA Minnesota & North Dakota has proceeded promptly and took only the time necessary to retain counsel and further research the question of representation in a Commission

²⁴ See MPUC Dockets No. PL6668/CN-13-473 (Sandpiper); PL9/CN-14-916, PL-9/PPL-15-137 (Line 3 Replacement), IP6984/CN-17-676, IP6984/CN-17-749 (Bitter Root Wind).

proceeding by a non-attorney before asking the Commission to take up the question. Therefore, there has been no delay that would adversely affect the other party.

D. To wait until after the hearing would render the matter moot and impossible for the agency to reverse or for a reversal to have any meaning.

The Order's prohibition on a party from representing itself through a non-attorney manager threatens to effectively eliminate LIUNA Minnesota & North Dakota's ability to pursue its interests in these proceedings. LIUNA Minnesota & North Dakota has no "Plan B" in its budget in the event that the organization is denied the ability to use non-attorney staff to represent the Organization, something the Organization has done heretofore in Commission proceedings. The Organization has not budgeted for the legal expense of hiring an attorney for the case. It is certain that such a prohibition on the use of non-attorneys would have severely limited the Organization's ability to participate in past proceedings where it has made valuable contributions with positive impacts moving forward, and such a prohibition would certainly limit or even eliminate the Organization's ability to participate in other cases going forward if it is not reversed.

Further, it is not certain that the Organization could obtain experienced representation in Commission matters even if it were able to afford it. Law firms that regularly practice before the Commission would very likely decline the Organization's business due to conflicts with the interests of energy industry clients. If the Commission does not act to rectify the ALJ's decision, LIUNA Minnesota & North Dakota would be, at best, burdened financially and disadvantaged in its ability to present a case; and at worst forced to withdraw completely from the proceedings.

E. It is necessary to promote the development of the full record and avoid remanding.

The ALJ's decision to bar LIUNA Minnesota & North Dakota's designated representative from representing the organization further in these proceedings will greatly burden, if not

eviscerate, the organization's ability to participate as a party in the hearings and prevent development of the full record.

F. The issues are solely within the expertise of the agency.

The Commission has the sole expertise to interpret its own Notice and Order for Hearing at 5 (Nov. 1, 2018), "In these proceedings, parties may be represented by counsel, may appear on their own behalf, or may be represented by another person of their choice, unless otherwise prohibited as the unauthorized practice of law."

VI. CONCLUSION

For the reasons set forth above, LIUNA Minnesota & North Dakota respectfully requests that the ALJ certify the Motion and Order to the Commission to allow for Commission review of the issues presented herein.

Dated: August 20, 2019

Respectfully submitted,

/s/ Brendan D. Cummins

Brendan D. Cummins, #276236

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APPROVED AS TO THE POSITIONS TAKEN

/s/ Kevin Pranis

Kevin Pranis, Marketing Manager

LIUNA Minnesota & North Dakota

81 East Little Canada Road

St. Paul, MN 55117

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Application of Dodge County Wind LLC for a Certificate of Need and Site Permit for the Dodge County Wind Project and Associated Facilities in Dodge, Steele, and Olmsted Counties, Minnesota, and a Route Permit for the 345 kV High-Voltage Transmission Line Associated with the Dodge County Wind Project in Dodge and Olmsted Counties

NOTICE OF APPEARANCE

MPUC DOCKETS IP-6981/CN-17-306
IP-6981/WS-17-307
IP-6981/TL-17-308

PLEASE TAKE NOTICE that:

1. The party/agency named below (Party/Agency) will appear at the prehearing conference and all subsequent proceedings in the above-entitled matter.

2. By providing its email address below, the Party/Agency acknowledges that it has read and agrees to the terms of the Office of Administrative Hearings' e-Filing policy and chooses to opt into receiving electronic notice from the Office of Administrative Hearings in this matter. **Note: Provision of an email address DOES NOT constitute consent to electronic service from any opposing party or agency in this proceeding.**¹

3. The Party/Agency agrees to use best efforts to provide the Office of Administrative Hearings with the email address(es) for opposing parties and their legal counsel.

Party's/Agency's Name: Laborers District Council of Minnesota and North Dakota

Party's/Agency's Attorney: Brendan D. Cummins

Firm Name: Cummins & Cummins, LLP

Email: brendan@cummins-law.com

Telephone: (612) 465-0108

Mailing Address: 920 Second Avenue South, 1245 International Centre, Minneapolis, MN 55402

Dated: August 15, 2019



Signature of Party/Agency or Attorney

¹ In order to opt in to electronic notice, this form must be emailed to OAH.efiling.support@state.mn.us. If the party does not wish to opt in to electronic notice, this form may be filed with the Office of Administrative Hearings via facsimile, U.S. Mail, or personal service. See 2015 Minn. Laws Ch. 63, Minn. R. 1400.5550, subs. 2-5 (2017).

Note: This form must be served upon the opposing party/agency. Counsel may not withdraw from representation without written notice.

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
ADMINISTRATIVE LAW SECTION
PO BOX 64620
ST. PAUL, MN 55164-0620

CERTIFICATE OF SERVICE

In the Matter of the Application of Dodge County Wind LLC for a Certificate of Need and Site Permit for the Dodge County Wind Project and Associated Facilities in Dodge, Steele, and Olmsted Counties, Minnesota, and a Route Permit for the 345 kV High-Voltage Transmission Line Associated with the Dodge County Wind Project in Dodge and Olmsted Counties

MPUC DOCKETS IP-6981/CN-17-306
IP-6981/WS-17-307
IP-6981/TL-17-308

OAH Docket Number: 5-2500-35668

I, Kevin Pranis, hereby certify that on the 20th day of August, 2019, I served a copy of the foregoing:

1. Notice of Appearance; and
2. Motion to Certify Motion and Order Denying Motion to Compel Discovery to the Minnesota Public Utilities Commission

on the attached list of persons in the method and manner indicated on the service list as set forth below:

Via electronic service; or by depositing a true and correct copy in a proper envelope with postage paid, addressed to the person, in the United States Mail at Minneapolis, Minnesota, according to the preference each person has indicated on the service list.

Dated this 20th day of August, 2019

s/Kevin Pranis

Kevin Pranis

Electronic Service Member(s)

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