

BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
600 North Robert Street
St. Paul, MN 55101

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION
121 Seventh Place East Suite 350
St. Paul, MN 55101

In the Matter of the Application of Flying Cow Wind, LLC for a Certificate of Need for the 152 MW Large Wind Energy Conversion System in Yellow Medicine County, Minnesota;

MPUC Docket No. IP-6984/CN-17-676
MPUC Docket No. IP-6984/WS-17-749
OAH Docket No. 60-2500-35035

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;

Joint Motion for Certification of Request for Contested Case Hearing and Intervention to Public Utilities Commission

I. INTRODUCTION.

The Laborers District Council of Minnesota & North Dakota (“Laborers Union”) and Lake Cochrane Improvement Association (“LCIA”) (collectively, “Petitioners”) respectfully request that the Administrative Law Judge (“ALJ”) certify Petitioners’ motions for contested case proceedings and party status for LCIA (“Motions”), and the ALJ’s related Orders denying Petitioners’ requests (“Orders”) to the Minnesota Public Utilities Commission (“Commission”) for further review. The Orders deny Petitioners’ requests for contested case proceedings in the above-referenced dockets and deny LCIA’s petition for party status in the proceedings. Petitioners respectfully request that the ALJ certify the Orders to the Commission for a

determination concerning whether the denial of the Motions and Petition for Intervention was warranted and, if not, what process should be followed going forward.

Petitioners represent stakeholders, including construction workers, residents, and businesses located in and around the location of the proposed Bitter Root Wind project, whose interests could be significantly affected by the Commission's decision to grant or deny a Certificate of Need and Site Permit. The Laborers Union, LCIA, and our members and affiliates have made substantial efforts to address concerns, obtain critical information, and resolve material factual disputes within the confines of the informal hearing process. Unfortunately, those good-faith efforts have failed to resolve critical factual matters or yield an adequate record.

Petitioners are not late arrivals to the Bitter Root proceedings, but have been raising our concerns with Applicant representatives, and Department of Commerce and Commission staff for months – years in the case of LCIA. During the process, we have been assured again and again by the Applicant and agency staff that the informal hearing process would provide ample opportunity to fully participate in the development of a robust record. In the words of the Minnesota Department of Commerce Division of Energy Resources (“DOC DER”), we were told that neither party status nor contested case hearings were needed because the informal process “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.”

Our experience has been quite different. Applicant has wielded the informal hearing process as a shield by objecting to Petitioners' full participation in the process, refusing to provide information, and generally ignoring the body of evidence that has been developed in the record by Petitioners. Applicant's refusal to provide simple and easily obtainable information on

use of local labor on the company's Minnesota wind energy projects – after implying during the hearing that such data would be made available – is just the latest example. Moreover, the rejection of LCIA's petition to intervene as of right under the Minnesota Environmental Rights Act (MERA) is unsustainable. MERA grants LCIA the right to press its environmental claims as a matter of is right, and the time limit imposed by the ALJ on that right is contrary to law. *Swan Lake Area Wildlife Ass'n v. Nicollet Cty. Bd. of Cty. Comm'rs*, 711 N.W.2d 522 (Minn. Ct. App. 2006). If the Commission denies intervention it will actually delay resolution of the issues, because MERA then grants LCIA the ability to vindicate its claims in District Court.

Petitioners simply do not believe that the informal hearing process has produced the sort of robust record upon which the Commission must rely in granting a Certificate of Need and Site Permit. We respectfully request that the Commission be given the opportunity to weigh in and, if necessary, to address the issue.

II. PROCEDURAL HISTORY.

On March 14, 2018, the Laborers Union filed a petition for intervention and initial request for a contested case hearing.

On March 21, 2018, Applicant filed a response arguing that the petition for a contested case hearing was untimely and unnecessary, and that formal intervention was also unnecessary based on the issues raised in the Laborers Union's petition, and considering procedural devices available through the informal hearing process.

On March 28, 2018, Petitioner filed a reply brief regarding its contested case hearing request.

On March 28, 2018, 2018, the Minnesota Department of Commerce Division of Energy Resources ("DOC DER") filed a reply brief arguing that contested case proceeding request was

untimely and also unnecessary, stating “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.”

On April 6, 2018, Mr. Bret Eknes submitted a letter on behalf of Commission staff disputing assertions made by Applicant and DOC DER that the request for contested case proceeding was timely. The letter contends that the deadline to request a contested case for the certificate of need is “tied to the deadline for reply comments on the merits of the need application.”

On May 7, 2018, the ALJ issued an order granting the Laborers Union’s petition to intervene in the proceedings and denying the union’s request for a contested case hearing, indicating that the Laborers Union had “failed to demonstrate a contested case hearing is necessary to produce facts that would aid the Commission in determining whether to issue the certificate of need or the site permit.”

On June 25, 2018, the Laborers Union sent an email to the ALJ and Applicant indicating the union’s intention, subject to the ALJ’s approval, to present and question two witnesses; to question Applicant witnesses on several topics including the Applicant’s past Minnesota wind energy projects; and to “submit simple discovery requests that could be fulfilled by the applicant prior to the scheduled close of the comment period” covering relevant information that the Applicant was unable to provide during the public hearing.

On June 25, 2018, Applicant responded by email to the abovementioned correspondence objecting “to the scope of Intervenors' proposed participation”, which Applicant characterized as “in multiple ways treating the Public Hearing as if it were a formal contested case hearing, which

it is not.” Applicant specifically objected “to Intervenors conducting direct examination of its witnesses and cross-examination of FCW witnesses (of which there are none)”. Applicant also objected to any written discovery request as “far outside the scope of the Public Hearing procedure, and more in line with a contested case proceeding.”

On June 27, Ms. Sheena Denny sent an email on behalf of the ALJ citing the Applicant’s objection and “denying the Laborers Union’s requests” regarding proposed participation in the public hearing.

On June 28, 2018, the ALJ presided over an informal joint public hearing on the Site Permit Application and Certificate of Need Application in Canby, Minnesota. The Laborers Union was permitted to provide, but not to question, two witnesses, and to ask a limited number of questions of Applicant’s representatives. Applicant representative Sean Flannery was unable to provide information on use of local labor on construction of Applicant’s most recent Minnesota wind energy development (Pleasant Valley) but stated that “[w]e’ve started to ask internally how we can find that information” and acknowledged that the company should, in its capacity as general contractor for the project, have access to detailed information. Applicant representative Brian Lammers further stated that Applicant would “endeavor to track down” data on hours worked by Minnesota workers on the Pleasant Valley project.

On July 10, 2018 the Laborers Union filed written comments responding to Mr. Lammers’ statement that the company would “endeavor to track down” the requested information in which the union specified the exact information sought on the construction of both Pleasant Valley and the company’s Stoneray Wind project, which was also discussed at the hearing.

On July 18, 2018, during the public comment period that followed the release of the Draft Site Permit, LCIA filed a petition to intervene based in part on the statutory right to intervene afforded under the Minnesota Environmental Rights Act, (MERA) Minn. Stat. Section 116B.09, and a motion for a contested case hearing on the proposed Certificate of Need and Route Permit. LCIA's motion was accompanied by evidence rebutting and directly contradicting testimony submitted by applicant at the public hearing. That evidence included (a) an ordinance passed by the Deuel County government as zoning authority essentially finding that placement of turbines within 3 miles of Lake Cochrane would be harmful and should be prohibited, (b) official watershed documents showing that Lake Cochrane is part of a watershed and ecosystem spanning both states, and a section from the Watershed official plan to the same effect (c) a declaration referring to a comprehensive federal Bureau of Land Management Study on the visibility impact of wind turbines that substantially contradicts information submitted by applicant, (d) a professionally prepared visual demonstration of the visibility impact of the closest turbines that substantially contradicts the evidence submitted by applicant at the public hearing. LCIA's filings urged that it was possible dramatically to reduced the impact of the proposed project by removing the few turbines that were too close to the Lake Cochrane basin, and that MEPA and MERA, including section 116D.04 subdivision 6, required selection of that alternative.

Although it was represented during these proceedings that the public hearing process was adequate to allow project opponents to prepare and respond to applicant, in fact, both LCIA and Laborers Union found the process completely inadequate to respond and rebut evidence at submitted at the public hearing.

On July 18, 2018, during the public comment period that followed the release of the Draft Site Permit, the Laborers Union filed a second request for a contested case hearing on the proposed Certificate of Need and Route Permit. The motion was accompanied by testimony from the Executive Director of North Star Policy Institute, a letter from Ullico Investment Management Company, and other evidence refuting material facts asserted by the Applicant that are directly relevant to the legal requirements for the grant of a Certificate of Need and Route Permit for a Large Wind Energy Conversion System.

On August 2, 2018, the ALJ issued an order denying the Laborers Union's second request for a contested case hearing. The order largely restated, verbatim, the reasoning from the ALJ's May 7 order rejecting the Laborers Union's first request for a contested case hearing – including an erroneous reference to “potential safety hazards associated with construction” that were cited as a potential concern in the first request but not in the motion under consideration.

On August 6, 2018, Applicant filed Reply Comments on the merits of the project. In an about-face from the company's posture during the public hearing, Applicant objected to the Laborers Union's request for information on the employment of local workers on the company's past and current Minnesota wind projects and refused to provide the requested information.

On August 10, 2018, the ALJ issued an order vacating the August 2 order denying the Laborers Union's request for a contested case hearing and striking the order from the record.

On August 8, 2018, the ALJ issued an order denying the LCIA petition to intervene in the proceedings and denying the organization's request for a contested case hearing, concluding that “LCIA's arguments and the facts it alleged do not meet the legal threshold required for a contested case hearing and that the petition to intervene was untimely filed.” The order essentially found that since Lake Cochrane itself was not in Minnesota, there could be no adverse

environmental impact on Minnesota, even though all of the turbines are located in Minnesota. Since Lake Cochrane is not in Minnesota, the order ruled, MEPA and MERA do not apply to the project, and therefore LCIA had no MERA rights, despite the mandatory nature of section 116B.09.

On August 14, 2018, the ALJ issued an amended order denying the Laborers request for a contested case hearing, concluding that “was filed so late in the process as to raise questions as to its timeliness and the possible prejudice to Flying Cow. More importantly, LDC failed to show there were any issues of material fact requiring an evidentiary hearing to resolve that would aid the Commission in making it decision.”

III. LEGAL STANDARD.

Minnesota Rule 1400.7600¹ 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 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

¹ Minn. R. 1405.2200 provides a complimentary provision allowing an administrative law judge to certify motions in route permit proceedings.

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.²

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

A. The motion involves controlling questions of law as to which there is substantial ground for a difference of opinion.

LCIA has prepared a separate memorandum asserting the reasons that the order denying its petition to intervene as a party. LCIA was not represented by counsel throughout the process leading to the public hearing. LCIA heard the staff and applicant repeatedly assert that participation without intervention would afford substantially the same rights as would be afforded if it sought formal intervention. LCIA understood that there were two phases of this case, the first being certificate of need, and the second being the site permit. The thrust of LCIA's position has always been that there the permit should honor the three-mile setback, and this seems clearly a site permit issue. When Laborers Union moved for a contested case, applicant argued that this request was premature. From a layman's perspective, LCIA feels as

² The analysis below addresses the law and facts relevant to the determination of whether the Motion and Order should be certified to the Commission. Petitioners' substantive arguments concerning the merits of the Motion are included in its previous filings are incorporated here by reference, pending supplement if allowed or requested by the Commission.

though it has been whipsawed, perhaps inadvertently, because now it is said that its motion is too late.

LCIA fails to understand the contention that it should not be allowed to intervene. As LCIA's memorandum makes clear, MERA gives it an absolute right to intervene, and MERA does not sanction the denial of the right to intervene to protect the environment simply because the intervention comes a few weeks or even months after the agency would prefer. The Court of Appeals has made it clear that even if LCIA had entirely bypassed intervention, LCIA could bring a MERA case even after the permit is granted. Forcing the intervention to occur in the district court, instead of here before the agency, merely postpones the issue until later. *State ex rel. Swan Lake Area Wildlife Ass'n v. Nicollet Cty. Bd. of Cty. Comm'rs*, 711 N.W.2d 522 (Minn. Ct. App. 2006). LCIA has met the statutory requirements for mandatory intervention. MERA and MEPA both require the PUC to observe the least feasible impact principle. LCIA has advanced a credible alternative project design that observes a significantly lesser impact, without materially impairing the project. The ER utterly failed to consider that lesser impact, even though LCIA has been urging its consideration since the beginning of this case. Postponing that controlling question – whether MEPA and MERA's least impact must be observed – would simply facilitate avoidance and postponement of this important issue until after the permit decision is issued.

By the same token, the issue of use of local labor, and the monitoring of the use of local labor is an important issue that should receive Commission consideration. Over and over again, applicants have repeatedly relied upon the use of local labor as a positive factor in the permitting process. Yet, despite assurances that the contested case process was unnecessary, because this issue could be fully explored, applicant has been allowed to avoid scrutiny. Once again, an

applicant is being allowed to claim the benefit of local hire, without being subjected to scrutiny. The local labor issue is explicitly made relevant by the Commission's own application guidance. This issue will appear again and again, and it is time that it gets the Commission attention it deserves.

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

Petitioners contend that, in the absence of contested case proceedings, the record has not been adequately developed with respect to disputed facts that are directly relevant to the Commission's ultimate decisions to grant or deny a Certificate of Need and Site Permit. If the Commission agrees that a contested case proceeding is necessary for the development of the record, the opportunity to make that determination now could avoid months of delay. Conversely, if the Commission determines that contested case proceedings are unnecessary, certification of the issue to the Commission will have little or no impact on the schedule. This factor, too, weighs in favor of certification.

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

The first Order denying the Laborers Union's Motion was issued on August 2, but was subsequently vacated on August 10, and replaced with an amended order denying the Motion on August 14. The Order denying LCIA's Motion and request for party status was issued on August. Petitioners make this motion just a few business days after the final Order was issued. Accordingly, there has been no delay that would adversely affect opposing parties.

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 Orders appear to prevent LCIA from participating in the case as a party with full rights, including the right to file exceptions to the ALJ's report and the right to appear before the

Commission as a party. If the Order denying LCIA's petition to intervene is not certified to the Commission, LCIA would have the choice to abandon further participation in the proceedings or continue to invest time and resources knowing that any comments and exceptions the organization files and efforts it makes could be rendered moot by their lack of party status. Denying that right to an organized citizen delegitimizes the process. But just as important, it leaves the MERA claims unresolved, and LCIA's right to bring those claims are simply deferred to the District Court, where the issues will be litigated at greater expense and in a more prolonged proceeding. In the Swan Lake litigation, an environmental group waited until after completion of public drainage proceedings, despite the fact that it might have intervened and raised the environmental issues in those proceedings. Nonetheless, the Court of Appeals held that failure to intervene at all, did not deprive the environmental group of the right to raise MERA issues in a district court proceeding. Significantly, the judicial process involved multiple trips to the court of appeals, and was ultimately decided only 5 years after the first Swan Lake decision authorized a district court action by a party that bypassed its opportunity to intervene at the administrative level. The effect of diverting these issues, to save a few months of time in a contested case, is penny wise and pound foolish.

Further, if the Commission must wait two or more months to consider the adequacy of the record in the absence of a contested case hearing until the time for a final decision, the prejudice asserted by the Applicant will be even greater and will weigh more heavily against Petitioners' case for further development of the record.

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

As stated above, Petitioners contend that, in the absence of contested case proceedings, the record has not been adequately developed with respect to disputed facts that are directly

relevant to the Commission's ultimate decisions to grant or deny a Certificate of Need and Route Permit.

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

Petitioners contend that the Commission is best suited to determine whether the disputed facts cited by the Laborers Union and LCIA are materially relevant to the Commission's ultimate decision, and whether full development of the record requires contested case proceedings. Thus, this factor weighs in favor of certification.

V. CONCLUSION.

For the reasons set forth above, the Laborers Union and LCIA respectfully request that the ALJ certify the Joint Motion and Order to the Commission to allow for Commission review of the issue.

Dated: August 21, 2018

RINKE NOONAN

THE LABORS DISTRICT COUNCIL OF
MINNESOTA AND NORTH DAKOTA

/s/ Gerald W. VonKorff
Gerald W. Von Korff, #113232
Suite 300 US Bank Plaza Building
1015 W. St. Germain St.
P.O. Box 1497
St. Cloud, MN 56302-1497
(320) 251-6700
(320) 656-3500 fax
Email: Jvonkorff@RinkeNoonan.com

/s/ Kevin Pranis
Kevin Pranis, Marketing Manager
81 Little Canada Road East
St. Paul, MN 55117
(651) 653-9776
Email: kpranis@liunagro.com

*Attorneys for Lake Cochrane Improvement
Association (LCIA)*