

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Dan Lipschultz  
Matthew Schuerger  
Katie J. Sieben  
John A. Tuma

Commissioner  
Commissioner  
Commissioner  
Commissioner

In the Matter of the Application of Freeborn  
Wind Energy LLC for a Route Permit for the  
Freeborn Wind Transmission Line in  
Freeborn County

DOCKET NO. IP-6946/TL-17-322

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**ASSOCIATION OF FREEBORN COUNTY LANDOWNERS  
MOTION TO STRIKE APPLICANT’S ATTACHMENT A AND RELATED ARGUMENT**

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Association of Freeborn County Landowners (AFCL), participant in the above-captioned docket and intervenor in the related and concurrent wind siting docket (IP6946/WS-17-410), brings this Motion to Strike Applicant’s Attachment A and page 5 of the Motion’s related Argument contained in its Answer to Petitions for Reconsideration in the above-captioned docket.<sup>1</sup>

On January 18, 2019, Invenergy’s Freeborn Wind filed an “Answer to Petitions for Reconsideration,” in response to AFCL and others’ Petition for Reconsideration filed January 8, 2019. Applicant raises for the first time an Opinion from Office of Attorney General, dated July 25, 2018. Applicant’s Attachment A, Attorney General Opinion and its attachments. After hearing rumblings of an Attorney General Opinion on these issues, AFCL had made inquiry to the Office of Attorney General, searching for an opinion regarding this precise subject, and none was produced. AFCL’s Affidavit of Overland, Exhibit A. Upon information and belief, Applicants had this Attorney General Opinion some time prior to this disclosure, and was using it in their private

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<sup>1</sup> Notice, Minn. R. 7829.0410, parties may file a response to this Motion within 14 days of service.

negotiations with Freeborn County and in their private negotiations leading to an agreement with Commerce and MPCA. Applicants should have disclosed this Opinion to parties before this late date – its filing of the Attorney General Opinion constitutes surprise and prejudices Association of Freeborn County Landowners. This Attorney General Opinion, which is not precedent, and which is not to be used where litigation is underway or is imminent, or to make a determination regarding local ordinances, resolutions, or contracts, may likely also have been used improperly in these discussions as weight to allow Invenergy/Freeborn Wind access to county road easements. It was not part of the record in the above-captioned docket, and it should be excluded by the Commission at this time.

**I. EXCLUSION OF A FILING IS PERMISSIVE, NOT MANDATORY.**

Exclusion of a filing is permissive, and not mandatory. Applicant produces, at this late date, a July 25, 2018 Opinion from Office of the Attorney General regarding the Dodge County Wind application now before the Commission, regarding the definition of “public utility” and whether use of county highway rights-of-way are available to companies that do not provide retail services. See Exhibit A, Attorney General Opinion, p. 1-2 and its attachments, Op. Att’y Gen. 629a (May 9, 1975), p. 3-4; and *Kuehn v. Village of Mahtomedi*, 207 Minn. 518, 522-23, 202 N.W. 187, 189-190 (1940). *Kuehn v. Village of Mahtomedi* is situational distinct, and not relevant to this docket, but as case law, that’s there for the arguing, but as an attachment to the Attorney General Opinion, it too should be exclude.

The Commission does have authority to exclude untimely filings, but it is authority to exclude.<sup>2</sup> The exclusion of a filing hinges on two requirements, that a filing be untimely, and that a Commission determination be made:

Commission rules state:

**Subpart 1. When filings may be excluded.**

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<sup>2</sup> The issue is not one of waiver of the 20-day statutory deadline as claimed by Applicants in its Motions to Strike.

On its own motion or at the request of any party or participant, the commission **may** exclude a filing from the record:

- A. when the filing was not made within a time period established by rule, notice, or commission order; and
- B. upon a commission determination that the value of the document to the commission's deliberative process is outweighed by prejudice to a party, participant, or the public interest caused by the untimeliness.

Minn. R. 7829.0420 (emphasis added).

The enclosure to the Attorney General Opinion makes several pertinent points. Op. Att’y Gen. 629a (May 9, 1975). That 1975 Opinion focuses on purpose and use of Attorney General Opinions. The Attorney General Opinion is not precedent, and is not to be used where litigation is underway or is imminent, or to make a determination regarding local ordinances, resolutions, or contracts, may likely also have been used improperly in these discussions as weight to allow Invenergy/Freeborn Wind access to county road easements. The Attorney General Opinion and its attachments should be excluded.

**II. APPLICANT’S FILING OF THE ATTORNEY GENERAL OPINION WAS UNTIMELY AND CONSTITUTES SURPRISE, PREJUDICING AFCL.**

Freeborn Wind late-filed an Attorney General Opinion in the Freeborn Wind transmission docket was untimely. It was untimely, not considered in the contested case, not disclosed or argued in briefs, and use of this Opinion constitutes surprise, prejudicing AFCL. Further, withholding this AG Opinion from parties and the public, likely misrepresenting the value and weight of this Opinion, while “negotiating” with the County, and separately “negotiating” with Commerce and MPCA, is contrary to the public interest.

**A. APPLICANT’S USE AND RELIANCE ON A.G. OPINION WILL CAUSE PREJUDICE TO AFCL, PUBLIC, AND FREEBORN COUNTY, CAUSED BY UNTIMELINESS AND SURPRISE.**

The rules state that the Commission “may” exclude a filing if two conditions are met. The first condition is that the filing be untimely, and, as above, the Applicant’s filing of the Attorney

General Opinion in IP-6946/TL-17-322 was late, disclosed only on January 18, 2018, in its Answer to Petitions for Reconsideration, long after the record had closed. This filing is untimely.

The second condition to be met is that a Commission determination be made “that the value of the document to the commission's deliberative process is outweighed by prejudice to a party, participant, or the public interest caused by the untimeliness.”

In October, after hearing an inference about an A.G. Opinion at a Freeborn County workshop, and upon information and belief that there was an Attorney General Opinion regarding these land rights issues, AFCL searched the Office of the Attorney General webpage and learned that A.G. Opinions were no longer available online. A request was made to the A.G.'s Office to find the rumored Opinion. The response from the A.G.'s Office was more avoidant than helpful. AFCL's Affidavit of Overland, Exhibit A. With Applicant's filing, we learn that the A.G. Opinion was issued July 25, 2018, and not disclosed by Applicant until six months later.

Use of this Attorney General Opinion is misleading. An AG Opinion is not precedent. Note the Applicant's Exhibit A attachment Op. Att'y Gen. 629a (May 9, 1975), which states that:

For purposes of summarizes the rules discussed in this and prior opinions, we note that the rulings of the Attorney General do not ordinarily undertake to:

...

(4) Decide questions which are likely to arise in litigation which is underway or is imminent, since our opinions are advisory and we must refer to the judiciary in such cases. See Ops. Atty. Gen. 519M, Oct. 18, 1956, and 196n, March 30, 1951.

...

(6) Make a general review of a local ordinance, regulation, resolution or contract to determine the validity thereof or to ascertain possible legal problems, since the task of making such a review is, of course the responsibility of local officials.” See Op. Atty. Gen. 477b-14, Oct. 9, 1973.

The Attorney General Opinion is one that should have been disclosed to parties, and because it was not, it should not be used. The Attorney General Opinion not precedent, and

because it is not, it should not be used, here before the Commission, or in private negotiations. As stated in the Op. Att’y Gen. 629a (May 9, 1975), Attorney General Opinions are not meant to decide questions or to make a general review of a local ordinance, regulation, resolution or contract to determine the validity thereof or to ascertain possible legal problems, since the task of making such a review is, of course, the responsibility of local officials. Local governments were likely not aware of the purpose, use, and weight of an Attorney General Opinion.

In addition, there would be extreme prejudice to Association of Freeborn County Landowners if this untimely and undisclosed Exhibit A would be accepted into the record. There is also prejudice to parties negotiating with Freeborn Wind, such as Freeborn County and separately, Commerce and MPCA. It is apparent in the responses to AFCL’s Data Practices Act Requests that Freeborn County was concerned and confused about use of County road rights-of-way, and the Commission’s decision, culminating in “If they don’t have the land, they can’t build it” adds pressure. Presentation of the A.G. Opinion to Freeborn County, and any reliance on this A.G. Opinion by the County, would be misplaced given the caveats above. Further, there would be prejudice to future intervenors if the Commission were to allow this filing and give it any weight – it is not precedent, just another document. It is the duty of the ALJ to make these evidentiary decisions. It would also prejudice AFCL and future intervenors and the public interest if filings such as this Motion to Strike were given significance or relied on by the Commission.

Applicant’s Exhibit A, the Attorney General Opinion and all of its enclosures/attachment, and Applicant’s text related to the A.G. Opinion in its Answer, p 5, should be stricken.

**III. AFCL ASKS THAT APPLICANT’S ANSWER TO PETITIONS FOR RECONSIDERATION, P. 5, AND EXHIBIT A BE STRICKEN.**

Association of Freeborn County Landowners ask that the page addressing the A.G. Opinion of the Applicant’s Answer to Petitions for Reconsideration, page 5, and Applicant’s Exhibit A, the A.G. Opinion and its attachments, be stricken. Exhibit A should have been disclosed to parties,

presented, and argued prior to the Commission meeting of September 20, 2018.

Respectfully submitted,

January 28, 2019



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Carol A. Overland #254617  
Attorney for AFCL  
Legalelectric  
1110 West Avenue  
Red Wing, MN 55066  
(612) 227-8638  
[overland@legalelectric.org](mailto:overland@legalelectric.org)



3. Freeborn Wind has attached to its Answer to Petitions for Reconsideration in the above-captioned docket an “Exhibit A” dated July 25, 2018, an Attorney General Opinion. This Opinion was not introduced in the contested case, was not addressed in briefing, and was not provided to parties in this docket. Freeborn Wind introduces it at this late stage, a surprise!
4. An attempt was made to find such an opinion, with no luck. Having heard that Freeborn County may have requested an Opinion from the Office of the Attorney General at a Freeborn County Board workshop, I made an inquiry in October, and received an unhelpful and avoidant answer. Attached as AFCL Exhibit A is a true and correct copy of an email received in response to my inquiry to the AG’s Office regarding an AG opinion, and below that, my request. Note the statement that “we have not found an opinion issued to Freeborn County on this issue,” and the link to the Freeborn Wind ALJ Recommendation, to which AFCL is a party!
5. An AG Opinion is not precedent. Note the Exhibit A attachment, Op. Att’y Gen. 629a (May 9, 1975), which states that:

For purposes of summarizes the rules discussed in this and prior opinions, we note that the rulings of the Attorney General do not ordinarily undertake to:

...

(4) Decide questions which are likely to arise in litigation which is underway or is imminent, since our opinions are advisory and we must refer to the judiciary in such cases. See Ops. Atty. Gen. 519M, Oct. 18, 1956, and 196n, March 30, 1951.

...

(6) Make a general review of a local ordinance, regulation, resolution or contract to determine the validity thereof or to ascertain possible legal problems, since the task of making such a review is, of course the responsibility of local officials.” See Op. Atty. Gen. 477b-14, Oct. 9, 1973.

6. The Attorney General Opinion is one that should have been disclosed to parties, and because it was not, should not be used now. As stated in the Op. Att’y Gen. 629a (May 9, 1975), Attorney General Opinions are not meant to decide questions or to make a general review of a local ordinance, regulation, resolution or contract to determine the



validity thereof or to ascertain possible legal problems, since the task of making such a review is, of course, the responsibility of local officials.

7. AFCL asks that Applicant make a statement for the record of how this A.G. Opinion has been utilized, i.e., in private negotiations with Freeborn County, and/or in private negotiations with Commerce and MPCA. Data Practices Act requests show the concern and confusion of Freeborn County staff regarding use of county road rights-of-way by Freeborn Wind, and Freeborn Wind's requests regarding use of county road rights-of-way.
8. Applicant's Exhibit A in full including attachments/enclosures and text of its Answer, p 5, should be stricken.

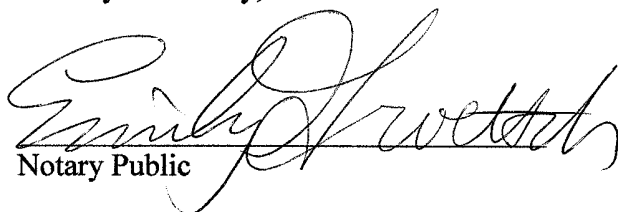
Further your affiant sayeth naught.

Dated: January 28th, 2019

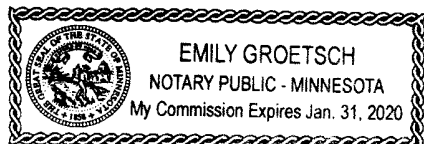


Carol A. Overland MN Lic. 254617  
Attorney for Association of Freeborn  
County Landowners  
Legalelectric  
1110 West Avenue  
Red Wing, MN 55066  
(612) 227-8638  
[overland@legalelectric.org](mailto:overland@legalelectric.org)

Signed and sworn to before me this  
28<sup>th</sup> day of January, 2019



Notary Public



## AFCL Exhibit A

**Subject:** RE: AG Opinions on AG website  
**From:** "Walters, Abigail" <Abigail.Walters@ag.state.mn.us>  
**Date:** 10/11/2018, 8:54 AM  
**To:** "Carol A. Overland" <overland@legalelectric.org>

Ms. Overland,

I've reviewed the recently published opinions and conferred with the opinions group, and we have not found an opinion issued to Freeborn County on this issue. However, there was an opinion recently produced by the OAH that might be of interest to you [https://mn.gov/oah/assets/2500-35036-freeborn-wind-transmission-line-puc-route-permit-report\\_tcm19-347428.pdf](https://mn.gov/oah/assets/2500-35036-freeborn-wind-transmission-line-puc-route-permit-report_tcm19-347428.pdf)

While we are happy to send copies of prior Attorney General opinions to county attorneys and others without charge, we do not have sufficient resources to identify and send all past opinions which may have dealt with a given topic or statute. We would prefer that you review the authorities cited in Minnesota Statutes Annotated, for example, and identify those prior opinions which you feel would be most useful to you. We may then send you copies of those which are not otherwise available to you.

Abigail Walters  
Library Director  
Minnesota Office of Attorney General  
445 Minnesota St., Suite 1050 | St. Paul, Minnesota 55101-2109  
(651) 757-1050 | FAX: (651) 296-7000 | [abigail.walters@ag.state.mn.us](mailto:abigail.walters@ag.state.mn.us)

-----Original Message-----

From: Carol A. Overland [<mailto:overland@legalelectric.org>]  
Sent: Tuesday, October 09, 2018 9:17 PM  
To: Walters, Abigail  
Subject: AG Opinions on AG website

Ms. Walters -

AG Opinions used to be posted on the site, and it's been a while since I've been looking -- now they're gone!

I'm looking for a very recent opinion on a request from Freeborn County regarding fee interest underlying county road easement, and perhaps also LLC v. utility.

Where would this be posted on the AG site, and would you please send a link? If not posted, would you please send a pdf?

Thanks,

Carol A. Overland

for Association of Freeborn County Landowners

## AFCL Exhibit A

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"Our lives begin to end the day we become silent  
about the things that matter." Dr. Martin Luther King, Jr.

Carol A. Overland  
Attorney at Law  
Legalelectric - Overland Law Office  
1110 West Avenue  
Red Wing, MN 55066

612-227-8638

[overland@legalelectric.org](mailto:overland@legalelectric.org)

[www.legalelectric.org](http://www.legalelectric.org)

[www.nocapx2020.info](http://www.nocapx2020.info)

[www.not-so-great-northern-transmission-line.org](http://www.not-so-great-northern-transmission-line.org)

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