

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE 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 150 MW Large Wind Energy Conversion System in Yellow Medicine County, Minnesota.

**FLYING COW WIND, LLC'S
CONSOLIDATED RESPONSE TO
LAKE COCHRANE
IMPROVEMENT ASSOCIATION'S
PETITION TO INTERVENE AND
REQUEST FOR CONTESTED CASE
HEARING**

Flying Cow Wind, LLC (“FCW”) provides this consolidated response in opposition to the Petition to Intervene (“Petition”) and Request for Contested Case Hearing (“Request”) by the Lake Cochrane Improvement Association (“Association”), submitted in connection with FCW’s applications for a site permit and certificate of need for its proposed Bitter Root Wind Project, an up to 152 megawatt (“MW”) Large Wind Energy Conversion System (“LWECS”) to be located in Yellow Medicine County (“Project”).

The Petition should be denied because (1) the Petition is untimely, having been brought *three weeks* after the joint public hearing on the applications, approximately *five months* after the initial public information and environmental report scoping meeting, and almost *eight months* after the Association and its members first filed comments that raised issues almost identical to those asserted in the Petition; (2) the Petition improperly asserts that the Minnesota Environmental Rights Act (“MERA”) provides a statutory right for the Association to intervene; and (3) intervention is unnecessary in light of the robust procedural and discovery devices

available to the Association under the informal review process ordered by the Commission. Additionally, the Request should be denied in its entirety because (1) the Association fails to set forth any disputed material facts, instead reiterating the same generalized concerns that were the subject of its comments throughout the proceedings; (2) the Request fails to provide the reasons a hearing is required to resolve the alleged issues of material fact or how holding a hearing would aid the Commission in making a final determination; and (3) the Request, if granted, would unduly prejudice FCW's rights. For the reasons set forth herein, FCW respectfully requests that the Petition and Request be denied in their entirety.

BACKGROUND

On October 19, 2017, FCW filed with the Commission an application for a certificate of need for the Project ("Certificate of Need Application").¹ On November 2, 2017, the Commission requested comments on whether it should find the application complete, the appropriate procedural treatment that it should direct for review of the application, and other issues or concerns related to the application.² The Association and its Co-President, Ron Ruud, filed comments during the comment period, asserting generalized concerns regarding noise and visual impacts to Lake Cochrane in South Dakota and requesting application of the three-mile setback from Lake Cochrane's Lake Park District adopted by ordinance by Deuel County, South Dakota - the same concerns and request that are now echoed in the instant Petition.³

On November 9, 2017, FCW filed an application for an LWECs site permit for the Project ("Site Permit Application").⁴ On November 28, 2017, the Commission requested

¹ Certificate of Need Application (Oct. 19, 2017) (eDocket ID 201710-136649-01).

² Notice of Comment Period (Nov. 2, 2017) (eDocket ID 201711-137138-01).

³ See Public Comment, (Dec. 20, 2017) (eDocket ID 201712-138318-01).

⁴ Site Permit Application (Nov. 9, 2017) (eDocket ID 201711-137275-01).

comments on the completeness and procedural treatment of the Site Permit Application, including whether the application should be referred to the Office of Administrative Hearings (“OAH”) for a contested case proceeding.⁵ The Commission met to consider the Certificate of Need Application on December 21, 2017 and the Site Permit Application on January 4, 2018.

On January 12, 2018, the Commission issued an Order accepting the Certificate of Need Application as substantially complete and directing the use of the informal comment and reply process for developing the record.⁶ On January 30, 2018, the Commission issued an Order accepting the Site Permit Application as substantially complete and referring the matter to the OAH to conduct a public hearing, including preparing a report setting forth findings of fact, conclusions of law, and recommendations.⁷

On February 2, 2018, the Commission issued a Notice of Public Information and Environmental Scoping Meeting, which scheduled a public meeting for February 27, 2018 and solicited comments on (1) the potential human and environmental impacts of the Project that should be considered in the environmental document and draft site permit for the Project, (2) the possible methods to minimize, mitigate, or avoid potential impacts of the Project, (3) the unique characteristics of the proposed site or the Project that should be considered, and (4) missing or mischaracterized items in the Site Permit Application or Certificate of Need Application.⁸ The Notice established a March 19, 2018 deadline for written comments.⁹

⁵ Notice of Comment Period (Nov. 28, 2017), (eDocket ID 201711-137714-01).

⁶ Order Accepting Application as Substantially Complete and Directing Use of Informal Review Process (Jan. 12, 2018) (eDocket ID 20181-138845-01).

⁷ Order Accepting Application, Establishing Procedural Framework, and Varying Rules (Jan. 30, 2018) (eDocket ID 20181-139534-01).

⁸ Notice of Public Information and Environmental Scoping Meeting (Feb. 2, 2018) (eDocket ID 20182-139712-02).

⁹ *Id.*

The Association and its members submitted additional written comments opposing the Project during the Environmental Scoping comment period, which again raised the same generalized concerns regarding sound, visual impacts, and property values and requested application of the Deuel County, South Dakota three-mile setback.¹⁰ The Association and its members also provided similar comments at the February 27, 2018 public information and scoping meeting.¹¹

On March 28, 2018, FCW filed a Site Permit Addendum with a revised layout for the Project.¹² On April 3, 2018, the Commission issued a Notice of Additional Comment Period extending the comment period to provide comments on the Project in response to the Site Permit Addendum.¹³ On April 18, 2018, EERA issued its Environmental Report Scoping Decision, which set forth matters to be addressed in the Environmental Report.¹⁴ EERA issued the Environmental Report on May 4, 2018. On the same day, the Commission issued a Notice of Commission Meeting to be held on May 17, 2018, to determine whether it should issue a Draft Site Permit.¹⁵ The Commission voted to issue the Draft Site Permit on May 17.

On June 12, 2018, the Commission issued a Notice of Joint Public Hearing and a Notice of Draft Site Permit Availability to be held on June 28, 2018.¹⁶ The Notice established a July 18, 2018 deadline for written comments on the following subjects: (1) whether the Commission should issue a Certificate of Need and a Site Permit for the Project; (2) whether the Project is needed and in the public interest; (3) the costs and benefits of the Project; (4) environmental and

¹⁰ See, e.g., Public Comment – Ron Ruud (Mar. 20, 2018) (eDocket ID 20183-141198-09).

¹¹ See Scoping Meeting Tr. at 52:25 – 55:5 (Pat Meyer); 55:9 – 25:25, 66:22 – 67:3, 67:13-16, 67:18-24 (Ron Ruud).

¹² Site Permit Addendum (Mar. 28, 2018) (eDocket ID 20183-141493-01).

¹³ Notice of Additional Comment Period (Apr. 3, 2018) (eDocket ID 20184-141655-01).

¹⁴ Environmental Report Scoping Decision (Apr. 18, 2018) (eDocket ID 20184-142097-02).

¹⁵ Notice of Commission Meeting (May 4, 2018) (eDocket ID 20185-142761-12).

¹⁶ Notice of Joint Public Hearing and Draft Site Permit Availability (June 12, 2018) (eDocket ID 20186-143766-01).

human impacts and how they can be addressed; and (5) other Project-related issues or concerns. Members of the Association – including Mr. Ruud – again spoke at the June 28 hearing and submitted written comments during the public comment period after the hearing. In both their oral and written comments, these members again raised general concerns about the Project and reiterated that the Commission should apply Deuel County’s three-mile setback ordinance.¹⁷

The Association filed the Petition and Request on July 18, 2018 – the very last day of the public comment period on the merits of the Certificate of Need Application and Site Permit Application, and nearly eight months after the Association first provided comments.¹⁸ The Petition and Request both raise the same generalized concerns that the Association has commented on throughout these proceedings; namely, that the Project will negatively impact the environment, tourism, and recreational economy of Lake Cochrane in South Dakota, and requesting that Deuel County, South Dakota’s ordinance establishing a three-mile setback from the lake be extended across county and state borders into Minnesota. (Petition ¶ 6; Request ¶¶ 5-11.) The Petition and Request also attempt to provide untimely comments on the scope of environmental review. (Petition ¶ 11; Request ¶ 9.) Lastly, even though the Association was formed to protect the interests of South Dakota property owners, the Petition claims that intervention is warranted under MERA due to the Project’s negative impact on natural resources located in Minnesota. (*Id.* at ¶¶ 1, 15.) The Request similarly alleges violations of MERA and the Minnesota Environmental Policy Act (“MEPA”). (Request ¶¶ 7-8.) For the reasons set forth below, the Association fails to show that either intervention or a contested case is warranted.

¹⁷ See, e.g., Public Hearing Tr. at 31:22 – 38:3 (Ruud); 21:13 – 23:9 (Viessman); 29:12 – 31:9 (Taylor); 38:11 – 39:20 (Maeyaert); 39:23 – 42:7 (Elkholm); Comments of Lake Cochrane Improvement Association (July 16, 2018) (eDocket IDs 20187-144949-01).

¹⁸ Petition to Intervene (July 18, 2018) (eDocket ID 20187-145010-01).

ARGUMENT

I. The Association’s Petition to Intervene Should Be Denied On Procedural Grounds and On the Merits.

A. The Petition is Not Timely.

A petition to intervene must be timely brought. Minn. R. 1400.6200, subp. 1; Minn. R. 1405.0900, subp. 1. “Timeliness will be determined by the judge in each case based on circumstances at the time of filing.” Minn. R. 1400.6200, subp. 1; Minn. R. 1405.0900, subp. 1. The Association cannot credibly argue that its Petition is timely. Despite having participated in these proceedings from the very beginning, the Association now brings this Petition approximately three weeks after the June 28, 2018 joint public hearing on the applications, approximately five months after the February 27, 2018 public information and environmental report scoping meeting, and roughly six months after the Commission’s January 2018 orders referring this matter to the OAH and ordering an informal review process. The Petition raises the same substantive issues that the Association and its members addressed in their previous comments, and the Association fails to explain why it did not seek intervention earlier.

Petitions to intervene have been readily denied under similar circumstances. For example, a petition in a recent certificate of need and route permit proceeding for a high-voltage transmission line was denied where it was filed approximately seven months after the Commission referred the proceedings to OAH for informal review, and one week *before* the joint public hearing on the applications.¹⁹ The Administrative Law Judge observed that the petitioners did not explain why they did not seek intervention earlier, and that the petitioners would not suffer any prejudice because they “are able to submit comments and participate in the public

¹⁹ *In the Matter of the Application of Great River Energy and Minnesota Power for a Certificate of Need and a Route Permit for the Menahga Area 115 kV Transmission Project in Hubbard, Wadena, and Becker Counties*, OAH Docket No. 5-2500-32715, 2015 WL 6110337, at *1 (Minn. O.A.H. Oct. 14, 2015).

hearing.”²⁰ In another route permit proceeding, a petition to intervene was denied in part because it was filed on the second-to-last day of a public and evidentiary hearing on the application, and the petitioner had been “actively participating” in the docket since the permit application was filed.²¹ Petitions to intervene outside the Commission context have also been denied where the petitioner had “been monitoring the case from at or near the beginning.”²²

The Association has actively participated in these proceedings from the beginning and has taken full advantage of the Commission’s informal review process. The Association and its members submitted written comments on completeness of the Certificate of Need Application,²³ provided written and oral comments in connection with the February 27, 2018 public information and environmental scoping meeting,²⁴ and provided written and oral comments in connection with the June 28, 2018 joint public hearing regarding the draft site permit.²⁵ The Association cannot claim that intervention is warranted at this late hour, nor can it show any prejudice if it is not permitted to intervene. In contrast, FCW and others will be prejudiced by the substantial delay that will result if they are required to engage in additional development of the record that – based on the allegations in the Petition – will likely be redundant to the comments already submitted by the Association, its members, and other Lake Cochrane residents. *See Blue*

²⁰ *Id.* at *2.

²¹ *In the Matter of the Application of Minnesota Power for a Route Permit for the Great Northern Transmission Line Project in Roseau, Lake of the Woods, Beltrami, Koochiching and Itasca Counties*, OAH Docket No. 65-2500-31637, 2015 WL 5175252, at *10 (Minn. O.A.H. Sept. 2, 2015).

²² *In re: Application of NATCOM Bancshares, Inc.*, OAH Docket No. 5-1005-34332, 2017 WL 3676445, at *4 (Minn. O.A.H. July 25, 2017); *see also SST, Inc. v. City of Minneapolis*, 288 N.W.2d 225, 230 (Minn. 1979) (declining to award full party intervenor status under MERA where petitioner “knew of the proposed condemnation from its beginning . . . and was personally involved in many of the preparations for trial”).

²³ *See* Public Comment (Dec. 20, 2017) (eDocket ID 201712-138318-01).

²⁴ *See, e.g.*, Public Comment – Ron Ruud (Mar. 20, 2018) (eDocket ID 20183-141198-09); Scoping Meeting Tr. at 52:25 – 55:5 (Pat Meyer); 55:9 – 25:25, 66:22 – 67:3, 67:13-16, 67:18-24 (Ron Ruud).

²⁵ *See, e.g.*, Public Hearing Tr. at 31:22 – 38:3 (Ruud); 21:13 – 23:9 (Viessman); 29:12 – 31:9 (Taylor); 38:11 – 39:20 (Maeyaert); 39:23 – 42:7 (Elkholm); Comments of Lake Cochrane Improvement Association (July 16, 2018) (eDocket ID 20187-144949-01).

Cross/Blue Shield of Rhode Island v. Flam by Strauss, 509 N.W.2d 393, 396 (Minn. Ct. App. 1993) (“Timeliness of an application depends on factors such as how far the suit has progressed, the reason for the delay in seeking intervention, and any prejudice to the existing parties because of the delay.”). Accordingly, the Petition should be denied on this basis alone.

B. The Association Cannot Rely on MERA to Show that Its Legal Rights, Duties, or Privileges Will Be Affected By These Proceedings.

In order to intervene, the Association must also show that its “legal rights, duties or privileges may be determined” by these proceedings. Minn. R. 1400.6200, subp. 1; Minn. R. 1405.0900, subp. 1. Further, the Association must show that its stated interests are “arguably among those intended to be protected by the applicable statute.” *Matter of Rochester Exp. Limousine Serv., Inc.*, 508 N.W.2d 788, 789 (Minn. Ct. App. 1993). The Association attempts to meet these standards by seeking intervention under the Minnesota Environmental Rights Act, asserting that MERA permits a legal entity having members residing within the state to intervene, and that the Association has members residing in Minnesota. (Petition ¶¶ 14-15.) That the Association has members residing in Minnesota, however, is not alone sufficient to establish a right to intervene under MERA. Rather, MERA protects *Minnesota* resources by, in part, allowing intervention where the conduct at issue is likely to cause pollution, impairment, or destruction of the air, water, land, or other natural resources “*located in the state.*” Minn. Stat. § 116B.09, subd. 1 (emphasis added). The Association’s Petition, however, is not focused on protecting Minnesota resources, but rather a South Dakota resource – Lake Cochrane. One must look no further than the Association’s Constitution to see that the Association’s stated purpose is as such, and not to protect the Minnesota properties owned by its Minnesota members.²⁶

²⁶ Indeed, if the Petition is considered in light of the Association acting to protect the Minnesota properties owned by its members who are Minnesota residents and not Lake Cochrane, then the Petition fails to demonstrate how the Association has a unique interest “as distinguished from an interest common to the public.” Minn. R. 7829.0800.

(Petition ¶ 1 & Ex. A art. I § 2.) Further, the Petition does not identify any impacts to any members' Minnesota properties, nor does it explain how any of these Minnesota properties would benefit from enforcing Deuel County's three-mile setback;²⁷ rather, all of the Association's alleged grounds for intervention are rooted in South Dakota. (Petition ¶¶ 7-13). Accordingly, it is clear that the Association is improperly using MERA to protect a South Dakota resource, and, without MERA as a statutory right to intervene, the Association cannot establish that its "legal rights, duties or privileges may be determined" by these proceedings.

Even if MERA allowed the Association to intervene on behalf of its Minnesota members, intervention would still not be warranted under the applicable rules.²⁸ The Association alleges, in part, that the Project will impact "modification of view." (Petition ¶ 6.) That is not a protected resource under MERA. Although MERA does protect "scenic and esthetic resources," it only provides this protection if those resources are "owned by any governmental unit or agency." Minn. Stat. § 116B.2, subd. 4. "The issue is whether protected scenic and esthetic resources of the *government owned land* would be materially adversely affected by construction of the tower." *State v. Drabik v. Martz*, 451 N.W.2d 893, 897 (Minn. Ct. App. 1990) (emphasis added). The Petition does not allege that the Project – lest it comply with the three-mile setback – will materially adversely impact the view from any government-owned land in Minnesota. Thus, the Association cannot use this as an interest warranting intervention.

The Petition also claims that the Project will impact noise. (Petition ¶ 6.) Even assuming this implicates an interest to be protected through intervention, the Petition does not indicate why

²⁷ Notably, the relocation of turbines away from Lake Cochrane to apply a three-mile setback, as suggested by the Association, may result in turbines be located *closer* to the Minnesota properties owned by the Association's Minnesota members.

²⁸ Although MERA provides a statutory basis for intervention, the Association must still meet the intervention under Minn. R. 1400.6200, subp. 1 and Minn. R. 1405.0900, subp. 1. See *In the Matter of the Petition of Northern States Power Company to Initiate a Competitive Resource Acquisition Process*, OAH Docket No. 8-2500-30760, slip op. at 3 (Minn. O.A.H. Aug. 21 2013) (applying Minn. R. 1400.6200 to petition to intervene under MERA).

compliance with the three-mile setback ordinance is necessary to reduce noise impacts. The Deuel County ordinance provides that noise levels “shall not exceed 45 dBA average A-Weighted Sound pressure at the perimeter of existing residences, for non-participating residences.” (Petition Ex. B § 13(a).) The revised Sound Modelling Assessment commissioned for FCW shows that the Project meets this requirement under the current arrangement, and the Association does not point to any information or evidence that suggests otherwise.²⁹

The Association’s remaining concerns relate to the Project’s purported impact on wildlife, tourism, and recreation. (Petition ¶ 6.) Again, these interests appear at least in part to pertain to resources located outside Minnesota. To the extent the Association seeks to protect wildlife, tourism, and recreation in Minnesota, those concerns are “common to the public or other ratepayers in general” and therefore do not provide a sufficient basis for intervention.³⁰ Accordingly, intervention under MERA is not warranted.

C. Formal Intervention is Unnecessary.

Lastly, the Petition should be denied because the informal review process ordered by the Commission already provided the Association sufficient rights to develop the record around its concerns, as evidenced by the Association’s repeated participation in these proceedings. The Petition does not attempt to explain what additional procedural rights, if any, the Association would be able to use if it is allowed to intervene. The Commission has made clear that “people may participate in these proceedings without intervening as a party.”³¹ Without intervention, the Association has been allowed to, among other things, question FCW and agency staff verbally or

²⁹ Sound Modeling Assessment – Revised § 6 (Mar. 29, 2018) (eDocket ID 20184-141999-04).

³⁰ *In the Matter of the Petition of Northern States Power Company to Initiate a Competitive Resource Acquisition Process*, OAH Docket No. 8-2500-30760, slip op. at 4 (Minn. O.A.H. Aug. 21 2013) (quoting Minn. R. 7829.0800, subp. 2).

³¹ Order Accepting Application, Establishing Procedural Framework, and Varying Rules at 6 (Jan. 20, 2018) (eDocket No. 20181-139534-01).

in writing, and to present its own evidence before, during, and after the joint public hearing. Minn. R. 1405.0800; 1405.1900; 7850.3800, subps. 2-4; 7829.1200, subp. 2. As a result, allowing intervention would not provide the Association with any meaningful procedural rights beyond those already available to it under the informal review process, particularly given the late stage of the proceedings.

II. The Request for a Contested Case Should be Denied on the Merits and Because it is Unduly Prejudicial to FCW.

A. The Association’s Request for a Contested Case Fails to Raise any Material Issues of Fact.

The Association’s Request for a contested case hearing should be denied on the merits because the Association failed to raise any material fact that is in dispute. To be entitled to a contested case, the Association must “raise a material issue of fact, and [show] that holding a hearing would aid the PUC in making a final determination on the permit application.” Minn. R. 7854.0900, subp. 5; *see also* Minn. R. 7829.1000; *In re N. States Power Co.*, 676 N.W.2d at 336 (Petitioner has the burden “to demonstrate the existence of material facts that would aid the agency in making a decision.”). To do so, the Association must do more than “raise questions or pose alternatives without some showing that evidence can be produced which is contrary to the action proposed by the agency.” *Matter of Air Emission Facility Permit*, 454 N.W.2d 427, 430 (Minn. 1990); *see also Modification of Indirect Source Permit 96-5*, No. C0-00-1539, 2011 WL 316174, at *4 (Minn. Ct. App. Apr. 3, 2001) (“It is not enough to raise issues without some showing that evidence can be produced.”).

The Association’s Request does not dispute any material fact related to the Project, nor does it establish that a contested case hearing would aid the Commission in making a decision on the Applications. Instead, the Association simply raises general concerns regarding the Project and its potential impacts to Lake Cochrane in South Dakota. The Association does not dispute

any factual representations made by FCW, and it does not assert that it can produce evidence or testimony that is contrary to the factual representations made by FCW.

Specifically, the Association makes only general assertions regarding (1) the lack of a power purchase agreement for the Project as an indication that there is not a need for the Project's power, (2) that the Deuel County, South Dakota zoning ordinance establishing a three-mile setback from Lake Cochrane demonstrates that the Project is harmful to the community, (3) that the Project violates MERA and MEPA because, if approved, it would significantly affect the quality of the environment, (4) there are feasible and prudent alternatives to the Project, (5) the photographs provided by FCW do not present an accurate impression of the impact on the Lake Cochrane area, and (6) the compatibility of the Project with environmental preservation, sustainable development, and the efficient use of resources. (Request ¶¶ 4-11). However, the Association does not offer to present specific testimony or evidence on these issues, let alone testimony or evidence that is contrary to FCW's statements in its applications and at informational meetings. *See Matter of Solid Waste Permit for the NSP Red Wing Ash Disposal Facility*, 421 N.W.2d 398, 404 (Minn. Ct. App. 1988) (agreeing that expert testimony may be helpful to guide a decision on whether to issue a solid waste facility permit, but declining to order a contested case in lieu of informal proceedings because petitioners "failed to provide . . . any indication of what specific *new facts* an expert might testify to at a contested case hearing").

As is set forth in further detail for each alleged issue, the Association has failed to meet its burden to demonstrate any material factual dispute, or show that a hearing would aid the Commission in making a final determination on the merits of the Certificate of Need Application and Site Permit Application.³²

³² Minn. R. 7854.0900, subp. 5; *In re Northern States Power*, 674 N.W.2d 326, 335 (Minn. Ct. App. 2004).

i. Need for the Project

The Association alleges that FCW has suggested that it will soon have a power purchase agreement which would support the need for the Project, but no power purchase agreement has been presented. (Request ¶ 4.) The Association fails to recognize, however, that Commission process specifically contemplates that proposed projects may not have power purchase agreements, and specifies that obtaining a site permit does not authorize the construction of a project if the project does not have a power purchase agreement or other enforceable mechanism for the sale of power. Minn. R. 7854.1100, subp. 3; Generic Large Wind Energy Conversion System Site Permit Template at § 8.2. Accordingly, the “absence of a power purchase agreement . . . at this stage does not create a fact issue that necessitates a hearing.”³³

ii. Deuel County Zoning Ordinance

The Association alleges that the existence of the Deuel County zoning ordinance establishing a three-mile setback from Lake Cochrane creates a factual issue regarding the impacts to the community. (Request ¶¶ 5-6.) The Association, however, confuses a factual issue with a legal one. There is no dispute that the Deuel County, South Dakota zoning ordinance exists, nor is there a dispute that certain turbines in the Project configuration will be located closer than three miles to Lake Cochrane. FCW has also established in the record through its noise and shadow flicker studies that the Project as sited is compliant with both Minnesota and Deuel County, South Dakota standards.³⁴ Furthermore, the fact that the Deuel County, South Dakota three-mile setback exists, and that Deuel County, South Dakota determined it was necessary to preserve the essential character of the Lake Cochrane area does not aid the

³³ Order on the Request for Contested Case Hearing and Petition for Intervention By Laborers District Council of Minnesota and North Dakota (May 7, 2018) (eDocket No. 20185-142799-01).

³⁴ Sound Modeling Assessment – Revised § 6 (Mar. 29, 2018) (eDocket No. 20184-141999-04); Shadow Flicker Modeling Assessment – Revised § 4 (Mar. 27, 2018)(eDocket No. 20184-141999-04).

Commission in its decisionmaking, because the Commission does not apply South Dakota county zoning laws, a fact the Association has conceded throughout these proceedings in its requests that the Commission “respect the three mile setback.”³⁵ Thus, there is no issue of material fact in dispute regarding the Deuel County, South Dakota zoning ordinance.

iii. MERA and MEPA Violations

The Association also generally alleges that the Project would significantly affect the quality of the environment, and that approval of the project would cause or is likely to cause pollution, impairment, or destruction of natural resources located within the state. (Request ¶¶ 7-8). The Request cites certain provisions of MERA and MEPA, but provides no further information to support this assertion or otherwise explain the material fact at issue, which is insufficient to establish grounds for a contested case hearing.³⁶

Even assuming the Association provided factual support for its assertions, the referenced provisions of law on which the assertions rely are inapposite. Minn. Stat. §116B.04 relates only to actions brought pursuant to Minn. Stat. §116B.03. As this proceeding is not an action under this statute, the standard does not apply. Furthermore, Minn. Stat. §116B.04, Minn. Stat. 116B.09, subd. 2 and Minn. Stat. §116D.04, subd. 6 are each limited in their application to “natural resources located within the state.” The Association’s Request, however, is based on alleged impacts to Lake Cochrane in South Dakota, and thus there is no legal basis in MERA or MEPA for its assertions.

³⁵ Request ¶ 9; *see also* Public Comment, (Dec. 20, 2017), eDocket ID 201712-138318-01.

³⁶ *See supra* Part II(A) (quoting *Matter of Air Emission Facility Permit*, 454 N.W.2d at 430; *Modification of Indirect Source Permit 96-5*, No. C0-00-1539, 2011 WL 316174, at *4).

iv. Feasible and Prudent Alternative

The Association alleges that there are feasible and prudent alternatives to locating the Project at Lake Cochrane because there are numerous other projects underway, or that the Project can be modified to “respect the three mile setback.” (Request ¶ 9.) The Request fails to establish, however, how a contested case hearing will aid the Commission in evaluating whether a more reasonable and prudent alternative has been demonstrated by a preponderance of evidence on the record, or how the informal process was insufficient in developing the record on alternatives. The Association fails to recognize that an alternative must be available to FCW, as the applicant,³⁷ and further fails to consider that FCW, as a private developer, is limited to working with landowners willing to convey land rights that would allow for development of the Project and by the point of interconnection for delivery of energy from the Project.³⁸

The Association also fails to establish how the informal process and record is insufficient to address the issue of feasible and prudent alternatives. EERA’s Environmental Report sets forth an analysis of available and feasible alternatives to the Project, which includes discussion of a generic 200 MW LWECs.³⁹ EERA noted that, during the Environmental Scoping public meeting and public comment process, “[n]o member of the public or any state agency recommended system or project alternatives to be considered in the Environmental Report.”⁴⁰ The Association offers no explanation of why it did not avail itself of the opportunity to recommend project alternatives at the appropriate time in the informal process, does not dispute

³⁷ *Combined Air & Solid Waste Permit No. 2211-91-OT-I*, 489 N.W. 2d 811, 815 (Minn. App. 1992) (holding that, under MEPA, there is no need to consider alternatives “whose implementation is deemed remote and speculative.”).

³⁸ *In the Matter of the Application of Marshall Solar, LLC for a Site Permit for the Marshall Solar Energy Project and Associated Facilities in Lyon County*, Order Issuing Site Permit at 13, Docket No. IP-6941/GS-14-1052 (May 5, 2016) (eDocket No. 20165-121073-01).

³⁹ Environmental Report §7 (May 4, 2018) (eDocket No. 20185-142751-01)

⁴⁰ *Id.*

any factual information in the EERA’s alternatives analysis in the Environmental Report, and does not provide how a contested case hearing will aid the Commission’s evaluation. Accordingly, the Request for a contested case hearing on alternatives is not warranted.

v. Impact on View

The Association alleges there is a “factual dispute as to whether the photographs offered by applicant allegedly depicting the appearance of towers presents an accurate impression of the impact on the Lake Cochrane area.” (Request ¶ 10.) The Request fails, however, to establish any disputed fact related to the visual simulations, as the Request does not assert with any specificity the disputed fact, the Request misstates the position of the Association presented in oral and written comments, and the position of the Association in oral and written comments does not dispute any material issue of fact.

On June 22, 2018, FCW filed visual simulations of the Project from six different locations near Lake Cochrane.⁴¹ At the June 28, 2018 public hearing, and in public comments submitted following the hearing, representatives of the Association, including Mr. Ron Ruud, expressed displeasure with the locations selected for the visual simulations, stating “Who gave you the six locations, that’s really the question. I’m not questioning you’re [*sic*] spot on [with the simulations provided.]”⁴² Written comments filed by the Association asserted that (1) no input was sought from residents of Lake Cochrane, (2) the sites chosen minimized views of the towers, (3) the photo taken from the public water access was low to the water and far away, making the towers look small, and (4) no pictures were taken from or near cabin sites.⁴³ Thus, the Association’s concerns all relate to the selection of locations for the visual simulations. The

⁴¹ FCW Visual Simulations (June 22, 2018) (eDockets No. 20186-144071-01 to 20186-144071-05).

⁴² Public Hearing Tr. at 31:22 – 38:3; 73:22 – 74:17; 81:3 – 6 (Ruud).

⁴³ Association Public Comments (July 16, 2018)(eDockets No. 20187-144949-01).

Association does not contest the accuracy of the visual simulations provided, they simply would like visual simulations for different/additional locations. As visual simulations are not required of applicants for a Site Permit or Certificate of Need,⁴⁴ there can be no material issue of fact in dispute regarding the visual simulations that would aid the Commission.

vi. Compatibility with Environmental Preservation, Sustainable Development, and the Efficient Use of Resources

The Association also alleges that information already submitted through the informal review process; namely the “comments, the ordinance, and the special role of the Lake and its recreational area” present a material issue of fact as to whether the project is compatible with environmental preservation, sustainable development, and the efficient use of resources. (Request ¶ 11.) Again, the Association confuses a factual issue for a legal one. FCW does not dispute the existence of the Association’s comments,⁴⁵ the Deuel County, South Dakota ordinance, or the fact that Lake Cochrane is used for recreation. Of course, FCW and the Association disagree as to whether the Project, based on the evidence and other information in the record, will be “compatible with environmental preservation, sustainable development, and the efficient use of resources.” Minn. Stat. § 216F.03. But that is a legal dispute to be decided based on the evidence and other information in the record, not a factual one. *See In re Little Rock Creek*, No. A16-0123, 2016 WL 6923602, at *9 (Minn. Ct. App. Nov. 28, 2016) (stating a contested case hearing request is properly denied where the petitioner asserts “questions of law or policy, as opposed to questions of fact”). Further, by the Association’s own admission, this aspect of the Request is improperly based on evidence and information already in the record, not

⁴⁴ Minn. R. 7854.0500; Minn. R. 7849.0220.

⁴⁵ To the extent the Association is stating that specific factual issues raised within its many comments in this proceeding raise a disputed issue of material fact, it must point to those specific issues directly rather than make vague, general references. It is the Association’s burden to show a disputed issue of material fact, and FCW is not aware of any information included in any comment by the Association or its members that would create a material factual dispute.

new information that the Association intends to raise through a contested case hearing. *See, e.g., In re Dairy Dozen-Thief River Falls, LLC*, No. 109-936, 2010 WL 2161781, at *17 (Minn. Ct. App. June 1, 2010) (stating petitioner had “not satisfied its burden in providing *new* evidence unknown to the MPCA in support of its contested case hearing request”) (emphasis added).

B. The Request fails to provide the reasons a hearing is required to resolve the alleged issues of material fact.

The Request should further be denied, as it fails to substantiate in any way how the informal public hearing process has been insufficient and a contested case is required to resolve its alleged issues. “The Person requesting the public hearing shall include, as part of the request, the issues to be addressed in the hearing *and the reasons a hearing is required to resolve the issues.*” Minn. R. 7854.099, Subp. 5 (emphasis added). The Request fails on its face to provide any reasons why a hearing is required to resolve the alleged issues of fact, or what, if any, information the Association hopes to develop in contested case proceeding. Accordingly, the Request should be denied for failure to demonstrate the reasons a hearing is required.

C. Granting the Request Would Be Unduly Prejudicial to FCW.

Finally, the Association’s Request should be denied because granting a contested case hearing at this late stage in the process would be unduly prejudicial to FCW. The informal hearing process and other public comment opportunities throughout these proceedings have provided the Association and the public ample opportunity to develop a robust factual record around these issues. The process ordered by the Commission allowed the Association sufficient opportunity to develop the record around its concerns, without a contested case proceeding. Specifically, under that process, the Association had the opportunity to question FCW and agency staff verbally or in writing, and to present its own evidence before, during, and after the informal public hearing. Minn. R. 1405.0800; 1405.1900; 7850.3800, subp. 2 to 4; 7829.1200,

subp. 2. Indeed, as noted above, the Association was an active participant in the process from the beginning. The Association's failure, however, to avail itself of this opportunity to develop a detailed factual record around these issues is not grounds to grant a contested case at this late juncture. Moreover, ordering a contested case hearing for the Association's generalized concerns would only serve to further delay the Commission's ruling on the Certificate of Need Application and Site Permit Application, perhaps as much as an additional three to four months, in contravention of Minn. Stat. §216B.243, subd. 5, and to FCW's detriment.

CONCLUSION

For the reasons discussed above, FCW respectfully requests that Association's Petition to Intervene and Request for Contested Case Hearing be denied in their entirety.

Dated: July 25, 2018

STINSON LEONARD STREET LLP

/s/ Andrew Gibbons

Andrew Gibbons (#0389692)
Thomas Burman (#0396406)
50 South Sixth Street, Suite 2600
Minneapolis, Minnesota 55402
Telephone: (612) 335-1500
Facsimile: (612) 335-1657
andrew.gibbons@stinson.com
thomas.burman@stinson.com

Attorneys for Flying Cow Wind, LLC

NAME	EMAIL	SERVICE
Debra Moynihan	debra.moynihan@state.mn.us	Electronic
Bob Patton	bob.patton@state.mn.us	Electronic
Janet Shaddix Elling	jshaddix@janetshaddix.com	Electronic
Cynthia Warzecha	cynthia.warzecha@state.mn.us	Electronic
Daniel P. Wolf	dan.wolf@state.mn.us	Electronic

Dated this 25th day of July, 2018

/s/ Nena L. Kuhnly

 Nena L. Kuhnly