

**STATE OF MINNESOTA  
BEFORE THE  
PUBLIC UTILITIES COMMISSION**

Dan Lipschultz  
Matthew Schuerger  
John Tuma  
Katie Sieben

Commissioner  
Commissioner  
Commissioner  
Commissioner

**In the Matter of the Application of Freeborn  
Wind Energy LLC for a Route Permit for  
the Freeborn Wind Farm to Glenworth  
Substation 161 kV Transmission Line  
Project in Freeborn County**

MPUC Docket No. IP-6946/WS-17-322;  
OAH Docket No. 5-2500-35036

**FREEBORN WIND ENERGY LLC'S  
ANSWER TO PETITIONS FOR  
RECONSIDERATION**

**INTRODUCTION**

Freeborn Wind Energy LLC (“Freeborn Wind”) submits this answer to the Petitions for Reconsideration (individually, a “Petition,” and collectively, the “Petitions”) of the Minnesota Public Utilities Commission’s (“Commission”) December 19, 2018 Order Approving Route Permit (“Order”).<sup>1</sup> Petitions were filed by Dorene Hansen, Allie Olson, and the Association of Freeborn County Landowners (“AFCL”)<sup>2</sup> (collectively, “Petitioners”). These Petitions do not establish that the Commission’s decision to grant a Route Permit for the Freeborn Wind Farm to Glenworth Substation 161 kilovolt (“kV”) Transmission Line Project (the “Project”) was either

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<sup>1</sup> When the Commission issued its Order and the Route Permit on December 19, 2018, the attachments to the Route Permit were inadvertently omitted. *See* Order Approving Route Permit (Dec. 19, 2018) (eDocket No. 201812-148593-01) (hereinafter “Order”). The Executive Secretary issued an Erratum Notice on December 27, 2018, correcting the Order and Route Permit to incorporate the attachments filed with the Erratum Notice. *See* Erratum Notice (Dec. 27, 2018) (eDocket No. 201812-148727-01).

<sup>2</sup> AFCL did not file a timely petition for reconsideration. AFCL’s untimely petition is subject to Freeborn Wind’s Motion to Strike Untimely Petition and Non-Record Evidence. Freeborn Wind, in responding to AFCL’s untimely petition, does not waive its Motion to Strike. Section VII and Exhibits E-G of AFCL’s Petition contain non-record evidence and are also subject to Freeborn Wind’s Motion to Strike. Freeborn Wind, in responding to these sections of and exhibits to AFCL’s Petition, does not waive its Motion to Strike.

unreasonable or unlawful. Because the Petitions set forth no basis for the Commission to reconsider its Order, the Petitions should be denied.

### **LEGAL STANDARD**

A request for reconsideration must be filed within 20 days of a Commission order and must specifically set forth the grounds for rehearing.<sup>3</sup> The Commission “may reverse, change, modify, or suspend” its original decision only if “the original decision, order, or determination is in any respect unlawful or unreasonable.”<sup>4</sup>

In determining whether to grant a petition for reconsideration, the Commission looks to whether the petition raises new issues, identifies new and relevant evidence, exposes errors or ambiguities, or otherwise provides persuasive justification for rethinking its decisions.<sup>5</sup>

### **DISCUSSION**

The Petitioners fail to satisfy any of the reconsideration criteria. Rather, the Petitions challenge the Commission’s conclusions and reiterate arguments that have already been made and that the Commission properly considered and rejected. Because Petitioners fail to meet any one of the criteria, no reconsideration is warranted.

To avoid repetition, Freeborn Wind will first respond to the issues raised in AFCL’s Petition and note where other Petitioners raised the same issue. Freeborn Wind will then respond to issues raised by other Petitioners but not AFCL.

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<sup>3</sup> Minn. Stat. § 216B.27, subd. 1 (“Within 20 days after the service by the commission of any decision constituting an order or determination, any party to the proceedings and any other person, aggrieved by the decision and directly affected thereby, may apply to the commission for a rehearing in respect to any matters determined in the decision.”); *id.* at subd. 2 (“The application for a rehearing shall set forth specifically the grounds on which the applicant contends the decision is unlawful or unreasonable.”).

<sup>4</sup> Minn. Stat. § 216B.27, subd. 3.

<sup>5</sup> *In re Appl. of N. States Power Co., a Minn. Corp., for Auth. to Increase Rates for Gas Serv. in Minn.*, Docket No. G-002/GR-09-1153, Order Denying Recons. (Jan. 28, 2011).

## **I. ANSWER TO ISSUES RAISED IN AFCL PETITION**

### **A. The Petitioners' Arguments Relating To Land Rights Do Not Warrant Reconsideration.**

The Petitioners ask the Commission to reconsider the Order in light of Freeborn Wind's land rights and land acquisition practices on the exact same grounds that the Commission has already considered and rejected. Specifically, the AFCL and Hansen Petitions restate arguments that Freeborn Wind's land agents acted inappropriately in securing and documenting easements.<sup>6</sup> The Petitioners also argue that Freeborn Wind does not have sufficient land rights to construct the Project on participants' land and cannot rely on eminent domain to obtain the necessary rights.<sup>7</sup> AFCL contends that the county lacks authority to use road easements for transmission lines and therefore that Freeborn Wind cannot utilize county road right-of-way for the County Road 108/830th Avenue crossing.<sup>8</sup> AFCL alleges "new" information supporting its assertions in the form of Freeborn County emails obtained through a Minnesota Government Data Practices Act ("MGDPA") served in November 2018, after the Commission's oral decision in this matter, emails that are the subject of Freeborn Wind's Motion to Strike. None of these issues is new, and none merits reconsideration.

#### **1. The Commission's conclusions regarding Freeborn Wind's land rights and ability to utilize public road right-of-way were lawful and reasonable.**

The Commission has already considered and rejected Petitioners' arguments regarding the sufficiency of Freeborn Wind's land rights and their repeated complaints that Freeborn

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<sup>6</sup> See AFCL Petition for Reconsideration at 11 (eDocket No. 20191-148989-01) (hereinafter "AFCL Petition"); Hansen Petition for Reconsideration at 1 (eDocket No. 20191-148973-01) (hereinafter "Hansen Petition").

<sup>7</sup> See AFCL Petition at 1, 11; Hansen Petition at 2; Olson Petition for Reconsideration at 1 (eDocket No. 20191-148974-01) (hereinafter "Olson Petition").

<sup>8</sup> See AFCL Petition at 17.

Wind's land agents acted inappropriately in securing and documenting easements.<sup>9</sup> The Commission concluded that "the extent of Freeborn Wind's current or future property rights is beyond the scope of these proceedings. These are disputes to be resolved between the Company, the relevant property owners, and the local units of government."<sup>10</sup> These arguments are not new and do not warrant reconsideration.

Further, Petitioners' assertion that Freeborn Wind does not have sufficient land rights to construct the Project is contrary to the evidence in the record and has already been considered and rejected by the Administrative Law Judge ("ALJ") and the Commission.<sup>11</sup> Freeborn Wind has, through voluntary agreements and engineering design, obtained the rights necessary to construct the Project along the approved route on participants' land except for the crossing of public road right-of-way at County Road 108/830th Avenue at one-quarter mile south of 120th Street, for which Freeborn Wind is seeking a utility permit from Freeborn County.<sup>12</sup> Freeborn Wind's coordination with local road jurisdictional authorities to obtain the necessary permit for the County Road 108/830th Avenue crossing was fully discussed in the record and considered by the ALJ and the Commission.<sup>13</sup>

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<sup>9</sup> See Order at 9-10.

<sup>10</sup> See Order at 10.

<sup>11</sup> See ALJ Findings of Fact, Conclusions of Law and Recommendation at ¶ 89 (July 26, 2018) (eDocket No. 20187-145230-01) (hereinafter "ALF Findings") (adopted by Commission).

<sup>12</sup> See, e.g., ALJ Findings at ¶ 89; Freeborn Wind Reply Comments at 1-2, 7-8 (June 18, 2018) (eDocket No. 20186-143962-01); Direct Testimony of Dan Litchfield at 5 (May 24, 2018) (eDocket No. 20185-143327-02) (hereinafter "Litchfield Direct"); Pub. Hrg. Tr. at 13 (Litchfield); Freeborn Wind Transmission Line Route Permit Application at 17 (Sept. 20, 2017) (eDocket No. 20179-135684-02) (hereinafter "Application").

<sup>13</sup> See, e.g., Order at 9-10; ALJ Findings at ¶¶ 73, 89, 152; Freeborn Wind Reply Comments at 8-9 (June 18, 2018) (eDocket No. 20186-143962-01) ("Freeborn Wind has had multiple constructive discussions with Freeborn County staff and Shell Rock Township officials, and is confident a thorough Three Part Agreement will be reached that will address issues related to utility permits for use of public ROW,

The Petitions erroneously argue that Freeborn Wind cannot utilize county road right-of-way for the County Road 108/830th Avenue crossing.<sup>14</sup> However, Minn. Stat. § 222.37 allows “[a]ny water power, telegraph, telephone, pneumatic tube, pipeline, community antenna television, cable communications or electric light, heat, power company, or fire department” to “use public roads for the purpose of constructing, using, operating, and maintaining lines, subways, canals, conduits, hydrants, or dry hydrants, for their business.” The entities that are entitled to use the public right-of-way include wind developers, including Freeborn Wind.

In an Opinion dated July 25, 2018 (attached as Attachment A), the Minnesota Attorney General confirmed the breadth of the statute. The Attorney General concluded that Minn. Stat. § 222.37 “includes any company that provides power as an entity with access to the public right of way, and does not limit such access to regulated public utilities as defined in Minn. Stat. § 216.02.”<sup>15</sup> The Minnesota Supreme Court has recognized that facilities used for “power purposes” within the meaning of Minn. Stat. § 222.37 are facilities “usually furnished by private capital for pecuniary gain.”<sup>16</sup> It is undisputed that the transmission line facilities will be used to provide power. Therefore, Minn. Stat. § 222.37 authorizes Freeborn Wind to access county road right-of-way, including the County Road 108/830th Avenue crossing.<sup>17</sup> Accordingly, Petitioners’ arguments fail as a matter of law. The Commission’s conclusions on this matter were lawful, supported, and reasonable and do not merit reconsideration.

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including the 108/830th Avenue crossing, as well as repair and maintenance of public road and drainage infrastructure”); Application at 17.

<sup>14</sup> See, e.g., AFCL Petition at 16-17.

<sup>15</sup> Attachment A at 2 (Op. Att’y Gen. (July 25, 2018)).

<sup>16</sup> *Kuehn v. Vill. of Mahtomedi*, 292 N.W. 187, 190 (1940); see also Attachment A at 2 (Op. Att’y Gen. (July 25, 2018)).

<sup>17</sup> See Attachment A at 2 (Op. Att’y Gen. (July 25, 2018)).

**2. The “new” information alleged by AFCL regarding Freeborn Wind’s land rights does not support reconsideration.**

AFCL argues that the communications obtained through a late November 2018 MGDPA, attached to its Petition as Exhibits E and F, constitute new information bearing on the land rights acquired for the Project.<sup>18</sup> Exhibits E and F consist of emails and documents obtained through MGDPA requests submitted to both Freeborn County and the Minnesota Department of Commerce (“Department”). The documents obtained, mostly emails from 2016 and 2017, involve various routine logistical discussions that occurred between individuals involved in this project. The MGDPA requests were not made until November 30, 2018, more than a month after the Commission hearing. AFCL provides no justification for the late submission of the documents.<sup>19</sup> As discussed in Freeborn Wind’s Motion to Strike, AFCL’s Exhibits E and F were not part of the record before the Commission issued its decision.<sup>20</sup> Furthermore, the Exhibits do not provide value to the Commission’s deliberative process and their consideration would be prejudicial because Freeborn Wind was not given the chance to respond to them.<sup>21</sup>

Further, Exhibits E and F do not contain new information. Freeborn Wind’s coordination with state and local road jurisdictional authorities to obtain the necessary permits prior to construction for public road right-of-way use, including the County Road 108/830th Avenue crossing, was fully discussed in the record and considered by the ALJ and the Commission.<sup>22</sup>

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<sup>18</sup> See AFCL Petition at 20-21.

<sup>19</sup> Nor is a reasonable explanation possible. With the exception of one email from May 2018, the documents are all from January 2018 or before.

<sup>20</sup> Minn. R. 7829.0420, subps. 1-2.

<sup>21</sup> *Id.* at subp. 1(B).

<sup>22</sup> See, e.g., Order at 9-10; ALJ Findings at ¶¶ 73, 89, 152 (adopted by Commission); Freeborn Wind Reply Comments at 8-9 (June 18, 2018) (eDocket No. 20186-143962-01) (“Freeborn Wind has had multiple constructive discussions with Freeborn County staff and Shell Rock Township officials, and is confident a thorough Three Part Agreement will be reached that will address issues related to utility

As discussed above, the Commission has already considered and rejected AFCL's arguments regarding the sufficiency of Freeborn Wind's land rights to construct the Project,<sup>23</sup> and Minnesota law provides Freeborn Wind access to county road right-of-way, including the County Road 108/830th Avenue crossing at issue.<sup>24</sup> Nothing in these Exhibits warrants reconsideration.

**B. The Commission Properly Considered the Routing Factors And Applicant's Preference When Selecting The Route For The Project.**

Petitioners AFCL and Hansen assert that the ALJ and Commission erred in considering Freeborn Wind's preference with respect to the route.<sup>25</sup> They allege that the ALJ, and the Commission through adopting the ALJ's recommendations, treated Freeborn Wind's preference as a routing criterion. Their argument is contrary to the plain dictate of the statute: "the commission shall be guided by, *but not limited to*, the following considerations..."<sup>26</sup> The Commission properly analyzed all of the routing factors, as required by the statute, and considered Applicant's preference, as authorized by the statute. Petitioners' allegation lacks merit and reconsideration should be denied.

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permits for use of public ROW, including the 108/830th Avenue crossing, as well as repair and maintenance of public road and drainage infrastructure"); Application at 17.

<sup>23</sup> Order at 9-10.

<sup>24</sup> See Minn. Stat. § 222.37; Attachment A, Op. Att'y Gen. at 2 (July 25, 2018); *Kuehn v. Vill. of Mahtomedi*, 292 N.W. 187, 190 (1940).

<sup>25</sup> See AFCL Petition at 9-10; Hansen Petition at 2.

<sup>26</sup> Minn. Stat. § 216E.03, subd. 7(b) (emphasis added). AFCL lists the factors from Minn. Stat. §216E.03, Subd. 7 on pages 1-2 of its Petition but conveniently omits the preceding portion of the statute quoted above.

**C. AFCL’s Assertions Regarding Procedural Issues And Public Participation Are Unsupported By Law Or Fact And Do Not Support Reconsideration.**

AFCL makes multiple claims of perceived irregularities in the process and generally asserts that the public – and AFCL in particular – were not given a full opportunity to participate and be heard in this proceeding.<sup>27</sup> As an initial matter, Freeborn Wind thinks it important to note that AFCL and its members were given – and took full advantage of – the opportunity to submit comments during the public hearing and public comment period in this docket.<sup>28</sup> Further, AFCL ignores that the Project was reviewed under the alternative process rather than the full permitting process. AFCL chose not to intervene in this proceeding; its apparent regret over that decision is not a valid basis for reconsideration. None of AFCL’s arguments provide a basis for reconsideration.

**1. The Commission does not need to reconsider its Order based on AFCL’s complaint regarding notice of the prehearing conference.**

AFCL argues that because no notice of the prehearing conference was filed in the docket, the public was not given proper opportunity to participate.<sup>29</sup> AFCL provides no legal justification supporting reconsideration on this basis. The docket followed all of the procedures

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<sup>27</sup> See, e.g., AFCL Petition at 4.

<sup>28</sup> See, e.g., Pub. Hrg. Tr. at 19-25 (Overland on behalf of AFCL) (sworn), at 50-55 (Overland), at 32-36 (Hansen) (sworn); Comment by AFCL (June 12, 2018) (eDocket No. 20186-143756-01); Comment by Dorene Hansen for AFCL (June 12, 2018) (eDocket No. 20186-143735-01); Comment by Dorene Hansen for AFCL (June 12, 2018) (eDocket No. 20186-143738-01); Comment by Dorene Hansen (June 1, 2018) (eDocket No. 20186-143501-01); Comment by Dorene Hansen (June 1, 2018) (eDocket No. 20186-143501-02); Comment by Dorene Hansen (June 1, 2018) (eDocket No. 20186-143501-03); Comment by Dorene Hansen (June 1, 2018) (eDocket No. 20186-143501-04); Comment by Dorene Hansen (June 1, 2018) (eDocket No. 20186-143501-05); AFCL Scoping Comments (Jan. 3, 2018) (eDocket No. 20181-138611-01); AFCL Comments – Response to Freeborn Wind (Nov. 15, 2017) (eDocket No. 201711-137414-01); Comment by Dorene Hansen (Oct. 24, 2017) (eDocket No. 201710-136748-01); Comment by Dorene Hansen (Oct. 24, 2017) (eDocket No. 201710-136752-01); AFCL Comments on Completeness (Oct. 24, 2017) (eDocket No. 201710-136755-01); Comment by Dorene Hansen (Oct. 23, 2017) (eDocket No. 201710-136747-01).

<sup>29</sup> AFCL Petition at 6.



required by the alternative process.<sup>30</sup> Further, notice of the proceeding was provided as required by law and Commission Rule.<sup>31</sup> Reconsideration is not warranted on this basis.

**2. None of AFCL’s complaints regarding the prehearing orders provide a basis for reconsideration.**

AFCL complains that the prehearing orders were insufficient in that they: (1) did not include language regarding options and methods of participation; (2) did not include language regarding the weight given to sworn vs. unsworn testimony; and (3) included “only nominal scheduling information, and the barest of information regarding [n]otice and the public hearing.”<sup>32</sup> As stated above, notice of the public hearing and comment periods was provided in full accordance with the law.<sup>33</sup> Further, the “standard” language AFCL cites with regard to the weight given to sworn/unsworn testimony and the methods of participations was pulled from a prehearing order in a full contested case proceeding and is therefore inapplicable here.<sup>34</sup>

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<sup>30</sup> See, e.g., Minn. R. 7850.3300 and Minn. R. 7850.2100 (notice obligations for project being considered under the alternative permitting process); Minn. R. 7850.3500 and Minn. R. 7850.2300, subps. 1-4 (notice requirements for public meeting); Minn. R. 7850.3700 (environmental assessment process and notice thereof).

<sup>31</sup> See, e.g., Notification of Pending Route Permit Application (June 15, 2017) (eDocket No. 20176-132807-01); Notice of Comment Period on Completeness of Route Permit Application (Sept. 22, 2017) (eDocket No. 20179-135743-01); Revised Notice of Comment Period on Completeness of Route Permit Application (Oct. 4, 2017) (eDocket No.201710-136114-01); Affidavits of Mailing and Publication (Oct. 16, 2017) (eDocket No. 201710-136534-01); Freeborn Wind Notice of Freeborn Wind Notice of Filing of Route Permit Application (Sept. 27, 2017) (eDocket No. 20179-135845-01); Notice of Commission Meeting (Nov. 3, 2017) (eDocket No. 201711-137152-02); Notice of Environmental Assessment Scoping and Public Information Meeting (Dec. 6, 2017) (eDocket No. 201712-137985-01); Freeborn Wind Affidavit of Publication (Dec. 14, 2017) (eDocket No. 20172-138188-01); Notice of Commission Meeting – February 8, 2018 (Jan. 26, 2018) (eDocket No. 20181-139386-08); Notice of Environmental Assessment Scoping Decision (March 8, 2018) (eDocket No. 20183-140885-01); Environmental Assessment and Notice of Availability (May 23, 2018) (eDocket No. 20185-143273-01); Notice of Environmental Assessment Availability (May 25, 2018) (eDocket No. 20185-143469-01); Notice of Public Hearing (May 17, 2018) (eDocket No. 20185-143158-01); Affidavit of Publication (May 25, 2018) (eDocket No. 20185-143338- 01).

<sup>32</sup> See AFCL Petition at 6-7.

<sup>33</sup> *Supra*, note 30.

<sup>34</sup> See AFCL Petition at 6-7.

AFCL's complaints regarding speaking under oath at the public hearing are equally infirm. As AFCL states, those who requested to be placed under oath were so obliged.<sup>35</sup> AFCL provides no legal justification for reconsideration on these matters.

**3. The record demonstrates that the Commission properly considered and addressed public comments.**

AFCL argues that the ALJ and the Commission failed to consider and appropriately address public comments. This argument is not supported by the record. The ALJ's Findings of Fact, Conclusions of Law, and Recommendations included a detailed summary of the public comments received throughout the proceeding, both written and oral.<sup>36</sup> Likewise, the Commission's Order demonstrates that it considered and addressed comments submitted by the public and in fact specifically addressed arguments and concerns raised by AFCL.<sup>37</sup>

**4. The Commission's consideration and treatment of AFCL's unauthorized filings was reasonable and lawful.**

AFCL takes particular issue with what it perceives to be the ALJ and Commission's "disregard" of AFCL's exceptions to the ALJ's Findings, and that the Commission erred in neither granting nor acknowledging AFCL's motion to suspend the proceeding following the ALJ recommendation in the Freeborn Wind Farm site permit docket (MPUC Docket No. IP-6946/WS-17-410).<sup>38</sup>

First, the procedure for public hearings on projects under the alternative review process does not require an exceptions period following the hearing examiner's report.<sup>39</sup> Second,

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<sup>35</sup> AFCL Petition at 7.

<sup>36</sup> See ALJ Findings at Appendix A.

<sup>37</sup> See, e.g., Order at 7, 9-11.

<sup>38</sup> See AFCL Petition at 2, 4, 8.

<sup>39</sup> See Minn. R. 7850.3800, subp. 3.

AFCL's contention that "there was no opportunity for the Commission to consider the specifics of the AFCL exceptions"<sup>40</sup> ignores the entire section of the Order dedicated to the Commission's analysis of the specifics of AFCL's exceptions.<sup>41</sup> Third, AFCL's July 13, 2018 Motion to Suspend was not authorized by the applicable rules. AFCL cites no legal authority for filing that motion in the first place. AFCL participated in this proceeding to the fullest extent contemplated by the applicable rules and statutes for non-parties, but this was not a contested case, and AFCL is not entitled to act as if it was. These proceedings will become needlessly cumbersome if participants submit motions that are not authorized under the applicable rules. The Commission's decision not to rule on AFCL's motion was reasonable and lawful, and reconsideration is not warranted.

**D. AFCL's Exhibit G Is Not Relevant To This Proceeding And Is Not A Basis For Reconsideration.**

AFCL argues that the partial excerpt from the Environmental Noise Guidelines issued by the World Health Organization ("WHO"), attached as Exhibit G to its Petition, warrants reconsideration of the Order.<sup>42</sup> As discussed in Freeborn Wind's Motion to Strike, AFCL's Exhibit G was not part of the record before the Commission issued its decision.<sup>43</sup> Furthermore, the Exhibit does not provide value to the Commission's deliberative process and its consideration would be prejudicial.<sup>44</sup> Freeborn Wind was never given the chance to respond. Further, in addition to lacking foundation and being an incomplete document, the document does

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<sup>40</sup> AFCL Petition at 2.

<sup>41</sup> Order at 9-11.

<sup>42</sup> See AFCL Petition at 21.

<sup>43</sup> Minn. R. 7829.0420, subps. 1-2.

<sup>44</sup> Minn. R. 7829.0420, subp. 1(B).

not bear on the issues before the Commission in this *transmission line* proceeding. This is not a basis for reconsideration.

**E. Reconsideration Is Not Warranted Based On AFCL’s Assertion Regarding Project Contact Information.**

AFCL argues that Freeborn Wind is not complying with the Route Permit, alleging that the address provided for contacting Freeborn Wind regarding complaints is outdated.<sup>45</sup> This argument is not a basis for reconsideration. In accordance with the requirements of the Route Permit, Freeborn Wind notified the Commission of the updated contact information for receiving complaints on January 17, 2019.<sup>46</sup> Reconsideration is not warranted on this basis.

**II. ANSWER TO HANSEN PETITION**

**A. The Commission Does Not Need To Reconsider Its Order Based On Petitioner Hansen’s Vague Reference To Timing Of A Compliance Filing.**

Petitioner Hansen vaguely questions “when” the geotechnical evaluation will be conducted.<sup>47</sup> This information is contained in both the Order and the Route Permit. Freeborn Wind acknowledges what appears to be a clerical error in the numbering of the special conditions. As a result, the special condition relating to karst and the geotechnical evaluation is referenced in the Order as Special Condition 6.3, but is actually Special Condition 6.2 in the Route Permit. This does not justify reconsideration. As a courtesy, Freeborn Wind directs Ms. Hansen to the language of Special Condition 6.2: “The Permittee shall provide geotechnical testing results at all proposed pole locations *when it files its plan and profile.*” (emphasis added). The time for filing the “plan and profile” is explained in Condition 9.1.

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<sup>45</sup> AFCL Petition at 19-20.

<sup>46</sup> Freeborn Wind Updated Complaint Contact (Jan. 17, 2019) (eDocket No. 20191-149305-01).

<sup>47</sup> See Hansen Petition at 1.

**B. The Commission Appropriately Reviewed The Project Under The Alternative Review Process.**

Petitioner Hansen challenged the use of the alternative review process in lieu of the standard review process for evaluating Freeborn Wind’s application.<sup>48</sup> The Commission already considered and dismissed this argument: “AFCL objected to use of the ‘alternative review process’ in lieu of the standard review process for evaluating Freeborn Wind’s application. As noted above, the alternative review process is available for analyzing lines intended to transmit less than 200 kV. Freeborn Wind seeks to build a 161 kV transmission line, and *the Commission finds no fault with analyzing Freeborn Wind’s application using the alternative review process.*”<sup>49</sup>

**C. The Commission’s Findings And Conclusions Related To Impacts To Nesting Eagles Are Reasonable And Supported By The Record.**

Petitioner Hansen vaguely argues that the Commission failed to adequately address concerns regarding impacts to eagle nests.<sup>50</sup> Her claims are not new.<sup>51</sup> As the Commission noted in its Order, there is extensive information in the record demonstrating that the Project has been designed to minimize impacts to eagle and other avian species.<sup>52</sup> Freeborn Wind hired trained biologists to conduct thorough raptor nest surveys and re-mobilized them to the site twice

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<sup>48</sup> Hansen Petition at 1.

<sup>49</sup> See Order at 9 (emphasis added).

<sup>50</sup> See Hansen Petition at 2.

<sup>51</sup> See, e.g., Comment by Dorene Hansen for AFCL (June 12, 2018) (eDocket No. 20186-143735-01); Comment by Dorene Hansen (June 1, 2018) (eDocket No. 20186-143501-01); Comment by Dorene Hansen (June 1, 2018) (eDocket No. 20186-143501-02); Comment by Dorene Hansen (June 1, 2018) (eDocket No. 20186-143501-03); Comment by Dorene Hansen (June 1, 2018) (eDocket No. 20186-143501-04); Comment by Dorene Hansen (June 1, 2018) (eDocket No. 20186-143501-05).

<sup>52</sup> See Order at 10; see also ALJ Findings at ¶¶ 215, 217-23; Environmental Assessment at 84-85 (May 14, 2018) (eDocket No. 20185-142993-01); Litchfield Direct at 8-9; Application at 51-52; Freeborn Wind Reply Comments, Attachment B (June 18, 2018) (eDocket No. 20186-143962-03).

as a sign of good faith to investigate alleged eagle nests and none were identified.<sup>53</sup> There are no raptor nests or bald eagle nests within the transmission line route.<sup>54</sup> Nothing offered in Petitioner Hansen’s Petition (nor in any of her other filings) supports her claim of adverse impacts to eagle nests. The multiple claims and comments by Ms. Hansen throughout this proceeding regarding alleged eagle nests in the Project and Freeborn Wind Farm area are unsubstantiated, contrary to the evidence, and have already been rejected by the ALJ and the Commission.<sup>55</sup> The Commission’s decision was reasonable and supported by the record, and reconsideration is not warranted.

**D. The Commission’s Findings And Conclusions Related To Impacts To The Shell Rock River Trail Are Reasonable And Supported By The Record.**

Petitioner Hansen argues that the Commission failed to adequately address the Project’s impacts to the Shell Rock River State Water Trail.<sup>56</sup> The Petition provides no support for this vague assertion. The Commission already considered concerns regarding the Project’s impact on the Shell Rock River State Water Trail and agreed with the ALJ, the Department, and Freeborn Wind that the river crossing is unavoidable, and the route selected for the Project best minimizes impacts to recreation at the river crossing.<sup>57</sup> Further, Freeborn Wind has coordinated with the Minnesota Department of Natural Resources (“MDNR”) to avoid or minimize impacts to avian

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<sup>53</sup> See, e.g., Freeborn Wind Reply Comments, Attachment C (June 18, 2018) (eDocket Nos. 20186-143962-04, 20186-143962-05).

<sup>54</sup> Order at 10.

<sup>55</sup> See Order at 10; ALJ Findings at ¶¶ 217, 218; see also Freeborn Wind Reply Comments, Attachment C at 11-12 and Schedules 6, 7, and 8 (June 18, 2018) (eDocket Nos. 20186-143962-04, 20186-143962-05).

<sup>56</sup> See Hansen Petition at 2.

<sup>57</sup> Order at 10-11.

species and along the Shell Rock River.<sup>58</sup> The Commission's decision was reasonable and supported by the record. Accordingly, reconsideration is not warranted.

**E. The Commission Does Not Need to Reconsider Its Order Relating To The Construction Noise Condition.**

Petitioner Hansen's argument for reconsideration is unclear. The Petition sets forth no justification for how the Commission's decision with regard to Condition 5.3.5 (noise) of the Route Permit is either unlawful or unreasonable.<sup>59</sup> Accordingly, reconsideration is not warranted.

**III. ANSWER TO OLSON PETITION**

**A. The Commission Does Not Need to Reconsider Its Order Based On Petitioner's EMF-Related Arguments.**

Petitioner Olson vaguely asserts grievances with the Commission's findings regarding impacts to implantable medical devices and the lack of a standard for magnetic fields.<sup>60</sup> The Commission has already considered and addressed these concerns. As the Commission noted, impact to implantable medical devices is expected to be negligible and impacts to human health are not anticipated, and can be mitigated if they do occur.<sup>61</sup> The Commission agreed with the Department that a standard for regulating magnetic fields is not warranted.<sup>62</sup> The Commission's findings were reasonable and supported by the record. Accordingly, reconsideration is not warranted.

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<sup>58</sup> For example, as requested by the MDNR, Freeborn Wind will install bird diverters on the span of the Project that will cross the Shell Rock River, and will apply the "wire/border zone method" at the crossing of Shell Rock River and its associated floodplain/wetlands. *See* Route Permit at Condition 5.3.15 and Special Condition 6.3.

<sup>59</sup> Hansen Petition at 2.

<sup>60</sup> Olson Petition at 1.

<sup>61</sup> Order at 10.

<sup>62</sup> Order at 10 (citing Department Comments at 6 (June 28, 2018)).

**CONCLUSION**

The Petitions do not raise new facts or arguments or otherwise justify reconsideration. They also fail to acknowledge that the Commission thoughtfully and comprehensively considered the record evidence and issued the Order and Route Permit based on that record. Accordingly, Freeborn Wind respectfully requests that the Petitions be denied.

Dated: January 18, 2019

Respectfully submitted,

*/s/ Lisa M. Agrimonti*

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# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

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TELEPHONE: (651) 297-2010

July 25, 2018

Mr. Paul Kiltinen  
Dodge County Attorney  
Dodge County Courthouse  
22 6<sup>th</sup> Street East, Department 91  
Mantorville, MN 55955

Re: Request for Legal Opinion

Dear Mr. Kiltinen:

I thank you for your e-mail correspondence dated July 5, 2018, requesting a legal opinion on behalf of Dodge County.

### Background

You state that private developers of solar projects and large wind energy conversion systems (LWECS or wind projects) have proposed to use county highway rights-of-way in Dodge County to locate transmission lines carrying energy from their projects to a local substation. You believe that a "public utility," as defined by Minn. Stat. § 216B.02 subds. 4 and 6, has a right to use county highway rights-of-way but you question whether that right is available to companies that do not provide retail services. You indicate that this issue has arisen in connection with a pending project in Dodge County.<sup>1</sup>

### Discussion

Minn. Stat. § 222.37 (2017) allows "any water power, telegraph, telephone, pneumatic tube, pipeline, community antenna television, cable communications or electric light, heat, power

<sup>1</sup> I understand that the Minnesota Public Utilities Commission (MPUC) has requested comments on completeness of an application filed on June 29, 2018 for a 23-mile long 345 kilovolt transmission line that a private developer intends to use, to connect a proposed LWECS to a substation in Olmsted County by means of single-circuit monopole structures in a 150-foot right-of-way. *In re Application of Dodge County Wind, LLC for a Route Permit for the 345 kV High-Voltage Transmission Line Associated with the Dodge County Wind Project in Dodge and Olmsted Counties, Minnesota*, MPUC Docket No. IP-6981/TL-17-308.

Mr. Paul Kiltinen  
Dodge County Attorney  
July 25, 2018  
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company, or fire department" to "use public roads for the purpose of constructing, using, operating, and maintaining lines, subways, canals, conduits, hydrants, or dry hydrants, for their business." The lines or other facilities cannot interfere with the safety and convenience of ordinary travel, and the use of the public right-of-way is subject to reasonable regulations imposed by the governing body of the county in which the public road is located. Utilities can ordinarily be constructed within a public road. *In re Application for A Route Permit for the Hiawatha transmission Line Project*, OAH Docket 15-2500-20599-2 (2010), WL 4004474, at \*73 and fn. 450 (Oct. 8, 2010).

Minn. Stat. § 222.37 (2017) includes any company that provides power as an entity with access to the public right of way, and does not limit such access to regulated public utilities as defined in Minn. Stat. § 216.02. In *Kuehn v. Village of Mahtomedi*, 207 Minn. 518, 522-23, 292 N.W. 187, 189-90 (1940), the court recognized that the plain language section 222.37, as then written, identified specific entities, and those terms should be given their plain reading. The court also observed that facilities used for "power purposes" are facilities "usually furnished by private capital for pecuniary gain". *Id.* Accordingly, that case supports reading the language of section 222.37 to permit any company that provides power, access to right-of-way whether or not it is a regulated public utility as defined in section 222.37.

I thank you again for your correspondence.

Very truly yours,



CHRISTIE B. ELLER  
Deputy Attorney General

(651) 757-1440 (Voice)  
(651) 297-1235 (Fax)

Enclosure: Op. Att'y Gen. 629a (May 9, 1975)

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Opinions of the Attorney General

Hon. WARREN SPANNAUS

ATTORNEY GENERAL: OPINIONS OF: Proper subjects for opinions of Attorney General discussed.

Thomas M. Sweeney, Esq. May 9, 1975  
Blaine City Attorney 629-a  
2200 American National Bank Building (Cr. Ref. 13)  
St. Paul, Minnesota 55101

In your letter to Attorney General Warren Spannaus, you state substantially the following

FACTS

At the general election in November 1974 a proposal to amend the city charter of Blaine was submitted to the city's voters and was approved. The amendment provides for the division of the city into three election districts and for the election of two council members from each district. It also provides that the population of each district shall not be more than 5 percent over or under the average population per district, which is calculated by dividing the total city population by three. The amendment also states that if there is a population difference from district to district of more than 5 percent of the average population, the charter commission must submit a redistricting proposal to the city council.

The Blaine Charter Commission in its preparation and drafting of this amendment intended that the difference in population between election districts would not be more than 5 percent over or under the average population for a district. Therefore, the maximum allowable difference in population between election districts could be as great as 10 percent of the average population.

You then ask substantially the following

QUESTION

Does the Blaine City Charter, as amended, permit a maximum population difference between election districts of 10 percent of the average population per district?

OPINION

The answer to this question depends entirely upon a construction of the Blaine City Charter. No question is presented concerning the authority to adopt this provision or involving the application or interpretation of state statutory provisions. Moreover, it does not appear that the provision is commonly found in municipal charters so as to be of significance to home rule charter cities generally. See Minn. Stat. § 8.07 (1974), providing for the issuance of opinions on questions of "public importance."

\* Minn. Stat. § 8.07 (1974) lists those officials to whom opinions may be issued. That section provides as follows:

The attorney general on application shall give his opinion, in writing, to county, city, town attorneys, or the attorneys for the board of a school district or unorganized territory on questions of public importance; and on application of the commissioner of education he shall give his opinion, in writing, upon any question arising under the laws relating to public schools. On all school matters such opinion shall be decisive until the question involved be decided otherwise by a court of competent jurisdiction.

See also Minn. Stat. §§ 8.05 (regarding opinions to the leg-

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In construing a charter provision, the rules of statutory construction are generally applicable. See 2 McQuillin, Municipal Corporations § 9.22 (3rd ed. 1956). The declared object of statutory construction is to ascertain and effectuate the intention of the legislature. Minn. Stat. § 645.16 (1974). When the words of a statute are not explicit, the legislature's intent may be ascertained by considering, among other things, the occasion and necessity for the law, the circumstances under which it was enacted, the mischief to be remedied, and the object to be attained. *Id.*

Thus, an interpretation of a charter provision such as that referred to in the facts would require an examination of a number of factors, many of which are of a peculiarly local nature. Local officials rather than state officials are thus in the most advantageous position to recognize and evaluate the factors which have to be considered in construing such a provision. For these reasons, the city attorney is the appropriate official to analyze questions of the type presented and provide his or her opinion to the municipal council or other municipal agency. The same is true with respect to questions concerning the meaning of other local legal provisions such as ordinances and resolutions. Similar considerations dictate that provisions of federal law generally be construed by the appropriate federal authority.

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

- (1) Determine the constitutionality of state statutes since this office may deem it appropriate to intervene and defend challenges to the constitutionality of statutes. See Minn. Stat. § 555.11 (1974); Minn. R. Civ. App. P. 144; Minn. Dist Ct. (Civ.) R 24.04; Op. Atty. Gen. 733G, July 23, 1945.
- (2) Make factual determinations since this office is not equipped to investigate and evaluate questions of fact. See, e.g., Ops. Atty. Gen. 63a-11, May 10, 1955 and 121a-6, April 12, 1948.
- (3) Interpret the meaning of terms in contracts and other agreements since the terms are generally adopted for the purpose of preserving the intent of the parties and construing their meaning often involves factual determinations as to such intent. See, Op. Atty. Gen. 629-a, July 25, 1973.
- (4) Decide questions which are likely to arise in litigation which is underway or is imminent, since our opinions are advisory and we must defer to the judiciary in

islature and legislative committees and commissions and to state officials and agencies) and 270.09 (regarding opinions to the Commissioner of Revenue).

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such cases. See Op. Atty. Gen. 519M, Oct. 18, 1956, and  
196n, March 30, 1951.

(5) Decide hypothetical or moot questions. See Op. Atty.  
Gen. 519M, May 8, 1951.

(6) Make a general review of a local ordinance, regula-  
tion, 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 re-  
sponsibility of local officials. See Op. Atty. Gen. 477b-14,  
Oct. 9, 1973.

(7) Construe provisions of federal law. See textual dis-  
cussion *supra*.

(8) Construe the meaning of terms in city charters and  
local ordinances and resolutions. See textual discussion  
*supra*.

We trust that the foregoing general statement on the  
nature of opinions will prove to be informative and of  
guidance to those requesting opinions.

WARREN SPANNAUS, Attorney General  
Thomas G. Mattson, Assist. Atty. Gen.