

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

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

In the Matter of the Application of Flying Cow Wind, LLC for a Certificate of Need for the 152 MW Large Wind Energy Conversion System in Yellow Medicine County, Minnesota; MPUC Docket No. IP-6984/CN-17-676
MPUC Docket No. IP-6984/WS-17-749
OAH Docket No. 60-2500-35035

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

**Laborers District Council of Minnesota & North Dakota
Exception to Administrative Law Judge's Report**

INTRODUCTION

The Laborers District Council of Minnesota & North Dakota (Laborers Union) takes exception both to Administrative Law Judge (ALJ) James LaFave's report on the application of Flying Cow Wind, LLC (Applicant) for a Site Permit for Bitter Root Wind, and to a flawed process that has left the Commission with a poor decision record. The Laborers Union has made substantial efforts over months to address a discrete set of issues that are directly relevant to the project's suitability for a Site Permit and Certificate of Need through the informal hearing process, even as both we and the Lake Cochrane Improvement Association (LCIA) petitioned unsuccessfully for contested case proceedings that might have expeditiously addressed shortcomings in the evidentiary record.

Yet the Applicant and ALJ repeatedly rejected not just the Laborers Union's petitions for contested case proceedings, but also reasonable accommodations that would have facilitated development of the record within the informal hearing process. Finally, when the Laborers Union persisted in its efforts to develop the record by providing evidence and expert testimony, both the Applicant and the ALJ chose to ignore the evidence in its entirety, as if, by ignoring us, they could make uncomfortable questions and evidence about the project's likely socioeconomic impacts go away.

The unfortunate result is that the Commission finds before it a broken record in which critical information is missing, and evidence that undercuts the Applicant's case for a Certificate of Need and Site Permit has gone unrefuted. It is conceivable that a better process might have developed a record that would support a decision to grant a Certificate of Need and Site Permit for Bitter Root Wind. Perhaps the Applicant could have refuted evidence that indicates the project is neither of benefit to society nor consistent with sustainable development and efficient use of resources. But the Commission must make its decision based on an existing record that is neither adequate nor consistent with approval.

There can be no question that the socioeconomic impacts of a Large Wind Energy Conversion System are relevant to a determination that the consequences of approval are more favorable than denial. Similarly, there should be no question that these impacts are relevant to a determination that approval of a Site Permit is consistent with sustainable development, which Minnesota's Environmental Quality Board defines in a vision statement that repeatedly references employment, the economy, and the health of local communities;¹ and with efficient use of Minnesota's wind resources. Finally, it should be obvious that the employment of Minnesota and other local workers on the construction of energy projects is a key aspect of their socioeconomic impact – not least because such jobs are routinely cited in permit applications and the Commission's findings of fact for wind and other energy projects.

The Laborers Union, together with fellow labor unions and community stakeholders, has provided in the record extensive evidence that variations in the use of local and non-local construction labor can significantly alter a project's socioeconomic impact. We have shown that use of largely local labor to build Minnesota wind energy is both beneficial and feasible, and that reliance on non-local labor can impose significant opportunity costs. And despite the company's refusal to provide basic data on its labor practices, we have shown that RES Americas' reliance on non-local labor could hurt area workers and communities that might have been better served by competing projects.

The ALJ's report makes no effort to grapple with any of this argument or evidence, but is instead written as if the record on jobs closed when the Commission accepted the Bitter Root application. In doing so, the report makes a mockery of the decision criteria and of the process set out under Minnesota statute and rule. The best example of the report's flawed approach is its findings in paragraphs 156 and 198 that "The Project will create approximately 150 temporary jobs during construction", with no mention whatsoever of the evidence in the record indicating that very few of the jobs will be held by Minnesota or local workers, or that reliance on non-local workers will substantially undercut the expected benefits of the project.

Such a "finding" is, at best, deeply misleading, and at worst, a cruel joke made at the expense of local workers and communities who will discover too late that most of the jobs aren't for them. The decision to rely on the Applicant's boilerplate while literally ignoring dozens of public comments, expert testimony (including two published reports!), eyewitness evidence, and the testimony of the Applicant's own witness, is indicative of the ALJ's approach and his profound disregard for the issues the Laborers Union seeks to address.

¹ "The Vision of the Minnesota Sustainable Development Initiative." February 3, 2016. <https://www.eqb.state.mn.us/vision-minnesota-sustainable-development-initiative-0>

Fortunately, we don't believe based on our experience before the Commission that the Commissioners intend the permitting process for large energy facilities to be a rubber stamp for developers. Nor do we believe that the Commission expects the permitting process to treat stakeholder participation as an exercise in blowing off steam rather than an opportunity to develop a robust decision record. We believe that there is still an opportunity for the Bitter Root proceedings to get back on track through a contested case hearing on a discrete set of contested facts. In the absence of such a hearing, however, we hope that the Commissioners will recognize that the record before them simply does not support a favorable decision.

The following list of proposed exceptions spells out in detail our objections to the report in its current form and the evidence that we believe supports our conclusions.

EXCEPTIONS

Procedural Summary

1. After paragraph 35 add new paragraph: "The substance of the public comments was as follows: 18 comments cited potential negative impacts to Lake Cochrane; 17 comments raised concerns about or emphasized the importance of local construction hiring; 17 comments cited potential wildlife impacts; 10 cited positive economic impacts; 9 requested a three-mile setback from Lake Cochrane; 21 cited other potential negative impacts such as reduced property values, light pollution, health effects, aircraft obstruction and drain tile damage; and 9 made other positive comments about the project.²" Please see attached comment summary for further detail.
2. Add to end of paragraph 40: "Flying Cow Wind also opposed the motion for contested case as to the Site Permit on the grounds that it was premature."
3. Add to end of paragraph 111: "Ten of the sixteen additional written comments raised concerns the need for more data on local hire and the lack of a firm and verifiable commitment from the developer to use local workers."³

Site Location and Characteristics

4. In Applicant's paragraph 14 replace "The county is predominantly rural with an agricultural economic base." with "Yellow Medicine County is located in a largely rural area of the state, but agriculture accounts for just three percent of jobs in the county, while the leisure and hospitality industry provides 15 percent of area jobs, according to

² Ex. 103 (Public Comments), Ex. 104 (Public Comments Received on the Scope of the Environmental Report – Oral Comments), Ex. 105 (Public Comments Received on the Scope of the Environmental Report – Written Comments), and Ex. 106 (Public Comments Received During Extended Comment Period).

³ *Id.*

data from the U.S. Census Quarterly Workforce Indicators (QWI).⁴ Yellow Medicine County is more reliant on leisure and hospitality employment than area wind host counties such as Lincoln and Pipestone, where leisure and hospitality industry account for a much smaller share of employment – seven to eight percent based on QWI data.”⁵

Summary of Public Comments

5. In paragraph 106 replace “Multiple commenters” with “Roughly two-dozen commenters” (see attached summary of public meeting comments).
6. In paragraph 108, replace “Multiple commenters” with “Approximately 10 commenters” (see attached summary of public meeting comments).
7. In paragraph 109, replace “Mr. Karels also requested that quarterly reporting requirements related to the use of local construction workers be required, and questioned what commitments Flying Cow Wind is willing to make regarding hiring of local workers.” with “Mr. Karels also observed that the Commission should consider use of local workforce when approving projects because the approval of a project that employs few local workers could “come at the expense of another that brings with it greater benefits.” Mr. Karels finally requested that quarterly reporting requirements related to the use of local construction workers be required, and questioned what commitments Flying Cow Wind is willing to make regarding hiring of local workers.”
12. In paragraph 118, replace “Mr. Stacey Karels, who spoke on behalf of the Mankato Building Trades Council, commented on his experience with contractors that are required to utilize a certain percentage of local workers.” with “Mr. Stacey Karels, who spoke on behalf of the Mankato Building Trades commented on his experience with area wind energy projects that were built by union contractors that employ largely local workforce. Mr. Karels also cited the opportunity for wind energy projects to recruit local workers into construction careers.”
13. Substitute paragraph 131 with “Ms. Katie Hatt, the Executive Director of the North Star Policy Institute presented on two reports recently published by the North Star Policy Institute on the impact of local and nonlocal hiring on upcoming wind farm construction projects, including the proposed Bitter Root project.⁶ Ms. Hatt highlighted the findings of the research, noting that the local economic impacts of wind energy development are much greater when local workers are hired to build them. Ms. Hatt reported, among other findings:
 - Use of a largely non-local construction workforce (10 to 20 percent local) on a 150 MW wind energy project such as Bitter Root is associated with an expected loss in economic activity of more than \$5 million compared to use of a largely

⁴ Testimony submitted by Katie Hatt as attachment to Intervenors Petition for Contested Case Hearing, July 18, 2018 at 4. eDocket No. 20187-145016-13

⁵ *Id.*

⁶ Public Hearing Tr. at 58-63 (Hatt).

local workforce.⁷ Ms. Hatt subsequently reported that this difference is equivalent to roughly seven years of lease payments or 10 years of production taxes.⁸

- The local economic activity associated with employment of a local worker on a wind energy project such as Bitter Root is three times greater than that of a nonlocal worker, excluding the value of retirement benefits (\$53,180 vs. \$15,600), and four times greater including the projected impact of retirement benefits (\$67,140 vs. \$15,600).⁹
- Development of a wind energy project that employs a largely nonlocal construction workforce could negatively impact the local economy if it displaces a competing project that would have employed more local workers.¹⁰

14. At end of Summary of Public Comments section add the following paragraphs:

- “Mr. Flannery and Mr. Berzins, speaking on behalf of Flying Cow Wind, acknowledged that in RES’s role as both developer and contractor, the company directly oversees the construction process, including hiring of workers and subcontractors, and should have access to highly-detailed information on the workforce that was employed on the construction of Pleasant Valley and other RES wind projects.¹¹”
- “Mr. Berzins indicated that local workers accounted for eight of 24 RES employees working on the construction of the nearby Stoneray Wind project.¹²”
- “Mr. Brian Lammers, speaking on behalf of RES and Flying Cow Wind, declined to consider making a commitment to local construction hiring citing concerns about the availability of workforce that meets the company’s labor and safety standards as well as the need for the project to remain cost-competitive.¹³”

Socioeconomic Considerations

14. The claim in paragraph 154, replace “The county is predominantly rural with an agricultural economic base” is inaccurate, and should be replaced with “The county is predominantly rural, but has a highly diversified economy and limited agricultural employment. Nearly one in four workers (23%) are employed in healthcare and social assistance, 15% work in leisure and hospitality, 11% are employed in retail trade and

⁷ Hatt, Katie. “A Tale of Two Wind Farms: How Southwest Minnesota Stand to Gain or Lose Jobs and Economic Investment Based on Local Hiring on Wind Energy Projects.” North Star Policy Institute. June 28, 2018. eDocket No. 20187-144798-01

⁸ Affidavit of Katie Hatt from Second Petition of Laborers Union for Contested Case Hearings (July 18, 2018) eDocket No. 20179-135372-01

⁹ Public Hearing Tr. at 58-63 (Hatt).

¹⁰ *Id.*

¹¹ Public Hearing Tr. at 85-95 (Flannery and Berzins).

¹² Public Hearing Tr. at 91 (Berzins).

¹³ Public Hearing Tr. at 98-99 (Lammers).

11% are employed in educational services,¹⁴ while just three percent work in agriculture¹⁵.” The ALJ report mistakenly relies on land area to characterize the local economy, but land use is a poor proxy for economic activity, because it overstates the contribution of land-intensive industries. By way of comparison, agriculture, food, and related industries account for less than six percent of U.S. Gross Domestic Product while farm output itself comprises just one percent of economic activity,¹⁶ yet roughly half of all U.S. land is devoted to agriculture according to the U.S. Department of Agriculture.¹⁷

15. Replace paragraph 156 with ““The Project will create 150 temporary jobs during construction, but the overwhelming majority – from two-thirds¹⁸ to 90 percent¹⁹ -- are expected to be filled by non-local workers based on the past practice of Applicant parent company RES Americas on Minnesota wind energy construction projects.²⁰” It should be noted that the Applicant refused to provide requested information on RES Americas’ employment of local workers on the company’s past and present Minnesota wind energy projects,²¹ despite having suggested that the company would likely be willing to do so.²² As a consequence, the Commission must rely on the only evidence in the record to assess the impact of the jobs created by the project, namely the testimony of Mr. Berzins regarding Stoneray and Mr. Steele’s affidavit regarding Pleasant Valley.

It should also be noted that the Commission cannot rely on RES Americas to be a responsible actor with respect to efforts to use local workforce because the evidence in the record shows not only that the company has performed poorly, but has also that RES Americas been less than transparent about the company’s labor practices. Transcripts of the public information meetings for the Pleasant Valley project suggest that, at best, the

¹⁴ Attachment B to affidavit of Katie Hatt from Second Petition of Laborers Union for Contested Case Hearings (July 18, 2018) eDocket No. 20187-145017-04.

¹⁵ Affidavit of Katie Hatt from Second Petition of Laborers Union for Contested Case Hearings (July 18, 2018) at 4. eDocket No. 20187-145017-04.

¹⁶ “Ag and Food Sectors and the Economy.” U.S. Department of Agriculture. <https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/ag-and-food-sectors-and-the-economy/>

¹⁷ “How Is Land in the United States Used? A Focus on Agricultural Land.” U.S. Department of Agriculture. <https://www.ers.usda.gov/amber-waves/2012/march/data-feature-how-is-land-used/>

¹⁸ Public Hearing Tr. at 91:2-18 (Berzins).

¹⁹ Affidavit of Sheldon Steele submitted as attachment to Laborers Union Second Petition for Contested Case Hearing, July 18, 2018. eDocket No. 20187-145016-05

²⁰ Hatt, Katie. “A Tale of Two Wind Farms: How Southwest Minnesota Stand to Gain or Lose Jobs and Economic Investment Based on Local Hiring on Wind Energy Projects.” North Star Policy Institute. June 28, 2018. eDocket No. 20187-144798-01

²¹ Applicant Reply Comments, Aug. 6, 2018, at 9-11

²² Sean Flannery stated on behalf of the Applicant during the hearing that, “[w]e’ve started to ask internally how we can find that information”, and acknowledged that the company should, in its capacity as general contractor for the project, have access to detailed information. Brian Lammers further stated on behalf of the Applicant that RES would “endeavor to track down” data on hours worked by Minnesota workers on the Pleasant Valley project. *See Public Hearing Tr. at 95:11-12 (Flannery) and 96:10-11 (Lammers).*

company allowed multiple members of the public concerned about local construction hiring believe that the project would create many opportunities for local workers.²³

16. Replace paragraph 157 with “The Project is not expected to significantly impact local demographics.” The claim that the Project is expected to be beneficial to the local economy is contradicted by evidence in the record indicating that the Project will not result in net economic benefits but is instead likely to displace competing projects that would have offered equivalent non-employment economic benefits and greater employment-related benefits.
17. Add to end of paragraph 167: “However, Yellow Medicine County is different than many of the counties that participated in the Stearns County survey because the county’s economy is less reliant on agriculture and more reliant on hospitality and leisure employment. The share of Yellow Medicine County residents employed in the hospitality and leisure industry (15 percent) is roughly twice that of Lincoln County (eight percent) and well above the state average (nine percent), while the share of Lincoln County residents employed in agriculture is nearly three times that of Yellow Medicine County (eight percent and three percent, respectively).²⁴ The differences suggest that the area adjacent to the Bitter Root wind project may be more vulnerable to the negative economic and property impacts cited by the Lake Cochrane Improvement Association than the typical wind host county in Minnesota or elsewhere in the United States.
18. In Applicant’s paragraph 105, add to the end of the paragraph: “These findings, however, might not generalize to the Yellow Medicine County given the county’s relatively high reliance on leisure and hospitality employment compared to the largely agricultural counties that have historically hosted wind development in Southwest Minnesota.”²⁵
19. Add to paragraph 168 “These findings, however, might not generalize to the Yellow Medicine County given the county’s relatively high reliance on leisure and hospitality employment compared to the largely agricultural counties that have historically hosted wind development.”²⁶
20. Replace paragraph 198 with, “The Project will create 150 temporary jobs during construction, but the overwhelming majority – from two-thirds²⁷ to 90 percent²⁸ -- are

²³ Pleasant Valley Wind Public Information Meeting Transcript (10 AM Meeting). February 22, 2010. At 9-11. (Submitted as attachment to Laborers Union Second Petition for Contested Case Hearing, July 18, 2018). eDocket No. 20187-145016-09. See also Pleasant Valley Wind Public Information Meeting Transcript (7 PM Meeting). February 22, 2010. At 40-43. (Submitted as attachment to Laborers Union Second Petition for Contested Case Hearing, July 18, 2018). 20187-145016-11

²⁴ Affidavit of Katie Hatt from Second Petition of Laborers Union for Contested Case Hearings (July 18, 2018) at 4. eDocket No. 20187-145017-04.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Public Hearing Tr. at 91:2-18 (Berzins).

expected to be filled by non-local workers and contribute relatively little to the local economy based on the past practice of Applicant parent company RES Americas on other Minnesota wind energy construction projects.²⁹”

21. Add new paragraph below 198: “The project will create approximately four to six permanent jobs. In addition, the Project will provide landowners and farmers an opportunity to increase land and agricultural profitability and diversify their income. Landowners involved with the Project, as well as those who have leased their wind rights to the Project, will receive a royalty or lease payment annually for the life of the Project.”
22. Replace paragraph 200 with “Local contractors and suppliers may be used for portions of the construction, but local economic benefits are expected to be limited by RES Americas’ historic reliance on non-local workforce.”^{30, 31}
23. Add paragraph after 200: “The foregoing findings are based on the assumption that the project is additive to regional wind energy generation and does not take the place of competing wind energy projects. But evidence provided by North Star Policy Institute (NSPI) and the ULLICO Infrastructure Management Company (ULLICO) indicates that the project can be expected to crowd out area projects that could be expected to provide similar non-employment economic benefits and greater employment-related benefits.”³²
24. Add preceding paragraph: “NSPI identified 14 wind energy projects totaling 2,686 MW that have been proposed for development in southwestern and western Minnesota.³³ NSPI observed these projects compete for limited pools of capital investment, power demand, and transmission capacity, and that the execution of Bitter Root could come at the expense of projects that would likely deliver greater socioeconomic benefits at lower socioeconomic cost.³⁴ NSPI’s conclusions are supported by a letter submitted by ULLICO, which conducts such analyses as part of the companies due diligence process.³⁵” There is no evidence in the record to refute the evidence and analysis provided by NSPI and ULLICO.

Site Permit Conditions

²⁸ Affidavit of Sheldon Steele submitted as attachment to Laborers Union Second Petition for Contested Case Hearing, July 18, 2018. eDocket No. 20187-145016-05

²⁹ Hatt, Katie. “A Tale of Two Wind Farms: How Southwest Minnesota Stand to Gain or Lose Jobs and Economic Investment Based on Local Hiring on Wind Energy Projects.” North Star Policy Institute. June 28, 2018. eDocket No. 20187-144798-01

³⁰ Public Hearing Tr. at 91:2-18 (Berzins).

³¹ Affidavit of Sheldon Steele submitted as attachment to Intervenor’s Petition for Contested Case Hearing, July 18, 2018. eDocket No. 20187-145016-05

³² Letter from Jeffrey Murphy, President, ULLICO Management Company submitted as attachment to Intervenor’s Petition for Contested Case Hearing, July 18, 2018. eDocket No. 20187-145016-07

³³ Attachment A to testimony submitted by Katie Hatt as attachment to Intervenor’s Petition for Contested Case Hearing, July 18, 2018. eDocket No. 20187-145017-02

³⁴ *Id.*

³⁵ Letter from Jeffrey Murphy, President, ULLICO Management Company submitted as attachment to Intervenor’s Petition for Contested Case Hearing, July 18, 2018. eDocket No. 20187-145016-07

22. The ALJ's report adopts EERA's suggested revision of a labor statistics reporting permit condition that was originally proposed by the Laborers Union (see paragraph 308). While the EERA proposal is well intentioned, the Laborers Union believes that the proposed language could make the exercise meaningless or even counterproductive. The EERA language reads as follows (emphasis added):

The Permittee shall file a post-construction Labor Statistics Report within 60 days of commencement of operation. The Report shall (a) detail the Permittee's efforts and the site contractor's efforts to hire Minnesota workers, and (b) provide an account of 1) the gross number of hours worked by or full-time equivalent workers who are Minnesota residents, as defined in Minn. Stat. 290.01, Subd. 7; 2) the gross number of hours worked by or full-time equivalent workers who are residents of other states, but live within 150 miles of the project; and 3) the total gross hours worked or total full-time equivalent workers. Permittee shall work with its contractor to determine the suitable reporting metric. The Report may not include personally identifiable data.

The condition is intended to provide for transparent reporting on the use of local and non-local construction workforce on the project, where "local" would include both Minnesota workers and workers from neighboring state who live near the project. But under the EERA formulation, the criteria for Minnesota workers and non-Minnesota locals would allow non-local workers who take up temporary residence near the project to be counted as Minnesota residents or other non-Minnesota local workers.

The statutory definition of Minnesota resident referenced in the proposed language includes "any individual domiciled outside the state who maintains a place of abode in the state and spends in the aggregate more than one-half of the tax year in Minnesota," which would apparently allow a Texas resident who spends six months and a day living in a motel while working on the project to be counted as a Minnesota resident. Similarly, the language defines a non-Minnesota local worker as one who "live[s] within 150 miles of the project" which could also be understood to include a worker who takes up temporary residence nearby for the duration of the project.

The Laborers Union's proposal to require quarterly reporting would substantially eliminate the Minnesota resident loophole because, at least during their first two quarters of employment, non-local workers could not be considered Minnesota residents. Likewise, the loophole for non-Minnesota local residents could be eliminated by substituting "maintain a permanent residence within 150 miles" for "live within 150 miles".

In addition to closing a loophole, quarterly reporting would also better serve the goals of transparency and encouraging the use of local labor to the extent practicable by

making information available to the public and project stakeholders during the construction process. There is no evidence in the record to indicate that such a quarterly reporting requirement would impose any undue burden on the Applicant or any other wind developer.

The Laborers Union proposes the following:

The Permittee shall file quarterly reports with the Commission within 45 days of the end of the quarter regarding construction workers that participated in construction of the project. The Reports shall (a) detail the Permittee's efforts and the site contractor's efforts to hire Minnesota workers, and (b) provide an account of 1) the gross number of hours worked by or full-time equivalent workers who are Minnesota residents, as defined in Minn. Stat. 290.01, Subd. 7; 2) the gross number of hours worked by or full-time equivalent workers who are residents of other states, but maintain a permanent residence within 150 miles of the project; and 3) the total gross hours worked or total full-time equivalent workers. Permittee shall work with its contractor to determine the suitable reporting metric. The Report may not include personally identifiable data.

23. The Laborers Union contends that Conclusions of Law #3 is inaccurate because the Commission has not yet complied with the requirement under Minn. Rules Chapter 7854 that the Commission consider the requests by the Laborers Union and Lake Cochrane Improvement Association for contested case hearings on the Certificate of Need. The rule states that “The commission shall order a contested case hearing if the commission finds that the person requesting the contested case hearing has raised a material issue of fact and that holding a hearing would aid the PUC in making a final determination on the permit application.” Minn. R. Ch. 7854.0900 Subp. 5 (B). We believe that the ALJ erred in his decisions to reject motions for contested case proceedings and in his decision to certify the question to the Commission, which is ultimately responsible for making this determination under the rules.

Conclusions of Law

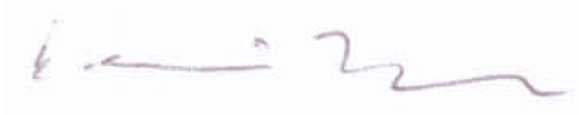
24. Conclusions of Law #6 should reflect the Labor Statistics Report permit condition language proposed above.
25. Conclusions of Law #10 should be changed to “The Applicant has failed to show, based on the evidence in the record the Project is compatible with sustainable development and efficient use of resources in as much as the Applicant has failed to refute evidence that the project will likely displace proposed wind energy projects that could deliver greater benefits with fewer negative impacts.”

Recommendation

26. Recommendation should be changed to “Based on these Findings of Fact an

Conclusions of Law, the Administrative Law Judge recommends that the Commission deny site permit to Flying Cow Wind to construct and operate the up to 152 MW Project in Yellow Medicine County.

Dated: September 19, 2018



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