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March 21, 2018

Via Electronic Filing

The Honorable James E. LaFave
Minnesota Office of Administrative Hearings
PO Box 64620
St. Paul, MN 55164-0620

Re: 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

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

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

Dear Judge LaFave:

Flying Cow Wind, LLC ("FCW") respectfully submits the enclosed Response in opposition to the Request for Contested Case Hearing and Petition to Intervene brought by the Laborers District Council of Minnesota and North Dakota, submitted in connection with FCW's applications for a site permit and certificate of need for its proposed Bitter Root Wind Project in the above-referenced matters. Please do not hesitate to contact me with any questions or concerns.

Sincerely,

Stinson Leonard Street LLP

A handwritten signature in blue ink, appearing to read "AJG", written over a light blue horizontal line.

Andrew J. Gibbons

AJG:SLS

Enclosures

**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
RESPONSE TO THE LABORERS
DISTRICT COUNCIL OF
MINNESOTA AND NORTH
DAKOTA'S REQUEST FOR
CONTESTED CASE HEARING AND
PETITION TO INTERVENE**

Flying Cow Wind, LLC ("FCW") submits this response in opposition to the Request for Contested Case Hearing and Petition to Intervene ("Request") brought by the Laborers District Council of Minnesota and North Dakota ("Petitioner"), 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"). Petitioner is not entitled to a contested case hearing because the Request is not timely under Commission rules and it raises only general questions and policy concerns, rather than material factual disputes, regarding the Project's potential impacts. And although FCW does not object to Petitioner's participation in this matter, formal intervention is unnecessary in light of the procedural devices already available to Petitioner under the specific review process ordered by the Commission. Accordingly, FCW respectfully asks that the Request be denied in its 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”). On November 2, 2017, the Commission requested comments on the completeness and procedural treatment of the Certificate of Need Application, including whether the matter should be referred to the Office of Administrative Hearings (“OAH”) for a contested case proceeding. On November 9, 2017, FCW filed an application for an LWECS site permit for the Project (“Site Permit Application;” together with the Certificate of Need Application, the “Applications”). On November 28, 2017, the Commission requested comments on the completeness and procedural treatment of the Site Permit Application, including whether the Site Permit Application should be referred to the OAH for a contested case proceeding. The Commission met to consider the Certificate of Need Application on December 21, 2017 and met to consider the Site Permit Application on January 4, 2018. On January 12, 2018, the Commission issued its Order Accepting Application As Substantially Complete and Directing Use of Informal Review Process (“Certificate of Need Completeness Order”), in which it accepted the Certificate of Need Application as substantially complete and directed the use of the informal comment and reply process for developing the record. On January 30, 2018, the Commission issued its Order Accepting Application, Establishing Procedural Framework, and Varying Rules (“Site Permit Completeness Order”) in which it accepted the Site Permit Application as substantially complete and referred the matter to the OAH to conduct a public hearing, including preparing a report setting forth findings of fact, conclusions of law, and recommendations. On February 27, 2018, Commission staff and the Department of Commerce – Energy Environmental Review and Analysis (“DOC-EERA”) held a joint public information and environmental report scoping meeting on the Applications.

Petitioner filed the Request with the OAH on March 14, 2018.

ARGUMENT

I. Petitioner's Request for a Contested Case Hearing Should Be Denied on Procedural Grounds and the Merits.

Petitioner's Request as it relates to the request for a contested case hearing process should be denied. As described further below, Petitioner's Request is procedurally flawed, and Petitioner has not raised any issues of material fact. Accordingly, the Request should be denied as it relates to a contested case hearing.

A. Petitioner's Request is procedurally flawed.

Petitioner's Request for a contested case hearing should be denied because Petitioner failed to request a contested case hearing during the Commission comment periods on the completeness and procedural treatment of the Applications, and the Request was not filed in the timeframe specified in Commission rules for requesting a contested case.

The Request for a contested case proceeding should be denied because the Request is not timely pursuant to the Commission's rules and requests for public comment. On November 2, 2017, the Commission issued a notice soliciting public comment on the completeness and procedural treatment of the Certificate of Need Application, including whether a contested case proceeding was appropriate. Similarly, on November 28, 2017, the Commission issued a notice soliciting public comment on the completeness and procedural treatment of the Site Permit Application, including whether a contested case proceeding was appropriate. Petitioner did not submit comments during either comment period. The Commission thereafter determined that a contested case was not warranted on either of the Applications, and referred this matter to OAH

to conduct a public hearing on the Applications.¹ Petitioner did not avail itself of the opportunity to comment on the appropriate procedural treatment of the Applications when the issue was before the Commission, and it should not be permitted to circumvent the Commission's decision by filing a petition to the administrative law judge overseeing the public hearing process.

Furthermore, Petitioner is requesting a contested case pursuant to Minn. R. 7854.0900, subp.5, which relates to contested case requests in proceedings related to site permits for LWECs.² Request at 1. Commission rules allow Petitioner to request a contested case hearing, but only if Petitioner does so "within the time period established for submitting comments on the draft site permit." Minn. R. 7854.0900, subp. 5. The draft site permit has not yet been issued, and thus the Request is also untimely in that respect. As the time period for commenting on the appropriate procedural treatment of the Applications has passed, and the draft site permit has not yet been issued, Petitioner does not have the right to request a contested case hearing at this time. *See In re Northern States Power Co.*, 676 N.W.2d 326, 332 (Minn. Ct. App. 2004) ("There is no right to a contested case hearing unless another statute provides such a right.") (citing Minn. Stat. § 14.57). Accordingly, the Request as it relates to a contested case proceeding should be denied on procedural grounds.³

¹ The Site Permit Completeness Order directs OAH to conduct a public hearing, while the Certificate of Need Completeness Order directs that the informal review process is to be used to develop the record on the Certificate of Need Application.

² Although the Request is made pursuant to the Commission's site permit rules, the statements made to substantiate a contested case make reference to factors considered by the Commission in connection with a certificate of need proceeding. It is unclear whether Petitioner is also requesting a contested case proceeding on the Certificate of Need Application.

³ There remains a question whether the ALJ is authorized to order a contested case hearing. The Site Permit Order specifically requested the OAH to assign an ALJ to oversee the public hearing process, and to conduct the hearing in accordance with Minn. R. 7850.3800, subp. 2 – 4, and, as the administrative law judge deems appropriate, Minn. R. 1405.0500, .0600, .0800, .1900, and .2200. Further, the ability for individuals to request a contested case under Minn. R. 7854.0900,

B. Petitioner has not set forth any disputed material facts.

Notwithstanding the procedural considerations, the Request should be denied on the merits because Petitioner failed to raise any material fact that is in dispute. To be entitled to a contested case, Petitioner 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 Northern 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, Petitioner 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.”).

Petitioner’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, Petitioner simply raises broad questions regarding the Project and policy concerns regarding wind development in the state in general, without indicating that it disputes any factual representations made by FCW or that it can produce evidence or testimony that is contrary to the factual representations made by FCW. Specifically, Petitioner raises general concerns regarding (1) the number of construction jobs that will be filled by Minnesota workers, (2) the lack of a power purchase agreement or interconnection agreement for the Project and how

and the Commission’s obligation to refer a proceeding to the OAH for a contested case if there are contested material issues of fact pursuant to Minn. R. 7829.1000, are processes by which the Commission (rather than the OAH) determines whether a contested case is appropriate.

approval by the Commission may impact competing proposals and existing power suppliers (without identifying any such proposals or suppliers), (3) the Project's impact on local construction employment, local economic activity, competing proposals and existing power suppliers, and (4) potential safety hazards associated with construction. Request at 3-4. However, Petitioner 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").

Further, many of Petitioner's concerns are simply not relevant to the question of whether a site permit or certificate of need should be issued, or are already addressed in the Commission's procedures, and therefore they will not "aid" the Commission in making its decision. *In re Northern States Power Co.*, 676 N.W.2d at 336. For example, Petitioner questions the number of jobs that will be filled by Minnesota workers. While the Commission broadly considers the economic impacts of the Project on the local community, it, however, is not mandated to consider the specific number of jobs to be filled by Minnesota workers when determining whether to issue a site permit or certificate of need, nor does it have the authority to require applicants to contract with certain entities or types of entities related to construction. *See generally* Minn. Stat. Ch. 216F; Minn. Stat. § 216B.243; Minn. R. chs. 7849, 7854. Additionally, Petitioner raised concerns regarding the lack of a power purchase agreement for the Project. The 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. Similarly, Petitioner’s concerns around public safety are addressed in the Commission’s Generic Large Wind Energy Conversion System Site Permit Template, which establishes requirements related to public safety (§5.2.25); safety codes and design requirements (§5.5.1); compliance with applicable permits and regulations (§5.5.2); and the process and information to be submitted for pre-construction review (§§10.1 – 10.3, 10.10, 10.11). In all instances, the Commission retains the ongoing authority to revisit these issues once the site permit is issued, and to revoke the permit in certain circumstances. *See* Minn. R. 7854.1300, subp. 2 – 4; Minn. R. 7854.1200.

Finally, Petitioner broadly asserts that it “does not believe that the issues raised here can be addressed adequately in the context of a public hearing.” Request at 4. Petitioner, however, goes no further, and provides no reasoning or support for its belief.

In sum, Petitioner fails to point to any concrete factual disputes regarding the Project that could aid the ALJ or the Commission in determining whether to issue a site permit or certificate of need. As a result, Petitioner fails to show that a contested case hearing is warranted.

II. The Process Ordered by the Commission Renders a Contested Case Hearing and Petitioner’s Formal Intervention Unnecessary.

Petitioner’s requests for a contested case proceeding and to participate as a full party are, as a practical matter, unnecessary in light of the procedures already ordered by the Commission, which are already sufficient to develop the record around Petitioner’s broad concerns. Petitioner claims that a contested case is needed so that it has the opportunity to “present evidence and witness testimony, to fully cross-examine [FCW’s] witnesses, and to conduct discovery on the

issues raised in this petition.” Request at 4. Petitioner further claims that the issues it raises cannot be “addressed adequately in the context of a public hearing.” *Id.* The process ordered by the Commission, however, allows Petitioner sufficient opportunity to develop the record around its concerns, without a contested case proceeding. Specifically, under that process,, Petitioner will be allowed to question FCW and agency staff verbally or in writing, and to present its own evidence before, during, and after the hearing. Minn. R. 1405.0800; 1405.1900; 7850.3800, subp. 2 to 4; 7829.1200, subp. 2. Notably, the Commission has further made clear that Petitioner “may participate in these proceedings without intervening as a party.” As a result, FCW does not object to Petitioner’s participation in this matter; however, allowing Petitioner to participate as a full intervenor would not provide Petitioner with any meaningful procedural rights beyond those already available to it under the process ordered by the Commission.

CONCLUSION

For the reasons discussed above, FCW respectfully requests that Petitioner’s Request be denied in its entirety.

Dated: March 21, 2018

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

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)
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)

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the **Flying Cow Wind, LLC's Response to Request for Contested Case Hearing and Petition to Intervene** have been served on this day by e-filing/e-serving or sending via U.S. Mail to the following:

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Dated this 21st day of March, 2018

/s/ Tammy J. Krause
Tammy J. Krause