

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

**ORDER ON THE REQUEST FOR  
CONTESTED CASE HEARING AND  
PETITION FOR INTERVENTION BY THE  
LAKE COCHRANE IMPROVEMENT  
ASSOCIATION**

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

This matter is pending before Administrative Law Judge James E. LaFave on the Lake Cochrane Improvement Association's (LCIA) Request for Contested Case Hearing and Petition to Intervene.

Based on all of the files and proceedings of the matter, the Administrative Law Judge makes the following:

**ORDER**

1. LCIA's Request for a Contested Case Hearing is **DENIED**.
2. LCIA's Petition to Intervene is **DENIED**.

Dated: August 10, 2018

  
JAMES E. LAFAVE  
Administrative Law Judge

## MEMORANDUM

### I. Background

The LCIA is an association that was formed “to encourage the development of the area around [Lake Cochrane] in such a way as to make it an attractive and desirable environment for the enjoyment of the great outdoors; and to ensure the continuation of Lake Cochrane and its environs for the benefit of future generations.”<sup>1</sup> Lake Cochrane is located in Deuel County, South Dakota, less than a half-mile from the Minnesota-South Dakota border.<sup>2</sup> On July 18, 2018, the LCIA filed a Request for Contested Case Hearing<sup>3</sup> and Petition to Intervene in these proceedings.<sup>4</sup>

Flying Cow Wind, LLC (Flying Cow) filed a Response<sup>5</sup> on July 25, 2018, and LCIA filed a Reply<sup>6</sup> on July 27, 2018. The Minnesota Department of Commerce Division of Energy Resources (DOC-DER), and the Laborers District Council of Minnesota and North Dakota (LDC), also parties to these proceedings, did not file a response to LCIA’s Request for Contested Case Hearing or the Petition to Intervene.

### II. Procedural History

On October 19, 2017, Flying Cow filed an application for a certificate of need with the Commission for an up to 152 megawatt (MW) large wind energy conversion system (LWECS) known as the Bitter Root Wind project, to be located in Yellow Medicine County, Minnesota (the Project).<sup>7</sup> 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 for a contested case hearing.<sup>8</sup>

Then, on November 9, 2017, Flying Cow filed an application for a LWECS site permit for the Project.<sup>9</sup> The Commission requested comments on the completeness of the site permit application, including whether it should be referred to the Office of Administrative Hearings.<sup>10</sup>

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<sup>1</sup> Petition to Intervene at Exhibit (Ex) A (LCIA Constitution) (July 18, 2018) (eDocket No. 20187-145008-01).

<sup>2</sup> *Id.* at 1.

<sup>3</sup> Request for Contested Case Hearing (July 18, 2018) (eDocket No. 20187-145009-01).

<sup>4</sup> Petition to Intervene (July 18, 2018) (eDocket No. 20187-145008-01).

<sup>5</sup> Flying Cow Wind, LLC’s Consolidated Response to the Lake Cochrane Improvement Association’s Petition to Intervene and Request for Contested Case Hearing (July 25, 2018) (eDocket No. 20187-145225-01).

<sup>6</sup> Lake Cochrane Improvement Association Reply (July 27, 2018) (eDocket No. 20187-145286-01).

<sup>7</sup> Certificate of Need Application (Oct 19, 2017) (eDocket No. 201710-136649-02).

<sup>8</sup> Notice of Comment Period (Nov. 2, 2017) (eDocket No. 201711-137138-01).

<sup>9</sup> Initial Filing (Nov. 9, 2017) (eDocket No. 201711-137275-04).

<sup>10</sup> Notice of Comment Period (Nov. 28, 2017) (eDocket No. 201711-137714-01).

After the close of the comment periods in the certificate of need and siting dockets, the Commission issued orders in each matter that accepted the applications of Flying Cow and established the process for reviewing the applications.<sup>11</sup> The Order in the certificate of need docket noted that “[n]o person has identified any contested issue of material fact or recommended that the case be referred to the Office of Administrative Hearings for contested case proceedings.”<sup>12</sup> The Commission therefore ordered the “informal comment and reply process for developing the record.”<sup>13</sup> The Order in the siting docket directed the Administrative Law Judge to conduct public hearings in accordance with certain applicable rules.<sup>14</sup> A joint public hearing on the certificate of need and siting dockets was held on June 28, 2018.<sup>15</sup>

### III. Request for a Contested Case Hearing

The law requires any request for a contested case hearing regarding a LWECS to set forth the issues to be addressed and the reasons a hearing is required to resolve those issues.<sup>16</sup> To prevail in its request for a contested case hearing, LCIA must show there are material issues of fact and show that a hearing would aid the Commission in making a final determination on the permit application.<sup>17</sup> They 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.”<sup>18</sup>

LCIA’s Request for a Contested Case Hearing, does not clearly state issues that need to be resolved, but rather identifies what are best described as areas of concern. A careful review of the areas of concern demonstrates that LCIA has failed to meet its burden. Those areas of concern are:

(1) LCIA argues that there is no need for the Project because Flying Cow does not have a power purchase agreement and that placing wind turbines near a major recreational area is inappropriate.<sup>19</sup>

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<sup>11</sup> See Order Accepting Application as Substantially Complete and Directing the Use of Informal Review Process (Jan. 12, 2018) (eDocket No. 20181-138845-01); Order Accepting Application, Establishing Procedural Framework, and Varying Rules (Jan. 30, 2018) (eDocket No. 20181-139534-01).

<sup>12</sup> Order Accepting Application as Substantially Complete and Directing the Use of Informal Review Process at 3 (Jan. 12, 2018) (eDocket No. 20181-138845-01).

<sup>13</sup> *Id.* at 3-4.

<sup>14</sup> Order Accepting Application, Establishing Procedural Framework, and Varying Rules (Jan. 30, 2018) (eDocket No. 20181-139534-01).

<sup>15</sup> Order Granting Flying Cow Wind LLC’s Motion to Amend the Scheduling Order (May 25, 2018) (eDocket No. 20185-143339-01).

<sup>16</sup> Minn. R. 7854.0900, subp. 5(A) (2017).

<sup>17</sup> Minn. R. 7854.0900, subp. 5 (2017); *In re Northern States Power*, 674 N.W.2d 326, 335 (Minn. Ct. App. 2004) (“The burden is on the relator . . . to demonstrate the existence of material facts that would aid the agency in making a decision.”).

<sup>18</sup> *Matter of Air Emission Facility Permit*, 445 N.W.2d 427, 430 (Minn. 1990).

<sup>19</sup> Request for Contested Case hearing Lake Cochrane Improvement Association at 1-2 (July 18, 2018) (eDocket No. 20187-145011-01).

The lack of a power purchase agreement does not indicate a lack of need for the project. The Commission's process specifically contemplates that a site permit may be issued before the applicant obtains a power purchase agreement.<sup>20</sup> A power purchase agreement must be obtained before the applicant begins construction.<sup>21</sup> The absence of a power purchase agreement or interconnection agreement at this stage does not create a fact issue that necessitates a hearing.

(2) LCIA asserts because the project size exceeds regulation by local government that the Commission is undertaking the planning and zoning functions of local government. LCIA notes that, on the South Dakota side of the boarder, zoning function belongs to Deuel County, and Deuel County has determined that a three mile setback is required to preserve the essential character of Lake Cochrane. LCIA argues that if the Commission is going to depart from the standards established by Deuel County it should do so only following a contested case hearing.<sup>22</sup>

There is no dispute Deuel County has determined a three-mile setback for wind turbines is necessary to preserve the essential character of Lake Cochrane. LCIA and its members request that the Commission honor the Deuel County setback. That is not an issue of fact. Rather, the question of whether the Commission should honor and implement the Deuel County setback is a policy issue for the Commission to determine. The Minnesota Court of Appeals has held that a request for contested case hearing is properly denied where the petitioner asserts "questions of law or policy, as opposed to questions of fact."<sup>23</sup> That rationale applies here.

(3) LCIA asserts that the Project, if approved, would cause "pollution, impairment, or destruction of the air water, land or other natural resources located within the state" in violation of the MERA and MEPA.<sup>24</sup>

LCIA fails to support this general assertion. Nor is there any clear indication of what disputed facts are at issue in connection with this assertion. It appears LCIA is arguing that the project will adversely impact Lake Cochrane. Since Lake Cochrane is in South Dakota, the MERA and MEPA do not apply. These claims do not identify issues of material fact that need to be resolved in a contested case hearing.

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<sup>20</sup> See Minn. R. 7854.1100, subp. 3 (2017).

<sup>21</sup> *Id.*

<sup>22</sup> Request for Contested Case hearing Lake Cochrane Improvement Association at 2 (July 18, 2018) (eDocket No. 20187-145011-01).

<sup>23</sup> *In re Little Rock Creek*, No. A-16-0123, 2016 WL 6923602, at \*9 (Minn. Ct. App. Nov. 28, 2016).

<sup>24</sup> Request for Contested Case hearing Lake Cochrane Improvement Association at 2 (July 18, 2018) (eDocket No. 20187-145011-01).

(4) The LCIA maintains that “there are feasible and prudent alternatives to locating this project at Lake Cochrane. They argue these other alternatives do not invade a regional reactional area.”<sup>25</sup>

LCIA fails to identify any other “feasible and prudent alternatives” to the propose Project. The LCIA has made no showing that the informal process is inadequate to fully develop this issue.

The EERA's Environmental Report analyzes the available and feasible alternatives to the Project.<sup>26</sup> A public hearing was held in Canby, Minnesota to receive comments on the scope of the environmental report.<sup>27</sup> 100 people attended the meeting, 17 spoke and the EERA receive 42 written comments in the subsequent comment period.<sup>28</sup> “No member of the public or any state agency recommended system or project alternatives to be considered in the environmental report.”<sup>29</sup>

The LCIA and its members actively participated in this process, yet failed to suggest any alternatives to the Project. A mere assertion at this late date that there are “feasible and prudent alternatives” does not create a fact issue.

(5) The LCIA asserts there is a factual dispute as to whether the photographs presented by Flying Cow at the June 28, 2018, joint meeting on the certificate of need and siting applications, accurately depict the impact of the wind towers on the Lake Cochrane area.<sup>30</sup>

The computer-generated photographs, depicting how the landscape would look if the Project were to be built, were provided to aide those at the June 28, 2018, joint public meeting on the certificate on need and site permit applications. The photographs are not required by law as part of the certificate of need or site permit applications. A dispute over the accuracy of the visual simulations does not create an issue of material fact that necessitates a contested case hearing.

(6) The LCIA maintains the Deuel County ordinance, together with the comments submitted, and the special role Lake Cochrane as a recreational area, presents fact issues as to whether the project is compatible with environmental preservation, sustainable development and efficient use of resources.<sup>31</sup>

The LCIA does not identify any issues of material fact. The Deuel County ordinance and the comments that have been submitted are already in the record.

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<sup>25</sup> *Id.* at 3.

<sup>26</sup> Environmental Report at 82-87 (May 4, 2018) (eDocket No. 20185-142751-01).

<sup>27</sup> *Id.* at 3.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 4.

<sup>30</sup> Request for Contested Case hearing Lake Cochrane Improvement Association at 3 (July 18, 2018) (eDocket No. 20187-145011-01).

<sup>31</sup> *Id.*

As previously discussed above, these are legal or policy decisions to be weighed and decided by the Commission. They are not a basis for a contested case hearing. LCIA's request for contested case hearing does not identify material facts in dispute or identify new facts that could be elicited in a contested case hearing which could not be provided during the informal review process.

LCIA must prove there is some evidence that can be produced that is contrary to the action proposed by the Commission.<sup>32</sup> In summary, LCIA failed to demonstrate a contested case hearing is necessary to produce facts that would aid the Commission in determining whether to issue the certificate of need or the site permit. The request for a contested case hearing is denied.

#### **IV. Petition to Intervene**

LCIA seeks to intervene as a party, with full party rights.<sup>33</sup> They articulate several grounds in support of their petition including that "its members are impacted directly by wind towers in the vicinity of the lake."<sup>34</sup> LCIA also maintains that the "Minnesota Environmental Right Act grants LCIA and its members the right to participate and advocate that environmental rights be minimized."<sup>35</sup> They also claim no other party represents their interests.<sup>36</sup>

To be considered, a petition for intervention must be timely filed. The standards for intervention are set out in Minn. R. 1400.6200 and 1405.0900 (2017). Both rules mandate that any person who desires to intervene must submit a "timely" petition to intervene.<sup>37</sup> Both rules also state that "timeliness" will "be determined by the administrative law judge on each case based on the circumstances at the time of filing."<sup>38</sup> The "timeliness of [a petition for intervention] depends of factors such as how far the suit has progressed, the reason for the delay in seeking intervention, and any prejudice to the existing parties because of the delay."<sup>39</sup>

LCIA has been aware of the Project and has been actively involved in these proceedings from the beginning. On October 19, 2017, Flying Cow filed an application for a certificate of need with the Commission. Then, on November 9, 2017, it filed an application for a site permit.

On November 16, 2017, only seven days later, Ron Ruud, who is a member of the LCIA and represents them in these proceedings, filed a comment

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<sup>32</sup> See *In re Northern States Power Co.*, 676 N.W.2d 326, 335.

<sup>33</sup> Petition to Intervene (July 18, 2018) (eDocket No. 20187-145008-01).

<sup>34</sup> *Id.* at 2.

<sup>35</sup> *Id.* at 3. See Minn. Stat. 116B.09 (2016).

<sup>36</sup> Petition to Intervene at 3 (eDocket No. 20187-145008-01).

<sup>37</sup> Minn. R. 1400.6200 (2017); Minn. R. 1405.0900 (2017).

<sup>38</sup> Minn. R. 1400.6200; Minn. R. 1405.0900.

<sup>39</sup> *SST, Inc. v. City of Minneapolis*, 228 N.W.2d 225, 230 (Minn. 1979).

with the Commission.<sup>40</sup> Mr. Ruud noted, among other things, that the Project was a threat to the wildlife in the area and that the lights, sounds and environmental hazards from the Project would ruin “one of the few recreational spots in the area [Lake Cochrane].”<sup>41</sup> He also argued that Commission should respect the determination by the Deuel County Commissioners that no industrial turbine be installed within three miles of Lake Cochrane.<sup>42</sup> The arguments are nearly identical to those found in LCIA’s Petition to Intervene and the Request for Contested Case Hearing.

The LCIA and its members attended the February 27, 2018 public information and scoping meeting and provided both oral and written comments. LCIA members also actively participated in the July 28, 2018, joint public hearing concerning the certificate of need and site permit.

The Petition for Intervention was filed on July 18, 2018. That was:

- nearly six months after the Commission referred these matter to the Office of Administrative Hearings for an informal review process;
- nearly five months after the February 27, 2018, public information and environmental report scoping meetings;
- three weeks after the July 28, 2018, joint public hearing on the certificate of need and site permit applications;
- on the last day of the public comment period; and
- on the day Flying Cow filed its Proposed Findings of Fact, Conclusions of Law, and Recommendation.

This matter is nearing its conclusion. The public hearing has been held, the initial comment period is closed, the reply period and the time for parties to submit comments on Flying Cow’s Proposed Findings of Fact, Conclusions of Law and Recommendation has past.

LCIA argued in its Reply that it waited until this late date to file its Petition for Intervention because “statements and filings of PUC staff and applicant suggested that our right would not be compromised” if they were not a party during the initial stages of these proceedings.<sup>43</sup> That is true. The Commission specifically ordered the Administrative Law Judge to “clarify that people may participate in these proceedings without intervening as a party.”<sup>44</sup> Consistent with

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<sup>40</sup> Public Comment (Ron Ruud) (Dec. 20, 2017) (eDocket No. 201712-138318-01).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Lake Cochrane Association Reply (July 27, 2018) (eDocket No. 20187-145286-01).

<sup>44</sup> Order Accepting Application, Establishing Procedural Framework, and Varying Rules at 6 (Jan. 30, 2018) (eDocket No. 20181-139534-01).

the directive from the Commission, LCIA and its members have participated in the process. They have attended the public hearings and have submitted many oral and written comments. The LCIA failed to identify what they would gain by becoming a party or how they would be prejudiced by not being granted full party status.

After carefully considering the record and arguments submitted, the Administrative Law Judge concludes the filing of the Petition for Intervention was untimely. Given the Petition was untimely, there is no need to entertain the arguments regarding the merits of the LCIA's Petition. The Petition for Intervention is denied.

## **V. Conclusion**

These rulings are not a decision on the merits of the claims made by the LCIA, its members, or any other individuals in this matter. Rather the rulings reflect the Administrative Law Judge's determination that LCIA's arguments and the facts it alleged do not meet the legal threshold required for a contested case hearing and that the petition to intervene was untimely filed.

**J. E. L.**



August 10, 2018

See Attached Service List

**Re: *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***

**OAH 60-2500-35035  
MPUC IP-6984/CN-17-676  
MPUC IP-6984/WS-17-749**

To All Persons on the Attached Service List:

Enclosed and served upon you is the Administrative Law Judge's **ORDER ON THE REQUEST FOR CONTESTED CASE HEARING AND PETITION FOR INTERVENTION BY THE LAKE COCHRANE IMPROVEMENT ASSOCIATION** in the above-entitled matter.

If you have any questions, please contact my legal assistant Sheena Denny at (651) 361-7881 or sheena.denny@state.mn.us, or facsimile at (651) 539-0310.

Sincerely,



JAMES E. LAFAVE  
Administrative Law Judge

JEL:sd  
Enclosure  
cc: Docket Coordinator

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
PO BOX 64620  
600 NORTH ROBERT STREET  
ST. PAUL, MINNESOTA 55164

**CERTIFICATE OF SERVICE**

<p>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</p> <p>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</p>	<p>OAH 60-2500-35035  MPUC IP-6984/CN-17-676  MPUC IP-6984/WS-17-749</p>
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Sheena Denny certifies that on August 10, 2018, she served the true and correct

**ORDER ON THE REQUEST FOR CONTESTED CASE HEARING AND PETITION  
FOR INTERVENTION BY THE LAKE COCHRANE IMPROVEMENT ASSOCIATION**

by eService, and U.S. Mail, (in the manner indicated below) to the following individuals:

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret
Generic Notice	Commerce Attorneys	commerce.attorneys@ag.state.mn.us	Office of the Attorney General-DOC	445 Minnesota Street Suite 1800 St. Paul, MN 55101	Electronic Service	Yes
Ian	Dobson	residential.utilities@ag.state.mn.us	Office of the Attorney General-RUD	1400 BRM Tower 445 Minnesota St St. Paul, MN 551012130	Electronic Service	Yes
Sharon	Ferguson	sharon.ferguson@state.mn.us	Department of Commerce	85 7th Place E Ste 280 Saint Paul, MN 551012198	Electronic Service	No
Sean	Flannery	sean.flannery@res-americas.com	Renewable Energy Systems Americas Inc.	12 South 6th Street Suite 930 Minneapolis, MN 55402	Electronic Service	No
Andrew	Gibbons	andrew.gibbons@stinson.com	Stinson Leonard Street	50 S 6th St Ste 2600 Minneapolis, MN 54002	Electronic Service	No
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James	LaFave	james.lafave@state.mn.us	Office of Administrative Hearings	PO Box 64620 St. Paul, MN 55164-0620	Electronic Service	No
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