

Minnesota Public Utilities Commission

Staff Briefing Papers

Meeting Date: December 18, 2014Agenda Item *1

Company: Black Oak Wind, LLC and Getty Wind Company, LLC

Docket No. IP6866/CN-11-471

In the Matter of the Application of Black Oak Wind, LLC and Getty Wind Company, LLC for a Certificate of Need for up to 82 MW Large Energy Facility in Stearns County.

Issue(s): Should the Commission grant the request to extend the certificate of need in-service date? Should the Commission grant the requests for intervention and a contested case proceeding?

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I. Relevant Documents

Commission - Order Granting a Certificate of Need.....December 31, 2012
Black Oak/Getty - Petition to Extend Certificate of Need..... October 28, 2014
DOC DER – Comments November 6, 2014
Getty Wind Company – Notification of Acquisition..... November 14, 2014
Residents of Getty & Raymond Townships – Petitions to Intervene and Petition for a Contested Case..... November 17, 2014
Residents of Getty & Raymond Townships – Comments November 24, 2014
Black Oak and Getty Wind – Reply Comments, Objections and Intervention.....December 1, 2014
Residents of Getty and Raymond Townships – Letter: FOIA to USFWS.....December 1, 2014

The attached materials are work papers of the Commission Staff. They are intended for use by the Public Utilities Commission and are based upon information already in the record, unless noted otherwise.

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II. Statement of the Issues

Should the Commission grant the request to extend the certificate of need in- service date?
Should the Commission grant the requests for intervention and a contested case proceeding?

III. Background and Department of Commerce Position

On December 31, 2012 the Commission issued Black Oak Wind, LLC and Getty Wind Company, LLC (collectively, Black Oak-Getty or, the Companies) a certificate of need for the up to 82 MW Black Oak and Getty Wind Project (the Projects). The Project was anticipated to be in-service by December 31, 2013.

On October 28, 2014, Black Oak Wind, LLC and Getty Wind Company, LLC (collectively, Black Oak-Getty or the Companies) petitioned the Commission for an extension of the Projects' in-service date (Change Petition) pursuant to the process outlined in Minn. Rule 7849.0400 subpart 2(H).¹

On November 3, 2014, the Commission solicited comments on the Change Petition.

Staff refers the Commissioners to the Department of Commerce's (Department) November 6, 2014 comments (attached to this briefing paper) for: 1) the Docket History, 2) relevant law and 3) summary of the Change Petition and 4) the Department's recommendation that the **change is acceptable without recertification**.

During the open comment period on the Change Petition, comments were received by the Residents of Getty and Raymond Townships and a response was provided by the Companies. The Residents of Getty and Raymond Townships also petitioned to intervene and requested a contested case hearing (discussed below).

¹ 7849.0400 2(H) - If an applicant determines that a change in size, type, timing, or ownership other than specified in this subpart is necessary for a large generation or transmission facility previously certified by the commission, the applicant must inform the commission of the desired change and detail the reasons for the change. (...)The commission shall evaluate the reasons for and against the proposed change and, within 45 days of receipt of the request, notify the applicant whether the change is acceptable without recertification. The commission shall order further hearings if and only if it determines that the change, if known at the time of the need decision on the facility, could reasonably have resulted in a different decision under the criteria specified in part **7849.0120**.

IV. Parties' Positions

Black Oak Wind, LLC and Getty Wind Company, LLC Initial Comments

Black Oak Wind and Getty Wind Company petitioned the Commission for an extension of the in-service date to December 31, 2015 citing delays in meeting the December 2013 in-service date related to the uncertainty surrounding the extension of the production tax credit and the Mid-continent Independent System Operator (MISO) interconnection process. The Companies argued that knowledge of the in-service date at the time of the certificate of need issuance would not have reasonably resulting in the Commission reaching a different decision under the certificate of need criteria.

The Companies request that the Commission approve the extension of the Projects' in-service date to December 31, 2015 without rehearing or recertification. However, in the alternative, if the Commission determines that additional hearings are necessary, the Companies requested that the Commission find that the Projects are exempt from the certificate of need requirements pursuant to the exemption provided under Minn. § Stat. 216B.243, subd. 9 as the Companies have stated they have an executed power purchase agreement with Minnesota Municipal Power Agency (MMPA).²

On November 14, 2014, the Companies provided notification to the Commission of the acquisition of Getty Wind by Black Oak Wind, LLC.³

Department of Commerce Comments

The Department evaluated the Change Petition and the proposed change to the in-service date to determine if the change in timing, if known at the time of the need decision on the facility, could have reasonably resulted in a different decision under the certificate of need criteria outlined in rule. The Department summarized their original conclusions drawn in the certificate of need docket regarding timing and noted that they agreed with the Companies' analysis on each of the certificate of need criteria as provided in the Change Petition (page 3 and 4). The Department noted that the delay appears to be out of the Companies' control and the project is needed by MMPA to comply with renewable energy standard milestones.

The Department concluded that the change in timing could not have reasonably resulted in a different decision. Therefore, the Department recommended the Commission notify the Companies that the change to the in-service date is acceptable without recertification.

² Minn. Stat. 216B.243, Subd. 9 provides an exemption from the certificate of need process for wind energy projects that are intended to be used to meet the renewable energy mandates - once the Commission determines that the Project is a reasonable and prudent approach for that utility.

³ Common ownership of the project was disclosed to the Commission during the certificate of need proceeding as a potential future course of action by the Companies.

Residents of Getty and Raymond Townships Initial Comments

The Residents of Getty and Raymond Townships (Residents) requested that: 1) the Companies' Change Petition be denied, 2) the matter be referred to the Office of Administrative Hearings (OAH) for a contested case proceeding, 3) the Commission grant the Residents' Petition to Intervene, 4) Chair Beverly Heydinger recuse herself, and/or, in the alternative, 5) a public hearing on the Change Petition be held.

The Residents have requested the Commission send the docket to the OAH for a contested case hearing since the project can no longer meet its December 31, 2014 in-service date.⁴ The Residents request that the Commission evaluate ownership issues, the Projects' C-BED status, the Power Purchase Agreements, MISO interconnection agreements and the failure of the Applicants to develop the project in a timely manner. The Residents cite the Commission's Large Wind Energy Conversion System Site Permit Rules regarding requests for contested case proceedings during the site permit process. Staff notes that those rules aren't discussed here because they do not apply to the issues before the Commission regarding the certificate of need Change Petition.

The Residents addressed the in-service date extension and the Change Petition and question whether the Companies' reasons for delay are legitimate. The Residents challenged the assertion that the Companies have a PPA with MMPA as it has not been filed on this docket. Further, the Residents questioned the status of the Companies' GIA at MISO since as of the writing of their comments no new information was available on the MISO queue website.

The Residents concluded that without scrutiny of the PPA or the GIA, the Commission has no basis to believe the project will be built, much less by the end of the 2015 calendar year. Further, without those documents, the Residents believe that there is no basis for a determination that there would or would not have been a different decision at the time the certificate of need was issued.

The Residents requested that since Chair Heydinger was the Administrative Law Judge (ALJ) assigned to this case she should recuse herself from the discussion, deliberation and decision of matters regarding the Project.

Black Oak Wind and Getty Wind Company, LLC Reply Comments

The Companies' indicated that the Residents request for a contested case did not provide any facts or evidence that support a determination that a rehearing or recertification should be required. The Companies provided that evidence of its power purchase agreement is available in the siting dockets (Dockets WS-10-1240 and WS-11-831) and the Project's GIA and System Impact Study are both available on the MISO website (link provided in comments) and both of those documents support, rather than call into question, the request to change the in-service date.

⁴ Minn. Rules 7849.0400, Subp. 2(A) provides for a one-year delay beyond the project's approved in-service date (here, December 31, 2013) resulting in an effective in-service deadline of December 31, 2014.

Further, the Companies' address the issues raised by the Residents (ownership, C-BED), but which are not germane to the in-service date extension Change Petition. Staff does not repeat those arguments here.

The Companies responded to the request for intervention and indicated that the petition was made under the intervention provisions of Minn. Rule 1400 and 1405 – which relate to contested cases before the OAH. The Companies cite Minnesota Rule 7829.2550 - which outlines the time periods set for intervention in certificate of need proceedings, which is prior to the Commission determination on whether to use a contested case or informal proceedings.⁵ This determination was made on December 15, 2011. Regardless, the Companies argued that the Residents have had the opportunity to adequately represent their interests and granting intervention at this time would do little to further them – and therefore the request should be denied.

Residents of Getty and Raymond Township - Reply Comments

The issues outlined in the reply comments are either repetitive of the initial comments by the Residents or relate to siting matters. Staff does not repeat those arguments here.

V. Staff Discussion

In-Service Date Change

Staff agrees with the Companies and the Department that for the reasons outlined in the Change Petition and the Department's comments, that the change to the in-service date, if known at the time of the original decision would not have resulted in a different decision under the certificate of need criteria. The conclusion is consistent with past Commission decisions on in-service date extensions and is supported by the claim that the Project has a PPA with MMPA.⁶

Staff does not believe that the issues surrounding the MISO queue would have changed the outcome of the Commission's original decision, especially considering the specific facts of this case – supported by the executed provisional GIA on August 2014.

Additionally, since the Minnesota Renewable Energy Standard requires an increasing percentage of energy from renewable resources through 2025, an October 2014 in-service date, if known at the time of the need decision, could not reasonably have resulted in a different

⁵ In practice, the Commission has allowed contested case hearing requests through the end of the comment period established in the certificate of need proceeding. No request was received during that period.

⁶ Staff has viewed the PPA compliance filing in the corresponding siting dockets; however, the notification is simply a statement by the Companies that a PPA exists. The PPA notification compliance filing identified the parties to the PPA and was sufficient for site permit compliance purposes. Originally, the Companies filed a heavily-redacted, unsigned PPA that didn't provide sufficient information to determine that a PPA existed. At this time Staff believes that the PPA compliance filing is representative of the current state of the PPA.

decision.

Staff believes the issues raised by the Residents are: 1) not issues that are relevant to the certificate of need extension decision currently before the Commission and 2) do not raise issues that are of material concern to the Commission's previously issued certificate of need on this project.⁷ Staff recommends the Commission deny the request for a contested case hearing, rehearing or recertification of the certificate of need, as well as the Resident's petition for intervention..

VI. Commission Options

1. Petition for a Contested Case Hearing

- A. Grant the Petition for a Contested Case Hearing specifying which issues are to be developed.
- B. Deny the Petition.
- C. Take no action.

2. Petition for Intervention

- A. Grant the Petition for Intervention.
- B. Deny the Petition.
- C. Take no action.

3. Petition to Extend the Certificate of Need In-service Date

- A. Determine that the change in timing from December 31, 2013 to December 31, 2015 is acceptable without recertification.
- B. Determine that the change, if known at the time of the need decision, could have resulted in a different decision and order additional hearings.
- C. Take some other action.

Staff recommends 1B, 2B, 3A.

⁷Staff notes that if the Commission disagrees with staff's conclusions, it has the discretion to reconsider its decision on its own motion. Issues related to siting have not been noticed for this agenda and, therefore, may need to be further addressed at a future agenda meeting.