

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Nancy Lange	Chair
Dan Lipschultz	Commissioner
Matthew Schuenger	Commissioner
Katie J. Sieben	Commissioner
John A. Tuma	Commissioner

In the Matter of the Application of Flying Cow Wind, LLC for a Certificate of Need for the up to 152 MW Bitter Root Wind Project and Associated Facilities in Yellow Medicine County, Minnesota

ISSUE DATE: January 3, 2019

DOCKET NO. IP-6984/CN-17-676

In the Matter of the Application of Flying Cow Wind, LLC for a Site Permit for the up to 152 MW Bitter Root Wind Project and Associated Facilities in Yellow Medicine County, Minnesota

DOCKET NO. IP-6984/WS-17-749

ORDER DEFERRING ACTION AND INITIATING NEGOTIATIONS;
NOTICE AND ORDER FOR HEARING

PROCEDURAL HISTORY

On October 19, 2017, Flying Cow Wind, LLC (Flying Cow or Applicant) filed an application for a Certificate of Need to build a Large Wind Energy Conversion System (LWECS or wind farm) with a capacity of up to 152 megawatts (MW) in Yellow Medicine County, west of Canby, Minnesota (Bitter Root Wind Project, or the project). This action initiated Docket No. IP-6984/CN-17-676 (Need docket).

On November 9, 2017, Flying Cow filed an application for a Site Permit for the project, initiating Docket No. IP-6984/WS-17-749 (Site docket).

On January 12, 2018, the Commission issued an order in the Need docket authorizing the use of an informal review process in lieu of a contested case proceeding. Accordingly, the Commission asked the Office of Administrative Hearings (OAH) to assign an administrative law judge (ALJ) to convene public hearings and prepare a summary of the record.¹ The Commission issued an analogous order in the Site docket on January 30, but requested the ALJ to issue findings of fact, conclusions of law, and recommendations on the merits of the Site Permit application.²

¹ Need docket, Order Accepting Application as Substantially Complete and Directing Use of Informal Review Process (January 12, 2018).

² Site docket, Order Accepting the Site Permit Application, Establishing Procedural Framework, and Varying Rules (January 30, 2018).

On September 5, 2018, the ALJ issued his Summary of Public Testimony, Findings of Fact, Conclusions of Law, and Recommendation (ALJ Report), summarizing the record and recommending that the Commission issue a Site Permit to Flying Cow for the Bitter Root Project.

On December 6, 2018, the Commission met to consider these matters.

FINDINGS AND CONCLUSIONS

I. Summary

In this order the Commission refers these matters for contested case proceedings and takes other procedural steps to enable a full consideration of the issues raised in this proceeding.

II. Commission Jurisdiction

In general, a person seeking to develop a large energy facility—including an electric power generating plant with a capacity of 50 MW or more, and related transmission lines³—must first obtain a Certificate of Need from the Commission.⁴ Likewise, a person seeking to build a wind farm with a combined nameplate capacity of 5 MW or more must first obtain a Site Permit from the Commission.⁵ Flying Cow has petitioned for both a Certificate of Need and a Site Permit for the 152 MW Bitter Root Wind Project.

The Commission exercises some discretion over the process it will use to address an application.⁶ For example, the Commission may elect to evaluate an application using a notice and comment process.⁷ But if there are significant factual issues that have not been resolved to the Commission’s satisfaction, the Commission refers the matter to the OAH for contested case proceedings under Minn. Stat. §§ 14.57 *et seq.*⁸

When determining whether to grant a Certificate of Need, the Commission must consider, among other things, “the effect of the proposed facility, or a suitable modification of it, upon the natural and socioeconomic environments compared to the effect of not building the facility....”⁹

³ Minn. Stat. § 216B.2421, subd. 2(1).

⁴ Minn. Stat. § 216B.243, subd. 2 and Minn. R. 7849.0030, subp. 1. *But see* exceptions at Minn. Stat. § 216B.243, subd. 8.

⁵ Minn. Stat. § 216F.01, subd. 2.

⁶ Minn. R. 7829.2500, subp. 9.

⁷ Minn. R. 7829.1200.

⁸ Minn. R. 7829.1000 and 7854.0900, subp. 5(B).

⁹ Minn. R. 7853.0130(C)(2).

Likewise, when determining whether to grant a Site Permit, the Commission “shall be guided by, but not limited to, ... [an] analysis of the direct and indirect economic impact of proposed sites...”¹⁰ But the Commission does not rule on a Site Permit for a wind farm that requires a Certificate of Need until the Commission has granted the certificate.¹¹

III. Commission Action

The Commission exercises its best judgment about when an informal process, rather than a contested case process, will suffice for developing the record of a case. But the record in the informal process and oral arguments have made it apparent that there are material facts in dispute that require further development—in particular, facts regarding how Flying Cow’s employment practices might influence the project’s socioeconomic consequences.

Accordingly, the Commission will now refer this matter for contested case proceedings to further develop the issues as determined by the ALJ. Consistent with this decision, the Commission will not act on the applicant’s petitions at this time; specifically, the Commission will decline the ALJ’s recommendation to issue a Site Permit based on the current record.

The Commission requests the ALJ to identify the issues and determine the appropriate scope and conduct of the hearing according to applicable law, due process, and fundamental fairness. To facilitate the review process, the Commission will require certain additional process steps as set forth in the ordering paragraphs below.

The Commission acknowledges and appreciates the Department’s role promoting the public interest. The Commission will ask the Department to facilitate discussions and negotiations among the parties, and to report to the Commission promptly if they achieve any resolution.

IV. Issues to be Addressed

The ultimate issue in this case is whether Flying Cow’s Certificate of Need and Site Permit applications meet the legal criteria. This turns on numerous factors—in particular, the socioeconomic consequences of Flying Cow’s labor practices—that are best developed in formal evidentiary proceedings.

The Commission will refer the merits of the Certificate of Need and Site Permit applications to the Office of Administrative Hearings for contested case development of the record, and request that the ALJ identify the issues, determine the appropriate scope, and conduct the necessary hearings according to applicable law, due process, and fundamental fairness.

¹⁰ Minn. Stat. § 216E.03, subd. 7.

¹¹ Minn. R. 7850.2700, subp. 3; 7850.3900, subp. 3; and 7854.0500, subp 2.

V. Procedural Outline

A. Administrative Law Judge

The Administrative Law Judge assigned to this case is Eric L. Lipman. His address and telephone number are as follows: Office of Administrative Hearing, 600 North Robert Street, St. Paul, Minnesota 55101 and (651) 361-7900. His mailing address is P.O. Box 64620, St. Paul, Minnesota 55164-0620. His Legal Assistant is Ian Lewenstein at 651-361-7857.

B. Hearing Procedure

- Controlling Statutes and Rules

Hearings in this matter will be conducted in accordance with the Administrative Procedure Act, Minn. Stat. §§ 14.57 – 14.62; the rules of the Office of Administrative Hearings, Minn. R. 1400.5100 – 1400.8400; and, to the extent that they are not superseded by those rules, the Commission's Rules of Practice and Procedure, Minn. R. 7829.0100 – 7829.3200. Copies of these rules and statutes may be purchased from the Print Communications Division of the Department of Administration, 660 Olive Street, St. Paul, Minnesota 55155; (651) 297-3000. These rules and statutes also appear on the Office of the Revisor of Statutes State of Minnesota's website at www.revisor.mn.gov/pubs.

The Office of Administrative Hearings conducts contested case proceedings in accordance with the Minnesota Rules of Professional Conduct and the Professionalism Aspirations adopted by the Minnesota State Bar Association.

- Right to Counsel and to Present Evidence

In these proceedings, parties may be represented by counsel, may appear on their own behalf, or may be represented by another person of their choice, unless otherwise prohibited as the unauthorized practice of law. They have the right to present evidence, conduct cross-examination, and make written and oral argument. Under Minn. R. 1400.7000, they may obtain subpoenas to compel the attendance of witnesses and the production of documents. Parties should bring to the hearing all documents, records, and witnesses necessary to support their positions.

- Discovery and Informal Disposition

Any questions regarding discovery under Minn. R. 1400.6700 – 1400.6800 or informal disposition under Minn. R. 1400.5900 should be directed to Cezar Panait, Energy Facilities Permitting Unit, Minnesota Public Utilities Commission, 121 7th Place East, Suite 350, St. Paul, Minnesota 55101-2147, 651-201-2207.

- Protecting Not-Public Data

State agencies are required by law to treat certain data as not public. Parties must advise the Administrative Law Judge if not-public data is offered into the record. They should take note that any not-public data admitted into evidence may become public unless a party objects and requests relief under Minn. Stat. § 14.60, subd. 2.

- Accommodations for Disabilities; Interpreter Services

At the request of any individual, this agency will make accommodations to ensure that the hearing in this case is accessible. The agency will appoint a qualified interpreter if necessary. Persons must promptly notify the Administrative Law Judge if an interpreter is needed.

- Scheduling Issues

The times, dates, and places of evidentiary hearings in this matter will be set by order of the Administrative Law Judge after consultation with the Commission and intervening parties.

- Notice of Appearance

Any party intending to appear at the hearing must file a notice of appearance (Attachment A) with the Administrative Law Judge within 20 days of the date of this Notice and Order for Hearing.

- Sanctions for Non-compliance

Failure to appear at a prehearing conference, a settlement conference, or the hearing, or failure to comply with any order of the Administrative Law Judge, may result in facts or issues being resolved against the party who fails to appear or comply.

C. Parties and Intervention

Parties to the case include the Flying Cow, the Department, and the Laborers District Council of Minnesota & North Dakota. Other persons wishing to become formal parties shall promptly file petitions to intervene with the Administrative Law Judge. They shall serve copies of such petitions on all current parties and on the Commission. Minn. R. 1400.6200.

D. Prehearing Conference

A prehearing conference will be held on Tuesday, January 15, 2019 at 1:30 p.m. in the Large Hearing Room at the office of the Public Utilities Commission, 121 Seventh Place East, Suite 350, St. Paul, Minnesota 55101-2147.

Persons participating in the prehearing conference should be prepared to discuss time frames, scheduling, discovery procedures, and similar issues. Potential parties are invited to attend the pre-hearing conference and to file their petitions to intervene as soon as possible.

E. Application of Ethics in Government Act

The lobbying provisions of the Ethics in Government Act, Minn. Stat. §§ 10A.01 *et seq.*, apply to contested cases addressing Certificates of Need and Site Permits. Persons appearing in this proceeding may be subject to registration, reporting, and other requirements set forth in that Act. All persons appearing in this case are urged to refer to the Act and to contact the Campaign Finance and Public Disclosure Board, telephone number (651) 539-1180, with any questions.

F. *Ex Parte* Communications

Restrictions on *ex parte* communications with Commissioners and reporting requirements regarding such communications with Commission staff apply to this proceeding from the date of this order. Those restrictions and reporting requirements are set forth at Minn. R. 7845.7300 – 7845.7400, which all parties are urged to consult.

VI. Public Advisor

Upon acceptance of an application for a Site Permit, the Commission designates a staff person to act as public advisor on the project under Minn. R. 7854.0700. The public advisor is available to answer questions from the public about the permitting process. In this role, the public advisor may not act as an advocate on behalf of any person.

The Commission has designated Bret Eknes as the public advisor. His contact information is: Bret Eknes, Public Advisor, Minnesota Public Utilities Commission, 121 Seventh Place East, Suite 350, Saint Paul, Minnesota 55101-2147. He can be reached at 651-201-2236, and by email at publicadvisor.puc@state.mn.us.

ORDER

1. The Commission hereby refers these matters to the Office of Administrative Hearings for a contested case proceeding to be conducted by an administrative law judge.
2. A prehearing conference shall be held on Tuesday, January 15, 2019 at 1:30 p.m. in the Large Hearing Room at the office of the Public Utilities Commission, 121 Seventh Place East, Suite 350, St. Paul, Minnesota 55101-2147.
3. The Commission requests that the ALJ identify the issues and determine the appropriate scope and conduct of the hearing according to applicable law, due process, and fundamental fairness.
4. The Commission requests that the ALJ consider timely comments received to date in evaluating the merits of the applications.
5. The Applicant shall facilitate in every reasonable way the continued examination of the issues by the staff of the Commission and the Minnesota Department of Commerce.
6. The Commission asks the Department to continue to advance the public interest by identifying issues warranting further development, studying the issues, and indicating during the hearing process, through testimony or comment, its position on the reasonableness of granting a Certificate of Need and Site Permit.
7. In addition, the Commission asks the Department to facilitate discussions and negotiations among the parties, and to report any resolutions to the Commission promptly.

8. Pending further developments, the Commission defers further action on these dockets—and, in particular, declines as premature the recommendation set forth in the Administrative Law Judge’s Summary of Public Testimony, Findings of Fact, Conclusions of Law, and Recommendation (September 5, 2018) to approve the Site Permit.
9. This order shall become effective immediately.

BY ORDER OF THE COMMISSION

Daniel P. Wolf
Executive Secretary



This document can be made available in alternative formats (e.g., large print or audio) by calling 651.296.0406 (voice). Persons with hearing loss or speech disabilities may call us through their preferred Telecommunications Relay Service or email consumer.puc@state.mn.us for assistance.

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Application of Flying Cow Wind, LLC for a Certificate of Need for the up to 152 MW Bitter Root Wind Project and Associated Facilities in Yellow Medicine County, Minnesota

NOTICE OF APPEARANCE

In the Matter of the Application of Flying Cow Wind, LLC for a Site Permit for the up to 152 MW Bitter Root Wind Project and Associated Facilities in Yellow Medicine County, Minnesota

PLEASE TAKE NOTICE that:

1. The party/agency named below (Party/Agency) will appear at the prehearing conference and all subsequent proceedings in the above-entitled matter.
2. By providing its email address below, the Party/Agency acknowledges that it has read and agrees to the terms of the Office of Administrative Hearings' e-Filing policy and chooses to opt into receiving electronic notice from the Office of Administrative Hearings in this matter. **Note: Provision of an email address DOES NOT constitute consent to electronic service from any opposing party or agency in this proceeding.**¹²
3. The Party/Agency agrees to use best efforts to provide the Office of Administrative Hearings with the email address(es) for opposing parties and their legal counsel.

Party's/Agency's Name: _____

Email: _____ Telephone: _____

Mailing Address: _____

Party's/Agency's Attorney: _____

Firm Name: _____

Email: _____ Telephone: _____

Mailing Address: _____

Respondent's/Opposing Party's Name: _____

Email: _____ Telephone: _____

Mailing Address: _____

Dated: _____

Signature of Party/Agency or Attorney

¹² In order to opt in to electronic notice, this form must be emailed to OAH.efiling.support@state.mn.us. If the party does not wish to opt in to electronic notice, this form may be filed with the Office of Administrative Hearings via facsimile, U.S. Mail, or personal service. See 2015 Minn. Laws Ch. 63, Minn. R. 1400.5550, subps. 2-5 (2017).