

## Staff Briefing Papers

Meeting Date	February 28, 2019	Agenda Item **4
Company	Flying Cow Wind, LLC	
Docket No.	<b>IP-6984/CN-17-676</b>  In the Matter of the Application of Flying Cow Wind, LLC for a Certificate of Need and a Site Permit for the up to 152 MW Large Wind Energy Conversion System in Yellow Medicine County, Minnesota	
Issues	1. Should the Commission approve the Applicant's request to withdraw its Application for a Certificate of Need?	
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### ✓Relevant Documents

### Date

Flying Cow Wind Request to Withdraw Application for Certificate of Need, Public and Trade Secret versions	December 28, 2018
Order Deferring Action and Initiating Negotiations; Notice and Order For Hearing	January 3, 2019
Department of Commerce DER Response to Withdrawal Request	January 11, 2019
Laborers District Council (LIUNA) Response to Withdrawal Request	January 11, 2019
Notice of Contested Withdrawal and Comment Period	January 14, 2019
Bluegreen Alliance Response to Withdrawal Request	January 25, 2019

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**✓Relevant Documents****Date**

Flying Cow Wind Request to Extend Comment Period on Withdrawal Request	January 25, 2019
Public Comment – Thomssen	January 28, 2019
Department of Commerce DER Comments	February 1, 2019
Public Comment - Evens	February 1, 2019
LIUNA Comments	February 4, 2019
Flying Cow Wind Reply Comments	February 8, 2019
LIUNA Reply Comments	February 11, 2019

## **I Statement of the Issues**

Should the Commission approve the Applicant's request to withdraw its Application for a Certificate of Need?

## **II Statutes and Rules**

Under Minn. Stat. § 216B.243, subd. 8(7), "a wind energy conversion system or solar electric generation facility if the system or facility is owned and operated by an independent power producer and the electric output of the system or facility is not sold to an entity that provides retail service in Minnesota or wholesale electric service to another entity in Minnesota other than an entity that is a federally recognized regional transmission organization or independent system operator" is exempted from the Certificate of Need requirement for large energy facilities.

Minn. R. 7849.0030, subp. 2 states "a certificate of need is not required for a facility exempted by Minnesota Statutes, section 216B.243, subdivision 8."

Under Minn. R. 7829.0430, subp.1, the Minnesota Public Utilities Commission has delegated to its Executive Secretary the authority to approve the withdrawal of a filing if the following conditions are met:

1. The party that submitted the filing has requested that the filing be withdrawn and has served notice on the persons listed on the official service list;
2. No person has expressed opposition to the withdrawal of the filing within 14 days of service of the notice; and
3. No commissioner or commission staff person has identified a reason that the matter should not be withdrawn.

Minn. R. 7829.0430, subp. 2. Contested withdrawal. If any person opposes a withdrawal request within 14 days of service of the notice, the commission will allow a filing to be withdrawn at the request of the filing party if the commission determines that the proposed withdrawal:

- A. does not contravene the public interest;
- B. does not prejudice any party; and
- C. does not concern a filing that raises issues requiring commission action.

If the commission determines that withdrawal would contravene the public interest or would prejudice a party, the commission may permit withdrawal only subject to conditions that mitigate the harm identified.

### III Procedural History

On January 3, 2019, the Commission issued an Order Deferring Action and Initiating Negotiations; Notice and Order For Hearing.<sup>1</sup> Specifically, the Commission:

1. Declined the ALJ's recommendation to issue a site permit based on the current record;
2. Declined to act on the applicant's petitions at that time;
3. Referred this matter for contested case proceedings;
4. Requested 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;
5. Asked the Department of Commerce to facilitate discussions and negotiations among the parties and to report back promptly if they achieve any resolution.

On December 28, 2019, Flying Cow Wind, LLC (Applicant or FCW) filed a petition to withdraw its application for a certificate of Need (CN).

On January 11, 2019, Department of Commerce Division of Energy Resources (Department or DOC DER) filed a response to the Applicant's request for withdrawal.

On January 11, 2019, Laborers District Council filed initial comments on the withdrawal request.

On January 25, 2019, Bluegreen Alliance filed comments on the withdrawal request.

On January 28, 2019, Will Thomssen submitted public comments on the withdrawal request.

On January 31, 2019 and February 1, 2019, Ramona Evens submitted public comments on the withdrawal request.

On February 1, 2019, DOC DER filed additional comments.

On February 8, 2019, FCW provided reply comments.

On February 11, 2019, LIUNA filed reply comments.

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<sup>1</sup> The Commission met on December 6, 2018 to decide this matter. The motion to defer action passed with a 5-0 decision.

#### IV Request to Withdraw Certificate of Need Application

On December 28, 2018, Flying Cow Wind, LLC filed a request to withdraw its application for a certificate of need for the proposed 152 MW Bitter Root Wind Farm in Yellow Medicine County, Minnesota (Project). FCW indicated that at the time it filed its CN application for the Project on October 19, 2017, it had not secured a Power Purchase Agreement (PPA).

However, on October 23, 2018, FCW provided notice to the Commission that it had entered into a long-term PPA for the Project. FCW is asserting that given who it has contracted with, it is now eligible for an exemption from certificate of need under Minn. Stat 216B.243, subd. 8 (a)(7), and requested that it be allowed to withdraw its CN application. Flying Cow maintained that it qualifies as an Independent Power Producer (IPP) and that its power purchaser does not provide retail service in Minnesota or wholesale electric service to another entity in Minnesota. Under the terms of the PPA, the Purchaser has agreed to purchase all of the energy and renewable attributes for the Project for the entire PPA term.

#### V Response to Petition

##### Department of Commerce, DER

On January 11, 2019, Department of Commerce Division of Energy Resources filed a response to the Applicant's request for withdrawal. In its comments, the Department objected to the request arguing that FCW has not met the criteria for an exemption. The Department stated that it is not whether the contracting entity presently provides retail or wholesale service in Minnesota, but rather, whether the future *electric output*, once the facility is in place and operational, is to be sold to an entity that does not provide retail electric service or wholesale electric service to another entity in Minnesota other than an entity that is a federally recognized regional transmission organization or independent system operator. The Department indicated it is aware of the sole off-taker for the output of the Bitter Root project, but requested additional information from the Applicant (IR #2) to confirm whether or not the Purchaser for the Bitter Root project has sought and received approval from FERC to operate as a wholesale power supplier.

On February 1, 2019, DOC DER filed additional comments on the withdrawal request. The additional comments are a follow-up to the Department's January 11 comments and provide additional information, after receiving an answer to their Information Request No. 3. IR No. 3, asked FCW to provide documents that demonstrate that *none of the electric output of the system* shall be sold to an entity that provides retail service in Minnesota or wholesale electric service to another entity in Minnesota other than an entity that is a federally recognized

regional transmission organization or independent system operator during the full term of the PPA.

Based on the response it received, DOC DER stated that the Applicant had not provided a commitment from the purchaser that electric output of the Bitter Root Wind project will not be sold to an entity “that provides...wholesale electric service to another entity in Minnesota.” For this reason, DOC DER concluded that the Applicant has not demonstrated that grounds for the withdrawal exist. The Department recommended that the Commission deny the request for withdrawal of the application for a certificate of need.

### **Laborers District Council (LIUNA) Initial Comments**

On January 11, 2019, LIUNA filed an objection and a discovery request pursuant to the petition by FCW to the withdrawal of the certificate of need application for the Bitter Root Wind project. LIUNA also objected to the trade secret designation of documents submitted in the company’s petition to withdraw and requested that the Commission make the documents available to the public. LIUNA argued that FCW has not demonstrated that it meets the Independent Power Provider exemption because the company has not shown that the power produced by the project will not be sold to “an entity that provides retail electric service in Minnesota or wholesale electric service to another entity in Minnesota”. LIUNA has questioned the duration of the company PPA and the circumstances under which the PPA could be terminated or modified. LIUNA asserted that the IPP exemption is not met if there is meaningful potential for the operational life of the project exceeds the duration of the PPA, or if there is a provision in the PPA that allows it to be terminated or modified before its expiration. LIUNA asserted that such a provision could allow for some or all of the energy produced by the facility available for sale to a utility or wholesale power provider in Minnesota. LIUNA also made a formal discovery request to FCW for additional information regarding whether or not the power generated by the Project could end up being sold to Minnesota ratepayers. LIUNA expressed their opinion that FCW’s petition to withdraw the CN application is a transparent attempt to avoid the scrutiny of the socioeconomic impacts of the project that LIUNA has sought to obtain. LIUNA argued that the socioeconomic issues of concern to their organization are equally relevant to the application for a Site Permit. LIUNA suggested that allowing FLYING COW to withdraw the CN application at this late date would prejudice the interests of their members by preventing them from exploring issues that could be relevant to the Commission’s ultimate decision in this case.

### **Bluegreen Alliance comments**

On January 25, 2019, the Bluegreen Alliance submitted comments objecting to the petition by FCW to withdraw the company’s application for a Certificate of Need and joined with LIUNA in objecting to the trade secret designation of documents submitted by the company in its petition. Bluegreen Alliance did not provide any legal arguments on whether the petition by the Applicant meets the criteria for a CN exemption. Bluegreen Alliance expressed their support for

Minnesota's renewable energy resources as a means not only of reducing carbon emissions and other forms of pollution associated with fossil fuels, but also to build a clean energy economy that works for all Minnesotans. Bluegreen Alliance suggested that the Commission did the right thing by ordering a contested case hearing and expressed hope that the Commission would reject attempts by RES Americas to get around the scrutiny ordered by the Commission. Lastly, the Bluegreen Alliance listed some concerns regarding the use of local versus non-local labor for the construction of the project that might be lost if not further developed through the contested case.

**Public Comment – Will Thomssen**

Mr. Thomssen is a resident of Lake Benton, MN. He commented against allowing the application to be withdrawn because this would prejudice the interests of union workers that have participated actively in these proceedings and prevent the Commission from developing a complete record on the impact of the project. He commented that the question of whether the project qualifies for an exemption should be answered through the contested case process.

**Public Comment – Ramona Evens**

Ms. Evens stated she is a farmer from Cold Springs, MN farming SW of Canby in Yellow Medicine County and SW of Ivanhoe in Lincoln County. She offered comments in support of the wind projects in general, stating that even the grocery store in Ivanhoe is sponsored by the local wind farm project, and also addressed the Bitter Root Wind Project in particular. She stated that rural Minnesota needs the potential jobs, the potential to pull people into the community and keep its young people employed in services. Wind projects, like Bitter Root provide sustainable income and opportunity to communities, jobs, and economic development to a very rural area, Canby in this case. The Canby community wants this project and the economic drivers it brings. The current discussion at the Commission does not take the actual community in consideration regarding the labor issue. Canby, and surrounding areas, do not benefit from a labor requirement or a local hiring requirement. The project impacts the community and the community benefits from the project being constructed and operated for over 20 years. The scrutiny on the power purchase agreement and the construction labor requirements is overshadowing the actual community benefits of the project. She asked that the issues of labor requirements and how to interpret a legal exemption for power purchase agreements be decided outside of this project permit. The community will benefit from the project, but only if it is actually constructed and operated. She stated that this is what the people of Canby want, "a long way from St. Paul and the choices you have".

**Flying Cow Response**

On February 8, 2019, FCW provided reply comments in support to its request to withdraw application for certificate of need, including providing copies of its answers to the Department's information requests. FCW designated certain information as proprietary and trade secret,

including the name of the purchasing entity under the PPA and the terms of the agreement, including duration.

The Applicant cited Minn. Stat. §13.37, subd. 1(b) in requesting the trade secret designation, arguing that the information from the PPA is the subject of reasonable efforts by Flying Cow Wind to maintain its secrecy and it derives independent economic value, actual or potential, from not being generally known or accessible to the public.

In responding to the Department's IR #2, FCW restated its main reasons for requesting the withdrawal, namely that the Purchaser is not (1) an entity that provides retail service in Minnesota, or (2) an entity that provides wholesale electric service to another entity in Minnesota.

FCW stated that the Purchaser sought and obtained Market-Based Rate Authority ("MRB Authority") from FERC. In its application for MBR Authority and in subsequent filings the Purchaser made clear that, while it has the authority to make wholesale sales of power, it does not provide retail or wholesale electric service in any jurisdiction, including Minnesota. FLYING COW also stated that the Purchaser does not own or control any transmission facilities, and is not a provider of wholesale electric service in Minnesota. According to FLYING COW, providers of retail electric service in Minnesota are known entities such as the regulated utilities (Allete, NSP, Northwestern Wisconsin Electric, Otter Tail Power Company) and various distribution cooperatives and municipalities. Wholesale electric providers in Minnesota are also a limited number of entities that have transmission assets and deliver wholesale electricity to distribution utilities. The list of wholesale electric service providers in Minnesota include Generation and Transmission cooperatives (GRE, Dairyland Power, Minnkota Power), and the municipal power agencies (Central Municipal Power Agency/Services, Minnesota Municipal Power Agency, Northern Municipal Power Agency, Southern Minnesota Municipal Power Agency, Western Minnesota Municipal Power Agency). Because the Purchaser is not one of these entities, nor an affiliate of one of these entities, and does not otherwise own or control transmission assets or a franchise service area, the output of the project will not be "sold to an entity that provides retail electric service in Minnesota or wholesale electric service to another entity in Minnesota" pursuant to Minn. Stat. §216B.243, Subd. 8(7).

In its response to Department's IR #3, FLYING COW reiterated the information already provided in its answer to IR #2, that pursuant to the PPA, the Purchaser will purchase all of the electric output from Flying Cow's Bitter Root Wind project for the term of the PPA. With regard to how the electric output will be used, it is FLYING COW's understanding that the Purchaser will resell the electric output purchased under the PPA into the Mid-Continent Independent System Operator ("MISO") wholesale energy market, and keep the Renewable Energy Certificates ("RECs"). This practice has been made public by the Purchaser in its Quarterly Reports to the Federal Energy Regulatory Commission. FLYING COW stated that it disagrees with DOC-DER's

interpretation of Minn. Stat. § 216B.243, subd. 8(7) that it requires a commitment regarding how the electric output will be used by the Purchaser and it reserved the right to challenge any such application of the statute.

Finally, FLYING COW clarified that any sales of electric output from the facility following the term of PPA will also qualify under the exemption, because FLYING COW plans to sell it into the Mid-Continent Independent System Operator wholesale energy market. Because of this, the electric output from the project following the PPA term will not be sold to an entity that provides retail or wholesale electric service in Minnesota other than an entity that is a federally recognized regional transmission organization or independent system operator.

### **LIUNA Reply Comments**

On February 11, 2019 LIUNA filed reply comments restating its January 10 observations regarding why they opposed the withdrawal, adding that the Applicant's refusal to provide access to the relevant information has prejudiced its rights as a party in the case.

LIUNA expressed concerns that the Applicant cannot provide assurance that electricity generated by the project will not end up burdening Minnesota ratepayers via wholesale sales by the customer to a local electric provider and that the Applicant wasn't able to provide any binding commitments that Minnesota ratepayers will not end up paying for the power generated by the facility.

LIUNA urged the Commission to deny the Applicant's petition and designate the filings in the record as public, based on the Applicant's failure to provide a legitimate basis for trade secret protection. LIUNA concluded that, to the degree any questions remain regarding the suitability of the project for an IPP exemption, they should be considered in the contested case process.

## **VI Staff Discussion**

Minn. Stat. §216B.243, subd. 8 (a)(7) provides that the requirement for a large energy facility to obtain a certificate of need from the Commission does not apply to "a *wind energy conversion system* or solar electric generation facility if the system or facility is owned and operated by an independent power producer and the electric output of the system or facility is not sold to an entity that provides retail service in Minnesota or wholesale electric service to another entity in Minnesota other than an entity that is a federally recognized regional transmission organization or independent system operator."

Staff suggests that on the surface, or at first glance, it would appear that Flying Cow, LLC could qualify for an exemption from the requirement for a certificate of need as provided under Minn. Stat. § 216B.243, subd. 8 (a)(7). Flying Cow is an IPP and, to staff's knowledge, the purchaser of the electric output of the Bitter Root facility is not a utility, does not have a

franchise or service territory, nor specific wholesale customers. This is certainly the case in Minnesota. The purchaser's publicly stated energy policy, as well as its past practice, suggests that any energy the purchaser resells is only sold into the competitive wholesale market of an independent system operator, while it maintains proprietorship of the RECs associated with the renewable attribute of the energy it purchases. This form of resale, of course, is permitted under the statutory CN exemption provision.

While the Department acknowledges that the publicly stated policy of the purchaser, as well as its past practice, may very well be that any energy it resells is only into a competitive wholesale market operated by an ISO, it argues here that Flying Cow has failed to provide documentation establishing an obligation that this will be the case with the electric output of the Bitter Root project. LIUNA also argued that the Applicant has failed to demonstrate, or to provide sufficient documentation, that would establish its qualification under the CN exemption.

Given the publicly stated policy, and past practice, that the purchaser of the electric output has, particularly given the concerns expressed in response to the withdrawal petition, staff is somewhat dismayed that Flying Cow has been unwilling or unable, in conjunction with its PPA partner, to provide documentation that would clearly indicate that the electrical output of the Bitter Root project will not be sold to an entity that provides retail service in Minnesota or wholesale electric service to another entity in Minnesota.

The Commission will need to determine what level of certainty is appropriate to determine an Applicant's qualification for a CN exemption under the statutory provision in question here.

Minn. R. 7829.0430 addresses the withdrawal of filings before the Commission. Specifically, Minn. R. 780430, subp. 2 addresses the withdrawal of a contested filing. In making its determination on whether to allow the withdrawal of the filing, the Commission is to consider whether allowing the withdrawal would contravene the public interest; b) whether it would prejudice any party; and c) concerns a filing that raises issues requiring commission action.

First, staff asserts that the Commission's decision to refer the issues related to the employment practices of Flying Cow and their socioeconomic consequences, as well as the impact to the analysis of the direct and indirect economic impact of proposed sites, as set out in its January 3, 2019 *Order Deferring Action and Initiating Negotiations; Notice and Order for Hearing* would indicate that there is a public interest in further record development of these issues. Second, staff believes, and LIUNA has argued, that allowing the withdrawal of the CN application at this time in the process would result in prejudice to LIUNA and its position, particularly given the cost and extent of the effort put LIUNA's participation in this matter to-date. While both the CN and Site permit applications were referred to OAH, allowing the withdrawal of the CN application would necessarily narrow the scope of issues to be further developed within the contested case. With regard to the third consideration, staff believes that any required

Commission action subsequent to allowing the withdrawal would be de minimis. Both applications have been referred to OAH for additional record development and proceedings. The Commission would need to inform the Administrative Law Judge of the CN withdrawal, but the contested case itself would continue and no further action by the Commission would be necessary. Even if the CN withdrawal is granted and the Commission reconsidered its January 3 Order, the only required Commission action would be to inform the ALJ.

Staff recommends the Commission discuss with Counsel, the issue of the interaction of a decision under statute and its impact on the consideration of the conditions under rule. In particular, if the Applicant is found to qualify for a CN exemption, does the Commission still need to consider the conditions set out in the rule or does the decision under the statute trump the considerations under the rule.

Staff is aware of only one other project that filed with the Commission and later withdrawn. Red Pine Wind Project, LLC filed an application with the Commission, but filed a request to withdraw the petition before a completeness determination was made. The withdrawal was uncontested so it was handled under Minn. R. 7829.0430, subp 1 under which the Commission has delegated authority for the Executive Secretary to approve the request.

Although Red Pine was granted an exemption under the same statutory provision as is requested for this project, Red Pine proposed to sell the entire electric output of its facility into MISO's competitive wholesale market. There was no third party involvement. The Company's petition to withdraw could be considered the documentation obligating the Applicant not to sell any of the electric output from the project to an entity that provides retail service in Minnesota or wholesale electric service to another entity in Minnesota.

### **Commission Decision Alternatives**

#### **A. Petition to Withdraw CN Application**

1. Grant the petition to withdraw the application for a Certificate of Need.
2. Deny the petition to withdraw the application for a Certificate of Need.
3. Take some other action deemed appropriate.

**Staff Recommendation: A1**