**STATE OF MINNESOTA**

**BEFORE THE PUBLIC UTILITIES COMMISSION**

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| **Leroy Koppendrayer** | **Chair** |
| **David C. Boyd** | **Commissioner** |
| **Marshall Johnson** | **Commissioner** |
| **Thomas Pugh** | **Commissioner** |
| **Phyllis Reha** | **Commissioner** |

**In the Matter of the Application of Kenyon Wind For a Large Wind Energy Conversion System Site Permit for a 18.9 Megawatt Wind Farm in Goodhue County**

**Docket No. IP6605/WS-06-1445**

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# KENYON WIND, LLC'S ANSWER TO CFERS, LLC'S PETITION FOR RECONSIDERATION

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Pursuant to Minnesota Rules Part 7829.3000, Subp. 4, Kenyon Wind, LLC submits its Answer to CFERS, LLC's Petition for Reconsideration, stylized in Petitioner's pleadings as "CFERS, LLC's Corrections & Objections to Order Issuing Site Permit."

## Introduction

Citizens for Environmental Rights & Safety, LLC (CFERS, LLC), by and through its President, Michael W. Chase, has petitioned for reconsideration of the Commission's July 18, 2007 Order Issuing Site Permit in the above matter. The Commissions' Findings and Conclusions are 12 pages in length, and they adopt the Minnesota Department of Commerce's Proposed Findings of Fact and Conclusions which are an additional 16 pages in length, detailed and carefully reasoned. The Order adopts and incorporates a project Site Permit. The Site Permit—some 20 pages in length—contains detailed permit provisions, including extensive conditions and safeguards.

The Commission granted Kenyon Wind, LLC its permit after thoroughly reviewing an extensive record and hearing arguments from all interested persons, including legal counsel for Petitioner CFERS, LLC. CFERS, LLC's Petition offers no new or relevant argument or evidence in support of its application. No circumstances are presented in the Petition which would warrant reconsideration of the Commission's July 18, 2007 decision in this matter. Accordingly, the Commission should decline to reconsider its Order and summarily deny CFERS, LLC's Petition.

## Discussion

A Commission Order will generally *not* be reconsidered unless warranted by the presentation of new and relevant argument or evidence.

Minn. Rule 7829.3000, Subp. 2, requires that a Petition have the following content:

> ... must *set forth specifically the grounds relied upon or errors claimed.* A request for amendment must set forth the specific amendments desired and the reasons for the amendments.

(Emphasis added.)

The Rule further provides that the Commission may decide the Petition for Rehearing "with or without a hearing or oral argument." Minn. Rule 7829.3000, Subp. 6.

In interpreting the Rule, the Commission appears to have consistently held that a Commission Order will not be reconsidered unless clearly warranted by the presentation of new and relevant argument or evidence. *See* Order Denying Reconsideration, *In the Matter of the Application of CenterPoint Energy For Authority to Increase Natural Gas Rates in Minnesota,* Docket No. G-008/GR-05-1380, Jan. 22, 2007, at 2; Order Denying Reconsideration, *In the Matter of the Great River Energy Application For a Route Permit for the Mud Lake to Wilson Lake 115-kv High-Voltage Transmission Line,* Docket No. ET-2/TL-06-980, April 2, 2007, at 1; and Order Denying Reconsideration, *In The Matter of the Application of Great River Energy, Northern States Power Company (d/b/a Xcel Energy) and Others for a Certificate of Need for the CapX 345-kv Transmission Project,* Docket No. ET-2/E-002 *et al.*/CN-06-1115, Aug. 2, 2007, at 1.

The Commission's standard of review of Petitions for Reconsideration are articulated, with consistency, in the two (2) above-cited Great River Energy cases. In its April 2, 2007 Order Denying Reconsideration, the Commission denied the Petition based upon its finding and conclusion that

> The Commission has reviewed the record and finds that *the Petition does not raise new issues, point to new and relevant evidence, expose errors or ambiguities in the original Order, and does not otherwise persuade the Commission that it should rethink its original decision.*

Order Denying Consideration, Docket No. Docket No. ET-2/TL-06-980, at 1 (emphasis added).

AND

> The Commission has carefully reviewed the entire record and concludes that *the petition does not raise new issues requiring development does not point to new and relevant evidence, does not expose errors or ambiguities in the original order, and does not otherwise persuade the Commission that it should reconsider its original decision.*

Order Denying Consideration, ET-2/E-002 *et al.*/CN-06-1115, at 1 (emphasis added).

To paraphrase, a Petition for Reconsideration must either (a) raise new issues, (b) point to new and relevant evidence, or (c) expose errors or ambiguities in the original Order and, in its totality the Petition must "persuade the Commission that it should reconsider its original decision." It is respectfully submitted that CFERS, LLC's Petition fails to meet the Commission's criteria for granting reconsideration and should be summarily denied.

The Commission's July 18, 2007 Order Issuing Site Permit contains its considered and careful analysis of issues raised throughout the permitting process. The Procedural History recited in the June 18 Order reflects considerable public input through the Public Hearing process. The Findings and Conclusions are detailed and address all issues raised in the permitting process. Indeed, Each of the five (5) issues now addressed in CFERS, LLC's present Petition are considered—in detail—in the Commission's Findings and Conclusions. Moreover, each of the issues presented by CFERS, LLC in its present Petition for Reconsideration are given specific and separate consideration in Section II of the Findings and Conclusions contained in the Order. *See* Order Issuing Site Permit at 3-9.

In Section II of its Findings and Conclusions, the Commission has carefully analyzed each of twelve (12) separate arguments raised by CFERS, LLC in its submissions to the Commission and in oral argument. At the June 14, 2007 Hearing in this matter, the record reflects that CFERS, LLC was granted considerable latitude to fully develop its arguments and issues in opposition to Kenyon Wind, LLC's Site Permit prior to the Commission's deliberation on the Site Permit at the June 14 Hearing. By its present Petition, CFERS, LLC raises no new issues or arguments. Rather, it has restated and realleged—more or less *verbatim*—five (5) of its original twelve (12) arguments.

A review of CFERS, LLC's Petition reveals that in restating its five (5) arguments, CFERS, LLC raises no new issues and advances no new evidence. Applying the standard in the above-cited *Great River Energy* cases, a review of the Petition reveals that CFERS, LLC's Petition

(a) does not raise new issues;

(b) does not point to new and relevant evidence,

(c) does not expose errors or ambiguities in the original Order; and, most importantly

(d) does not explain why the Commission should "rethink its original decision."

Rather, the Petition merely restates the same concerns and issues addressed by the Commission in its considered Order Issuing Site Permit and related Site Permit, adding additional anecdotal but nonmaterial commentary. Accordingly, the Commission should decline to reconsider its Order and deny the Petition.

## Response to Restated Issues

## I. C-BED ISSUES.

The lead and primary argument of CFERS, LLC is that unspecified "C-BED issues" serve as the primary basis for setting aside the Commission's considered Order Issuing Site Permit. No new evidence or argument is offered. No errors or omissions in the Commission's Findings are alleged. Rather, the Petition contains vague representations as to the possibility that there may be "improprieties in qualifying for C-BED status." What those improprieties are is not defined. It is suggested that the C-BED issues are somehow related to the right of individuals to seek "legal resource" against Kenyon Wind, LLC. As such, it would appear that the issue is more one related to the issues of bonding, insurance and public safety, which are dealt with at great length in the Commission's Order of July 18, 2007, and specifically addressed throughout the proposed Site Permit.

The Commission addressed C-BED issues at length in its Findings and Conclusions. *See* Findings and Conclusions II.B at 3-4. Kenyon Wind, LLC's position then—as now—is that C-BED status is not germane to the site permit process. The issue of C-BED was specifically addressed by the Commission in Docket No. E-002/M-06-1196. The Commission concluded as follows:

> The Commission agrees [with the Department's Proposed Findings] that whether or not the Kenyon Wind Project qualified as a C-BED project is not relevant to the issue before the Commission in this docket, *i.e.,* whether the standards established in Minn. Stat. § 216F and Minn. Rules Ch. 441 for the siting of Wind Energy Conversion Systems have been met. Fn. 1.

The Commission's footnote further provided:

> 1. Regarding the C-Bed status of the project, the Department filed comments in Docket No. E-002/M-06-1196 stating: "Appendix F of the Company's Petition shows that the Power Purchase Agreement (PPA) meets the requirements of the C-BED tariff. Page F2 is a letter from the Department of Commerce (DOC) confirming that the Kenyon Project meets the requirements of Minn. Stat. § 216B.1612, Subd. 2.

Order Issuing Site Permit, Findings and Conclusions at 4, para. II.B.

CFERS, LLC's Petition raises no new issues. It merely suggests, based upon anecdotal information alone, that there may be unspecified improprieties in Kenyon Wind, LLC's C-BED eligibility. As Kenyon Wind, LLC's representatives have pointed out, they do—and must—meet C-BED eligibility to receive rates contemplated by their Power Purchase Agreement with Xcel Energy/NSP and, therefore, must fully comply with C-BED eligibility criteria at all times. The question of C-BED eligibility has been addressed by the Commission on two occasions. In raising the issue a third time, no new substantive facts are alleged or arguments made. The

issues of indemnification, insurance and, more generally, public safety are dealt with in detailed fashion in the Commission's Order Issuing Site Permit. There is no basis for reconsideration.

## II. SETBACKS.

Since the outset of these proceedings, CFERS, LLC has argued that prevailing statewide setbacks are inadequate. The issue raised is really one of broader regulatory concern as CFERS, LLC would have the Commission adopt or modify a statewide standard consistently applied to wind projects throughout the state. As such, CFERS, LLC asks that existing setbacks be doubled from 250 feet to 500 feet from a road and from 500 feet to a 1,000 feet from a dwelling. CFERS, LLC's Petition continues to maintain that the State's standard is inadequate. As in each of its prior submissions, no quantitative evidence is offered by its present Petition, and no new argument or facts are alleged. CFERS, LLC simply seeks to reargue the issue. The issue of setbacks was carefully considered by the Commission. CFERS, LLC's position was analyzed and rejected. The Commission specifically found and concluded as follows:

> The Department [Minnesota Department of Commerce] stated that setbacks proposed in the draft Site Permit are the standard setback distances used in every wind project site permit issued by the Commission. The Department argued that these distances were reasonable since there have been no tower collapses or tip-overs in Minnesota or anywhere else in the country.
>
> The Commission concurs with the Department that the setback distances recommended by the Department in its proposed Site Permit are reasonable and consistent with past Commission practice.

*Id.* at 4, para. II.C.

The anecdotal information and arguments contained in that portion of CFERS, LLC's Petition pertaining to setbacks contains a lengthy anecdotal commentary but no new and material facts and, as noted above, no new arguments. The request that setback requirements be doubled is arbitrary and not supported by any credible scientific, engineering or commercial evidence.

## III. WETLANDS.

As with all five (5) of the issues raised by CFERS, LLC in its Petition, the issue of wetlands was carefully dealt with by the Commission in its Order Issuing Site Permit. No wetlands will be affected by the project. As the Department stated in its comments, there are wetlands in the general area of the project, but Kenyon Wind, LLC has not proposed to work in those areas. Significantly, CFERS, LLC's Petition *concedes* that the Department of Natural Resources (DNR) has expressed no concerns about the project. If the project does cross public water wetlands, Kenyon Wind, LLC will have to obtain a permit from the DNR to do so. The Site Permit contains significant safeguards for promoting compliance with the restriction against building on wetlands. Without any basis in doing so, CFERS, LLC suggests that the fact that the DNR has expressed no concern about the project is somehow "more likely to be related to a lack of resources to conduct an appropriate on-site review as opposed to some perceived benign

endorsement." CFERS, LLC's Petition at 2, para. 3. CFERS, LLC's claim is speculative and without basis in fact.

## IV. FAILURE MODE EFFECTS ANALYSIS (FEMA).

Once again, the issues raised by CFERS, LLC in its Petition pertaining to Failure Mode Effects Analysis are the same as those presented, considered and addressed by the Commission in its Order Issuing Site Permit. No new material facts or arguments are offered. Rather, the Petition raises the arguments addressed by the Commission at the time of the issuance of its Order Issuing Site Permit. The Commission properly held as follows:

> Based on the background provided by the Department, the Commission finds no grounds to require a Failure Mode Effects Analysis (FEMA) to assess the results of a hypothetical failure of the Suzlon turbine, as suggested by CFERS. Absence of such an analysis in this docket provides no grounds to withhold issuance of the requested Site Permit.

Order Issuing Site Permit, Findings and Conclusions at 6.

CFERS, LLC fails to advance any credible new argument as to why the Commission's conclusions should be reconsidered. Rather, the Petition engages in a long-winded, anecdotal (and largely inaccurate) rendition of the Public Hearing process and discussions apparently had between Mr. Chase and Suzlon. It is suggested by CFERS, LLC that Kenyon Wind, LLC somehow failed to respond to Mr. Chase's request for information. However, the record reflects that neither Mr. Chase nor CFERS, LLC ever directly requested that Kenyon Wind, LLC provide CFERS, LLC with information. Moreover, the information Mr. Chase apparently requested of Suzlon's representative appears to have been proprietary.

As recognized by the Department of Commerce, the Suzlon Turbine to be used in this project is a proven utility-grade turbine, not a prototype. It has been approved by the International Electromechanical Commission, a trusted independent, nongovernmental organization which proposes and publishes international standards for all electrical, electronic and related technologies. *See* Commission Findings at 5, para. II.E. CFERS, LLC's Petition advances no basis for reconsidering the Commission's decision with regard to this issue.

## V. BONDING.

As with each of the other issues, the issue of bonding was also carefully considered by the Commission. Extensive Findings are found at page 7, para. II.H. CFERS, LLC raises no new issues and alleges no new facts in support of its argument. Rather, CFERS, LLC, in its Petition, simply reargues its position, raised throughout the Public Hearing process. The Commission's considered ruling in this regard was as follows:

> The Commission will not adopt CFERS' recommendation regarding bonding. CFERS has not demonstrated the need or reasonableness of requiring contingent financial reserves beyond

> those normally provided in construction projects by the use of licensed, bonded and insured contractors.

Order Issuing Site Permit at 7, para. II.H.

CFERS, LLC fails to state—much less allege—any reason why the Commission's ruling in this regard should not stand.

**Summary**

CFERS, LLC's Petition does not raise new issues. It does not point to new and relevant evidence. It does not expose errors or ambiguities in the Commission's July 18, 2007 Order Issuing Site Permit. Rule and authority interpreting the Rule require that a Petition provide these things—and more—a persuasive argument to the effect that the Commission should somehow rethink its original decision. In the present case, CFERS, LLC's Petition merely restates old arguments raised since the inception of the Public Hearing process. CFERS, LLC's arguments have been considered and are carefully addressed in the Commission's July 18 Order. The Petition for Reconsideration should be denied.

Dated: August 16, 2007.

Respectfully submitted,

**KENYON WIND, LLC**

**By** _____
**John H. Daniels, Jr.**
**Its Chief Manager**

**AFFIDAVIT OF SERVICE BY MAIL**

**STATE OF MINNESOTA :**
**: ss.**
**COUNTY OF HENNEPIN :**

**Sharie L. Larson, being first duly sworn on oath, deposes and says that at the City of Minneapolis, County and State aforementioned, on the 16th day of August, 2007, she served Kenyon Wind, LLC'S Answer to CFERS, LLC's Petition for Reconsideration, MPUC Docket Number IP6605/WS-06-1445, upon the following landowners of record by depositing in the United States Mail at said City true and correct copies thereof, properly enveloped, with first-class postage prepaid and addressed to:**

SEE ATTACHED LISTING.

**Sharie L. Larson**

Subscribed and sworn to before me
this 16th day of August, 2007.

**NOTARY PUBLIC**

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