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December 1, 2010

Dr. Burl W. Haar
Executive Secretary
Minnesota Public Utilities Commission
127 7th Place East, Suite 350
St. Paul, MN 55101-2147

**RE: Comments and Recommendations of the Office of Energy Security Energy
Facility Permitting Staff
Docket No. IP-6605/WS-06-1445**

Dear Dr. Haar:

Attached are the Comments and Recommendations of the Office of Energy Security Energy Facility Permitting Staff in the following matter:

In the Matter of the Site Permit issued to Kenyon Wind, LLC for a Large Wind Energy Conversion System in Goodhue County.

OES EFP Staff is available to answer any questions the Commission may have.

Sincerely,

Ingrid Bjorklund
OES EFP Staff

Attachment

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BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

**COMMENTS AND RECOMMENDATIONS OF THE
MINNESOTA OFFICE OF ENERGY SECURITY
ENERGY FACILITY PERMITTING STAFF**

DOCKET NO. IP-6605/WS-06-1445

Meeting Date: December 9, 2010.....Agenda Item # 2

Company: **Kenyon Wind, LLC**

Docket No. **IP-6605/WS-06-1445**

**In the Matter of the Site Permit issued to Kenyon Wind, LLC for a Large
Wind Energy Conversion System in Goodhue County.**

Issue(s): Should the Commission amend the site permit per Kenyon Wind, LLC's petition?

OES Staff: Ingrid E. Bjorklund651-297-7039

Relevant Documents

Petition for Amendment to Site Permit.....October 21, 2010
Notice for Comment Period on Permit Amendment.....November 3, 2010
Public CommentsNovember 29, 2010
Order Amending Site Permit.....February 18, 2009
Petition for Amendment..... December 5, 2008
Order Issuing a Site Permit for Kenyon Wind.....July 18, 2007

The enclosed materials are the work papers of the Office of Energy Security (OES) Energy Facility Permitting Staff (EFP). They are intended for use by the Public Utilities Commission and are based on information already in the record unless otherwise noted.

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See eDocket filings (06-1445) at <https://www.edockets.state.mn.us/EFiling/search.jsp>, or the Commission website at: <http://energyfacilities.puc.state.mn.us/Docket.html?Id=18946> for project related documents.

Statement of the Issues

Should the Commission amend the site permit per Kenyon Wind, LLC's petition?

Introduction and Background

The Minnesota Public Utilities Commission (Commission) issued a site permit to Kenyon Wind, LLC (Kenyon Wind) to construct an 18.9 Megawatt Large Wind Energy Conversion System (LWECS) in Goodhue County on July 18, 2007, pursuant to Minnesota Rules chapter 7836 (renumbered to 7854). On February 18, 2009, the Commission amended the site permit in four ways: 1) allowed additional types of wind turbines to be deployed; 2) changed the location of those turbines within the permit boundaries; 3) granted additional time to secure a power purchase agreement (PPA) or other enforceable mechanism for sale of the project's output; and 4) granted additional time to begin construction.

Under the amended site permit, Kenyon Wind must obtain a PPA or some other enforceable mechanism for sale of the electricity by December 31, 2010, and begin construction by February 18, 2011.

On October 21, 2010, the Commission received a request from Kenyon Wind to amend its amended site permit to extend the time in which to obtain a PPA or some other enforceable mechanism for sale of the electricity to December 31, 2012, and the time in which to begin construction to February 18, 2013.

Notice of Comment Period on the Petition for Amendment was issued by the OES EFP staff on November 2, 2010, and was distributed to all persons on the OES EFP project list and those persons subscribed to the project via eDockets. Comments were accepted through November 19, 2010.

Regulatory Process and Procedures

Under Minnesota Rule 7854.1300, subpart 2, the Commission may amend the site permit at any time if it has good cause to do so. Further, subpart 4 permits the Commission to initiate action to consider amendment or revocation of a site permit on its own initiative or upon the request of any person. This rule states that no site permit may be amended or revoked without first providing notice and affording due process to the permit holder. Section III.K.3 of Kenyon Wind's amended site permit allows modification or amendment to the site permit after notice and opportunity for a hearing.

In addition, the Commission may allow the Kenyon Wind site permit to expire or take action to revoke the permit.

Expiration of the Site Permit

Under section III.J.4 of the amended site permit, the permit shall be null and void in the event the permittee does not obtain a PPA by December 31, 2010. The Commission may take no action and let the permit expire because this condition would not be satisfied by December 31, 2010.

Revocation of the Site Permit

Under section III.K.2 of the amended site permit, the Commission may determine whether the permit should be revoked if the permittee has not completed the required pre-construction surveys and commenced construction within two years of the issuance of the amended permit, which is February 18, 2011.

Minnesota Statutes section 216F.02 states that section 216E.14 applies to the Minnesota Wind Siting Act (chapter 216F). Section 216E.14 and Section III.K.4 of the site permit state that the Commission may revoke or suspend the permit upon the grounds that: 1) a false statement was knowingly made in the application or accompanying statements by the applicant, and a true statement would have warranted a changed in the Commission's findings; 2) there has been a failure to comply with material conditions of the permit or there has been a failure to maintain health and safety standards; or 3) there has been a material violation of a provision of an applicable statute or rule or any order of the Commission. The Commission may revoke the site permit upon the grounds that there has been a failure to comply with material conditions of the permit.

Section 216E.14 requires that revocation or suspension of a site or route permit by the Commission can occur after adequate notice of the alleged grounds for revocation or suspension and a full and fair hearing in which the affected entity had an opportunity to confront any witness and respond to any evidence against it and to present rebuttal or mitigating evidence upon a finding by the Commission that there is grounds for revocation or suspension.

Section III.K.4 of the site permit states that upon a finding of any of the above grounds for revocation or suspension, the Commission may require the permittee to undertake corrective measures in lieu of having the permit suspended or revoked.

Requested Amendments by Kenyon Wind

Kenyon Wind is requesting two amendments to its amended Large Wind Energy Conversion System Site Permit.

Power Purchase Agreement

Kenyon Wind proposes amending section III.J.4 of the site permit to extend the time frame in which to obtain a PPA or some other enforceable mechanism for the sale of electricity from December 31, 2010, to December 31, 2012.

Kenyon Wind argues that the project is "shovel ready" because it has recordable executed options to enter into leases with landowners, an interconnection agreement with the Midwest Independent Transmission System Operator, and a financial partner. Kenyon Wind states that

“[a]ll that prevents the project commencing construction is a power purchase agreement or other enforceable mechanism to sell electricity.” Kenyon Wind believes that the current economic conditions have reduced the demand for power, but that a utility may be interested in the project as the economy improves due to the favorable aspects of the project, which include a suitable location adjacent to a 69 kV transmission line and commercially viable wind resource.

Failure to Commence Construction

Kenyon Wind proposes amending section III.K.2 of the site permit to extend the time frame in which to commence construction from two years of the issuance of the amended permit (which is February 18, 2011) to February 18, 2013.

Kenyon Wind argues that because construction cannot begin without a PPA, the requirement to commence construction should be extended for the same reasons it needs an extension to obtain a PPA.

OES EFP Staff Analysis and Comments

OES EFP received eight written comments during the comment period; all opposed granting Kenyon Wind’s petition to amend its site permit. Issues raised in the comments include concern that the Goodhue County ordinance was not considered, the project is not viable, noise, population density, and property values. One commenter suggested that Kenyon Wind should submit a new application to allow for more accurate and current information.

Of the concerns raised in the comments, most focused on the Goodhue County ordinance and that Kenyon Wind has not been able to secure a PPA since permit issuance in 2007 indicating the project is not viable.

OES EFP staff addresses the issues raised in the comments below.

Noise: Section III.E.3 requires Kenyon Wind to demonstrate its project can meet the noise standard pursuant to Minnesota Rules chapter 7030, which is also required of recently issued permits. However, recent permits are generally requiring the permittee to submit a proposal for the conduct of a noise study, which shall be carried out on approval by the Commission. Section III.F.2 of the Kenyon Wind site permit requires a noise study upon request of the Commission. The Commission could amend Kenyon Wind’s site permit to require that a noise study be conducted to confirm that the noise standard has been met once the project is operational.

Population Density: Several people expressed concern that population density in the area is too high for wind development. As population density increases, the remaining space in which to erect wind turbines decreases because setbacks to residences (including those needed to meet the noise standard), roads, and non-participating landowners exclude a greater area. These larger exclusion areas that come with more residences and roads generally prohibit siting of LWECs in a highly populated area. Thus, population density is indirectly rather than directly applied as a measure for evaluating the merits of a site permit application. Further, the issue of population density does not relate to the matter of whether to grant Kenyon Wind’s petition; however, the Commission could amend the permit with additional conditions as discussed below.

Property Values: One person expressed concern that property values would decrease if the project was to be constructed. The Commission already considered this issue in its findings at the time of permit issuance for this project. Further, this issue has been explored in other site permit dockets. In summary, evidence demonstrating that a decline in property values is imminent as a result of a nearby wind projects is inconclusive.

Goodhue County Ordinance: Many commenters expressed that the standards under the Goodhue County ordinance should apply to this project. Goodhue County adopted a Wind Energy Conversion System Regulations (Article 18) on October 2, 2007, and amended its ordinance on October 5, 2010. The site permit for Kenyon Wind was issued July 18, 2007. The Goodhue County ordinance would be considered if Kenyon Wind applied for a new site permit because its existing permit expired or was revoked by Commission. Alternatively, the Commission could choose to amend Kenyon Wind's existing permit to include all or parts of the ordinance.

Project Viability: Many commenters raised concerns that the project is not viable because Kenyon Wind has not yet obtained a PPA even though it has already received a two-year extension from the Commission. Under its amended site permit, Kenyon Wind has had approximately three and half years to obtain a PPA or some other enforceable mechanism to sell the electricity. If Kenyon Wind's petition is granted, it would have approximately five and half years to obtain a PPA or some other enforceable mechanism and begin construction.

Minnesota Rule 7854.1100, subpart 3, states that the Commission may include a permit condition that establishes a date by which the permittee must obtain a PPA or other enforceable mechanism or the site permit is null and void. The site permit issued to Kenyon Wind has such a condition, which allows the permit to expire. But permits issued in the last two years generally do not contain this condition. Recently issued site permits call for the Commission to determine whether the permit should be amended or revoked if the permittee does not obtain a PPA or some other enforceable mechanism for sale of the electricity within two years of the issuance of the permit. As a result, unlike the site permit issued to Kenyon Wind, current site permits do not automatically expire after two years if the condition to obtain a PPA or some other enforceable mechanism is not met within a certain time period.

If construction has not commenced within two years after issuance of the site permit, Minnesota Rule 7854.1200 requires the permittee to advise the Commission of the reasons construction has not commenced. The rule further states that the Commission may determine whether the permit should be revoked. No revocation of a permit for failure to commence construction may be undertaken except in accordance with part 7854.1300, subpart 4, which requires providing notice and affording due process to the permit holder.

Minnesota Statutes section 216F.04 states that it is the policy of the state to "site LWECs in an orderly manner compatible with environmental preservation, sustainable development, and the efficient use of resources." Because rules require the permittee to advise the Commission if it fails to commence construction within two years, the Commission can revisit whether the project meets the policy goals of the state. The Commission could determine that three and half years is sufficient time to allow for project development. Under this conclusion, the Commission could let the permit expire under section III.J.4 or revoke the permit under section III.K.2 and Minnesota Rule 7854.1200.

To the knowledge of OES EFP staff, only Kenyon Wind has received an extension to obtain a PPA or some other enforceable mechanism and begin construction since the Commission has had the authority to issue permits. But next year, several other permittees will likely face similar permit deadlines. Further, it is highly unlikely that any permittee has been provided more than five years to obtain a PPA or other enforceable mechanism since the legislature adopted the Minnesota Wind Siting Act in 1995. If the Commission intended for permits to be valid in perpetuity without the permittee ever securing a mechanism in which to sell the electricity, time limitations would not have been incorporated into permits and agency rules.

The Commission could extend the time to allow Kenyon Wind to secure a PPA or some other enforceable mechanism to some degree, but allowing the permittee to have five and half years from permit issuance may set a precedent that could compromise the policy of the state as discussed above. Indeed, allowing any extension beyond Kenyon Wind's current extension would likely set a precedent. The Commission could extend the time in which to secure a PPA and commence construction by nine months to allow sufficient time to negotiate a PPA under Xcel Energy's most recent Request For Proposals, which were accepted through October 15, 2010, or with some other utility.

If the permit was not revoked or allowed to expire, section III.J.2 of the site permit does not preclude another entity from seeking a site permit to construct a LWECS in any area within the site permit boundaries for this project. This project site is approximately 7,000 acres of which 1,100 acres are under option for the Kenyon Wind project.

If the Commission were to grant an extension, the site permit could be amended to require a post-construction noise study and include other conditions deemed appropriate by the Commission. The site permit could also be amended to include more stringent standards adopted by Goodhue County in its ordinance. The Commission could also amend section III.J.4 to require the Commission to amend or revoke the site permit if the permittee does not obtain a PPA or some other enforceable mechanism for sale of the electricity within a certain time period instead of existing language that allows the permit to become null and void.

If the Commission amends the Kenyon Wind amended site permit, OES EFP staff can prepare an Amended and Restated Site Permit that incorporates the 2009 amendments in addition to amendments in this order that would supersede and replace in its entirety the site permit issued on July 18, 2007, to keep track of the changes in an orderly manner.

Commission Decision Options

1. Deny the Petition for Amendment by Kenyon Wind, LLC, thereby allowing Kenyon Wind, LLC's amended Large Wind Energy Conversion System Site Permit to expire under III.J.4.
2. Amend Kenyon Wind, LLC's amended Large Wind Energy Conversion System Site Permit as requested in Kenyon Wind's Petition for Amendment, dated October 21, 2010.
3. Amend Kenyon Wind, LLC's amended Large Wind Energy Conversion System Site Permit as follows:

Section III.J.4: This Permit does not authorize construction of the project until the Permittee has obtained a power purchase agreement for the electricity to be generated by the project. In the event the Permittee does not obtain a power purchase agreement by ~~December 31, 2010~~ September 30, 2011, ~~this Permit shall be null and void.~~ the Permittee must advise the PUC of the reason for not having such commitment. In such event, the PUC may determine whether this permit should be amended or revoked. No amendment or revocation of this permit may be undertaken except in accordance with applicable statutes and rules, including Minnesota Rule 7854.1300.

Section III.K.2: If the Permittee has not completed the pre-construction surveys required in paragraph III.D. and commenced construction of the LWECs ~~within two years of the issuance of this Amended Permit~~ by November 18, 2011, the Permittee must advise the PUC of the reason construction has not commenced. In such event, the PUC may determine whether this Permit should be revoked. No revocation of this Permit may be undertaken except in accordance with applicable statutes and rules, including Minnesota Statute 216E.14.

4. Amend Kenyon Wind, LLC's amended Large Wind Energy Conversion System Site Permit per Option 3 and adopt the following additional amendment:

Section III.F.2: ~~On request of the PUC,~~ The Permittee shall submit a proposal to the PUC for the conduct of a noise study. Upon the approval of the PUC the Permittee shall carryout the study. The study shall be designed to determine the noise levels at various distances from the turbines at various wind directions and speeds.

5. Request OES EFP staff to prepare an Amended and Restated Site Permit that incorporates the 2009 amendments in addition to amendments in this order.
6. Make some other decision deemed more appropriate.

OES EFP staff recommends options 3, 4, and 5.