

**STATE OF MINNESOTA
BEFORE THE PUBLIC UTILITIES COMMISSION**

**LeRoy Koppendrayner
Marshall Johnson
Kenneth Nickolai
Thomas Pugh
Phylis Reha**

**Chair
Commissioner
Commissioner
Commissioner
Commissioner**

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

KENYON WIND, LLC REPLY COMMENTS

These Reply Comments by Kenyon Wind, LLC (“Kenyon”) respond to the request by CFERS, LLC (“Petitioner”) for a contested case hearing.

STANDARD FOR ASSESSING NEED FOR CONTESTED HEARING

Petitioner, which describes itself as a group of local landowners near the Kenyon Wind site, seeks an order of this Commission granting a contested case. Although it is conceded by Petitioner that its request is governed by Minn. Rule 4401.0550, Subd. 5, Petitioner’s description of that section fails to fully address all of the required elements for the granting of a contested hearing.

As this Commission is aware, requests are governed, in pertinent part, by Rule 4401.0550, Subd. 5(A) and (B) (generally the “Rules”) These sections read as follows:

- A. Any person may request in writing that a contested case hearing be held on an application for a site permit for a proposed LWECs project. The contested case hearing request must be filed within the time period established for submitting comments on the draft site permit. The person requesting the public hearing shall include, as part of the request, the issues to be addressed in the hearing and the reasons a hearing is required to resolve those issues.
- B. The board shall order a contested case hearing if the board finds that the person requesting the contested case hearing has raised a material issue of fact and that holding a hearing would aid the EQB in making a final determination on the permit application.

Petitioner’s April 10, 2007 Petition suggests that a contested case pertaining to a site permit shall be granted “... if the person making the request has raised a material issue of fact.” See Petition for Contested case at page 1. Such greatly misinterprets the elements of Rule 4401.0550, cited above. As this Commission has recently recognized, in determining a contested case shall be ordered the Commission must determine whether the person requested contested case hearing...has raised a material issue of fact *and* that holding a hearing would aid the Commission in making a final determination on a permit application. (Emphasis in original.) See Order Denying Request for Contested Case Hearing, But Expanding Scope of Public Hearing dated March 30, 2007, In Re

Application ... High Prairie Wind Farm II, Docket Number PT-6556/CN-06-1428; PT-6556/WS-06-1520 (hereinafter “High Prairie Order”).

In the High Prairie Order the Commission found and concluded that, as it applied to that case, the petitioner must (a) raise a material issue of fact sufficient to justify a contested case hearing, (b) the issues raised must be within the scope of the wind permitting process, (c) the issues raised, although material, need not warrant a contested case hearing where they can be adequately addressed through the public hearing process, (d) the proponent of the contested case hearing “must identify *contested* and material factual issues relative to a site permit that would aid the commission in making a final determination on the permit application, and would therefore require resolution in a contested case hearing,” *Id* at page 2 (emphasis in original). Moreover, the Commission required that the petitioner must provide an “indication that an evidentiary hearing with full due process protections would be helpful or would serve the public interest. *Id* at page 3.

In its order in the High Prairie case, the Commission did not touch upon the standards governing the written petition to be submitted to the Commission which, in addition to the above described elements of materiality and ability to aid the Commission in making a final determination specifically require that the proponent state “the reasons the hearing is required to resolve these issues....”

It is respectfully submitted that Petitioner has failed to state a case for a contested case hearing. The issues raised by Petitioner are, for the most part, not material issues but rather are generalized complaints about wind projects in Minnesota, the Midwest and perhaps worldwide. Moreover, Petitioner has failed to demonstrate, as required by this Commission in its High Prairie Order, that the issue, if material, justifies a contested case hearing, that the issues raised are within the scope of the permitting process, that the issues raised cannot be adequately addressed in the public hearing process and that a contested case hearing—with its “full due process protections”—would be helpful or would serve the public interest.

For the most part Petitioner has failed in the case of each “claimed” issue to posit an alternative plan.

We address these specific issues raised in the Petition as follows.

1. Demographics

Petitioner claims that the “demographics” of the site of the proposed project is somehow inappropriate “given the universe of possible sites” and that the Kenyon project area is somehow “more densely populated than a typical wind site in Minnesota.” The complaint is more commentary—and an unfair one at that—than an assertion of a material fact which should serve as a basis of a contested hearing. The claimed issue is wholly lacking in specificity. No information is given to support the claim. The terms “densely populated,” “typical wind site” and “university of possible sites” are not defined and appear more invective than helpful.

Petition ignores the fact that the area in which the wind project is sited is zoned agricultural and that Goodhue County planning criteria specifically contemplates wind development, limits residential development and advises residents that they “can expect agricultural, forestry and mining activities within the vicinity of their homes.” *See* Goodhue County Planning Policy, Element 5,

Goal 3. Indeed, wind development has long been identified as an agricultural activity in Minnesota and Federally.

2. Noise

Here as in the High Prairie Case previously considered by the Commission, the proponent of the contested case hearing asserts that the potential noise levels “are material facts at issue.” *See* Petition at 2-4. Although considerable verbiage is expended to address this issue, Petitioner once again fails to meet the standards for a contested case called for in the Rules. Specifically, Petitioner fails to address with specificity any material issues to be considered to be resolved in the siting permit. Petitioner is understandably concerned about the impact of noise generated by turbines utilized in the project. However, Petitioner has failed to articulate the basis for addressing this siting concern in a contested case hearing. Petitioner repeatedly states that the “issue of noise is a material issue.” That being the case, however, Petitioner fails to explain (a) the reasons why a hearing is required, (b) why a contested case hearing would aid the Commission in making a final determination, and (c) has presented no evidence that there is an alternative plan which the Commission should consider. Rather, Petitioner rambles on about potential “annoying” characteristics of the wind turbines without quantifying its concerns in any way.

Commission staff and the permitting process provide a meaningful method for the evaluation of noise concerns. Specifically, the position advocated by the Department of Commerce staff and adopted by this Commission in issuance of Kenyon Wind’s draft permit would require Kenyon Wind, upon the request of the Public Utilities Commission, to submit a proposal on the conduct of a noise study. Upon the approval of the Public Utilities Commission, Kenyon Wind would be required to carry out the noise study to determine the noise levels at various distances from the wind turbines and at various wind directions. *See* Draft Site Permit for Kenyon Wind, LLC at 12. The Commission can then apply quantitative state standards in the assessment of noise issue and if necessary mitigation of noise issues.

Petitioner would have this Commission evaluate noise issues in a contested case setting without first defining the material facts at issue in any quantifiable form. Petitioner fails to state why holding a contested case hearing would be aid the Commission in making a final determination of this issue. Kenyon respectfully submits the testing process addressed in the draft permit would far more “effectively” aid the Commission in addressing the noise issue. It appears that the gravamen of the complaint is the viability of Minnesota’s noise standards. This is not a siting issue and thus it is not a proper basis for ordering a contested case hearing.

3. Visual Impacts

Relying on testimony from Petitioner member, Michael Chase before this Commission on February 15, 2007, Petitioner flatly states that “the impact of the shadows and reflections of the turbines, sometimes called ‘flicker’ is a material issue of fact.” Once again, Petitioner labors under the misconception that the Rules governing the granting of a contested case hearing require only that one identify a “material issue of fact.” This Commission can properly take note that there are virtually thousands of wind turbines throughout the world that through shadows, reflections and may indeed “flicker.” Merely because Michael Chase, who holds himself out as an engineer, testified “that the flicker can cause “headaches, nausea and even seizures” does not make the claim scientific fact and most certainly does not make such claim a “material fact” within the meaning of

the Rule. Moreover, no effort is made by Petitioner why a contested case hearing will help resolve the claimed “flicker issue” and why a contested case hearing would aid the Commission in making a final determination on Kenyon Wind’s application for a permit. Perhaps, this is an aesthetics issue more than a scientific issue and as such does not require a contested case hearing. Indeed, neither Petitioner nor engineer Chase has presented evidence that “flicker” is a material scientific issue, nor do they propose an alternative plan which the Commission should consider. In the absence of a credible material issue and an appropriate alternative plan, a contested case hearing would provide no material benefit to the Commission in making its determination.

4. Public Services and Infrastructures.

Petitioner addresses six areas of concern under the heading of “Public Services and Infrastructure.” These areas of concern include:

- Traffic and roads
- Infrastructure decommissioning
- Public Safety and Indemnification
- Tax Revenues
- Aircraft Traffic
- Radio and Television Reception

All of these concerns can be addressed in the commissioning process, and each are specifically addressed in the draft site permit for Kenyon Wind, LLC previously approved by the Commission. In the case of each of the above-named concerns, Petitioner merely recites in conclusionary fashion that each constitutes “material issue.” Once again, as it has throughout its Petition, Petitioner fails to frame its remarks in a context of Minn. Rule 4401.0550. Specifically, in each case Petitioner fails to advance any reason why a hearing is required to resolve the above issues. Similarly, Petitioner fails to state why, as to each material issue of fact that holding a contested case hearing would somehow aid the Commission in making a final determination in Kenyon’s petition for a final permit. In each case, Petitioner has presented no evidence that there is an alternative plan which the Commission should consider. In the absence of an alternative plan, a contested case hearing would provide no material benefit in its decision making.

Traffic and roads issues presented by this project pose no new issues unique to the wind siting process. Presumably, every wind project built in the State of Minnesota has to address traffic and road issues. It is not feasible to grant a contested case hearing granted for every traffic and road issue posed by a wind siting project. Indeed, this issue is addressed in the draft site permit which requires Kenyon Wind to work with local government authorities to obtain the required permits regulating traffic and road issues.

Similarly, infrastructure decommissioning is claimed to be addressed inadequately in the permit application of Kenyon Wind. It is claimed, without more, that Kenyon has underestimated decommissioning costs. It is suggested that a decommissioning agreement apparently borrowed from a Butler County, Kansas, wind project should serve as the Commission’s model in this project. The issue of decommissioning has received considerable regulatory attention throughout Minnesota’s long history of wind generation. The draft site permit at pages 12 and 13 contains decommissioning requirements which, it is understood, has been applied to other wind projects.

Petitioner fails once again to state why a contested case hearing is required to aid the Commission in its final determination. It fails to state why an agreement borrowed from a Kansas wind project is somehow more in the public interest than the process tentatively adopted by this Commission in its draft site permit for this project. Lastly, it fails to state why a contested case hearing is needed to explore the relative merits the Kansas document vis-à-vis the Commission's document.

Public safety and indemnification issues are also dealt with in the draft site plan and have been addressed at length in the public hearing process. Petition makes much of the failure of Suzlon S88 installed Lake Wilson which failed in 2006. Of course, Petitioner makes no reference to the successful operation of Suzlon S88 turbine elsewhere, *e.g.*, in northern Missouri. The Petition provides gratuitous commentary of appropriateness of the Suzlon S88 generators stating "there are field upgrades that should be made, *i.e.*, a redundant breaking system to prevent catastrophic runaway conditions as above." It is submitted that the make, model and performance criteria of the wind generator to be used is not, for the most part, a legitimate siting concern. Moreover, in the public hearing in this matter a Suzlon representative testified that Suzlon has addressed problems of the S88 and is confident that the machine poses no public risk. Whether or not that is the case, the Commission's draft site permit can adequately address the concerns to public health and safety. And here, once again, Petitioner has failed to advance any reason why a contested case hearing these vague and ill-defined issues of public safety would aid the Commission in making a final determination on Kenyon's permit application. Similarly, Petition has presented no alternative plan which the Commission should consider. In the absence of an alternative plan, a contested case hearing would provide no material benefit to the Commission in making its final determination.

Petitioner also suggests that the issue of "local tax revenues" is somehow a material issue of fact. It is submitted that the question of tax revenues from the project is not a siting issue. Indeed, the issue is one governed by statute and in which state and local authorities have considerable expertise in applying the appropriate taxing standards. If Petitioner has a genuine concern in this area it is best addressed to the Minnesota legislature.

Regarding aircraft issues, claims that aircraft traffic constitutes a "material issue of fact" is pure conjecture. FAA permits have been applied for and are part of the permitting process. The fact that National Guard airplanes fly in the area or that crop dusters and ultra-lites take the air is no reason to convene a contested case hearing. And here, once again, Petitioner has failed to advance any reason why a contested case hearing these vague and ill-defined issues of air traffic would aid the Commission in making a final determination on Kenyon's permit application.

Impacts of radio and television reception and internet connections have been dealt with in the draft site permit granted by this Commission. The draft permit requires that studies be performed to determine if the turbine towers will cause disruption in radio and television signals and microwave beams. Kenyon Wind has either completed these tests or are in the process of obtaining tests. The draft permit requires that Kenyon Wind mitigate or correct any disturbances in radio and television reception and internet connections. Once again, Petitioner has failed to advance any reason why a contested case hearing of the issues of television and radio reception and internet connections which are dealt with in the draft permit would aid the Commission in making a final determination on Kenyon's permit application.

5. Geologic and Ground Water Resources—Surface Water and Flood Plain Resources

Once again the issues raised are raised in every rural wide development. Indeed, the draft site permit for Kenyon Wind specifically addresses these issues, and Kenyon Wind will be following the protocol directed by the site permit. Of course, it is in the Commission's discretion to modify the draft site permit. However, Petitioner fails to state that the common problem of ditch easements and drain tile work needs to be addressed by the Commission in a contested case hearing. Similarly, Petitioner has not presented any alternative plan which the Commission should consider. In the absence of an alternative plan, a contested case hearing would not provide any benefit to the Commission in making its final determination.

6. Wildlife

The Petition also suggests that, generally speaking, the impact of wind turbines on wildlife is a "material issue of fact." The allegation is conclusionary and fails to address any "material issue of fact" which this Commission should investigate in a contested case hearing. The draft site permit contemplates that Kenyon Wind will commission a wildlife survey, if needed. Indeed, Kenyon Wind has commissioned a wildlife survey by the Minnesota Department of Natural Resources. Should any issues of concern develop as a result of the study the Commission as within its authority the ability to direct mitigation and protection of wildlife in the project area. Generally speaking, the ability of wildlife to co-exist with wind generators is a matter of considerable current knowledge. The issue is not unique to the Kenyon Wind project, and the siting of this project in Kenyon and Cherry Grove Townships raise no issues which would benefit from a contested case hearing. Once again, Petitioner has failed to advance any reason why a contested case hearing would aid the Commission in making a final determination on Kenyon's permit application on the issue of wildlife.

Under the heading of "Wildlife" in the Petition, Petitioner suggests that Kenyon Wind has not addressed the "material fact of impact [sic] of project on property values." Petitioner advances a conclusionary statement that property values next to turbines decrease." There is no factual basis for this claim. In particular, Petitioner does not state why property value issues is a siting issue. As noted above, Goodhue County planning regulations contemplate that wind energy serves as a component of agriculture. This project is sited in an agricultural area as Petitioner must concede.

As it has through its Petition, Petitioner has wholly failed to address the reasons why a hearing is required to resolve real estate values and why a hearing would aid the Commission in making its final determination in Kenyon Wind's permit application. See Minn. Rule 4401.0550.

7. Stray Voltage

It is suggested that because landowner Keith Cook obtained a \$450,000 verdict in a 1993 case against Goodhue County Co-Op Electric Association that somehow "stray voltage is an issue in the area." It is respectfully submitted, that Petitioner failed to state with any credibility that "stray voltage"—a phenomenon which it does not define—is somehow an issue of material fact. As it has throughout its Petition, Petitioner has wholly failed to state why a contested case would be helpful in determining the existence of and the effect of stray voltage and why holding a hearing would aid the Commission in determining its final determination. Further, Petitioner again does not

set forth an alternative plan for this issue. Finally, while the issue of compensation is apparently very important to Petitioner it is not relevant whether the project should be granted a site permit.

8. Status of C-BED Project

The issue of whether Kenyon Wind qualifies as a C-BED project is not a siting issue. However, Kenyon Wind has received written confirmation from the Department of Commerce that it does indeed qualify as a C-BED project. Also, on April 17, 2007 the Goodhue County Board of Commissioners unanimously adopted a resolution supporting Kenyon Wind's eligibility as a C-BED project.

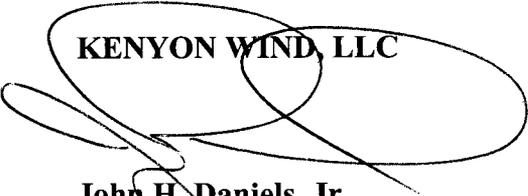
Conclusion

It is respectfully submitted that the Commission should deny the Petition for a contested case hearing. Petitioner has failed to apply the required statutory standard in making its request for a contested case hearing. For the most part, most of the issues raised are not material issues of fact but rather are commentaries. Petitioner has failed to advance reasons why a contested case hearing is required to resolve their "material issues" as required by rule. Most significantly, Petitioner has failed to demonstrate in each case why holding a hearing would aid the Commission in making a final determination on the permit application. Lastly, Petitioner uniformly to advance an alternative plan for each issue, and in the absence of a plan, a contested case hearing would provide not material benefit to the Commission in its decision making.

Dated: April 25, 2007.

Respectfully submitted,

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