

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE PUBLIC UTILITIES COMMISSION

In the Matter of the Application of AWA  
Goodhue Wind, LLC, for a Large Wind  
Energy Conversion System Site Permit  
for the 78 MW Goodhue Wind Project in  
Goodhue County

**ORDER ON MOTION FOR  
PROTECTIVE ORDER**

This matter came before Administrative Law Judge Kathleen D. Sheehy on the Motion for Protective Order filed by Goodhue County on February 17, 2011. The motion record closed upon receipt of the Applicant's response on February 21, 2011.

Jay T. Squires, Ratwik, Roszak & Maloney, P.A., 730 Second Avenue South, Suite 300, Minneapolis, MN 55402, appeared for Goodhue County.

Todd J. Guerrero and Christina K. Brusven, Fredrickson & Byron, P.A., 200 South Sixth Street, Suite 4000, Minneapolis, MN 55402-1425, appeared for AWA Goodhue Wind, LLC (Applicant).

Based upon the materials submitted, and for the reasons explained in the attached Memorandum, the Administrative Law Judge makes the following:

**ORDER**

1. The County's Motion for Protective Order is **GRANTED**; and
2. The Applicant is precluded from taking depositions of Goodhue County Commissioners in this matter.

Dated: February 22, 2011

s/Kathleen D. Sheehy  
KATHLEEN D. SHEEHY  
Administrative Law Judge

## MEMORANDUM

On or about February 14, 2011, the Applicant served Notices of Taking Deposition of Daniel Rechtzigel and Richard Samuelson, both of whom are Goodhue County Commissioners. The deposition notices provided that the depositions were to take place on February 22, 2011. On February 17, 2011, the County filed this motion for a protective order.<sup>1</sup>

The County argues that deposing the commissioners would impermissibly intrude upon their mental decision-making processes and that their legislative actions cannot be the basis for any discovery. It also argues that the thought processes of individual commissioners are irrelevant in this matter.

The Applicant argues that the depositions are an appropriate way to obtain evidence about the health, safety, or public policy considerations that support the Goodhue Wind Ordinance adopted by the County. The Applicant also argues that the County entered this fray voluntarily by intervening and that it must respond to reasonable discovery, as would any other party. Finally, the Applicant contends that depositions of the commissioners are permissible because the Applicant is not seeking to overturn the ordinance, but seeks only to learn what materials were considered before these commissioners voted. The Applicant has offered to limit the depositions to 1.5 hours each and has attached its proposed questions as Attachment A to its response. The proposed questions ask for the identification of documents or other information that provide a scientific, health, or safety basis for the ten-rotor diameter setback, the stray voltage testing requirements, the wetlands setback, and the property line setback contained in the ordinance.<sup>2</sup>

### Legal Standard

The rules of the Office of Administrative Hearings specify that any means of discovery available under the Rules of Civil Procedure for the District Court of Minnesota is allowed and authorize the filing of motions to compel. The rules further state that a party bringing a motion to compel must show the discovery is needed for the proper presentation of its case, is not for delay, and the issues or amounts in controversy are significant enough to warrant the discovery. The party resisting discovery may raise any objections that are available under the Minnesota Rules of Civil Procedure, including lack of relevancy and privilege.<sup>3</sup>

In addition, Minn. R. 1400.6700, subp. 4, authorizes the Administrative Law Judge to issue a protective order as justice requires, “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or

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<sup>1</sup> The County has referred to the deposition notices as “subpoenas” and also seeks to “quash” the subpoenas. The deposition notices are not subpoenas, and no motion to quash is necessary.

<sup>2</sup> See Minn. R. Civ. P. 26.02 and Minn. R. 1400.6300.

<sup>3</sup> Minn. R. 1400.6700, subp. 2.

expense” due to a discovery request. The Minnesota Rules of Civil Procedure similarly provide that, for good cause shown, the court may make any order “which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”<sup>4</sup>

The Minnesota Public Utilities Commission initiated this contested case hearing to develop a record for the purpose of determining whether certain provisions of Goodhue County’s Ordinances on Wind Energy Conversion Systems should be applied to large wind energy conversion systems (LWECS) in Goodhue County; whether there is good cause, as that term appears in Minn. Stat. § 216F.081, to not apply the standard to LWECS in Goodhue County; and whether there is sufficient evidence regarding health and safety to support the 10-rotor diameter setback for nonparticipating residents and the stray voltage requirements contained in the ordinance. As the Administrative Law Judge has stated in the past, this contested case is not a due process challenge to the validity of the ordinance.<sup>5</sup> The County has intervened as a party in this case for the purpose of supporting its ordinance and encouraging the Commission to apply the ordinance standards to the Applicant.

Much of the case law cited by the County is inapposite here, because it involved attempted discovery of the mental processes of agency decision-makers in the course of a legal challenge to the agency’s final decision. Courts have concluded in those cases that limited written discovery may be permissible to determine whether certain procedural steps were appropriately followed, but that depositions of the decision-makers were generally impermissible.<sup>6</sup> In this case, the County is a party to litigation, and it is obligated to respond to legitimate discovery requests that are calculated to lead to the discovery of admissible evidence. The areas outlined in Attachment A—which seek the identification of documents and information that provide the scientific, health, or safety basis for the ordinance standards at issue—are legitimate areas of inquiry.

The problem, however, is that the Applicant has aimed its discovery efforts at the individual county commissioners, as opposed to the County itself, and it seeks the information in an expensive and burdensome format. The views of two individual county commissioners, and the documents or information they reviewed or did not review before voting on the ordinance, are not relevant. Moreover, requiring the County to identify the information providing the scientific, health, or safety basis for the ordinance standards through an elected county commissioner, in the course of a deposition, instead of in response to document requests or interrogatories, is an unreasonable use of public resources. As the

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<sup>4</sup> Minn. R. Civ. P. 26.03.

<sup>5</sup> First Prehearing Order (Dec. 8, 2010).

<sup>6</sup> *Mampel v. Eastern Heights State Bank of St. Paul*, 254 N.W.2d 375 (Minn. 1977) (appeal of commerce commissioner’s decision to grant a certificate of authority); *In the Matter of the Application of Lecy*, 304 N.W.2d 894 (Minn. 1981) (appeal of commerce commissioner’s decision to issue certificate of authority); *In the Matter of the Application for Combined Air and Solid Waste Permits*, 483 N.W.2d 105 (Minn. App. 1992) (appeal of MPCA decision to deny permits).

Minnesota Court of Appeals reasoned in issuing a writ of prohibition to preclude the deposition of the Commissioner of Labor and Industry, “[c]onsidering the volume of litigation to which the government is a party, a failure to place reasonable limits upon private litigants’ access to responsible governmental officials as sources of routine pretrial discovery would result in a severe disruption of the government’s primary function.”<sup>7</sup>

The County’s motion for a protective order is accordingly granted. The Applicant may seek the information described above through other, less burdensome, discovery methods.

K.D.S.

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<sup>7</sup> *Ellingson & Associates v. Keefe*, 396 N.W.2d 694, 696-97 (Minn. App. 1987), citing *Community Federal Savings & Loan v. Federal Home Loan Bank*, 96 F.R.D. 619, 621 (D.D.C. 1983).