STATE OF IOWA
DEPARTMENT OF COMMERCE
BEFORE THE IOWA UTILITIES BOARD

IN RE: THE PETITION OF	)	
	)	
BERTHA MATHIS and STEPHEN MATHIS	)	Docket No. DRU-2017-0003
	)	
	)	
FOR A DECLARATORY ORDER ON WHETHER A CERTIFICATE OF PUBLIC CONVENIENCE, USE AND NECESSITY IS REQUIRED FOR A WIND ENERGY PROJECT IN PALO ALTO COUNTY, IOWA.	)	PETITIONERS' BRIEF

Come now the Petitioners and hereby submit the following Brief:

INTRODUCTION

MidAmerican Energy Company is developing a wind energy project in Palo Alto County that consists of at least 170 wind turbines, each with a nameplate capacity of 2 MW. Palo Alto Wind Energy is a company that has contracted with MidAmerican Energy to undertake the preliminary steps in developing the project, including acquisition of land and obtaining required permits. MidAmerican Energy will own and operate the project.

The Petitioners live near the proposed wind energy project and will be impacted by the project in the use and enjoyment of their property. They are also concerned about the environmental impacts of the project. The Iowa Department of Natural Resources and the Iowa State Archaeologist have identified environmental and historic resources that would be impacted by the project. A copy of the letters from the Iowa DNR and the State Archaeologist

are hereto attached as Exhibits 1-3. There are also land use issues that need to be addressed because this project is crowding at least 170 wind turbines into a site among 167 residences. A copy of the site plan for the project is hereto attached as Exhibit 4.

On October 13, 2017, the Petitioners, along with five of their neighbors, filed a civil lawsuit in Palo Alto County District Court (the "Palo Alto Case") seeking a declaratory judgment that Palo Alto Wind Energy and MidAmerican Energy are required to obtain a certificate of public convenience, use and necessity from the Board for the project pursuant to Iowa Code Chapter 476A.

An application by MidAmerican and Palo Alto Wind Energy for a certificate of public convenience, use and necessity would enable the Board to evaluate the project to ensure that it "will be consistent with reasonable land use and environmental policies and consonant with reasonable utilization of air, land and water resources, considering available technology and the economics of available alternatives." Iowa Code § 476A.6(3).

MidAmerican and Palo Alto Wind Energy take the position that they do not need to apply for a certificate of public convenience, use and necessity because of the Board's rulings in prior declaratory orders. In those prior declaratory orders, beginning with Zond Development Corporation, DRU-97-5, the Board determined that if the wind turbines connected to a single gathering line produce

less than 25 MW of power, a certificate of public convenience, use and necessity is not required. In those orders, however, the Board did not provide any basis or explanation why the gathering line was chosen as the threshold for determining whether a certificate is required.

In the Palo Alto Case, MidAmerican and Palo Alto Wind Energy filed a motion to dismiss, claiming that the plaintiffs in that case must seek a declaratory order from the Board in order to exhaust administrative remedies. While the plaintiffs in the Palo Alto Case resisted that motion, out of an abundance of caution, the Petitioners have filed the Petition for Declaratory Order in this docket should it be so required to exhaust administrative remedies.

STANDARDS GOVERNING DECLARATORY ORDERS

Pursuant to Iowa Code 17A.9(1)(a) "[a]ny person may petition an agency for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the agency." Section 17A.9(b)(2) states, however, "an agency shall not issue a declaratory order that would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding."

Pursuant to 199 I.A.C. 4.9(1), the Board may refuse to issue a declaratory order if:

1. The question does not substantially comply with the required form.

2. The petition does not contain facts sufficient to demonstrate that the petitioner will be aggrieved or adversely affected by the failure of the utilities board to issue an order.

3. The utilities board does not have jurisdiction over the questions presented in the petition.

4. The questions presented by the petition are also presented in a current rule making, contested case, or other agency or judicial proceeding, that may definitively resolve them.

5. The questions presented by the petition would more properly be resolved in a different type of proceeding or by another body with jurisdiction over the matter.

6. The facts or questions presented in the petition are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue an order.

7. There is no need to issue an order because the questions raised in the petition have been settled due to a change in circumstances.

8. The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely upon prior conduct in an effort to establish

the effect of that conduct or to challenge an agency decision already made.

9. The petition requests a declaratory order that would necessarily determine the legal rights, duties, or responsibilities of other persons who have not joined in the petition, intervened separately, or filed a similar petition and whose position on the questions presented may fairly be presumed to be adverse to that of the petitioner.

MIDAMERICAN ENERGY HAS PREVENTED THE BOARD FROM ISSUING A DECLARATORY ORDER IN THIS CASE

In its Petition for Intervention MidAmerican Energy stated in Paragraph 15 of the Petition, "MidAmerican does not consent to be bound by any determination in this proceeding that is inconsistent with the Board's prior determinations relating to Iowa Code Chapter 476A."

As noted in the preceding section of this Brief, Iowa Code § 17A.9(b)(2) precludes the Board from issuing a declaratory order if a necessary party does not consent to "the determination of the matter by a declaratory order proceeding." There does not appear to be any flexibility in that prohibition. Section 17A.9(b)(2) clearly says that the Board "shall not" issue a declaratory order unless a necessary party consents.

So, unfortunately, MidAmerican is preventing the Board from issuing a declaratory order in response to the Petitioners' Petition, even as MidAmerican in the district court action has argued that the Petitioners must proceed with a declaratory order petition to exhaust administrative

remedies. MidAmerican is attempting to place the Petitioners in a Catch-22 dilemma.

A FACILITY AS DEFINED IN IOWA CODE § 476A.1(5) IS THE ENTIRE WIND PROJECT IN THIS CASE AND NOT JUST THE TURBINES CONNECTED TO A SINGLE GATHERING LINE

Although MidAmerican's lack of consent to this proceeding prevents the Board from acting on the Petitioners' Petition, in order to ensure that they have exhausted their administrative remedies, the Petitioners will present argument as to why the Board should determine that an entire wind energy project, not just the turbines connected to a single gathering line, is a facility as defined in Iowa Code § 476A.1(5).

Pursuant to § 476A.1(5) a facility includes a "combination of plants at a site" with a total output of at least 25 MW. In Zond Development Corp. and declaratory orders adopting the Zond holding, the Board has determined that the "site" referred to in § 476A.1(5) is the turbines on a single gathering line. But in Zond the Board did not explain why the gathering line was chosen as the basis for determining what is a site. The Board simply said:

> The Board does not believe, in these cases, that the word "site" refers to a 15 or 20 square mile area. However, the Board also does not believe "facility" refers only to a single wind turbine." In these cases involving AEP wind energy projects built to help satisfy investor-owned utilities' statutory AEP purchase obligation, the Board believes "facility" refers to the wind turbines connected to a common gathering line.

So the Board acknowledged that a single turbine would not be a site. But then the Board arbitrarily said that a

site does not refer to the entire area of the wind project. However, the Board did not say why the entire area would not be a site. The definition in § 476A.1(5) clearly says that a facility includes a combination of plants at a single site. There is nothing in that definition that would limit a site to a gathering line. The gathering line concept was definitely an arbitrary decision by the Board.

The Board in Zond did refer to the Iowa Supreme Court decision in Reid v. Ia. State Commerce Comm., 357 N.W.2d 588 (Iowa 1984). In Reid the court interpreted § 476A.1(5) to mean that the 25 MW threshold applies to "all of the components of a facility even when the components are geographically separated." Id. at 590. In Reid the court held that a landfill located some 6 or 7 miles from an electric generating plant was part of the "facility" for purposes of requiring a certificate of public convenience, use and necessity.

The Board said in Zond that the Reid case meant that the landfill and the generating plant would not have been a single site. In fact, the court in Reid said just the opposite. The court held that the plant and the landfill constituted a facility. In any event, the Reid case does not answer the question of whether the gathering line or the entire project area is a site.

In order to properly interpret the definition of facility in § 476A.1(5) it is appropriate to examine the legislative intent in defining what is a facility. It is

apparent that the legislative intent is to require a certificate of public convenience, use and necessity for electric power generation of an industrial scale. That is why a combination of plants is included in the definition of facility in § 476A.1(5). It would make no sense in terms of the legislative intent to allow a wind energy project of 170 turbines clustered together on contiguous land and constructed at the same time to be carved up into very small units of less than 25 MW for the sole purpose of evading the certificate requirement.

In addition, the court in Reid quoted the legislative intent as follows:

> This bill establishes a consolidated hearing procedure for the siting, construction, operation and maintenance of electric power generating facilities and certain associated transmission lines. . . . This bill requires the filing of one application resulting in a single proceeding.

Reid, 357 N.W.2d at 591. The court found that the legislative intent demonstrated by this language was to have a unitary proceeding to cover geographically separated components of a facility. Id. So, likewise, all of the turbines in a contiguous wind energy project should be taken together as one proceeding, not chopped up into gathering line parts that the project owner would use to evade the certificate requirement.

Legislative intent is further demonstrated by considering the statutory criteria for issuing a certificate of public convenience, use and necessity set forth in Iowa Code § 476A.6(3). One of those criteria is

that "[t]he construction, maintenance, and operation of the facility will be consistent with reasonable land use and environmental policies and consonant with reasonable utilization of air, land, and water resources, considering available technology and the economics of available alternatives." It is clear, therefore, that the legislature intended for the Board to be able to evaluate the environmental impacts of a facility. The Board cannot make that evaluation if a wind project developer can evade the requirement by considering each gathering line as a site.

MidAmerican and Palo Alto Wind Energy have effectively admitted that if the Board were to evaluate the environmental impacts listed in §476A.6(3) the Palo Alto wind project would not receive a certificate of public convenience, use and necessity. In other words, the environmental impacts of this project are such that the project should not proceed. MidAmerican, in Paragraph 14 of its Petition for Intervention, states that wind energy projects would be adversely impacted if the Board grants the declaratory order requested by the Plaintiffs.

Palo Alto Wind Energy, in Paragraph 5 of its Petition for Intervention, states that a declaratory order requiring an evaluation of the entire project would interfere with or increase the regulatory burden on future wind energy projects. In other words, wind energy project developers could not evade the requirements of § 476A.6(3). Iowa Environmental Council and Environmental Law and Policy

Center also weighed in by their Petition for Intervention. They said, in Paragraph 5, that a review by the Board of the entire wind energy project would have a significant impact on the policy framework supporting renewable energy in Iowa.

Rather than allowing wind energy developers to evade the review contemplated by § 476A.6(3), the Board should accept its responsibility to ensure that environmental impacts are considered. Accepting that responsibility would not contradict the legislative policy of encouraging renewable energy. It would simply ensure that renewable energy development is consistent with other environmental goals. There is nothing in Chapter 476A that exempts renewable energy projects from the legislative intent of that chapter for the Board to consider the environmental goals set forth in § 476A.6(3). Likewise, there is nothing in Chapter 476 that would indicate a legislative intent that the goals of encouraging renewable energy would take precedence over the provisions of Chapter 476A.

In the Zond order the Board also relied on a regulation of the Federal Energy Regulatory Commission (FERC). That regulation, 18 C.F.R. § 292.204(a)(2), which uses a one-mile radius for defining a facility, must be read in conjunction with 18 C.F.R. § 292.204(a)(1), which sets a limit on the size of small power production facilities to be qualifying facilities. The point of the

FERC regulations is to restrict the size of the facility so it can be classified as a small power production facility.

Since the FERC regulations apply to small power production facilities, those regulations have no relevance to an industrial scale wind energy project. In other words the purpose of the FERC regulations is to put a cap on the size of a facility that would qualify as a small power production facility. The purpose of the definition of facility in § 476A.1(5) is to ensure that the entire production system is subject to the requirement for a certificate of public convenience, use and necessity.

The position of MidAmerican and Palo Alto Wind Energy is that Zond and other Board orders following Zond establish a well-settled precedent that cannot be overturned. However, following the Board's issuance of the Zond order, and in response to subsequent wind energy project requests for declaratory orders, the Board has simply cited Zond as precedent without any further discussion or reconsideration of the Zond order. Apparently no one, until now, has ever questioned the correctness of the Zond order. Therefore, the position of MidAmerican and Palo Alto Wind Energy that this is a well-settled precedent is tenuous at best and does not hold up in light of Petitioners' arguments presented herein.

The facts surrounding the Palo Alto County wind project in particular also call into question using the gathering line as the basis for determining what is a

facility. The entire 170-turbine project has been developed as a single project to be constructed at the same time on contiguous parcels of land. The application filed with Palo Alto County by Palo Alto Wind Energy (Ex. 5, p. 10) recites that "[t]he site plan is attached as Appendix A (for the entire project)." Appendix A of the application clearly shows that the site is the area for the entire 170 turbines (Ex. 6). So MidAmerican and Palo Alto Wind Energy have effectively admitted that the site is the area of the entire project.

Another important point is that there is nothing in the application or appendices that refers to the gathering lines as the determination of what is a site. Throughout the application and appendices the site is considered to be the area of the entire project. There is no justifiable reason therefore to arbitrarily use the gathering line as the basis for defining a facility site.

The Board's regulation, 199 I.A.C. § 24.2, defines "site" as "the land on which the generating unit of the facility, and any cooling facilities, cooling water reservoirs, security exclusion areas, and other necessary components of the facility, are proposed to be located." This is clearly meant to be an expansive definition, taking into its ambit every aspect of the facility. It also infers that "facility" is more than just a "generating unit of the facility." That further confirms the expansive nature of the term "site."

It is also instructive to review the Board rule on the requirements for an application for a certificate of public convenience, use and necessity. 199 I.A.C. § 24.4(1)(e) requires in the application a general description of the proposed facility including a description of "the portion (in MW) of the design capacity of the proposed facility which is proposed to be available for use by each participant." A "participant" is defined in 199 I.A.C. § 24.2 as "any person who either jointly or severally owns or operates a proposed facility." Therefore, since MidAmerican will own and operate the entire Palo Alto wind project, it is the participant, and pursuant to the required description of the facility, it is the entire project that is the facility available to the participant.

Additionally, § 24.4(1)(e) states that "a group of several similar generating units operated together at the same location such that segregated records of energy output are not available shall be considered as a single unit." This statement further clarifies that all generating units are to be treated as a single unit.

Upon further review of § 24.4(1), subsection (h) is related to interconnection with the transmission system. In that regard, that subsection requires "[a] system impact analysis performed by the operator of the transmission system with which the facility will be interconnected, as well as any analysis, . . . , concerning the impact of the facility on the area grid." This statement clearly shows

that the entire Palo Alto wind project is the facility since the whole project will be a single interconnection with the transmission grid.

199 I.A.C. § 24.4(4) requires the applicant for a certificate of public convenience, use and necessity to set forth information related to the selection of the proposed site for the facility, including the general criteria used to select alternative sites and how these criteria were used to select the proposed site. This requirement is significant in the way it applies the terms "site" and "facility." If the site and the facility were just the few turbines on a single gathering line, there would be no alternative sites to be considered. This is because the turbines on a gathering line could not be moved to an alternative site and still be part of the entire project. The only way there could be alternative sites for the facility is if the facility is the entire project.

Finally, the definition of facility in § 476A.1(5) includes "those associated transmission lines connecting the generating plant to either a power transmission system or an interconnected primary transmission system or both." In wind energy projects the power transmission system is the line that connects the wind power plants to the utility grid. The interconnected primary transmission system is the high-voltage utility grid system that enables transmission of electrical energy within the system's coverage area. Both of these systems clearly go beyond the gathering

lines. Therefore, a facility, if it includes the power and primary transmission systems cannot be limited to the turbines on a single gathering line. The legislative intent in defining the term "facility" was clearly an expansive definition which cannot be limited to a single gathering line.

THERE IS NO REASON TO BELIEVE THAT A DECLARATORY ORDER AS REQUESTED BY THE PETITIONERS WOULD CONFLICT WITH IOWA'S POLICY OF ENCOURAGING RENEWABLE ENERGY

The Intervenors apparently contend that a declaratory order as requested by the Petitioners herein would strike a blow against the development of wind energy in Iowa. There is no proof of that assertion. Treating an entire wind energy project as the facility requiring a certificate of public convenience, use and necessity would simply mean that the Board would review the environmental impacts of the proposed project. Why do the Intervenors assume that such an environmental review would preclude the development of a wind project? And if the environmental impacts weigh against development of the project, why should the project be allowed to proceed?

IEC and ELPC, in Paragraph 6 of their Petition for Intervention, state that they "are supportive of the development of renewable energy generation and want such project to be developed in a cost effective, replicable, and environmentally sustainable manner." (emphasis added). That is exactly what the Petitioners want. That is exactly

what a declaratory order as requested by the Petitioners would ensure.

CONCLUSION

The definition of facility in Iowa Code § 476A.1(5), the use of the terms "facility" and "site" in the Board's rules, a careful reading of the decision in Reid v. Ia. State Commerce Comm., a reconsideration of the Zond declaratory order and its progeny, and giving effect to the legislative intent of Chapters 476 and 476A all lead to the conclusion that a facility with respect to wind energy projects is the turbines in the entire project, not just the turbines on a single gathering line. The Board should not be afraid to revisit its prior orders in light of the arguments presented by the Petitioners in this docket. A precedent is never so well-settled that it cannot be reconsidered based on new information or changing circumstances.

If the Board decides that it cannot issue a declaratory order because, pursuant to Iowa Code § 476A.6(3), MidAmerican does not consent, the Petitioners request a dispositive order from the Board so the Petitioners can show the district court that they have exhausted administrative remedies.

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