

STATE OF IOWA
DEPARTMENT OF COMMERCE
BEFORE THE IOWA UTILITIES BOARD

<p>IN RE:</p> <p>BERTHA MATHIS and STEPHEN MATHIS</p> <p>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.</p>	<p>DOCKET NO. DRU-2017-0003</p>
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**INITIAL BRIEF OF THE
OFFICE OF CONSUMER ADVOCATE**

The Office of Consumer Advocate (OCA), a division of the Iowa Department of Justice, responds as follows to the Petition for Declaratory Order (Petition) filed by Bertha Mathis and Stephen Mathis on December 5, 2017, in accordance with the procedural schedule established by the Iowa Utilities Board (Board) in its Order Giving Notice of Petition for Declaratory Order and Setting Comment Schedule issued December 8, 2017.

INTRODUCTORY COMMENTS

The function of a declaratory order is to provide “reliable advice from an agency as to the applicability of unclear law.” Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, The Rulemaking Process*, 60 Iowa Law Rev. 731, 805 (1975). Iowa Code § 17A.9 (2011) contemplates declaratory orders by administrative agencies on a disclosed set of facts. *City of Des Moines v. P.E.R.B.*, 275 N.W.2d 753, 758 (Iowa 1979). A declaratory order enables the public to secure definitive binding advice as to the applicability of agency-enforced law to a particular set of facts. Bonfield at 822-23.

It is not the function of a declaratory order to resolve issues involving factual analysis “too complicated to handle outside of an actual adjudication.” Bonfield at 807. A declaratory order is not a “contested case” as defined in Iowa Code § 17A.2(5); namely, it is not an evidentiary hearing which is also an administrative remedy set forth in Iowa Code chapter 17A (2011). Consequently, the issues raised in the Petition should be viewed by the Board as questions of law applicable to future factual situations identical to those disclosed in the Petition.

FACTS

OCA recognizes the facts contained in the Petition as paragraph 1 and Iowa Code §§ 476A.1(5) and 15 as the particular set of facts and law the subject matter of this Declaratory Order and to which the legal analysis can be applied in future factual identical situations.

1) A facility that requires a certificate of public convenience, use and necessity from the Board is defined by Iowa Code § 476A.1(5) as “any electric power generating plant or a combination of plants at a single site, owned by any person, with a total capacity of twenty-five megawatts of electricity or more.”

2) 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. The total combined output of the project is therefore 340 MW. Although chapter 476A of the Iowa Code requires that any facility, which is an electric power plant or combination of plants at a site, producing at least 25 MW of power, must obtain a certificate of public convenience, use and necessity from the IUB, MidAmerican relies on prior declaratory orders of the Board that a facility is the amount of wind turbine capacity on a single gathering line. Petitioners believe that the entire project site should be the basis for defining a facility. (Petition at paragraph 1).

3) The Board, pursuant to Iowa Code § 476A.15, if it determines that the public interest would not be adversely affected, may waive any of the requirements of this subchapter.

ISSUE

- I. Can a wind energy project be divided into multiple gathering lines with a total capacity of twenty-five megawatts of electricity or less to avoid requesting a certificate pursuant to Iowa Code § 476A.2?**

REQUESTED ANSWER

OCA requests the Board to answer the question in the following way: A wind energy project with a total of twenty-five megawatts of electricity or more is required to file for a certificate pursuant to Iowa Code §476A.2. The Board has the authority to waive any of the requirements of chapter 476A for persons filing for a certificate of public convenience. Dividing the wind energy project into multiple gathering lines of twenty-five megawatts of electricity or less does not avoid the requirement to request a certificate.

ARGUMENT

- I. Can a wind energy project be divided into multiple gathering lines with a total capacity of twenty-five megawatts of electricity or less to avoid requesting a certificate pursuant to Iowa Code § 476A.2?**

- A. A facility requires a certificate of public convenience if it has a total capacity of twenty-five megawatts of electricity or more.

OCA recognizes that the Board has previously determined that a large wind project could be divided in a manner to allow it to avoid requesting a certificate pursuant to Iowa Code § 476A.2 (2017). (DRU-03-3 and WRU-08-45-150). OCA asks the Board to reconsider that determination. Allowing large wind projects to be divided into multiple gathering lines to avoid certification has created configuration maximums. The Board recognized this when IPL exceeded the 25 MW standard in 2008. The Board stated “IPL could easily reconfigure the

Franklin Project to avoid the requirement altogether (although this might adversely affect the Franklin's Project's economics)." *Interstate Power and Light Company*, WRU-08-45-150, Order at 6. In fact the adverse economic impact was visible recently in a Board filing. Turtle Creek Wind Farm LLC (Turtle Creek) filed a Withdrawal of a Request for a Waiver of Generating Certificate Requirements. (*In Re Turtle Creek Wind Farm LLC*, Docket No. WRU-2017-0023-4472.) Turtle Creek decided that it was better to increase the cost of the project \$2,875,000 by manipulating multiple gathering lines rather than comply with the regulatory requirements of chapter 476A. (Turtle Creek Withdrawal at 2.) All costs are ultimately passed on to consumers.

The Board must no longer look at form over substance. In this proceeding, a wind energy project is being developed in Palo Alto County that consists of at least 170 wind turbines, each with a nameplate capacity of 2 MW. The total combined output of the project is approximately 340 MW. (Petition at paragraph 1). Iowa Code § 476A.1(5) defines a facility that requires a certificate of public convenience, use and necessity from the Board as "any electric power generating plant or a combination of plants at a single site, owned by any person, with a total capacity of twenty-five megawatts of electricity or more." The wind energy project in Palo Alto County is a facility with a total capacity of twenty-five megawatts of electricity or more. A wind energy project with a total of twenty-five megawatts of electricity or more is required to file for a certificate pursuant to Iowa Code §476A.2. The owner of the wind energy project should file for a certificate of public convenience. Any other interpretation prevents notice and opportunity for participation by interested parties and affected owners of real property, and defeats the purpose of the chapter. Iowa Code § 476A.4 (2017).¹

¹ OCA agrees with the Board that notice by publication may be appropriate in these types of proceedings. *Interstate Power and Light Company*, WRU-08-45-150, Order at 6.

- B. The Board may determine that the public interest would not be adversely affected and waive any of the requirements of chapter 476A.

The requirement that a person file a certificate of public convenience does not dictate that the Board hold a hearing. The Board has the authority to determine that the public interest would not be adversely affected and waive any of the requirements of chapter 476A. Iowa Code § 476A.15 (2017). If a certificate is requested and notice is provided to interested parties, the Board will have all the information necessary to waive a hearing if the public interest is not adversely affected. The Board has the authority to waive any of the requirements of chapter 476A for persons filing for a certificate of public convenience.

- C. The current practice of dividing a wind energy project into multiple gathering lines with a total capacity of twenty-five megawatts of electricity or less to avoid requesting a certificate pursuant to Iowa Code § 476A.2 increases costs to customers.

Allowing wind projects in excess of twenty-five megawatts of electricity to avoid the statutory requirements by dividing the energy project into multiple gathering lines with a total capacity of twenty-five megawatts of electricity or less creates an incentive to avoid regulation at a cost to customers. (Turtle Creek Withdrawal at 2.) The statute does not allow for avoidance, and the Board should clearly provide direction that a wind energy project cannot be divided into multiple gathering lines of twenty-five megawatts of electricity or less to avoid the requirement to request a certificate.

CONCLUSION

OCA requests the Board to issue a Declaratory Order finding: A wind energy project with a total of twenty-five megawatts of electricity or more is required to file for a certificate pursuant to Iowa Code §476A.2. The Board has the authority to waive any of the requirements of chapter 476A for persons filing for a certificate of public convenience. Dividing the wind energy project into multiple gathering lines of twenty-five megawatts of electricity or less does not avoid the requirement to request a certificate.

Respectfully submitted,

/s/ Mark R. Schuling_____

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