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August 4, 2009

via email and mail

RECEIVED

AUG 05 2009

PUBLIC SERVICE COMMISSION

Mr. Darrell Nitschke
Executive Director
NORTH DAKOTA PUBLIC
SERVICE COMMISSION
12th Floor, State Capitol
600 E. Boulevard Ave., Dept. 408
Bismarck, ND 58505-0480

Dear Mr. Nitschke:

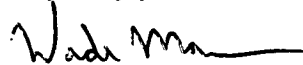
In re:

M-Power, LLC
Electric Generation/Wind-Griggs/Steele County
Siting Application
Case No. PU-08-34

M-Power, LLC/Ashtabula Wind II, LLC
Transfer of Site Certificate
Siting Application
Case No. PU-09-221

Enclosed for filing please find Ashtabula Wind II, LLC's Objection to Petition for Rehearing of Jim and Mary Ann Miller.

Very truly yours,



WADE C. MANN

bw
Enc.

cc: Jerry Lien

28 **PU-09-221** Filed: 8/5/2009 Pages: 18
**Objection to Petition for Rehearing of Jim and Mary
Ann Miller, et-al**

Ashtabula Wind II, LLC

Wade Mann, Atty Crowley Fleck PLLP

150 **PU-08-34** Filed: 8/5/2009 Pages: 18
**Objection to Petition for Rehearing of Jim and Mary
Ann Miller, et-al**

Ashtabula Wind II, LLC

Wade Mann, Atty Crowley Fleck PLLP

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

M-Power, LLC
Electric Generation/Wind-Griggs/Steele County
Siting Application

Case No. PU-08-34

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Siting Application

Case No. PU-09-221

**ASHTABULA WIND II, LLC'S OBJECTION
TO PETITION FOR REHEARING OF JIM AND MARY ANN MILLER, ET. AL.**

Pursuant to North Dakota Century Code § 49-22-19, § 28-32-40 and North Dakota Administrative Code § 69-02-06-02, Ashtabula Wind II, LLC ("Ashtabula Wind II") respectfully submits this Objection to the Petition for Rehearing in Case No. PU-08-34, dated July 23 ("Miller Petition"). The petition was signed by Jim and Mary Ann Miller and numerous other individuals from around the state of North Dakota and one individual from Arizona. Although no affidavit or certificate of service was included, the petition was mailed to Ashtabula Wind II by Jim and Mary Ann Miller and received July 30, 2009. Because none of the signatories to the petition is a party and the petition was mailed by Jim and Mary Ann Miller, this objection is being served on the Millers.

In objecting to this Petition, Ashtabula Wind II incorporates and makes part of this objection, its argument and legal analysis from its Objection to the Petition for Re-evaluation of Setbacks from Dwellings in Wind Farm, dated July 15, 2009, in Case No. PU-08-34, signed by Senator Tim Mathern of Fargo, North Dakota ("Mathern Petition") and Petition for Hearing and

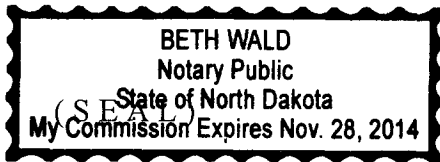
Reevaluation of High Risk Wind Turbines signed by Gerald and Connie Stokka of Cooperstown, North Dakota (“Stokka Petition”). Ashtabula Wind II’s objection to these petitions was filed with the Public Service Commission (“Commission”) on July 27, 2009 and a copy of the objection is attached as Exhibit A to this objection and is herewith served upon Jim and Mary Ann Miller.

None of the Miller Petitioners are a party to Case No. PU-08-34. A “party” means “each person named or admitted as a party or properly seeking and entitled as of right to be admitted as party.” N.D.C.C. § 28-32-01(8). Although some of the petitioners attended and offered testimony at the public hearing in Case Nos. PU-08-34 and PU-09-221, none of these individuals exercised their statutory right to intervene and become a party.

Both statute and Commission rules allow for interested persons to intervene in a matter. N.D.C.C. § 28-32-28; N.D.A.C. § 69-02-02-05. “Any person with a substantial interest in a proceeding may petition to intervene in that proceeding by complying with this section. An intervention may be granted if the petitioner has a statutory right to be a party to the proceeding; or the petitioner has a legal interest which may be substantially affected by the proceeding, and the intervention would not unduly broaden the issues or delay the proceeding.” N.D.A.C. § 69-02-02-05.

Despite the fact that these individuals failed to exercise their right to seek intervention, they were still afforded a full and fair opportunity to appear and testify at the public hearing. Their issues have been reviewed and considered by the Commission. However, “the PSC is limited to the statutory authority given it by the legislature.” Application of Nebraska Public Power District, 330 N.W.2d 143, 147 (N.D. 1983). The “statutory authority” of the Commission

Subscribed and sworn to this 4th day of August, 2009.



Beth Wald

Beth Wald, Notary Public
Burleigh County, North Dakota
My Commission Expires 11/28/14

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was on the 4th day of August, 2009, mailed to the following:

Lawrence Bender
FREDRIKSON & BYRON
200 N. Third Street, Ste. 150
P.O. Box 1855
Bismarck, ND 58502-1855

Annette Bendish
Public Service Commission
600 E. Boulevard Ave., Dept. 408
Bismarck, ND 58505

Jim and Mary Ann Miller
720 119th Ave. SE
Luverne, ND 58056

Wade Mann
WADE C. MANN

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

M-Power, LLC
Electric Generation/Wind-Griggs/Steele County
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Case No. PU-08-34

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Case No. PU-09-221

**ASHTABULA WIND II, LLC'S OBJECTION
TO PETITIONS FOR REHEARING**

Pursuant to North Dakota Century Code § 49-22-19, § 28-32-40 and North Dakota Administrative Code § 69-02-06-02, Ashtabula Wind II, LLC ("Ashtabula Wind II") respectfully submits this Objection to the following two Petitions: a Petition for Re-evaluation of Setbacks from Dwellings in Wind Farm, dated July 15, 2009, in Case No. PU-08-34, signed by Senator Tim Mathern of Fargo, North Dakota; and a Petition for Hearing and Reevaluation of High Risk Wind Turbines signed by Gerald and Connie Stokka of Cooperstown, North Dakota. The Petitions were served on Ashtabula Wind II on July 20, 2009. As further explained below, Ashtabula Wind II, respectfully requests that both Petitions be denied.

Ashtabula Wind II and M-Power, LLC filed a Joint Application for the Transfer of a Requested Certificate of Site Compatibility for Energy Conversion Facility for Phase I of the Luverne Wind Farm Project in Griggs and Steele Counties, North Dakota. The Public Service Commission ("Commission") held a public hearing, with large public attendance, on June 5, 2009, in Cooperstown, North Dakota to address the application for Certificate of Site

Compatibility and transfer of the Certificate. See Public Service Commission Findings of Fact, Conclusions of Law and Order dated July 8, 2009, in Case Nos. PU-08-34 and PU-09-221 (“PSC Order”), pg. 3. All interested persons were allowed an opportunity to be heard and the Public Service Commission “reviewed and considered all testimony and evidence presented.” PSC Order, pg. 3.

On July 8, 2009, the Commission issued Findings of Fact, Conclusions of Law and Order in Case Nos. PU-08-34 and PU-09-221 and issued Certificate No. 13, a Certificate of Site Compatibility for Energy Conversion Facility, in accordance with the conditions and limitations set forth in the Commission’s Order. The Certificate certified designation of an energy conversion facility site for Ashtabula Wind II, LLC for Phase I of the Luverne Wind Farm consisting of up to 80 1.5 MW wind turbine generators and associated facilities in Griggs and Steele Counties.

Petition of Gerald and Connie Stokka

Gerald and Connie Stokka (“Stokkas”) seek rehearing relating to the siting of Turbine Nos. 170, 171, 172, and 166 and the denial of one-mile setbacks for these turbines. North Dakota Century Code § 49-22-19 allows any “party aggrieved by the issuance of a certificate of site compatibility or transmission facility construction permit from the Commission” to request a rehearing by the Commission. Although the Stokka Petition makes general reference to homeowners and business owners in the area, it is unclear if they, themselves, are an aggrieved party. The Petition does not indicate if they have a home or business within one mile of Turbine Nos. 170, 171, 172 or 166 or if they personally are claiming to be aggrieved in some other manner.

North Dakota Century Code § 28-32-01(8) defines a “party” as “each person named or admitted as a party or properly seeking and entitled as of right to be admitted as party.” The Stokkas are not a “party” to Case No. PU-08-34 or PU-09-221. Therefore, they do not have a statutory right to seek rehearing.

The Stokkas list a mailing address of 11551 2nd St. SE, Cooperstown, ND as their mailing address. They have not described the location of their residence or any business they may own in relation to Turbine Nos. 170, 171, 172 or 166 and it appears that their property may not be within or adjacent to the Luverne Wind Farm. Even if they do own a residence or business in or adjacent to the project that would be impacted by the project as suggested in the opinion, they had a legal right to intervene as parties in this matter but chose not to exercise their right.

North Dakota Administrative Code § 69-02-02-05 states that “[a]ny person with a substantial interest in a proceeding may petition to intervene in that proceeding by complying with this section. An intervention may be granted if the petitioner has a statutory right to be a party to the proceeding; or the petitioner has a legal interest which may be substantially affected by the proceeding, and the intervention would not unduly broaden the issues or delay the proceeding.” See also N.D.C.C. § 28-32-28 (providing a statutory right of intervention to persons substantially affected by a proceeding). The Stokkas did not intervene to become parties in either case. Despite this fact, they were still afforded an opportunity to raise their concerns at the June 5, 2009 public hearing.

It is undisputed that the Stokkas are not a “party.” Additionally, the Stokkas have failed to provide any information in their petition that they, personally, are “aggrieved.” They make general complaints regarding noise as relayed by other individuals and make unsubstantiated

claims that the project may diminish property values adjacent to the project. They do not, however, establish that they have or will be affected by noise related issues nor do they provide any evidence that property they own will diminish in value. In addition to the fact that they are not parties, the fact that they have not demonstrated that they are “aggrieved” further precludes their ability to seek rehearing.

Even assuming that they were a “party” and they could demonstrate that they were “aggrieved,” their petition for rehearing is still precluded. An aggrieved party’s request for rehearing is governed by N.D.C.C. § 28-32-40 and a party seeking rehearing or reconsideration is not automatically entitled to such relief. Application of Nebraska Public Power District, 330 N.W.2d 143, 146 (N.D. 1983). N.D.C.C. § 28-32-40(3) states that “the party must submit with the petition for reconsideration a statement of the specific grounds upon which relief is requested or a statement of any further showing to be made in the preceding.” A petition for rehearing can be denied by the Commission and should be denied if the petition does not contain a statement of further showing or statement of specific grounds for relief. Application of Nebraska Public Power District, 330 N.W.2d at 148.

The Stokka Petition contains no statement of specific grounds upon which relief is requested, nor does it provide a statement of any further showing to be made in the proceeding. Instead, the Petition raises general, noise related issues of individuals other than the Stokkas. The Petition relies on the testimony of Cathryn Stillings, Mark Askerooth, and Dennis Stillings from the June 5, 2009 public hearing. There is no indication of the existence of any noise related testimony that has not already been heard. The Stokka Petition simply asks the Commission to reconsider evidence that it has already reviewed and considered.

The Findings of Fact, Conclusions of Law and Order confirm that the noise issue was thoroughly addressed by the Commission and that the affected landowners' concerns have been considered. PSC Order, pgs. 3-4. The Findings of Fact note that "members of the public and local landowners presented testimony at the hearing both for and against the proposed turbine locations. Generally, those opposed to certain locations were concerned about turbine noise, vibration, shadow flicker from sunlight shining on spin blades, reduced property values and other potential adverse effects." PSC Order, pg. 4, ¶ 5. The Findings further explain that an acoustic assessment was conducted and that the Luverne Wind Farm will operate within EPA noise guidelines which have been developed to protect both health and human welfare. PSC Order, pgs. 4-5, ¶¶ 6, 7. The Commission also found that acoustic modeling demonstrated that the Luverne Wind Farm would comply with OSHA safety standards at all inhabited residences considered to be noise-sensitive areas. PSC Order, pg. 5, ¶ 7. The Commission further determined, based on the acoustic models, that the Luverne Wind Farm would comply with both Griggs and Steele County Board of County Commission noise standards for occupied residences. PSC Order, pg. 5, ¶ 8. The Petition does not challenge these findings.

Pursuant to statutory limitations on its authority, the Commission has historically denied similar petitions for rehearing from landowners opposing siting certificates who have been afforded an opportunity to testify at public hearing and later seek rehearing on the same issues based on the same evidence. Application of Nebraska Public Power District, 330 N.W.2d at 148. In Application of Nebraska Public Power District, a group of aggrieved landowners sought rehearing at the issuance of a certificate of corridor compatibility. The Commission denied the

request for rehearing. The North Dakota Supreme Court agreed with the Commission's denial of rehearing explaining:

After the PSC granted NPPD the corridor, the landowners petitioned for a rehearing to present additional evidence on undergrounding. The PSC denied the request because the landowners made no reference to, and did not attach to their petition, studies which establish the technological feasibility to build the MANDAN line underground. Section 28-32-14, NDCC, requires that the aggrieved landowners submit with their rehearing request "a statement of any further showing to be made in the proceeding." The landowners have not shown this court that the PSC erred in its refusal to grant a rehearing.

Id.

In this case, the Stokkas are not even seeking rehearing to present additional evidence. Instead, they are asking the Commission to reconsider the same evidence they have already considered. Nothing in the Petition indicates the existence of any additional insight or evidence that has not already been considered by the Commission. It is clear from the Commission's Findings of Fact, Conclusions of Law and Order, that issues of noise and property value were heard at the public hearing and considered by the Commission.

The Stokkas and others have been given a full and fair opportunity to be heard. The noise and property issues have been fully addressed. Reopening the hearing at this point to readdress the identical issues that have been thoughtfully considered by the Commission would be a waste of agency and party resources and result in undue delay of the project. Our supreme court has warned that "reconsideration of previously litigated issues, absent strong justification, spawns inconsistency and threatens the reputation of the judicial system." In re Guardianship and Conservatorship of Onstad, 2005 ND 158, ¶ 11, n. 2, 704 N.W.2d 554. No strong justification exists in this case to rehear the exact same issues and reconsider the exact same

evidence. And as our supreme court cautioned, liberal reconsideration of adjudicative administrative proceedings will only spawn inconsistency and threaten the reputation of the agency. Id.

Granting these types of petitions would have a chilling effect on the further development of wind as a resource in our state. Ashtabula Wind II, has expended substantial time, money and resources to ensure compliance with all statutory and regulatory requirements and to minimize or eliminate any adverse effects from the Luverne Wind Farm. Because of this diligence, the Commission concluded that the project “is compatible with environmental preservation and the efficient use of resources” and “is of such design, location and purpose that it will produce minimal adverse effects.” PSC Order, pg. 7, ¶¶ 5, 8. Allowing the wasteful duplication of proceedings causing unnecessary and unwarranted delay in construction of the project will only hinder the Commission’s goal of “ensuring continuing system reliability and integrity and ensuring that energy needs are met and fulfilled in an orderly and timely fashion.” PSC Order, pg. 7, ¶6.

The equitable doctrine of laches also prohibits rehearing in this matter. Laches “is a delay or lapse of time in commencing an action that works a disadvantage or prejudice to the adverse party because of a change in conditions during the delay.” Williams County Social Services Bd. v. Falcon, 367 N.W.2d 170, 174 (N.D. 1985). The Stokkas chose to forego their legal right to intervene and raise their claims until after the certificate has been issued and construction on the project commenced. If allowed to disrupt construction on the project, this delay will result in significant prejudice to Ashtabula Wind II. Construction on the project commenced July 8, 2009. See Affidavit of Scott Scovill (“Scovill Aff.”), ¶3. Ashtabula Wind II

has invested approximately \$235,000,000 in the Luverne Wind Farm Project to this date. Scovill Aff., ¶2. Any further delay in construction of the project caused by a rehearing on the previously reviewed and considered evidence would result in additional costs of approximately \$75,000 per day the project is delayed. Scovill Aff., ¶4. Allowing a person to hijack the project at this point after sitting on their rights would violate the doctrine of laches and should not be condoned.

Petition of Senator Tim Mathern

Ashtabula Wind II also objects to Senator Tim Mathern's Petition for Re-evaluation of Setbacks from Dwellings in Wind Farm, dated July 15, 2009. In objecting to this Petition, Ashtabula Wind II incorporates its analysis from the objection to the Stokka Petition above. Additionally, Ashtabula Wind II makes the following additional objections.

As explained above, an "aggrieved party" may seek rehearing of the issuance of a site compatibility permit. Senator Mathern's Petition fails to give any indication of how he is an aggrieved party. Senator Mathern lives in Fargo, North Dakota. He is a Senator representing the citizens of District 11. District 11 is contained within the City of Fargo. District 11 does not include any land within or adjacent to the Luverne Wind Farm project which is located more than seventy miles from Fargo.

Senator Mathern sets forth general concerns about noise generated by the turbines and unspecified "health problems associated with the repetitive quality of this noise." He indicates that the exhibits from the June 5, 2009, hearing contain information regarding five hazards, including:

1. Vibroacoustic Disease.
2. Accidents from brake failure.

3. Turbine flicker and strobe-light effect.
4. High-velocity “throw” of ice.
5. Wind Turbine Syndrome.

Senator Mathern does not allege that he has been harmed or is at risk of being harmed by any of these alleged hazards. He does not allege that he has a home or a business or other property in or adjacent to the Luverne Wind Farm.

The North Dakota Supreme Court has explained that “the PSC is limited to the statutory authority given it by the legislature.” Application of Nebraska Public Power District, 330 N.W.2d at 147. Pursuant to N.D.C.C. §§ 49-22-19 and 28-32-40, the Commission may only entertain a motion for reconsideration from an aggrieved party. Because both Senator Mathern and the Stokkas have failed to demonstrate that they are “parties”, let alone “aggrieved parties,” the Commission lacks the statutory authority to grant either Petition for Reconsideration. Therefore, both Petitions must be denied.

NOW THEREFORE, Ashtabula Wind II respectfully requests that for the foregoing reasons, the Petitions for Rehearing of Gerald and Connie Stokka and Senator Tim Mathern be denied.

Lawrence Bender
FREDRIKSON & BYRON
200 N. Third Street, Ste. 150
P.O. Box 1855
Bismarck, ND 58502-1855

Annette Bendish
Public Service Commission
600 E. Boulevard Ave., Dept. 408
Bismarck, ND 58505

Senator Tim Mathern
429 16th Ave. South
Fargo, ND 58103

Gerald & Connie Stokka
11551 Second Street SE
Cooperstown, ND 58425



WADE C. MANN

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

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AFFIDAVIT OF SCOTT SCOVILL

STATE OF FLORIDA)
)SS.
COUNTY OF PALM BEACH)

Scott Scovill, being first duly sworn, hereby states as follows:

1. I am employed by NextEra Energy Company, LLC, as Director of Wind Development. Ashtabula Wind II, LLC is a wholly owned subsidiary of NextEra Energy, LLC. I make this affidavit on behalf of Ashtabula Wind II, LLC.
2. Ashtabula Wind II, LLC has invested approximately \$ 235,000,000 in the Luverne Wind Farm Project to this date.
3. Construction of the Luverne Wind Farm commenced on July 8, 2009.
4. Delay in construction of the Luverne Wind Farm would cost Ashtabula Wind II, LLC approximately \$ 75,000 for each day the project is delayed.

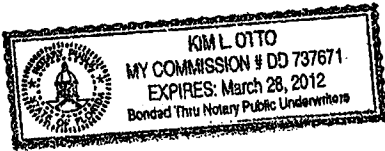
Dated this 27th day of July, 2009.



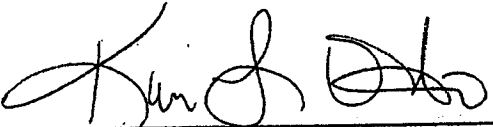
SCOTT SCOVILL

STATE OF FLORIDA)
)SS.
COUNTY OF PALM BEACH)

Subscribed and sworn to before me this 27TH day of July, 2009.



(SEAL)



Notary Public
Palm Beach County, Florida
My Commission Expires: 3-28-2012