TESTIMONY OF JULIE JOHNSON
Champaign County
IN OPPOSITION TO Sub. H. B. 114

Chairman Balderson, Vice Chairman Jordan, Ranking Member O'Brien and members of the Committee; my name is Julie Johnson and I am a resident of Champaign county. I am here to speak against the proposed reduction of the property line setbacks for industrial wind turbines in Sub HB 114.

Why are we here? We are here because the wind industry wants you to believe that Ohio has the strictest and most unreasonable industrial wind turbine setbacks in the nation. They want you to move the current setback of 1,125' from the property line to the exterior of a home. My testimony will address these issues and argue that Ohio townships impacted by wind development should be permitted to join those other forty or so states that invite local participation in the siting process either through local zoning or collaboration.

A review of siting policies collected by the National Conference of State Legislatures illustrates that siting industrial wind is almost uniformly a shared responsibility of state and local government. (See Attachment A) Moreover, shared state/local siting policies almost *uniformly* use the property line as the point from which setbacks are measured. Only Vermont establishes the setback from a residence and that setback is 10x the turbine height from a residence. For a 600' turbine that is 6,000'.

Fourteen states leave wind turbine siting entirely to local government. Twenty-seven states, including Ohio, have a shared authority for siting with local government. Five states are deemed by NCSL to have state mandated setbacks but two of these mandate that local governments establish zoning ordinances for wind and two (North Carolina and Connecticut) have longer setbacks than Ohio. Four states are unknown.

The wind industry complains that Ohio's current 1,125' setback from the property line is the strictest standard in the nation. I have tried to determine what that universe is given that so many states either have local zoning or a shared zoning. I decided to use the NCSL information and focus on the states which have shared siting responsibilities.

This review indicates that Wisconsin, South Dakota, Maine, New Hampshire, Massachusetts and Wyoming may have more lenient or less protective setbacks than Ohio. But Massachusetts, Maine and Wyoming can defer to local government. That leaves New Hampshire at 1.5x turbine height to the property line and South Dakota and Wisconsin at 1.1x turbine height to the property line. In that scenario it would appear Ohio is currently the "strictest" in a universe of 4 states. If the proposal in HB 114 is adopted, only South Dakota and Wisconsin would be left. Ohio would have the third most lenient, least protective setback in the nation.

I remind you that South Dakota ranks 46th in population. As for Wisconsin, in 2014 the Brown County Board of Health declared a Green Bay area wind project to be a human health hazard. That project consists of 8 500-foot tall, 2.5 MW wind turbines. Earlier, the Wisconsin Town Association passed a Resolution calling for a moratorium on industrial wind development and the President of the WTA asserted that a setback of 1,125' from a residence was too low.

The proposal you have before you establishing a setback from a home at 1,125' would make Ohio like Wisconsin – a state known nationally for its harmful wind siting. Numerous families in Wisconsin have

abandoned their homes and you have written testimony today from one of those families, David and Rose Enz.

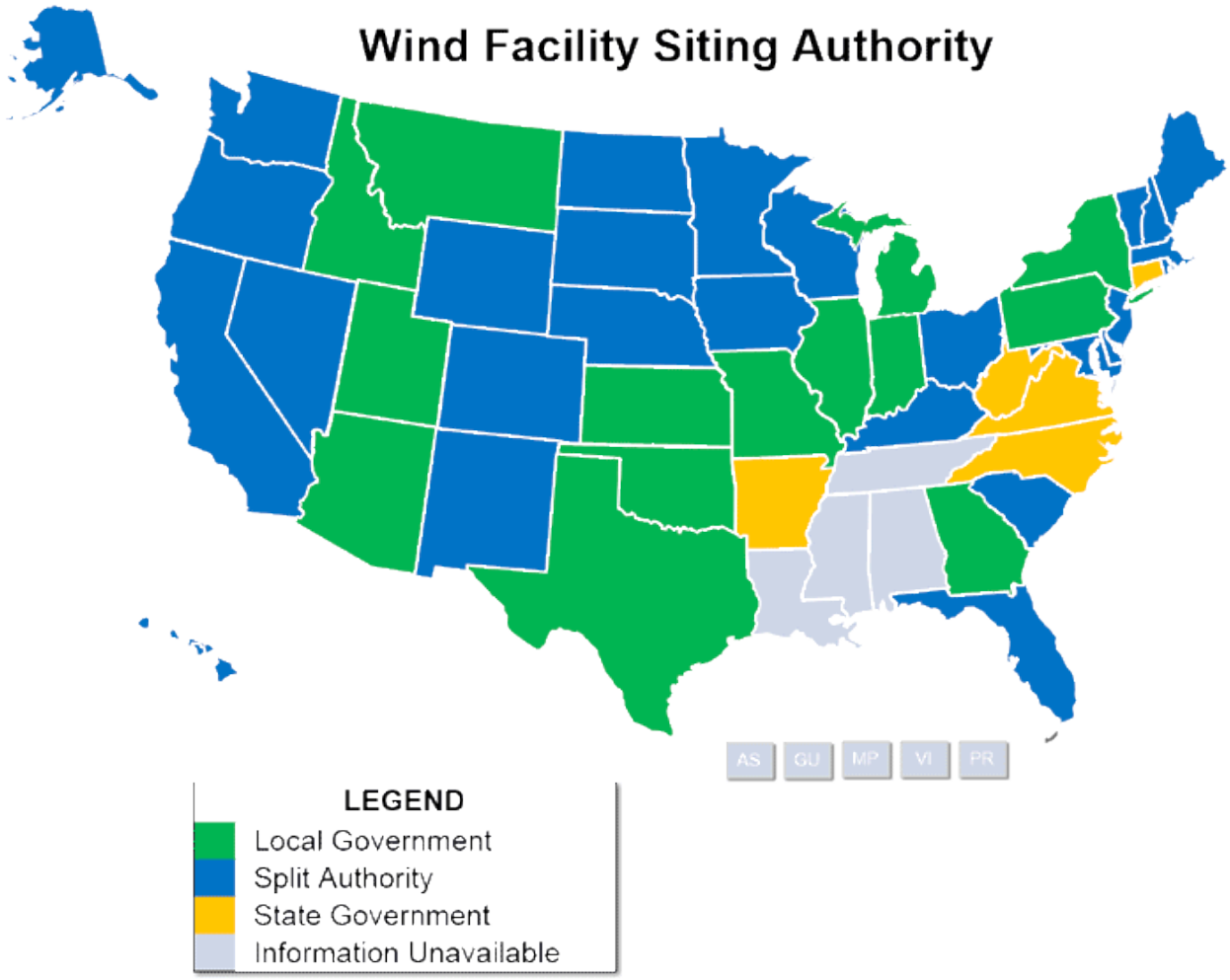
How out of step would Ohio be if it shortened wind setbacks? Most localities are increasing setbacks as turbines increase in height and create more noise and more vibration. In Indiana, the Rush County Board of Zoning Appeals extended their wind turbine setback zoning to 2,300' from the property line. They were sued by Apex, the developer of Flat Rock Wind. Last year the Indiana Court of Appeals upheld the Rush County zoning and the judge noted that "if the decision of the BZA was ever modified or reversed, remonstrators' health and real estate values will be directly affected, and they would no longer be adequately represented by the BZA." (Attachment B)

I have also attached a regional chart Attachment C) reflecting how out of step Ohio is with many of our neighboring counties in Indiana and Michigan. That is not to say that some areas have, indeed, determined locally that there is community support for short setbacks. I use the term "community" guardedly since many such communities have many absentee landowners.

And I think you will find Attachment D to be of interest as the courts in West Virginia, Kansas and Minnesota have found in favor of people bring nuisance lawsuits for proximity to industrial wind turbines.

In summary, I can find only one state, Vermont, that measures a setback from a residence. I find most states support local zoning – they do not pre-empt it. The development of industrial wind across America has continued to flourish in areas where its development can be accommodated in a manner that protects people and property. It is time you let us decide.

ATTACHMENT A – Derived from the National Conference of State Legislatures



http://www.ncsl.org/research/energy/state-wind-energy-siting.aspx

The 5 **yellow** states on this map and their state government mandated setbacks are:

Arkansas – State government mandates that "Wind siting is conducted at the local level of government.".
West Virginia – Unspecified
Virginia – State government requires the local community to establish zoning under which a special use permit can be issued for siting. Ordinance is required to set a minimum property line setback of 1.1x turbine height but local zoning can adopt whatever distance it chooses at its discretion.
North Carolina – State mandates .5 mile from the property line.
Connecticut – 2.5x Height from Property Line (600' turbine would be set back 1,500')

Twenty-six **blue states** on this map have "split authority". In Ohio, the state regulates wind developments >5MW. But of these 26, ten states do not have a state-wide setback. The sixteen remaining states have longer setbacks than Ohio

1. **Vermont** – 10x turbine height to a residence. (For a 600' turbine this is 6,000')

2. **Maine** – The Maine Wind Energy Act authorizes both the Maine Department of Environmental Protection and Land Use Regulation Commission to be the permitting authority at the state level only when there is no local, incorporated municipal government in the area. State of Maine requires a minimum of 1.5x Turbine height to property boundaries.

3. **New Hampshire** – 1.5x Turbine Height to Property Line for projects > 30 MW

4. **Massachusetts –** 1.5x Turbine Height to Property Line required in optional model ordinance for local units of government

5. **Rhode Island** – 2x Turbine Height to Property Line. Limit of 30 hours of Shadow Flicker anywhere on neighboring proper

6. **New Jersey** - Wind turbine projects may require authorization from the Division of Land Use Regulation depending on the characteristics of the proposed structures, the project location, and impacts to "special areas" regulated by the Department. Such disturbances may require multiple permits from the Division prior to site preparation or construction.

7. **Maryland** – Supports Local Zoning

8. **Delaware** - Very little on-shore wind potential. 2MW in the entire state at the University. State defers to local ordinance for small wind with setback from property line.

9. **Kentucky** – At least 1,000' to the property line

10. **South Carolina** – Local Determination

11. **Florida** – Subject to local land use plans and zoning

12. **Wisconsin** - 1.1x turbine height from property line and 1, 125' feet from residence. In 2013, the Wisconsin Town Association passed a Resolution calling for a moratorium on further wind developments until health studies could be undertaken. The President of the Board stated at the time that "setback distances from non-participating residences of only 1,250 feet was too low."

13. **Iowa** – State adheres to local siting where established. Clinton County is 2,000' to property line.

14. **Minnesota** - Incorporates Local Ordinance where established otherwise 5 Rotor Diameters from property line in direction of Prevailing Wind. (E.g. a Siemens SWT-2.5-120 has a rotor diameter of 394'. 5RD=1,970'.)

15. **North Dakota** – State issues certificate of Site Compatibility but cannot supersede Local Zoning

16. **South Dakota** - 1.1x Turbine Height from Property Line

17. **Nebraska** - Local Zoning

18. **Wyoming** - Local zoning with required minimum of 1.1x Turbine Height to Property Line and minimum 5.5x Turbine Height to a residence (3,330' for a 600' turbine)

19. **Colorado** Local permit required before State approval

20. **New Mexico** – Local zoning is supported.

21. **Washington** – Case by Case Basis where overlay zone permits development. Subject to local setbacks.

22. **Oregon** - Under 35MW siting is carried out by local ordinance utilizing property line. Over 35MW it is on a case by case basis.

23. **California -** While localities can adopt wind siting ordinances for small projects. The state has established that minimum setbacks can be no further from the property line than the system height. Further setbacks are authorized to comply with fire setback requirements. Noise limits are also measured at the property line. Additionally, the state has an extensive siting process for wind turbines and nearby military facilities.

24. **Nevada** – Nevada regulates wind projects greater than 70MW but gives deference to local ordinances that permit establishment of extended setbacks if a project 1) Represents a danger to the health, safety or welfare of the public; or (2) Is not compatible with the character of the area in which the system is located.

25. **Alaska –** Shared responsibility for wind turbine siting depending on the location.

26. **Hawaii - I**n Hawaii, local government sites most wind facilities.

27. **Ohio** – The Ohio Power Siting Board establishes setbacks for projects > 5MW. The current setback is 1,125' from the property line.

Fourteen **Green States** leave industrial wind siting to Local Government. These states are Michigan, Pennsylvania, Indiana, Illinois, New York, Georgia, Missouri, Texas, Oklahoma, Kansas, Arizona, Utah, Idaho and Montana.

Four States are unknown. They are Tennessee, Louisiana, Mississippi and Alabama

ATTACHMENT B

https://www.theindianalawyer.com/articles/42798-coa-affirms-setback-distance-for-eastern-indiana-wind-farm

COA affirms setback distance for Eastern Indiana wind farm

February 14, 2017
Jennifer Nelson

The Indiana Court of Appeals on Tuesday upheld a Rush County zoning ruling requiring industrial wind turbines to be at least 2,300 feet from some people's property lines. The judges emphasized that the zoning ordinances outline minimum distances and the zoning board is able to increase those distances when warranted.

Flat Rock Wind LLC seeks to construct a wind farm on more than 29,000 acres in Rush and Henry counties with 95 wind turbines, with 65 of those in Rush County. Flat Rock in March 2015 filed an application for approval of a special exception to the Rush County zoning ordinance to build and operate a portion of the wind energy conversion system in Rush County. Zoning ordinances require a minimum setback of 1,000 feet from residential dwellings. But there were concerns about harmful side effects of the placement of the turbines, and studies showing sleep disruption, stress and annoyance associated with wind turbines near residences.

Flat Rock then amended its application to have a 1,400-foot setback from non-participating owners, those who weren't leasing land to Flat Rock as part of the project. A zoning board member moved to make the minimum 2,300 feet, which passed by a majority vote.

Flat Rock sought judicial review of the setback condition, which Special Judge Matthew Bailey upheld. Bailey also allowed several landowners to intervene, which Flat Rock challenged on appeal.

Judge Patricia Riley for the Court of Appeals wrote that the BZA has the power to impose the enlarged setback condition under Section 6.4 of the Rush County Zoning Ordinance by its reference to a "minimum setback distance."

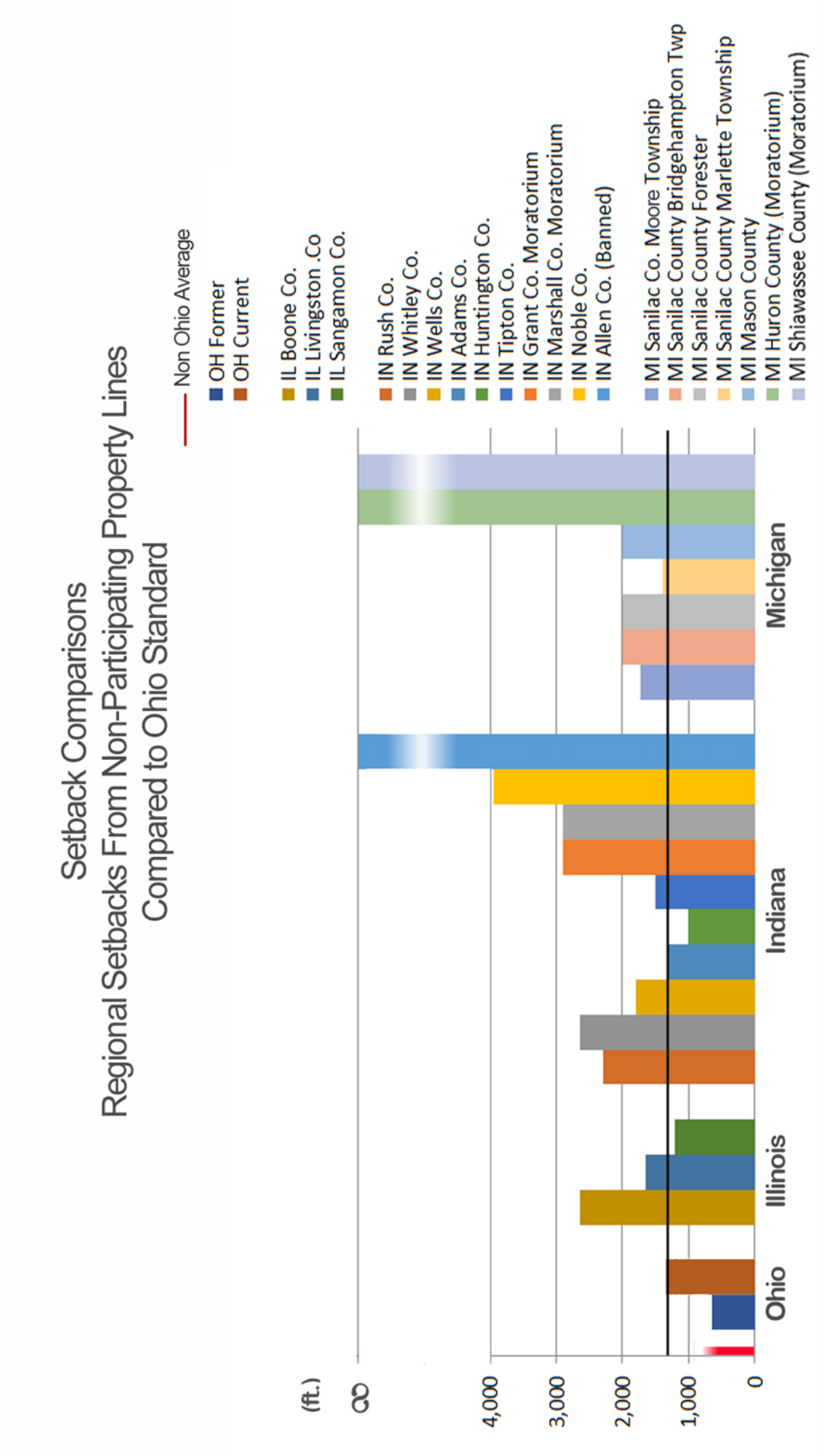
"Based on the explicit language of the Zoning Ordinance, we conclude that the BZA did not exceed its authority by creating the Setback Condition, as well as a new method for measuring this Setback. In interpreting the Zoning Ordinance, the BZA viewed the siting setback as a 'minimum' guideline, which was subject to 'reasonable restrictions' to preserve the health and safety of the public," Riley wrote.

The COA also affirmed the trial court's decision to grant the remonstrators' motion to intervene. Flat Rock claimed it was an abuse of discretion because the remonstrators didn't show that they were "aggrieved" under Indiana statute. Indiana cases addressing Trial Rule 24(A)(2), which was used by the judge and allows for intervention, impart a three-part test, requiring intervenors to show an interest in the subject of the action; disposition of the action may as a practical matter impede the protection of that interest; and representation of the interest by the existing parties is inadequate.

Riley noted if the decision of the BZA was ever modified or reversed, remonstrators' health and real estate values will be directly affected and they would no longer be adequately represented by the BZA.

The case is Flat Rock Wind, LLC v. Rush County Area Board of Zoning Appeals, et al.,70A01-1606-PL-1382

Attachment C



ATTACHMENT D

http://lawprofessors.typepad.com/agriculturallaw/2018/06/wind-farm-nuisance-matter-resolved-buy-the-homeowners-out.html

Friday, June 8, 2018

Wind Farm Nuisance Matter Resolved – Buy the Homeowners Out!

By Roger A. McEowen

Overview

Wind "farms" can present land-use conflict issues for nearby landowners by creating nuisance-related issues associated with turbine noise, eyesore from flicker effects, broken blades, ice-throws, and collapsing towers, for example.

Courts have a great deal of flexibility in fashioning a remedy to deal with nuisance issues. A recent order by a public regulatory commission is an illustration of this point.

Wind Farm Nuisance Litigation

Nuisance litigation involving large-scale "wind farms" is in its early stages, but there have been a few important court decisions. A case decided by the West Virginia Supreme Court in 2007 illustrates the land-use conflict issues that wind-farms can present. In *Burch, et al. v. Nedpower Mount Storm, LLC and Shell Windenergy, Inc., 220 W. Va. 443, 647 S.E.2d 879 (2007),* the Court ruled that a proposed wind farm consisting of approximately 200 wind turbines in close proximity to residential property could constitute a nuisance. Seven homeowners living within a two-mile radius from the location of where the turbines were to be erected sought a permanent injunction against the construction and operation of the wind farm on the grounds that they would be negatively impacted by turbine noise, the eyesore of the flicker effect of the light atop the turbines, potential danger from broken blades, blades throwing ice, collapsing towers and a reduction in their property values. The court held that even though the state had approved the wind farm, the common-law doctrine of nuisance still applied. While the court found that the wind-farm was not a nuisance per se, the court noted that the wind-farm could become a nuisance. As such the plaintiffs' allegations were sufficient to state a claim permitting the court to enjoin the creation of the wind farm.

In another case involving nuisance-related aspects of large-scale wind farms, the Kansas Supreme Court upheld a county ordinance banning commercial wind farms in the county. *Zimmerman v. Board of County Commissioners, 218 P.3d 400 (Kan. 2009).* The court determined that the county had properly followed state statutory procedures in adopting the ordinance, and that the ordinance was reasonable based on the county's consideration of aesthetics, ecology, flora and fauna of the Flint Hills. The Court cited the numerous adverse effects of commercial wind farms including damage to the local ecology and the prairie chicken habitat (including breeding grounds, nesting and feeding areas and flight patterns) and the unsightly nature of large wind turbines. The Court also noted that commercial wind farms have a negative impact on property values, and that agricultural and nature-based tourism would also suffer.

Buy-Out Ordered

A recent settlement order of the Minnesota Public Utilities Commission (Commission)requires a wind energy firm to buy-out two families whose health and lives were materially disaffected by a wind farm complex near Albert Lea, Minnesota. As a result, it is likely that the homes will be demolished so that the wind farm can proceed unimpeded by local landowners that might object to the operation. That's because the order stated that if the homes remained and housed new residents, those residents could not waive the wind energy company's duty to meet noise standards even if the homeowners were willing to live with violations of the Minnesota Pollution Control Agency's ambient noise standard in exchange for payment or through some other agreement.

In re *Wisconsin Power and Light, Co., No. ET-6657/WS-08-573, Minn. Pub. Util. Commission (Jun. 5, 2018)* has a rather lengthy procedural history preceding the Commission's order. On October 20, 2009, the Commission issued a large wind energy conversion system site permit to Wisconsin Power and Light Company (WPL) for the approximately 200-megawatt first phase of the Bent Tree Wind Project, located in Freeborn County, Minnesota. The project commenced commercial operation in February 2011. On August 24, 2016, the Commission issued an order requiring noise monitoring and a noise study at the project site. During the period of September 2016 through February 2018 several landowners in the vicinity filed over 20 letters regarding the health effects that they claim were caused by the project. On September 28, 2017, the Department of Commerce Energy Environmental Review Analysis Unit (EERA) filed a post-construction noise assessment report for the project, identifying 10 hours of non-compliance with Minnesota Pollution Control Agency (MPCA) ambient noise standards during the two-week monitoring period.

On February 7, 2018, EERA filed a phase-two post construction noise assessment report concluding that certain project turbines are a significant contributor to the exceedances of MPCA ambient noise standards at certain wind speeds. The next day, WPL filed a letter informing the Commission that it would respond to the Phase 2 report at a later date and would immediately curtail three turbines that were part of the project, two of which were identified in the phase 2 report. On February 20, 2018, the landowners filed a Motion for Order to Show Cause and for Hearing, requesting that the Commission issue an Order to Show Cause why the site permit for the project should not be revoked, and requested a contested-case hearing on the matter.

On April 19, 2018, WPL filed with the Commission a Notice of Confidential Settlement Agreement and Joint Recommendation and Request, under which WPL entered into a confidential settlement with each landowner, by which the parties agreed to the terms of sale of their properties to WPL, execution of easements on the property, and release of all the landowners' claims against WPL. The agreement also outlined the terms by which the agreement would be executed. The finality of the agreement was conditioned upon the Commission making specific findings on which the parties and the Department agreed. These findings include, among others: dismissal of the landowners' February 2018 motion and all other noise-related complaints filed in this matter; termination of the required curtailment of turbines; transfer of possession of each property to WPL; and a requirement that compliance filing be filed with commission. The Commission determined that resolving the dispute and the terms of the agreement were in the public interest and would result in a reasonable and prudent resolution of the issues raised in the landowner's complaints. Therefore, the Commission approved the agreement with the additional requirement that upon the sale of either of the landowners' property, WPL shall file with the Commission notification of the sale and indicate whether the property will be used as a residence. If the property is intended to be used as a residence after sale or upon lease, the permittee must file with the Commission several things - notification of sale or lease; documentation of present compliance with noise standards of turbines; documentation of any written notice to the potential residence of past noise studies alleging noise standards exceedances, and if applicable, allegations of present noise standards exceedances related to the property; and any mitigation plans or other relevant information.

Conclusion

The order issued in the Minnesota matter is not entirely unique. Several decades ago, the Arizona Supreme Court ordered a real estate developer to pay the cost of a cattle feedlot to move their feeding operations further away from the area where the developer was expanding into. *Spur Industries, Inc. v. Del E. Webb Development Co., 108 Ariz. 178, 494 P.2d 700 (1972).*

However, the bottom-line is that the matter in Minnesota is an illustration of what can happen to a rural area when a wind energy company initiates development in the community.