

## Brighton, Eau Pleine move to dismiss wind lawsuit

*By Kevin O'Brien*

Attorneys for the towns of Brighton and Eau Pleine are asking a Marathon County judge to dismiss a lawsuit filed last year by a renewable energy company seeking to have the towns' wind siting ordinances declared null and void.

Last month, attorneys for the towns filed motions to dismiss the case filed by Marathon Wind Farm (MFW), a subsidiary of EDP Renewables, pointing to multiple reasons why they believe the case should be thrown out of court. In response, an attorney for MFW wrote a letter to Judge LaMont Jacobson, asking for the motions be "immediately stricken" based on several factors.

Matthew Lee, the attorney for MFW, asked the judge to schedule a status conference regarding the motions to dismiss, claiming that the motions were nothing more than an attempt by the towns to preempt the judge's decision on MFW's request for a preliminary injunction blocking enforcement of the ordinances.

On Dec. 23, however, Judge Jacobson denied the motion for a preliminary injunction, allowing the ordinances to stay in effect while the lawsuit proceeds. A telephonic scheduling conference has been scheduled for Jan. 27 to discuss the next steps in addressing the towns' motions.

A Dec. 5 motion filed by Rernzy Bitar, the attorney representing Brighton, argues that the ordinances do not, as MFW claims, violate state law regarding large-scale wind energy operations. Bitar says PSC 128, the administrative code that dictates wind energy regulations in Wisconsin, allows local governments to adopt regulations as long as they are "reasonable" and serve one of three purposes, including the protection of "public health and safety."

"The Town of Brighton's ordinance does not impose blanket restrictions or unreasonable conditions on wind energy systems," he wrote. "Instead, it establishes a clear, consistent framework for evaluating wind energy proposals case-by-case, as allowed by and in compliance with the procedural and substantive requirements of PSC 128."

Because MFW has yet to file a permit application under the ordinances, Bitar says the company's concerns are purely "hypothetical" at this point.

See **LAWSUIT**/ page 3

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Lawsuit

Continued from page 1

In response, Lee said the motions were not filed in a timely matter, they were only meant to delay the judge's decision on the preliminary injunction, and they really should be resubmitted as motions for summary judgement.

"If the court does not strike the motions, it should order the towns to withdraw and restyle the motions as motions for summary judgment," Lee wrote. He added that the motions rely on documents beyond formal court filings "to make factual arguments" regarding the legality of the ordinances and Marathon Wind's alleged failure to properly notify the towns of its amended complaint.

**The arguments**

Brighton's motion to dismiss the lawsuit rests on three main arguments, the first of which is that the town's current ordinance does, in fact, comply with state law.

"The ordinance aligns with state requirements, provides reasonable oversight of wind energy systems, and operates within the permissible scope of municipal authority," Bitar wrote.

First off, the attorney points out that Brighton amended its original ordinance, adopted in 2023, after MWF claimed that it exceeded state regulations on areas such as noise limits and minimum setbacks. Several provisions were changed to comply with a document entitled "Application Filing Requirements" published by the Public Service Commission, but MWF filed an amended complaint reiterating many of its allegations.

Bitar goes through all of the ways in which the updated ordinance allegedly violates state law, according to MWF's complaint. Specifically, he defends five challenged provisions in the ordinance: 1. A requirement that wind energy companies consult with town officials before submitting an application 2. A requirement that the applicant submit a variety of documents and information as part of the application 3. A 15-year license term limit, with requirements to renew every 10 years.

4. Requirements for monitoring and decommissioning wind energy systems.

5. The criteria for evaluating wind energy applications, which MWF calls "overly subjective."

With each provision, Bitar said the ordinance "serves legitimate public health and safety purposes," "does not significantly increase costs or reduce efficiency" and "accommodates alternative system of comparable cost and efficiency."

The second argument made by Bitar is that MWF is not in the position to file a lawsuit because it has yet to show any harm caused by the ordinances and has not exhausted all of its options by first attempting to apply for an application or engage in the process outlined by the ordinance, which allows aggrieved parties to seek a public hearing.

Lastly, the motion to dismiss points out an alleged procedural lapse on MWF's part – the fact that it did not serve the towns with a notice of claim after the ordinances were amended.

"Without actual notice and in the absence of a new notice of claim, the procedural defect is fatal," Bitar writes.

Toward the end of his motion to dismiss, Bitar also points to emails between the MWF and the town indicating that the company's attorney did not follow through on its offer to do a "detailed analysis" of Brighton's ordinance with the town's attorney, who agreed to go through a list of issues raised by MWF.

## **Responses to judge's decisions**

Last week's edition reported that Judge Jacobson had denied MWF's request for a preliminary injunction to block the ordinances from being enforced while the lawsuit is in progress.

When asked for a comment, MWF provided the following statement from David Neely, director of the Central Region: "We respect Judge Jacobson's decision and continue to look forward to the eventual resolution of the case, and we remain hopeful that we will ultimately be able to strengthen Marathon County's electric grid and local economy through the construction of Marathon Wind Farm," he said.

Judge Jacobson also denied a request by Farmland First, a citizens group opposed to industrial wind and solar operations, to intervene in the case.

When asked for a response, Ryan LaSee of Farmland First noted that 15 townships in Clark and Marathon have passed health and safety ordinances regulating industrial wind operations.

“The ordinance received overwhelming support from local residents, with approval rates exceeding 95% in each case,” he said. “This decisive vote sends a clear message that industrial wind and solar developers are not welcome in these communities.”

“Farmland First had sought to participate in the Brighton/Eau Pleine lawsuit to represent the strong majority of residents who oppose these projects,” he added. “While we respect the court’s decision, we remain committed to working with our attorneys to advocate for the interests of the majority who do not want to see these developments in their communities.”

[LAWSUIT from page 1 to 3](#)

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