

Injunction sought in wind farm lawsuit

By Kevin O'Brien

With work halted on its proposed wind farm, a renewable energy company is asking a judge to block two Marathon County townships from enforcing their licensing ordinances so that it can move forward with its project while its lawsuit against the towns proceeds.

EDP Renewables, doing business as Marathon Wind Farm (MWF), filed a motion in August seeking a preliminary injunction against the towns of Eau Pleine and Brighton, which both have ordinances requiring energy companies to obtain a local permit before starting a construction on wind power operations. Mark A. Lee, an attorney for MWF, states in a court brief that the company is “reasonably likely – if not certain” to win its lawsuit against the towns, but in the meantime, it’s unable to reap the benefits of its multi-million dollar project.

“Refusing to grant the preliminary injunction could have a catastrophic effect on Marathon Wind, and the future of renewable energy development in Wisconsin,” Lee wrote. “Marathon Wind has spent millions of dollars over nearly eight years investing in clean energy that will bring jobs and resources to Wisconsin residents, including those in Brighton and Eau Pleine.”

MWF has also amended its lawsuit against the two townships, which was originally filed in June of this year after the company failed to convince town officials to repeal or change their ordinances. By the time the lawsuit had been filed in Marathon County Circuit Court, Brighton had already amended its ordinance, and Eau Pleine did the same in July.

Despite the towns making changes to their ordinances, which loosened some of the restrictions on wind operations, MWF says the amended ordinances still make it virtually

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impossible to proceed with a project it has been working on since 2017. The company laid out its case against the new ordinances in an amended complaint filed on Aug. 29.

Since then, attorneys for both Brighton and Eau Pleine have written point-by-point responses to MWF’s amended complaint in briefs filed in mid-September.

In his response on behalf of Brighton, attorney Jason Prochnow says MWF is not entitled to a judgment in its favor for a variety of reasons, including the fact that “it has not even tried to comply with existing local ordinances,” which were put in place to “protect and ensure the health and safety” of town residents.

Meanwhile, the citizens group Farmland First has filed a motion to intervene in the case, arguing that it meets the legal requirements to be involved in the litigation as an organization dedicated to opposing wind farm operations.

A brief by the group’s attorney, Matthew Fernholz, says that Farmland First was founded with the goal of educating landowners and municipalities about the possible negative impacts of industrial wind energy operations.

“If the court were to rule for the plaintiff (MWF), presumably the wind farm project would go forward, which would directly impact Farmland First’s interest of preserving ‘the enjoyment of scenic beauty’ of central Wisconsin farmland,” the brief states.

Judge LaMont K. Jacobson has asked to receive responses from the parties later this month and is expected to rule on the injunction request and Farmland First’s motion to intervene on or about Dec. 20, according to a court document.

The arguments

The crux of MWF’s argument is that Brighton and Eau Pleine are violating state law by passing wind energy regulations that are more restrictive than those adopted by the Wisconsin Public Service Commission (PSC), which is given sole authority under statute to regulate large-scale wind operations in Wisconsin.

PSC 128 is the administrative code that spells out the requirements for establishing a largescale wind energy operation in Wisconsin, including rules regarding such issues as setback requirements and noise limits.

Brighton and Eau Pleine – along with about a dozen other townships in Marathon and Clark counties – passed wind ordinances in 2023 that included setbacks and noise limits, along with requirements for compensating landowners and decommissioning turbines, that went beyond PSC 128.

Town officials and members of Farmland First have pointed to a section in state statute 66.0401 that says local municipalities may, in fact, pass stricter wind energy rules than the PSC if they serve to “protect the public health and safety.”

In its Aug. 29 amended complaint, MWF says the revised ordinance adopted this year by both Brighton and Eau Pleine “remedies certain illegalities” in the original version, but it still goes beyond what is required by PSC 128. The complaint lists 12 provisions in the revised ordinance that “exceed permissible restrictions.”

Among those allegedly unlawful provisions is a requirement that wind company representatives “attend a series of meetings with the town for consultation purposes” before submitting an application. The ordinances also require a wide range of data from the applicant regarding the location and technical aspects of turbines and other equipment, decommissioning plans, construction equipment and noise mitigation – none of which are required by PSC 128. MWF also takes issue with a part of the ordinance that allows town officials to inspect the wind farm facilities and issue notices of non-compliance. PSC 128 allows third-party inspectors to monitor compliance – “not the town itself,” the complaint says.

Lastly, the complaint says the ordinance includes several “subjective criteria” for evaluating a wind energy application, “such as whether a wind energy system is contrary to a zoning designation, presents a net economic liability to the community, presents risks to public health, presents risks to wildlife or regional ecosystems, changes the character of an area, impacts radar systems, and/or impacts use of restricted air space or a military installation.”

The complaint implies that these criteria amount to “unreasonable conditions” that are prohibited by PSC 128, which says a municipality “may not unreasonably deny an application for a wind energy system.”

In Eau Pleine’s response to the amended complaint, the town “denies it acted improperly in adopting those provisions in its revised ordinance, that it violated plaintiff’s rights, and maintains that its revised ordinance complies with applicable law.”

According to its motion requesting an injunction, MWF says it has invested over \$5 million in the Marathon County wind project, having leased more than 12,000 acres of land from 65 landowners since 2017. These landowners have already been paid a total of \$2 million in rent.

“More than 65 individual landowners have leased land to Marathon Wind for use in the Marathon County project, securing additional income for themselves and their families,” Lee wrote. “Because of the strong wind resource in Marathon County, neighboring landowners in municipalities without such onerous, illegal restrictions will have access to additional revenue streams to support their farms.”

In its request to intervene, Farmland First says it’s interested in protecting farmers and rural landowners, including those who have signed leases with companies like MWF, from the possible adverse impacts of industrial wind energy operations.

“The organization further believes that the growth of wind farms has a negative impact on property values that is not adequately presented when energy companies seek to gain approval of local municipalities and citizens for wind farm projects,” Fernholz wrote.

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