

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 09-T-0049 - Application of Upstate NY Power Corp. for a Certificate of Environmental Compatibility and Public Need for a 50.6 mile 230kV Transmission Facility From Galloo Island in the Town of Hounsfield, Jefferson County, to the Fitzpatrick-Edic Substation in the Town of Mexico, Oswego County.

RULING ON MOTION FOR ADJOURNMENT
AND CROSS-MOTION TO DISMISS APPLICATION

(Issued February 26, 2013)

KEVIN J. CASUTTO
Administrative Law Judge:

The purpose of this ruling is to address the Applicant's motion for adjournment, and Staff's cross-motion to dismiss this case (without prejudice to the Applicant to file a new application.)¹

No activity has occurred in this case for some time. Most recently, on July 3, 2012, in advance of a telephone conference scheduled for July 6, 2012 to receive a status report from Upstate NY Power Corp. (the Applicant) in this proceeding, the Applicant submitted an email message to the parties. Citing circumstances in the statewide and national economy that negatively affect development of the proposed project, Applicant requested a further adjournment of six to nine months for a subsequent status report. By letter dated July 5, 2012, Staff responded to Applicant's letter by requesting that the July 6, 2012 conference call be held.

¹ Commission Rule 85-2.15 provides that when it appears that the statutory requirements for a certificate cannot be met, the Commission may dismiss the application and terminate the proceeding upon the motion of any party or Staff, or upon its own motion. Staff does not rely upon this rule in its motion to dismiss.

The telephone conference was held, as scheduled, on July 6, 2012. During the telephone conference, the parties discussed the Applicant's request for further adjournment of the proceeding. The Applicant reported no new project-specific information regarding any further study or evaluation of any proposed route. Several landowners expressed their frustration and dissatisfaction with the continued adjournment of the proceeding in the absence of any substantive activity. These landowners explained that, due to the pendency of this Article VII application, they have not developed or improved their agricultural business properties, as they otherwise might have done.

Staff inquired whether the Applicant has considered withdrawing its application, without prejudice, until it was ready to proceed. Staff noted that, if the preferred route were to remain as proposed, the application materials would require updating in any event, due to the length of time that has passed since this application was filed. The Applicant declined to withdraw its application.

Following the conference, I provided a schedule for written responses to the Applicant's motion for further adjournment of this proceeding for six to nine months. Such responses were due by July 17, 2012. Three responses were filed; two by landowners, Ms. French and Ms. Rossiter, and Staff's Reply and Cross-Motion to Dismiss. In its motion, Staff seeks dismissal of the application in the interests of fairness to the potentially affected landowners, without prejudice to the Applicant to file a new application. Applicant has filed no response to Staff's cross-motion.

PROCEDURAL HISTORY

The Applicant submitted an application pursuant to Public Service Law (PSL) Article VII on January 13, 2009, proposing to construct a 50.6 mile electric transmission facility from Galloo Island in the Town of Hounsfield, Jefferson County to the Fitzpatrick-Edic Substation in the Town of Mexico, Oswego County. Following the submission of supplemental filings, the application was determined to comply with the filing requirements of the PSL and implementing regulations, as of August 20, 2009.

A pre-hearing conference was convened on November 16, 2009 and public statement hearings were held on November 16 and 17, 2009. By ruling dated December 17, 2009, a case schedule was established, providing for evidentiary hearings to commence April 8, 2010.

However, on February 17, 2010, the Applicant submitted a motion requesting that the schedule be suspended so that it could develop additional detailed analysis of certain alternative routes in response to public comments it received. Applicant's February 17, 2010 motion identified several alternative routes it planned to review further and also included a proposed Community Involvement and Outreach Plan. Staff responded to the Applicant's motion on February 26, 2010, opposing the motion on the basis that the proposal did not provide for adequate community involvement and public outreach. By letter dated March 2, 2010, Ms. Roberta French, business partner and representative for citizen intervenor Margaret Gavin, provided comments in reply to the motion and cross-motion. On March 31, 2010, I issued a ruling canceling the hearing schedule and setting a procedural conference for September 15, 2010.

The Applicant and Staff jointly filed a stipulation on June 22, 2010 that described the actions the Applicant would take to inform the public and parties of the reasons for an adjournment of the proceedings and included outreach provisions the Applicant would undertake. A letter from the Applicant accompanying the stipulation also updated parties on its alternatives analysis, describing a two-tiered system for evaluating alternate route locations. At the time of filing the letter and stipulation, the Applicant indicated its Tier 1 alternatives analysis was nearing completion. However, the Applicant has never filed this analysis or circulated it to the parties.

Subsequently, the Applicant has been granted successive adjournments, to seek a power purchase agreement in furtherance of establishing the economic viability of the project. However, the Applicant has not been able to secure a power purchase agreement for this project.

Applicant submitted a letter dated July 16, 2010, stating it was working to complete the Tier 1 analysis, describing other outreach efforts it would perform, and requesting a postponement of the September 15, 2010 status conference. A Ruling on Revised Schedule dated July 22, 2010, canceled the September 15, 2010 procedural conference and scheduled a telephone conference among the parties on October 13, 2010, for the Applicant to provide a status report on its alternatives analysis and outreach efforts. The ruling also confirmed Applicant's intent to circulate a Tier 2 alternatives map to the parties by that date. However, the Applicant has never filed a Tier 2 analysis or circulated such an analysis to the parties.

During the October 13, 2010 telephone conference with the parties, the Applicant requested that its application be

held in abeyance with regard to land-based routes to allow the Applicant to explore the feasibility of a sub-aquatic route between Galloo Island and the Town of New Haven. The Applicant provided a summary of the conference call by letter dated October 21 2010. With this letter, the Applicant also provided a map indicating an alternative sub-aquatic route and three land-based routes in addition to the preferred land-based route previously identified in the application.

In a ruling dated October 27, 2010, the Applicant's request was granted and a subsequent telephone conference was scheduled to provide an interim status report of the sub-aquatic route evaluation. A further status conference was scheduled for April 14, 2011 by which time the Applicant anticipated having confirmation regarding award of a power purchase agreement with the New York Power Authority (NYPA) and other information regarding the feasibility of a sub-aquatic route.

On January 26, 2011, by telephone conference, the Applicant provided an interim status report on the sub-aquatic route evaluation. The Applicant provided little additional information on its sub-aquatic route evaluation. Instead, during the telephone conference, the Applicant described its efforts to obtain a power purchase agreement, which had not been successful to date.

Another status telephone conference was held on April 14, 2011. The Applicant noted no change regarding the status of the power purchase agreement and noted it was completing a "desktop" evaluation of the sub-aquatic route. Several landowners posed questions regarding the above-ground route and stated their concerns regarding the uncertainty of the transmission line location. A subsequent telephone conference was scheduled for August 4, 2011.

By letter dated April 20, 2011, several landowners represented jointly by counsel, the "Ellisburg landowners," provided their summary of the April 14, 2011 status telephone conference. The Ellisburg landowners stated that the Applicant indicated it had completed a "desktop" evaluation including evaluation of bathymetry, electrical, and construction issues and that the information identified no obstacles that would disqualify the sub-aquatic route alternative. The Ellisburg landowners noted that during the telephone conference, they requested that the desktop studies be made available to the parties; and the Applicant declined to do so. The Ellisburg landowners also noted that the Applicant stated its commitment to investigate the feasibility of the sub-aquatic route, but that no further investigation would occur in the absence of a power purchase agreement.

By letter dated April 25, 2011, the Applicant responded to the Ellisburg landowners' letter, clarifying that although desktop studies were performed on the sub-aquatic route, other studies would have to be performed before the Applicant could reach a definitive conclusion on whether to proceed with the sub-aquatic route. The Applicant explained that a sub-aquatic route would be significantly more expensive than an over-land route and that, unless it was awarded a power purchase agreement, it would pursue an over-land route.

On July 27, 2011, the Applicant submitted a letter and attached an editorial article from the Rochester, New York, *Democrat and Chronicle*. The article stated that a NYPA staff report regarding NYPA's Great Lakes Offshore Wind (GLOW) program was due in September. The Applicant requested that the status conference be rescheduled for October 26, 2011, to review the anticipated NYPA staff report.

By a Ruling on Revised Schedule, dated July 28, 2011, the telephone conference status report was rescheduled for October, 2011. The Ellisburg landowners submitted a letter dated July 29, 2011 providing their observations on the Applicant's July 27 letter. They noted that the purpose of the status report was to report on evaluation of the sub-aquatic route (rather than NYPA's review of and determination to grant a power purchase agreement) and they requested that the next status report focus on the Applicant's progress with the sub-aquatic route evaluation.

A telephone conference was held on October 27, 2011. The Applicant reported that NYPA had denied the Applicant's request for a power purchase agreement and that NYPA had terminated its GLOW Program. The Applicant also reported that it was pursuing other possibilities for a power purchase agreement. In response to a landowner's question regarding which land-based route would be proposed if the Applicant did not pursue the underwater cable, the Applicant stated that the original proposed route remains its preferred route.

A Ruling on Schedule, issued November 2, 2011, states that the Applicant had requested until the second quarter of 2012 to explore other possible power purchase agreement options and that it expected to have a definitive answer by then, as to whether it could propose a sub-aquatic route, or whether it would have to pursue an land-based route. In the ruling, I set a telephone conference date of July 6, 2012, to receive the Applicant's status report. In the ruling, I also required that Applicant submit an interim status report on or before April 5, 2012.

By letter dated April 4, 2012, the Applicant reported that there are no reasonable prospects for a power purchase agreement or other revenue source to allow the Project to

proceed with the sub-aquatic route. The Applicant noted that there may be an opportunity for it to secure an interconnection point at the Coffeen Street Station (in Watertown), routing the transmission line through the Town of Hounsfield. However, the Applicant did not indicate that any prospects exist for a purchase power agreement to support such a proposal. Additionally, a proposed route with interconnection at Coffeen Street would require substantial new information. Moreover, the Applicant noted that a Coffeen Street Station routing proposal would depend upon cooperation of third parties in the New York Independent System Operator (NYISO) queue for interconnection. Lastly, the Applicant also reported pursuing a Request for Proposal for the power purchase agreement from the Department of Defense (DOD) at the former Griffiss Air Force Base. However, it was subsequently reported in the press that the DOD power purchase agreement was awarded to another entity.

Applicant has been represented in this proceeding by the law firms of Nixon Peabody, LLP, and Young Sommer, LLC. By letter dated April 30, 2012, Young Sommer LLC, withdrew as counsel of record for the Applicant. In correspondence dated May 1, 2012, Nixon Peabody, LLP withdrew as attorneys of record in this matter. Therefore, Applicant no longer is represented by counsel in this proceeding.

THE APPLICANT'S MOTION FOR ADJOURNMENT

The Applicant provided the following information in requesting further adjournment of this proceeding for a period of 6 to 9 months. Applicant states that electrical power prices are currently at an all-time low because of an oversupply of natural gas due to newly developed resources using hydro-fracking. The Applicant asserts that this has put wind energy projects on hold generally throughout the country, including the Galloo Project. The entire U.S. wind energy industry, the

Applicant contends, is waiting to see when these circumstances will turn around. The Applicant also states that the federal Production Tax Credit for renewable energy expires at the end of 2012, and it is unclear whether or when Congress will act on an extension of the tax credit.² In sum, the Applicant stated that its investors are awaiting a change in circumstances before committing any further investment to this Project.

The Applicant further states that the current downturn in the wind energy industry may cause several other projects that are ahead of the Galloo Island Project in the NYISO interconnection queue to abandon their positions, thereby allowing an interconnection for the Galloo Project at the Coffeen Street substation.

Lastly, the Applicant contends that the company's investors have already spent in excess of \$12 million on this project proposal. The Applicant contends this investment represents an enormous benefit to the State on several levels, including development of what would be a \$60 million, non-rate-payer based, privately funded, transmission line in an area with documented poor electrical transmission infrastructure.

In concluding its request for further delay, the Applicant asserts that no legitimate reasons exist to deny its request to hold this case in abeyance.

STAFF'S COUNTER-MOTION

Staff makes two points in support of its counter-motion: first, that the Applicant has not provided any additional substantive information since March 2010; and second,

² On January 1, 2013, Congress enacted the American Taxpayer Relief Act of 2012, which extends the federal Production Tax Credit for renewable wind power generation projects that begin construction by the end of 2013. Previously, such tax credit was only available to wind power generation projects that completed construction and were placed into service by the end of 2012.

that this application should be dismissed in the interests of fairness to the potentially affected landowners, without prejudice to the Applicant to file a new application.

Staff asserts that the proceeding has been suspended or in abeyance since March 2010, almost three years. The suspension/abeyance period, Staff asserts, now represents the predominant status of the proceeding. Staff states that there is no prospect for the Applicant to obtain a power purchase agreement in the foreseeable future; nor has the Applicant identified any such prospect. An effect of substantive inactivity of this application, Staff contends, is that potentially affected landowners have had to put their livelihoods and investments on hold while awaiting a determination in this proceeding.

Applicant did not file a response to Staff's counter-motion.

DISCUSSION

The landowners assert that due to this pending proceeding, they cannot develop their agricultural business properties until they know if, and in what manner, the proposed project will impact their properties. Staff argues that this case should be dismissed on an equitable basis, in fairness to the landowners. In balancing the equities, it is the nature of the marketplace that another wind generation project could be proposed in the area and would present similar concerns for affected landowners regarding local business development. On the other hand, if this application were dismissed, the Applicant could refile, if or when the Applicant is prepared to go forward with an updated or revised project.

The lengthy period of inactivity regarding this application and the fact that the Applicant is no longer

represented by counsel in this proceeding suggest a lack of viability in pursuing this application.

The Applicant has been afforded a great deal of time to move forward substantively on this application. Even so, the Applicant has not reported any progress or movement on this project in many months. Since at least late October 2011, when NYPA denied the Applicant's proposal for a power purchase agreement and terminated its GLOW initiative, the Applicant has had no potential purchaser for its energy. NYPA's termination of the GLOW initiative and denial of a purchase power agreement to the Applicant were major setbacks for this project.

As the Applicant has noted, other setbacks include lower natural gas prices, nationally, and lack of clarity regarding the continued availability of the federal Production Tax Credit for renewable energy beyond 2013. (Although the tax credit was recently extended through 2013, this brief extension is not sufficient to benefit to the Applicant.) Furthermore, these factors, cited by the Applicant as support for further extension of this application, also are reasons why Applicant's project lacks viability.

In balancing the equities, I find that the factors cited by the Applicant in support of its request for additional adjournment of this proceeding are unpersuasive. These factors are not project specific, but instead are statewide or national issues affecting the wind power industry, generally. To the extent that they are relevant, these factors reduce viability of the application.

Regarding a Coffeen Street connection, Applicant has not provided any indication that the cooperation of third parties in the NYISO queue will be forthcoming. Moreover, the Applicant has not explained why its project, rather than another in the NYISO queue, should be afforded a preference.

In my view, this application lacks viability at present. The continued pendency of this application has had a chilling effect upon potentially affected landowners and their plans for business development. Therefore, it is my recommendation that the Commission should dismiss this application in the interests of fairness to potentially affected landowners. I recommend that this application be dismissed without prejudice to the Applicant to file an updated or new application, should its circumstances change.

CONCLUSION

Staff's motion to dismiss the application is granted, as modified. The Applicant's motion for further adjournment of the proceeding is denied.

This matter is referred to the Commission for consideration, with my recommendation that the Commission dismiss this application in the interests of fairness to potentially affected landowners. Further, I recommend that this application be dismissed without prejudice to the Applicant to file an updated or new application, should its circumstances change.

(SIGNED)

KEVIN J. CASUTTO