

NEW YORK STATE BOARD ON ELECTRIC
GENERATION SITING AND THE ENVIRONMENT

CASE 16-F-0267 - Application of Atlantic Wind LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 for Construction of the Deer River Wind Energy Project in Lewis and Jefferson Counties.

RULING ON INTERVENOR FUNDING REQUESTS

(Issued July 25, 2017)

JAMES A. COSTELLO and LISA A. WILKINSON, Examiners:

INTRODUCTION

At a pre-application procedural conference held on July 12, 2017, at the Lowville Academy & Central School in Lowville, New York, we awarded pre-application intervenor funds in the total amount of \$35,000 to the Towns of Pinckney, Harrisburg, and Montague (the Towns) and to Heath Ash/Concerned Citizens of Deer River Wind Energy Project (Concerned Citizens). This ruling confirms our awards of pre-application intervenor funds to the Towns and Concerned Citizens.

BACKGROUND

On May 15, 2017, Atlantic Wind LLC (Atlantic Wind), a wholly-owned subsidiary of Avangrid Renewables, LLC, filed a Preliminary Scoping Statement in connection with its proposal to construct the Deer River Wind Farm, a major wind energy generating facility, consisting of up to 40 wind turbines, together with the associated overhead and below grade electric collection lines, access roads, meteorological towers, an operation and maintenance building, and a collection substation (the Project). The Project would have a maximum generating capacity of 100 megawatts (MWs) and would be located on leased

private land and easements located in the Towns of Pinckney, Harrisburg, and Montague, in Lewis County, New York. To deliver power to the New York State power grid, Atlantic Wind proposes to construct a collection substation adjacent to an existing interconnection switching station, which will interconnect with National Grid's 115 kV transmission line in the Town of Rodman in Jefferson County, New York.

Pursuant to Public Service Law §163(4), a pre-application intervenor fund of \$35,000 was established for this proceeding. A Notice of Availability of Pre-Application Intervenor Funds, issued May 19, 2017, and revised by notice issued May 23, 2017, directed eligible municipal and local parties intending to participate in the pre-application stage of this proceeding to submit their requests for pre-application stage intervenor funding by June 16, 2017. The Towns and Concerned Citizens separately filed requests for pre-application intervenor funds totaling \$70,000. At the July 12, 2017 pre-application procedural conference, we granted pre-application intervenor funding awards of \$16,000 to the Town of Pinckney, \$10,500 to the Town of Harrisburg, \$3,500 to the Town of Montague, and \$5,000 to Concerned Citizens.

REQUESTS FOR INTERVENOR FUNDING

The Towns

The Town of Pinckney states that it is the site of 29 of the windmills proposed under the Project. It further asserts that, as of the 2010 census, it had a population of 329 people and has little funding available for legal representation or engineering services with respect to the Project. The Town of Pinckney requested \$9,500 for the legal services of Conboy, McKay, Bachman & Kendall LLP (the Conboy law firm). It states that the Conboy law firm has extensive experience with municipal matters and will provide services enabling it to understand the

full nature and extent of the Project's impacts and to meaningfully participate in the Article 10 process. The Town specifically states that the Conboy law firm will review and update Town zoning laws, analyze the PSS and the Project, and assist the Town with considering payments in lieu of taxes (PILOT) agreements, road agreements, cultural mitigation studies and outreach to various parties involved in the process. The Town submitted a copy of its retainer agreement with the Conboy law firm, signed by attorney James A. Burrows, which states that the law firm's normal rates range from \$100 per hour for paralegals to \$250 per hour for partners and that Mr. Burrows's discounted municipal hourly rate is \$185 per hour.

Further, noting that the Towns intend to share the costs for engineering services to be provided by Bernier Carr & Associates, the Town of Pinckney requests \$10,500 as its share of the costs for such services. The Town states that Bernier Carr & Associates has more than four decades of experience and the necessary credentials to help the Town analyze and understand the physical, visual, wildlife, public health, economic, safety, noise and various other impacts that will be caused by the Project. Bernier Carr & Associates agrees to provide such services at rates varying from \$100 to \$165 per hour.

The request for intervenor funding filed by the Town of Harrisburg states that a portion of the Project will be constructed within its boundaries and that it has an interest in the physical, scenic and economic impacts the Project will have on the Town and its residents. It also states that property taxes are the sole source of its funding and that it has no funds for use to retain legal or engineering services in connection with the Project. The Town of Harrisburg requested \$7,500 as its share of the costs to hire Bernier Carr & Associates for engineering services. The Town supports that

request with essentially the same information as provided in the Town of Pinckney's request discussed above. In addition, at the pre-application procedural conference, the Town explained that Kris Dimmick from Bernier Carr & Associates has worked with municipalities in connection with various wind energy projects.

The Town of Harrisburg also requests \$4,000 for the legal services of attorney Mark G. Gebo of Hrabchak & Gebo, P.C. The Town states that Mr. Gebo has been its general counsel and has substantial experience in representing municipalities in connection with other wind energy projects. It further states that Mr. Gebo's legal services will help it to understand and effectively participate in the Article 10 process. A retainer agreement attached to the Town's request for intervenor funds specifies that such services will be provided at a rate of \$140 per hour for the attorneys' time and \$60 per hour for legal assistants, plus actual out of pocket expenses.

The request for intervenor funds filed by the Town of Montague states that the Town is a municipal entity in which a portion of the Project will be constructed. It further states the Town has no funds to hire legal or engineering services in connection with the Project. The Town requests \$2,500 as its share of the costs to hire Bernier Carr & Associates for engineering services and \$1,000 for legal services to be provided by Mr. Gebo. The Town supports its request with respect to Bernier Carr & Associates with essentially the same information as provided by the Towns of Pinckney and Harrisburg. It also supports its request with respect to Mr. Gebo with essentially the same information as provided by the Town of Harrisburg.

Concerned Citizens

Concerned Citizens' request for intervenor funds states that Concerned Citizens is a recently formed group of residents who have concerns about the Project, specifically regarding visual, public health and real property value impacts, as well as potential impacts on the operations of Fort Drum in Jefferson County. At the time of the pre-application procedural conference, Concerned Citizens had two members, Heath and Noreen Ash, both of whom live in the Town of Pinckney. Concerned Citizens states that it is an eligible group local party that has no funding and requires pre-application intervenor funds to ensure local participation in the Project. Concerned Citizens requested \$35,000 to retain the legal services of Lippes Mathias Wexler Friedman LLP, which it asserts has extensive experience in Article 10, government compliance, municipal, environmental, and land use law. The law firm would review the PSS, negotiate stipulations, retain experts to address potential impacts on real estate values, acoustics and the public health, and otherwise provide legal advice on the Article 10 process. Pursuant to a retainer agreement provided by Concerned Citizens, such legal services would be provided at discounted hourly rates of \$270 for attorney Dennis Vacco, \$250 for attorney Mark Davis and \$215 for attorney Benjamin Wisniewski.

DISCUSSION

Pursuant to Public Service Law §163(4), only municipal and local parties may receive intervenor funds. The purpose of the pre-application intervenor fund is to enable municipal and local parties to better participate in the review of the PSS and to participate in the stipulations process by allowing those parties to defray expenses for expert witnesses, consultants, legal representation, and administrative fees. The Examiners must reserve at least 50% of the funds for potential awards to

municipalities¹ and must award the funds on an equitable basis upon a determination that the funds will be used to make an effective contribution to the review of the PSS and the development of an adequate scope of the application to be submitted by the project sponsor.²

The Towns are municipal parties eligible to receive pre-application intervenor funds. The Towns' funding requests each meet the criteria identified in 16 NYCRR §1000.10(c). The participation of the Towns in this stage of the process will ensure representation of their respective constituents' interests in the development of an adequate scope of the application for the Project. We therefore confirm our awards of \$16,000 to the Town of Pinckney, \$10,500 to the Town of Harrisburg, and \$3,500 to the Town of Montague, for a total award to the Towns of \$30,000.

The Towns' requests for intervenor funding, however, is approved only to the extent that the proposed legal and engineering services to be provided "will contribute to the compilation of a complete record as to the appropriateness of the site and facility," as required by 16 NYCRR 1000.10(c)(1)(vi). Any request by the Towns for disbursement of funds for the services provided by attorneys and the engineering firm must sufficiently describe the activities or services specifically related to the Siting Board's review of this

¹ Public Service Law §164(6)(b); 16 New York State Codes, Rules and Regulations (NYCRR) 1000.10(b)(7)

² For this reason, the pre-application funding request form (provided on the Siting Board's web page for use by those seeking an award of funding) asks for (1) a detailed statement of the services to be provided by the requestor's proposed experts and (2) a detailed statement "specifying how such services and expenses will make an effective contribution to [the] review of the Preliminary Scoping Statement and the development of an adequate scope of appropriate studies for the application to be submitted and thereby provide early and effective public involvement."

Project. We note that pre-application intervenor funding cannot be used for services in assisting the Towns with updating their local zoning laws, consideration of PILOT agreements, or for preparation of independent studies because those activities will not meaningfully contribute to development of an adequate scope of the application to be submitted by the project sponsor.

Concerned Citizens is a group local party eligible to receive pre-application intervenor funding because the Ashes reside in the Town of Pinckney and assert that the Project may affect their property value and subject them to noise and visual impacts.³ Concerned Citizens' funding request meets the criteria identified in 16 NYCRR 1000.10(c). The participation of Concerned Citizens in this stage of the process will ensure additional local representation in the development of an adequate scope of the application for the Project. We therefore confirm our award of \$5,000 to Concerned Citizens with respect to legal services to be provided by Lippes Mathias Wexler Friedman LLP. As stated at the pre-application procedural conference, the awarded funds cannot be used for the services of currently unidentified experts in real estate, public health and acoustics. To the extent Concerned Citizens wishes to use pre-application intervenor funds to retain such experts, it must first request approval by filing another application containing the information about such experts required by 16 NYCRR 1000.10(c).

CONCLUSION

We confirm our awards of \$16,000 to the Town of Pinckney, \$10,500 to the Town of Harrisburg, \$3,500 to the Town of Montague, and \$5,000 to Concerned Citizens. Each award of

³ "Local parties" are defined as "persons residing in a community who may be affected by the proposed major electric generating facility" and who "individually or collectively" seek intervenor funding (Public Service Law §160(9)).

pre-application intervenor funds is to be used only for the purpose(s) that have been approved by us in our rulings granting an award of such funds. Each of the Towns and Concerned Citizens will be required to enter into a contract with the Department of Public Service (DPS) and will be provided with a form voucher that each party must submit to receive disbursements of funds. No funds will be disbursed until after the work has been performed and detailed invoices have been submitted for review by the presiding examiner and the DPS Finance Office.

The Towns and Concerned Citizens are reminded that they must comply with the reporting requirements set forth in 16 NYCRR 1000.10(b)(10). The quarterly reporting required by this regulation shall be due 15 days following the close of each calendar quarter, with the first quarterly report due 15 days following the close of the third quarter of 2017. These reporting requirements, in part, are intended to enable the presiding examiner to provide meaningful oversight of funding awards, to track the progress of work performed with intervenor funds, and to ensure that the funds are used for the purpose(s) for which they were awarded. Failure to comply with these reporting requirements may result in a determination that further expenditures and disbursements are not warranted. If actual expenditures exceed the total budgeted amount awarded, they cannot be reimbursed from the intervenor fund.

(SIGNED)

JAMES A. COSTELLO

(SIGNED)

LISA A. WILKINSON