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15-F-0122 - 10-5-2016 - Hornell, NY

NYS BOARD ON ELECTRIC GENERATION
SITING AND THE ENVIRONMENT

15-F-0122 - APPLICATION OF BARON WINDS LLC FOR A
CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY
AND PUBLIC NEED PURSUANT TO ARTICLE 10 TO
CONSTRUCT A WIND ENERGY FACILITY

PRE-APPLICATION PROCEDURAL CONFERENCE
REGARDING INTERVENOR FUNDING REQUESTS AND
THE STIPULATIONS PROCESS

Wednesday, October 5, 2016
10:00 a.m.
Hornell City Hall
Courtroom
82 Main Street
Hornell, New York 14843

Presiding Examiner Kevin Casutto
Administrative Law Judge
Three Empire State Plaza
Albany, NY 12223-1350

Associated Examiner Maria E. Villa
NYS Dept. of Environmental Conservation
625 Broadway
Albany, NY 12203

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2 A.L.J. CASUTTO: I call case 15-F-0122,
3 Application for Baron Winds, L.L.C., for a
4 Certificate of Environmental --

5 MR. WEINTRAUB: I cannot --.

6 A.L.J. CASUTTO: -- Compatibility and
7 Public Need, pursuant to Article 10, to construct a wind-
8 energy project.

9 My name is Kevin Casutto. I am a New York
10 State Department of Public Service Examiner for this case.

11 And with me this morning, co-presiding, is
12 New York State Department of Environmental Conservation
13 Examiners, Maria Villa.

14 I'm going to go off the record for just a
15 moment, to see if we can turn off the fan.

16 (Off-the-record discussion)

17 Thank you, Officer Schneider.

18 OFFICER SCHNEIDER: Yes, your Honor.

19 A.L.J. CASUTTO: All right. So I'd like to
20 have appearances on the record now, beginning with the
21 project sponsor, Mr. Muscato.

22 MR. MUSCATO: Good morning, your Honor.

23 My name is Jim Muscato, along with my
24 colleague, Jessica Klami, who's attending by phone this
25 morning. We're from Young Summer representing the

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2 Applicant, Baron Winds, L.L.C.

3 From Baron Winds this morning we have Seth Wilmore
4 and Kevin Sheen with us, as well as our consultant, Ben
5 Brazell from EDR, who's supporting the project.

6 A.L.J. CASUTTO: Thank you.

7 And the Department of Public Service staff,
8 Ms. Behnke.

9 MS. BEHNKE: Yes. Good morning.

10 This is Heather Behnke from the Department
11 of Public Service Staff by phone.

12 A.L.J. CASUTTO: Thank you.

13 And as I mentioned earlier -- and as I
14 mentioned earlier, Mr. Davis and Mr. Quackenbush are
15 present in the hearing room.

16 For D.E.C. staff, Mr. Weintraub?

17 MR. WEINTRAUB: Yes. This is Larry
18 Weintraub for the Department of Environmental Conservation
19 with, Roger Beidic by phone.

20 A.L.J. CASUTTO: Thank you.

21 And for the Department of Health, Mr.
22 Thomas?

23 MR. THOMAS: Yes.

24 This is Richard Thomas, with the New York
25 State Department of Health, also by phone.

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2 A.L.J. CASUTTO: Thank you.

3 And for the Department of Agriculture and
4 Markets, Ms. Wells?

5 MS. WELLS: Yes.

6 This is Tara Wells for the Department of
7 Agriculture and Markets also by phone.

8 A.L.J. CASUTTO: Thank you.

9 MR. SAVIOLA: And is that microphone on?
10 I'm with the Department of Agricultural --

11 A.L.J. CASUTTO: Yeah.

12 MR. SAVIOLA: -- and Markets --

13 MR. MUSCATO: Uh-huh.

14 MR. SAVIOLA: -- as well.

15 A.L.J. CASUTTO: I'm sorry?

16 MR. SAVIOLA: Michael Saviola with the
17 Department of Agriculture and Markets, Division of Lead
18 and Water Resources, Agricultural Protection Unit.

19 A.L.J. CASUTTO: Thank you.

20 So, Mr. Saviola is present in the hearing
21 room as well.

22 In the pre-application phase of this
23 project review, there are no formal parties because an
24 application hasn't been filed yet, but nonetheless, the
25 participants may file as parties in the Department of

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2 Public Service online system, the DMM system as it's
3 called, to facilitate the exchange of materials among
4 participants. So if anybody hasn't filed -- hasn't filed
5 yet as a party, please do so, to facilitate the exchange
6 of information.

7 I'd like to speak about the stipulation
8 process for the benefit of members of the public who are
9 here observing this morning. During the pre-application
10 phase of a major electric generation facility siting case,
11 such as this one, pursuant to Public Service Law Article
12 10 and related regulations, the project sponsor and
13 Department of Public Service Staff and other interested
14 persons may engage in discussions on any aspect of the
15 preliminary scoping statement that's been prepared by the
16 project sponsor and any study or program of studies made
17 or proposed to be made by the project sponsor to support
18 the sponsors eventual application for the project.

19 Once in -- once the application is -- is
20 filed, that begins a formal review process under Article
21 10 of the Public Service Law, before the siting board.

22 If the project sponsor reaches agreement
23 with any such interested persons, such studies or program
24 of studies would then be conducted by the project sponsor
25 and included as part of the requirements for their

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2 application for that particular project.

3 The studies may include an evaluation of
4 potential impacts of proposed project on the environment,
5 public health and other public-interest factors. So the
6 statute and the regulations are already quite detailed as
7 to what is required in an application for a major electric
8 generating facilities such as this wind project.

9 So the stipulations are meant to provide
10 detail or nuance for the specific project and the
11 particular site.

12 If the project sponsor and interested
13 persons reach agreement or stipulations as they're called,
14 the sponsor must file any proposed stipulations and the
15 Examiners will set a comment period to be announced to
16 provide participants and other interested persons of the
17 public, with an opportunity to comment on the proposed
18 stipulations. After the conclusion of the comment period,
19 the project sponsor and persons in agreement may enter
20 into the final stipulation set forth in the agreement.

21 The current regulations regarding the
22 contents of an Article 10 siting application are 16 NYCRR
23 Part 1001 and as I've mentioned, those -- those
24 regulations are quite detailed as to the contents of an
25 application.

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2 So examples of -- of matters that could be
3 addressed in the stipulations process would be regarding
4 visual-impact assessment, the identify -- the
5 identification of specific sensitive visual receptor
6 locations -- excuse me, or regarding noise impact
7 assessment, the identification of specific sensitive-noise
8 receptor locations.

9 Now, I want to explain some of the ground
10 rules for the negotiation process in developing
11 stipulations and basically the stipulation consultation
12 process is confidential among the participants, but
13 participation is open to all interested persons. So, the
14 Commission's Rules regarding settlements applied to
15 Article 10 and the pre-application stipulation process.

16 Rule 1000.3 provides that unless a
17 provision of Public Service Law Article 10 Section 306 of
18 the State Administrative Procedure Act, or the regulations
19 conflict with it, the Rules of procedure of the Public
20 Service Commission shall apply in connection with each
21 certification proceeding under Article 10. With limited
22 exceptions, the -- the Public Service Commission's Rules
23 and procedure, therefore, are applicable and the PSC Rule
24 concerning settlement negotiations, which is Rule 3.9,
25 states that no discussion, admissions, concession, or

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2 offer to stipulate, or settle whether oral or written,
3 made during any negotiation session, concerning the
4 stipulation or settlement, shall be subject to discovery
5 or admissible in any evidentiary hearing against any
6 participant who objects to its admission.

7 Participating parties and their
8 representatives and other persons attending settlement
9 negotiations, shall hold confidential, such discussions,
10 admissions, concessions and offers to settle and shall not
11 disclose them outside the negotiations except to their
12 principals, who shall also be bound by the confidentiality
13 requirement without the consent of the parties
14 participating in the negotiations.

15 The Administrative Law Judge, or in this
16 instance the Examiners assigned to the case, may impose
17 appropriate sanctions for the violation of this
18 subdivision, which may be in -- which may include
19 exclusion from the settlement process. Therefore, by
20 operation of Rule 1000.3, the stipulation consultation
21 process under Article 10 Rule 1000.5(J) is subject to PSC
22 Rule 3.9(D).

23 I hope you were all able to follow that.
24 And if members of the public wish, once we go off the
25 record, I'd be happy to explain that to you again.

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2 So on August 15th, 2016, a Notice of
3 Availability of Pre-Application Intervener Funds and
4 deadline for submitting funding requests was issued. The
5 deadline for funding requests was -- was September 14th,
6 2016.

7 I notice for this procedural conference,
8 was issued on September 2nd, 2016 and in response to the
9 request for funding, no requests for funding have been
10 received.

11 The Intervener Fund in this case is one
12 hundred and five thousand dollars. That's the Pre-
13 Application Intervener Fund. In the event an application
14 is filed subsequently, a separate Application Phase Fund
15 will be available to defray the costs of the members of
16 the public, local parties, or municipal parties who wish
17 to participate in review of this proceeding.

18 So because we have no requests for funding,
19 my office will initiate the process to set a new period, a
20 second period, for funding requests. If the funds are not
21 used during the pre-application phase and the project
22 sponsor does file an application, the pre-application
23 funds will be available during the application review, in
24 addition to any application funds.

25 Now, in view of the fact that no requests

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2 for intervener funds were received, the Examiners have
3 decided that the stipulation process may commence. And as
4 I've mentioned already, a second round of intervener
5 funding requests will be initiated.

6 Mr. Muscato, while we were off the record,
7 I discussed with you that you should file a Notice of
8 Commencement of the stipulation process, address that as a
9 letter to the secretary, so that it will go to DMM and be
10 distributed to all interested persons in this case.

11 MR. MUSCATO: Your Honor, can I ask a
12 clarification question --

13 A.L.J. CASUTTO: Yes.

14 MR. MUSCATO: -- at this point regarding
15 the stipulations process?

16 You, a moment ago, spoke regarding the
17 ground rules for confidentiality, and I understood those
18 ground rules for confidentiality under 3.9(d) is applying
19 in this proceeding. My question is whether or not the
20 settlement Rules by the Public Service Commission's
21 regulations, prescribe the manner in which the Applicant
22 participates or conducts the voluntary stipulations
23 process and -- and whether or not there's any
24 clarification regarding how that's conducted going forward
25 could be provided at this time.

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2 A.L.J. CASUTTO: You mean the settlement
3 guidelines?

4 MR. MUSCATO: Yes.

5 With respect to if those settlement
6 guidelines prescribe a specific manner in which the -- the
7 Applicant has to engage parties and --.

8 A.L.J. CASUTTO: I -- I think at a minimum
9 you could use those as -- as advisory and if an issue
10 arises regarding your position on applicability of those
11 guidelines, you could resort to the Examiners for
12 clarification at that time.

13 MR. MUSCATO: It -- it --.

14 A.L.J. CASUTTO: So I would suggest using
15 those guidelines as advisory. I mean, they haven't been
16 adopted by the siting board.

17 MR. MUSCATO: Right.

18 A.L.J. CASUTTO: So technically they're not
19 the -- the regulation or guidance of the siting board.

20 But I would recommend using them as a guide
21 essentially, as advisory and then if an issue arises, you
22 can bring it to the Examiners and we can make a ruling on
23 it or provide guidance at that time.

24 MR. MUSCATO: Okay. I -- that --

25 A.L.J. CASUTTO: Is that sufficient?

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2 MR. MUSCATO: -- that makes sense, your
3 Honor.

4 I guess I then have a follow up question,
5 whether or not it's worthwhile discussing it during this
6 session, since this is for -- formally for commencement of
7 stipulations and because we have the -- all of the parties
8 that are participating in this proceeding available right
9 now, whether or not we have experience -- this Applicant
10 in particular has experience with another proceeding --
11 proceeding through stipulations process and obtaining
12 executed stipulations from the parties that were
13 participating in that proceeding.

14 And I -- I want to confirm that, in light
15 of what you said in the ground rules and 3.9 and the
16 settlement procedures that apply that the process that the
17 applicant obtained stipulations in that proceeding would
18 -- would still be applicable. And so I was going to
19 outline just very generally, what -- how I see the
20 stipulations process proceeding and -- and making sure
21 that that doesn't -- if you have concerns about that, or
22 if you thought that was inconsistent with the settlement
23 guidelines, either you could let us know, or if a party --
24 if -- if one of the parties identified an issue with that,
25 to let us know.

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2 Is -- is -- so would it be okay --

3 A.L.J. CASUTTO: Yeah. I -- I

4 MR. MUSCATO: -- if I --

5 A.L.J. CASUTTO: -- think --.

6 MR. MUSCATO: -- describe some of that?

7 A.L.J. CASUTTO: Well, I -- I'll allow you
8 to do that now, but I would recommend that you do that at
9 an -- at an initial meeting or an initial contact with the
10 other interested participants after the Notice --

11 MR. MUSCATO: Okay.

12 A.L.J. CASUTTO: -- of commencements -- of
13 stipulations has begun and then if anybody objects, or the
14 process is not deemed acceptable by anyone, then we can
15 deal with it at that time.

16 MR. MUSCATO: Okay. The -- the -- we
17 anticipate providing stipulations -- draft stipulations
18 available to the parties by October 21st. And -- and
19 again I will set this forth in the letter that we're
20 providing to the secretary.

21 But from there we anticipate receiving
22 comments from the parties that want to participate in the
23 stipulations process and are amendable to an agreement
24 with the applicant with respect to the scope -- excuse me,
25 and methodologies of studies to be conducted and included

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2 in the application. We would expect those comments to be
3 received, the Applicant could then review the comments,
4 meet with the parties as needed to finalize the
5 stipulations and resolve any outstanding issues or
6 comments.

7 And then ultimately, with the parties that
8 are agreeable to that document -- or to that set of
9 stipulations or exhibits, to file that with the secretary
10 and to notify your Honors and to commence the formal
11 comment period for those stipulations -- the public-
12 comment period. So that -- that's my --

13 A.L.J. CASUTTO: Yes. The --.

14 MR. MUSCATO: -- outline or sketch of the
15 process and I just wanted to confirm that was -- was
16 acceptable at this time.

17 A.L.J. CASUTTO: All right. Well, again, I
18 mean, it would be a question first, whether any of the
19 participants would object.

20 MR. MUSCATO: Right.

21 A.L.J. CASUTTO: So, I hesitate -- I mean,
22 that could work, but I don't want to --

23 MR. MUSCATO: And this is a little awkward
24 --

25 A.L.J. CASUTTO: -- I don't to preclude a -

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2 -

3 MR. MUSCATO: -- because of the telephone.

4 A.L.J. CASUTTO: -- participant from
5 objecting or -- or raising -- or suggesting another way of
6 proceeding.

7 MR. MUSCATO: Uh-huh.

8 A.L.J. CASUTTO: So that could work, but
9 let's see what the participants say and if there is a
10 disagreement that can't be worked out among yourselves,
11 you can bring it to the Examiners.

12 MR. MUSCATO: Okay. And -- and -- and I
13 guess I would ask my -- the fellow parties that are either
14 attending by phone, or -- or in person if there is any
15 comment on that at this point, but otherwise, we will file
16 the letter with the secretary and proceed --

17 A.L.J. CASUTTO: Right.

18 MR. MUSCATO: -- with that.

19 A.L.J. CASUTTO: It might be helpful to
20 briefly describe that process in the notice letter --

21 MR. MUSCATO: Okay.

22 A.L.J. CASUTTO: -- and request by X date
23 that, you know, parties indicate their -- you know,
24 agreement or -- or objection -- you know, if they have --
25 if they disagree with some aspect of that proposal for

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2 going forward.

3 MR. MUSCATO: We will do so, your Honor.

4 Thank you.

5 A.L.J. CASUTTO: Okay.

6 MR. MUSCATO: Yeah.

7 A.L.J. CASUTTO: Okay. Judge Villa, did
8 you want to add anything to what we've covered so far this
9 morning?

10 A.L.J. VILLA: Not at this time.

11 Thank you, Judge Casutto.

12 A.L.J. CASUTTO: All right. Thank you.

13 And let ask the participants, is there
14 anybody by telephone conference who wishes to raise any
15 other matter during this procedural conference?

16 All right. Let the record reflect -- yes.

17 Who is speaking please?

18 MR. MUSCATO: I think it may have been the
19 echo, your Honor.

20 A.L.J. CASUTTO: Oh. All right. Well, let

21 -- let the record reflect then that nobody has so

22 indicated among the telephone-conference participants.

23 And Mr. Davis, Mr. Quackenbush, is there
24 anything you want to raise this morning that hasn't been
25 addressed?

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2 MR. QUACKENBUSH: Nothing this morning.

3 Thanks.

4 A.L.J. CASUTTO: All right. Thank you.

5 And Mr. Muscato, is there anything further
6 that you wish to raise?

7 MR. MUSCATO: Nothing further, your Honor.

8 A.L.J. CASUTTO: All right. All right.
9 So, my office will be initiating the process to identify a
10 second round of intervener funding and a deadline for
11 submitting funds, so that if municipal parties or local
12 parties wish to seek funding, there will be a second
13 opportunity to do so.

14 I -- that concludes the matters that I wish
15 to cover, so I'm about to close the record at this time.

16 Again, does anybody wish to say anything
17 further before we close the record?

18 All right. So, at this time, we'll --
19 we'll conclude the procedural conference and as I
20 mentioned to members of the public, we'll be available
21 after we go off the record if you have questions for us,
22 or want a further explanation of anything that was
23 discussed during the conference.

24 Thank you very much, ladies and gentlemen.

25 That concludes this procedural conference.

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MR. MUSCATO: Thank you, your Honor.

(The conference concluded.)

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2 STATE OF NEW YORK

3 I, HOWARD HUBBARD, do hereby certify that the foregoing
4 was reported by me, in the cause, at the time and place,
5 as stated in the caption hereto, at Page 1 hereof; that
6 the foregoing typewritten transcription consisting of
7 pages 1 through 19, is a true record of all proceedings
8 had at the hearing.

9 IN WITNESS WHEREOF, I have hereunto
10 subscribed my name, this the 12th day of October, 2016.

11

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13 HOWARD HUBBARD, Reporter

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