

NEW YORK STATE BOARD ON ELECTRIC
GENERATION SITING AND THE ENVIRONMENT

CASE 15-F-0327 - Application of Galloo Island Wind LLC for a
Certificate of Environmental Compatibility and
Public Need Pursuant to Article 10 to Construct
a Wind Energy Facility

RULING ON INTERVENOR FUNDING REQUEST

(Issued August 18, 2016)

KEVIN CASUTTO, ASHLEY MORENO, AND MICHAEL CARUSO, Examiners:

INTRODUCTION

On June 6, 2016, Galloo Island Wind LLC (Galloo or Project Sponsor), a subsidiary of Apex Clean Energy Holdings LLC (Apex), filed a Preliminary Scoping Statement (PSS) in connection with its proposal to construct a major electric generating facility on Galloo Island, in the Town of Hounsfield, Jefferson County, New York. Construction would include wind turbines producing up to 110.4 megawatts (MW) of wind energy, electrical lines connecting the turbines to each other and to the electrical network, a collection substation, access roads, meteorological towers, temporary construction staging and storage areas, permanent housing for operational staff, and an operations and maintenance facility (the Project).

Galloo proposes to interconnect the Project with the State's electric system by constructing an approximately 30-mile 115 kilovolt (kV) alternating current (AC) underwater electric transmission cable and a point of interconnection substation near the Mitchell Street Substation in the City of Oswego (the Transmission Facility). The Transmission Facility would be a "major utility transmission facility" subject to Public Service Law Article VII, which means it cannot be built or operated without a separate Certificate of Environmental Compatibility

and Public Need issued by the Public Service Commission. Galloo plans to file an application for permission to construct and operate the proposed Transmission Facility that will be reviewed in a separate proceeding before the Public Service Commission.

During the pre-application phase of a major electric generating facility siting case such as this one, pursuant to Public Service Law (PSL) Article 10 and regulations issued pursuant thereto,¹ the project sponsor, DPS Staff, and other interested persons may engage in discussions on any aspect of the preliminary scoping statement and any study or program of studies made or to be made by the project sponsor to support the project sponsor's application. If the project sponsor reaches agreement with any such interested persons, such studies or program of studies would then be conducted and included as part of the application for that particular project. The studies may include evaluation of the potential impacts of the proposed project on the environment, public health, and other public interest factors.² If the project sponsor and interested persons reach any agreements, the project sponsor must file any proposed stipulation and a public comment period would then provide participants and other interested persons with an opportunity to comment upon the proposed stipulation(s). After the conclusion of the comment period, the project sponsor and persons in agreement may enter into the final stipulation setting forth the agreement(s).

Pursuant to Public Service Law (PSL) §163(4), a pre-application intervenor fund of \$38,640 has been established

¹ 16 NYCRR Part 1000 et seq.

² See generally 16 NYCRR Part 1001.

for this proceeding.³ The purpose of the pre-application intervenor fund is to enable municipal and local parties to better participate in review of the Preliminary Scoping Statement and to participate in the stipulations process by allowing municipal and local parties to defray expenses for expert witnesses, consultants, legal representation, and administrative fees.⁴

Pursuant to PSL §163(4), only municipal and local parties may receive intervenor funds. To encourage early and effective public participation during the pre-application stage of project review, the Examiners must award the funds on an equitable basis upon a determination that the funds will be used to make an effective contribution to review of the Preliminary Scoping Statement and the development of an adequate scope of the Application to be submitted by the project sponsor.

A request for intervenor funds must contain all of the information required by the Siting Board's rules set forth in 16 NYCRR, Section 1000.10(c). A party receiving a pre-application award of funds must use the awarded funds only for the purpose(s) that have been specified in the particular award of intervenor funding. A party receiving an award of funds must also comply with certain quarterly reporting requirements.⁵

³ The term "Intervenor" refers to a person or entity that joins a case or proceeding as a third party, other than the project sponsor and the Siting Board Staff, for the protection of an interest. Some intervenors join as a matter of right established in the Article 10 statute; others are permitted to join at the discretion of the Siting Board.

⁴ The Examiners must reserve at least 50% of the funds for potential awards to municipalities. 16 NYCRR 1000.10(a)(5).

⁵ See 16 NYCRR 1000.10(a)(11).

The Notice of Available Intervenor Funds, issued June 8, 2016, invited eligible municipal and local parties participating in the pre-application process of this proceeding to submit requests for pre-application phase intervenor funding by July 8, 2016. Three timely request were filed,⁶ by the Town of Hounsfield (the Town), the Village of Sackets Harbor (the Village), which is located within the Town of Hounsfield, and jointly, Anthony and Cara Dibnah, owners of property that abuts the proposed Project area on Galloo Island.

On July 28, 2016, the Examiners held a public pre-application conference at the Hounsfield Town Hall, located in Watertown, to consider the funding request. Participants at the conference included Galloo, Department of Public Service Staff (Staff), New York State Department of Environmental Conservation (DEC), the Town, the Village, and Mr. Dibnah. Mr. Dibnah resides in Nevada, and participated in the conference by telephone. During the conference, the Examiners requested clarification from the Town regarding its request by August 1, 2016, granted initial awards of pre-application funding in the amount of \$5,000 to the Town and \$5,000 to the Village, and encouraged the Town and Village to coordinate their scoping review of this Project and make a further request for funding to ensure prudent and effective use of the funds. The Examiners requested additional funding requests by August 11, 2016. The Examiners reserved on the Dibnahs' funding request; first, to consider argument about whether the Dibnahs are "local parties," as defined in the statute and regulations, and therefore eligible to receive an award of intervenor funds, and second, to

⁶ The Town filed separate requests for legal services and for engineering and environmental services, and on August 11, 2016, filed a supplemental funding request for scope of visual impact assessment. The Town's requests are addressed in this ruling as one request for funding.

allow Mr. Dibnah to provide a proposed retainer agreement for legal services in support of his funding request.

A second notice of availability of intervenor funds was issued on August 3, 2016, inviting funding requests by August 11, 2016. On August 11, 2016, the Town filed a supplemental funding request for technical services regarding review of potential visual impacts of the Project. The Town indicated its belief that the proposed scope of work would also meet the needs of the Village. In addition, Mr. Dibnah filed a comment requesting that the visual assessment to be undertaken by the Town include review of potential visual impacts to the Dibnahs' lighthouse property.

The purpose of this ruling is to confirm the Examiners' ruling from the bench during the July 28, 2016 Conference, to rule on the Dibnahs' funding request, and to make further awards of pre-application intervenor funds.

THE REQUEST FOR INTERVENOR FUNDS

The Town and the Village each are municipal parties eligible to receive pre-application intervenor funds. The Village is located within the Town and is the population center of the Town. The Town, as host municipality for this Project, and the Village maintain that a Project of this magnitude will impact all the residents of their municipalities.⁷ They each state they have limited financial resources and no funds budgeted or available for review of this Project.

Funding for operating municipal services, the Town and Village each assert, is raised principally from property taxes

⁷ Galloo Island is located within the Town of Hounsfield. The Town of Hounsfield population, as reported in the 2010 U.S. Census, is 3,466; of the Town's population, the 2010 U.S. Census reports a population of 1,450 in the Village of Sackets Harbor, more than 40% of the Town's population.

and is limited. The Town and Village each assert that their taxpayers and residents will be directly impacted by the Project, and that an award of intervenor funds will allow them to meaningfully participate in the pre-application proceedings. The Town and Village each seek intervenor funds to retain legal counsel and technical experts experienced in reviewing wind energy generating facilities.

An award of intervenor funds, the Town and Village each contend, will enable them to review and analyze the scope of studies proposed or performed by Galloo to ensure that Galloo is fully considering the potential impacts the Project may have on the citizens of the Village and Town, and to ensure that the Galloo responds appropriately to other concerns regarding the Project that may be identified by their citizens.

The Town's initial funding request identifies the law firm of Curtin & DeJoseph, P.C. (Paul J. Curtin, Jr., Esq.) to provide legal services and the engineering and environmental consultant, Barton & Loguidice, D.P.C. (B&L), to provide engineering and environmental services during the pre-application scoping phase of this proceeding. The request identifies individuals within each firm who would work on the scoping review and hourly service rates for them. The Town requests \$13,380 for legal services and \$25,000 for its technical consultant, B&L.

In response to the Examiners' inquiry during the conference, by letter dated July 29, 2016, the Town clarified its request for funding for B&L by revising its statement of services to be provided. The Town filed a revised funding application for B&L, clarifying its statement of services to be provided, and omitting reference to "new transmission facilities" within the Town.

On August 11, 2016, in response to the second notice of availability of intervenor funds, the Town filed a supplemental funding request, on behalf of the Town and, in turn, the Village, to retain Saratoga Associates Landscape Architects, Architects, Engineers, and Planners, P.C. (Saratoga Associates), for services regarding scoping review of potential visual impacts of the Project. The proposed scope of work includes review and identification of potential locations of interest as well the preparation of photographic simulations and evaluation of the potential Project visibility. The Town requests \$10,100, in addition to its earlier funding request, to fund these services. In total, the Town requests intervenor funds in the amount of \$48,480.

The Village funding request identifies the law firm of Conboy, McKay, Bachman & Kendall, LLP (Dennis G. Whelpley, Esq.; Conboy McKay) to provide legal services and the engineering and environmental consultant, Bernier Carr & Associates, Inc. (Bernier Carr), to provide engineering and environmental services during the pre-application scoping phase of this proceeding. Likewise, the Village identifies individuals within each firm who would work on the scoping review and hourly service rates for them. The Village requests \$20,000 to fund these services; \$14,420 for legal services and \$5,580 for the services of Bernier Carr. By letter dated August 15, 2016, the Village indicated it accepts the Town's proposal that the Village work with the Town and Saratoga Associates to conduct a scoping of visual impact assessment described in Galloo's PSS, provided the Village will have input into the process and act as an equal partner in utilizing Saratoga Associates' expertise. The Village states that, given its participation in the review of this Project and its plans to continue to participate in the

pre-application scoping phase, it reduces its initial funding request of \$20,000 by \$1,000.

The Dibnahs' funding request identifies the law firm of Harter, Seacrest & Emery, LLP, to provide legal services. Their stated interest is the historical relevance of the Galloo Lighthouse, located on their property, which is listed on the National Register of Historic Places. On July 29, 2016, the Dibnahs' proposed legal representative filed a proposed retainer agreement. The Dibnahs request \$15,000 to fund these legal services.

DISCUSSION

The intervenor funds available at this pre-application stage of review are intended to allow interested participants to engage in discussions on any aspect of Galloo's preliminary scoping statement and the scope of any study or program of studies Galloo has proposed, or that another participant may propose to be required to be submitted with Galloo's Article 10 application for this Project. The amount of funds requested exceeds the \$38,640 pre-application funds that are available.

The funding requests of the Town and Village each meet the criteria identified in 16 NYCRR Section 1000.10(c). However, because available pre-application funds are limited, and the municipalities exercise concurrent jurisdiction within the Village, during the Conference, we concluded that the funds requested would result in duplicative review during the stipulations process and would not be an efficient and effective use of the funds. We requested that the Town and Village coordinate their efforts to avoid duplicative review, anticipating further or renewed requests from the Town and Village reflecting their efforts to coordinate scoping review that will determine required contents of an application for this Project. During the conference, the Village identified

potential Project-related transportation impacts as a primary concern.

The funding request of the Town shows that Curtin & DeJoseph, B&L, and Saratoga Associates have the appropriate respective expertise and experience necessary to represent the Town in the scoping review process. In view of the limited funds available at this phase of the proceeding, during the conference, we granted the Town \$5,000 of intervenor funds. We now modify that initial \$5,000 award to grant the Town a total award of \$27,000 as follows: \$8,000 for services of Saratoga Associates, \$9,000 for services of B&L, and \$10,000 for legal services of Curtin & DeJoseph. We find that such an award will encourage early and broad public participation by the Town and its constituents, including Town constituents within the Village. The participation of the will effectively provide representation of its constituents' interests in the development of an adequate scope of the application for this Project. The Town, in utilizing the expertise of Saratoga Associates to review the scope of visual impact assessment for this Project, should include the Village in the discussion and recommendation process.

Lastly, we emphasize that the purpose of the pre-application phase is to evaluate the preliminary scoping statement and the stipulations process is designed to allow interested parties to reach agreement on any aspect of the preliminary scoping statement, and any study or program of studies made or to be made by Galloo to support its anticipated application. At this early stage in the proceeding, it is not appropriate or prudent to use intervenor funds to conduct intervenor-sponsored studies. The scope of work for Saratoga Associates indicated the preparation of simulations and evaluation of the degree and nature of visual change. Such work

appears to be premature at the pre-application scoping stage, and we will not authorize disbursement of intervenor funds at this stage of the proceedings for such work, unless the Town or Village obtains our prior approval.

The funding request of the Village shows that Conboy McKay and Bernier Carr have the appropriate respective expertise and experience necessary to represent the Village in the scoping review process. In view of the limited funds available at this phase of the proceeding, during the conference, we granted the Village's funding request in the amount of \$5,000. We now modify that initial \$5,000 award to grant the Village a total award of \$11,640, as follows: \$3,640 for services of Bernier Carr and \$8,000 for legal services of Conboy McKay. We find that such an award will encourage early and broad public participation by the Village and its constituents. The participation of the Village in reviewing the Preliminary Scoping Statement will effectively provide representation of its constituents' interests in the development of an adequate scope of the Application for this Project.

The Town and Village are advised that we will review their intervenor fund reimbursement requests to ensure that the intervenor funds are appropriately and prudently utilized, avoiding use of intervenor funds to conduct intervenor-sponsored studies at this stage of the review process (absent our prior approval) or duplicative review of Galloo's scoping statement for this Project.

Under Public Service Law (PSL) Article 10, intervenor funds are available to "municipal and local parties."⁸ The regulations define a local party as "[a]ny person residing in a community who may be affected by the proposed major electric

⁸ See PSL Section 163(4) (a).

generating facility at the proposed location, or any alternative location identified, who is a party to the proceeding. For the purposes of this definition, the term "residing" shall include individuals having a dwelling within a community who may be affected."⁹ The regulations do not provide a definition for a dwelling.

By letter dated July 18, 2016, in response to the Examiners' inquiry, Mr. Dibnah contends that the lighthouse property includes the keeper's quarters, in which the keeper of the lighthouse would reside, and therefore, is a dwelling. He stated that the keeper's quarters contains doors, windows, bathroom, kitchen, bedrooms, living area, well and septic system. Lastly, he acknowledged that he and his wife do not reside on the property.

During the conference, the Village challenged the Dibnahs' eligibility to receive intervenor funds, maintaining that the Dibnahs do not have a dwelling within the community, stating the belief that the keeper's quarters have been unoccupied for at least 50 years. In response to a question by Galloo, Mr. Dibnah stated he does not have a Certificate of Occupancy for the keeper's quarters.

In view of these circumstances, although the Dibnahs, as property owners on Galloo Island, will be affected by the Project, should it be approved, we are constrained to find that they are not eligible to receive an award of intervenor funds as a local party because they do not reside, or have a dwelling, in the community. The common definition of a "dwelling" includes the concept of habitability, and the Dibnahs have not demonstrated that the keeper's quarters presently is habitable.

⁹ See Rule 1000.2.

Therefore, we are unpersuaded that the keeper's quarters is a dwelling.

We nonetheless encourage the Dibnahs to participate in the pre-application stipulations process, and in the event an application is filed for this Project, to participate as a party in the proceeding. Furthermore, we encourage Mr. Dibnah to contact the Town to discuss the extent to which the lighthouse property may be considered in the Town's pre-application scoping review of this Project, including the visual impact scoping review to be conducted by Saratoga Associates.

CONCLUSION

With this formal ruling, we confirm the awards of intervenor funds during the July 28, 2016 conference, and augment those awards pursuant to the second notice of funding availability. The initial \$5,000 award to the Town is modified to a total award of \$27,000 as follows: \$8,000 for services of Saratoga Associates, \$9,000 for services of Barton and Loguidice, and \$10,000 for legal services of Curtin & DeJoseph. The initial \$5,000 award to the Village is modified to a total award of \$11,640, as follows: \$3,640 for services of Bernier Carr, and \$8,000 for legal services of Conboy, McKay, Bachman & Kendall, LLP. These intervenor funds are to be used for the purposes described in their respective funding requests and as described in this ruling.

The required quarterly reporting 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 fourth quarter of 2016.

We find that the Dibnahs are not eligible to receive an award of intervenor funds as a local party because the keeper's quarters do not constitute a dwelling and the Dibnahs

do not otherwise reside or have a dwelling in the community that may be affected by the proposed Project.

Lastly, we emphasize that, in making this award of funds, we are not making any determination on the merits of any issues that a recipient of intervenor funds may pursue through use of the funds.

(SIGNED)

KEVIN J. CASUTTO

(SIGNED)

ASHLEY MORENO

(SIGNED)

MICHAEL CARUSO