

NEW YORK STATE BOARD ON ELECTRIC  
GENERATION SITING AND THE ENVIRONMENT

CASE 15-F-0122 - Application of Baron Winds, LLC for a  
Certificate of Environmental Compatibility and  
Public Need to Construct a Wind Energy  
Facility.

RULING GRANTING TOWN OF FREMONT'S MOTION TO RECONSIDER  
EVIDENTIARY HEARING LOCATION

(Issued May 12, 2023)

MAUREEN F. LEARY, Presiding Examiner:

This ruling conditionally grants the Town of Fremont's motion for reconsideration of the April 18, 2023 revised procedural ruling that designated Albany, New York as the evidentiary hearing location for the petitions by Baron Winds, LLC (Baron) to amend and transfer the Certificate of Environmental Compatibility and Public Need under Public Service Law (PSL) Article 10 (Certificate).

On September 6, 2022, Baron filed the petitions at issue in this phase of the proceeding. On March 24, 2023, the parties filed direct testimony with respect to the petitions and on April 21, 2023, Baron filed rebuttal testimony. On April 12, 2023, afternoon and evening public statement hearings and information sessions on the Phase II Project were held in the Town of Fremont Town Hall. A total of approximately 120 people attended the hearings and 23 members of the community provided public comments.

On April 18, 2023, the Presiding Examiner issued a revised procedural ruling designating the evidentiary hearing

location to be in Albany, New York commencing on June 5, 2023.<sup>1</sup> On April 28, 2023, the Town filed a motion to reconsider the revised procedural ruling and the designated Albany location for the evidentiary hearing.<sup>2</sup>

The Town's motion asserts that PSL 165(3) requires that the evidentiary hearing be held within two miles of the proposed location of the facility and be of sufficient duration to provide an opportunity to hear direct and rebuttal evidence from residents in the area affected by the proposed facility. The Town also cites PSL 165(5), which provides that the hearing on a petition to amend a Certificate shall be held in the same manner as the hearing on the initial application for a Certificate.<sup>3</sup>

The Town's motion indicates that "[m]any municipal officials and local residents within or adjacent to the facility project area desire to participate in and/or observe the hearing" and that holding the hearing in Albany will deprive residents of meaningful participation.<sup>4</sup> The Town claims that video or telephone participation does not allow the same degree of observation by local residents as in-person observation would allow. The Town acknowledges that there are limited venues for the hearing in Fremont, where the proposed Phase II Project is located, but points to nearby communities "with suitable facilities" as possible hearing locations.

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<sup>1</sup> Ruling Revising Procedural Schedule (issued April 18, 2023), p. 2, n. 1.

<sup>2</sup> DMM Item No. 753, Town of Fremont Motion to Reconsider Location of Evidentiary Hearing (filed April 28, 2023).

<sup>3</sup> Id., p. 2.

<sup>4</sup> Id., pp. 2-3.

On May 8, 2023, the Presiding Examiner notified the parties of the opportunity to file responses to the Town's motion by the close of business on May 11, 2023.

Baron and other parties filed timely responses to the Town's motion on May 11, 2023. Baron's response indicates that it strongly supports "an outcome that maintains the current schedule and enables the Siting Board to timely act on the pending petitions."<sup>5</sup> Baron opposes changing the hearing location to the extent that a delay would result.

The Department of Public Service Trial Staff's (DPS Staff's) response to the Town's motion notes that DPS Staff is located in Albany and that travel time and expense would be required if the hearing location were changed from Albany to the Phase II Project area. DPS Staff therefore requests that, if the location is changed, the evidentiary hearing be scheduled to begin on Tuesday, June 6, 2023 in order to allow for travel time from Albany. In their separate responses to the Town's motion, staff of the Departments of Environmental Conservation (DEC Staff) and Agriculture and Markets reiterates the points made by DPS Staff and expresses support for the request that the hearing begin on Tuesday, June 6, 2023 to allow travel time from Albany.

Intervenor Alice Sokolow's response to the Town's motion states that the 2019 evidentiary hearing (referring to the hearing held in the Town of Fremont on Baron's original application) was well-attended, as were the recent April 12, 2023 public statement hearings, which were also held in the Town.

On May 10, 2023, pursuant to the revised procedural ruling, certain parties submitted Statements of Contested Issues

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<sup>5</sup> DMM Item No. 762, Baron Response to Town of Fremont Motion to Reconsider Location of Evidentiary Hearing (filed May 11, 2023).

to be adjudicated in the evidentiary hearing. The Town's Statement set forth six main issues in dispute, including: whether a waiver of Town's law limiting turbine height to 500 feet should be granted; whether the Project would comply with required setbacks for public health and safety; whether the reduced decommissioning cost estimate was accurate; whether the Project would comply with required noise levels; whether impacts to threatened and endangered species have been accurately identified and mitigated; whether the transfer of the Certificate is consistent with host community and road use agreements; and whether the Certificate Conditions and compliance obligations will be enforceable against both Baron and Baron Winds II because they do not agree to joint and several liability.

DPS Staff's Statement identified noise impacts and appropriate mitigation as the single contested issue. DEC Staff's Statement identified contested issues with respect to stream and wetland crossings in the Phase I Project area and violations of Certificate Conditions related to: Environmental Conservation Law (ECL) Articles 15 (stream disturbance and water quality) and Article 24 (wetlands and adjacent areas) and the implementing regulations; ECL Article 11 (listed species) and the implementing regulations. DEC Staff asserted that there are no contested issues for adjudication, however, based on the positions advanced in Baron's rebuttal testimony. Baron's Statement concurred with DEC Staff, but additionally identified noise impacts and the issues raised by the Town as contested and therefore subject to adjudication in the evidentiary hearing.

Discussion

PSL § 165(3) expressly gives members of the community who will be most affected by a proposed major electric generation facility the opportunity to be heard and participate in a proceeding for issuance of a Certificate. That provision requires the hearing to be of a "sufficient duration to provide adequate opportunity to hear direct evidence and rebuttal evidence from residents of the area affected by the proposed major electric generating facility." PSL § 165(3) also requires that the presiding examiner designate the location of the hearing within two miles of the proposed facility, but only "[t]o the extent practicable." PSL § 165(5) provides that hearings on an application to amend a Certificate "shall be held in the same manner as a hearing on an application for a certificate." The Town's motion also makes several salient points related to the community's significant interest in the issues and the outcome of this proceeding.

Previous Article 10 proceedings demonstrate that, to the extent practicable, the evidentiary hearing on initial Certificate applications have been held in the community in which a proposed project is located. Thus, in each of those proceedings, the Examiners adhered to the requirement in PSL § 165(3). Indeed, the evidentiary hearing on Baron's original Certificate Application was held over three days in the Project Area, at the Fremont Fire Department from March 20, 2019 to March 22, 2019.<sup>6</sup> Here, although the petitions to amend/transfer the Certificate involve more limited issues than those presented in the original Certificate application, the Phase II Project

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<sup>6</sup> In addition, public statement hearings were held in the Project Area (Hornell, New York) on October 11, 2018, at which time several comments were received from members of the community.

will nevertheless be constructed and operated almost entirely in the Town of Fremont.

In initially designating Albany for the evidentiary hearing in the revised procedural ruling, several factors were considered, including the feasibility of the hearing location for most parties and witnesses with respect to accommodations and other necessary amenities, the potential for additional input from members of the community beyond the input provided in the public statement hearings, and the time, expense, and convenience to the active parties who are likely to participate in the hearing. Notably, no residents or businesses from the Town of Fremont filed testimony or became parties to this proceeding and, as such, their participation in the proceeding was not expected.<sup>7</sup> Although the Town's participation in the evidentiary hearing was anticipated when the Presiding Examiner selected the Albany hearing location, as one party, its interest was weighed against the interests of Baron and the several agency parties, all of which are located in Albany.

Based on the substantive contested issues raised in the Town's and Baron's Statements, it appears that those two parties dispute more issues than those presented by any other party. In large part, the evidentiary hearing is likely to focus on those contested issues, including the Phase II Project's noise impacts, an issue of concern to DPS Staff as well.

In view of the language of PSL § 165(3) and (5), the historic practice of holding evidentiary hearings near proposed facilities, and the Town's significant interest in the Phase II

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<sup>7</sup> Although they have actively participated in this proceeding, Intervenors Chad Zigenfus and Alice Sokolow are not residents of the Town of Fremont and apparently reside in the Towns of Cohocton and Penfield, respectively, which are not within either the Phase I or Phase II Project areas.

Project, reconsideration of the Albany hearing location is justified. I find that DPS Staff and the other agency parties raise reasonable requests to delay by one day the commencement of the hearing to allow for travel time by counsel and witnesses. I further find that a one-day delay to commencement of the hearing is not prejudicial to Baron's interests. The location of the evidentiary hearing is therefore changed to the Town of Fremont and will be held at the **Fremont Town Hall commencing on Tuesday, June 6, 2023 at 10:00 A.M. and will continue day to day thereafter until completed.**

This ruling is conditioned upon the availability of the Town of Fremont Town Hall commencing on the date and at the time noted. Counsel for the Town is directed to make the appropriate arrangements with the Town in order for the hearing to be conducted at that location commencing on the date and at the time noted and continuing until completed.

Within five (5) days of the date of this ruling, counsel for the Town shall confirm in writing to the Presiding Examiner and all parties the availability of the Fremont Town Hall for the evidentiary hearing. In the event that the Fremont Town Hall is not available, within five (5) days of the date of this ruling, counsel for the Town shall so notify the Presiding Examiner and all parties. In that event, the evidentiary hearing may be designated to be held at the Department of Public Service, Three Empire State Plaza, Albany, New York commencing on Monday, June 5, 2023 at 10:00 A.M., but counsel for the Town

shall have the opportunity to submit an alternative proposal to which all parties shall have the opportunity to respond. In either event, the Secretary will issue a separate public notice setting forth the date, time, and location for the evidentiary hearing.

(SIGNED)

MAUREEN F. LEARY