

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 ON CONTESTED ISSUES SUBJECT TO ADJUDICATION
AND WITNESSES SUBJECT TO CROSS-EXAMINATION
IN THE EVIDENTIARY HEARING

(Issued May 23, 2023)

MAUREEN F. LEARY, Presiding Examiner:

This ruling is issued pursuant to Public Service Law (PSL) § 165(2) and identifies the contested issues that will be subject to adjudication in the June 6, 2023 evidentiary hearing in this proceeding on Baron Wind, LLC's (Baron's) petitions to amend and transfer the Article 10 Certificate of Environmental Compatibility and Public Need (Certificate) for Phase II of this wind energy project (Phase II Project). These issues were identified in the parties' Statements of Contested Issues (Statements) filed on May 10, 2023 pursuant to the April 18, 2023 revised procedural ruling.

In their Statements, Baron, the Town of Fremont (Town), trial staff from the Department of Public Service (DPS Staff) and the Department of Environmental Conservation (DEC Staff), and intervenor Alice Sokolow submitted timely Statements identifying issues to be adjudicated in the evidentiary hearing. On May 12, 2023, intervenor Chad Zigenfus submitted an untimely Statement.

The Town's Statement sets forth several disputed issues, including: whether Baron's request for a waiver of Town's law limiting turbine height to 500 feet should be

granted; whether the Project would comply with required setbacks for purposes of public health and safety; whether the reduced decommissioning cost estimate is accurate and financial security is sufficient; whether the Project will 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 under concepts of joint and several liability.¹

DPS Staff's Statement identified noise impacts and appropriate noise reduction operations and mitigation as contested issues.

Baron's Statement identified noise impacts raised by DPS Staff and several other issues raised by the Town as contested and therefore subject to adjudication in the evidentiary hearing. Baron asserted that DEC Staff's issues related to horizontal directional drilling and inadvertent returns had been resolved by Baron's rebuttal witnesses, but presented no evidence of such resolution. Baron's Statement noted that no other party had submitted direct testimony, but that it reserved the right "to contest new issues or new evidence" submitted by the parties in their Statements.

DEC Staff's Statement identified contested issues with respect to (1) wetlands and waterbodies crossings and inadvertent returns and compliance with Environmental Conservation Law (ECL) Articles 15 and 24 and the implementing regulations; and (2) listed threatened and endangered species and compliance with ECL Article 11 and the implementing

¹ Along with the agency parties, the Town is a statutory party to this proceeding pursuant to PSL § 166(1)(j).

regulations. DEC Staff asserted, however, that there are no contested issues for adjudication based on the positions advanced by certain witnesses in Baron's rebuttal testimony.

Intervenor Sokolow's Statement sets forth 52 contested issues, including but not limited to: turbine setbacks, property encroachments, map accuracy, and Application Exhibit 9; compliance with the existing Certificate Conditions for the Phase I Project; Certificate ownership changes; issues in Trireme v. Innogy, (U.S. District Court, S.D.N.Y.); Baron as "public utility" and "transmission corporation;" Federal Energy Regulatory Commission filings; legal compliance with host community and road use agreements and claw back; well monitoring; hours of construction; Steuben County service defects; Steuben County Industrial Development Agency payment in lieu of taxes; segmentation of Phases I and II; visual impacts; 4.5 MW turbine model data; compliance with local laws; turbine collapse/failure; April/May 2020 Siting Board decision on Phase I; listed species impacts; ETSMP compliance with Certificate Conditions; changes in eagle population and Project impact on nests; turbine heights; turbine optimization; ice throw; New York Constitution Section 19 environmental rights; noise impacts, amplitude modulation (wind shear, stall, etc.), noise complaints, health effects, and segmentation of Phase I noise studies; shadow flicker; meteorological towers; turbine wake impacts; the Climate Leadership and Community Protection Act (CLCPA) and cumulative greenhouse gas emissions; and turbine fires and contamination.

Intervenor Chad Zigenfus' untimely Statement raised as disputed issues compliance with noise limits, noise monitoring, and turbine setbacks.

The Department of Agriculture and Markets (AGM) and the Department of Health (DOH) submitted separate Statements,

indicating that they had no contested issues for adjudication associated with Baron's petitions for the Phase II Project.

In a May 15, 2023 pre-hearing conference, the Presiding Examiner discussed with the parties the issues raised in their respective Statements, certain record deficiencies, the parties' intentions to cross-examine witnesses, and the estimated time for cross-examination, among other things. The parties identified the witnesses that they intended to cross-examine at the evidentiary hearing regarding the contested issues and the estimated time necessary for cross-examination.

On May 16, 2023, Baron filed a notice of settlement negotiations pursuant to 16 NYCRR § 3.9. In the notice, Baron identified the issues that would be discussed during settlement discussions including, but not be limited to, wildlife impacts, horizontal direction drilling requirements, and impacts to communications.

In a May 19, 2023 email, DEC Staff requested that its witnesses be scheduled for the first day of the hearing.

Discussion

After considering the Statements filed by the parties, the following issues are subject to adjudication during the evidentiary hearing with respect to the Phase II Project:

1. Noise impacts (modeled pre-construction sound levels, noise reduction operations, residential complaints and resolution, compliance and monitoring);
2. Increased turbine heights impacts and waiver of Town of Fremont local laws;
3. Setbacks for public safety;
4. Decommissioning cost estimates and Financial Security;
5. Wildlife impacts and mitigation (bald eagles);

6. Certificate transfer; certificate holders' liability for compliance obligations and violations of certificate conditions;
7. Wetlands and waterbodies impacts (crossings and compliance with ECL Articles 15 and 24, the implementing regulations, and water quality standards).

The foregoing issues are subject to revision and/or deletion by the Presiding Examiner prior to the commencement of the evidentiary hearing. In addition, PSL § 165(2) provides that the Presiding Examiner's identification of issues to be addressed does not "preclude consideration of additional issues or requests for additional submissions, documentation or testimony at a hearing which warrant consideration in order to develop an adequate record."

The other issues raised by intervenors Sokolow and Zigenfus overlap with the contested issues identified above, or involve the Phase I Project, and/or are irrelevant to the Siting Board's consideration of the Phase II Project. Since intervenor Sokolow does not reside in either the Phase I or Phase II Project areas, and intervenor Zigenfus does not reside in the Phase II Project area, they each will be given a limited opportunity to cross-examine witnesses only with respect to noise impacts and only to the extent that such cross-examination is not repetitive or duplicative of the questions and/or testimony elicited by other parties. Noise compliance issues associated with the Phase I Project will inform the record with respect to potential noise impacts associated with the Phase II Project. As such, evidence of Phase I Project noise impacts and the outcome of noise complaints may be introduced at the evidentiary hearing. Both Baron and DPS Staff should be prepared to address those issues.

With respect to the other contested issues, although intervenors Sokolow and Zigenfus were granted party status in this phase of the proceeding, they lack a sufficiently demonstrated interest in those issues and may not cross-examine witnesses with respect to such issues.² In the event that they can demonstrate an interest in those issues, however, they may seek leave to conduct cross-examination at the hearing.

The parties have expressed an intention to cross-examine the following witnesses at the hearing. DEC Staff's request for its witnesses to be cross-examined on the first day of the evidentiary hearing is granted. The following witnesses are required to attend the evidentiary hearing and will be heard in the following sequence:

Wildlife/Bald Eagles Impacts

Baron Witness: Adam Gravel
DEC Witnesses: Brianna Denoncour
Matthew Palumbo

Wetlands/Streams Impacts

DEC Staff Witness: Jenny Landry
Baron Witnesses: Eben Baker
Jason Dagger
Scott Schwartz

Noise Impacts

Baron Witnesses: Kenneth Kaliski
Isaac Old
Per Lundqvist
DPS Staff Witness: Miguel Moreno-Caballero
Town Witness: David Hessler

² Intervenors Sokolow and Zigenfus cannot be considered to be a "local party" within the meaning of 16 NYCRR § 1000.2(s) in order to justify more extensive participation in the evidentiary hearing with respect to other contested issues.

Decommissioning

Baron Witness: Lisa Oliver
Town Witnesses: Stephen LeFevre
Kayla Kibling

Local Laws

Baron Witnesses: Jason Dagger
Scott Schwartz

Certificate Transfer/Compliance

Baron Witnesses: Jason Dagger
Scott Schwartz

Visual Impacts

Baron Witness: Kiva VanDerGeest

Soil/Ground Disturbance Impacts

Baron Witness: Eben Baker
Town Witness: Stephen LeFevre

Communications Impacts

Baron Witness: David Meyer
Town Witness: Ben Evans

Because the parties are engaged in settlement discussions on a limited set of issues, the foregoing contested issues and list of witnesses is subject to change/revision. Parties shall notify the Presiding Examiner, on notice to all parties, of any proposed changes/revisions to the foregoing by no later than the close of business on **Thursday, June 1, 2023**. In any event, witnesses shall remain available for attendance at the hearing and may be subject to cross-examination unless otherwise notified by the Presiding Examiner.

(SIGNED)

MAUREEN F. LEARY