

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 ESTABLISHING CRITERIA AND PROCEDURES FOR
ADMISSION OF EVIDENCE TO THE RECORD AT THE
EVIDENTIARY HEARING FOR THE PHASE II PROJECT AND
DENYING ADMISSION OF UPDATED TESTIMONY AND EXHIBITS

(Issued May 30, 2023)

MAUREEN F. LEARY, Presiding Examiner:

Introduction

This phase of the proceeding was established to consider separate petitions by Baron Winds, LLC (Baron) to amend and to transfer (Amendment/Transfer Petitions) the Certificate of Environmental Compatibility and Public Need (Certificate) issued by the Board on Electric Generation Siting and the Environment (Siting Board). Evidentiary hearings are scheduled to begin on June 6, 2022, at the Fremont Town Hall in Arkport, New York. This ruling establishes the criteria and procedures for the admission of evidence to the record at the evidentiary hearing and addresses disputes related to the proposed Exhibit List to be used for purposes of compiling a complete record of this phase of the proceeding. This ruling also rejects the purported "correction" of the rebuttal testimony and supporting exhibit (Exhibit PL-4) of Baron's noise expert, which represent an update, rather than a correction, and therefore are unauthorized late submissions, to which other parties have not had an adequate opportunity to respond.

Background

Baron filed its Application for a Certificate in November 2017 and thereafter filed numerous updates and supplements. Several parties participated in the original Certificate proceeding, filing testimony and exhibits and serving discovery. Baron filed extensive rebuttal testimony. The Presiding Examiners held a four-day evidentiary hearing in March 2019 and issued a Recommended Decision in May 2019, which was subject to exceptions. In September 219, the Siting Board granted the Certificate with conditions, after which rehearing was sought and denied.

In March 2020, Baron filed a petition to amend the Certificate and proposed a phased approach to constructing the Project. In May 2020, the Siting Board granted the amendment and approved "Phase I" of the Project (Phase I Project). Thereafter, Baron submitted a series of compliance filings in accordance with applicable Certificate Conditions. The Commission's orders approving the Phase I Project and the subsequent compliance filings expressly stated that they apply only to the Phase I Project.¹

On September 6, 2022, Baron filed the Amendment/Transfer Petitions at issue here, with supporting

¹ See Order Approving Amendment (issued May 6, 2020), pp. 15-16; Order Approving Compliance Filings 68(a-e), Subject to Conditions (issued December 29, 2022), p. 14 ("this approval should not be considered indicative of any future approvals related to Baron Winds Phase II and is not to be relied upon as precedent in other cases"); Order Approving Compliance Filings 49, 50(e) and (f), 52(a), 52(a)(1), 61, 63, and 64, Subject to Conditions (issued November 22, 2022), pp. 13-15 (Commission approval of compliance filings for bald eagle mitigation, bat curtailment, and avian/bat monitoring plans are only "for the Operation phase of Baron Winds Phase I"); Order Approving Compliance Filings 46, 48, 61, and 63, Subject to Conditions (issued October 17, 2022), pp. 9-11 (same).

documentation, and proposed construction and operation of Phase II of the Project (Phase II Project), which is located primarily in the Town of Fremont. On September 20, 2022, the Secretary to the Siting Board determined that, because Baron was proposing "multiple changes from the Certified Facility," the Amendment Petition represented "a material conflict with a community's current plans or goals as officially approved or adopted" and constituted a "revision" within the meaning of 16 NYCRR 1000.16(a).² The Secretary's determination meant that the Amendment/Transfer Petitions would be subject to an evidentiary hearing.

Pre-Hearing Proposed Consensus Exhibit List

Pursuant to the April 18, 2023 Ruling Revising Procedural Schedule, Baron was required first to circulate to the parties for review and comment a proposed consensus Exhibit List and thereafter to submit it to the Presiding Examiner. The proposed Exhibit List is intended to be used at the June 6, 2023 evidentiary hearing and is designed to include the record of the proceeding concerning the Amendment/Transfer Petitions for the Phase II Project.

On May 22, 2023, Baron submitted a proposed Exhibit List to the Presiding Examiner, indicating in the accompanying letter that "the Parties have not been able to agree on a consensus list at this time."³ Baron explained that three parties had proposed the addition of certain exhibits to the Exhibit List that were part of the initial Certificate proceeding. The three parties were Department of Public Service

² DMM Item No. 683. In reaching this determination, the Secretary cited the implementing regulations of the State Environmental Quality Review Act, 6 NYCRR § 617.7(c)(iv).

³ DMM Item No. 774, May 22, 2023 Letter to Presiding Examiner from Baron Counsel, Jessica Klami, p. 1.

Trial Staff (DPS Staff), who had requested the addition of one exhibit; the Town of Fremont (Town), who had requested the addition of two exhibits; and intervenor Alice Sokolow (Intervenor Sokolow), who had requested the addition of more than 100 exhibits from the initial Certificate proceeding as well as several filings in this and certain other proceedings.⁴

Baron's letter noted that it had added to the Exhibit List materials from the initial Certificate proceeding. This included the originally-filed Application, testimony, exhibits, and all hearing transcripts, none of which had been filed as a part of its Amendment/Transfer Petition for the Phase II Project. Baron's additions to the Exhibit List totaled thousands of pages from the original Certificate proceeding, as well as several documents from the Phase I Project amendment proceeding, specifically:

- (1) Confidential and redacted versions of Evidentiary Hearing Transcripts, dated March 20, March 21, March 22, and March 25, 2019, (each containing direct and rebuttal testimony and referencing hundreds of exhibits);
- (2) Original Article 10 Application, dated November 29, 2017, including all supporting exhibits;
- (3) Six Application Updates, dated December 20, 2017 January 2, 2018, May 2, 2018, August 23, 2018, February 1, 2019, and February 15, 2019;
- (4) Three Application Supplements, dated March 12, 2018, June 15, 2018, and August 2, 2018;
- (5) Supplemental Sound Modeling dated March 9, 2020, July 29, 2021 and September 26, 2022;

⁴ Id., p. 2.

- (6) Wildlife Mitigation Plans, dated June 26, 2020 and July 2, 2020, submitted for the Phase I Project;
- (7) Cultural Resource Mitigation Plan, dated July 21, 2022, submitted for the Phase I Project;
- (8) Other compliance and Phase I Project filings, dated August 24, 2021, June 17, 2022.⁵

Although Baron did not file the foregoing as part of the Amendment/Transfer Petitions, it justified adding these to the evidentiary hearing record and the Exhibit List for this proceeding because the Phase II Project Amendment Petition "relies on the conclusions and analysis in the original Application to make conclusions about the environmental impacts associated with the Amendment."⁶

Baron's letter alternatively proposed that the Presiding Examiner "take judicial notice of the Evidentiary Hearing Exhibit List from the original Article 10 Application and allow Parties to incorporate by reference or otherwise use documents that were admitted into evidence in the original proceeding to the extent they are relevant to the issues raised in this proceeding."⁷ In support of this position, Baron cited the Article 10 regulations governing evidence.⁸

In a May 22, 2023 responsive email, the Presiding Examiner indicated that she would rule on any disputed exhibits at the beginning of the evidentiary hearing, after parties have

⁵ Id., pp. 1-2.

⁶ Id., p. 1.

⁷ Id., p. 2.

⁸ 16 NYCRR § 1000.12(7) provides: "Any party may move that evidence, including records and documents, in the possession of the DPS, or other public records, be received in evidence in the form of copies or excerpts or by incorporation by reference."

had the opportunity to be heard.⁹ After noting Baron's inclusion of extensive information from the initial Certificate proceeding, the Presiding Examiner advised that, as previously discussed with the parties, the record for the Phase II Project should be limited, meaning that it should be comprised primarily of the Amendment/Transfer petitions, supporting documents, testimony, and exhibits. She reminded Baron that information from the original Application had not been filed in support of the Amendment/Transfer Petitions.

The Presiding Examiner noted that because the parties were unaware during the proceeding of Baron's intention to rely on such extensive information from the original Certificate proceeding, they did not have the opportunity to respond. She indicated that Baron could not now rely on that information by adding all of it to the Exhibit List, or through the mechanism of judicial/administrative notice, or by incorporating it all "by reference." She further noted that the material in the initial Application, in large part, was likely outdated and potentially irrelevant to the Phase II Project. She directed Baron to delete from the Exhibit List any reference to documents preceding the Amendment/Transfer Petitions, but to add a section entitled "Proposed Hearing Exhibits" and list the parties' disputed additions.

Lundqvist Updated Testimony/Exhibits

The April 18, 2023 Revised Procedural Ruling further required corrections to testimony and exhibits to be filed by

⁹ In its letter, Baron identified the disputed documents to include one proffered by DPS Staff, one by the Town, and several by intervenor Alice Sokolow. The Presiding Examiner's email ruling directed Baron to revise the Exhibit List to add a heading captioned "Proposed Hearing Exhibits" and to then list any disputed documents, which would be ruled on at the hearing after the parties had an opportunity to be heard.

May 26, 2023. On May 22, 2023, Baron filed the purportedly corrected rebuttal testimony of its noise expert, Per Lundqvist, along with a new version of Exhibit PL-4.¹⁰

The newly proffered version of Exhibit PL-4 indicates on its cover page that it is a "Noise Reduction Management System Description," dated February 16, 2023, and deals with the "2.0-2.2 MW Onshore" and "3.0-4.5 MW Onshore" turbine models. The initially filed version of Exhibit PL-4 has the same title, "Noise Reduction Management System Description," but is dated November 10, 2020, and deals with different turbine models, specifically, the "1.8/2.2 MW Onshore, 3.0-3.6 MW Onshore, 4.0 MW Onshore" models. Mr. Lundqvist's newly proffered rebuttal testimony explains (p. 11) that "Vestas released an updated version of the NRMS Description in 8 February 2023" (emphasis added). In other words, Mr. Lundqvist testifies that new Exhibit PL-4 is an update to the previously filed PL-4, rather than a correction to it.

In a May 22, 2023 email ruling, the Presiding Examiner identified the differences between the initially filed Exhibit PL-4 and the newly proffered version of it, indicating that the two addressed different turbine models. The Presiding Examiner also noted that changes to PL-4 were not noted, redlined, or explained. She therefore concluded that Exhibit PL-4 was actually an improper update, not a correction, and that it had not been filed in sufficient time for other parties to review and respond to it. The Presiding Examiner left open the possibility for Baron to seek to admit it at the evidentiary hearing, subject to objection.

¹⁰ Baron also filed a new version of Exhibit PL-3, a manufacturer's letter regarding turbine noise, which is substantially the same as the prior version of PL-3, with the exception of a new date. Updated Exhibit PL-3 need not be addressed in this ruling.

This ruling confirms, but extends and clarifies, the Presiding Examiners foregoing email rulings and directives with respect to the Exhibit List and the revised Lundqvist rebuttal testimony.

Discussion

Baron's Amendment/Transfer Petitions at issue here seek to amend the existing Certificate and change additional portions of the previously-approved project known as the Phase II Project. The original Certificate proceeding and Baron's first amendment petition for the Phase I Project have been the subject of extensive proceedings before the Siting Board and/or the Public Service Commission (Commission).

Evidentiary Hearing Exhibit List

This proceeding is related only to the Phase II Project. The Exhibit List - and the record of this proceeding as a whole - should therefore include only relevant and material information directly related to the Phase II Project in order to inform the Siting Board in applying the criteria in PSL § 168 to Baron's proposal. Thus, the Exhibit List should include the Amendment/Transfer Petitions, supporting documents, filed direct and rebuttal testimony and exhibits, discovery, and any other information relevant to disputed issues for the Phase II Project. It should not include the entire record of Baron's initial Certificate filings dating from 2017.

The exception is, of course, related to noise issues, one of the most contested issues in this proceeding. Baron, DPS Staff, the Town, and intervenors Zigenfus and Sokolow have each raised issues related to the Phase II Project's noise impacts. Testimony expressly refers to filings in the original

Certificate proceeding and in the Phase I Project proceeding.¹¹ Moreover, the question of the now-operational Phase I Project's compliance with noise-related Certificate Conditions will inform the Siting Board with respect to whether the Phase II Project's noise impacts have been avoided and minimized to the maximum extent practicable, as PSL § 168 requires.

Accordingly, the Exhibit List may include previously filed relevant and material information in either the initial Certificate proceeding or in the Phase I Project proceeding with respect to noise. To the extent that there are references in the testimony in this proceeding to prior filings, additions to the record may be permitted with respect to other disputed issues. As such, this ruling limits but does not bar the admission of previously filed information to the record here. Parties should be prepared at the evidentiary hearing to demonstrate the relevance and materiality of such information.

The Article 10 regulations governing Certificate amendments require that "the certificate holder shall submit the data and information required by this Subchapter that would otherwise be necessary to support an application for a certificate" (emphasis added).¹² To the extent that Baron may not have included certain information in support of the Amendment/Transfer Petitions, such omissions cannot belatedly be fixed now by importing the entire record of the original Certificate proceeding or the Phase I proceeding into this record. The last minute, wholesale importation of the existing

¹¹ See DPS Staff Testimony of Miguel Moreno Caballero, pp. 15-26; Town Testimony of David M. Hessler, P.E., pp. 3-5; Baron Rebuttal Testimony of Kenneth Kaliski and Isaac Old, pp. 3-13.

¹² 16 NYCRR § 1000.16(b)(2).

record of those previous proceedings is excessive and clouds the record.¹³

Baron has the burden to meet the criteria set forth in PSL 168 for the Phase II Project.¹⁴ This burden is separate and apart from the burden it carried in the original Certificate proceeding and the Phase I Project proceeding. Baron must rely on what has been filed to date in support of the Phase II Project, on which the other parties relied in filing their testimony. To include the entire record of prior proceedings now would be prejudicial to the other parties, who are entitled to have a full and clear understanding - from the date of filing of the Amendment/Transfer Petitions - of the basis for the relief Baron seeks and to respond accordingly through testimony, discovery, and participation in this proceeding.¹⁵

As noted in the email ruling, much of the information in the original Certificate proceeding was submitted between 2017-2019 and is likely stale and no longer relevant, given the changes implemented for the Phase I Project and the proposed changes to the Phase II Project. Information related to the Phase I Project (filed with the March 2020 Phase I amendment petition) also may be stale and irrelevant in light of the different location of the Project. Notably, the Commission's

¹³ Baron's May 22, 2023 letter acknowledges the Presiding Examiner's specific statement that the original Certificate record should not be included on the proposed Exhibit List. The Presiding Examiner's approach was intended to create a limited and clear record, but to assure all parties had the opportunity to understand the evidentiary basis for the Amendment/Transfer Petitions.

¹⁴ 16 NYCRR § 1000.12(b)-(c).

¹⁵ This is particularly true for the Town, whose participation in the original Certificate proceeding and in the Phase I proceeding was markedly different than its participation in this proceeding, where the waiver of local laws is at issue.

order approving the Phase I Project and each order approving that Project's compliance filings expressly indicate that they are for Phase I only.

Baron cites 16 NYCRR 1000.12(f), which allows a party to move to admit "public record" evidence. That provision does not supersede the right of all parties to have, from the beginning of the proceeding, an understanding of the basis for the relief sought and to have an adequate opportunity to be heard.

Baron alternatively proposes that the Presiding Examiner take official administrative notice of the original Certificate record. That request is denied. The nature of that record, including the opinions of various party experts, is not, as a matter of law, subject to administrative notice.¹⁶ In addition, the substantial quantity of the information makes such a request impracticable. Baron also requests that the original Certificate record be admitted to the record "by reference." This request is far too expansive and would enable any party to rely on anything and everything in that record. That request is also denied.

This ruling allows the parties at the evidentiary hearing to seek the admission of evidence to the record through additions to the Exhibit List. In light of the limited issues presented for adjudication in this proceeding, the record must be more limited than Baron proposes.

Lundqvist Updated Testimony/Exhibit PL-4

As outlined above, Baron submitted purportedly corrected rebuttal testimony of its noise expert, Per Lundqvist, along with a new, updated version of Exhibit PL-4. This ruling confirms the Presiding Examiner's May 22, 2023 email ruling

¹⁶ See CPLR § 4511.

excluding the proffered filing of Exhibit PL-4, but expands that ruling to exclude the exclusion of Mr. Lundqvist's proffered testimony in its entirety.

As noted in the Presiding Examiner's email ruling, the updated Exhibit PL-4 is a different document than the initially filed PL-4 insofar as it applies to different turbine models. In addition, the changes to PL-4 are not identified. Of note is the February 16, 2023 date on the face of the updated Exhibit PL-4, which suggests that could have been filed and served on all parties before the March 24, 2023 deadline for testimony. Of further note is Baron's failure to provide certain noise information for the Vestas 4.5 MW turbine it plans to use for the Phase II Project. Instead, Baron directed the use of noise information for an entirely different turbine model (Vestas 4.2 MW).

Upon closer review of the proffered "corrected" Lundqvist testimony, I find that it is not a mere correction, but also represents an untimely update to prior rebuttal testimony. The redlined revisions to the testimony explain, incorporate, and refer to the updated Exhibit PL-4. Like Exhibit PL-4, this is not a permitted filing at this point in the proceeding.

The parties have not had an adequate opportunity to consider and respond to the updated Lundqvist testimony and Exhibit PL-4. The attempt to file this information as a correction, after testimony was filed and just before the evidentiary hearing, is prejudicial to the parties. It is therefore excluded from the hearing record.

Conclusion

This ruling confirms and amends the May 22, 2023 email rulings with respect to the Exhibit List and the Lundqvist testimony. With the exception of the previous noise-related

filings referenced in testimony, Baron is directed to delete from the Proposed Exhibit List any documents or materials that precede the September 6, 2022 Amendment/Transfer Petitions, including those related to the original Certificate Application and to the Phase I Project.

Baron is directed to add to the Proposed Exhibit List a section designated "Proposed Hearing Exhibits," which shall list previously-filed documents that the parties have requested to be added to the Exhibit List and admitted to the record of the Phase II Project proceeding. This includes any documents subject to dispute among Baron, DPS Staff, and the Town, and also includes the documents that Intervenor Sokolow has filed in this (but only this) proceeding. All documents listed in the Proposed Hearing Exhibits section shall be identified with specificity in accordance with the required headings.

At the commencement of the evidentiary hearing, parties may seek leave to have proposed documents admitted to the record of the Phase II Project proceeding, but shall be prepared to demonstrate that the information is relevant and material to the disputed issues in this proceeding and that it will inform the Siting Board in its consideration of the Amendment/Transfer Petitions.

(SIGNED)

MAUREEN F. LEARY