

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on August 22, 2007

COMMISSIONERS PRESENT:

Patricia L. Acampora, Chairwoman
Maureen F. Harris
Robert E. Curry, Jr.
Cheryl A. Buley

CASE 07-E-0674 - Petition of Advocates for Prattsburgh, Cohocton
Wind Watch and Concerned Citizens of Italy for a
Declaratory Ruling on Windfarm Prattsburgh.

DECLARATORY RULING ON ELECTRIC CORPORATION JURISDICTION

(Issued and Effective August 24, 2007)

BY THE COMMISSION:

BACKGROUND

By Petition filed June 8, 2007, Advocates for Prattsburgh, Cohocton Windwatch, and Concerned Citizens of Italy (collectively, Petitioners) seek a Declaratory Ruling that the Commission has jurisdiction over WindFarm Prattsburgh, LLC (WFP) as an electric corporation and over its proposed wind energy project to be located in the Town of Prattsburgh, Steuben County, and the Town of Italy, Yates County. They also request that WFP's proposed project be considered, together with two projects proposed by WFP affiliates and one project proposed by Ecogen, LLC (Ecogen) located in the same general area as WFP's project, as one electric generating facility.

Petitioners served the petition on persons and organizations potentially interested in, or affected by, this proceeding, pursuant to 16 NYCRR §8.2(b). WFP submitted a

response to the petition within the 21-day period prescribed in 16 NYCRR §8.2(c); on July 18, 20, 24, and 27, 2007, it supplemented its response by providing answers to interrogatories propounded by Department of Public Service Staff.¹

THE PETITION AND WFP'S RESPONSE

Petitioners claim that WFP is an electric corporation within the meaning of §2(13) of the Public Service Law (PSL). As such, they contend, the benefits and impacts of WFP's project (proposed to be located in the counties of Steuben and Yates) must be evaluated in a public hearing pursuant to PSL §68. Petitioners assert that differences between WFP's proposed project and the Steel Winds Project, which was found not to be jurisdictional,² warrant a different result here. Whereas the Steel Winds Project consisted of eight turbines and connecting electric lines located on the 1,300-acre parcel of a single lessor, Petitioners maintain that WFP's proposed project will consist of 40 turbines and associated facilities spread over a project area of 2,500 acres; will have multiple lessors; and will involve non-participating landowners interspersed among the participating landowners on whose property project components will be located.

¹ Petitioners submitted additional pleadings on dated August 13, 2007 and WFP replied by letter August 21, 2007. These pleadings are untimely and fail to develop the issues under consideration; they will not be considered.

² Case 06-E-1203, Steel Winds Project LLC and Steel Winds LLC, Declaratory Ruling on Electric Corporation Jurisdiction (Issued December 13, 2006).

Citing Case 03-T-1385,³ Petitioners aver that WFP's proposed project cannot be treated as independent of the three other proposed projects in the vicinity because of the impact of the projects as a whole on the State's power grid. They also allege that WFP's project and that of Ecogen will share transmission lines and may also share a substation. They argue that the proposed project's proximity to the Ecogen project and to the Cohocton and Dutch Hill projects proposed by WFP's affiliates, Canandaigua Power Partners, LLC (CPP) and Canandaigua Power Partners II, LLC (CPP II), respectively, require that all the projects be evaluated as one.

Responding to the Petition, WFP describes its proposed project as including 44 turbines (with a total generating capacity of 66 MW), two meteorological towers, an operation and maintenance building, gravel access roads, 34.5kV electrical collection lines,⁴ a substation, and a 140-foot long 115kV transmission line connecting the substation to a transmission line owned by New York State Electric and Gas Corporation (NYSEG).⁵ According to WFP, its project will be located on leased private land and extend over approximately 2,500 acres.⁶ WFP maintains that its electrical collection lines and substation are located at the same project site as its wind turbines. It contends that the project site includes not only

³ Case 03-T-1385, Rochester Gas And Electric Corporation, Declaratory Ruling Concerning Jurisdiction over Proposed Transmission Project (Issued January 28, 2004).

⁴ According to WFP, the collection lines may be installed either partially overhead and partially underground, or entirely underground.

⁵ WFP states that NYSEG will construct own and operate the transmission interconnection and will own and operate the high side of the substation.

⁶ The 2,500 acres was calculated by summing the acreages of the participating land owners parcels.

the land on which the turbines, meteorological towers, and substation are located, but also includes the right-of-way (ROW) for the collection lines and all access roads needed to bring construction materials to, and maintain, the substation site and each turbine site.

WFP states that, it, CPP, and CPP II are wholly-owned subsidiaries of UPC New York Wind, LLC, which in turn is a wholly-owned subsidiary of UPC Wind Partners, LLC (UPC Wind).⁷ WFP explains that, while its project is proposed in a location immediately adjacent to Ecogen's project, it is about two miles from the project proposed by CPP in the Town of Cohocton. WFP states, moreover, that its proposed project will share neither property rights nor facilities with the projects proposed by its affiliates or Ecogen. It claims that Petitioner's citation of the Declaratory Ruling in Case 03-T-1385 does not support evaluation of the projects as one because that decision discussed two portions of a single project that were connected by an existing electric transmission system and were operationally dependent on each other.

DISCUSSION AND CONCLUSION

While WFP will own electric plant, as defined in PSL §2(12), whether it is an electric corporation subject to regulation under the PSL depends upon the application of the exemptions from regulation set forth in the PSL. Applying those exemptions requires interpretation of the statutory language and an analysis of the facts Petitioners and WFP have submitted. PSL §2(13), provides, in pertinent part:

⁷ WFP states that UPC Wind was formed by principals of the UPC Group, which is based in Europe. UPC Wind's affiliates have three wind projects in commercial operation in Maui, Hawaii; Mars Hill, Maine; and, Lackawanna, New York.

The term "electric corporation," when used in this chapter, includes every ... company ... owning, operating or managing any electric plant... except where electricity is generated by the producer solely from one or more... alternate energy production facilities or distributed solely from one or more of such facilities to users located at or near a project site.⁸

PSL §2(2-b), reads, in pertinent part:

The term "alternate energy production facility," when used in this chapter, includes any... wind turbine... facility, together with any related facilities located at the same project site, with an electric generating capacity of up to eighty megawatts.

PSL §2(2-d), reads, in pertinent part:

The term "related facilities" shall mean any land, work, system, building, improvement, instrumentality or thing necessary or convenient to the construction, completion or operation of any... alternate energy production... facility and include also such transmission or distribution facilities as may be necessary to conduct electricity... to users located at or near a project site.

The question of whether WFP is an electric corporation turns on whether the facilities related to its proposed 66 MW Wind Project are located at the same project site or not,⁹ and on whether the capacity of its proposed project should be

⁸ Similarly, §2(4) excludes from the definition of persons subject to the PSL, except for the purposes of Article VII, entities "generating electricity ... from one or more alternate energy production facilities or distributing electricity ... from ... such facilities to users located at or near a project site."

⁹ Case 06-E-1203, supra.

aggregated with the capacities of nearby projects to bring the total above 80 MW because their facilities are not physically separate.¹⁰ For the reasons given below, we conclude that WFP is not an electric corporation.

Petitioners appear to argue that the generating capacities of all four wind energy projects in question should be aggregated such that the total capacity would exceed the 80 MW limit specified in PSL §2(2-b). Generating capacities of physically separate projects proposed by affiliates however, have not previously been aggregated in determining whether a facility is a State qualifying facility under PSL §2(2-a), (2-b), or (2-c). Moreover, while WFP's project is only about two miles from that of its nearest affiliate, WFP does not indicate that the projects will be interconnected. Indeed, if they were interconnected, WFP's project would lose qualifying facility status under § 2(2-b). As to whether WFP's project will share facilities with that of Ecogen, there is a difference of opinion. Petitioners believe such sharing will occur, while WFP states that it will not. So long as the Projects of WFP and Ecogen remain physically separate, however, their generating capacities will not be aggregated for the purpose of determining whether the developers are electric corporations. That facilities can be shared does not demonstrate that they will be shared.

It is clear that the operation and maintenance building, meteorological towers, collection lines, and the low side of the substation (all of which WFP will own and operate) are "related facilities" within the meaning of PSL §2(2-d) because they are necessary or convenient to the construction,

¹⁰ Case 91-E-0454, Output Limitations Implementing the 80 MW Size Restriction, Order Interpreting and Clarifying 80 MW Output limitations (Issued April 22, 1992).

completion, or operation of the wind turbines. That said, the question is whether the related facilities are located on the same project site as the wind turbines, as §2(2-b) requires.

Petitioners argue that differences between WFP's project and the Steel Winds project compel the conclusion that the related facilities now under discussion are not located at the same project site. That argument is unpersuasive. It is true that WFP's project is proposed for a location significantly larger in area than the location of the Steel Winds Project.¹¹ WFP, however, is proposing more than five-times the number of turbines (with a generating capacity more than three-times as large) as the Steel Winds Project.

While the WFP project distances are greater than those regarding the Steel Winds Project, the proximity of the wind turbines and other electric equipment (with the closest turbine being about 0.2 miles from the substation and the furthest being about 4.2 miles from the substation) is still consistent with a reasonable design for a small wind project.¹² All of the facilities WFP proposes to own and operate are necessary or convenient for generating electricity and bringing it to the substation, from whence it will be transmitted by NYSEG into the state wide power grid.¹³

Moreover, while WFP's project will occupy the land of more than one lessor, WFP will exercise project site control by purchasing easements or property from land owners, and using a

¹¹ Parcels of non-participating land owners interspersed among those of participating land owners mean that the effected project area is larger than the 2,500 acres reported by Petitioners and WFP

¹² At its farthest point, the electrical collection system is approximately 5.1 miles from the substation.

¹³ NYSEG, not WFP, will own and operate the high side of the substation and the transmission line that will function as part of the power grid.

Town-owned ROW or entering into property sharing agreements with NYSEG. Those components and the fact that the property of non-participating land owners is near that on which the project will be located, have no bearing on whether the related facilities are located on the same project site because WFP's site control is not thereby diminished.¹⁴ Therefore, WFP's facilities are components of one project located at the same site. Hence, WFP will not become an electric corporation as a result of its ownership and operation of the related facilities.

The Commission finds and declares:

1. WindFarm Prattsburgh, LLC is not an electric corporation within the meaning of Public Service Law §2(13) and is not a person within the meaning of Public Service Law §2(4) (except for the purposes of Public Service Law Article VII).

2. This proceeding is closed.

By the Commission,

(SIGNED)

JACLYN A. BRILLING
Secretary

¹⁴ See Case 04-E-1179 Ruthe Matilsky, Order Dismissing Petition (issued January 14, 2005)