

# Young / Sommer LLC

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October 3, 2017

### VIA REGULAR MAIL and ELECTRONIC FILING

Hon. Sean Mullany  
Presiding Examiner  
NYS Dept. of Public Service  
3 Empire State Plaza  
Albany, NY 12223

Hon. Daniel O'Connell  
Associate Examiner  
NYS Dept. of Environmental Conservation  
625 Broadway, First Floor  
Albany, NY 12223

***Re: Response to Request for Pre-Application Intervenor Funds to Study Raptors and Golden Eagles in Case No. 16-F-0559: Application of Bluestone Wind LLC***

Dear Presiding Examiners Mullany and O'Connell:

Our office represents Bluestone Wind, LLC ("Bluestone Wind" or "Project Sponsor"), a wholly-owned subsidiary of Calpine Corporation, which is seeking a Certificate of Environmental Compatibility and Public Need ("Certificate") from the New York State Board on Electric Generation Siting and the Environment ("Siting Board") pursuant to Article 10 of the Public Service Law ("PSL") in the above-noted proceeding. We submit this letter in response to a Request for Intervenor Funds submitted by the Delaware-Otsego Audubon Society on September 22, 2017, and as supplemented September 26, 2017, for funding to study raptors and golden eagles.<sup>1</sup>

Bluestone Wind filed its Preliminary Scoping Statement ("PSS") on August 18, 2017 and filed its PSS Comment Response on September 29, 2017. Prior to and following submission of the

<sup>1</sup> We note that Your Honors have already raised a threshold issue in response to this request, regarding DOAS's status as a local party under 16 NYCRR 1000.2(s). Similar concerns have been raised in other Article 10 proceedings (see eg. Ruling on Intervenor Funding Requests in Case 13-F-0464, Application of National Grid for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 for the Repowering of its E.F. Barrett Power Station in the Town of Hempstead, Nassau County (May 27, 2014)(finding that environmental and advocacy groups must have a "strong nexus to the community" which requires a showing that group members "actually reside within the impacted community"). We have concerns in this regard as well, in particular, as the money allocated from DOAS would lessen the intervenor fund available to other intervenors, in particular the Towns of Windsor and Sanford.

PSS, Bluestone Wind has been in contact with the Delaware-Otsego Audubon Society (“DOAS”) regarding matters raised in the group’s PSS comments and request for intervenor funds. In response to comments on the scope of studies by the New York State Department of Environmental Conservation (“DEC”), the United States Fish and Wildlife Service (“USFWS”), as well as other parties including DOAS, Bluestone Wind has revised the avian study work plan for the Facility to provide for additional study of fall and spring eagle migration. Bluestone Wind is seeking USFWS and DEC concurrence on the proposed methodology of the work plan, and will supplement this response with the final work plan upon receipt of USFWS and DEC concurrence.<sup>2</sup> In light of Bluestone Wind’s plans to expand its eagle migration surveys, DOAS’s proposed pre-application study work is not necessary at this time. Additionally, even if Bluestone Wind study efforts were not already addressing DOAS’s proposed work, the request is premature at the pre-application stage of the process.<sup>3</sup>

As DOAS notes in its request, Bluestone Wind has engaged with the organization via in-person meetings, telephone conversations, and electronic correspondence, to discuss DOAS’s concerns regarding golden eagle use in the Project Area, particularly during the migration period. This consultation has been ongoing and will continue as the project proceeds through the Article 10 process. As noted in greater detail in Bluestone Wind’s PSS Comment Response (September 29, 2017), the Project Sponsor has consulted with state and federal agencies regarding the scopes of studies to confirm compliance with the applicable USFWS and DEC Guidelines to assess risk and potential impacts to various avian species. As a result of those discussions, Bluestone Wind has agreed to expand its proposed eagle study. The additional survey work was developed based on consultation with USFWS and previous input from DOAS, and utilizes methods consistent with USFWS’s Eagle Conservation Plan and Guidance, which USFWS advised as the best method for assessing risk to eagles from land-based wind projects. Notably, both USFWS and NYSDEC indicated that, based upon the location of the proposed Project, no additional survey work for raptor species other than eagles was necessary.

The DOAS requests \$10,548 in intervenor funds to assess raptor and eagle populations in the Project Area. This includes a request for \$5,548 to perform seven hours of surveys on 20 migration days between October 25 and November 24, as well as on 15 migration days between March 1 and March 21, with specific days to be selected based on weather conditions. However, this work is duplicative of the Project Sponsor’s expanded eagle use survey plans for the fall 2017 and spring 2018, which will provide 168 total hours of on-site observation effort during the fall migration period (October 25 to December 2, 2017), and 120 total hours of on-site observation effort during the spring migration period (February 21 to March 28), using a weekly surveying method at 24 survey locations. The proposed survey locations will be identified in the revised Bluestone Wind Eagle Observation

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<sup>2</sup> The document was intended to be included in the PSS Response to Comments document but coordination with the USFWS and the DEC on the scope had not yet been completed.

<sup>3</sup> “At this early stage in the proceeding, it is not appropriate or prudent to use intervenor funds to conduct intervenor-sponsored studies.” Ruling on Intervenor Funding in Case 15-F-0327, Application of Galloo Island Wind LLC for a Certificate of Environmental Compatibility and Public Need (August 18, 2016), at page 9 and Ruling on Intervenor Funding in Case 16-F-0328, Application of Number Three Wind LLC for a Certificate of Environmental Compatibility and Public Need (January 24, 2017) at page 9; Pre-application intervenor funding “is not to be used for consultants to perform their own studies.” Transcript of Pre-Application Conference in Case 14-F-0485, Application of Lighthouse Wind, LLC for a Certificate of Environmental Compatibility and Public Need (January 21, 2016) at page 28; It would not be appropriate to use Pre-Application intervenor funding to “prepare testimony for a party’s affirmative case,” and noting that “no costs related to such activities will be authorized at this stage in the proceeding using intervenor funds.” Ruling on Intervenor Funding in Case 15-F-0122, Application of Baron Winds LLC for a Certificate of Environmental Compatibility and Public Need (December 30, 2016) at 9.

Survey Protocol; these locations were selected, following consultations with NYSDEC and USFWS, because they provided the best unobstructed views<sup>4</sup> of the surrounding landscape. The study protocol will also include details regarding the selection of viewing days based on the weather conditions most conducive to viewing migrating diurnal raptors. Specifically, raptor migration days will be selected based on such weather-related criteria as prevailing winds (northerly winds in the fall and southerly winds in the spring), days with light or no precipitation, good visibility, and immediately before or after cold (fall) and warm (spring) fronts passing through the Project Area.

Further, during previous consultation, DOAS has requested that the Project Sponsor purchase data from Dr. Tricia Miller and Todd Katzner for migrating golden eagles. Because Bluestone suggests that its on-site study work is better evidence for golden eagle flights in the Project Area, it declined to purchase this data. However, now DOAS seeks \$5,000 from the intervenor fund to purchase this data. This is unnecessary because Bluestone is following the USFWS Eagle Conservation Plan Guidance, which USFWS believes provides the best information to determine site-specific risk to eagles. Bluestone is collecting data on golden and bald eagle flight heights, flight direction, behaviors, mapping flight paths and perched locations on recent aerial photographs, and the number of minutes every eagle spends within the viewshed of the biologist. This study will use the USFWS Bayesian Model (or peer-reviewed equivalent) to determine potential collision risk to bald and golden eagles. The results of this work and related information will be included in the Application at Exhibit 22, and will supplement the other avian study work already proposed by Bluestone Wind in the PSS.

Bluestone Wind believes that its expanded eagle study plans will adequately characterize the use of the site by golden and bald eagles, and will facilitate the required impact assessment of the proposed Facility on these species. For that reason, the study work proposed by DOAS in its request for intervenor funding would be duplicative of efforts the Project Sponsor has already agreed to undertake, and would divert a significant portion of the limited available intervenor funding (\$43,750) from other parties seeking that funding, including the Towns of Windsor and Sanford, which have jointly requested funds equal to the entire available intervenor funding pool.

Please do not hesitate to call me with any questions.

Respectfully submitted,



James A. Muscato II, Esq.

Laura K. Bomyea, Esq.

cc: Party List, DMM

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<sup>4</sup> The heavily forested nature of the western portion of the Project Area did not provide adequate viewsheds to complete raptor migration surveys. Survey points should have as much of an unobstructed 360-degree viewshed as possible, and this area did not provide adequately unobstructed views to make placement of survey points there feasible or scientifically appropriate.