

NEW YORK STATE BOARD ON ELECTRIC
GENERATION SITING AND THE ENVIRONMENT

At a session of the New York State
Board on Electric Generation Siting
and the Environment held in the City
of Albany on December 10, 2018

BOARD MEMBERS PRESENT:

John B. Rhodes, Chair
New York State Public Service Commission

Louis Alexander, Alternate for
Basil Seggos, Commissioner
New York State Department of Environmental Conservation

Dr. Elizabeth Lewis-Michl, Alternate for
Howard A. Zucker, M.D., J.D., Commissioner
New York State Department of Health

Vincent Ravaschiere, Alternate for
Howard Zemsky, Commissioner, President & CEO
New York State Empire State Development

John Williams, Alternate for
Richard L. Kauffman, Chair
New York State Energy Research and Development Authority

Joan Treadwell-Woods, Ad Hoc Member, dissenting

CASE 15-F-0327 - Application of Galloo Island Wind LLC for a
Certificate of Environmental Compatibility and
Public Need Pursuant to Article 10 to Construct
a Wind Energy Facility.

ORDER DENYING INTERLOCUTORY APPEAL

(Issued and Effective December 10, 2018)

BY THE BOARD:

INTRODUCTION

Galloo Island Wind LLC (Galloo) filed an application
with the New York State Board on Electric Generation Siting and

the Environment (Siting Board) on September 25, 2017, proposing to construct and operate a 108.9 megawatt (MW) major electric wind generating facility pursuant to Public Service Law (PSL) Article 10. The proposed facility includes the installation and operation of up to 30 wind turbines along with associated underground collection lines, access roads, collection substation components, meteorological towers, an operation and maintenance building, and related facilities (the Project). The Project is proposed to be located on Galloo Island, in the Town of Hounsfield, Jefferson County, New York. Galloo proposes to interconnect the Project to the power grid by constructing an underwater electric transmission cable that would interconnect near the Mitchell Street Substation in Oswego, Oswego County, New York. The transmission facility will be subject to review pursuant to Article VII of the PSL; it will not be reviewed as part of the Project proposed in this proceeding. After several supplemental filings by Galloo, the Chair of the Siting Board found the application to be fully compliant with statutory requirements as of July 6, 2018.

On August 23, 2018, the Examiners overseeing this case issued a Ruling on Party Status and Intervenor Funding. Anthony and Cara Dibnah (the Dibnahs) owners of a lighthouse property, which includes a keeper's quarters, abutting the proposed Project area on Galloo Island, requested that they be accorded party status and receive intervenor funding. As to party status, the Examiners granted that aspect of their request pursuant to PSL §166(1)(o) as "affected landowners." However, regarding intervenor funding, the Examiners denied the Dibnahs' request, ruling that they did not fall within the definition of "local parties" eligible to receive an award of intervenor funds

because they neither "reside" nor have a "dwelling" within the community that may be affected by the Project.¹

The Dibnahs timely filed a request for an appeal of the Examiners' funding determination to the Siting Board. Although not specifically stated, that request is made pursuant to 16 NYCRR §4.7. As explained below, the Siting Board finds here that the Examiners' ruling denying the Dibnahs' intervenor funding request is reasonable and, therefore, denies their request that the ruling be reversed.

BACKGROUND

On August 15, 2018, the Examiners oversaw a procedural conference at the Henderson Fire District Building/Community Room in Henderson, New York. There they addressed requests for party status and awarded intervenor funds in the total amount of \$116,652.50, reserving \$5,000 for potential future awards. The Dibnahs, despite having their request for party status granted, were denied their request for an award of intervenor funds totaling \$50,000.

On August 23, 2018, the Examiners confirmed their oral rulings in a written ruling. The Examiners found that the Dibnahs were ineligible to receive funding because, although they owned property which would be impacted should the Project be built, they could not be considered a "local party." This was because the Dibnahs "neither reside nor have a dwelling within a community that may be affected by the Project."²

The Dibnahs responded with a request for an appeal of the Examiners' ruling. In their August 28, 2018 letter request to the Siting Board, the Dibnahs argue two points. First, they

¹ Case 15-F-0327, Ruling on Party Status and Intervenor Funding Requests (issued August 23, 2018), p. 14.

² Id.

contend that the concept of habitability should not be used as criteria to deny intervenor funding. They state that the term "dwelling," which is left undefined in the PSL, does not include a concept of habitability (or at least should be interpreted to include buildings not presently inhabited by persons). Second, they argue that, as a matter of public policy, the intent of Siting Board's regulations is to "contribute to compilation of a complete record" as required by 16 NYCRR §1000.10(c)(1)(vi).

The Dibnahs concede that there is no certificate of occupancy for the keeper's quarters. They assert that no such certificate has ever been issued because, having been built and occupied as early as 1866, they state that the keeper's quarters pre-dated the certificate process. The Dibnahs concede that neither they nor any other person resides in the keeper's quarters currently.³ The Dibnahs reside in Nevada and do not own or rent any property other than the lighthouse property in the Project area.

LEGAL AUTHORITY

Interlocutory review of a ruling by a presiding Administrative Law Judge will be available and may be sought only in "extraordinary circumstances" [16 NYCRR §4.7]. Any request for interlocutory review must identify specifically the ruling to be reviewed and must identify the extraordinary circumstances alleged to warrant interlocutory review. Ultimately, the determination of whether extraordinary circumstances exist is fact specific and is done on a case-by-case basis.

³ See, E-mail from Anthony and Cara Dibnah to Hon. Kathleen H. Burgess, Secretary to the Siting Board (dated August 28, 2018).

Under PSL Article 10, intervenor funds are available to "municipal and local parties."⁴ The regulations define a local party as "[a]ny person residing in a community who may be affected by the proposed major electric generating facility at the proposed location, or any alternative location identified, who is a party to the proceeding. For the purposes of this definition, the term 'residing' shall include individuals having a dwelling within a community who may be affected."⁵

DISCUSSION

Extraordinary Circumstances

The Dibnahs have been permitted to participate as a party but have not been awarded intervenor funding to cover any expenses they may incur in doing so. The Siting Board finds that their interlocutory appeal does not demonstrate extraordinary circumstances as required by 16 NYCRR §4.7. Despite the absence of extraordinary circumstances, the Siting Board has nevertheless decided to provide guidance to the parties. Each of the arguments is discussed below.

"Local Parties" and Intervenor Funding

The PSL requires an applicant in an Article 10 pre-application phase to pay fees, which are set aside as a pool of funds for affected municipalities and local parties to obtain in order to "defray pre-application expenses ... for expert witness, consultant, administrative, and legal fees."⁶ The applicant also must pay another set of fees in the application phase for similar reasons.⁷ Under PSL §160(9), the term "local parties" is

⁴ See, PSL §163(4)(a).

⁵ 16 NYCRR §1000.2(s).

⁶ PSL §163(4)(a).

⁷ PSL §164(6)(a).

defined as "persons residing in a community who may be affected by the proposed major electric generating facility who individually or collectively seek intervenor funding." The word "person" is defined to include "any individual, corporation, public benefit corporation, political subdivision, governmental agency, municipality, partnership, co-operative association, trust or estate."⁸ The pertinent regulations contain similar definitions and further specify that the term "residing" shall include "individuals having a dwelling within a community who may be affected."⁹ Notably, although the former Article X of the PSL also provided for intervenor funding to be distributed to "local parties," that statute did not contain a definition of local party.

Given the Legislature's specific inclusion of a definition of "local parties" in the new PSL Article 10, the Siting Board believes those receiving funding must have a strong nexus to the community by limiting the scope of applicants eligible for funding to individuals, or groups of individuals, who actually reside within the impacted community or have members that reside within the impacted community.¹⁰ Local parties are defined in the PSL as "persons residing in a community who may be affected by the proposed major electric

⁸ PSL §160(3).

⁹ 16 NYCRR §1000.2(s); see also, 16 NYRR §1000.2(ab).

¹⁰ See, e.g., 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, Ruling on Intervenor Funding Requests (issued May 27, 2014), pp. 3-4; Id., pp. 4-5; see also, Case 16-F-0559, Application of Bluestone Wind, LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 for Construction of the Bluestone Wind Farm Project Located in the Towns of Windsor and Sandford, Broome County, Ruling on Intervenor Funding (issued November 21, 2017), pp. 14-16.

generating facility who individually or collectively seek intervenor funding,” and 16 NYCRR §1000.2 further provides that the term “residing” shall include “individuals having a dwelling within a community who may be affected.”¹¹ The regulations do not, however, provide a definition for the term “dwelling.”

The common definition of dwelling is “a shelter (such as a house) in which people live.”¹² It in part originates from the verb “dwell,” which is further defined as either “to remain for a time” or “to live as a resident.”¹³ Thus, to refer to an unoccupied building as a “dwelling” is misplaced. A more accurate description would require present or active habitation of a building. Here, the Examiners avoided such a strict interpretation by reasonably relying on the fact that the keeper’s quarters were not habitable at the time of the request for intervenor funding. The habitability requirement is an appropriate criterion. Had the Legislature desired to include all property owners or other interested persons, it could have done so. Expanding the definition of local parties when awarding intervenor funding creates the risk that ineligible, non-local parties could exhaust intervenor funds set aside for those physically residing within the affected community. In the case of the Dibnahs, their potential use is too speculative to warrant a finding of habitability.

¹¹ PSL §160(9); 16 NYCRR §1000.2(s).

¹² See, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/dwelling> (Sept. 11, 2018).

¹³ See, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/dwell> (Sept. 11, 2018).

Denial of Intervenor Funding Does Not Preclude Meaningful Participation

Contrary to the Dibnahs' assertions, there is ample opportunity for meaningful participation in the application process even without intervenor funding. The Dibnahs were granted party status, meaning they can continue to participate in the same manner as they have done for the last several years. For example, they retain access to the Public Information Coordinator's office, can engage in discovery, can testify, submit exhibits, and conduct cross-examination at evidentiary hearings, and submit post hearing briefs and replies. In addition, the Dibnahs will have access to the public work product submitted by the expert witnesses and consultants retained through intervenor funding granted to the municipalities and other parties in addition to those of the statutory parties like the Department of Environmental Conservation and trial staff of the Department of Public Service. Should the Dibnahs ultimately feel these measures are inadequate, nothing precludes them from retaining counsel at their own cost to represent their interests.

CONCLUSION

For the reasons stated above, the appeal of the Examiners' ruling is denied.

The New York State Board on Electric Generation Siting and the Environment for Case 15-F-0327 Orders:

1. The interlocutory appeal is denied on the grounds that Anthony and Cara Dibnah have not demonstrated extraordinary circumstances.

2. This proceeding is continued.

By the New York State Board
on Electric Generation Siting
and the Environment,

(SIGNED)

KATHLEEN H. BURGESS
Secretary