

STATE OF NEW YORK
BOARD ON ELECTRIC GENERATION SITING AND THE ENVIRONMENT

Case 16-F-____ - In the Matter of Ball Hill Wind Energy, LLC,
Petition for Declaratory Ruling that a Certificate
is Not Required Under Section 162(4)(d) of
the Public Service Law.

PETITION FOR DECLARATORY RULING

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Dated: May 12, 2016
Albany, New York

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INTRODUCTION

Pursuant to Section 161 of the Public Service Law (“PSL”) and Part 8 of the Rules of Procedure of the Public Service Commission of the State of New York (“Commission”), Ball Hill Wind Energy, LLC (“Ball Hill”), the developer of a proposed, approximately 100 megawatt (“MW”) wind energy facility in the Towns of Villenova and Hanover in Chautauqua County (the “Project”), hereby petitions the Chair of the Board on Electric Generation Siting and the Environment (“Chair” or “Siting Board,” as the case may be) for a declaratory ruling. Ball Hill requests that the Chair declare that a certificate of environmental compatibility and public need (“Certificate”) for the Project is not required pursuant to Section 162(4)(d) of the PSL. As discussed herein, although permitting is well underway pursuant to the State Environmental Quality Review Act (“SEQRA”), Ball Hill requires the clarity and certainty of a declaratory ruling to consummate financing.

BACKGROUND

The Project

Development of the Project began on or about May 23, 2008, with an application filed for a Special Use Permit and Wind Overlay Zoning District under Local Law No. 1 of 2007, the Wind Energy Facilities Law of the Town of Villenova (the “Wind Energy Facilities Law”).¹ That application described the Project as wind energy facilities producing approximately 100 MW of clean, renewable energy including, without limitation, access roads, an electrical collection system, laydown areas, operations and maintenance areas, an electrical transmission system, a substation and switchyard, and other utility related infrastructure.² The location of the Project was designated in the application³ and EAF.⁴ As shown on the maps included in the application, the Project’s location extends east to west from Zahm Road to Dye Road, and north to south from Stebbins Road to Route 83.⁵

On May 20, 2008, the Town Board of the Town of Villenova issued a resolution declaring its intent to act as the Lead Agency, pursuant to SEQRA (Environmental Conservation Law (“ECL”) Article 8 and its implementing regulations at 6 NYCRR Part 617).⁶ This resolution also memorialized an escrow agreement between the Town Board and the Project’s developer for the engineering and legal review of the Project’s application.⁷

¹ See *Wind Energy Conversion Facilities Application*, Noble Ball Hill Windpark, LLC (May 23, 2008), attached hereto as Appendix I. Appendix I, which is the filed application, included the Project’s Environmental Assessment Form (“EAF”). Figure 1 depicts the Project location.

² *Id.* § I(4); see also Appendix II at 1.

³ Appendix I § I(4); see also Appendix II at 1.

⁴ Appendix I § III(13).

⁵ *Id.* § I(4).

⁶ Appendix III.

⁷ *Id.*

The Town Board accepted the Project's application as complete and issued a Positive Declaration of Environmental Significance on June 23, 2008.⁸ As a result, a Draft Environmental Impact Statement ("DEIS") was prepared for the Project, which was then reviewed by the Town Board and its engineering and legal consultants and accepted by the Town Board as complete for public review and comment on October 8, 2008.⁹ The Town of Villenova received written and oral comments on the DEIS and the Project from interested and involved agencies and the public at a public hearing held on October 30, 2008.¹⁰

The New York State Department of Public Service ("DPS") reviewed the DEIS and provided comments thereon to the Project's developer in a letter dated November 10, 2008.¹¹ In this letter, DPS Staff noted that the Project required a Certificate of Public Convenience and Necessity ("CPCN") pursuant to PSL § 68.¹²

Thereafter, Project development continued at the same Project location.¹³ On August 10, 2011, the Project's developer filed an amended application with the Town Board that showed layout and equipment changes at the same Project location.¹⁴ The Town Board accepted the amended application as complete by resolution on February 8, 2012.¹⁵ It also ordered that a Supplemental DEIS ("SDEIS") be prepared to analyze potential impacts of the Project, as

⁸ Appendix IV; *see also* Appendix II at 1.

⁹ Appendix V; *see also* Appendix II at 1.

¹⁰ Appendix II at 1.

¹¹ Appendix VI.

¹² *Id.*

¹³ *See* Appendix I § I(4), Figure 1; Appendix II at 1.

¹⁴ Appendix II at 1.

¹⁵ Appendix VII; *see also* Appendix II at 1.

required by the Wind Energy Facilities Law and SEQRA, and adopted a scope of impacts for said SDEIS.¹⁶

The Project's developer filed a second amended application with the Town Board on May 14, 2012, revising the layout and equipment at the same Project location.¹⁷ The Town Board accepted the second amended application for the Project as complete on May 23, 2012.¹⁸ An SDEIS, analyzing all impacts identified in the Town Board's resolutions dated February 8, 2012, and May 23, 2012, was prepared and submitted for the Town Board's engineering and legal consultants' review.¹⁹

On October 29, 2015, the Town Board adopted a resolution stating, *inter alia*, that Ball Hill "will continue the development of the Project and assume all rights and responsibilities of prior developers as related to the Project and shall be recognized by the Town Board as, Applicant for the Project from its inception."²⁰ This resolution also affirmed that the Town Board will continue as Lead Agency under SEQRA for the review of the Project, the SDEIS, and all subsequent submissions under SEQRA, and outlined the scope required for an updated SDEIS.²¹

On March 14, 2016, DPS Staff provided comments on the SDEIS in a letter to the Town Board.²² DPS Staff stated that Ball Hill must file a petition for a CPCN pursuant to PSL § 68 if

¹⁶ *Id.*

¹⁷ Appendix II at 1.

¹⁸ *Id.* at 2.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Appendix VIII.

the Project will operate above 80 MWs.²³ The letter also noted that DPS has been an involved agency in the Project's SEQRA review since the original filing of the Project in 2008.²⁴

The Applicant

Ball Hill is a wholly-owned subsidiary of RES America Developments Inc. ("RES America"). The RES Group of companies have constructed over 160 renewable energy projects with a total capacity of more than 9,000 MW around the world. RES America has been active in North America since 1997, and has a renewable energy and storage construction portfolio that exceeds 7,500 MW and over 80 projects, as well as 600 miles of overhead and underground transmission lines. In addition, RES America has a robust development pipeline of wind and solar projects across North America, and the company currently operates more than 250 MW of renewable energy and storage projects.

On September 23, 2015, Governor Andrew M. Cuomo announced that the Project was selected by the New York State Energy Research and Development Authority ("NYSERDA") as the largest of five large-scale clean energy projects that will help the State meet its Reforming the Energy Vision goal to increase the amount of electricity generated by renewable energy sources.²⁵ In total, NYSERDA awarded approximately \$175 million in contracts to the selected projects, which are expected to reduce greenhouse gas emissions and improve the resiliency of

²³ *Id.*

²⁴ *Id.*

²⁵ *Governor Cuomo Announces \$175 Million in Awards For Five New Clean Energy Projects*, Office of the Governor Pressroom (Sept. 23, 2015), <https://www.governor.ny.gov/news/governor-cuomo-announces-175-million-awards-five-new-clean-energy-projects> (attached hereto as Appendix IX).

New York's electric grid and energy infrastructure while decreasing the state's reliance on fossil fuels, leading to a cleaner, healthier environment.²⁶

DISCUSSION

THE CHAIR SHOULD DECLARE THAT THE PROJECT DOES NOT REQUIRE A CERTIFICATE UNDER SECTION 162(4)(D) OF ARTICLE 10 OF THE PUBLIC SERVICE LAW.

Section 162(1) of the PSL provides that no person shall commence the construction of a major electric generating facility in the state without having first obtained a certificate issued with respect to such facility by the Siting Board. PSL § 162(4)(d) provides that this requirement shall not apply to a major electric generating facility “if, on or before the effective date of the rules and regulations promulgated pursuant to this article and section 19-0312 of the environmental conservation law, an application has been made for a license, permit, certificate, consent or approval from any federal, state or local commission, agency, board or regulatory body, in which application the location of the major electric generating facility has been designated by the applicant.” The regulations promulgated by the New York State Department of Environmental Conservation under ECL § 19-0312 became effective July 12, 2012. The regulations promulgated by the Siting Board, however, became effective August 1, 2012. The exemption provided in PSL § 162(4)(d), therefore, applies to projects which (1) filed an application for a permit or other approval before August 1, 2012, and (2) designated the location of the generating facility in such application.

The Project fully satisfies both statutory requirements. As described above, the Project's original developer filed an application for approval of the Project with the Town Board on May

²⁶ *Id.*; see also *Main Tier Solicitations*, NYSERDA, <http://www.nyserda.ny.gov/All-Programs/Programs/Main-Tier/Main-Tier-Solicitations> (last visited Mar. 28, 2016).

23, 2008, more than four years before the effective date of the Siting Board's regulations. The two amended applications were filed with and accepted by the Town of Villanova before August 1, 2012, as well. The Project's applications have been pending before the Town Board and under review since their original filing in 2008.²⁷

As to the second statutory criteria, the original application and amended applications consistently designated the location of the Project as the same site.²⁸ The location has remained constant throughout the Project's development despite the several design and equipment layout changes within the same site location.²⁹

As noted above, the SEQRA process continues, as DPS Staff recently submitted comments on the SDEIS.³⁰ DPS Staff also noted that Ball Hill would be required to file a petition for a CPCN pursuant to PSL § 68. Proceeding under Article 10, however, was not requested. Despite the ongoing permitting process under SEQRA, to which no one has objected, Ball Hill requires the clarity and certainty of a declaratory ruling in order for it to obtain the necessary financing for construction of the Project.

²⁷ Appendix II at 1.

²⁸ *See id.*; Appendix I § I(4).

²⁹ Appendix II at 1.

³⁰ Appendix VIII.

CONCLUSION

Based on the foregoing, Ball Hill respectfully requests that the Chair issue a ruling that declares that the proposed construction of the Project does not require the issuance of a Certificate under Article 10 of the PSL.

Respectfully submitted,

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