

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA in the City of Charleston on the 30th day of December 2014.

CASE NO. 14-1905-E-CS-PC-PW

NEW CREEK WIND, LLC

Application for waiver of siting certificate modification requirements or, in the alternative, for modification of the siting certificate for the New Creek Wind Power Facility and related requests for relief.

COMMISSION ORDER

The addition of two turbines and the relocation of an operation and maintenance (O&M) building are not material modifications of the applicant's siting certificate within the meaning of W.Va. Code §24-2-1(c)(5) and Rule 6.1 of the Commission Rules Governing Siting Certificates for Exempt Wholesale Generators, 150 C.S.R. Series 30 (Siting Rules).

BACKGROUND

New Creek Wind, LLC (New Creek) holds a siting certificate, pursuant to W.Va. Code §24-2-11c, for the construction and operation of a wholesale electric generating facility consisting of up to sixty-six wind turbines and related interconnection facilities (Project) to be located over a seven-mile stretch of the New Creek Mountain ridgeline in Grant County, West Virginia, and proceeding to the county line with Mineral County, West Virginia.¹

On November 14, 2014, New Creek filed an application for a waiver of siting certificate modification requirements, or in the alternative, for modification of siting certificate and related requests for relief (Application). New Creek described planned

¹ The Commission certified the Project in a siting certificate (Siting Certificate) issued to AES New Creek, LLC (AES New Creek) by Commission Order dated September 30, 2009 (as amended on November 4, 2009) in Case No. 08-2105-E-CS (Siting Certificate Order), granting relief sought in AES New Creek's application in that case, as supplemented and amended (Siting Certificate Application). The Commission extended the commencement-of-construction period to eight years from five years in its September 16, 2014 order in that docket. In seeking this extension, AES New Creek advised that it expected AES would transfer AES New Creek's membership interests to an unidentified buyer, which would assume responsibility for completing and operating the Project. On October 9, 2014, AES New Creek informed the Commission of its sale to EverPower Wind Holdings, Inc. (EverPower). Subsequently, EverPower changed the project company's name to New Creek Wind LLC.

modifications to the Project and asserted that none is material under Siting Rule 6.1. At the time of filing of the Application, New Creek represented that when considering the totality of the circumstances, the “three minor design revisions” described in the Application did not materially affect the Project’s viewshed impacts, sound levels, emissions, or other environmental impacts. Application at 1. The three revisions (Revisions) consisted of (a) two additional turbines at the Project’s southern end (Turbines T-1 and T-2) (New Turbines); (b) the use of overhead electric collection lines rather than an underground electric collection system (Overhead Collection Line); and (c) moving the O&M building from the substation site to a location nearer to the access road entrance (O&M Building Relocation). Id. at 4-6. New Creek requested a waiver of the requirement to file a notice of intent, a waiver of any requirement to publish a notice of filing, and expedited treatment. New Creek paid a filing fee and asked the Commission to hold the fee in escrow pending its decision on whether the proposed modifications are material. New Creek requested a Commission Order on or before December 22, 2014. Id. at 10-11.

On November 19, 2014, New Creek filed a request that the Commission issue a publication order on or before Friday, November 21, 2014, to allow for timely publication of a notice of filing in Grant County. New Creek explained that it agreed to publish notice when it became aware that Commission Staff believed publication was required. New Creek asked the Commission to consider a twenty-one day comment period, rather than the thirty-day period prescribed in W.Va. Code §24-2-11c(a). New Creek stated that shortening the comment period would result in the protest period expiring on December 16, 2014, six days before the date that New Creek requested a Commission order on its Petition.

On November 20, 2014, Commission Staff filed an Initial Memorandum summarizing the petition and recommending that the Commission: 1) grant a waiver of the thirty-day notice of intent requirement, 2) order New Creek to publish a notice of filing providing a thirty-day protest period, and 3) order New Creek to promptly file the information required by Siting Rule 6.2. and described in Siting Rules 3.1.a through 3.1.p. Staff stated that New Creek and Staff agreed to the form of the notice of filing with the exception of the length of the protest period. Staff stated it did not support shortening the protest period to twenty-one days because W.Va. Code §24-2-11c(a) requires a thirty-day period to ensure due process to members of the public. Staff argued that the time period is statutory and the right to comment or protest should be not shortened. Staff stated that it would expeditiously review the additional information requested from New Creek and complete its analysis of the substantive question whether the proposed modifications are material.

In a Commission Order entered November 21, 2014, the Commission required the publication of notice, denied the New Creek request to shorten the public comment period, and required New Creek to file certain additional information. The Commission also waived the requirement that New Creek pre-file a thirty-day notice of intent.

On November 21, 2014, New Creek also filed its First Supplement to Application (Supplement). In the Supplement, New Creek provided additional information in support of the Application, including several additional maps and drawings responsive to certain Staff requests, measurements of distances to the nearest turbines under the certificated layouts and with respect to the two proposed additional turbines (Turbines T-1 and T-2), noise modeling information and supporting assumptions, descriptions and related data on the proposed overhead electric collection line, and an explanation of how New Creek asserted it had met the applicable requirements of Siting Rules 3.1.a through 3.1.p with respect to the Revisions. On this last point, New Creek suggested that Staff's request for a map showing "all habitable structures within a five (5) mile radius of the project footprint" was unnecessary and burdensome. New Creek also reiterated and explained its request for expedited treatment, contending that to give financing lenders adequate time to review and conduct due diligence to confirm that the Project has obtained all necessary permits and authorizations to construct the Project, a Commission Order granting the requested relief by the end of 2014 was critical.

On December 8, 2014, New Creek filed affidavits from the *Grant County Press* and the *Charleston Daily Mail* that publication of the notice required in the Commission's November 21 order was made. Based on the later to occur of these publications (November 26), the 30-day public comment period expired on December 26, 2014. No protests of the Application were filed by this date.

On December 12, 2014, New Creek filed a letter withdrawing its earlier request for authorization to construct the Overhead Collection Line. New Creek indicated that based on further design work and site and operational constraint analysis, it had determined that locating the collection lines underground as originally contemplated would be preferable. With this withdrawal, New Creek's filing (and the Revisions discussed below) covers the New Turbines and the O&M Building Relocation only.

The Staff issued its Final Joint Staff Memorandum on December 23, 2014 (Final Memorandum). Staff recommended that the Commission determine that the New Turbines and the O&M Building Relocation are not material modifications to the Project and require no modification to the Siting Certificate.² Staff reserved the right to change this recommendation should an issue be brought to its attention during the protest period. Staff also recommended that the Commission remind New Creek that (i) it must comply with all the terms and conditions of the Siting Certificate and (ii) if there are further changes to the Project as described in the Siting Certificate case and considered in this case, New Creek must seek Commission approval to modify the Siting Certificate a Commission conclusion that the change/modification is not a material modification of the Siting Certificate. Final Memorandum at 1.

² Staff made the same recommendation with respect to the change in turbine type, the new planned micro-siting of the turbines to result in the shift in the location of certain turbines, and the "reduction in project capacity." Final Memorandum at 1. New Creek did not request waiver of the material modification requirements as to these changes, because it contended that they all fell within the scope of the Siting Certificate. Application at 3-4.

On December 26, 2014, New Creek filed a letter concurring with the Staff recommendation and urging the Commission to enter an order approving it. New Creek also filed a proposed order for this purpose on December 26, 2014.

DISCUSSION

The issue to be decided in this proceeding is whether the New Turbines and/or the O&M Building Relocation constitute a material modification to the Siting Certificate, and if so, whether the Siting Certificate should be modified to incorporate these changes. In determining materiality, the Commission looks to Siting Rule 6.1:

If an owner or operator of a 24-2-1(c) generating facility for which a Siting certificate has been issued plans to: construct the facility using engineering design plans different than those filed with its original Siting certificate application; modify the footprint of the 24-2-1(c) generating facility; increase the transmission or generation of the 24-2-1(c) generating facility; make any modification to the 24-2-1(c) generating facility with a potential for environmental impact, then the owner or operator must obtain prior Commission approval of such modification. If the owner or operator believes that when considering the totality of the circumstances surrounding any such modification, the modification is not material or that the modification will not materially affect the viewshed impacts, noise levels, emissions, or other environmental impacts, it may petition the Commission for a waiver of the requirement to obtain a modification or amendment to its Siting certificate. The Commission may deny or grant such request or it may limit the information required to be filed, depending on the circumstances of the proposed modification.

As the Commission stated in Case Number 03-1860-E-CS-CN, Longview Power, LLC, materiality is not an absolute concept. It is necessary to look at the surrounding circumstances. February 16, 2007 Commission Order at 27-38, 41, Conclusion of Law 5.

Evidence on Revisions' Impact on Project as Approved

The Siting Certificate Application requested authority for up to sixty-six wind turbines with a maximum output of up to 160 MW. In the Siting Certificate Application, no specific turbine model had been selected, but the Project was assessed based on data reflecting the installation of (i) fifty-three Clipper 2.5 MW Liberty wind turbines, each with a hub height of 80 meters and rotor diameter of 99 meters, for a total height of 129.5 meters with a blade in a vertical position; (ii) sixty-six General Electric (GE) 1.5 MW turbines, also with a hub height of 80 meters, but with a 77 meter rotor diameter, for a total height of 118.5 meters; or (iii) fifty-three 2.5 MW GE turbines, with a hub height of 85 meters and a rotor blade diameter of 100 meters, for a total height of 135 meters. In the Application, New Creek represented that it had elected to use

forty-seven Gamesa Model G97 2.0 MW turbines, each with a hub height of 78 meters and a rotor diameter of 97 meters, for a total height of approximately 125 meters. Consequently, the Project will have fewer turbines and a smaller total generating capacity (94 MW, compared with the 160 MW authorized in the Certificate).³ Moreover, the total turbine and blade height will be shorter (125 meters, as compared with the authorized 135 meters). New Creek contended that these changes are within the scope of the Certificate's authority, and none required Commission review. New Creek will continue construction of this Project scope in February 2015 and expects to begin operations before the end of 2015. Id. at 4.

New Turbines

New Creek proposed to add two turbines to the Project (Turbines T-1 and T-2), for a total of forty-nine turbines (98 MW). These turbines are located 1,402 feet and 706 feet, respectively, from the southernmost turbine location (T-3). New Creek asserted that these two turbines fall within the Project footprint: although Turbines T-1 and T-2 are south of the southernmost project turbine in the Exhibit 1 and 2 layouts provided in the Application, they both fall along the Project access road/collection system shown in those layouts, are situated between the southernmost turbine and the original substation location, and are within the construction layout area for the Project. Application at 5. Exhibit 1 to the Supplement showed that the nearest residences are, respectively, 4,233 feet from turbine T-1 and 4,438 feet from turbine T-2; by comparison, the nearest residence to the southernmost turbine in the certificated turbine layouts is 3,979 feet. Supplement at 2 and Exhibit 1. New Creek indicated that it established the location of the nearest residences based on very recent aerial imagery and comparing the same with the closest residences identified in the Siting Certificate Application, and that the results were consistent with recent observations. Id. at 2.

As for viewshed and other impacts, New Creek indicated that the 125 meter total height of the Gamesa layout falls between the total heights of the GE 1.5 MW layout (118.5 meters) and the Clipper 2.5 MW layout (129.5 meters) for which viewshed impact analyses were provided in the Application, and is well below the 135 meter total height the Commission approved for the GE 2.5 MW layout. New Creek asserted that adding Turbines T-1 and T-2 at the southern end of the Project will have no adverse viewshed impact, especially when the shorter overall Project height is considered. It also contended that another factor minimizing the potential for viewshed impact is that the closest residences and structures on the southern end are generally to the east and west of the ridgeline, and not directly south of it. Consequently, adding two turbines does not make the turbine string any closer to these locations; according to New Creek's measurements, Turbines T-1 and T-2 are further away from the nearest residence (4,233 and 4,439 feet, respectively) than the nearest turbines were to the same residence under the original fifty-three turbine and sixty-six turbine layouts approved by the Commission (4,143 and 4,214 feet, respectively). Application at 6-7.

³ Application at 3-4. These figures do not reflect the addition of the New Turbines as described below.

New Creek indicated that the New Turbines will not be appreciably closer to the nearest residences or structures than other turbines on the southern end of the string. New Creek's noise modeling, using the WindPRO 2 program and applying the ISO 9613-Part 2 standard, showed that noise impacts near the southern end of the Project will result in nominal increases at residences closest to the two additional turbines, even when taking into consideration the 10 dBA nighttime penalty as prescribed in the Siting Rules, and would be well within the EPA-recommended guideline of 55 dBA. Application at 7; Supplement at 2-3.

New Creek asserted that shadow flicker modeling of the originally proposed turbine layouts projected an impact of one hour per year at the nearest residence. Given the overall reduction in the number of turbines and a total height lower than either of the largest turbine-tower configurations approved for use in the Siting Certificate Order, and because the nearest non-participating landowner is more than 1,000 meters from either of Turbines T-1 or T-2, New Creek indicated that adding these turbines will have no incremental material shadow flicker impact on residences and structures near the southern end of the Project. Application at 7-8.

The Revisions will cause no increase in emissions from the Project, and according to New Creek, the total surface area to be disturbed to add the New Turbines is not materially greater than the total permanent disturbance anticipated for the approved Project layouts, which had fifty-three and sixty-six turbine sites, respectively – in fact, four fewer turbine sites will be permanently disturbed as compared with the smaller configuration approved in the Siting Certificate Order. Because of the reduction in the number of turbines, the Revisions will not increase traffic or other construction-related impacts from those anticipated in the Siting Certificate Order.

O&M Building Relocation

In the Siting Certificate Application, the O&M building would be constructed near the substation. As depicted on Exhibit 4 to the Supplement, New Creek now proposes to locate the O&M building and storage yard on a portion of leased property adjacent to U.S. Route 48 and at the foot of the access road. New Creek indicated that this relocation will ease access to the O&M building from the main road. Application at 6. New Creek estimates that the new location will be approximately 1,000 feet from U.S. Route 48. Supplement at 5. The size and scope of the O&M building will be the same, and its relocation will have no appreciable environmental impact compared with its construction at the initial location. Application at 8.

Material Modification Waiver Analysis

Engineering Design Plans

The Revisions will not have a material effect on the Project engineering design plans. The New Turbines will be located along the same ridgeline as the other Project turbines, and like those turbines, will be within the per-turbine capacity and total height limitations set forth in the Siting Certificate Order. Likewise, there is no indication that a change of the O&M Building location will affect its design or use as foreseen in the Siting Certificate Application.

Footprint of Project

Although the New Turbines are south of the southernmost project turbine in the project layouts considered in the Siting Certificate case, they both fall along the Project access road/collection system, are situated between the southernmost turbine and the original substation location, and are within the construction laydown area for the Project. Even adding these two turbines, the total Project is smaller, in terms of turbine count, turbine size, permanent disturbance, and total capacity, than either of the Project layouts initially approved. For these reasons, it is reasonable to conclude that the New Turbines do not materially alter the Project footprint. In the same way, the location of the O&M Building is not relevant to the potential public impact of the Project, and its relocation approximately 1,000 feet from U.S. Route 48 does not materially affect the Project footprint.

Generation and Transmission Capacity of the Project

Neither of the Revisions will change the generation or transmission capacity of the Project. Including the New Turbines will result in a Project turbine count of forty-nine turbines and a Project generating capacity of 98 MW, each of which is within the terms of the Siting Certificate. The O&M Building Relocation will have no effect on either Project parameter.

Potential for Environmental Impact

The Revisions will cause no increase in emissions from the Project, and the total surface area to be disturbed for the New Turbines is not materially greater than the total permanent disturbance anticipated for the Project layouts approved in the Siting Certificate Order, which had fifty-three and sixty-six turbine sites, respectively. Because of the reduction in the number of turbines, the Revisions will not increase traffic or other construction-related impacts from those anticipated in the Siting Certificate Order.

Finally, we return to the requirements of Siting Rule 6.1. New Creek is not proposing to construct the Project using engineering design plans different from those filed with the Siting Certificate Application, to modify the Project footprint, or to

increase the Project's transmission or generation capacity or output. As explained above, the Revisions will not change in any material manner the viewshed impacts, noise levels, emissions or other environmental impacts. Under the totality of these circumstances, the Revisions are not material modifications to the Siting Certificate.

Filing Fee

With the Application, New Creek submitted the minimum filing fee of one thousand dollars (\$1,000) to meet the requirements of Siting Rule 6.5 in the event the Revisions were determined to constitute a material modification of the Siting Certificate. Because the Commission has concluded that the Revisions do not constitute material modifications to the Siting Certificate, the Executive Secretary of the Commission will be directed to return the filing fee to New Creek.

FINDINGS OF FACT

1. New Creek holds a Siting Certificate pursuant to W.Va. Code §24-2-11c, for the construction and operation of a wholesale electric generating facility consisting of up to sixty-six wind turbines and related interconnection facilities.

2. The New Creek petition includes two alternative requests. The first request is that the Commission determine that the proposed modifications are not material and that a modified siting certificate is unnecessary. In the alternative, if the Commission decides that the modifications are material and that New Creek must obtain a modified siting certificate, New Creek requests that the Commission issue a modified siting certificate.

3. New Creek has provided evidence that it published notice as required in the November 21, 2014 Commission Order. No protests of the Application have been filed.

4. On December 12, 2014, New Creek filed a letter withdrawing its earlier request for authorization to construct the Overhead Collection Line.

5. In its Final Memorandum, Staff recommended that the Commission determine that the New Turbines and the O&M Building Relocation are not material modifications to the Project and require no modification to the Siting Certificate.

6. The Revisions will not have a material effect on the engineering design plans of the Project. The New Turbines will be located along the same ridgeline as the other Project turbines and will be within the per-turbine capacity and total height limitations set forth in the Siting Certificate Order. The change in the O&M Building location will not affect its design or use as foreseen in the Siting Certificate Application.

7. The Revisions do not materially affect the Project footprint. The New Turbines fall along the Project access road/collection system, are situated between the

southernmost turbine and the original substation location, and are within the construction layout area for the Project. Even adding these two turbines, the total Project is smaller, in terms of turbine count, turbine size, permanent disturbance, and total capacity, than either of the Project layouts initially approved. The location of the O&M Building is not relevant to the potential public impact of the Project, and its relocation approximately 1,000 feet from U.S. Route 48 does not materially affect the Project footprint.

8. The Revisions will not change the generation or transmission capacity of the Project. The New Turbines will result in a Project turbine count of forty-nine turbines and a Project generating capacity of 98 MW, each of which is within the terms of the Siting Certificate.

9. The Revisions will not increase emissions from the Project or materially increase the total surface area to be disturbed, and will not increase traffic or other construction-related impacts from those anticipated in the Siting Certificate Order.

CONCLUSIONS OF LAW

1. For purposes of determining whether a proposed modification is “material,” materiality is not an absolute concept. It is necessary to look at the surrounding circumstances. Longview, Case No. 03-1860-E-CS-CN, February 16, 2007 Commission Order at 27-38, 41, Conclusion of Law 5.

2. The Revisions will not materially modify the footprint of the Project.

3. The Revisions will not increase the transmission or generation of the Project.

4. The Revisions will not materially affect the viewshed impacts, noise levels, emissions or other environmental impacts of the Project.

5. The Revisions will not make any modification to the Project with a potential environmental impact.

6. The Revisions do not constitute material modifications of the Siting Certificate within the meaning of W.Va. Code §24-2-1(c)(5) and Siting Rule 6.1.

7. The Revisions are not material modifications of the Siting Certificate; therefore, the \$1,000 filing fee should be returned to New Creek.

8. The Project, including the Revisions, continues to be subject to all conditions imposed under the Siting Certificate Order.

9. If there are further changes to the Project as described in the Siting Certificate case and considered in this case, New Creek must seek Commission approval

to modify the Siting Certificate or a Commission conclusion that the change/modification is not a material modification of the Siting Certificate.

ORDER

IT IS THEREFORE ORDERED that the Revisions are not material modifications to the Siting Certificate within the meaning of W.Va. Code §24-2-1(c)(5) and Siting Rule 6.1.

IT IS FURTHER ORDERED that the Project, including the Revisions, shall be subject to all of the conditions imposed under the Siting Certificate Order.

IT IS FURTHER ORDERED that the Executive Secretary shall return to New Creek the \$1,000 filing fee.

IT IS FURTHER ORDERED that upon entry of this Order, this case is removed from the Commission's docket of active cases.

IT IS FURTHER ORDERED that the Executive Secretary of the Commission serve a copy of this Order by electronic service on all parties of record who have filed an e-service agreement, by United States First Class Mail on all parties of record who have not filed an e-service agreement, and on Commission Staff by hand delivery.

A True Copy, Teste,



Ingrid Ferrell
Executive Secretary

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