

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

At a session of the Public Service  
Commission held in the City of  
Albany on August 9, 2018

COMMISSIONERS PRESENT:

John B. Rhodes, Chair  
Gregg C. Sayre  
Diane X. Burman  
James S. Alesi

CASE 14-F-0490 - Application of Cassadaga Wind LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 to Construct a Wind Energy Project, located in the Towns of Charlotte, Cherry Creek, Stockton and Arkwright, Chautauqua County.

ORDER APPROVING COMPLIANCE FILING

(Issued and Effective August 9, 2018)

BY THE COMMISSION:

INTRODUCTION

On January 17, 2018, the New York State Board on Electric Generation Siting and the Environment (the Siting Board), issued an Order Granting Certificate of Environmental Compatibility and Public Need, With Conditions (Certificate Order)<sup>1</sup> to Cassadaga Wind LLC (Cassadaga Wind or Certificate Holder) pursuant to Public Service Law (PSL) §168. The Certificate Order conditionally authorizes Cassadaga Wind to construct and operate a utility-scale wind energy project (the

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<sup>1</sup> Case 14-F-0490, Application of Cassadaga Wind LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 to Construct a Wind Energy Project, Order Granting Certificate of Environmental Compatibility and Public Need, With Conditions (issued January 17, 2018).

Project) in the Towns of Charlotte, Cherry Creek, Arkwright, and Stockton in Chautauqua County, New York. The Certificate Order contained several Certificate Conditions that required subsequent compliance filings by the Certificate Holder, to be approved by the Siting Board or the Public Service Commission (Commission) in the event the Siting Board's jurisdiction has ceased, including Certificate Conditions for the Project's construction and operational impact mitigation.<sup>2</sup>

On June 15, 2018, Cassadaga Wind filed its Net Conservation Benefit Plan (NCBP). The NCBP was submitted in compliance with Certificate Condition 33 of the Certificate Order. Through this Order the Commission approves the NCBP as submitted by the Certificate Holder.

#### BACKGROUND

On June 15, 2018 Cassadaga Wind filed its NCBP pursuant to PSL Article 10 Regulations 16 NYCRR §1002.3 as required by Certificate Condition 33 of the Certificate Order. Specifically, Certificate Condition 33 required the following:

A final Net Conservation Benefit Plan which shall be filed within six months of the date of issuance of the Certificate. The [NCBP] shall be prepared in consultations with and approved by [Department of Environmental Conservation] DEC and [Department of Public Service] DPS Staff, said consultations being open to any Party to Case 14-F-0490 desiring to participate or observe, and shall meet the requirements of 6 NYCRR §182.11. The minimization measures in the Net

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<sup>2</sup> Under 16 NYCRR §1002.2, "[t]he applicant may not commence construction of all or any portion of the facility or interconnections for which the Board has required approval of a compliance filing as a condition precedent to such construction until the applicant has submitted the required compliance filing for that portion of the facility and received approval of it by the Board, or by the Commission after the Board's jurisdiction has ceased."

Conservation Benefit Plan that require installation shall be installed prior to operation of the Facility. At a minimum, the [NCBP] shall contain:

- a) a demonstration that the [NCBP] results in a positive benefit on the Northern Long Eared Bat species and not just an offset for any potential take of the species;
- b) detailed net benefit calculations based on the actual location and type of minimization measures to be taken;
- c) full source information used as inputs to the net benefit calculations;
- d) a consideration of potential minimization measures identified by DEC Staff;
- e) a consideration of potential sites identified by DEC Staff for minimization measures;
- f) the identification and detailed description of the additional minimization measures developed to minimize potential take of the Northern Long Eared Bat that will be undertaken by the Certificate Holder; and
- g) a curtailment regime during the period July 1 through October 1 requiring a minimum curtailment of 5.0 m/s, 30 minutes prior to sunset through 30 minutes after sunrise, when temperatures are greater than 10 degrees Celsius.<sup>3</sup>

The NCBP was required to be developed in consultation with staffs of the US Fish and Wildlife Service (USFWS), the New York State DEC, and DPS, and other interested parties to the proceeding. The NCBP was required to meet the Incidental Take Permit (6 NYCRR §182.11) requirements for expected impact on a species listed as Endangered or Threatened, pursuant to the New York State Environmental Conservation Law. In this instance, during the evidentiary phase of this proceeding, DEC presented evidence demonstrating that the Northern Long-Eared Bat (NLEB), a Threatened Species, would be adversely affected by operation

<sup>3</sup> Certificate Order, Appendix A, pp. 14-15.

of the Project during the fall migration season of that species. The Siting Board agreed with DEC that there could be impacts to Threatened and Endangered species and through Certificate Condition 33 ordered the Certificate Holder to create a NCBP and outlined the criteria that plan must apply.

PUBLIC NOTICE

On June 15, 2018 the Certificate Holder submitted its final NCBP and served it as required under 16 NYCRR §1002.2(c)(1-5). Pursuant to 16 NYCRR §1002.2(d), "[a]ny interested person or party may file comments regarding any compliance filing within 21 days of the filing and service of such compliance filing done in accordance with subdivision (c) of this section." No parties, or others, submitted any comments on Cassadaga Wind's compliance filing during the minimum twenty-one-day comment period or thereafter.

LEGAL AUTHORITY

Under PSL §168(7), "[f]ollowing any rehearing and any judicial review of the Board's decision, the board's jurisdiction over an application shall cease, provided, however, that the permanent Board shall retain jurisdiction with respect to the amendment, suspension or revocation of a certificate." On February 20, 2018, Concerned Citizens of the Cassadaga Wind Project (Concerned Citizens) filed a Petition for Rehearing pursuant to PSL §170(1), challenging certificate conditions related to wildlife conservation planning and noise mitigation and enforcement. On May 15, 2018, the Siting Board issued its determination on Concerned Citizen's rehearing petition. PSL §170(1) states in part that "[a] judicial proceeding shall be brought in the appellate division of the supreme court of the state of New York in the judicial department embracing the

county wherein the facility is to be located or, if the application is denied, the county wherein the applicant has proposed to locate the facility. Such proceeding shall be initiated by the filing of a petition in such court within thirty days after the issuance of a final decision by the board upon the application for rehearing." Concerned Citizens did not pursue a judicial review of the Siting Board's final rehearing decision. Therefore, under PSL §168(7), the Siting Board's jurisdiction has ceased except under certain exceptions.<sup>4</sup>

Public Service Law §168(5) includes a delegation of authority to the Commission for compliance administration. That section states "[t]he department [of Public Service] or the [Public Service] commission shall monitor, enforce and administer compliance with any terms and conditions set forth in the [Siting] board's order [Order Granting Certificate of Environmental Compatibility and Public Need]."

The Siting Board's rules, 16 NYCRR §1002(1), establish procedures and requirements for a certificate holder to comply with the "terms, conditions, limitations, or modifications of the construction and operation of the facility authorized in the certificate." 16 NYCRR § 1002.2 describes the procedures that a certificate holder must comply with, including filing requirements, notice procedures, and outlines the jurisdiction of the Siting Board and the Commission in approving compliance filings. As discussed above, the Siting Board's jurisdiction

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<sup>4</sup> Specifically, PSL §168(7) states that "[f]ollowing any rehearing and any judicial review of the board's decision, the board's jurisdiction over an application shall cease, provided, however, that the permanent board shall retain jurisdiction with respect to the amendment, suspension or revocation of a certificate."

has ceased, as such, pursuant to 16 NYCRR §1002.2(f)<sup>5</sup> the Commission has the jurisdiction to approve this compliance filing.

Pursuant to 16 NYCRR §1002.3 the Certificate Holder is required to submit "(a) a description of and citation to the requirement in a certificate or an order for which compliance is to be demonstrated; (b) a description of how the applicant will comply with the requirements of the certificate or order; and (c) final maps, plans, diagrams, drawings, studies, reports or other documents demonstrating compliance." Under 16 NYCRR §1002.2(g), the Siting Board, or the Commission if the Siting Board's jurisdiction has ceased, may approve compliance filings subject to specified terms, conditions, limitations, or modifications. Finally, pursuant to 16 NYCRR 1002.2(i), the standard of review for compliance filings shall be whether the "compliance filing reasonably assures compliance with the Certificate."

#### DISCUSSION

Pursuant to Certificate Condition 33, the NCBP was prepared by the Certificate Holder in consultations with the DEC and the DPS and any Party in the proceeding desiring to participate or observe. On March 2, 2018, DEC circulated a meeting notice to the Parties in the proceeding notifying the Parties of a March 14, 2018 consultation session on the NCBP. The March consultation session was attended by DEC and DPS and counsel for the Concerned Citizens attended by teleconference. On May 15, 2018, the Certificate Holder circulated a draft NCBP to DEC, DPS, the Department of Health (DOH), the Department of

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<sup>5</sup> "Compliance filings will not be effective until approved by the Board or by the Commission after the Board's jurisdiction has ceased."

Agriculture and Markets and Concerned Citizens. On May 16, 2018, DEC issued a contingent approval of the draft plan requesting certain changes be made to the plan before final submission. The Certificate Holder did not receive any other comments on the draft plan. On May 30, 2018, the Certificate Holder circulated the final NCBP to all interested parties.

The Certificate Holder submitted the final NCBP on June 15, within the required six-month deadline, for approval by the Siting Board or Commission in accordance with 16 NYCRR §1002. In sum, Cassadaga Wind's compliance filing addresses the required Certificate Condition 33 criteria for (a) demonstrating a net benefit to the NLEB at the population level; (b) calculations of estimated "take" impacts on individual NLEB for the estimated 30-year life of the wind project; (c) identification of source information for making estimates of benefit; (d) consideration of the potential minimization or mitigation measures as identified by DEC Division of Wildlife staff; (e) consideration of potential mitigation site locations; (f) detailed description of the minimization and mitigation measures the Certificate Holder will undertake to address the expected take of NLEB; and, (g) adoption of a wind turbine operational curtailment scheme that the Certificate Holder will implement during the July 1 through October 1 fall migratory period for NLEB. The curtailment regime involves avoiding operation at light-wind conditions during periods when NLEB would be expected to be active and susceptible to operational impacts. The filing was timely.

Based on the review of the final NCBP, the Commission determines that it reasonably complies with Certificate Condition 33 and should be approved.

CONCLUSION

Given the Certificate Holder's compliance with required pre-filing consultation and review by parties and the substantive criteria included in Certificate Condition 33, the Commission finds that the compliance filing meets the standard under 16 NYCRR §1002.2(i) and the filing reasonably assures compliance with Certificate Condition 33.

The Commission orders:

1. The Net Conservation Benefit Plan submitted by Cassadaga Wind LLC, on June 15, 2018, is approved.
2. This proceeding is continued.

By the Commission,

(SIGNED)

KATHLEEN H. BURGESS  
Secretary