

**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 1st day of June 2012.

CASE NO. 12-0251-E-C

RICHARD L. BRAITHWAITE
Keyser, Mineral County,

Complainant,

v.

PINNACLE WIND, LLC,
an electric wholesale generating facility
located on Green Mountain, southwest of
the City of Keyser, Mineral County,

Defendant.

COMMISSION ORDER

The Commission dismisses this case.

BACKGROUND

Case No. 09-0360-E-CS

On March 17, 2009, Pinnacle Wind Force, LLC filed an application for a siting certificate pursuant to W.Va. Code §24-2-11c, to authorize the construction and operation of a \$131 million wholesale electric wind generating facility, including related interconnection facilities, and an approximate 0.75-mile 138 kV transmission line. Pinnacle proposed to construct about twenty-three wind turbines, with a projected total operating capacity of 55.2 megawatts of electric power, along a 3.5-mile stretch on Green Mountain in Mineral County, West Virginia.

On January 11, 2010, after publication and hearing, the Commission granted a siting certificate subject to certain pre-construction, construction, and operational conditions.

Present Case

On February 22, 2012, Richard L. Braithwaite (Complainant) filed a formal complaint against Pinnacle Wind, LLC¹ (Pinnacle), alleging that (i) noise from the Pinnacle wind generation facility in Mineral County (Project) make it impossible for him to rest or sleep, (ii) the noise in his home frequently exceeds sixty dBA day or night, (iii) the noise outside his home exceeds eighty dBA, and (iv) the sunlight flickering through the moving blades gives him migraines. In addition to his complaints regarding the wind turbines, the Complainant alleged that Pinnacle did not properly repair the roads damaged during construction of the project. The Complainant requests Pinnacle shut its turbines down during the night until it fixes the noise problem. Attached to his complaint were copies of a petition signed by several residents that the Complainant submitted to the Mineral County Commission and the State Delegation serving Mineral County.

On March 7, 2012, Pinnacle submitted its answer and a motion to dismiss stating that the Complainant had not alleged violations of the material terms and conditions of the Commission Order in Case No. 09-0360-E-CS (Commission Order January 11, 2010) (Siting Certificate), that granted Pinnacle permission to construct the wind turbines. Pinnacle noted that W.Va. Code §24-2-11c limits the continuing jurisdiction of the Commission over siting certificates to (i) future requests by the certificate holder to modify or amend the siting certificate, (ii) complaints related to whether the certificate holder is complying with the material terms and conditions of the Commission Order granting the certificate, and (iii) enforcing the material terms and conditions of a Certificate Order. Citing David RR Webber v. NedPower Mount Storm, LLC, Case No. 07-1574-E-C (Commission Order November 6, 2008), Pinnacle asked that the Commission dismiss this case with prejudice because the Complainant does not allege a violation of a material term or condition. Pinnacle further asserted that the Complainant's request that the wind turbines not operate at night amounts to an improper attempt to have the Commission impose new and costly operating restrictions in violation of W.Va. Code §24-2-11c.

On March 28, 2012, Commission Staff filed its Initial Joint Staff Memorandum. Staff stated that the Complainant had alleged violations of representations made by Pinnacle in its application and violations of Findings of Facts and Conclusions of Law contained in the Certificate Order. Finding of Fact 52 from the January 11, 2010 Order states the maximum operational noise level for the most affected landowner is 56 dBA and that measurements at all other residences are below 55 dBA. Finding of Fact 54 states: "To both protect public health and welfare and provide a safety margin, the United States Environmental Protection Agency recommends an outdoor noise level of no higher than 55 dBA DNL for any residential areas, farms or areas where people spend time

¹ On August 4, 2011, Pinnacle Wind Force, LLC changed its name to Pinnacle Wind, LLC. Certificate of Amendment to Certificate of Authority dated January 10, 2012 (Case No. 09-0360-E-CS).

outdoors.” From those Findings of Fact, the Commission made the following conclusion in Conclusion of Law 15:

The Pinnacle noise study complied with Commission requirements accurately portrayed ambient sound levels that are typical for a rural community, and employed a variety of conservative assumptions to allow the Commission to assess the “worst case” scenario for the Project’s sound impacts. Based upon the totality of the evidence presented to us, the Commission concludes that the Project will emit some noise, but the operational sound levels are expected to be similar to existing ambient sound levels and noise impacts are not expected to be objectionable because of the Project. The Commission also concludes that, to the extent that operational noise results in negative impacts, those negative impacts are expected to be as minimally disruptive to existing property uses as is reasonably possible.

Staff also noted that in the application filed in the certificate case Pinnacle committed to restoring the roads to their pre-construction condition (Application filed on March 13, 2009, Volume 1 of 3, at 91). Staff stated that Pinnacle should supply the Commission with a description of the road restoration to date and any further planned restoration.

Staff asserted that the Commission has discretion to review discrepancies between the completed Project and (i) representations made by Pinnacle in its application and (ii) Findings of Fact and Conclusions of Law of the Siting Order. Staff recommended that Pinnacle (i) file the noise studies associated with the prototype testing along with any other studies conducted in regards to this complaint, (ii) inform the Commission of any efforts undertaken to resolve the noise complaints, the result of those efforts, and any future planned efforts, and (iii) file a description of the road restoration completed to date and planned restoration.

On April 9, 2012, Pinnacle filed a response, including noise study data, to the Staff Initial Joint Staff Memorandum. Regarding the jurisdiction of the Commission, Pinnacle theorized that if the operational noise impacts that Pinnacle projected during the siting certificate case were deliberately and grossly inaccurate, such that the actual operational noise levels were dramatically different from the projected levels on which the Commission relied, then it could be said that Pinnacle had effectively violated a material term of the Siting Certificate. Regarding the facts of this case, Pinnacle stated that (i) its recent investigation has shown that the noise study and operational noise projections provided during the siting certificate case were accurate and reliable, (ii) there is no reasonable basis to conclude that the Project is generating noise levels in excess of those projected in that study, and (iii) Pinnacle has not violated any material term or condition of its Siting Certificate. Pinnacle concluded that it is physically impossible for the

Project to cause sound levels in excess of 80 dBA at the Complainant's residence (3790 feet from the nearest turbine), when actual sound pressure measurements even a few hundred feet from the turbines are far less than this level. Pinnacle asserted that it is not required to modify the Project or its operations in any way.

Pinnacle noted that neither the governing statute nor the Rules Governing Siting Certificates for Exempt Wholesale Generators (Siting Rules), 150 C.S.R. 30, contained any operational noise limitations or guidelines, but instead required the Commission "to balance various project impacts," both negative and positive, and "their effects on the community." Siting Certificate at 25. Pinnacle argued that the Commission is not required to conclude that the Project will never impact existing ambient noise levels, "nor would that be a reasonable thing to do." Id. Based on the "totality of the evidence" presented on this issue, the Commission determined that operational noise levels should not be objectionable, and that any negative impacts from operation of the Project were expected to be "as minimally disruptive to existing property uses as is reasonably possible." Id. at 25, 46-47 (Findings of Fact 44-55), 52 (Conclusions of Law 14-15). In short, the Commission found that the Acentech Study conducted in the Certificate case complied with the Siting Rules and allowed the Commission to assess the sound impacts of the Project. Id. at 52 (Conclusion of Law 15). Pinnacle noted the care necessary to obtain accurate sound readings and questioned whether the Complainant possessed the proper equipment and expertise to perform those measurements.

The Acentech Study conducted in the Certificate Case identified the Complainant's residence (designated as Structure A-48) as lying approximately 3,790 feet from the nearest turbine and outside the projected operational sound level contour of 46 dBA.

Pinnacle described recent efforts to reduce the noise from the Project, including (i) determining that actual measured sound pressure levels from the turbines comport closely with the manufacturers data used in the Acentech Study to project operational noise levels, (ii) incorporating actual ground-level sound pressure levels to calculate turbine-generated sound pressure levels at Structure A-48, the Complainant's residence, finding the calculated level to be consistent with the projection in the Acentech Study (45 dBA on an Ldn basis, as compared with the Acentech projection of 46 dBA), and (iii) obtaining, installing, testing, and moving to implement an acoustic louver system on all Project turbines, which will have a significant additional noise reduction impact for the entire Project, including a likely reduction of approximately 7 dBA at Structure A-48 (to 37.9 dBA on an Ldn basis from 45.4 dBA).

Regarding road repairs, Pinnacle stated that it has committed to resurface specific roads and that all remaining resurfacing work will be completed by early summer 2012. Pinnacle noted that it is not required by the Siting Order to implement road repairs.

On April 16, 2012, the Complainant submitted a report prepared by Stephen E. Ambrose, INCE, describing the reaction of community residents in response to noise.

On April 24, 2012, Staff filed its Further Joint Staff Memorandum. Staff conducted a site visit on April 17-18, 2012. Staff stated that (i) the noise measurements conducted by the Complainant were not performed under controlled scientific parameters although the readings were taken in dBA (as opposed to dB) and (ii) the sound of the turbines was very prominent when the exhaust from the turbine cooling fan was facing the home of the Complainant. Staff toured the Project site on April 18, 2012, noting that the acoustic louver being tested by Pinnacle reduced the noise level of the unit. Staff stated that “[w]hile the theoretical analysis of the studies appear to support Pinnacle’s position, the fact remains there is unwanted, unpredicted noise affecting the residents living near the project.” Staff recommended that (i) Pinnacle be ordered to perform a noise study including receptors corresponding to the locations used in the previous noise studies as well as including receptors located at the Complainant’s home and any residence within two miles of the nearest turbine, (ii) the noise study should include the full range of the Project’s generation and should be conducted over a period of time sufficient to obtain a full picture of the noise generated by the project, and (iii) because the acoustic louvers will reduce noise level over the entire project, a noise study conducted after the installation of the acoustic louvers will provide sufficient data to determine whether there has been a successful resolution of this complaint.

On May 4, 2012, Pinnacle filed a response to the Further Joint Staff Memorandum. Pinnacle stated that the Staff recommendation, if adopted, would infringe on the Pinnacle property interest in the Siting Certificate, damage the economic viability of the Project, violate procedural due process rights of Pinnacle, and unfairly shift the burden of proof from the Complainant to Pinnacle. Further, the adverse consequences of the Staff recommendation would not only harm Pinnacle but would also undermine the finality of other certificate orders, encouraging post-certificate complaints at generating facilities, and stifle infrastructure investment in West Virginia. Pinnacle asked that the Commission dismiss this complaint no later than June 15, 2012 to allow Pinnacle to complete a pending financing of the Project.

On May 17, 2012, Staff filed its Final Joint Staff Memorandum. Staff stated that it is possible the installation of the acoustic louvers will eliminate the noise, but the impact cannot be verified until the acoustic louvers are operational. Staff recommended that this proceeding remain open until the complaint has been resolved.

On May 24, 2012, Pinnacle filed a new request for expedited treatment.

DISCUSSION

Commission review of siting certificates pursuant to W.Va. Code §24-2-11c(e) requires that the Commission appraise and balance the interests of the public, the general interest of the state and local economy, and the interests of the applicant. As stated by the Supreme Court of Appeals of West Virginia (WVSCA) in Burch v. NedPower Mount Storm, LLC, 647 S.E.2d 879 (W.Va. 2007), “Notably absent in this balancing of interests are the interests of nearby landowners whose use and enjoyment of their properties may be substantially interfered with by the operation of an electric generating facility” and that the “private rights [of individuals] are not among the primary factors to be considered by the PSC when making siting decisions.” Burch v. NedPower at 889.

W.Va. Code §24-2-11c(e) states:

If the commission issues the siting certificate, the commission shall have continuing jurisdiction over the holder of the siting certificate for the limited purposes of: (1) Considering future requests by the holder for modifications of or amendments to the siting certificate; (2) considering and resolving complaints related to the holder's compliance with the material terms and conditions of the commission order issuing the siting certificate, whether or not the complainant was a party to the case in which the siting certificate was issued, which complaints shall be filed, answered, and resolved in accordance with the commission's procedures for resolving formal complaints; and (3) enforcing the material terms and conditions of a commission order as provided in subsection (f) of this section.

The Commission did not create material terms and conditions in the Siting Order regarding noise, the flickering-light effect of the turbine blades, or rehabilitation of roads subject to damage by construction of the Project. Therefore, pursuant to W.Va. Code §24-2-11c, the Commission does not retain the statutorily defined, continuing jurisdiction to address the issues raised by the Complainant. The Commission will dismiss the complaint.

The Commission decision in this case does not leave the Complainant without legal recourse. The WVSCA in Burch v. NedPower held that

the right of a person under the common law to bring in circuit court a nuisance claim to enjoin the construction and/or operation of an electric generating facility that is designated under federal law as an exempt wholesale generator is not precluded by the fact that the Public Service Commission of West Virginia has granted a siting certificate to the owner or operator of the facility pursuant to W.Va. Code §24-2-1(c)(1) (2006) and related statutes.

Burch v. NedPower at 889.

FINDINGS OF FACT

1. The Complainant filed a formal complaint to address noise, the flickering light effect of the turbines, and damage to roads, allegedly caused by the Project. Complaint.

2. The Siting Order does not contain material terms and conditions related to noise, the flickering-light effect of the turbine blades, or rehabilitation of roads subject to damage by construction of the Project. See, Siting Order.

CONCLUSION OF LAW

Because the Commission Siting Order did not establish material terms and conditions regarding noise, the flickering-light effect of the turbine blades, or rehabilitation of roads subject to damage by construction of the Project, the Commission does not possess statutory authority to address the issues raised by the Complainant. W.Va. Code §24-2-11c.

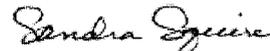
ORDER

IT IS THEREFORE ORDERED that the complaint filed by Mr. Braithwaite in this matter is dismissed.

IT IS FURTHER ORDERED that on entry of this Order this case shall be removed from the Commission docket of open 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 Staff by hand delivery.

A True Copy. Text:


Sandra Squire
Executive Secretary

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