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STATE OF MAINE
DEPARTMENT OF CONSERVATION
22 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0022

WILLIAM H. BEARDSLEY
COMMISSIONER

Third Procedural Order

**In the Matter of
Development Permit DP 4886
Blue Sky East, LLC
Bull Hill Wind Project
April 14 2011**

To: Geoff West (Applicant)
Kelly Boden, Esq. (Attorney with Verrill Dana counsel for Applicant)
Dylan Voorhees (Intervenor, NRCM, Natural Resources Council of Maine)
Lynne Williams, Esq. (Intervenor, CCRHC, Concerned Citizens of Rural Hancock County)
Philip Roy, (Government Agency, CFO, Hancock County Commissioners)

cc: Commissioners of the Land Use Regulation Commission (LURC)
Amy B. Mills, AAG
Catherine Carroll, LURC Director
Samantha Horn-Olsen, LURC Planning Division Manager
Donald Murphy, LURC Project Manager
Jim Palmer, LURC Scenic Quality Consultant

From: Gwen Hilton, Land Use Regulation Commission Chair and Presiding Officer

Subject: Scenic standard applicable to associated facilities, Wind Energy Act, 35-A M.R.S. § 3452(2);
Enlargement of time for Applicant's response to certain review agency comments

I. Background

A. Scenic standard applicable to associated facilities

No person raised a concern regarding the scenic impact standard applicable to associated facilities within 30 days of LURC staff's determination that this project's application was complete. This issue arose at this project's pre-hearing conference on March 22, 2011, and the Presiding Officer issued the First Procedural Order that same day, seeking filings regarding whether the Wind Energy Act scenic standard or the Title 12 scenic standard is applicable to this project's associated facilities. That order set filing deadlines and provided the parties with an opportunity to submit written argument in advance of the Presiding Officer's determination on this scenic standard issue, which is governed by 35-A M.R.S. § 3452(2).

On March 29, 2011 CCRHC submitted a filing, arguing that “there are numerous state and nationally significant scenic resources” in the project area, and that the Applicant’s visual impact assessment fails to adequately address the scenic impacts of associated facilities on those resources.

On April 5, 2011, the Applicant responded, asserting the 30-day time period in which the Commission must determine the scenic standard applicable to associated facilities has expired, 35-A M.R.S. § 3452(2), and therefore the scenic standard set forth in the Wind Energy Act must be applicable as a matter of law. The Applicant further asserts the scenic impacts of the associated facilities are fully addressed in the visual impact assessment, and that the impacts are minimal. The Applicant states that this project proposes no new generator lead line, that the substation is only slightly visible from one scenic resource of state or national significance, that the operations and maintenance building will blend into the surrounding topography, that only 4.8 miles of new access roads will be constructed in the context of an existing, extensive logging road system, that the access roads will be located on slopes that will not require substantial cut and fill, and that the access roads connecting the turbines will have minimal to no visibility from scenic resources deemed significant under the Wind Energy Act.

On April 7, 2011 CCRHC sought leave to file supplemental written argument to the Commission to address issues raised by the Applicant in its April 5th filing. CCRHC states that it ought to be allowed to file additional argument because parties in the Highland Wind energy project were provided an opportunity, after having already filed written argument, to present oral argument to the Commission on the scenic standard applicable to the associated facilities in that proceeding.

B. Enlargement of time for Applicant’s response to review agency comments

Following the pre-hearing conference, the Presiding Officer issued the Second Procedural Order in this matter on April 4, 2011, establishing deadlines for the submission of certain materials. That order required the Applicant to file its response to review agency comments by April 13th. Due to what appeared to be conflicting review agency comments with regard to engineering plans related to stormwater management, a meeting between the review agencies and the Applicant was scheduled for April 1st. Due to the severe snow storm on April 1st that shut down state offices, however, that meeting had to be postponed, and was held on April 11th. In view of that weather-related delay, the Applicant requests 2 additional days – to April 15th – to submit the portion of its response to agency comments related to site engineering.

II. Order

A. CCRHC request for leave to file additional argument

A determination on the scenic standard applicable to the associated facilities in this project must be made as promptly as possible. On February 2, 2011 LURC staff determined the application for this wind energy project was complete, and the public hearing regarding this project has been set for May 16 & 17, 2011. Pursuant to the Second Procedural Order, pre-filed testimony must be filed by April 25, 2011. This schedule is in keeping with legislative amendments made to 12 M.R.S. § 685-B(2-C), which direct the Commission to render a decision on this wind energy project within 270 days of the date staff found the application complete. Fairness to all parties in this proceeding requires that a determination on the applicable scenic standard be made in advance of the filing of direct testimony and the holding of the public hearing.¹

¹ 35-A M.R.S. § 3453(2) does state that the Commission “shall make a determination [regarding the scenic standard applicable to associated facilities] within 30 days of its acceptance of the application as complete for processing.” The Applicant argues that the Commission may not now, as a matter of law, consider whether the Wind Energy Act

The arguments submitted by the parties in accordance with the deadlines set by the First Procedural Order and the information contained in the administrative record to date, including the Applicant's complete application, have provided the Presiding Officer with sufficient information to determine the scenic standard applicable to the associated facilities in this project. For all of the reasons discussed above, it is appropriate for the Presiding Officer to make this determination and to make it expeditiously, and therefore CCRHC's request is denied. *See* 35-A M.R.S. § 3452(2) (directing Commission to make scenic standard determination based upon complete application and consideration of any information that it may, or may not, receive from interested persons); First Procedural Order (setting filing deadlines for submission of written argument without rebuttal).

B. Applicable scenic standard

As a preliminary matter, to determine which scenic standard applies to the associated facilities in this project, the definition of associated facilities, as compared to generating facilities, and must be clear. In accordance with 35-A M.R.S. §§ 3451(1) & (5):

Generating facilities means wind turbines, including their blades, towers, and concrete foundations, and transmission lines (except generator lead lines).

Associated facilities means all other facilities that are not generating facilities, and that includes the turbine pads, which are the cleared, leveled areas of gravel around each turbine, all roads used to access the turbines, the generator lead lines, and the meteorological towers, as well as the operations and maintenance building and the substation.

Regarding the scenic standard applicable to associated facilities, the Wind Energy Act provides, in relevant part:

The [Commission] shall evaluate the effect of associated facilities of a wind energy development in terms of potential effects on scenic character and existing uses related to scenic character in accordance with Title 12, section 685-B, subsection 4, paragraph C . . . in the manner provided for development other than wind energy development, *if the [Commission] determines that application of the [Wind Energy Act scenic] standard . . . to the development may result in unreasonable adverse effects due to the scope, scale, location or other characteristics of the associated facilities.* An interested party may submit information regarding this determination to the primary siting authority for its consideration. The primary siting authority shall make a determination pursuant to this subsection within 30 days of its acceptance of the application as complete for processing.

35-A M.R.S. § 3452(2) (emphasis added). Thus, this section provides the Commission with an analytical framework as follows.

scenic standard or the Title 12 scenic standard applies to this project's associated facilities because it is more than 30 days after the application was found complete. The 30-day time period set by the Legislature for the Commission, however, is directory, not mandatory, and therefore the Presiding Officer does not agree with the Applicant's assertion. As stated above, testimony has not yet been pre-filed, this matter has not yet gone to public hearing, and there has been no showing that making the scenic standard determination now would be unfairly prejudicial to any party to this proceeding. Rather, deciding this issue before the pre-filing of testimony and before the hearing will lend itself to fairness as all parties will know the scenic standard applicable in this administrative proceeding before the matter is adjudicated before the Commission.

To determine which scenic standard to apply, § 3452(2) first directs the Commission to apply the scenic standard provided by the Wind Energy Act to the associated facilities. That scenic standard and its associated criteria are found at 35-A M.R.S. §§ 3452(1) & (3). In applying that standard, the Commission would consider views of the associated facilities only from scenic resources determined under the Wind Energy Act to be of state or national significance, and based upon the criteria set forth in the Act, it would consider whether the associated facilities significantly compromised those views such that there was an unreasonable adverse effect on scenic character or existing uses related to scenic character.² 35-A M.R.S. §§ 3451(9), 3452(1) & (3). Upon this review, that is—the scenic impacts of the associated facilities under the Wind Energy Act standard—section 3452(2) then directs the Commission to consider whether the application of that standard, as opposed to application of the scenic standard set forth in Title 12, “may result in unreasonable adverse effects due to scope, scale, location or other characteristics of the associated facilities.” 35-A M.R.S. § 3452(2). Thus, the Commission must next consider what it would consider with regard to the scenic impacts of associated facilities under the Title 12 standard that it would not consider under the Wind Energy Act standard.

Under the Commission’s traditional scenic standard, 12 M.R.S. § 685-B(4)(C) and Commission Standards § 10.25(E)(1), the Commission would consider whether “adequate provision has been made for fitting the [project] harmoniously into the existing natural environment in order to ensure there will be no undue adverse effect on [among other things] existing uses [and] scenic character . . . in the area likely to be affected by the project.” Thus, under Title 12, the standard is the so-called harmonious fit/no undue adverse effect standard, and the Commission’s review of the scenic impacts of associated facilities would not be not limited to those views that have been identified by the Legislature as significant under the Wind Energy Act. See 35-A M.R.S. § 3451(9) & § 3452(1). Under Title 12 the Commission would consider the impacts the associated facilities would have on views from scenic resources of state or national significance as well as locally significant scenic resources in the area likely to be affected by the project.

Accordingly, if the Commission were to apply the Wind Energy Act standard to associated facilities, two factors are relevant for the Commission’s consideration. First, the Commission would not consider the scenic impacts of the associated facilities on locally significant scenic resources. Second, with respect to views of the associated facilities from scenic resources of state or national significance, the Commission would not consider whether the associated facilities fit harmoniously into the natural environment. Thus under the analytical framework provided by 35-A M.R.S. § 3452(2), the Commission must ultimately consider: whether (because of their scope, scale, location or other characteristics) the associated facilities may result in (because the above two factors would not be taken into consideration) unreasonable adverse effects.

C. Bull Hill Wind Project associated facilities

A review of the parties’ filings regarding the scenic standard applicable to the associated facilities of this project and the information contained in the administrative record to date, including the Applicant’s complete application, indicates the following with respect to the scope, scale, location and other characteristics of the associated facilities:

² The Wind Energy Act provides that the Commission “shall consider insignificant the [scenic] effects of portions of the development’s *generating facilities* located more than 8 miles . . . from a scenic resource of state or national significance.” 35-A M.R.S. § 3452(3) (emphasis added). Therefore, under the Wind Energy Act, there is no distance limitation on the Commission’s consideration of associated facilities’ scenic impact on scenic resources of state or national significance. It may be that parties have not addressed this issue as associated facilities may not typically be visible beyond 8 miles.

- No locally significant scenic resources, other than scenic resources of state or national significance, have been identified with respect to concern regarding the scenic impacts of the associated facilities;
- This project does not propose a new generator lead line and all associated facilities would be proximate to the generating facilities;
- This project proposes only 4.8 miles of new access roads in a project area that contains existing logging roads, and the topography of the project area will not require substantial cut and fill on slopes to construct the roads;
- Elevations proximate to the project area are relatively low-lying, and the elevations that will have views of the associated facilities, for example the substation, will be at a distance that reduces the scenic impact; and
- This project's associated facilities may be visible to varying degrees from scenic resources that have been identified as significant under the Wind Energy Act, but they will not be visible from any national natural landmark, federally designated wilderness area, nationally-listed historic property, or national park.

The Presiding Officer does not conclude that the application of the Wind Energy Act scenic standard to this project's associated facilities may result in an unreasonable adverse effect. While such application will eliminate consideration of the associated facilities' scenic impact on any locally significant scenic resources, no concern has been identified in that regard. Further, in view of the scope, scale, and location of the associated facilities, as identified above, the Presiding Officer concludes that not requiring them to fit harmoniously into the natural environment with respect to how they will be viewed from scenic resources of state or national significance will not result in an unreasonable adverse effect. For all of these reasons, the Wind Energy Act scenic standard, not the Title 12 standard, is applicable to the associated facilities of the Bull Hill Wind Project.

D. Enlargement of time for Applicant's response to review agency comments

In view of the weather-related closure of state offices and the resulting inability of the Applicant to meet with state agencies, the Applicant's request for an extension to April 15, 2011 for filing its response to agency comments on engineering plans related to stormwater management is granted.

III. Authority and Reservations

This Procedural Order is issued by the Presiding Officer pursuant to LURC Chapter 5, *Rules for the Conduct of Public Hearings*. All objections to matters contained herein should be timely filed in writing with the Commission but are not to be further argued except by leave of the Presiding Officer. All rulings and objections will be noted in the record. The Presiding Officer may amend this Order at any time.

Questions regarding these rulings of the Presiding Officer should be directed to Catherine Carroll, the Commission's Director, or Donald Murphy at the Commission's office in Augusta. No *ex parte* communication may occur with the Presiding Officer or any other Commission member.

DATED AT AUGUSTA, MAINE THIS 14th DAY OF April 2011

By:



Gwen Hilton, Chair and Presiding Officer