

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

At a session of the Public Service  
Commission held in the City of  
Albany on May 5, 2004

COMMISSIONERS PRESENT:

William M. Flynn, Chairman  
Thomas J. Dunleavy  
Leonard A. Weiss  
Neal N. Galvin

CASE 02-E-0362 - Petition of Flat Rock Windpower LLC for an Order that its Proposed Flat Rock Wind Generation Facility will be Subject Only to Lightened Regulation and for a Certificate of Public Convenience and Necessity Pursuant to Section 68 of the Public Service Law.

ORDER GRANTING A CERTIFICATE OF  
PUBLIC CONVENIENCE AND NECESSITY  
AND PROVIDING FOR LIGHTENED REGULATION

(Issued and Effective June 17, 2004)

BY THE COMMISSION:

INTRODUCTION

In a petition filed on March 12, 2002, Flat Rock Windpower LLC (Flat Rock or the company), requests that it be issued a Certificate of Public Convenience and Necessity (CPCN) pursuant to Public Service Law (PSL) §68 for its proposed wind powered generating facility (Facility) to be located in Lewis County, in the Towns of Lowville, Martinsburg, and Harrisburg. Flat Rock also requested that it be lightly regulated as an electric corporation under the Public Service Law. Flat Rock moved for an expedited proceeding on a non-contested application for its CPCN, pursuant to 16 NYCRR §21.10.

On May 13, 2002, Flat Rock filed a supplement to its March 12<sup>th</sup> petition, updating information concerning its proposed Facility. It made another supplemental submission on March 17, 2004, detailing changes to the Facility and to renew its request for an expedited proceeding on its application for a CPCN.

Pursuant to 16 NYCRR §21.10, which establishes requirements for expedited approval of requests for Certification, notices were published on March 18, 2004 in the Watertown Daily Times and March 24, 2004 in The Journal and Republican, newspapers with general circulation in the region nearby to the proposed Facility. No written objections to the granting of the motion or comments were received by April 5, 2004, the end of the ten-day period for filing prescribed in 16 NYCRR §21.10.

In accordance with the State Administrative Procedure Act (SAPA) §202(1), the petition was properly noticed in the State Register on May 1, 2002. The comment period has expired and no comments were received.

#### THE PETITION

Flat Rock is a limited liability corporation owned by Atlantic Renewable Energy Corporation (AREC) and Zilkha Renewable Energy, LLC (Zilkha). The petition states that AREC is the leading developer of wind energy farms in the eastern United States and is developing and constructing wind energy generating facilities in New York, Pennsylvania, West Virginia, and Iowa. Its New York facilities include six of the nine commercial wind energy farms in the eastern United States, including the Madison Wind Project and the Fenner Wind Power Project, both in Madison County, New York. Zilkha is described as the leading mid-sized wind energy farm developer in the

United States having developed over 300 megawatts (MW) of wind generating facilities in California, Pennsylvania, Iowa, Oklahoma, Central America, and the United Kingdom. Aside from Flat Rock, Zilkha and AREC are involved in a joint venture that developed 59 MW of wind energy in Pennsylvania.

During the past four and a half years, reports Flat Rock, AREC and Zilkha have assessed the wind energy potential of the Tug Hill Region of New York. Based on their assessment, Flat Rock proposes to build a wind generation facility consisting of approximately 187 wind turbines with a potential maximum output of approximately 300 MW. According to the March 17, 2004 supplemental filing, the Facility will be completed in two phases, with Phase 1 consisting of 100 turbines with an approximate total output of 150 MW, expected to enter service by the end of 2004, and Phase 2 by the end of 2005. The proposed Facility will provide a significant source of renewable energy to New York State and will boost the Lewis County economy by \$10 million per year through lease payments to landowners, local tax payments, and the creation of 10 to 15 new jobs.

In its March 17, 2004 supplemental filing, Flat Rock indicates that it is anticipated that the interests in Flat Rock, along with the Phase 1 assets, will be sold to a third-party investor on or before the end of the second calendar quarter of 2004. At the time of the sale, Flat Rock will transfer the assets necessary for construction of Phase 2 to Flat Rock Windpower II LLC (Flat Rock II). Flat Rock states that, until approximately April 15, 2005, Flat Rock II will remain jointly owned by its parent corporations, AREC and Zilkha. Sometime after that date, sale of all membership interests of Flat Rock II to a third-party is planned. Therefore, at the time both phases of the project are finished,

the two entities, Flat Rock and Flat Rock II, may or may not be owned and operated by different entities.

Flat Rock states that the Commission has determined that entities similar to it proposing to operate as wholesale generators qualify for lightened regulation.<sup>1</sup> According to the petition, Flat Rock will operate the Facility solely as a merchant plant, selling all electric capacity, energy and ancillary products only in the competitive wholesale generation market and not to the retail market. Flat Rock further asserts that it will not affiliate with a power marketer and expects to sell all of its output pursuant to Power Purchase Agreements (PPA) or into the New York Independent System Operator (NYISO) spot market. Flat Rock indicates that it has not entered into a PPA at this time.

#### DISCUSSION AND CONCLUSION

##### Environmental Quality Review

The purpose of the State Environmental Quality Review Act (SEQRA)<sup>2</sup>, and its implementing regulations (6 NYCRR Part 617 and 16 NYCRR Part 7), is to incorporate consideration of environmental factors into the existing planning, review and decision-making processes of state, regional and local government agencies at the earliest possible time. To accomplish this goal, SEQRA requires that all agencies determine whether the actions they are requested to approve may have significant impact on the environment, and, if it is determined that the action may have a significant adverse impact, prepare

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<sup>1</sup> Case 99-E-0148, AES Eastern Energy, L.P., Order Providing for Lightened Regulation (issued April 23, 1999); Case 98-E-1670, Carr Street Generating Station, Order Providing for Lightened Regulation (issued April 23, 1999).

<sup>2</sup> New York Environmental Conservation Law Article 8.

or request the applicant to prepare an environmental impact statement.

Flat Rock proposes to construct, in addition to 187 wind turbines, two meteorological towers, a system of gravel roads, a buried and above ground 34.5 kV electrical collection system, a substation located at Nefsey Road, and a 4.9 mile 115 kV overhead transmission line connecting the Nefsey Road substation with the Rector Road substation.<sup>3</sup> The electricity generated by the Facility will be upgraded from 115 kV to 230 kV at a new substation located north of Rector Road in the Town of Martinsburg. A new 10.3 mile, 230 kV transmission line will connect the Rector Road substation to a switch station at the 230 kV Adirondack-Porter transmission facility in the Town of Watson. The Commission granted a Certificate for construction of the proposed 230 kV transmission facility.<sup>4</sup>

In April 2002, the Town of Martinsburg (Town) made a solicitation of lead agency status to potentially involved and interested parties, proposing to serve as lead agency in a coordinated SEQRA review and evaluation of the environmental impacts associated with the construction and operation of the Facility. No agency objected to the designation of the Town as lead agency. The Commission is an involved agency because of its authority to issue a CPCN pursuant to PSL §68 for construction of the wind turbines, interconnecting electric lines and the 4.9 mile 115 kV transmission facility.

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<sup>3</sup> The 4.9 mile 115 kV line is not subject to PSL Article VII as it does not fall within the definition of a major utility transmission facility under PSL §120(2).

<sup>4</sup> Case 03-T-0515 - Certificate of Environmental Compatibility and Public Need for the Construction of a 230 Kilovolt Electric Transmission Line, Opinion and Order Adopting Terms of a Joint Proposal and Granting a Certificate of Environmental Compatibility and Public Need, (issued April 12, 2004).

On October 28, 2003, the Town issued a Positive Declaration requiring the preparation of a draft environmental impact statement (DEIS) by Flat Rock for the Facility. On December 3, 2003 the DEIS was accepted by the Town as complete and made available for review and public comment. The public comment period remained open until January 15, 2004. A public statement hearing was held on January 5, 2004 at the Martinsburg Town Hall. By letter dated January 15, 2004, Department of Public Service staff provided comments on the DEIS. On February 18, 2004, the Town accepted the Final Environmental Impact Statement (FEIS) prepared by Flat Rock as adequate and complete. The Town prepared and adopted SEQRA findings on March 4, 2004.

The DIES and FEIS analyzed alternatives, potential environmental impacts on land use and zoning, community character, cultural and visual resources, socioeconomic issues, traffic and transportation, air quality, noise, soils, geology, terrestrial and aquatic ecology including threatened and endangered species, storm water management, impacts of construction, and proposed general and specific mitigation measures. The Town determined, based upon field investigations and review of the DEIS and the FEIS, that the proposed action with the mitigation measures incorporated in the FEIS minimizes or avoids significant environmental impact to the maximum extent possible.<sup>5</sup> The mitigation measures discussed in the FEIS include: compliance with conditions and any mitigation measures required by any federal, state, and local permits and approvals and implementation of appropriate mitigation measures defined in

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<sup>5</sup> The lead agency's determination is binding on potentially involved and interested parties pursuant to 6 NYCRR §617.b(3)(iii).

such permits or approvals; Facility phasing and design that avoid concentrating construction-related impacts in any one area; Facility layout and location that avoid areas with concentrations of residents or sensitive environmental features; minimum setbacks from residences to limit noise, visual and public safety impacts; and, employment of environmental monitors to assure compliance with all environmental commitments and permit requirements. The Town determined that a large-scale wind power-generating project will result in significant environmental and economic benefits to the area.

In addition to the mitigation measures included in the FEIS adopted by the Town, we direct Flat Rock to provide, as a compliance filing, plan specifications and profile drawings for the 4.9 mile 115 kV transmission facility and plans, elevations and specifications for the Nefsey Road Substation. In addition, the applicant shall within three days after commencement of commercial operation of each phase of the approved Facility, submit a written notice (original and five copies) to the Secretary to the Commission.

Certificate of Public Convenience and Necessity

We are authorized to grant approval to an electric corporation pursuant to PSL §68, after due hearing and upon a determination that construction of electric plant is necessary and convenient for the public service. We have previously identified the requirements which must be met prior to granting a CPCN: the electric corporation must be able and willing to provide adequate service; the corporation must show that its enterprise is financially and economically viable; and the service to be rendered must be safe and adequate.<sup>6</sup>

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<sup>6</sup> See, Case 93-E-1023, Wallkill Generating Company- Certificate of Public Convenience and Necessity, Opinion No. 94-18, at p. 12 (issued August 12, 1994).

Flat Rock intends to provide electricity to the wholesale competitive market and has sited the Facility to utilize a portion of the wind energy potential in New York State. As a Facility based on renewable resource technology, providing clean and renewable supplies of electricity to the wholesale energy market, project financing should be readily available. Furthermore, Flat Rock's owners, AREC and Zilkha, are experienced and financially viable developers of wind energy farms. Finally, AREC and Zilkha, as developers of a number of wind farm projects, are required to comply with the National Electric Safety Code, and will, therefore, provide safe and adequate service.

Further, the proposed Facility will facilitate compliance with Executive Order 111, issued by Governor George Pataki on June 30, 2001, which requires all New York State agencies to purchase 10% of their electricity from renewable energy sources by 2005 and 20% by 2010. Implementation of Executive Order 111 is coordinated by NYSERDA, which has committed \$5 million in funding for the Facility. The Facility also addresses the objectives identified in the 2002 New York State Energy Plan and the Preliminary Investigation into Establishing a Renewable Portfolio Standard in New York (NYSERDA, 2003). These objectives include stimulating economic growth, increasing energy diversity, and promoting a cleaner, healthier environment. The proposed Facility's benefits include positive economic impacts, such as increased tax revenues to municipalities and lease revenues to landowners, and environmental quality, including reduction of emissions from fossil-fuel burning power plants. The Facility will potentially provide enough electricity to power approximately 94,000 homes in New York State or approximately 2.2% of Niagara Mohawk Power Corporation's residential load.

We will grant the motion for an expedited proceeding. A hearing having been held in this proceeding on May 5, 2004, we find, as required by PSL §68, that the construction and operation of the Facility as described in the petition is necessary or convenient for the public service. Further, Flat Rock shall be subject to the lightened regulation regulatory regime described below.

Lightened Regulation

In interpreting the Public Service Law, the Commission has examined what reading best carries out the Legislature's intent and advances the public interest. In the AES and Carr Street Orders<sup>7</sup>, it was concluded that new forms of electric service providers participating in wholesale markets would be lightly regulated. Under this realistic appraisal approach, wholesale generators operating nuclear facilities may be more lightly regulated than traditional monopoly electric utilities.

Under this approach, PSL Article 1 applies to Flat Rock because it meets the definition of an electric corporation set forth in PSL §2(13) and it is engaged in the manufacture of electricity as described in PSL §5(1)(b). Flat Rock is therefore subject to provisions, such as PSL §§11, 19, 24, 25 and 26 that prevent producers of electricity from taking actions that are contrary to the public interest.<sup>8</sup>

All of Article 2 is restricted by its terms to the provision of service to retail residential customers, and so is inapplicable to wholesale generators like Flat Rock. Certain

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<sup>7</sup> Case 99-E-0148, supra and Case 98-E-1670, supra.

<sup>8</sup> The PSL §18-a assessment is applied against gross retail revenues. As long as Flat Rock remains exclusively a wholesaler, there are no retail revenues and no assessment is collected.

provisions of Article 4 are also restricted to retail service.<sup>9</sup> It was decided in the AES and Carr Street Orders that other provisions of Article 4 pertain to wholesale generators.<sup>10</sup> Application of these provisions was deemed necessary in light of obstacles to entry into the generation market. The Article 4 provisions, however, were implemented in a fashion that limited their impact in a competitive market, with the extent of scrutiny afforded a particular transaction reduced to the level the public interest required. Moreover, wholesale generators were allowed to fulfill their PSL §66(6) obligation to file an annual report by duplicating the report they were required to file under federal law. This analysis adheres to Flat Rock.

Regarding PSL §70, it was presumed in the AES Order that regulation would not "adhere to transfer of ownership interests in entities upstream from the parents of a New York competitive electric generation subsidiary, unless there is a potential for harm to the interests of captive utility ratepayers sufficient to override the presumption."<sup>11</sup> Wholesale generators were also advised that the potential for the exercise of market power arising out of an upstream transfer would be

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<sup>9</sup> See, e.g., PSL §66(12), regarding the filing of tariffs, required at our option; §66(21), regarding storm plans submitted by retail service electric corporations; §67, regarding inspection of meters; §72, regarding hearings and rate proceedings; §75, regarding excessive charges; and §76, regarding rates charged religious bodies and others.

<sup>10</sup> PSL §68 provides for certification of construction of new electric plant, unless such plant is reviewed pursuant to PSL Articles VII or X or to electricity sales made via direct interconnection with retail customers. PSL §69, §69-a and §70 provide for the review of security issuances, reorganizations, and transfers of securities, works or systems.

<sup>11</sup> Case 99-E-0148, supra, p. 7.

sufficient to defeat the presumption and trigger PSL §70 review.<sup>12</sup>

In Case 99-M-1722, however, it was decided to initiate a proceeding to revisit the regulatory requirements applicable to wholesale generators and other competitive entities.<sup>13</sup> As a result of the proceeding, the Article 4 requirements imposed in the Carr Street Order and similar orders could be revised. Any further requirements adopted in that proceeding that are applicable to wholesale generators generally will be applicable prospectively to Flat Rock as well.

Turning to PSL Article 6, several of its provisions that adhere to the rendition of retail service do not pertain to Flat Rock because it is engaged solely in the generation of electricity for sale into the wholesale market.<sup>14</sup> Application of PSL §115, relating to requirements for the competitive bidding

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<sup>12</sup> In this context, under PSL §66(9) and (10), we may require access to records sufficient to ascertain whether the presumption remains valid. Further, in view of the various transfers to unknown third-parties contemplated by Flat Rock, as discussed above, Flat Rock is further advised that in any PSL §70 petition for transfer, it shall provide information sufficient for us to determine whether lightened regulation is appropriate after any transfer to a third-party.

<sup>13</sup> Case 99-M-1722, Applicability of Public Service Law Provisions to Competitive Entities, Order Instituting Proceeding (issued December 17, 1999).

<sup>14</sup> E.g., PSL §112, regarding enforcement of rate orders; §113, regarding reparations and refunds; §114, regarding temporary rates; §114-a, regarding exclusion of lobbying costs from rates; §116, regarding discontinuance of water service; §117, regarding consumer deposits; §118, regarding payment to an authorized agency; §119-a, regarding use of utility poles and conduits; and, §119-c, regarding recognition of tax reductions in rates.

of utility purchases, is discretionary and will not be imposed on wholesale generators. In contrast, PSL §119-b, relating to the protection of underground facilities from damage by excavators, adheres to all persons, including wholesale generators.

Most of the remaining provisions of Article 6 need not be imposed generally on wholesale generators.<sup>15</sup> These provisions were intended to prevent financial manipulation or unwise financial decisions that could adversely impact rates charged by monopoly providers. So long as the wholesale generation market is effectively competitive, wholesale generators cannot raise prices even if their costs rise due to poor management. Moreover, imposing these requirements could interfere with wholesale generators' plans for structuring the financing and ownership of their facilities. This could discourage entry into the wholesale market, adversely affecting its operation to the detriment of the public interest.

As discussed in the Carr Street Order, market power issues may be addressed under PSL §110(1) and (2), which afford us jurisdiction over affiliated interests.<sup>16</sup> Flat Rock, however, reports that it does not plan to affiliate with a power marketer and instead will sell its output through PPAs or the NYISO. Therefore, no market power concerns are raised. In the event such issues do arise upon the affiliation of Flat Rock or a successor with a marketer, PSL §110(1), on the reporting of stock ownership, and PSL §110(2), on access to books and records

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<sup>15</sup> These requirements include approval of: loans under §106; the use of utility revenues for non-utility purposes under §107; corporate merger and dissolution certificates under §108; contracts between affiliated interests under §110(3); and, electric, gas, and water purchase contracts under §110(4).

<sup>16</sup> Case 98-E-1670, supra, pp. 9-10.

and the filing of reports, shall pertain to Flat Rock or its successor and any marketing affiliate.

Consequently, we will not impose the requirements of Article 6 on Flat Rock, except for §119-b and conditionally impose the requirements of §110(1) and (2) as discussed above. Flat Rock is reminded, however, that it remains subject to PSL jurisdiction with respect to matters such as enforcement, investigation, safety, reliability, and system improvement, and the other requirements of PSL Articles 1 and 4, to the extent discussed above.

The Commission orders:

1. The motion for an expedited proceeding on the non-contested application of Flat Rock Windpower LLC is granted.

2. A Certificate of Public Convenience and Necessity is granted, authorizing Flat Rock Windpower, LLC to construct and operate the Flat Rock Wind Generation Facility described in its petition and in this Order, and to perform the functions of an electric corporation within New York State, subject to the conditions in this Order, to the condition that it shall obtain all necessary federal, state, and local permits and approvals, and shall implement appropriate mitigation measures defined in such permits or approvals.

3. Flat Rock Windpower, LLC shall file within 90 days of the issuance of this Order plan specifications and profile drawings for the 4.9 mile 115 kV transmission facility and plans, elevations, and specifications for the Nefsey Road Substation with the Secretary to the Commission.

4. Flat Rock Windpower LLC shall file with the Secretary to the Commission, within three days after commencement of commercial operation of each phase of its Facility, an original and five copies of written notice thereof.

5. Flat Rock Windpower, LLC shall comply with the Public Service Law in conformance with the requirements set forth in the body of this Order.

6. This proceeding is continued but shall be closed by the Secretary as soon as the compliance filings have been reviewed, unless the Secretary finds good cause to continue the proceeding further.

By the Commission,

(SIGNED)

JACLYN A. BRILLING  
Secretary