

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 17-2571-INV

Investigation pursuant to 30 V.S.A. Sections 30 and 209 into whether Georgia Mountain Community Wind, LLC, operated its wind electric generation facility in Georgia, Vermont, during icing conditions on January 3, 2017	
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Order entered:

PROPOSAL FOR DECISION

I. Introduction

On January 9, 2017, Scott and Melodie McLane filed a complaint with the Vermont Public Utility Commission (“Commission” or “PUC”) alleging that Georgia Mountain Community Wind, LLC (“GMCW”) operated its wind turbines on January 3, 2017, with ice present on the blades in violation of GMCW’s winter operating protocol (the “protocol”).

On March 10, 2017, after considering responses to the complaint from both GMCW and the Vermont Department of Public Service (“Department”), the Commission issued an order opening this investigation into whether GMCW’s operations on January 3, 2017, constituted a violation of the protocol and the Commission’s order of January 13, 2012, approving the protocol. As part of this investigation, the Commission also considered whether GMCW’s proposed supplement to the protocol were appropriate and consistent with the requirements of GMCW’s certificate of public good.

In today’s proposal for decision, I recommend that the Commission find that GMCW violated the terms of the protocol as well as the Commission’s order dated January 13, 2012, when it operated its turbines during meteorological conditions conducive to ice formation. I further recommend that the Commission impose a civil penalty on GMCW pursuant to 30 V.S.A. § 30 in the amount of \$10,000. I also recommend that the Commission direct GMCW to make a telephone number available to receive operational complaints about the facility and require GMCW to respond to any such complaints within one hour.¹ Lastly, I note that the Commission’s order of August 24, 2017, directed GMCW to file “a revised winter operating

¹ GMCW already has a phone number in place for receiving complaints about both winter operating conditions and sound levels from its facility. In the event GMCW is able to respond to complaints lodged at this phone number within one hour, then I recommend the Commission deem this recommended condition as fulfilled.

protocol incorporating its proposed amendments thereto no later than August 30, 2017.” The records in ePUC for this investigation contain no indication that GMCW complied with this requirement. Accordingly, I also recommend that the Commission direct GMCW to file an affidavit of compliance pursuant to 30 V.S.A. § 30(g) that demonstrates how it complied with this requirement or explains why it failed to do so.

II. Procedural History

On January 9, 2017, the McLanes filed their complaint.

By procedural order dated January 13, 2017, the Commission directed GMCW to respond to the McLanes’ complaint, and established a date for the Department and the Agency of Natural Resources (“ANR”) to reply to both the McLanes’ complaint and GMCW’s response.

On January 27, 2017, GMCW filed its response describing the weather conditions present at the site at the time of the complaint. GMCW also submitted a proposed supplement to its winter operating protocol to better ensure future compliance with its obligations under that protocol.

On February 6, 2017, the Department filed its reply recommending that the Board: 1) open an investigation into the circumstances surrounding the operation of the turbines at the time of the complaint, and 2) provide an opportunity for discovery and comments from any interested individual or group prior to the Commission’s consideration of the proposed supplement to the winter operating protocol.

On March 10, 2017, the Commission issued an order opening this investigation into whether GMCW operated its turbines on January 3, 2017, in violation of its winter operating protocol and the Commission’s order of January 13, 2012. As part of the investigation, the Commission stated that it would consider GMCW’s proposed supplement to the winter operating protocol.

On March 24, 2017, I conducted a prehearing conference, after which, at the request of the parties, the parties began a period of an informal exchange of information in an attempt to resolve the question of whether a violation had occurred.

On April 21, 2017, again at the request of the parties, I issued a procedural order granting the parties additional time to continue their settlement discussions.

On May 17, 2017, the Department filed a letter with the Commission explaining that the parties were unable to resolve all of their differences in this investigation and recommending that a schedule be set to proceed with a formal penalty investigation.

On May 24, 2017, pursuant to a schedule proposed by the parties and adopted by order dated May 22, 2017, GMCW filed its proposed modifications to its winter operating protocol.

On June 14, 2017, the Department filed comments that were generally supportive of the proposed modifications to the winter operating protocol, but also recommended the addition of an annual reporting requirement for at least the next five years, and recommended that GMCW “strongly consider” installing video monitoring equipment at each turbine to aid in the identification of icing conditions.

On June 28, 2017, GMCW responded to the Departments comments, stating that it had no objection to the recommended reporting requirement but opposing the recommendation to install the video monitoring equipment.

On July 26, 2017, I issued a Hearing Officer Report and Recommendation recommending to the Commission that it approve the proposed supplement to the winter operating protocol but that it defer requiring GMCW to install the recommended video monitoring equipment unless and until another violation of the protocol occurred, given the newly proposed supplement to that protocol.

On August 9, 2017, the McLanes, the Department, and GMCW each filed comments on the Report and Recommendation.

On August 24, 2017, the Commission issued an order approving the Report and Recommendation, thereby requiring GMCW to implement the proposed supplement to the protocol and to file an annual report identifying any icing events and explaining any adjustments made to the thresholds used in the protocol during the prior winter.

On October 30, 2017, in compliance with a schedule proposed by GMCW and supported by the Department, GMCW filed its recommendation on whether a penalty should be imposed on GMCW for operating its turbines on January 3, 2017, under conditions conducive to ice formation. Neither the Department nor the McLanes filed recommendations or testimony.

On November 27, 2017, the Department filed comments in response to GMCW's October 30th filing.²

On November 30, 2017, GMCW filed an objection to the Commission's consideration of the Department's November 27th filing because it was untimely.

No party requested an evidentiary hearing even though a date for making such a request was provided in the scheduling order dated September 19, 2017.

III. Positions of the Parties

GMCW argues that the Commission should reject the Department's recommendation that video monitoring equipment be installed at the turbines at this time, pointing out that the Commission has already ruled on this issue.³ GMCW admits that it operated its turbines on January 3, 2017, between 6:00 a.m. and 6:50 a.m. while conditions conducive to ice formation were present at the turbine sites. However, GMCW asserts that no penalty is warranted in this matter because public safety was never at risk as there is no indication that any ice actually formed on the turbines' blades. GMCW also contends that its actions were in good faith because the Commission had not yet issued its order denying GMCW's motion for reconsideration in Docket 8734 at the time of the alleged violation. Lastly, GMCW states that its implementation of the revisions to its winter operating protocol eliminate the need for the deterrent effect a penalty might otherwise provide.⁴

The Department believes that the Commission should require GMCW to install video monitoring equipment at each of the turbine sites to assist in determining the actual operating conditions at the site at the time of an alleged violation. However, the Department does not believe that a monetary penalty is warranted for the current alleged violation because GMCW's turbines are currently operating under the revised protocol approved by the Commission by order of August 24, 2017.⁵

² Responsive comments or rebuttal testimony to GMCW's October 30th filing were due on November 20, 2017.

³ Letter from Andrew N. Raubvogel, Esq. to Judith Whitney, Clerk of the Commission, dated November 30, 2017.

⁴ Letter from Andrew N. Raubvogel, Esq. to Judith Whitney, Clerk of the Commission, dated October 30, 2017.

⁵ Rebuttal recommendations of the Department of Public Service dated November 27, 2017. GMCW argues that the Commission should not consider the Department's recommendations because they are untimely, but at the same time agrees with the Department's recommendation that no penalty be imposed.

The McLanes did not file any testimony or recommendations pursuant to the schedule established for such filings. However, earlier in this proceeding they asked that the Commission to require the installation of video monitoring equipment and the establishment of a phone number for lodging complaints with GMCW subject to the requirement that GMCW respond to any complaints within one hour.⁶

IV. Documents Admitted into Evidentiary Record

For the purpose of making findings in this matter, I am admitting the following documents into the evidentiary record⁷ in light of the fact that no party requested an evidentiary hearing:

1. Letter from Andrew N. Raubvogel, Esq. to Judith Whitney, Clerk of the Commission, dated January 27, 2017 (“January 27 letter”).
2. Letter from Andrew N. Raubvogel, Esq. to Judith Whitney, Clerk of the Commission, dated November 30, 2017 (“October 30 letter”).
3. Complaint of Scott and Melodie McLane dated January 6, 2017 (“McLane complaint”).

V. Findings

Based on the information admitted into the evidentiary record, I have determined that this matter is ready for decision and hereby report the following proposed findings to the Commission in accordance with 30 V.S.A. § 8(c).

1. GMCW operated one or more of its turbines during conditions conducive to ice formation on January 3, 2017, between 6:00 a.m. and 6:50 a.m. in violation of its winter operating protocol. January 27 letter at 1-2; October 30 letter at 1-2.

2. Operational data for the turbines during that time show that the turbines were operating normally, indicating that no ice build-up occurred on the turbine blades. January 27 letter at 1-2; October 30 letter at 1.

3. The McLanes filed a complaint with GMCW that the turbines were running with ice on the blades at 6:34 a.m. on January 3, 2017, by calling the phone number provided by GMCW

⁶ See, e.g. McLane comments on Hearing Officer Report and Recommendation dated August 9, 2017. The McLanes also requested real-time, continuous sound monitoring for the life of the project. However, such a request is beyond the scope of this proceeding and I therefore do not address it in this proposal for decision.

⁷ Any objections to the admission of these documents and the reasons therefor must be presented at the time a party files its comments on this proposal for decision.

for lodging such complaints. Nobody answered the phone and the McLane's left a message about the icing along with a request that the turbines be shut down. McLane complaint at 3.

4. GMCW did not contact the McLanes in response to the complaint, nor did it shut down the turbines. McLane complaint at 3.

5. GMCW has never actually answered the phone when the McLanes have called to lodge a complaint. McLane complaint at exh. 1.

VI. Discussion

As an initial matter, I will recommend a resolution to the late-filed nature of the Department's November 27th rebuttal recommendations and GMCW's objection to the Commission's consideration thereof.

I agree with GMCW that the Department's recommendations were untimely. Additionally, the Department appears not to acknowledge the fact that the July 26, 2017, Hearing Officer Report and Recommendation was adopted by the Commission in a final order dated August 24, 2017. As a result, if the Department wished to advocate for an amendment to that order requiring the immediate installation of video-monitoring equipment at the turbine sites, it should have filed a motion seeking such an amendment pursuant to the requirements of V.R.C.P. 59(e) within ten days of the August 24th order. As a result, I recommend that the Commission decline to consider the Department's request with respect to the video-monitoring equipment.

Additionally, for the reasons explained below, I recommend that the Commission reject the notion advanced by both GMCW and the Department that no penalty is warranted as a result of this investigation, even though GMCW has acknowledged that it violated its winter operating protocol on January 3, 2017.⁸

In today's proposal for decision, I recommend that the Commission impose a civil penalty on GMCW in the amount of \$10,000, for the January 3, 2017, violation of the protocol, its third such violation in a period of less than one year.

⁸ The winter operating protocol requires GMCW to place the turbines in pause mode when: 1) the installed ice monitoring device(s) and heated wind sensors detect unsafe conditions due to icing conditions; 2) ice accretion is recognized by the site operator; 3) meteorological conditions at the site are conducive to ice formation; 4) air temperature is several degrees above zero degrees Celsius after icing conditions; or 5) other weather conditions are present that create an unsafe operating environment. It is the third item in the above list that GMCW has admitted to violating.

The analysis under several of the factors set forth in 30 V.S.A. § 30(c) to be considered when setting a penalty amount remains largely the same as it did in the recent investigation into GMCW's earlier violations of the winter operating protocol in Docket 8734. As a result, the analysis below largely focuses on those factors that informed my decision to recommend the \$10,000 penalty amount to the Commission in this proceeding.

1. The Legal Standard

Subsection (b) of Section 30 provides as follows with respect to civil penalty amounts for such violations:

(b) The [commission] may impose a civil penalty under subsection (a) of this section of not more than \$40,000.00. In the case of a continuing violation, an additional fine of not more than \$10,000.00 per day may be imposed. In no event shall the total fine exceed the larger of:

(1) \$100,000.00; or

(2) one-tenth of one percent of the gross Vermont revenues from regulated activity of the person, company or corporation in the preceding year.

Subsection 30(c) identifies eight factors the Commission may consider in determining the amount of a civil penalty:

(1) the extent that the violation harmed or might have harmed the public health, safety or welfare, the environment, the reliability of utility service or the other interests of utility customers;

(2) whether the respondent knew or had reason to know the violation existed and whether the violation was intentional;

(3) the economic benefit, if any, that could have been anticipated from an intentional or knowing violation;

(4) the length of time that the violation existed;

(5) the deterrent effect of the penalty;

(6) the economic resources of the respondent;

(7) the respondent's record of compliance; and

(8) any other aggravating or mitigating circumstance.

In the instant case, the Commission could impose a total civil fine of not more than \$40,000 for the single violation. I set forth my reasons for recommending a total fine of \$10,000, below.

2. Analysis under applicable factors

1. The extent that the violation harmed or might have harmed the public health, safety or welfare, the environment, the reliability of utility service or the other interests of utility customers.

GMCW asserts that there was never any risk to the public because the turbines were operating normally during the time period in question, indicating that no ice had accumulated on the blades, and therefore their continued operation under conditions conducive to ice formation posed no safety risk.

This argument is similar to the arguments advanced by GMCW in Docket 8734 which were rejected by the Commission.⁹ The same reasoning applies and the analysis need not be set forth again here in detail. It does, however, bear repeating that the act of operating the turbines under conditions that are conducive to ice formation in and of itself creates the risk that is intended to be controlled by the protocol's requirement that the turbines be shut down under such conditions.¹⁰ I recommend that the Commission find that GMCW's act of operating the turbines when conditions were conducive to ice formation created a risk of harm to public safety and that it weigh this factor in favor of a significant penalty.

2. Whether GMCW knew or had reason to know the violation existed and whether the violation was intentional.

GMCW relies heavily on the fact that at the time of the January 3, 2017, violation, the Commission had not yet denied GMCW's motion for reconsideration on the question of liability for its March 11 and 14, 2016, violations of the protocol. According to GMCW, it could not know that its January 3, 2017, operations were a violation of the protocol because, even though the Commission had clearly ruled in Docket 8734 in its order of October 13, 2016, that turbine operations under conditions conducive to ice formation constituted a violation of the protocol, the Commission had not yet ruled on GMCW's motion to reconsider that order.

I recommend that the Commission reject GMCW's argument. While GMCW may be legally correct that its motion for reconsideration suspended the finality of the Commission's October 13, 2016, order in Docket 8734, the fact of that order put GMCW on notice of the Commission's thinking. Under such circumstances, any prudent operator in GMCW's position would have immediately shut down the turbines in response to a complaint. Instead, GMCW continued to employ the same flawed reasoning regarding the need for extreme weather

⁹ Docket 8734, Order of 11/29/17 at 9-10, 23.

¹⁰ *Id.* at 23 ("Given the stated purpose of the winter operating protocol, a violation of its shutdown requirements per se results in a risk to public safety.").

conditions to be present to shut down the turbines that the Commission roundly rejected in the October 13, 2016, order in Docket 8734.¹¹

I recommend that the Commission find that GMCW had a clear reason to know that its January 3, 2017, operations were in violation of the protocol and that this factor weigh heavily in favor of a significant penalty given GMCW's knowledge of the Commission's reasoning as set forth in the October 13, 2016 order in Docket 8734.

3. The economic benefit, if any, that GMCW could have anticipated from an intentional or knowing violation.

The same reasoning applies here as did in the Commission's order of November 29, 2017, and there is no need to repeat it here.

4. The length of time that the violation existed.

The evidence of record indicates that the violation lasted for approximately 50 minutes between 6:00 a.m. and 6:50 a.m. on January 3, 2017.

Given the short duration of the violation, I do not recommend that it weigh in favor of a more significant penalty. However, given that GMCW took no steps on its own to correct it, I also do not recommend that this factor mitigate against the imposition of a penalty.

5. The deterrent effect of the penalty.

I do not recommend any upward adjustment to the proposed penalty amount under this factor because the supplement to the winter operating protocol, if it functions as designed and expected, discounts the need for the deterrence of future violations at GMCW's facility. However, I do not recommend any downward adjustment because the other factors discussed herein independently support the recommended penalty amount without consideration of the deterrent effect. Additionally, a downward adjustment could send an incorrect signal to operators of other wind facilities in Vermont regarding the seriousness with which the Commission views violations of this nature.

6. The economic resources of the applicant.

The same reasoning applies here as did in the Commission's order of November 29, 2017, and there is no need to repeat it here.

¹¹ See McLane complaint, exhibit 2 at 5. ("If unsafe operating conditions occur, they will shut the turbines." (Staskus)).

7. GMCW's record of compliance.

I recommend that the Commission find GMCW's record of regulatory compliance is less than adequate. As outlined in the Commission's order of November 29, 2017, in Docket 8734, GMCW at that time had three previous violations of its regulatory obligations. The November 29th order imposed a penalty for two more violations. If the Commission accepts my recommendation in this proceeding, GMCW will have committed six established violations since 2012. I recommend that GMCW's record of non-compliance weigh heavily in favor of a significant penalty.

8. Any other aggravating or mitigating circumstance.

I recommend that the Commission find that there are no mitigating factors that weigh in favor of a lesser penalty for the same reasons set forth in the Commission's order of November 29, 2017, in Docket 8734.

In addition to the factors discussed above, I do recommend that the Commission find that the following aggravating factors weigh in favor of a significant penalty in this proceeding: 1) GMCW's failure to respond directly to the McLanes' phone message; 2) GMCW's repeated failure to actually answer the complaint line when the McLanes have called to lodge a complaint; and 3) GMCW's failure to take proactive action in response to the McLanes' complaint.

3. Recommended penalty amount

I am recommending the amount of \$10,000 based on foregoing analysis, with particular emphasis on GMCW's record of non-compliance, its awareness of the Commission's October 13, 2016, order in Docket 8734, and the safety risk associated with non-compliance with the winter operating protocol. Additionally, I believe the \$10,000 amount is an appropriate escalation from the amounts of \$2,500 and \$5,000 imposed for GMCW's first and second violations of the winter operating protocol in Docket 8734.

4. McLane Request for Telephone Number

The McLanes have requested that the Commission direct GMCW to establish a phone number for area residents to call to lodge complaints about GMCW's turbines operating under icing conditions, and to require that GMCW respond to any such complaints within one hour. No party has opposed this request and I recommend that the Commission impose this requirement. However, I note that GMCW already has a phone number for residents to call and

lodge complaints about sound levels and winter operations. Accordingly, if GMCW certifies that it is able to respond to complaints lodged using that phone number within one hour, then I recommend the Commission not require the establishment of a second phone number.

5. Compliance Affidavit re: Amended Winter Operating Protocol

In its order of August 24, 2017, in this matter, the Commission directed GMCW to file “a revised winter operating protocol incorporating its proposed amendments thereto no later than August 30, 2017.” The records in ePUC for this investigation contain no indication that GMCW complied with this requirement. Accordingly, I also recommend that the Commission direct GMCW to file an affidavit of compliance pursuant to 30 V.S.A. § 30(g) that demonstrates how it complied with this requirement or explains why it failed to do so.

Dated at Montpelier, Vermont this *15th* of *December*, 20*17*.



John J. Cotter, Esq.
Hearing Officer

VII. Order

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED by the Public Utility Commission of the State of Vermont that:

1. The findings, conclusions, and recommendations of the Hearing Officer are adopted.
2. Pursuant to 30 V.S.A. § 30, Georgia Mountain Community Wind, LLC (“GMCW”) shall pay a penalty of \$10,000.00 by sending to the Public Utility Commission at 112 State Street, Montpelier, VT 05620-2701, a check in the amount of \$10,000 made payable to the State of Vermont within 30 days of the date of this Order
3. GMCW shall establish a telephone number for area residents to call to lodge complaints about GMCW’s turbines operating under icing conditions and shall respond to any such complaints within one hour. If GMCW certifies that it can and will respond to complaints made to its existing complaint line within one hour, there is no need for GMCW to establish a second complaint line. Such certification must be filed within 10 days of the date of this order.
4. GMCW shall file an affidavit of compliance pursuant to 30 V.S.A. § 30(g) that demonstrates how it complied with the requirement in the August 24, 2017, order in this proceeding that GMCW file a revised winter operating protocol incorporating the amendments that were approved in the August 24th order no later than August 28, 2017, or explains why GMCW failed to comply with the requirement. GMCW shall file the affidavit within 15 calendar days of the date of this order.

SO ORDERED.

Dated at Montpelier, Vermont this

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_____	)	
Anthony Z. Roisman	)	PUBLIC UTILITY
	)	
	)	
_____	)	COMMISSION
Margaret Cheney	)	
	)	
	)	OF VERMONT
_____	)	
Sarah Hofmann	)	

OFFICE OF THE CLERK

Filed:

Attest: _____
Clerk of the Commission

Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Commission (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: puc.clerk@vermont.gov)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Commission within thirty days. Appeal will not stay the effect of this Order, absent further order by this Commission or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Commission within ten days of the date of this decision and Order.