

STATE OF VERMONT  
PUBLIC UTILITY COMMISSION

Docket 7250

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| Amended Petition of Deerfield Wind, LLC, for a certificate of public good authorizing it to construct and operate a 15-turbine, 30 MW wind generation facility, and associated transmission and interconnection facilities, on approximately 80 acres in the Green Mountain National Forest, located in Searsburg and Readsboro, Vermont, with 7 turbines to be placed on the east side of Route 8 on the same ridgeline as the existing GMP Searsburg wind facility (Eastern Project Area), and 8 turbines along the ridgeline to the west of Route 8 in the northwesterly orientation (Western Project Area) |  |
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Order entered: 9/09/2020

**ORDER GRANTING DEERFIELD’S MOTION TO CORRECT CLERICAL ERROR AND  
DENYING WINDACTION/SHEA MOTION TO AMEND**

**I. INTRODUCTION**

This case pertains to the amended certificate of public good (“Amended CPG”) issued by the Vermont Public Utility Commission (“Commission”) to Deerfield Wind, LLC (“Deerfield”) for construction and operation of a 30 MW wind electric generation facility located in Searsburg and Readsboro, Vermont (the “Project”).

In this order, we grant Deerfield’s motion pursuant to Vermont Rule of Civil Procedure 60(a) (“Rule 60(a)”) to correct a clerical error on page 6 of the Commission’s June 26, 2020, Order. Additionally, we deny the Wind Action Group and Thomas Shea’s (“Windaction/Shea”) motion pursuant to Vermont Rule of Civil Procedure 59(e) (“Rule 59”) to alter or amend the June 26 Order based on information provided by Deerfield’s expert.

**II. RELEVANT PROCEDURAL HISTORY**

On January 9, 2020, the Commission issued an order finding the Project in compliance with the Amended CPG’s sound limits based on sound monitoring reports for Fall 2018 and Spring 2019 filed by the Vermont Department of Public Service (“Department”). The January 9

Order also required Deerfield to select one of two options: (1) submit to an additional round of fall sound monitoring; or (2) conduct outside-to-inside noise reduction (“OINR”) testing at Mr. Shea’s residence.

On January 31, 2020, Deerfield responded to the January 9 Order and noted that it was electing to submit to an additional round of sound monitoring in the Fall of 2020 and was seeking further clarification on how the sound monitoring should be conducted.<sup>1</sup>

After reviewing extensive comments from the parties, the Commission issued a decision on June 26, 2020, detailing the specifications for conducting sound monitoring and ordering that such monitoring occur at Site C only in Fall 2020.

On July 27, 2020, Windaction/Shea filed a motion to alter or amend the June 26 Order pursuant to Rule 59(e).

On August 7, 2020, Deerfield filed a motion to correct a clerical error in the June 26 Order and an objection to Windaction/Shea’s motion to alter or amend.

No other motions, responses, or comments were filed after the June 26 Order.

### **III. SUMMARY OF MOTIONS AND RESPONSES**

#### **Motion to Correct Clerical Error**

Pursuant to Rule 60(a), Deerfield moves that the Commission correct a clerical error that appears on page 6 of its June 26 Order. The Order states, “The Commission orders testing at Site B, per its decision, below.” Given the findings and conclusions throughout the June 26 Order, Deerfield argues that this should instead read, “The Commission orders testing at Site C, per its decision, below.”

No other party submitted a response to Deerfield’s motion to correct the reference to Site B.

#### **Motion to Alter or Amend**

Pursuant to Rule 59(e), Windaction/Shea moves that the Commission alter or amend its June 26 Order and (1) find the Project in violation of the sound requirements contained in the Amended CPG; (2) require fall sound monitoring at Sites A, B, and C; and (3) order that the data used in computing the  $L_{eq}$  represent periods when the turbines are producing at or near maximum

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<sup>1</sup> Letter from Andrew N. Raubvogel, Esq., to Judith Whitney, Clerk of the Commission, dated January 31, 2020.

sound power levels.<sup>2</sup> Alternatively, Windaction/Shea request that the data already collected at Sites A, B, and C be reprocessed after first excluding sound data where the turbines are producing sound levels below their maximum.<sup>3</sup> Windaction/Shea characterize the information provided by Mr. Ken Kaliski of RSG (“Kaliski Memo”) as “new information” regarding the sound power levels that occurred during much of the noise monitoring period that “was ignored.”<sup>4</sup>

Deerfield objects to the Windaction/Shea motion as “untimely, beyond the scope of the outstanding issues in the proceeding, and subject to issue preclusion as it raises issues and requests remedies previously litigated and decided.”<sup>5</sup> First, Deerfield argues that the Windaction/Shea motion is untimely as the alleged “new information” cited by Deerfield was filed with the Commission on December 13, 2019, and was considered, discussed, and rejected in the Commission’s Order dated January 9, 2020. According to Deerfield, Windaction/Shea needed to move for reconsideration or appeal in the appropriate time after the January 9 Order issued.

Second, Deerfield contends that Windaction/Shea’s motion is an improper attempt to “relitigate old matters” already decided, rather than addressing mistake or inadvertence as Rule 59(e) is intended to be utilized as an extraordinary remedy.<sup>6</sup> Deerfield further argues that “[g]iven the Commission’s prior rulings, and the time, effort, and financial resources that have gone into the prior monitoring and the prior proceedings, granting [Windaction]/Shea’s request would be extraordinarily unfair to Deerfield and the Department, and well beyond the type or relief intended under [V.R.C.P.] 59(e).”

Finally, Deerfield claims that Windaction/Shea are precluded from relitigating the Kaliski Memo facts because the issue raised in Windaction/Shea’s motion was finally adjudicated by the January 9 Order by the doctrine of collateral estoppel: “Regarding the overall fairness at stake here, issue preclusion is an appropriate mechanism to conserve the resources of the Commission

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<sup>2</sup> Windaction/Shea Motion to Amend the Vermont PUC Order of June 26, 2020, filed 07/27/20 at 3.

<sup>3</sup> Windaction/Shea Motion to Amend the Vermont PUC Order of June 26, 2020, filed 07/27/20 at 3.

<sup>4</sup> Windaction/Shea Motion to Amend the Vermont PUC Order of June 26, 2020, filed 07/27/20 at 1-2.

<sup>5</sup> Deerfield Wind, LLC’s Opposition to the Wind Action Group’s and Tom Shea’s Joint Motion to Amend PUC’s 6/26/2020 Order, filed 08/07/20 at 1.

<sup>6</sup> Deerfield Wind, LLC’s Opposition to the Wind Action Group and Tom Shea’s Joint Motion to Amend PUC’s 6/26/2020 Order, filed 08/07/20 at 3.

and litigants by protecting against repetitive litigation of previously-resolved issues and to prevent vexatious litigation.”

None of the parties requested a hearing on the motions.

#### IV. DISCUSSION & CONCLUSION

##### Motion to Correct Clerical Error

Rule 60(a) provides in relevant part, “Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.”<sup>7</sup> No party contests and the Commission agrees that its intent, as made clear by later parts of the June 26 Order, was to order fall sound monitoring at Site C, not Site B.

As such, the Commission corrects the clerical error on page 6 of its June 26 Order to read: “The Commission orders testing at Site C, per its decision, below.” A corrected version of the June 26 Order will be issued contemporaneously with this Order to reflect the correction.

##### Motion to Alter or Amend

The Commission denies Windaction/Shea’s motion to alter and amend its June 26 Order because we do not find the extraordinary remedy of Rule 59 appropriate in these circumstances. Windaction/Shea’s motion was filed pursuant to Rule 59, which provides parties with 28 days to ask the Commission to “grant a new trial” and “amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.”<sup>8</sup> Reconsideration is appropriate only to avoid an unjust result “due to mistake or inadvertence of the Commission, as opposed to that of a party.”<sup>9</sup>

Relief pursuant to Rule 59 is an extraordinary remedy that is to be used with great caution.<sup>10</sup> The Commission has broad discretion to alter or amend a judgment pursuant to Rule 59; however, Rule 59 does not permit parties to relitigate issues or correct previous tactical

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<sup>7</sup> The Vermont Rules of Civil Procedure are made applicable to Commission proceedings via Commission Rule 2.103.

<sup>8</sup> Rule 59(a) and (e).

<sup>9</sup> *Rubin v. Sterling Enterprises, Inc.*, 164 Vt. 582, 588, 674 A.2d 782 (1996).

<sup>10</sup> *Petition of Vermont Gas Systems, Inc. for authority to condemn easement rights in property interests of the Town of Hinesburg, Vermont, at Shelburne Falls Road, Hinesburg, Vermont, for the purpose of constructing the pipeline authorized in Docket 7970, Docket 8643, Order of 11/3/16 at 1.*

decisions.<sup>11</sup> A party's mere disagreement with the Commission's decision is not grounds for reconsideration.<sup>12</sup>

The Commission agrees with Deerfield that the alleged "new information" described in Windaction/Shea's motion was received and evaluated as part of the Commission's January 9 decision.<sup>13</sup> The Commission considered the information presented and rejected it in determining the Project is in compliance with the Amended CPG. This information was also considered when further clarifying the methodology for collecting data during the fall sound monitoring campaign as detailed in the June 26 Order.<sup>14</sup>

Although Windaction/Shea contend that the Commission ignored the Kaliski Memo when it determined hub height speeds of 6 m/s as the appropriate metric for sound data collection, the Commission considered Windaction/Shea's criticism and instead adopted the positions advanced by the Department and Deerfield as codified in the sound monitoring protocol ("Protocol") adopted by the Commission.<sup>15</sup> The Protocol requires "that shutdowns occur when hub height wind speeds are over 6 m/s" as a proxy for maximum power output.<sup>16</sup> Thus, to take Windaction/Shea's approach would require an amendment to the Protocol, which the Commission expressly rejected in its June 26 Order.<sup>17</sup>

Further, the Department—through its expert—and Deerfield offered technical arguments refuting Windaction/Shea's assertion that wind turbines typically produce their maximum sound levels when operating at or near full electricity power output. The Commission weighed the parties' positions and the supporting documentation and concluded that maximum power output does not equate to maximum sound output, which, in fact, is what was presented in the Kaliski

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<sup>11</sup> *Petition of Vermont Gas Systems, Inc. for authority to condemn easement rights in property interests of the Town of Hinesburg, Vermont, at Shelburne Falls Road, Hinesburg, Vermont, for the purpose of constructing the pipeline authorized in Docket 7970, Docket 8643, Order of 11/3/16 at 1 (citing In re Cent. Vt. Pub. Serv. Corp., Docket Nos. 6946/6988, Order of 5/25/05 at 3).*

<sup>12</sup> *Investigation to consider revising maximum and minimum water levels at Great Averill Pond, Little Averill Pond, and Norton Lake in the towns of Averill, Norton, and Warren's Gore, Vermont, Docket No. 8429, Order of 12/21/17 at 6.*

<sup>13</sup> Docket No. 7250, Order of 01/09/20 at 5-7, 10-11 & n.27 (citing Mr. Ken Kaliski's letter).

<sup>14</sup> Docket No. 7250, Order of 06/26/20 at 7.

<sup>15</sup> *Department of Public Service Comments on Spring Sound Monitoring Report and Motion for OINR Testing*, Nov. 15, 2019 at 2; *Deerfield Wind – Fall 2018 Sound Monitoring Compliance Report*, Oct. 11, 2019 (revised) at 26, § 4.2.4 ("Fall Sound Monitoring Report").

<sup>16</sup> *Department of Public Service Reply to Comments Regarding Spring Sound Monitoring Report and Motion for OINR Testing*, Dec. 13, 2019 at 6-7.

<sup>17</sup> Docket No. 7250, Order of 06/26/20 at 6-7.

Memo.<sup>18</sup> Weighing the evidence before it, the Commission reasoned that the Protocol's approach to hub-height speed was the appropriate methodology for conducting the further sound monitoring in Fall 2020. As such, the Commission has "ordered the data used in computing the  $L_{eq}$  represent periods when the turbines are producing at or near maximum sound power levels" per Windaction/Shea's request. We do not disturb that conclusion here and, therefore, deny Windaction/Shea's motion to alter or amend the Commission's judgment pursuant to Rule 59.<sup>19</sup>

Regarding Windaction/Shea's above requests, the Commission does not agree with Deerfield's assessment that the January 9 Order provided the level of finality regarding the sound monitoring protocols to carry out the Fall 2020 sound monitoring, particularly given Deerfield's own request for clarification after the January 9 Order and the three months of comments that followed. Thus, the Commission does not adopt Deerfield's arguments that the Rule 59 motion is untimely or that collateral estoppel applies to Windaction/Shea's requests pertaining to the fall sound monitoring protocols.

However, the Commission's decision that the Project is in compliance with the sound requirements contained in the Amended CPG was a final determination contained in its January 9 Order.<sup>20</sup> We declined to reconsider that determination in our June 26 Order. Such reconsideration pursuant to Rule 59 is both untimely and an inappropriate application of the Rule. The proper vehicle for challenging that decision would have been a timely notice of appeal. Similarly, the Commission will not revisit its conclusion to require sound monitoring only at Site C for Fall 2020. As noted in our June 26 Order, Windaction/Shea have requested additional sound monitoring at Sites A, B, and C as a means of challenging the Amended CPG compliance, which, again, has been finally decided.<sup>21</sup>

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<sup>18</sup> See *Deerfield Wind, LLC's Response to Other Parties' Comments on the Spring 2019 Sound Report and to Mr. Shea's Request for OINR Testing*, Dec. 13, 2019 at 2; Kenneth Kaliski, RSG, *Response to Deerfield Filings of November 15, 2019 Letter*, Dec. 13, 2019 at 1-2.

<sup>19</sup> For the reasons we deny Windaction/Shea's Rule 59 motion, we also reject Windaction/Shea's alternative request to reprocess the collected data by first excluding sound data where the turbines are producing sound levels below their maximum. The Commission views this as a further effort to relitigate the hub-height-speed issue and as inconsistent with the Amended CPG and Protocol.

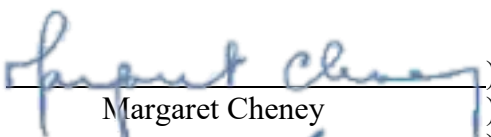
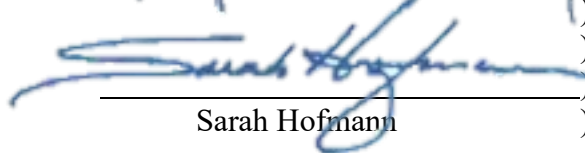
<sup>20</sup> Docket No. 7250, Order of 01/09/20 at 10; Docket No. 7250, Order of 06/26/20 at 6.

<sup>21</sup> Docket No. 7250, Order of 06/26/20 at 5-6.

Deerfield's motion to correct the clerical error in the Commission's June 26 Order is granted. Windaction/Shea's motion to alter or amend the Commission's judgment pursuant to Rule 59 is denied.

**SO ORDERED.**

Dated at Montpelier, Vermont this 9th day of September, 2020.

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|  | ) |                |
| Margaret Cheney                                                                    | ) | PUBLIC UTILITY |
|                                                                                    | ) |                |
|  | ) | COMMISSION     |
| Sarah Hofmann                                                                      | ) | OF VERMONT     |

OFFICE OF THE CLERK

Filed: September 9, 2020

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](mailto:puc.clerk@vermont.gov))*

*Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Commission within 30 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 28 days of the date of this decision and Order.*