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August 7, 2020

By E-Mail and First-Class Mail

Ms. Judith Whitney, Clerk
Vermont Public Utility Commission
112 State Street, Drawer 20
Montpelier, VT 05620-2701

Re: Docket No. 7250 – 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 in Searsburg and Readsboro, Vermont.

Dear Ms. Whitney,

On July 24, 2020, the Wind Action Group and Tom Shea ("IWAG/Shea") filed a joint motion to amend the Public Utility Commission's Order of June 26, 2020. CPG Holder Deerfield Wind, LLC ("Deerfield") hereby files its reply objecting to the IWAG/Shea motion. Deerfield also hereby files its *Motion to Correct Clerical Error in Commission Order of June 26, 2020*.

Deerfield thanks the Commission in advance for its consideration of the above. Please let us know if you have any questions or require further information.

Sincerely,

Andrew N. Raubvogel, Esq.
Nico Lustig, Esq.
DUNKIEL SAUNDERS ELLIOTT RAUBVOGEL & HAND, PLLC

Encls.

cc: Service List

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Amended Petition of Deerfield Wind, LLC for a certificate of public good authorizing it to construct and operate 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)	)	Docket No. 7250

NOTICE OF APPEARANCE

Pursuant to PUC Rule 2.201(A), the undersigned attorney hereby enters their appearance on behalf of Deerfield Wind, LLC in the above-captioned matter.

Dated at Burlington, Vermont this 7th day of August, 2020.

Nico Lustig, Esq.
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STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Amended Petition of Deerfield Wind, LLC for a certificate of public good authorizing it to construct and operate 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)	)	Docket No. 7250

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

CPG Holder Deerfield Wind, LLC ("Deerfield") submits the following Opposition to the Wind Action Group's and Mr. Tom Shea's ("IWAG/Shea") *Motion to Amend the PUC's Order of June 26, 2020* (6/24/2020) (the "Motion").[1] The Motion, filed pursuant to Vermont Rules of Civil Procedure Rule 59(e), claims that "new information provided by the Petitioner's expert … was not considered in the final decision." Motion at 1. As discussed below, the Commission should deny this Motion as it is 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.

I. The Motion is Untimely Under Rule 59(e).

Rule 59(e) provides parties with 28 days to request amending "findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment."[2] Rule 59(e) recognizes the Commission's broad power to amend a judgment.[3] However, "Rule 59 does not permit parties to relitigate issues or correct previous tactical decisions."[4] The Motion fails

[1] PUC Order Regarding Fall 2020 Sound Monitoring (6/26/2020) ("June 26th Order").

[2] Vt. R. Civ. P. 59(a) and (e).

[3] PUC Order Denying Motion for Reconsideration (11/7/2019), at 2 in Case No. 19-2970-PET in re Request of Green Mountain Solar to Change Environmental Attribute Election Re CPG #18-3020-NMR.

[4] *Id.*

to meet the Rule 59 standard by seeking an untimely request to religitate an issue that was previously addressed and decided by the Commission.

While IWAG/Shea's Motion purports to seek an amendment to the June 26th Order, the Motion is in fact entirely based on an issue that was previously addressed and decided in the Order issued on January 9, 2020.[5] IWAG/Shea claim that "the hearing officer failed to consider that the turbines where not producing at full sound power levels during much of the period when noise data was evaluated"[6] for the Fall 2018 and Spring 2019 monitoring programs based on "new information [that] was made available by Mr. Ken Kaliski of RSG."[7] The Motion fails to note that Deerfield filed the Kaliski memo *prior to* the January 9th Order, on December 13, 2019.[8] And, rather than the Commission ignoring the issue as IWAG/Shea claimed, it was specifically addressed in the January 9th Order.[9]

The January 9th Order acknowledged IWAG/Shea's assertion that "the sound data make the results unreliable and 'bias[ ] the result in favor of compliance,'" but the Commission ultimately rejected their criticism of the sound monitoring results.[10] The Commission concluded in the January 9th Order that "the Project complies with the Amended CPG's sound limits . . . [and] that the Protocol was adhered to and that the consequences of the sound monitoring standard dispute are not an underestimate of overall calculated sound."[11]

After issuance of the January 9th Order, IWAG/Shea did not move for reconsideration, nor did they file an appeal with the Vermont Supreme Court. The January 9th Order thus become final and beyond appeal. For this reason alone, the instant Motion is untimely and should be denied.[12]

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[5] PUC Order Finding Project in Compliance with Amended CPG and Ordering Deerfield to Select Next Step in Resolving OINR Testing Issue (1/9/2020) ("January 9th Order").

[6] Motion at 1. Later in the Motion, IWAG/Shea claims "roughly 30% of the time," rather than "much of" the time. Motion at 2.

[7] Motion at 1.

[8] Deerfield Response to Other Parties' Comments on the Spring 2019 Sound Report and to Mr. Shea's Request for OINR Testing (12/13/2019).

[9] January 9th Order at 5–6.

[10] *Id.*

[11] *Id.* at 10–11.

[12] Apart from the fundamental untimeliness of the relief being requested by the Motion, the Motion was filed at 5:18 pm on July 24th, and therefore after the Commission's close of business deadline (4:30 pm). The Motion thus was not filed within 28 days as required for a motion for reconsideration.

Moreover, IWAG/Shea's claim in the Motion that they raised the issue in their filing of March 4, 2020,[13] is irrelevant for the same reason; the issue was asked and answered in the January 9th Order.

II. IWAG/Shea's Motion Raises a Decided Issue, Contrary to Rule 59(e).

IWAG/Shea's Motion impermissibly raises, for a second time, their disagreement with the January 9th Order. In evaluating a Rule 59(e) motion, "a party's mere disagreement with the Commission's decision is not grounds for reconsideration."[14] "The purpose of Rule 59(e) is to avoid an unjust result due to mistake or inadvertence of the Commission, as opposed to that of a party."[15] It is not a vehicle to "relitigate old matters" or "raise arguments or present evidence that have or could have been raised prior to entry of judgment."[16]

As noted above, the January 9th Order addressed the issues from Deerfield's December 13, 2019 filing, and the June 26th Order further addressed IWAG/Shea's March 4th filing.[17] The Motion is thus just another attempt to revisit a previously-decided issue. Moreover, the Motion cannot demonstrate a mistake or inadvertence of the Commission; while IWAG/Shea claimed that the Commission ignored its comments,[18] to the contrary they were considered twice.[19]

Finally, relief pursuant to Rule 59 "is an extraordinary remedy that is to be used with great caution."[20] The facts do not demonstrate a need for such an extraordinary remedy. The Motion asks the Commission to disregard all of the prior sound monitoring data and to order additional rounds of testing at all three monitoring sites.[21] Given the Commission's prior rulings, and the time, effort, and financial resources that have gone into the prior monitoring and the prior proceedings,

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[13] Motion at 2.

[14] Case No. 19-2970-PET, *supra* note 3.

[15] PUC Order Denying Motion for Reconsideration (10/9/2019) at 3 in Case No. 18-3996-PET in re Petition of Dairy Air Wind, LLC for an Amendment to Its Standard-Offer Contract.

[16] *Id.* (citing Willey v. Willey, No. 2017-382, 2018 WL 3023337, at *4 (Vt. June 15, 2018)).

[17] June 26th Order at 5–6.

[18] Motion at 1.

[19] *See* January 9th Order at 11 (discussing the parties arguments with the sound monitoring data and concluding that "no one raise[d] a credible concern" regarding the reported sound levels); *see also* June 26th Order at 5–6 (discussing IWAG/Shea's comments and citing to the January 9th Order to limit the remaining issue to determining whether OINR testing at Site C (Shea residence) has been triggered).

[20] PUC Order Denying Motion for Reconsideration (10/17/2019) at 2 in Case No. 17-4049-NMP in re Petition of Acorn Energy Solar 2, LLC (citing PUC Order of 11/3/2016 in Docket No. 8643 in re Petition of Vermont Gas Systems, Inc.)

[21] Motion at 3.

granting IWAG/Shea's request would be extraordinarily unfair to Deerfield and the Department, and well beyond the type or relief intended under Rule 59(e).

III. The Doctrine of Collateral Estoppel Prohibits Relitigation of Decided Issues.

The issues raised in the Motion also must be precluded under the doctrine of collateral estoppel. Collateral estoppel, or issue preclusion, prohibits subsequent litigation of factual or legal issues that have been actually litigated and necessarily decided in a prior action.[22] Issue preclusion applies when five criteria are met: (1) preclusion is asserted against one who was a party in the prior action; (2) the same issue was raised in the prior action; (3) the issue was resolved by a final judgment on the merits; (4) there was a full and fair opportunity to litigate the issue in the prior action; and (5) applying preclusion is fair.[23] As discussed below, all five criteria are satisfied and thus issue preclusion applies.

IWAG/Shea are parties in this proceeding and were so at the time of the January 9th Order. In the Motion IWAG/Shea raised an issue that was addressed and resolved in the January 9th Order. IWAG/Shea had an opportunity to litigate the issue in an earlier ruling in this case, and an opportunity to file a motion for reconsideration or appeal of the January 9th Order within the applicable deadlines. After the applicable periods expired and no motion was filed or appeal taken, the January 9th Order became a final judgment on the merits. The first three criteria necessary for issue preclusion are thus met.

In addressing the fourth and fifth criteria—whether there was a full and fair opportunity to litigate the issue and whether applying preclusion is fair—they are generally considered together.[24] "No one simple test is decisive in determining whether either of the final two criteria are present; courts must look to the circumstances of each case."[25] The record in this docket leading up to the June 26th Order demonstrates that IWAG/Shea had a full and fair opportunity to litigate the issue.

The January 9th Order found that the Project complies with its Amended CPG, and the *only* remaining issue left open in the Order was how to resolve whether the Shea residence was eligible for Outdoor to Indoor Noise Reduction ("OINR") testing.[26] The January 9th Order determined that this remaining issue would be resolved by allowing Deerfield to elect either an additional round of exterior sound monitoring at Site C (Shea property) in the Fall 2020, or, OINR testing at the Shea

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[22] In re Tariff Filing of Cent. Vermont Pub. Serv. Corp., 172 Vt. 14, 20 (2001) (citing Berlin Convalescent Ctr. v. Stoneman, 159 Vt. 53, 56 (1992)).

[23] *Id.* (citing State v. Dann, 167 Vt. 119, 126, 702 A.2d 105, 110 (1997)).

[24] In re Apple Hill Solar LLC, 2019 VT 64, ¶ 22 (Vt. 2019), reargument denied (10/2/2019).

[25] Trepanier v. Getting Organized, Inc., 155 Vt. 259, 265 (1990).

[26] January 9th Order at 10–11.

residence in the Fall 2020.[27] Deerfield responded to the January 9th Order by electing an additional round of exterior sound monitoring at Site C.[28] In addition, Deerfield asked the Commission to clarify the methodology that the Department of Public Service's sound consultant would use in evaluating the Fall 2020 data for the purpose of determining whether OINR testing is triggered.

In a Procedural Order dated February 12, 2020, the Hearing Officer requested comments from the other parties on Deerfield's January 31st filing.[29] IWAG/Shea filed comments on March 4, 2020, contending that "new information" from Mr. Kaliski disqualifies any claim that the Project is operating in compliance with the certificate.[30] As noted above, the Kaliski memo was far from new and had already been considered by the Commission in the January 9th Order.[31] IWAG/Shea did not raise a new issue or new information related to the Hearing Officer's request for comments on the sound monitoring methodology that would be employed at Site C in the Fall 2020 campaign. Instead, IWAG/Shea's March 4th comments merely disagreed with the Commission's January 9th Order which held that "the Project complies with the Amended CPG's sound limits,"[32] sought to dismiss the prior rounds of sound monitoring at Sites A, B, and C, and demanded additional testing at all three Sites.[33] As discussed above, IWAG/Shea already had a full and fair opportunity to litigate the issue, and elected not to appeal the January 9th Order.

As for the June 26th Order itself, the scope of that decision was limited to the specific issues that remained in this proceeding, i.e., clarifying the methodology that the Department would use in assessing sound monitoring data to be collected at Site C in the Fall 2020, and whether OINR testing would be required at the DeGray residence.[34] The June 26th Order addressed IWAG/Shea's March 4th Comments, including Mr. Kaliski's "new information", and affirmed the January 9th Order.[35] The June 26th Order did not reopen the validity of the prior rounds of sound monitoring at

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[27] *Id.*

[28] Deerfield Letter to the Commission (1/31/2020) at 1.

[29] PUC Procedural Order Requesting Comments (2/12/2020) at 2.

[30] Windaction-Shea Joint Comments in Response to Vermont PUC Order of February 12, 2020 (3/4/2020) ("IWAG/Shea March 4th Comments") at 3.

[31] *See supra* Section I.

[32] *See* January 9th Order at 10–11 (finding the sound monitoring did not underestimate the overall calculated sound; "no one raise[d] a credible concern that the reported sound levels are lower than actual turbine-only sound levels at the Sites" and "the Commission need not order revisions to the Fall 2018 Report or Spring 2019 Report.").

[33] IWAG/Shea March 4th Comments at 2.

[34] June 26th Order at 1, 6.

[35] *Id.* at 1, 8-11. The issue of OINR testing at the DeGray residence grew out of the Order of April 7, 2020.

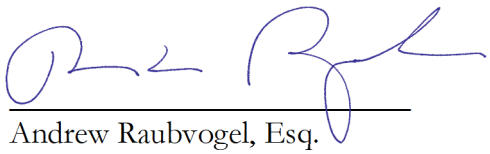
Sites A, B, and C, or whether the prior rounds of monitoring demonstrated compliance with the CPG limits, nor did it conclude that new monitoring was required at all three sites.

Regarding the overall fairness at stake here, issue preclusion is an appropriate mechanism to conserve the resources of the Commission and litigants by protecting against repetitive litigation of previously-resolved issues and to prevent vexatious litigation. Readdressing the issues in IWAG/Shea's Motion would lead to repetitive and vexatious litigation in a docket that has already faced years of litigation. To conclude otherwise would promote an unfair and unreasonable outcome. Therefore, elements four and five of issue preclusion are satisfied, and issue preclusion should be applied against the IWAG/Shea Motion.

Conclusion

For the above-stated reasons, Deerfield respectfully objects to the IWAG/Shea Motion and requests that it be denied.

Dated at Burlington, Vermont this 7th day of August, 2020.

By: 

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CERTIFICATE OF SERVICE

I, Grace Grundhauser, certify that on August 7, 2020, I forwarded copies of Deerfield Wind, LLC's: *Objection to Windaction-Shea's Joint Motion to Amend the Public Utility Commission Order of June 26, 2020; Motion to Correct Clerical Error in Commission Order of June 26, 2020; Notice of Appearance of Nico Lustig*, and associated cover letter to the following service list by the delivery method noted:

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Dated at Burlington, Vermont, this 7th day of August, 2020.

By:

Grace Grundhauser
Paralegal