

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. EMP-93, Sub 0

In the Matter of)
Application of Wilkinson Solar, LLC)
to Amend Certificate of Public) PROPOSED ORDER
Convenience and Necessity to) DENYING AMENDMENT
Construct 74-MW Solar Facility in) OF CERTIFICATE
Beaufort County, North Carolina)

HEARD : Beaufort County Courthouse, Washington, North Carolina on March 19, 2018 at 7:00 p.m., and

Commission Hearing Room 2115, Dobbs Building 430 North Salisbury Street, Raleigh, North Carolina on April 11, 2018 at 10:00 a.m.

BEFORE: Commissioner ToNola D. Brown-Bland, Presiding, Commissioner James G. Patterson and Commissioner Lyons Gray

APPEARANCES:

For Wilkinson Solar, LLC:

Henry C. Campen, Jr., Esq., and Merrick Parrot, Esq., Parker, Poe, Adams and Bernstein, LLP, 301 Fayetteville Street, Suite 1400, Raleigh North Carolina 27601

For Marshall Lilly, Joann Lilly and Deb Van Staalduinen, Intervenors

Brady Allen, Esq., and Britton Allen, Esq., Allen Law Offices, PLLC, 1514 Glenwood Ave., Suite 200, Raleigh, NC 27604

For the Using and Consuming Public

Dianna W. Downey, Esq., Staff Attorney, Public Staff – North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

BY THE COMMISSION: On March 13, 2017, Wilkinson Solar, LLC (Applicant) filed an application for a certificate of public convenience and necessity for construction

of a solar photovoltaic electric merchant plant and registration of up to 74 MW.

On March 27, 2017, the Commission issued its first Order Scheduling Hearings, Requiring Filing of Testimony, Establishing Procedural Guidelines and Requiring Public Notice. This Order scheduled the public witness hearing for Wednesday, May 17, 2017, in Washington, North Carolina, and scheduled a hearing on Monday, May 22, 2017, at 2:00 p.m. in the Commission Hearing Room, the Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, for the sole purpose of receiving expert testimony of the parties.

On April 26, 2017, David Butcher and Alan Meijer filed Petitions to Intervene.

On April 27, 2017, the Public Staff filed a Motion for Extension of Time to File Testimony which was granted by the Commission on April 27, 2017.

The State Environmental Clearinghouse filed comments on May 2, 2017 and May 9, 2017.

On May 4, 2017, Petitioners Butcher and Meijer filed supplemental verified Petitions to Intervene. On May 4, 2017, the Public Staff filed the direct testimony of witness Evan D. Lawrence.

On May 5, 2017, the Applicant filed an Affidavit of Publication of Public Notice for four successive weeks on April 4, 11, 18 and 25 of 2017.

On May 11, 2017, the Applicant filed a Motion for Extension of Time to file rebuttal testimony and a Motion to Confirm Evidentiary Hearing Proceeding. The Motion for Extension of Time was allowed, and on May 12, 2017, Applicant filed prefiled supplemental testimony and exhibits of April Montgomery and Paul Thienpont.

On May 15, 2017, Intervenor Butcher filed a supplement to his motion to

intervene. The Commission issued an Order granting his Petition to Intervene on May 15, 2017. Also, on that date, the Commission issued an Order on Motion Regarding Hearing Procedure.

On May 17, 2017, the Commission issued an Order Denying Petition to Intervene for Mr. Meijer but noting that he could appear and testify at the public hearing on May 17, 2017 as a public witness. The public witness hearing was held on May 17, 2017, in Washington, North Carolina. During which, sixteen (16) public witnesses testified against the proposed CPCN.

On May 19, 2017, Notice of Appearance of Legal Counsel was filed on behalf of Petitioner Butcher, and Applicant filed a Motion to Take Judicial Notice and a Motion to Present Witnesses as a Panel. The Motions were not opposed and were granted at the May 22, 2017 hearing.

On May 22, 2017, the Commission held an evidentiary hearing as scheduled for the purpose of receiving testimony as contemplated by the Order on Motion Regarding Hearing Procedure.

On June 22, 2017, Applicant and David Butcher filed Proposed Orders.

On August 3, 2017, the Commission issued an Order Requiring Additional Post-Hearing Filings requiring the parties to submit additional filings addressing the status of negotiations and providing a forecast of whether a compromise is likely.

On August 30, 2017, David Butcher, non-party Terra Ceia Christian School and Applicant filed a Joint-Post Hearing Filing informing the Commission that David Butcher, the Terra Ceia Christian School, Harlene Van Staalduinen and Stuart Ricks had agreed to withdraw any and all objections and complaints against the project proposed by

Applicant, upon execution of a Summary Term Sheet, which was filed under seal as it constitutes confidential and proprietary information.¹ Also on that date, Applicant filed notice of withdrawals of objections from David Butcher, William Van Staalduinen on behalf of Terra Ceia Christian School, Harlene Van Staalduinen, Gertrude Respess, and Stuart Ricks.

On October 9, 2017, Applicant filed a CPCN layout amendment, which removed solar panels from the Respess parcel and relocated the battery storage facilities.

On October 11, 2017, the Commission, pursuant to N.C. Gen. Stat. § 62-110.1, granted Applicant a Certificate of Public Convenience and Necessity (CPCN) for construction of a 74-MW solar photovoltaic merchant plant electric generating facility located in Beaufort County, North Carolina, on the south side of Terra Ceia Road, between Vreugdenhil Road and Christian School, and the north side of Terra Ceia Road and east of Christian School Road, subject to various conditions.

On November 29, 2017, Applicant filed an additional CPCN Site Layout Amendment to substitute additional land for the removal of the Respess property north of Terra Ceia Road, which was removed due to the Agreement from Applicant's initial CPCN Site Layout Amendment. This additional CPCN Site Layout sought to expand the territory of the facility, which was granted in the CPCN approved on October 11, 2017. Due to the change of the site location, it was necessary for the Commission to enter an Order Requiring Publication.

On December 6, 2017, the Commission issued an Amended Order Requiring Publication of Notice and Further Review by the State Clearinghouse. The Order stated

¹ The Confidential Term Sheet is filed with the Commission and is referred to hereafter as "the Agreement".

Applicant shall not begin construction of the new portion of the footprint being proposed for the facility unless and until the Commission issues an order authorizing such construction.

On January 16, 2018 and January 26, 2018, the State Clearinghouse provided comments to this Docket.

On February 1, 2018, the Applicant filed an Affidavit of Publication of Public Notice for four successive weeks on December 8, 15, 22 and 29 of 2018.

On February 7, 2018, the Commission issued an Order Scheduling Further Hearing, Requiring Filing of Testimony, Establishing Procedural Guidelines and Requiring Public Notice.

On February 16, 2018, Applicant prefiled Direct Testimony and Exhibit of Witness April Montgomery.

On March 8, 2018, the Public Staff filed supplemental testimony of Witness Evan D. Lawrence.

On March 9, 2018, Deb Van Staalduinen, Marshall and Joann Lilley, and Kristina Beasley filed petitions to intervene, *pro se*. On March 12, 2018, Applicant filed a motion to deny those interventions. On March 14, 2018, Kristina Beasley, Deb Van Staalduinen, Marshall and Joann Lilley filed verified responses to Applicant's motion to deny their interventions.

On March 15, 2018, the Commission issued an Order denying the Petition to Intervene of Joann and Marshall Lilley, and granting the Petition to Intervene of Deb Van Staalduinen, subject to the condition that she file a complete, executed and notarized verification form as a supplement to her petition to intervene on or before March 19,

2018.

On March 16, 2018, the Commission issued an Order Rescheduling the Evidentiary Hearing in Raleigh, North Carolina until April 11, 2018.

On March 19, 2018, the Commission held a hearing in Washington, North Carolina to receive public witnesses, in which nine public witnesses testified, eight of which expressed opposition to the facility.

On March 26, 2018, Deb Van Staalduinien filed an additional petition to intervene, and Marshall and Joann Lilley filed a motion for reconsideration of the denial of their petition to intervene. On April 2, 2018, Applicant filed a motion to deny second petition to intervene of Deb Van Staalduinien.

On April 5, 2018, Applicant prefiled supplemental testimonies of witnesses Joe Von Wahlde, Paul Thienpont, and John Barefoot.

On April 6, 2018, the Commission issued its Second Order on Petition to Intervene, which granted to interventions of Marshall and Joann Lilley and Deb Van Staalduinien.

On April 11, 2018, the Commission held an evidentiary hearing in Raleigh, North Carolina.

Based on the testimony presented at the hearings and the entire record of this proceeding, including matters of which judicial notice has been taken, the Commission makes the following findings of fact:

FINDINGS OF FACT

1. Applicant is organized under the laws of the State of Delaware with its principal place of business in Chicago, Illinois.

2. The Commission issued Applicant a CPCN to construct a 74-MW solar photovoltaic electric generating facility to be located in Beaufort County, North Carolina on October 11, 2017.
3. After the CPCN Order, Applicant secured approximately 165 additional acres to the south of its approved footprint on which it intends to install panels to substitute for the panels removed pursuant to the Agreement between Applicant, Intervenor David Butcher and individuals of the Terra Ceia Christian School, Gertrude Respass, Harlene Van Staaduinien and Stuart Ricks.
4. Applicant filed with the Commission a letter that amended its Application for the original CPCN. The Commission concluded Applicant was required under N.C. Gen. Stat. § 62-82(a) to publish notice of the amended application, and the Commission found good cause to deliver copies of the notice to the Clearinghouse Coordinator of the Office of Policy and Planning of the Department of Administration for distribution by the Coordinator to State agencies having an interest in the application.
5. Applicant admits that it intends to construct the proposed facility approved in the CPCN granted on October 11, 2017, even if the Commission decides not to extend the CPCN to include the additional 165 additional acres acquired by Applicant.
6. Applicant has made an insufficient showing that the public convenience and necessity will be served by construction of the facility as proposed on the additional land requested by Applicant because Applicant acknowledges that the facility can be constructed without the additional land.

7. It is reasonable and appropriate to deny the requested amendment to the CPCN to Applicant.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 1

This finding is essentially informational and pertains to the identity of the applicant, and is not in dispute. It is supported by the application and the exhibits thereto and the prefiled testimony of Applicant witness Montgomery and Public Staff witness Lawrence.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 2-4

These findings are essentially informational, procedural or jurisdictional in nature and are not in dispute. They are supported by the application and the exhibits thereto and the prefiled testimony of Applicant witness Montgomery and Public Staff witness Lawrence.

North Carolina General Statute § 62-110.1 provides that no person may begin construction of a facility for the generation of electricity to be directly or indirectly used for furnishing public utility service without first obtaining from the Commission a certificate that the public convenience and necessity requires or will require such construction.

In instituting North Carolina General Statute § 62-110.1, Commission Rule R8-63 requires any person seeking to construct a merchant plant in North Carolina to apply for a CPCN. Commission Rule R-8-63(b)(2)(ii) requires the applicant to show the proposed site boundary and layout before obtaining a CPCN.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 5-7

These findings are supported by the application and the testimony of Applicant witness Montgomery, Public Staff witness Lawrence, and testimonies of the public witnesses.

North Carolina General Statute § 62-110.1 and Commission Rule R8-63 provide that no person may begin construction of a facility for the generation of electricity to be directly or indirectly used for furnishing public utility service without first obtaining from the Commission a certificate that the public convenience and necessity requires or will require such construction. An examination of the CPCN Site Layout Amendment, the exhibits attached thereto, and the testimony of the witnesses confirms that Applicant has complied with all filing requirements of the statute and the Commission's merchant plant certificate rule.

According to the application and testimony of Applicant witness Montgomery, the CPCN Site Layout Amendment removed approximately 200 acres of property located behind the Terra Ceia Christian School and the residence of Mr. Butcher and added approximately 165 acres south of Terra Ceia road. (T. V. 5, p 109). Witness Montgomery stated all aspects of the facility, including its generating capacity, panel technology, and construction have not changed, and that the Applicant's financial and operational ability have not changed since the original CPCN was granted, and that Layout Amendment does not impact the demonstrated need for the Facility. (T. V. 5, p 109).

G.S. § 62-110.1, and related Commission Rule R8-63, are intended to provide for the orderly expansion of electric generating capacity in order to create a reliable and economical power supply. *State ex rel. Utilities Comm. V. Empire Power Co.*, 112

N.C.App. 265, 278, disc. rev. denied, 335 NC 564 (1994). What constitutes ‘public convenience and necessity is primarily an administrative question with a number of imponderables to be taken into consideration.’” *State ex rel. Utilities Comm'n v. Carolina Coach Co.*, 260 N.C. 43, 52, 132 S.E.2d 249, 255 (1963) (quoting *Utilities Comm'n of N.C. v. Great Southern Trucking Co.*, 223 N.C. 687, 690, 28 S.E.2d 201, 203 (1943)). This regulatory statute was enacted to help curb overexpansion of generating facilities beyond the needs of the service area. *State ex rel. Utilities Com. V. High Rock Lake Asso.*, 37 N.C. App. 138, 140, 245 S.E.2d 787, 790 (1978). This act directs the Commission to consider the location of the facilities, the appropriateness of the site, and the need for the facility. *Id.* at 141-142. In this case, the Commission cannot limit its review only to the question of whether the additional facility serves the public convenience and necessity, but it must also determine whether the use of the Amended Site Layout is required in order to serve the public convenience and necessity.

The standard of the public convenience and necessity is relative or elastic, rather than abstract or absolute, and the facts of each case must be considered. *State ex rel Utils. Comm'n v. Casey*, 245 N.C. 297, 302 (1957). As herein discussed, the Commission has considered multiple factors in reaching its conclusion that Applicant has failed to carry its burden of proof to establish that the public convenience and necessity is served by Applicant’s amended site layout in this docket. As the Commission concluded in its Order Granting Certificate With Conditions No. EMP-92, Sub 0, it is reasonable for the Commission to require substantial evidence of the need for the Facility in the state and/or region, as required by Commission Rule R8-63(b)(3). Applicant failed to make such a showing in this matter.

Neither Applicant nor the Public Staff provided any evidence that the amended site layout is justified by the public need. The Applicants repeatedly stated that the amended site plan was intended to substitute or compensate the Applicant for the land area removed by the Agreement. (See T. V. 5, p 104, T. V. 4, p 63, and Applicant's CPCN Site Layout Amendment filed November 29, 2017 p 1). Of course, the question is not whether the Applicant must be compensated or other land substituted for the proprietary benefit of Applicant. Rather, the relevant question is whether the additional land included in the amended site plan is needed to accomplish the objective in the CPCN issued by the Commission. At the evidentiary hearing Applicant's attorney stated, "The Company can build that facility on the layout that was approved by the Commission in October [2017]." (T. V. 5, p 20). When asked on cross-examination whether the Applicant believes it can move forward with the construction of its project under its original CPCN, Applicant's witness Montgomery testified that affirmatively the Applicant could. (T. V. 5, p 127). Public Staff witness Lawrence testified that the purpose of the Applicant's amended site layout is to request that the Commission amend the CPCN to allow Applicant to incorporate additional land south of Terra Ceia road into the footprint of the facility. This additional land will be used for a portion of the facility's solar panels instead of the land to the north of Terra Ceia Road that was in the original application and approved in the CPCN. (T. V. 5, p 15). Notably, witness Lawrence did not make any determinations as to whether the additional land was needed for the project to proceed. Thus, as a threshold matter, it is apparent from the Applicant's statements and testimony that the additional land requested is not necessary for the Applicant to proceed with the project.

A number of the public witnesses testified that the amended site layout did not serve in the public's convenience. The issues raised by the public witnesses concerned the project's impact on wetlands, streams and ditches, contamination of drinking water due to the presence of chemical substances and heavy metals in the solar panels, and the loss of farmland. In its April 24, 2008 Order in Docket No. SP-231, Sub 0, the Commission discussed local authority over the siting of facilities, stating that "such decisions are, in most instances, best left to the local community through the exercise of its zoning authority rather than made by the Commission." Nonetheless, *High Rock Lake Assoc.*, 37 N.C. App. at 141, states that location and environmental concerns, while not at the heart of the regulatory process, are relevant considerations. The Commission requires substantial evidence to support the Commission's findings as to the appropriateness of the site and the need for the facility. *Id.* at 142.

In response to these concerns, the Applicant provided supplemental testimony of three witnesses. Applicant witness Joe von Wahlde's testimony provided the Commission with information in response to the allegations raised at the public hearing that the Applicant had not coordinated with the United States Army Corp of Engineers regarding wetland delineations. Witness von Wahlde stated that the two wetland delineations performed on the facility's site identified minimal jurisdictional areas with the project (T. V. 5, p 34). Applicant witness John Barefoot's testimony provided the Commission with information in response to stormwater runoff concerns that were raised by witnesses who testified at the public hearing. Witness Barefoot testified that he conducted a site visit on the original site layout, which included the Respress property and did not include the amended site layout, on June 19, 2017, and that he prepared a

memorandum detailing his assessment. (T. V. 5, p 84). Witness Barefoot's assessment was that the proposed development's impact to existing drainage patterns and flows will be negligible, or more likely, the proposed solar use will provide a reduction in runoff from the site. Furthermore, Witness Barefoot stated that in the event that the final design results in a different conclusion additional measures can be implemented on the site to address stormwater concerns. (T. V. 5, p 85). Witness Barefoot stated that the acreage added as part of the Site Layout Amendment is identical in all material respects to the Respass acreage and that his conclusions that the project's impact to the existing draining patterns will be negligible, or even reduce runoff, is equally applicable to the amended site layout.

Witness Barefoot stated that the only maintenance required to sustain the ditches is mowing the grass. (T. V. 5, p 91). When questioned as to whether the town of Terra Ceia uses heavy machinery to maintain the ditches, witness Barefoot responded that he wouldn't know that and the ditches looked like they have been mowed on the site visit and were maintained. (T. V. 5, p 91). Contrarily, at the May 23, 2017 hearing in Raleigh, witness David Butcher, a resident of the area for more than twenty-two years and an agricultural consultant, testified that the ditches require maintenance usually annually or biannually to keep the ditches clean. (T. V. 3, p 60). Witness Butcher stated that if the ditches are not maintained the hydrology of the area would change, that the water would stand over the land for longer periods of time, and that the land could revert back to wetlands. (T. V. 3, p 60).

A number of public witnesses testified that solar panels contain GenX , PFAS, and potentially harmful heavy metals. In response to those concerns the Applicant

provided the supplemental testimony of Applicant Witness Thienpont who stated that neither GenX nor PFAS were present in the solar panels used for the project. He based this opinion entirely on a memorandum from JinkoSolar, the solar panel manufacturer, provided as Supplemental Exhibit 1. He further stated that the level of heavy metals used in the solar panels pass the Toxicity Characteristic Leach Procedure (TCLP) test and therefore allows for their disposal in landfills. (T. V.5, p 56).

On cross examination witness Thienpont acknowledged that solar panels may contain heavy metals, but he repeated they comply with the TCLP standards. He stated he could not speak to whether residence of Terra Ceia received their water from public sources or wells. After being asked whether a landfill would be a safe place to get drinking water, he acknowledged it would not. (T. V.5, p 56). When asked how far from a landfill containing solar panels would be a safe distance for obtaining drinking water, he again stated he could not comment. Witness Thienpont was then asked whether he was aware that coal ash also passed the TCLP standard, and once again stated he could not comment. (T. V.5, pp 58-59).

With regards to the selection of JinkoSolar, Witness Thienpont stated the Applicant has rigorous selection criteria for its suppliers that is based on the quality of the product, the technology and bankability of the supplier. Intervenors introduced Intervenor Thienpont Cross Exhibit Number 1, which showed JinkoSolar faced an investor lawsuit over pollution violations. When asked if this is consistent with JinkoSolar's statement in Supplemental Exhibit 1 that it "always conducts business in accordance with applicable laws rules, and regulations", witness Thienpont again stated he could not comment. (T. V.5, pp 59-61).

When under questioning from Commissioner Patterson, Witness Thienpont acknowledged he could not testify with certainty that soldering of the solar panels were free of lead and testified that he did not consider the manufacturing process itself and only reviewed the finished solar panels. (T. V. 6, p 67).

As previously cited, the Commission requires substantial evidence to support the Commission's findings as to the appropriateness of the site and the need for the facility. *High Rock Lake Assoc.*, 37 N.C. App. at 142. Both the public witnesses as well as the Commission raised valid concerns as to the appropriateness of the site due to the presence of heavy metals involved in the solar manufacturing process. This problem is compounded by Applicant's admission that it did not need the additional land in order to construct the project as originally proposed. The Commission's actions always require it to balance the interests of the public with the interests of the Applicants. It simply makes no sense for the Commission to expose the additional land to potential risks when, by its own admission, Applicant does not need the additional land to complete the proposed project. The statutory requirement of public convenience and necessity is what is required for the public and not of an individual, including the Applicant in this case, *Utilities Commission v. Piedmont Natural Gas*, 346 N.C. 558, 488 S.E.2d 591 (1997) . Applicant simply did not offer substantial evidence to prove to the Commission that use of the amended site layout is in the public convenience and necessity and accordingly, the Commission concludes that the site plan should not be changed to include the additional land proposed by Applicant.

This Order does not signal a change in North Carolina's solar policy. North Carolina is a leader in adding renewable generation, a large percentage being solar. Since

the beginning of 2007, North Carolina has experienced the installation of more than 1,300 MW of solar capacity. More than 4,000 MW of third-party solar capacity is in development and requesting to interconnect. However, in this case, Wilkinson Solar has already been granted a CPCN to build its facility and has stated that it can build the facility without extending the site plan. Therefore, considering the risk of contamination and reversion of the land to wetlands, as well as the potential loss of agricultural land, this Commission cannot approve the extension of the Applicant's facilities footprint when that extension is unnecessary for the Applicant to proceed with its project.

IT IS THEREFORE, ORDERED, as follows:

1. That the amendment to certificate of public convenience and necessity shall not be issued to Wilkinson Solar, LLC.
2. Wilkinson Solar, LLC can move forward with the CPCN that was granted to it on October 11, 2018

This this ____ day of _____, 2018.

NORTH CAROLINA UTILITIES COMMISSION

Martha Lynn Jarvis, Chief Clerk

CERTIFICATE OF SERVICE

I certify that all parties of record on the service list have been served with the foregoing Proposed Order either by electronic mail or by deposit in the U.S. Mail, postage prepaid.

This the 21st day of May, 2018.



Brady W Allen