

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 8734

Investigation pursuant to 30 V.S.A. §§ 30 and)
209 into operations during icing conditions by)
the Georgia Mountain Community Wind, LLC)
wind electric generation facility in Georgia,)
Vermont

Order entered:

1/13/2017

ORDER DENYING RECONSIDERATION

I. Introduction and Background

On May 25, 2016, the Vermont Public Service Board (“Board”) opened this investigation to determine whether operation of the Georgia Mountain Community Wind, LLC (“GMCW”) wind electric generation facility (the “Project”) during icing conditions constituted a violation of the Project’s certificate of public good (“CPG”) or its winter operating protocol (the “Protocol”).

On October 13, 2016, the Board issued an Order (the “Violations Order”) in which it determined that GMCW had twice violated the requirements of the Protocol and the Board’s Order dated January 13, 2012, which approved the Protocol (the “Approval Order”), by operating the Project on two separate occasions when ice had formed on the turbine blades.

On October 27, 2016, GMCW filed a motion for reconsideration of the Violations Order.

On November 14, 2016, the Vermont Department of Public Service (the “Department”) filed a response to GMCW’s motion.

The Board heard oral argument on GMCW’s motion on November 30, 2016, in the Susan M. Hudson Hearing Room in Montpelier, Vermont.

For the reasons discussed below, we deny GMCW’s motion for reconsideration and identify the amount of a civil penalty that we believe is appropriate given the circumstances surrounding the violations. GMCW may elect to pay the identified civil penalty or, pursuant to 30 V.S.A. § 30, request a hearing at which a hearing officer will take evidence on the appropriate amount of a penalty and make a recommendation on such amount for the Board’s consideration.

II. Positions of the Parties

GMCW

In its motion, GMCW asserts that the Violations Order ignores the terms of the Approval Order and thus the requirements of the Protocol itself. GMCW states that the Board's Approval Order supplanted the requirements of a May 31, 2011, Order (the "Setbacks Order") because the Approval Order approved terms in the Protocol that GMCW contends differ from the requirements in the Setbacks Order.

According to GMCW, the language in the Protocol is the controlling regulatory language and that language only requires turbine curtailment or shutdown when both icing and extreme weather conditions are present. GMCW asserts that the Violations Order, by relying on the requirements in the Setbacks Order, makes mere surplusage of language in the Protocol that requires the presence of extreme weather conditions in addition to icing before Project operations are affected.¹

GMCW also argues that the use of the phrases "subject to shutdown" and "curtail operations" in the Protocol indicates that something less than a full shutdown of the turbines is required when both icing and extreme weather conditions are present – something GMCW contends is unaccounted for in the Violations Order.²

Also, according to GMCW, any ambiguity created by the Protocol's language must be resolved in favor of GMCW as a matter of law.³

Lastly, GMCW argues that the Violations Order leads to an absurd result because it must be interpreted to require turbine shutdowns even when "so much as a molecule" of ice is present on the blades, or "whenever a snowflake might make contact with the blades." Such a result, asserts GMCW, constitutes a manifest injustice and violates the legal principle that permit conditions must be reasonable.⁴

1. GMCW motion at 4-5.

2. GMCW motion at 5.

3. GMCW motion at 5-6.

4. GMCW motion at 6-7.

Department

The Department asserts that GMCW has failed to establish that any of the grounds that would support reconsideration of the Violations Order are present in this case.⁵ The Department asserts that, instead, GMCW's motion "seeks only to relitigate the proper interpretation of the GMCW Winter Operating Protocol . . . and the resulting obligations imposed on GMCW."⁶

According to the Department, the arguments GMCW raises – that the plain language of the Protocol requires the presence of extreme weather conditions to lead to turbine shutdown and that the Violations Order would lead to unreasonable results – are arguments that were already considered and rejected by the Board in the Violations Order. The Department argues that a motion for reconsideration is an inappropriate vehicle to relitigate these issues and states that GMCW has offered nothing additional that would warrant a change in the outcome of this proceeding.⁷

The McLanes

The McLanes did not submit any written response to GMCW's motion. However, Mr. McLane appeared at the oral argument and stressed the importance of shutting down the turbines whenever ice is present on the blades. Mr. McLane stated that when the blades are iced the sounds produced by the turbines increase to a level that, according to Mr. McLane, is in excess of allowable limits.⁸

III. Discussion1. Violations

We deny GMCW's motion because the motion does not: 1) demonstrate any manifest error of law or fact in the Violations Order; 2) present any newly discovered or previously unavailable evidence; 3) demonstrate any manifest injustice that would result from the Violations Order; or 4) demonstrate an applicable intervening change in controlling law.

The disposition of a motion to alter or amend a judgment rests with the discretion of the trial court.⁹ Vermont Rule of Civil Procedure 59(e) gives courts "broad power to alter or amend

5. Department response at 1-2.

6. Department response at 1.

7. Department response at 2.

8. Tr. 11/30/16 at 7-10, 18-19 (McLane).

9. *Alden v. Alden*, 187 Vt. 591, 592 (2010) (citations omitted).

a judgment.”¹⁰ In addressing a Rule 59(e) motion “the court may reconsider issues previously before it, and generally may examine the correctness of the judgment.”¹¹ The purpose of Rule 59(e) is to avoid an unjust result due to inadvertence of the Board, as opposed to that of a party.¹² However, the rule is not intended to permit parties to relitigate issues or correct previous tactical decisions.¹³ The motion must “present facts which could not, with the exercise of due diligence by counsel, have been placed before the court before the order complained of was issued.”¹⁴

In the instant case, GMCW is presenting arguments that it has already made and which we considered and rejected in issuing the Violations Order. The motion on its face does not present any newly discovered or previously unavailable evidence, nor does it point to an applicable intervening change in controlling law.

We also disagree with GMCW that the Violations Order ignores the intent of the Protocol, which GMCW contends requires both extreme weather conditions and ice accumulation on the turbine blades before turbine shutdown is mandated. In the Setbacks Order, we made the following finding based on evidence provided by GMCW’s expert witness:

GMCW is proposing to implement a winter operating protocol that will curtail operation of the wind turbines in the event of icing and when extreme weather conditions present unsafe conditions for the general public. Automatic controls would shut down the system under any of the following circumstances:

- The installed ice monitoring device(s) and heated wind sensors (installation subject to reliability testing) detect that unsafe conditions are present due to icing conditions;
- Ice accretion is recognized by the remote or on-site operator;
- Air temperature, relative humidity and other meteorological conditions at the site are conducive to ice formation;
- Air temperature is several degrees above 0 degrees Celsius after icing conditions; and

10. V.R.C.P. 59(e) Reporter’s Notes.

11. *Drumheller v. Drumheller*, 185 Vt. 417, 432 (2009) (citing *In re Robinson/Keir Partnership*, 154 Vt. 50, 54 (1990) (citations omitted)).

12. *Osborn v. Osborn*, 147 Vt. 432, 433 (1986).

13. *In re Cent. Vt. Pub. Serv. Corp.*, Docket Nos. 6946/6988, Order of 5/25/05 at 3.

14. *Cent. Vt. Pub. Serv. Corp.*, Docket Nos. 6946/6988, Order of 5/25/05 at 3 (quoting *Brown v. International Harvester Corp.*, 142 Vt. 140, 142-43 (1982)).

- Any other weather conditions which appear unsafe.¹⁵

The initial sentence of the finding contains the same conjunctive language found in the Protocol that GMCW relies on to argue that both extreme weather conditions and ice accretion are necessary before turbine operations are curtailed. However, the finding, based on GMCW's own expert testimony, explains that the Protocol would require turbine shutdown under any of the enumerated conditions that followed. Those enumerated conditions describe four separate scenarios where icing conditions exist or are likely to exist, and also include "[a]ny other weather conditions which appear unsafe."

This finding, based on GMCW's own proposal, demonstrates that the conjunctive language relied upon by GMCW actually is intended to provide an independent ground for turbine shutdown beyond the listed icing conditions, and not an additional requirement for turbine shutdown when the listed icing conditions are present. GMCW never challenged this finding or requested that it be amended in a manner that would reflect the position it is now taking in this proceeding.

Based on evidence provided by GMCW's witness about GMCW's proposal, we directed GMCW to:

prepare a winter operating protocol, subject to review by the parties and approval by the Board prior to commencement of construction, which shall require that the proposed turbines be placed in pause mode under any of the following circumstances: (a) installed ice monitoring device(s) or heated wind sensors (installation subject to reliability testing) detect if unsafe conditions are present due to icing conditions; (b) ice accretion is recognized by the remote or on-site operator; (c) air temperature, relative humidity and other meteorological conditions at the site are conducive to ice formation; (d) air temperature is several degrees above 0 degrees Celsius after icing conditions; and (e) any other weather conditions that may result in the unsafe operation of the turbines.¹⁶

This condition, contained in our Setbacks Order, is consistent with GMCW's proposal for a winter operating protocol based on representations by GMCW's own expert witness. Based on GMCW's proposal as presented by GMCW's witness, we were "persuaded that implementing an

15. Docket 7508, Order of 5/31/11 at 5-6.

16. Docket 7508, Order of 5/31/11 at 10-11.

icing protocol that will stop the turbine blades from turning in situations where ice accretion on the blades is present will minimize the risks associated with ice throw.”¹⁷

GMCW’s current argument that the Violations Order ignores the language and intent of the approved Protocol misses the mark because the conjunctive language it relies on in support of its argument first appeared during the hearings on the Setbacks Order and was given a very different meaning by GMCW’s witness. GMCW’s assertions thus essentially ask the Board to ignore the representations of GMCW’s witness as to the meaning of the language in the Protocol. As a result, we reject GMCW’s argument that the Approval Order somehow supercedes and modifies the requirements of the Setbacks Order. Rather, the Approval Order accepted the Protocol based on evidence provided by GMCW’s own witness regarding the intent of the language at issue that was consistent with the requirements in the Setbacks Order. This is also consistent with the conclusions of the Violations Order regarding the requirements of the Protocol.

We are also unpersuaded by GMCW’s argument that the Protocol’s use of the phrases “subject to shutdown” and “curtail operations” introduce an ambiguity in the Protocol’s requirements relative to the Setbacks Order. The phrase “subject to” means that for one thing to be true, another thing must occur.¹⁸ In this instance, it simply means that shutdown of the turbines is dependent on the presence of any of the listed conditions. We find no ambiguity here. With respect to the use of the word “curtail,” it simply indicates that if some, but not all, turbines are experiencing ice accumulation, then only those turbines experiencing the accumulation will be subject to shutdown.

GMCW’s motion also fails to point to a manifest error of law or fact in the Violations Order. With respect to the existence of any violations, the only relevant fact is the one that GMCW stipulated to: that one or more of GMCW’s turbines operated with ice present on the blades for a period of time on March 11 and 14, 2016.¹⁹ GMCW’s admission is factual evidence that the turbines were operated with ice on the blades sufficient to find that the two violations occurred. While we agree that additional evidence might be needed if GMCW were claiming

17. Docket 7508, Order of 5/31/11 at 7.

18. “[D]ependent on something else to happen or be true.”
<https://www.merriam-webster.com/dictionary/subject%20to>.

19. Parties’ stipulated material facts at 1.

that a single molecule of ice or a single snowflake was present on the blades, or that the blades were merely coated in frost, such is not the case here. GMCW has admitted that it operated its turbines with ice present on the blades and has never characterized the facts in this proceeding as anything else.

We also disagree with GMCW that the Violations Order fails to give effect to the principle that any ambiguity in GMCW's permit conditions must be resolved in GMCW's favor because a review of the three relevant orders in conjunction with the evidence from GMCW's witness demonstrates that there is no ambiguity in the Protocol's requirements.

The Vermont Supreme Court has stated that, "[i]n construing permit conditions, we rely upon normal rules of statutory construction. Our principal concern is 'to implement the intent of the draftpersons.' Ordinarily, we do so by accepting the plain meaning of the words because we presume that they express the underlying intent."²⁰

As discussed above, the meaning of the language at issue, based upon the testimony of GMCW's own expert regarding the operation of the proposed Protocol, is clear. Extreme weather conditions provide a basis for turbine shutdown even in the absence of icing; they are not a prerequisite to shutdown when icing is already present. Because the Violations Order is consistent with the evidence presented by GMCW's witness, there is no ambiguity in what is required of GMCW when icing conditions occur and therefore no need to resolve any uncertainty in GMCW's favor.

We also disagree with GMCW that enforcement of the Violations Order will result in a manifest injustice. GMCW asserts that application of the Violations Order will require it to shut down turbine operations in the presence of even a "molecule" of ice or "whenever a snowflake might make contact with the blades."

However, the requirements set forth for the Protocol, as detailed in the Setbacks Order, were based on evidence from GMCW's own expert witness that there would be approximately 16 to 18 icing days per year at the Project site,²¹ a number far below the number of days in a typical Vermont winter when the air temperature would be expected to drop to freezing or below, or when there would be light snowfall or frost present at the turbine site. This estimated number

20. *Agency of Natural Resources v. Weston*, 2013 VT 58, ¶ 16 (citations omitted).

21. *See* Docket 7508, Order of 5/31/11 at 6.

of days is the number of days that GMCW itself expected it would need to subject the Project to curtailment or shutdown as a result of the conditions it proposed. We are not persuaded that requiring GMCW to operate the Project consistent with the representations it made during the hearing that led to the Setbacks Order can constitute manifest injustice.

For the foregoing reasons, we deny GMCW's motion for reconsideration of our October 13, 2016, Order in this matter.

2. Civil Penalty

Section 30 of Title 30 provides for the imposition of a civil penalty for a violation of a final Board order. In this case, we have determined that GMCW twice violated the requirements of the Protocol and the Approval Order by operating the Project on two separate occasions when ice had formed on the turbine blades.

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

(b) The board 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 that the Board 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.

Based on our review of the documents filed to date and the arguments presented at oral argument we have concluded that GMCW is liable for two separate violations for operating its turbines with ice present on the blades. Our consideration of the eight factors enumerated in 30 V.S.A. § 30(c) in light of the information presented to us so far leads us to propose that GMCW pay a civil penalty in the amount of \$2,000.00, representing \$1,000.00 for each of the two violations.

Section 30 provides GMCW an opportunity for a hearing prior to the imposition of any civil penalty. Therefore, if GMCW declines to accept and pay the proposed penalty, it shall request a hearing no later than the close of business 30 calendar days from the date of this order. In that event, the case shall be returned to the hearing officer to take evidence on the appropriate amount of a civil penalty. The amount we propose today should in no way be taken as an indication of the amount of a civil penalty we may impose after additional evidence is presented at a hearing, if one is requested.

If GMCW is amenable to accepting the penalty proposed in this Order, it shall pay a civil penalty of \$2,000.00 by sending to the Public Service Board at 112 State Street, Montpelier, VT 05620-2701, a check in that amount made payable to the State of Vermont within 30 days of the date of this Order.

SO ORDERED.

Dated at Montpelier, Vermont, this 13th day of January, 2017.

s/James Volz)
)
s/Margaret Cheney)
)
s/Sarah Hofmann)

PUBLIC SERVICE
 BOARD
 OF VERMONT

A TRUE COPY
 OFFICE OF THE CLERK

FILED: January 13, 2017

ATTEST: *Judith C. Whitney*
 Clerk of the Board

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

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