

## An Opportunity For FERC To Clarify The 1-Mile Rule

By **George Cannon Jr. and Shawn Whites**

*Law360, New York (July 7, 2017, 11:53 AM EDT)* -- On June 9, 2017, Beaver Creek Wind II LLC and Beaver Creek Wind III LLC (together, “Beaver Creek”) responded to a deficiency letter from Federal Energy Regulatory Commission staff seeking further information on Beaver Creek’s calculation of the “one-mile” rule in its applications for certification as qualifying small power production facilities (QFs).

At issue is Beaver Creek’s proposed “weighted geographic center” methodology used to calculate the distance between wind projects consisting of multiple pieces of geographically dispersed electric generating equipment (i.e., wind turbines) for the purposes of applying the one-mile rule under the Public Utility Regulatory Policies Act of 1978 (PURPA).



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With a potential FERC quorum on the horizon, the instant case provides the new FERC commissioners with an opportunity to establish a preferred methodology, if any, for measuring one mile for purposes of PURPA. As such, the outcome could have immediate impacts for renewable energy project developers, particularly those developing wind projects, as they perform due diligence on property selection and equipment siting when planning multiple projects.

### One-Mile Rule

Under PURPA’s “mandatory purchase obligation,” a public utility is generally required to purchase all of the output of QFs with which it is interconnected at the utility’s avoided cost rate. A facility qualifies as a QF if its capacity is less than 80 MW, which includes the aggregated capacity of other small generation facilities that (1) use the same resource type, (2) are owned by the same person or its affiliates, and (3) are located at the same site.[1]

In determining whether two or more facilities are located at the same site, FERC’s regulations specify that a facility “located within one mile of the facility for which [QF status] is sought” — as measured by the distance between the electric generating equipment of the facilities — is deemed to be “located at the same site.”[2] Since developers often pursue multiple projects within the same general vicinity, two 80 MW facilities owned by affiliates would not qualify as separate QFs if they are located within one mile of each other.

### Beaver Creek’s Weighted Geographic Center Methodology

On Feb. 9, 2017, Beaver Creek applied for QF status for two approximately 80 MW wind projects in Montana made up of 32 wind turbines each. Beaver Creek notes that the projects are contiguous to two additional 80 MW wind projects, although the two Beaver Creek projects are not affiliated with each other or the other two projects.[3] Despite their stated non-affiliation, Beaver Creek nonetheless acknowledges that “the [close] proximity of these four wind projects raises a question of how the calculation of the ... one-mile rule would be applied [if] the Commission determined that the [projects] were affiliated” or if the Beaver Creek projects decide at a later date to form an affiliate relationship.[4]

While the distance between the projects’ electric generating equipment (i.e., wind turbines) serves as the relevant measurement for applying the one-mile rule, Beaver Creek argues that such an approach poses a “unique challenge” for wind projects. Unlike other renewable energy projects with less stringent siting requirements and fewer pieces of generating equipment, Beaver Creek notes that the siting of wind projects is “determined based on the specific topography of the region”[5] in order to maximize the wind resource, which requires the dispersal of multiple wind turbines across a large stretch of land.

Beaver Creek instead proposes that the “appropriate application of the one-mile rule to wind facilities is to apply the distance calculation to the weighted geographic center of the turbine array,”[6] since each individual wind turbine forms a piece of the project as a whole, ultimately “converg[ing] to a central point for collection.”[7] Beaver Creek notes that, when measuring from this geographic center, each of the projects satisfies the one-mile rule.

NorthWestern Corporation, the utility required to purchase the output of the projects, protested the proposed methodology, arguing that the one-mile rule is “unambiguous” — the electric generating equipment is the wind turbines, and the distance between the two closest turbines is less than one mile.[8]

### **Beaver Creek’s Responses to FERC’s Deficiency Letters**

FERC’s deficiency letters asked Beaver Creek to (1) explain how its weighted geographic center calculation of the one-mile rule complies with the commission’s requirement that the “distances [between two facilities] shall be measured from the electrical generating equipment of a facility,” (2) provide the distance between the wind projects by measuring the distance between the two closest individual wind turbines and (3) submit a topographical map depicting the location of each individual wind turbine.[9]

In its June 9, 2017, response, Beaver Creek repeats many of the same arguments made in its original application, stressing that “measur[ing] the distance between wind generation facilities” using individual wind turbines “is an impractical view on what constitutes the ‘facility’ or ‘electrical generating equipment’ for purposes of applying” the one-mile rule.[10] Beaver Creek then notes that, since the “Commission has provided little guidance on how to calculate the distance between wind generation facilities for purposes of calculating the one-mile rule,”[11] the weighted geographic center methodology serves as a reasonable proxy that is easily applicable to all wind projects.

Crucial to Beaver Creek’s argument is the fact that, when taking into account the 2.5 MW capacity of each individual wind turbine, “there is no area within a one-mile radius of [each of the projects] with more than 80 MW of generation capacity.”[12]

### **Implications**

Beaver Creek is essentially asking the commission to reinterpret the one-mile rule. In previous orders on QF applications, the commission took the position that the one-mile rule is a “rule and not a rebuttable presumption” in response to protests that two projects technically greater than one-mile apart should nonetheless fail the test because they “gamed” PURPA.[13]

Though that context differs from the instant case, which involves the standard of measurement for applying the rule, the commission’s language appears to be clear — the one-mile rule is not open to interpretation.

Concerns over PURPA’s one-mile rule were most recently discussed at a June 2016 FERC technical conference, where at least one participant, the American Wind Energy Association, urged the commission to “publish information about how it measures one mile.”[14] Such information has yet to be published, though it could come through the issuance of an order on Beaver Creek’s applications once quorum is restored at FERC.

The future commission will thus need to determine whether the use of a weighted geographical center methodology is an acceptable approach for calculating the one-mile rule or whether the rule’s standard of measuring from the “electric generating equipment” is also a bright line. In any event, a clarification of the commission’s policy regarding the one-mile rule will provide increased regulatory certainty for developers of projects hoping to achieve QF status.

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[1] 18 C.F.R. § 292.204(a)(1) (2017).

[2] *Id.* § 292.204(a)(2).

[3] The additional projects are Beaver Creek Wind LLC and Beaver Creek Wind IV LLC, together with Beaver Creek Wind II LLC and Beaver Creek Wind III LLC.

[4] Beaver Creek Wind II LLC, Application for Certification, QF17-673-000, at 12 (filed Feb. 9, 2017). While two applications were submitted in two separate dockets, both applications are substantively the same and are therefore referred to as one application in this post.

[5] *Id.* at 13.

[6] *Id.* at 12.

[7] Beaver Creek Wind II, LLC, Motion for Leave to Answer and Answer, Docket No. QF17-673-000, at 5 (filed March 17, 2017).

[8] NorthWestern Corp., Motion to Intervene, Motion to Consolidate, and Protest, Docket No. QF17-

673-000, at 6 (filed March 2, 2017).

[9] FERC Staff, Deficiency Letter, Docket No. QF17-673-000, at 2 (May 10, 2017).

[10] Response of Beaver Creek Wind II LLC to May 10, 2017 Deficiency Letter, Docket No. QF17-673-000, at 3 (filed June 9, 2017).

[11] Id.

[12] Id. at 5.

[13] See, e.g., DeWind Novus LLC, 139 FERC ¶ 61,201, at P 25 (2012).

[14] American Wind Energy Association, Post-Technical Conference Comments, AD16-16-000, at 6 (filed Nov. 15, 2016).