STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7156

Petition of UPC Vermont Wind, LLC, for a Certificate of Public Good, pursuant to 30 V.S.A. § 248, authorizing the construction and operation of a 52 MW wind electric generation facility, consisting of 26 wind turbines, and associated transmission and interconnection facilities, in Sheffield and Sutton, Vermont	)

Order entered: 9/8/2006

ORDER RE MOTION TO JOIN

I. Introduction

On May 12, 2006, Universal Health Services, Inc. and UHS of Sutton, Inc. (collectively "UHS") and Ridge Protectors, Inc. ("RPI") filed with the Public Service Board ("Board") a motion to join, as necessary parties, the lessors of the land UPC Vermont Wind, LLC ("UPC") has leased for UPC's proposed wind generation project. In this Order we deny UHS and RPI's motion for the reasons explained below.

II. Background

The Motion

UHS and RPI assert that "unlike most merchant generators, UPC does not own the land on which its turbines will sit" but rather leases the land from the underlying property owners. The moving parties contend that, due to this fact, the lessors are necessary parties and should be joined, pursuant to Vermont Rule of Civil Procedure 19(a). The moving parties set forth three reasons why joinder is necessary in this Docket.

First, UHS and RPI contend that UPC's lessors are necessary parties to ensure that conditions contained in any Board order regarding this Docket can be enforced. The moving parties assert that the lessors will not be bound by the Board's order, and therefore, conditions that affect the land which the lessors are leasing to UPC, such as those related to construction access, wetlands, and decommissioning, might not be implemented if UPC were to default on its obligations. UHS and RPI provide the analogy of Act 250 rules that require that all persons with a substantial property interest be parties to an application.

Second, UHS and RPI contend that joining the lessors to this Docket could prevent subsequent litigation. The moving parties provide as an example a situation where wind generation facilities would need to be decommissioned and UPC has defaulted on its obligations. The moving parties assert that litigation could be necessary to establish that the landowners would be required to remove the facilities and remediate the site.

Third, UHS and RPI contend that joining the lessors is necessary to protect the lessor's interests. The moving parties contend that a Board order, regardless of whether a certificate of public good ("CPG") is issued, would affect the lessors. If the Board denied a CPG, the leases with UPC would likely have little value. If the Board issued a CPG for the proposed project, the Board could impose conditions on UPC's use of the lessor's land.

Responses

On May 22, 2006, the Department of Public Service ("Department") filed a response opposing UHS and RPI's motion. The Department contends that the moving parties have not met their burden of proof demonstrating a reasonable potential for inadequate or conflicting judgments if the lessors are not joined and, therefore, the motion should be denied.

The Department asserts that 30 V.S.A. § 248 is concerned only with the public good, not the individual rights of private landowners and, consequently, the lessors are not necessary parties to these proceedings. The Department further contends that the issues raised by the moving parties regarding conditions imposed by the Board are irrelevant. According to the Department, "the only question is whether or not the petitioner can meet the conditions. If the petitioner is unable to fulfill certain conditions, it must either ask the Board to amend the order or simply not proceed with the project." The Department contends that "[t]he leases are not inextricably linked to any of the criteria under section 248 and the Board can therefore render a decision without joining the lessors." The Department further states that the moving parties' reliance on the Act 250 rules is unavailing because Act 250 permits run with the land, while

Section 248 CPGs are revocable licenses that are held only by the certificated entity, with any conditions of the CPG imposed on the petitioner and not on a lessor landowner.

Finally, the Department contends that the lessors' interests are not a subject of this proceeding and, therefore, cannot be prejudiced by the Board's order.

On May 30, 2006, UPC filed a response opposing UHS and RPI's motion. UPC contends that Section 248 does not require joinder of lessors, with the express language of Section 248 and Vermont Supreme Court rulings confirming that the purpose of Section 248 review is to determine whether a project promotes the general good of the state, not to address the interests of private landowners. UPC states that it is bound by any conditions imposed by the Board, and if UPC cannot meet these conditions, the project will not be allowed to proceed. Further, UPC points out that "the Board may exercise its enforcement authority under 30 V.S.A. § 30 in the event UPC violates a Board order."

UPC notes an April 21, 2004, decision by the Board declining to join landowners involved in a proposed wind measurement tower.[1] In that decision the Board stated that the moving parties "failed to provide sufficient demonstration that joinder of the landowners is needed to ensure repair and restoration of the site." UPC contends that the present motion suffers from the same shortcomings.

UPC contends that the moving parties' "concerns regarding remediation and decommissioning can be fully addressed by conditions the Board may choose to attach to the CPG for this Project, and these conditions can and will be satisfied and enforceable within the scope of UPC's agreements with the landowners." UPC proposes that, if the Board is concerned with UPC's agreements with the lessors, the Board can require a filing from UPC demonstrating that it has adequate agreements with landowners to fully satisfy all conditions of the Board's order.

UPC asserts that the proceedings will not prejudice lessors' interests because the lessors had the opportunity to protect their interests during negotiations on the lease agreements. According to UPC, "[t]he landowners entered their agreements with UPC well aware of UPC's intended use of the property, and made their own calculations of the risks and benefits of these

1. Docket 6884, Order of 4/21/04.

agreements." UPC also questions the moving parties' standing to raise these issues on the landowners' behalf, contending that "[i]n this case none of the landowners have sought to intervene, and there is no basis for RPI/UHS to stand in their shoes and attempt to represent their interests." Further, UPC asserts that courts have determined that a financial interest in the outcome of litigation is insufficient to render a party necessary for purposes of Rule 19.

Finally, UPC contends that the moving parties have not provided any support for their motion through relevant statute, regulation, or case law. UPC asserts that none of the cases cited by UHS and RPI are sufficiently on point to support its motion.

On June 2, 2006, UHS and RPI filed a reply to the Department and UPC's comments. UHS and RPI contend that UPC and the Department "have not adequately addressed the fact that this petition involves the siting of a utility-scale wind project on the land of individuals and other entities that are not present in this proceeding." UHS and RPI contend that, if the lessors are not parties, "additional proceedings will be required merely to establish that these landowners must comply with the Board's order." Finally, the moving parties contend that the Board has jurisdiction over the lessors.

On June 7, 2006, the Board issued a memorandum requiring UPC to file copies of the leases and provided parties an opportunity to file comments on the leases and UHS's and RPI's June 2 comments. UPC made the required filing on June 14, 2006.

On June 20, 2006, UHS and RPI filed comments stating that the leases are inadequate, for several reasons. First, UHS and RPI note that four of the seven agreements are options rather than leases. Additionally, UHS and RPI contend that the three leases do not contain any requirement "that the Lessors agree to any and all conditions imposed by the Board on their land" and further "the leases themselves contain no provisions that would ensure that the turbines are decommissioned after the lease is terminated or that environmental remediation occurs."

On June 20, 2006, UPC filed comments stating that a requirement that the lessors be joined would be both "harsh and unreasonable" and would "have the effect of pressuring UPC's lessors to withdraw their support for the Project." UPC further disputes UHS and RPI's contention that the lessors are "companies" within the meaning of 30 V.S.A. § 201(a). Additionally, UPC asserts that the leases provide UPC with the rights to comply with likely

Board-imposed conditions but that "it makes the most sense for the Board to review UPC's leases post-certification, once the Board has heard the evidence and established the final CPG conditions."

On June 29, 2006, the Board issued a memorandum requesting additional briefing on the issue. In particular, the Board requested comments on the Board's jurisdiction over the lessors if they were made parties to this Docket, and whether the leases, even if they contained sufficient assurances, could be invalidated.

On July 13, 2006, the Department filed comments addressing these issues. The Department contends that the Board has no jurisdiction to impose conditions on the lessors because such authority is not expressly granted to the Board nor is it necessarily implied. The Department contends that:

> [w]hile the landowners initially appear to fit the definition of a 'company' under 30 V.S.A. § 201 because they own property that is intended to be used in conjunction with public utility service . . . Section 203 expressly limits the Board's jurisdiction over 'companies' to those that are 'engaged in the manufacture, transmission, distribution or sale of gas or electricity . . . .'

The Department further contends that "the leasehold and lease option interests held by the petitioner constitute a property interest owned by an entity that is seeking authority to engage in the generation, transmission and sale of electricity for eventual use by the public (30 V.S.A. § 203(1)) and thus would fall within the Board's authority." The Department concludes that the Board could require that the leases be recorded in the appropriate municipal land records. Finally, the Department states that the leases could be determined to be void under certain circumstances, but contends that, even if this were to occur, "it is highly likely that the landowner would cooperate in providing access for the decommissioning."

On July 14, 2006, UHS and RPI filed comments. UHS and RPI contend that the Board has jurisdiction over the lessors, because their property is being used in connection with the generation of electricity. UHS and RPI further state that the Board "must exercise jurisdiction over the landowners if it will put in place conditions that affect their land. To put in place any such conditions that affect a property interest without the participation of the owner would raise serious due process concerns." The moving parties assert that the relevant issue at hand is not whether any Board-imposed conditions would run with the land, but "whether the court's judgment will bind successors to the land." With respect to this issue, UHS and RPI contend that "it is equally well established that court judgments affecting land are conclusive as to person succeeding to that interest in the land." Finally, UHS and RPI assert that there are situations, such as bankruptcy, that could result in leases becoming invalid, and contend that tying any conditions regarding decommissioning and environmental remediation to the lessors, in addition to UPC, would provide additional protection for the state.

On July 14, 2006, UPC filed comments contending that the lessors would not be subject to the Board's jurisdiction even if the Board joined the lessors. UPC additionally states that, while it is unaware of any authority that would indicate conditions imposed under Section 248 would run with the land, "[t]hrough the approval process, the Board can ensure that any transferee knowingly accepts the responsibilities of any CPG conditions, and it can even impose additional requirements guaranteeing performance of the conditions." Finally, UPC asserts that, given the low risk that a lessor might have been incompetent at the time the lease was entered into, and the possibility that the competency of a grantor for a transmission line easement could also be at issue in other cases, the "remote possibility that one of UPC's lessors was incompetent to execute the lease agreement is not a reasonable basis for joinder of the lessors in this proceeding."

On July 14, 2006, Michael and Marsha Burrington filed comments asserting that the lessors should be joined "so they are fully aware that if UPC should default on any of its obligations they could be held accountable to all damages and negative impacts that occur to neighboring properties."

On July 14, 2006, the Town of Kirby filed comments contending that the lessors should be joined because "UPC's contracts with its lessors by default enjoins the lessors of the lands, since they hold title to the lands and entered into a business agreement with UPC."

III. Discussion

Under Vermont case law, to join a party as necessary under Rule 19(a), "[t]he moving party bears the burden of advancing a cogent argument on why the absent party is needed to prevent inconsistent or inadequate judgments."[2] We find that UHS and RPI have not met this burden.

UHS and RPI first assert that the lessors are necessary parties to ensure that conditions imposed by the Board can be enforced. However, the moving parties have not demonstrated that joining the lessors would accomplish this goal. Even if the Board were to join the lessors, the Board would not have sufficient jurisdiction over individual landowners to impose conditions directly on the landowners.

UHS and RPI urge the Board to read the definition of "company" contained in Section 201(a) in conjunction with the grant of Board jurisdiction in Section 203(1) to produce a result whereby the Board would have jurisdiction over any individual that owns property used in the generation, transmission, or distribution of electricity.

We reject UHS and RPI's interpretation. The definition of "company" in Section 201(a) includes: "individuals, partnerships, associations, corporations and municipalities, owning or conducting any public service business or property used in connection therewith and covered by the provisions of this chapter." Section 203(1) states that the Board has jurisdiction over a "company engaged in the manufacture, transmission, distribution or sale of gas or electricity directly to the public . . . ."

It could be argued that the lessors are companies pursuant to the definition of Section 201(a). However, Section 203(1) provides the Board with jurisdiction only over companies that are "engaged in the manufacture, transmission, distribution or sale" of electricity. Under no reasonable interpretation could the lessors be considered to be *engaged* in any of these activities.

Furthermore, to read the statutes as UHS and RPI suggest would produce absurd results if such a reading were utilized consistently in Section 248 reviews. Under UHS and RPI's reading, the Board would have jurisdiction over all landowners who have a transmission or distribution line on their property, as well as jurisdiction over any municipality in which a utility has placed facilities within a town highway right-of-way. Additionally, UHS and RPI contend that the lessors are necessary parties because the Board might impose conditions in the CPG that would touch and concern the lessors' land. If the Board were to join any landowner on whose property

2. *Grassy Brook Village v. Blazej, Inc.*, 140 Vt. 477, 482 (1981).

the Board might impose conditions as part of the CPG process in the review of a transmission line, there could be hundreds of "necessary parties" as defined by UHS and RPI.

While the Board does not have jurisdiction to impose conditions on the landowners, we do have sufficient jurisdiction to impose appropriate conditions on UPC and require that the lease agreements contain provisions adequate to provide reasonable assurance of compliance with those conditions. If UPC cannot meet such conditions, it may not construct the proposed project. Further, if the company begins construction and does not comply with all of the necessary conditions, the Board has the authority, pursuant to 30 V.S.A. §§ 30 and 247, to impose penalties. Consequently, there are sufficient safeguards to ensure that there will be compliance with any conditions imposed on the proposed project.

We are requiring UPC to submit affidavits from the lessors indicating that the lessors are aware that conditions imposed by the Board may be significant, and once imposed, may not be easy to modify. If the Board issues a CPG in this Docket, the Board will hold a compliance hearing that lessors must attend to ensure that they understand the conditions contained in the CPG and agree that the leases they have entered into require compliance with the conditions.

The Board will require UPC to demonstrate that its agreements with landowners are adequate to ensure compliance with all conditions of any certificate of public good, should one be issued. In its response memorandum, UPC stated: "Should the Board so order in the CPG, UPC can and will provide an appropriate post-CPG filing which demonstrates that it has adequate agreements with landowners to fully satisfy all conditions of the Board's order." Such agreements must, at a minimum, ensure that decommissioning can effectively occur in the event of UPC's insolvency or dissolution, or UPC's breach of the lease, and allow access to the impacted land for purposes of fulfilling any CPG condition, including access by representatives of the Department, the Board, and the Agency of Natural Resources. If the Board issues a CPG in this Docket, it would likely include a requirement that UPC provide a compliance filing demonstrating that the terms of the lease agreements contain reasonable assurance of compliance with conditions contained in the CPG.

Turning to UHS and RPI's arguments regarding minimizing subsequent litigation, we again find no basis for joining the lessors. There does not appear to be a reasonably likely scenario under which any party would initiate litigation against the lessors regarding the proposed project. The scenario posited by UHS and RPI appears to discount the Board's ability to effectively institute a decommissioning fund for the proposed project.

UHS and RPI also argue that joinder is required to protect the lessors' interests. However, the lessors had every opportunity to intervene in this case and chose not to take this opportunity. As UPC points out, the lessors had the opportunity to protect their rights when entering into the leases with UPC for the use of their land. To claim that the lessors must be joined to protect their interests appears to assume that the lessors are unable to protect their own interests. The Board does not make this assumption.

While UHS and RPI have raised legitimate concerns regarding the enforcement of any conditions that the Board may impose if it does approve the proposed project, we conclude that joinder is not necessary to address these concerns.

IV. Conclusion

For the reasons stated above, the Board denies UHS and RPI's motion to join the lessors. However, we will require UPC to take certain actions necessary to ensure that the lessors fully understand the implications of any conditions imposed in the CPG, as explained above.

So Ordered.

Dated at Montpelier, Vermont, this 8th day of September, 2006.

s/James Volz	)	
	)	PUBLIC SERVICE
	)	
s/David C. Coen	)	BOARD
	)	
	)	OF VERMONT
s/John D. Burke	)	

OFFICE OF THE CLERK

FILED: September 8, 2006

ATTEST: s/Susan M. Hudson

Clerk of the Board

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