

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7156

Amended 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 40 MW)
wind electric generation facility, consisting of 16 wind)
turbines, and associated transmission and interconnection)
facilities, in Sheffield and Sutton, Vermont, to be known as)
the "Sheffield Wind Project")

Order entered: 11/1/2006

ORDER RE AMENDED PETITION AND SCHEDULE

I. Introduction

In this Order the Public Service Board ("Board") allows the amended petition filed by petitioners on October 13, 2006, and sets a schedule for the remainder of this Docket.

II. Amendment to the Petition

On September 25, 2006, UPC Vermont Wind, LLC ("UPC") filed rebuttal testimony in this Docket that indicates that UPC is substantially modifying the proposed project. The Public Service Board ("Board") issued a memorandum on September 28, 2006, stating that the Board had determined that the changes to the proposed project require an amendment to the petition.

On October 13, 2006, UPC filed an amended petition. The amended petition, and the September 25 testimony, indicate that the proposed project has been altered in several ways, including the following:

- the number of turbines has been reduced from 26 to 16;
- the locations of the remaining turbines have been altered;
- the type of turbine has changed from a 2 MW turbine with a maximum height of 398 feet (with the blade tip in the vertical position), to a 2.5 MW turbine with a maximum height of 420 feet (with the blade tip in the vertical position). Additionally, the tower height has changed from 78 meters to 80 meters.

Positions of the Parties

Several parties filed comments on the scope of UPC's modifications to the proposed project.¹

On October 10, 2006, Universal Health Services, Inc., UHS of Sutton, Inc. (collectively "UHS"), and Ridge Protectors, Inc. ("RPI") filed comments opposing UPC's amendment. UHS and RPI assert that the amendment should not be allowed because UPC's new proposal "goes beyond the purposes of Board Rule 2.204 and V.R.C.P. 15." UHS and RPI further assert that they would be prejudiced if the Board allows the amendment due to the additional work and analysis that would need to be completed to address the altered project. UHS and RPI also question the timing of UPC's changes to the proposed project, specifically, whether UPC was contemplating changes early in the process without informing the Board or the parties, thereby forcing the parties to incur costs. Finally, UHS and RPI assert that, if the Board does allow the amendment, UPC should be required to pay the costs associated with reviewing the new proposal.

On October 10, 2006, the Town of Sutton ("Sutton") filed an opposition to the amendment on the grounds that the amendment would "unreasonably delay this proceeding, and unreasonably adversely affect the rights of Sutton and prejudice Sutton's ability to proceed in this matter." Further, Sutton states that, should the Board allow the amendment, "Sutton will be seeking conditions pursuant to Board Rule 2.204(G) to eliminate or alleviate the damages caused to Sutton as a result of UPC's unilateral actions."

On October 11, 2006, the Town of Lyndon ("Lyndon") filed comments on UPC's amendment. Lyndon requests that the Board allow additional time to consider the ramifications of the changes to the proposed project. Additionally, Lyndon requests that, if the Board allows the amendment, that we "impose conditions under Board Rule 2.204(G) to justly protect Lyndon and other surrounding towns affected by this project."

On October 17, 2006, UPC filed a response to the comments. UPC contends that Board precedent illustrates that the Section 248 process should be "flexible enough to make it possible

1. We treat these filings as comments on the amendment, although the amendment itself was not filed until after several of these comments were received.

to allow projects to be improved while undergoing review." UPC further asserts that the amendment does not prejudice the parties. UPC contends that it made the decision to revise the proposed project after receiving the testimony from opposing parties. Finally, UPC contends that an award of costs is not appropriate as "[a]warding costs would penalize UPC for modifying the Project to reduce impacts."

Discussion

Pursuant to Board Rule 2.204(G)(1), amendments to a petition may be allowed if the Board finds that the amendments "will not unreasonably delay any proceeding or unreasonably adversely affect the rights of any party." Additionally, Board Rule 2.204(G)(1) states that the "Board may condition the acceptance of any amendment as justice may require." Finally, the rule states that "[i]n the event an amendment makes a substantial change in a filing, the Board may order such additional notice to other parties and the public as justice may require."

The Board has previously allowed amendments to petitions filed under Section 248. In Docket 6860, the Board allowed Vermont Electric Power Company, Inc. ("VELCO") to amend its petition for a transmission project despite the objection of several parties, stating:

The Proposed Amendment represents an effort by VELCO to address some of the concerns that parties and the public have raised regarding the original petition. Such modifications to the project not only may mitigate adverse impacts, but also might in fact expedite the final resolution of this, and related proceedings.²

UPC's amendment is clearly an attempt to address the concerns of the public and the parties, although we cannot determine, until after we hear the relevant evidence and arguments, whether the amendment lessens the impacts associated with the proposed project and represents an improvement to the proposed project.

UHS and RPI argue that the alterations to the proposed project go beyond the scope of Board Rule 2.204(G) and Vermont Rule of Civil Procedure 15. We first note that V.R.C.P. 15 has not been specifically adopted by the Board, and under Board rules, is not applicable in Board cases because the Board has adopted its own Rule (Rule 2.204(G)) which specifically governs

2. Docket 6860, Order of 3/5/06, at 4 (footnote omitted).

amendments to filings.³ Board Rule 2.204(G) provides no limitation on the scope of an amendment, subject to provisions protecting the rights of parties.

We find that the amendment does not unreasonably adversely affect the rights of the parties in this case. There is no doubt that the amended petition presents additional work for the parties. However, Section 248 is an analysis of whether a proposed project promotes the public good. Consequently, the Board must weigh any hardship caused by the amendment with the possible benefits that might accrue from the changes to the proposed project. In this case, UPC has made clear that the alterations are in response to concerns expressed by parties. As such, the amendment "not only may mitigate adverse impacts, but also might in fact expedite the final resolution of this, and related proceedings."⁴

An additional requirement of Board Rule 2.204(G) is that the amendment not unreasonably delay the proceedings. The Board is extending the schedule in this Docket, as set forth in detail below; however, we find that the additional time for review does not constitute an unreasonable delay since the extended schedule allows for review of the changes to the proposed project — changes which were made in an attempt to respond to concerns of the parties and the public.

For the reasons stated above, the Board allows UPC's October 13 amendment.

UHS and RPI state that they "believe that the Board and the parties are entitled to an explanation from UPC as to when its plans to revise the project became firm and why the Board and parties were not notified earlier." UPC states that it decided to make revisions to the proposed project after evaluating the parties' testimony.

Some parties have suggested that the Board should condition acceptance of the amended petition on a requirement that UPC pay the costs of reviewing the altered project. The Board has required petitioners to pay costs only under exceptional circumstances.⁵ The Board has made clear that it will not award costs simply because a petitioner is altering a proposed project. As we

3. See, Board Rules 2.104 and 2.105.

4. Docket 6860, Order of 3/5/06, at 4.

5. See, Docket 6300, Order of 12/15/00; Docket 6860, Order of 9/26/06.

have previously stated, a petitioner's willingness to alter a proposed project may ultimately benefit the public interest:

Our decision here should not be read as a broad precedent indicating that awards of attorney's fees are readily available in a Board proceeding whenever a petitioner modifies its proposal. Such modifications are frequently made in response to concerns presented by other parties or to reflect improvements that the petitioner has itself identified; accordingly, those modifications frequently serve the public interest, and should not be discouraged by the specter of an attorney's fee award.⁶

In this instance, the petitioner has attempted to be responsive to parties. Consequently, we do not find any basis to award costs here.

III. Schedule

In its September 28, 2006, memorandum, the Board requested the parties to file "comments regarding whether the changes to the proposed project would require an alteration to the schedule." After reviewing the comments of the parties, the Board has established the following schedule:

Second site visit and third public hearing	November 8, 2006
Discovery on UPC Rebuttal Testimony	Rolling through November 20, 2006; responses due within 10 business days ⁷
Other parties file Surrebuttal Testimony	December 11, 2006
Discovery on other parties	Rolling through January 5, 2007; responses due within 10 business days
UPC files request for live surrebuttal (if necessary)	January 16, 2007
Technical Hearings	January 29 — February 9, 2007
Initial briefs	March 12, 2007
Reply Briefs	March 26, 2007

6. Docket 6860, Order of 9/26/06 at 5.

7. November 24, 2006, shall not be considered a business day.

SO ORDERED.

Dated at Montpelier, Vermont, this 1st day of November, 2006.

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

OFFICE OF THE CLERK

FILED: November 1, 2006

ATTEST: s/Susan M. Hudson
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@state.vt.us)