

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: 10/1/2007

**ORDER RE MOTIONS AND REQUESTS FOR MODIFICATION,
AMENDMENT, CLARIFICATION AND CORRECTION**

INTRODUCTION

On August 8, 2007, the Public Service Board ("Board") issued an Order and Certificate of Public Good ("CPG") in this docket.

On August 14, 2007, the Town of Sheffield ("Sheffield") filed "Comments" in which it asks the Board to make two modifications to the August 8 Order and CPG.

On August 22, 2007, UPC Vermont Wind, LLC ("UPC") filed a Motion for Clarifications, Technical Corrections, and Modifications to the Board's August 8 Order and CPG. In its Motion, UPC specifies eight items for which it requests clarifications, technical corrections, and modifications. UPC also states that it has no objection to Sheffield's requested modifications.

Also on August 22, 2007, the Vermont Department of Public Service ("Department") filed a Motion to Amend Final Order. In its Motion, the Department requests that the Board amend the noise standard that the August 8 Order establishes, and identifies two technical corrections.

On August 30, 2007, the Department filed a Reply to UPC's Motion. On September 10, 2007, UPC filed a Reply to the Department's Motion. The Department filed an objection, on

September 7, 2007,¹ to an affidavit included in UPC's Reply. On September 11, 2007, UPC filed a response to the Department's objection.

In this Order we grant Sheffield's requests and the Department's motion, and grant in part and deny in part UPC's motion.

SHEFFIELD'S REQUESTS

Finding 71 of the August 8 Order reads:

71. Under an agreement between UPC and Sheffield, UPC would pay Sheffield between \$400,000 to \$550,000 per year in local taxes and mitigation payments. Local tax payments, which would represent between \$125,000 to \$150,000, would reduce Sheffield residents' taxes by 50%. The mitigation payments would be placed in a separate fund and managed and disbursed as determined by Sheffield. Aldrich pf. at 7; Aldrich surr. pf. at 6.

Sheffield requests that we modify the second sentence of Finding 71 to more accurately convey that only the municipal-government portion of the property tax burden would be halved, rather than the total taxes paid (of which a large component consists of state education taxes). Sheffield proposes that the second sentence of Finding 71 be modified to read:

Local tax payments, which would represent between \$125,000 to \$150,000, would reduce Sheffield residents' taxes by paying for approximately one-half the annual Sheffield municipal budget.

No party has objected to this proposed modification. We find this to be an appropriate clarification, and hereby adopt the modification. Accordingly, Finding 71 shall read:

71. Under an agreement between UPC and Sheffield, UPC would pay Sheffield between \$400,000 to \$550,000 per year in local taxes and mitigation payments. Local tax payments, which would represent between \$125,000 to \$150,000, would reduce Sheffield residents' taxes by paying for approximately one-half the annual Sheffield municipal budget. The mitigation payments would be placed in a separate fund and managed and disbursed as determined by Sheffield. Aldrich pf. at 7; Aldrich surr. pf. at 6.

Sheffield's second proposed modification is to include in the CPG a condition that UPC perform under its agreement with Sheffield. As Sheffield notes in its filing, we expressly stated

1. The Department filed its Objection before UPC's Reply was formally filed at the Board, because the Department had already received UPC's Reply electronically.

in the August 8 Order that we would include such a condition. No party has objected to Sheffield's request. Our failure to include the requested condition in the August 8 Order was an oversight, which should be corrected. Therefore, we add the following requirement as Condition 33 to the "Order" section of the August 8 Order and as Condition 33 to the CPG:

33. UPC shall comply with all provisions of its agreement with the Town of Sheffield (exhibit Sheffield-MA-2).

NOISE

UPC's Motion requests several clarifications and modifications concerning the noise restrictions contained in the Order and CPG. UPC contends that Finding 192, which states that noise from the Project will be below Environmental Protection Agency ("EPA") guidelines, should be expanded to acknowledge that the noise will also be below World Health Organization ("WHO") guidelines. UPC also requests that Condition 8, dealing with noise restrictions at the King George School and surrounding residences, should be modified in several ways. First, UPC argues that the condition which requires UPC to "construct and operate the project" within certain noise limits, would impose unnecessary sound limits during Project construction. Second, UPC argues that the use of indoor sound level measurements are problematic because of difficulty of access, and are not required by WHO and EPA guidelines. Third, UPC objects to the use of day-night averaging (Ldn) in the sound-level limitations; according to UPC, because of the manner in which it is calculated, the average would effectively impose a lower sound limit than 30 dBA during the nighttime hours. Fourth, UPC argues that the application of the sound-level limits to "any King George School structure," which would include unoccupied buildings, is overly broad. Finally, UPC contends that the application of the limits to "surrounding residences" is ambiguous and should be clarified to relate to existing surrounding residences only.

The Department's Motion also objects to the use of Ldn in the sound level restriction imposed in Condition 8 of the Order. However, the Department argues that the averaging would effectively allow for sound levels in excess of 30 dBA. The Department contends that the turbines could be operated at significantly higher sound levels for up to twelve hours and still be within the average limits if those turbines were then shut down for the remainder of the

twenty-four hour period. The Department requests that the Board change the average standard to a maximum standard of 30 dBA. In the alternative, the Department suggests the adoption of an hourly average (30 dBA, (Leq) (1)) to allow for short-duration noise events.

Discussion

Finding 192 of the Order (at 69) states that noise from the Project will be "below the Environmental Protection Agency's guideline of 55 dBA." While UPC does not dispute the validity of the finding, it argues that the finding should be expanded to indicate that noise from the Project will also be in compliance with WHO guidelines. The evidence supports such an expansion; therefore, we amend the finding to read as follows:

192. Noise generated by the project will be audible at some locations, including homes, in the area surrounding the Project site, but will be below the Environmental Protection Agency's guideline of 55 dBA, and the World Health Organization's guideline of 45 kBA (Leq – 8-hour nighttime) designed to protect against sleep disturbance. Bajdek pf. at 6; exh. DPS-MK-1 at 22; Kaliski pf. at 7; Bajdek and Menge pf. reb. at 8; exh. UPC-CB-SSRb1; exh. UPC-Cross-KK1 at 3; tr. 2/8/07 at 151–153 (Kaliski).

Condition 8 of the Order and CPG states that:

8. UPC shall construct and operate the Project so that it emits no prominent discrete tones pursuant to ANSI standards at the receptor locations, and indoor sound levels at any King George School structure and any surrounding residences do not exceed 30 dBA(Ldn).

UPC misinterprets the requirement to "construct and operate" the Project in accordance with the required sound levels as applying to the noise from the construction of the Project as a whole. Therefore, we clarify that the use of the term "construct" in this context refers to the construction of the turbines as it relates to the sound generated by the *turbines*. This condition requires UPC to ensure that the turbines used in the Project are constructed so that they will operate within the sound level guidelines set forth in this condition; the condition does not apply to sound generated by the construction activities themselves.

UPC objects to the use of indoor sound levels as being impractical and unnecessary. The Board has chosen to use indoor sound levels largely because there is substantial disagreement among the expert witnesses regarding the degree of attenuation between outdoor and indoor

sound-level measurement. Using an outdoor sound level could potentially expose nearby residents to much higher sound levels than anticipated. Use of indoor sound levels eliminates this uncertainty. UPC also argues that gaining the access required for indoor sound-level measurement may prove difficult. As the Department notes, access to property would also be required if we imposed an outdoor sound-level requirement. We also note that Condition 10 of the Order and CPG requires that UPC file a noise-monitoring plan for approval with the Board. We expect that the sound-monitoring plan will propose a process for dealing with noise complaints, including the need for indoor access to verify complaints. Residents who do not comply with the access provisions of an approved plan will not have their complaints addressed.

The Department and UPC argue that the use of a day-night average (Ldn) sound level requirement for the Project is inappropriate. We agree that the use of the Ldn standard may have unforeseen consequences and may not achieve the results we intended. We conclude that the use of an hourly average, as suggested by the Department, rather than a 24-hour average sound-level measurement, is more appropriate. This standard will allow for some short duration noise episodes from operation of the Project and still maintain an appropriate indoor sound level. Therefore, we amend Condition 8 to utilize a sound level requirement of 30 dBA (Leq)(1).²

We agree with UPC that the imposition of sound level limits "at any King George School structure and any surrounding residences" is overly broad. This would have the effect of applying the sound-level restrictions to unoccupied storage buildings and to new structures that are located closer to the Project. Therefore, we amend the Condition to apply to existing structures and to those actively used by school personnel.

Condition 8, as amended, shall read as follows:

8. UPC shall construct and operate the Project so that it emits no prominent discrete tones pursuant to ANSI standards at the receptor locations, and indoor sound levels at any existing King George School structures used for residential or

2. Attached to its Reply Motion, UPC filed the affidavit of R. Scott Bodwell offering testimony regarding the noise conditions in the Order. The Department, in a letter dated September 7, 2007, objects to consideration of the affidavit as the evidentiary record in this case is closed. We agree that consideration of new testimony after the evidentiary record has been closed is inappropriate and, therefore, we have not considered or relied upon the affidavit in promulgating this Order.

instruction purposes and any existing surrounding residences do not exceed 30 dBA(Leq)(1).

UPC'S OTHER REQUESTS

In addition to its requested modifications to the noise restrictions, UPC asks that the Board:

- (1) explicitly resolve the motions by the Department and the Town of Sutton ("Sutton") to rule that UPC's January 16, 2007, revisions constituted a substantial change to the proposed project;
- (2) clarify the scope of the Board's "review and approval" of power purchase agreements under Condition 3 of the Order and CPG;
- (3) alter Condition 7 of the Order and CPG regarding remediation of damage due to blasting activities;
- (4) correct an apparent typographical error; and
- (5) modify Condition 22 of the Order and CPG to delete restrictions on maintenance-related traffic and on traffic through the Town of Barton.

We address each of these in turn, below.

1. Substantial Change

UPC observes that the August 8 Order did not explicitly rule upon motions that the Department and the Town of Sutton filed in January, in which those parties asked that we find UPC's January 16, 2007, revisions to the proposed project constituted a "substantial change" to the project and thus required additional notice under Board Rule 5.407. As UPC notes, at the January 29, 2007, technical hearing, the Board allowed UPC to present its January 16 revisions while taking under advisement the Department's and Sutton's motions. UPC contends that, in approving the revised project, the August 8 Order implicitly determines that the January 16 revisions did not necessitate any additional procedural requirements. UPC asks that, "in order to remove any ambiguity in the record and to memorialize this determination," the Board add specific language (which UPC sets forth in its Motion) to the Order's procedural history.

The Department concurs with UPC's characterization that the Board implicitly rejected the Department's and Sutton's "substantial change" motions, and states further that it does not

object in principle to making explicit the Board's rejection of those motions. However, the Department faults UPC's proposed language as setting bad precedent. The Department proposes that, instead, the Board focus on the limited extent of the January 16 revisions as the basis for concluding that an amended petition was not required. The Department also requests that, if the Board does explicitly address this issue in an amendment to the August 8 Order, the amendment also note that the Board required UPC to indicate whether the January 16 revisions would result in any newly impacted adjoining landowners.

After considering the parties' arguments, we conclude that we should modify the August 8 Order to make explicit our ruling on the Department's and Sutton's motions regarding the January 16 project revisions. As explained below (in the new language that we are adding to the August 8 Order), we conclude that the January 16 revisions do not constitute a substantial change.

We hereby add the following language to the Procedural History section of the August 8 Order:

On January 16, 2007, in accordance with the schedule, UPC filed with the Board a request for live sur-surrebuttal testimony and prefiled sur-surrebuttal exhibits, concerning revisions to the Project. On January 17, 2007, the Board issued a memorandum requiring UPC to file a statement indicating whether the revisions would impact new adjoining landowners who had not previously received notice of the petition. Sutton and the Department each filed comments with the Board on UPC's request, on January 22 and January 24, 2007, respectively. Sutton and the Department each requested that the Board deem the revisions a "substantial change" to the Amended Petition, and thereby require UPC to fulfill the notice provisions of Board Rule 5.407. In addition, Sutton requested a postponement of the hearing, additional time for discovery and the submission of prefiled testimony, and an award of costs. On January 26, 2007, the Board stated from the bench that the matter was under advisement, and allowed UPC to proceed with the presentation of the requested live sur-surrebuttal testimony.³

The revised layout described in UPC's live sur-surrebuttal testimony and exhibits moves the remaining two turbines out of the Town of Sutton. The revision also makes other adjustments to the layout for the following reasons: to fit the two turbines in the Town of Sheffield; to re-optimize the array for power

3. Tr. 1/29/07 at 13 (Volz).

production; to reduce roads, impacts on wetland, and impacts on bear-scarred beech trees; and to make micro-siting improvements.⁴

When considered in the context of the overall project, these are relatively minor revisions, and do not change in any meaningful way the size or scope of the project. Thus, the January 16 revisions can be distinguished from those that UPC filed earlier, on September 25, 2006, for which the Board required UPC to file an amended petition. Because the January 16 revisions represent relatively minor modifications to the project's layout, we conclude that they do not rise to a level that requires an amended petition, and we deny the Department's January 22, 2007, and Sutton's January 24, 2007, requests related to the January 16 revisions.⁵

2. Power Contracts

The August 8 Order and CPG each include the following Condition 3:

3. UPC shall make all reasonable efforts to enter into diverse, long-term, stably priced power contracts with Vermont utilities. UPC shall provide an update of any negotiations with Vermont utilities 90 days after the date of this Order. Prior to commencement of construction, UPC must produce copies of such contracts entered into with Vermont utilities for Board review and approval. If, after good-faith negotiations on the part of UPC and the utilities, UPC cannot reach an agreement, it may file a statement explaining why an agreement cannot be reached and why the Board should modify or remove this requirement.

According to UPC, in light of the findings and discussion in the August 8 Order, the Board's "review and approval" of the power contracts need only address whether the contracts include stable pricing terms, and "would not be approving the contracts in and of themselves, or assessing whether the utilities have acted prudently in agreeing to particular economic terms."⁶ UPC asks that the third sentence of this condition be modified to read as follows:

Prior to commencement of construction, UPC must produce copies of such contracts entered into with the Vermont utilities for Board review to determine if they contain stable pricing terms, in whole or in part.

4. Exhs. UPC-CRV-SSRb1 and SSRb3.

5. Also, as we have noted in other orders, we do not wish to discourage petitioners from filing potential improvements to a proposed project for fear that additional procedural steps would significantly delay the proceeding. We must balance this objective with the goals of ensuring that the other parties receive due process and allowing opportunity for additional public comment when appropriate. Given the relatively small changes that the January 16 revisions encompass, we conclude that the proper balance in this instance is to allow the revisions without any further procedural requirements.

6. UPC Motion at 3.

The Department contends that UPC's proposed modification would overly constrain the Board's review of the power contracts. The Department notes that, in the August 8 Order, the Board concluded "that the general good will not be promoted unless we condition our approval of the Project on the requirement that UPC make further efforts to enter into stably priced contracts with the Vermont utilities."⁷ According to the Department, UPC's proposed modification of Condition 3 would allow the condition to be satisfied by "only the smallest measure of price stability," which, the Department asserts, "is not conducive to a determination of whether the project will promote the public good"⁸ The Department thus contends that the Board should reject UPC's proposal; if Condition 3 is to be clarified, the Department proposes the following language for the third sentence of the condition:

Prior to commencement of construction, UPC must produce copies of such contracts entered into with Vermont utilities for Board review to determine if the contracts contain appropriate terms and conditions, including price stability, to promote the general good of the State of Vermont.

We agree with UPC that Condition 3 should be clarified, but not as specifically proposed by UPC. The Department correctly notes that we included Condition 3 to ensure that the proposed project would promote the general good of the state, and that a stably priced but de minimis amount of power should not serve automatically to satisfy the condition. We thus adopt the Department's proposed language. We will also include in the revised Condition 3 both a requirement that UPC file with the contracts an explanation as to how the contracts promote the general good of the state, and a deadline for other parties to respond to UPC's filings.⁹

Therefore, Condition 3 of the Order and CPG shall read as follows:

3. UPC shall make all reasonable efforts to enter into diverse, long-term, stably priced power contracts with Vermont utilities. UPC shall provide an update of any negotiations with Vermont utilities 90 days after the date of this Order. Prior to commencement of construction, UPC must produce copies of such contracts entered into with Vermont utilities for Board review to determine if the contracts contain appropriate terms and conditions, including price stability, to

7. August 8 Order at 40.

8. Department Reply at 4.

9. We are adding this new filing requirement and response deadline in order to shorten the time that should be necessary for Board review. If we did not include these new elements in the condition, our review would be delayed by the need to set such a schedule after UPC made its filing.

promote the general good of the State of Vermont. Along with the contracts, UPC must also file an explanation as to how the contracts promote the general good of the state. If, after good-faith negotiations on the part of UPC and the utilities, UPC cannot reach an agreement, it may file a statement explaining why an agreement cannot be reached and why the Board should modify or remove this requirement. For any UPC filings made pursuant to this condition, other parties shall file any comments and responses within two weeks of the UPC filing.

3. Blasting

Condition 7 of the Order and CPG provides:

7. In the event surrounding landowners express concern regarding the impacts of blasting on wells or other structures on their property, UPC shall remediate any damage caused by blasting activities.

UPC asserts that the condition "wrongly suggests that a landowner complaint regarding blasting would automatically give rise to the requirement that UPC remediate."¹⁰ UPC asks that the condition be modified such that UPC would only be required to remediate damage that is determined to be caused by blasting. Under UPC's proposal, this condition would read:

In the event surrounding landowners express concern regarding the impacts of blasting on wells or other structures on their property, and subsequent investigation determines that the blasting caused the impacts, UPC shall remediate any damage caused by the blasting activities.

We decline to adopt UPC's requested modification. By adding the requirement that subsequent investigation must determine that damage was caused by the blasting, UPC's proposed language would impose a procedural hurdle for an aggrieved landowner who seeks remediation. The condition as set forth in our August 8 Order and CPG limits UPC's liability to "damage caused by the blasting activities." This is consistent with established Vermont law, which imposes strict liability for blasting operations,¹¹ and no additional limitations to UPC's liability are warranted. Furthermore, this condition does not preclude UPC, if it wishes, from conducting an investigation of a claim prior to remediation. Therefore, we conclude that further clarification of this condition is unnecessary.

10. UPC Motion at 4.

11. *Malloy v. Lane Construction Corp.*, 123 Vt. 500, 503-504 (1963).

4. Typographical Error

UPC notes that in the August 8 Order's discussion on noise at page 73, the reference to findings 189–194 should instead refer to findings 192–195. Therefore, we correct the reference on page 73, line 26, of the August 8 Order to read "findings 192–195."

5. Condition 22 (Traffic)

UPC requests two modifications to Condition 22 of the Order and CPG, which provides:

22. UPC shall, to the extent commercially practicable, route construction and maintenance traffic in a manner that avoids the streets in the town and village of Barton, for example, by accessing New Duck Pond Road from the south via Route 5.

First, UPC notes that this condition, in restricting traffic in the *Town* of Barton, is inconsistent with the discussion of construction transportation issues earlier in the Order (at pages 58-59). In that discussion, we stated:

We adopt the Department's proposed conditions on these issues with some modifications. In particular, the Department's proposed condition would have UPC attempt to avoid all roadways in Barton, not just those in the Village itself. We adopt a condition that UPC take all commercially reasonable efforts to avoid roadways in Barton Village.

UPC requests that we delete the words "town and" from Condition 22, so that it conforms with our discussion of the issue. The Department, in its Motion to Amend, asks that the Board make this same change. This modification is appropriate, and will result in a condition that accurately reflects our intent.

Second, UPC asks that the reference to maintenance traffic be deleted from Condition 22. UPC contends that there was no evidence that maintenance-related traffic would have undue impacts, and that "regular operational traffic will be extremely limited."¹² UPC is correct that traffic related to normal maintenance activity should be excluded from the restrictions set forth in Condition 22. However, oversized-truck traffic related to reconstruction, repair, or maintenance activities, such as replacement of a turbine blade, will be subject to those restrictions.

12. UPC Motion at 10.

UPC's concern with the condition as written further suggests that the restriction on construction traffic should be clarified, so that there is no future dispute over whether a particular activity constitutes "construction." Our intent in restricting construction traffic is for project-related traffic to avoid the Village of Barton during the initial construction of the project, by which we mean those construction activities required for UPC to fully construct the facilities, including all earthwork, as shown on the final approved design plans that are required by Condition 1 of the August 8 Order and CPG. We also clarify that while this condition restricts construction-related traffic passing through the Village of Barton on its way to and from the project site, it does not prohibit the construction workers from traveling to the village for lunch or shopping, so long as the workers are traveling in passenger cars, pickup trucks, or vans.¹³

Therefore, we modify Condition 22 to read as follows:

22. UPC shall, to the extent commercially practicable, route construction traffic, and oversized-truck traffic related to reconstruction, repair, or maintenance activities, in a manner that avoids the streets in the Village of Barton, for example, by accessing New Duck Pond Road from the south via Route 5. For purposes of this condition, the term "construction" shall mean those construction activities required for UPC to fully construct the facilities, including all earthwork, as shown on the final approved design plans that are required by Condition 1 above.

THE DEPARTMENT'S ADDITIONAL TECHNICAL CORRECTION

In addition to its requested modifications to the noise restrictions and to Condition 22 (both of which are discussed above), the Department notes a typographical error in Condition 5 of the Order and the CPG: the word "sage" should be "safe." We hereby correct this error, so that Condition 5 of the Order and CPG shall read:

5. All blasting shall be carried out by licensed and certified blasting technicians. All blasting shall be performed in accordance with any and all applicable laws and regulations, including, but not limited to, U.S. Department of Interior Rules 816.61-68 and 817.61-68 and the Blasting Guidance Manual, Office of Surface Mining, Reclamation and Enforcement, U.S. Department of Interior, to

13. This clarification appears to be consistent with the concerns expressed by the Village and Town of Barton in their brief, in which they stated that "any CPG should include as a condition that UPC utilize routes other than the proposed route through the Village and Town of Barton *to transport materials and components* to the project site in Sheffield." Barton Brief, 4/30/07, at 9.

limit peak particle velocity and ground vibration to safe levels. Noise and air blast effects shall be limited through application of proper techniques and blasting mats shall be used where needed to limit the occurrence of flyrock.

SO ORDERED.

Dated at Montpelier, Vermont, this 1st day of October, 2007.

<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: October 1, 2007

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)

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.