

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7628

Joint Petition of Green Mountain Power Corporation,)
Vermont Electric Cooperative, Inc., and Vermont)
Electric Power Company, Inc. for a certificate of public)
good, pursuant to 30 V.S.A. Section 248, to construct up)
to a 63 MW wind electric generation facility and)
associated facilities on Lowell Mountain in Lowell,)
Vermont, and the installation or upgrade of)
approximately 16.9 miles of transmission line and)
associated substations in Lowell, Westfield and Jay,)
Vermont)

Order entered: 12/27/2010

ORDER RE: DYER DUNN MOTION TO STRIKE AND ALBANY MOTION TO AMEND SCHEDULE

Introduction

On December 10, 2010, Dyer-Dunn, Inc. ("DDI") filed with the Public Service Board ("Board") a Motion to Strike Green Mountain Power Corporation's Rebuttal Testimony of Charles Pughe ("DDI Motion").¹ On December 13, 2010, the Town of Albany ("Albany") filed with the Board a Motion to Modify the Prehearing Conference Memorandum and Scheduling Order. In this Order we deny DDI's motion and grant in part Albany's motion by adopting limited amendments to the existing schedule.

1. We are treating DDI's motion to strike as an objection to the admissibility of evidence pursuant to PSB Rule 2.216(C). Because the prefiled testimony and exhibits submitted in this Docket will not actually become part of the evidentiary record until it is admitted into that record in the course of the technical hearings, there is nothing to strike from the record at this time. The language of Board Rule 2.216(C) does not contain the phrase "motion to strike," nor does it provide a standard for deciding such motions. Rather, that rule prescribes a process for objecting in Board proceedings to the admissibility of prefiled testimony. Generally, a "motion to strike" is filed pursuant to Rule 12(f) of the Vermont Rules of Civil Procedure, which permits such motions in order to seek removal "from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter," or is made to strike evidence after it has come into the evidentiary record.

DDI's Motion to Strike

In its motion, DDI claims that the rebuttal testimony filed by Mr. Pughe and other supporting witnesses is beyond the scope of permissible rebuttal and amounts to a "bold effort" to file "a wholly new Petition within the context of this pending Docket."² DDI's motion goes on to specifically criticize the testimony of Mr. Pughe, and characterizes the changes described in that testimony as "far from minor" and represent a "wholesale" and "radical" modification of the proposed project.³ DDI asserts that the testimony associated with the proposed changes to the project must be stricken because it is not "offered to disprove or contradict the evidence presented by an opposing party,"⁴ but rather, it improperly raises new issues.⁵ DDI requests that the Board strike the testimony in question, or alternatively that it order Green Mountain Power Corporation ("GMP") to seek leave to amend its original petition and establish a new schedule for the proceeding.⁶ DDI, however, did not identify with any particularity what portions of Mr. Pughe's testimony it believes should be stricken. Instead, it stated that there were too many instances of what it believes to be "offensive" testimony to specify in its motion, and that the Board should therefore "rule on the threshold issue" with specific redactions to be determined at some unidentified later date.⁷

Positions of the Parties⁸

On December 15, 2010, the Department of Public Service ("Department") filed a response applicable to both motions addressed in this Order. With respect to the DDI motion, the

2. DDI motion at 1-2.

3. DDI motion at 2-3.

4. DDI motion at 2 (quoting Black's Law Dictionary).

5. DDI motion at 2 (citing *Willard v. Norcross*, 81 Vt. 293 (1908)).

6. DDI motion at 5.

7. DDI motion at 2-3.

8. On December 21, 2010, the Agency of Natural Resources ("ANR") filed a response to the DDI and Albany motions. In our memorandum of December 15, 2010, we established December 20, 2010, as the deadline for responding to these motions. ANR's response generally concurs with the Department of Public Service's filing and states that the proposed changes warrant the filing of an amended petition.

Department states that it does not believe striking Mr. Pughe's rebuttal testimony is an appropriate remedy, even if the testimony proposes changes to the project.⁹ Instead, the Department states that the Petitioners should be required to file an amended petition pursuant to PSB Rule 2.204(G) describing the proposed changes, and that the rebuttal testimony should be accepted in support of the amended petition.¹⁰ The Department took no position on whether any changes to the schedule were appropriate because it did not believe it needed any additional time to review the proposed changes.¹¹

On December 20, 2010, GMP filed an opposition to both motions addressed in this Order.¹² GMP contends generally that: (1) the majority of the testimony at issue constitutes rebuttal testimony because it is responsive to concerns raised by other parties; (2) the remainder of the testimony consists of updates or supplements to prior testimony, or identifies additional mitigation proposals; (3) the proposed changes are not substantial and therefore do not warrant an amendment to the petition; and (4) there is no justification for extending the current schedule because there is no indication that there is insufficient time for other parties to review the new information, and because extending the schedule would prejudice GMP by undermining its goal of completing project construction by December 31, 2012, so that it can take advantage of the current federal production tax credits.¹³ With respect to DDI in particular, GMP argues that DDI's motion states only that the proposed changes are significant, but it fails to identify additional analysis or other effort that it must undertake to review and respond to the rebuttal testimony beyond the seven weeks that it has under the existing schedule.¹⁴

9. DPS response at n.1. As discussed earlier, we are treating DDI's motion as an objection to admissibility under PSB Rule 2.216(C) rather than a motion to strike testimony.

10. The Department distinguishes between changes to the project, which it believes should be the subject of an amended petition, and updated information with regard to elements of the project that are either fluid in nature or relate to studies prepared in response to other parties' requests, which it does not believe need to be part of an amended petition. DPS response at 2-3.

11. DPS response at 4.

12. GMP also filed a Motion to Amend along with an amended petition in the event the Board determined that such a motion and amendment were necessary. Because we decide today that no amendment to the petition is necessitated by the proposed project changes, we do not reach GMP's Motion to Amend.

13. GMP response at 2-3.

14. GMP response at 7.

Discussion

We deny DDI's motion because it fails to provide a legal basis for the relief requested, because it fails to describe with sufficient specificity the relief that DDI is seeking, and because DDI did not demonstrate how the generalized relief requested is related to the scope of its intervention in this proceeding.

First, DDI's motion and reasoning indicate a lack of familiarity with both Board rules and Board precedent. DDI appears to assume that once a petition for a proposed project is filed under 30 V.S.A. § 248, the petitioner is prohibited from proposing modifications to the project during the course of the proceeding. Board Rule 5.407 specifically envisions the possibility that changes will be proposed to projects being reviewed under Section 248 after a petition has been filed and prior to the issuance of a final order, and requires only that notice be given to certain entities if the changes are "substantial."¹⁵ Since the Board's rule governing 248 proceedings contemplates changes to proposed projects while they are under review, imposing certain notice requirements if the changes are substantial, it provides no basis for DDI to object to the admissibility of Mr. Pughe's testimony.¹⁶ Additionally, Board Rule 2.204(G), which applies generally to proceedings before the Board, sets forth a process for petitions to be amended after filing, again providing no basis for DDI's request in this matter.

DDI's motion also fails to find support in Board precedent under Section 248. As we have noted in the past, it is not unexpected for plans for a significant energy project to change, even after a CPG has been issued.¹⁷ In addition, we have allowed proposed amendments to Section 248 petitions over the objection of other parties and prior to issuance of a CPG, noting the potential for improvement as a result of proposed changes, particularly where the proposed changes reflect an attempt to address concerns raised by other parties.¹⁸ Lastly, in cases where

15. A proposed change is considered substantial if it has the potential for significant impact with respect to any of the criteria of Section 248(b) or on the general good of the state under Section 248(a). PSB Rule 5.407.

16. It should also be noted that PSB Rule 5.408 envisions the possibility of proposed changes to a project that has already received a Certificate of Public Good ("CPG"), and requires an amendment to the previously issued CPG only where the proposed changes are substantial.

17. *Amended Petition of UPC Vermont Wind*, Docket 7156, Order of 5/24/09 at 7.

18. Docket 7156, Order of 11/1/06 at 3-4 (quoting *Petition of Vermont Electric Power Company, Inc. to construct the Northwest Reliability Project*, Docket 6860, Order of 3/5/06 at 4).

project changes have been proposed and parties have sought recovery of fees and costs that would result from review of the proposed changes, we have determined that petitioners should only be required to pay such costs under exceptional circumstances. We have made clear that petitioners will not be required to pay costs simply because a proposed project is modified during the course of a proceeding, because "a petitioner's willingness to alter a proposed project may ultimately benefit the public interest."¹⁹ In short, Board precedent demonstrates that changes proposed to projects undergoing Section 248 review are allowed, particularly where the proposed changes are an attempt to address concerns raised by other parties, and provided the rights of other parties are adequately protected. This approach can result in increased efficiency in the review of proposed projects because parties may come to agreement on certain topics, potentially narrowing the scope of contested issues that must be resolved through the hearing process.

Second, even if DDI had provided some legal basis supporting an objection to the admissibility of Mr. Pughe's rebuttal testimony, which it did not, the motion is deficient because it does not identify with any specificity the testimony DDI believes to be "offensive." Rather, DDI asks the Board to rule on an unidentified "threshold issue"²⁰ and to defer specific redactions until some later time because, according to DDI, the problems with Mr. Pughe's prefiled rebuttal testimony are too numerous to detail in its motion. Not only does DDI's motion fail to ask the Board to take specific action, it appears that the motion is based solely on a review of Mr. Pughe's rebuttal testimony, in particular the contents of question and answer 4, which gives a general description of the proposed changes. It does not appear from the language of the motion that DDI read the relevant rebuttal testimony of each witness that details the extent of the changes listed in Mr. Pughe's response to question 4. If DDI had done so, it would have understood the relatively minor nature of the modifications and would then have been unlikely to use terms such as "radical" and "wholesale" to describe the proposed changes.

Third, DDI's motion fails to relate the relief it seeks to the scope of its intervention in this proceeding.²¹ DDI's intervention is limited to specific criteria under Section 248, and impacts

19. Docket 7156, Order of 11/1/06 at 4-5 (citing and quoting Docket 6860, Order of 9/26/06 at 5).

20. Presumably, this threshold issue is that rebuttal testimony filed by a petitioner can never modify a proposed project under Section 248, a ruling we decline to make based on the plain language of our rules and our precedent.

21. This is at least in part due to the lack of specificity in the motion.

related to those criteria that the proposed project would have on its real property located nearby, and in places possibly abutting, the project site.²² DDI's motion makes no attempt to correlate the potential impacts from the proposed changes to the property it owns and which provided the basis for its intervention.

As a final matter, we note that DDI asked for alternative relief in the form of an order directing Petitioners to file an amended application and establishing a new schedule for the proceeding. In its motion, DDI fails to explain how the proposed changes create the potential for significant impacts under the Section 248(b) criteria, or on the general good of the state under Section 248(a), and its request for an amended petition is therefore denied. This proceeding will examine the potential impacts from the proposed project with respect to the substantive criteria of Section 248(b), and on the general good of the state under Section 248(a). What DDI failed to demonstrate is how the changes themselves create new potential for significant impacts that are not otherwise already subject to Board review as a result of the original petition.²³

In a previous Docket, the Board examined the question of whether an amended petition was necessary in the face of proposed changes to a Section 248 project that were contained in the final design plans, which were filed subsequent to the issuance of a CPG and in compliance with the conditions of approval for the project. In that Docket, we determined that an amended petition was not necessary because the proposed changes did not have "the potential for significant impact with respect to any of the criteria of Section 248(b) or on the general good of the state under Section 248(a)." ²⁴ Thus, in determining whether an amended petition was required under Section 248, we enunciated the same standard that we utilize in PSB Rules 5.407, governing changes to proposed projects in the course of pending Section 248 proceedings, and

22. Order of 9/3/10 at 13.

23. We also note that DDI did not provide any explanation of why it would need additional time to respond to rebuttal testimony, alleging only that its due process rights would be violated if the testimony of Mr. Pughe were admitted. The current schedule, however, provides DDI with seven weeks between the filing of the Petitioners' rebuttal testimony and the date that it must file its surrebuttal. As GMP points out, DDI did not even serve any discovery requests on the rebuttal testimony filed by Petitioners on November 22, 2010. Accordingly, DDI need not wait for discovery responses in order to begin performing its review and drafting its response to the rebuttal testimony at issue. We do not believe, and DDI has provided no explanation to the contrary, that a seven-week period for DDI to review and respond to Petitioners' rebuttal testimony is insufficient to protect its due process rights.

24. Docket 7156, Order of 5/24/09 at 12.

5.408, governing when proposed changes to an approved project will require an amendment to a previously issued CPG.

In its response to DDI's motion, the Department concludes that the changes described by Petitioners' rebuttal testimony in the current proceeding are not "substantial" and therefore no additional notice is required pursuant to PSB Rule 2.204(G).²⁵ The Department, however, noting that the Board's rules do not specify the circumstances under which an amended petition is required, concludes that the proposed changes alter the original petition enough so that an amended petition should be required in this instance.

While we agree with the Department that the proposed changes described in the rebuttal testimony are not "substantial" as that term is used in the Board's rules, we disagree with the Department that the changes require an amended petition in this instance. The issue presented by DDI's motion is, when must a Section 248 petition be amended as a result of proposed changes to the project under consideration. Our earlier decision in Docket 7156 stands for the proposition that an amended Section 248 petition is required when the proposed changes have "the potential for significant impact with respect to any of the criteria of Section 248(b) or on the general good of the state under Section 248(a)."²⁶ That enunciated standard is the definition of the term "substantial" as used in PSB Rules 5.407 and 5.408, which are specifically applicable to Section 248 proceedings. If the proposed changes are not "substantial," a point on which we agree with the Department, then by definition they do not create new potential for significant impacts with respect to any of the criteria of Section 248(b), or on the general good of the state under Section 248(a), and therefore do not require the filing of an amended petition.²⁷ Accordingly, DDI's request that we direct the Petitioners to file an amended petition is denied. And, because DDI's request for a new schedule was premised on its request for an amended petition, that request is also denied.

25. DPS response at 4. The Department distinguishes the proposed changes in this proceeding from the changes made in the petitioner's rebuttal filing in Docket 7156. In Docket 7156, the Board required an amended petition due to the substantial nature of the changes, and the Department concluded that the changes in the current Docket are "less substantial" than those in Docket 7156.

26. *Amended Petition of UPC Vermont Wind*, Docket 7156, Order of 5/24/09 at 12.

27. Our ruling today is specific to proceedings under Section 248, and should not be read as creating a standard by which to determine the necessity for amendments to any other petitions filed with the Board.

Albany's Motion to Modify Schedule

On December 13, 2010, Albany filed a Motion to Modify the Prehearing Conference Memorandum and Scheduling Order,²⁸ asserting that the addition by Petitioners of two new turbine models to the list of models under consideration has increased the amount of work its noise expert must undertake in order to properly review and respond to the testimony of Petitioners' witness on this issue. Albany contends its witness must perform additional research, modeling and noise analysis to address the new turbine models in his rebuttal testimony. Albany asserts that the opportunity to perform the analysis is important in this instance because Petitioners' witness has acknowledged that the new turbine models under consideration have the potential to violate the noise standard the Board has used in previous cases, which will require implementation of a noise reduction protocol (known as an "NRO") in certain circumstances.²⁹ Albany's expert, Mr. James, submitted an affidavit in support of Albany's motion and indicates that the earliest possible date he would be able to prefile his surrebuttal testimony is February 4, 2011. Albany is therefore asking that the date for prefiling surrebuttal testimony be moved to February 4, 2011, with the balance of the Docket schedule being adjusted accordingly.³⁰

Positions of the Parties

On December 13, 2010, Lowell Mountains Group ("LMG") submitted to the Board a response³¹ supporting Albany's motion to amend the schedule, and included with its memorandum an affidavit from its noise expert, Mr. Blomberg, indicating that inclusion of two

28. While not the primary focus of its motion, Albany also asks that the Board require Petitioners to withdraw all prefiled rebuttal testimony that describes changes to the proposed project, and that Petitioners be directed to file an amended petition pursuant to PSB Rule 2.204(G). Because the arguments advanced by Albany on this topic are similar to those advanced by DDI, we deny Albany's request for the same reasons explained above in our denial of DDI's motion.

29. Albany motion at 3-4.

30. Albany motion at 4.

31. On December 22, 2010, GMP filed a letter with the Board asserting that it was not properly served with LMG's response to Albany's motion, and requesting that the Board reject the filing as substantially defective. Our decision today to make a slight revision to the schedule does not rely upon the reasoning of LMG's December 13, 2010, submission and would have been the same in its absence. However, given the extension of time being granted to Albany's noise expert, we are granting the same extension of time to LMG's noise expert so the testimony addressing the noise impacts of the two new potential turbine models will be received by all parties at the same time.

new possible turbine models has increased the amount of work that he must perform prior to filing his surrebuttal testimony, such that he will not be able to meet the current deadline of January 10, 2011.³²

On December 15, 2010, the Department filed a response applicable to both motions addressed in this Order. With respect to the Albany motion, the Department took no position on whether any changes to the schedule were appropriate because it did not believe it needed any additional time to review the proposed changes.³³

On December 20, 2010, GMP filed an opposition to both motions addressed in this Order. GMP's general contentions, described above, apply equally to Albany's motion. Additionally, GMP argues that Albany, without explanation, waited almost three weeks after it filed its rebuttal testimony before filing its motion and therefore has not justified its request for additional time.³⁴ Additionally, GMP contends that Albany has failed to properly explain why its noise expert needs to conduct sound modeling of the two new potential turbine models when: (1) it did not submit any such modeling in its initial testimony regarding the turbines identified in the petition; (2) Albany's first round of testimony consisted of its expert raising generic issues unaffected by the type of turbine model under review, and the turbine locations have not changed; and (3) the methodology GMP's expert witness used to model the new turbine models is the same methodology used to model the original turbine models, and that methodology has been available to all parties since early September, 2010, when the Petitioners served their responses to first round discovery requests.³⁵ GMP further asserts that the issues surrounding the implementation and effectiveness of an NRO for the new turbine models is properly addressed in post-certification review of a noise monitoring plan, and that Albany failed to explain why its expert needed more than 10 weeks to complete his analysis.³⁶

32. LMG response at 1-2.

33. DPS response at 4.

34. GMP response at 7.

35. GMP response at 8.

36. GMP response at 8.

Discussion

We are granting in part Albany's motion to amend the Docket schedule through a limited modification to allow some additional time for the preparation and filing of surrebuttal testimony that includes analysis of the impacts of the two new turbine models, and by directing the parties to schedule their noise witnesses for late in the hearing schedule. We are not modifying any other aspect of the schedule.

Albany contends that its expert requires additional time to review information submitted by Petitioners in rebuttal, to conduct modeling of the two new turbine models proposed by the Petitioners, and to analyze the need for and effectiveness of an NRO. Albany states that the additional work is necessary because, according to GMP's own witness, the two new turbine models have the potential to exceed, under certain circumstances, the noise standard the Board has imposed in previous Dockets involving commercial-scale wind generation projects. We find Albany's request for some additional time to evaluate the new turbine models to be reasonable. The Petitioners added the two new models in their rebuttal testimony on their own initiative, and while we recognize that Petitioners believe the new turbines may increase the economic benefit of the proposed project, that does not eliminate the fact that their inclusion has created the need for additional work to be performed by Albany's noise expert. We are not persuaded by GMP's argument that Albany raised only generic issues with respect to the modeling methodology employed by GMP's noise expert, and that therefore Albany should not be performing its own modeling with respect to the new turbines. The fact that GMP's own witness acknowledged the possibility that the new turbine models may violate the noise standard imposed in previous Dockets provides sufficient reason for Albany to take a closer look at the new turbines. Also, while Albany may have had access to certain relevant information back in September of 2010 when GMP served its first round of discovery responses, that does not change the fact that Albany has sought information specific to the two new models in its latest round of discovery, information it was scheduled to receive on December 23, 2010. Lastly, we think that Albany's desire to examine the effectiveness of an NRO in its surrebuttal testimony is reasonable. While GMP wishes to put off such an examination until after a CPG is issued, we believe it is reasonable to examine whether a protocol can be effective prior to approving a project that, in the absence of an effective protocol, might violate a noise standard if one is imposed in this proceeding.

Accordingly, we are amending the schedule as follows:

Surrebuttal Testimony of Mr. James and Mr. Blomberg	1/24/11
Discovery Requests on Surrebuttal Testimony of Mr. James and Mr. Blomberg	1/31/11
Discovery Responses to Requests on Surrebuttal Testimony of Mr. James and Mr. Blomberg	2/15/11

Additionally, when the parties develop a scheduling proposal for witnesses for the technical hearings, they are directed to schedule their noise experts to appear during the final days of the technical hearings to allow each party time to prepare their examination of the other parties' witnesses.

All other components of the schedule set forth in the Prehearing Conference Memorandum and Scheduling Order dated July 14, 2010, remain unchanged.

In amending the schedule as described above, we are mindful of both the Petitioners' concerns regarding timely completion of this proceeding, and the need for Albany's and LMG's noise experts to perform additional work as a result of the newly proposed turbine models. We believe our Order today strikes an appropriate balance between those two competing interests by providing some measure of additional time for the two noise experts to perform the work they assert is necessary, while still preserving the overall schedule that was previously established.

SO ORDERED.

Dated at Montpelier, Vermont, this 27th day of December, 2010.

<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: December 27, 2010

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)