

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: 8/2/2013

PROCEDURAL ORDER RE SHOW CAUSE HEARING

INTRODUCTION

On July 15, 2013, the Public Service Board ("Board") issued an Order to Show Cause and Notice of Hearing in Docket 7628, establishing August 8, 2013, as the date for Green Mountain Power Corporation ("GMP") to appear and show cause why it should not be sanctioned, pursuant to 30 V.S.A. § 30, for violations of the noise standard imposed in Condition 39 of the Order and Certificate of Public Good ("CPG") issued by the Board on May 31, 2011, in Docket 7628. The July 15, 2013, Order also established a deadline for GMP and other parties to prefile testimony addressing the question of potential civil penalties for violations of Condition 39.

On July 29 and 31, 2013, Lowell Mountains Group, Inc. ("LMG") and the Towns of Albany and Craftsbury (collectively, the "Towns"), respectively, filed comments with the Board through individuals other than their current attorneys of record. Pursuant to Board rules, representation of these parties continues by counsel of record until the attorneys seek and receive Board permission to withdraw their appearance.¹ To date, neither counsel of record for LMG nor the Towns has sought to withdraw their representation of their respective clients. Accordingly, any formal participation in this proceeding by LMG and the Towns must proceed through

1. PSB Rule 2.201(D).

counsel until such time as their respective lawyers file for leave from the Board to withdraw their representation of LMG and the Towns.

Board rules do allow for *pro se* representation.² For example, a corporation may be represented by a corporate officer or by an employee so designated in writing by a corporate officer. Accordingly, if LMG, Albany or Craftsbury intends to participate in further proceedings in this Docket without representation by counsel, then LMG, Albany and Craftsbury must each, in writing with a copy delivered to the Board and served on other parties, authorize a specific and appropriate individual to engage in their representation. Upon receipt of any such authorization, the Board will rule on whether the criteria for *pro se* representation have been met.³

Additionally, we have reviewed the record in this case and determined that Craftsbury does not have standing to offer testimony, conduct cross-examination or otherwise actively participate on the issue of noise impacts in this Docket. Craftsbury did not seek to intervene with respect to noise and was therefore not granted party status on that issue.⁴ Accordingly, while Craftsbury is free to attend the show cause hearing on August 8, 2013, it does not have standing to actively participate in that hearing.

In their comments, both LMG and the Towns state that they can no longer afford the costs of legal representation, and in the case of the Towns, expert witness fees. Albany and Craftsbury request that the Board penalize GMP in part by requiring GMP to pay the costs of the Towns' attorney and expert witnesses, and to postpone the schedule for the show cause hearing to allow them time to develop a complete penalty proposal. LMG's comments express a hope that the Board will provide intervenor funding so that LMG may fully participate in the process going forward.

We cannot grant the requests made by the Towns⁵ and LMG with respect to either attorney's fees or expert witness costs because there is no statutory basis to do so. The August 8,

2. PSB Rule 2.201(B).

3. *See* PSB Rule 2.201(B).

4. Docket 7628, Order of 9/3/10 at 16.

5. Craftsbury's request for attorney and expert witness fees is also without support with respect to the upcoming show cause hearing because Craftsbury did not seek, nor was it granted, party status on the issue of noise impacts.

2013, show cause hearing is being conducted to determine an appropriate civil penalty under 30 V.S.A. § 30 for violations of Condition 39 of the Order and CPG, and penalties assessed under Section 30 are statutorily required to be paid into the state's general fund.⁶ This statute does not provide authority for the Board to order that attorney's fees or other costs be paid to parties in this case.

However, by law, the Board is vested with "the powers of a court of record in the determination and adjudication of all matters over which it is given jurisdiction."⁷ "We have previously construed this statutory grant of authority to mean that we have the power 'to award attorney's fees in litigation that is properly before us in the same manner as a Vermont court would be authorized to award attorney's fees.'"⁸ We have exercised this power sparingly in recognition of the American Rule, which is followed in Vermont. The American Rule holds that attorney's fees generally are not awarded absent statutory authority or an enforceable contractual agreement.⁹ However, as other courts do, it has been the Board's practice to depart from the American Rule and to award attorney's fees in exceptional circumstances, such as when a discovery sanction is warranted, or when it is appropriate to off-set the additional litigation costs incurred by one party in responding to another party's untimely or inefficient actions in presenting its case.¹⁰

In the instant case, there are no circumstances that would support the exercise of Board discretion to impose sanctions on GMP in the form of an award of attorney's fees to either Albany¹¹ or LMG. There is no evidence that GMP has engaged in any bad faith actions with respect to the matter at hand. GMP completed the initial rounds of sound monitoring consistent

6. See 12 V.S.A. § 435(b)(12).

7. 30 V.S.A. § 9.

8. *Investigation into Entergy Nuclear Vermont Yankee, LLC*, Docket 7600, Order of 4/19/10 at 3 (quoting *Petition of Vermont Elec. Power Co., Inc. et al.*, Docket 6860, Order of 9/26/06 at 2).

9. *In re Appeal of Gadhue*, 149 Vt. 322, 327 (1988).

10. Docket 7600, Order of 4/19/10 at 2-3 (citations omitted).

11. As noted above, Craftsbury is without standing on the issue of noise impacts and its request for attorney's fees is therefore without support procedurally.

with the requirements of the Order and CPG and the company's approved sound-monitoring plan. Upon completion of each of the initial monitoring periods, GMP has timely filed its sound-monitoring reports detailing the results of its sound monitoring, including those times when the sound standard imposed by Condition 39 of the Order and CPG was violated. While it is unfortunate that the applicable standard was violated, the existence of a sanctionable violation pursuant to 30 V.S.A. § 30 does not, in and of itself, give rise to circumstances that justify a departure from the American Rule. Accordingly, the requests for attorney and expert witness fees are denied. Given our denial with respect to these fees, the request that the show cause hearing be postponed is also denied.

Lastly, Board staff will conduct a prehearing conference in the Board's hearing room commencing at 9:00 a.m. on August 8, 2013, to review with the parties the procedures that will govern the hearing that day. All parties with standing on the topic of noise impacts that intend to actively participate in the hearing must attend the prehearing conference.

SO ORDERED.

Dated at Montpelier, Vermont, this 2nd day of August, 2013.

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

OFFICE OF THE CLERK

FILED: August 2, 2013

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)