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: 7/12/2011

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

INTRODUCTION

On May 31, 2011, the Public Service Board ("Board") issued an Order and Certificate of Public Good ("CPG") in this docket approving, subject to certain conditions, the construction and operation of the proposed wind electric generating facility.

On June 14, 2011, Green Mountain Power Corporation ("GMP") and the Towns of Albany and Craftsbury (the "Towns") each filed a Motion for Reconsideration in which they ask the Board to make a number of modifications to the May 31, 2011, Order and CPG. On the same date, the Vermont Agency of Natural Resources ("ANR") filed a Motion to Alter or Amend, and Vermont Electric Power Company, Inc. and Vermont Transco LLC (together, "VELCO") filed a Motion to Amend May 31, 2011, Order. Lastly, also on June 14, 2011, Lowell Mountains Group, Inc. ("LMG") filed a Motion for New Hearing, Motion to Alter or Amend Order, and Motion for Relief from Judgment.

On June 24, 2011,[1] the Towns filed an Opposition to Green Mountain Power's Motion for Reconsideration, and ANR filed a Response of the Agency of Natural Resources to the Petitioner Green Mountain Power's Motion for Reconsideration. On that same date, the Vermont Department of Public Service ("DPS") filed a Response to Green Mountain Power's Motion for Reconsideration and a Response to VELCO's Motion to Amend May 31, 2011, Order. Also on June 24, 2011, GMP filed a Response to Motion for Reconsideration of Albany and Craftsbury, a Response to Motion for Reconsideration of Lowell Mountains Group, and a Response to Motions of Towns of Albany and Craftsbury and Lowell Mountains Group for Additional Discovery, Evidentiary Hearings and Other Relief.[2] Lastly, LMG filed an Opposition to GMP's Motion for Reconsideration, also on June 24, 2011.

On June 29, 2011, the Towns, GMP and LMG all filed reply memoranda in response to various parties' June 24, 2011, filings.

In this Order we grant in part the relief requested by GMP, deny the relief requested by the Towns, deny the relief requested by LMG, grant the relief requested by ANR, and deny the relief requested by VELCO.

Green Mountain Power's Motion

In its motion, GMP asks the Board to Modify Conditions 12 (provision of specialized first responder equipment), 17 (habitat fragmentation connectivity easement), 19 (System Impact Study filing) and 28 (completed archeological studies) so that compliance is not required prior to the commencement of construction. Additionally, GMP asks that Condition 20 (implementation of all upgrades required by Feasibility Study) be deleted in its entirety.

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1. Per a Memorandum from the Clerk of the Board's office dated June 16, 2011, any memoranda in response to the motions filed on June 14, 2011, must have been filed with the Board no later than the close of business on Friday, June 24, 2011, and could be filed electronically provided a hard copy was filed with the Board no later than Monday, June 27, 2011. Replies to responsive memoranda must have been filed with the Board no later than the close of business on Wednesday, June 29, 2011, and could be filed electronically provided a hard copy was filed with the Board no later than Thursday, June 30, 2011.

2. GMP's third document is related to comments and motions filed in response to its initial compliance filing. Accordingly, it will be addressed, along with the relief requested by the Towns and LMG and to which GMP was responding, in a separate order.

Condition 12

Condition 12 currently states:

> The Petitioners shall organize and conduct any necessary training for the area's first responders, and shall provide any and all specialized equipment needed for first responders to effectively provide their services prior to the start of any significant construction activities.

GMP argues that the specialized equipment need only be obtained prior to the activities that the equipment is intended to address, such as tower fires or access to infrastructure during heavy snow conditions. GMP proposes that the condition be modified as follows:

> The Petitioners shall organize and conduct any necessary training for the area's first responders, and shall provide any and all specialized equipment needed for first responders to effectively provide their services prior to the start of ~~any significant construction~~ activities for which the specialized equipment is needed.

The DPS is the only party with standing to address issues of public health and safety that responded to this requested amendment.[3] The DPS supports the proposed modification, agreeing that it makes sense to require GMP to obtain the specialized equipment only as the need for it arises.[4]

Discussion

We grant GMP's request to modify Condition 12. We can see no benefit from requiring GMP to obtain specialized equipment well in advance of when it would be needed. The intent of this condition was to make sure the equipment was available and first-responders trained in its use in the event it became necessary. The record was not clear on exactly when the equipment would be needed. Upon reconsideration, it is clear that specialized equipment will not be needed at the commencement of construction. GMP's proposed amendment adequately addresses the

3. LMG is opposed to the requested amendment. However, LMG's request to intervene on general matters of public health and safety was denied. Docket 7628, Order of 9/3/10 at 12. Accordingly, we are not giving LMG's arguments any consideration on this requested amendment. The same result applies to LMG's opposition to GMP's requested amendments to Conditions 19 and 28.

4. DPS Response to GMP at 1.

concerns we were attempting to address when we imposed the original condition. Accordingly, Condition 12 shall now read:

> The Petitioners shall organize and conduct any necessary training for the area's first responders, and shall provide any and all specialized equipment needed for first responders to effectively provide their services prior to the start of activities for which the specialized equipment is needed.

Condition 17

Condition 17 currently states:

> GMP shall secure prudent fragmentation-connectivity easements of adequate size and location, pursuant to the requirements of paragraph 3.2 of the Natural Resource MOU, and file them for Board approval, prior to commencing construction. Parties with standing on the issue shall have two weeks to file comments from the time any easements are filed.

GMP argues that the condition should be modified so that the requirement applies prior to the start of commercial operations, rather than the start of construction. GMP asserts that the pre-construction deadline is unnecessary because the Memorandum of Understanding between it and ANR ("Natural Resource MOU") "requires that if GMP cannot secure a suitable fragmentation easement in proximity to the Project area, 'GMP and ANR will work in good faith to enable GMP to acquire connectivity easements of comparable scale and ecological value to address connectivity in the Lowell mountain habitat block'"[5] GMP also argues that a pre-operational deadline is consistent with past Board Orders approving wind projects, that the ability to obtain the easements prior to construction is a matter largely beyond its control, and that a pre-construction deadline would have the unintended consequence of delaying construction to the point where the federal Production Tax Credits ("PTCs") would be placed at risk.[6]

GMP proposes modifying Condition 17 as follows:

> GMP shall secure prudent fragmentation-connectivity easements of adequate size and location, pursuant to the requirements of paragraph 3.2 of the Natural Resource MOU, and file them for Board approval, ~~prior to commencing~~

5. GMP Motion at 5 (quoting Exh. Pet.-GMP-ANR-1 at 9).

6. GMP Motion at 5-8. GMP also originally argued that the condition was not foreseeable because no party had raised it prior to the Board's May 31, 2011, Order and CPG. However, by letter filed June 27, 2011, GMP acknowledged that the Towns had in fact addressed a pre-construction deadline requirement in their brief.

~~construction~~ prior to operation. Parties with standing on the issue shall have two weeks to file comments from the time any easements are filed.

The Towns oppose GMP's request, arguing that GMP has not met the standard of V.R.C.P. 59(e), the purpose of which is to avoid unjust outcomes due to inadvertence by the Board, and that the Board was clear in its findings and discussion that the easements need to be acquired before the habitat is impacted by construction.[7] The Towns also argue that GMP is improperly relying on the mechanism of reconsideration to raise an argument for the first time, an argument that it should have raised in its reply brief in response to the Towns' arguments in their initial brief.[8] The Towns further assert that the pre-construction deadline is necessary to avoid undue impacts to wildlife habitat because fragmentation occurs when construction commences, and there is no guarantee that adequate parcels can be obtained, creating the risk that the impacts are borne, but the easements are not obtained and the project never operates.[9] Lastly, the Towns argue that any timing issues associated with obtaining the easements before construction are entirely of GMP's own making since it was aware of the need to be operational by December 31, 2012, or risk losing the PTCs, and could have been working to mitigate fragmentation impacts by seeking to obtain appropriate easements all along, instead of spending time litigating the extent of those impacts.[10]

LMG also opposes the requested amendment, arguing that allowing construction to proceed prior to GMP obtaining the easements would result in an undue adverse impact to wildlife habitat for an undetermined period of time, and that loss of the PTCs is unrelated to the condition at issue and should therefore be disregarded by the Board.[11]

The DPS does not oppose the relief requested by GMP, but expresses concerns over potential ratepayer impacts should the Board allow construction to proceed and it turns out that GMP is ultimately unable to obtain adequate easements, and is thus unable to complete or operate the project. The DPS therefore reserves its right to challenge any attempt to pass through

7. Towns Opposition to GMP at 1-2.
8. Towns Opposition at 2-6.
9. Towns Opposition at 7-10.
10. Towns Opposition at 11-14.
11. LMG Opposition at 5-7.

in rates any costs attributable to construction if the easements are ultimately unavailable and the project is not completed.[12]

ANR responded to GMP's request by proposing that the pre-construction deadline be modified so that GMP is required to obtain the easements on or before December 31, 2011. ANR asserts that this will ensure the easements are in place during the first phase of construction. To provide further assurance that the easements will be obtained in a timely manner, ANR recommends that the Board make clear that if they are not obtained by December 31, 2011, all construction activities must cease and will not be allowed to re-commence until the easements are obtained and approved. ANR recommends the following change to Condition 17:

> GMP shall secure prudent fragmentation-connectivity easements of adequate size and location, pursuant to the requirements of paragraph 3.2 of the Natural Resource MOU, and file them for Board approval~~, prior to commencing construction~~. Parties with standing on the issue shall have two weeks to file comments from the time any easements are filed. The easements must be approved, executed, and conveyed by December 31, 2011. GMP shall cease all construction activities if the fragmentation-connectivity easements have not been approved and executed by December 31, 2011.[13]

By letter filed with the Board on June 27, 2011, GMP indicated it had no objection to ANR's proposal and acknowledged that its Motion for Reconsideration was incorrect when it asserted that the Towns had not raised the issue of a preconstruction deadline in their briefs.[14]

By letter filed with the Board on June 29, 2011, the Towns argue that GMP's acknowledgment that the Towns had raised the deadline issue in their briefs requires the Board to disregard GMP's arguments on this issue in their entirety. The Towns also assert that the Board cannot consider the "compromise" deadline of December 31, 2011, proposed by ANR because it was proposed in response to an "invalid Motion for Reconsideration," and even if the Board could consider it, it should be rejected because it does not adequately address the Board's concerns over habitat fragmentation impacts. Lastly, the Towns assert that if the deadline is

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12. DPS Response to GMP at 1-2.
13. ANR Response at 1-2.
14. Letter from Peter Zamore, Esq., to Susan M. Hudson, Clerk, dated 6/27/11.

changed to December 31, 2011, then the Board must require the Petitioners to submit a complete list of construction activities scheduled to occur prior to December 31, 2011, including maps showing where construction will take place, and the amount of clearing, blasting and impervious surface that will be created. The Towns also argue that the Board then must require testimony from ANR witness Mr. Sorenson on the nature and extent of these impacts, allow the parties an opportunity for discovery, to present rebuttal testimony, and to conduct cross-examination. Absent this process, the Towns state, there will be no evidence for the Board to conclude that a December 31 deadline would not pose the same harms the Board sought to avoid with the pre-construction deadline.[15]

Discussion

After careful reconsideration, we are amending Condition 17 of our May 31, 2011, Order to incorporate, with a slight modification, the changes recommended by ANR.

The disposition of a motion to alter or amend a judgment rests with the discretion of the trial court.[16] Rule 59(e) gives courts "broad power to alter or amend a judgment."[17] In addressing a Rule 59(e) motion "the court may reconsider issues previously before it, and generally may examine the correctness of the judgment."[18] The purpose of Rule 59(e) is to avoid an unjust result due to inadvertence of the Board, as opposed to that of a party.[19] The rule is not intended to permit parties to relitigate issues or correct previous tactical decisions.[20] The motion must "present facts which could not, with the exercise of due diligence by counsel, have been placed before the court before the order complained of was issued."[21]

In the instant case, GMP has pointed out that, despite its efforts, it will be unable to complete the acquisition of the fragmentation-connectivity easements prior to August 1, 2011,

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15. Towns letter dated June 27, 2011.

16. *Alden v. Alden*, 187 Vt. 591, 592 (2010) (citations omitted).

17. V.R.C.P. 59(e) Reporter's Notes.

18. *Drumheller v. Drumheller*, 185 Vt. 417, 432 (2009) (citing *In re Robinson/Keir Partnership*, 154 Vt. 50, 54 (1990) (citations omitted)).

19. *Osborn v. Osborn*, 147 Vt. 432, 433 (1986).

20. *In re Cent. Vt. Pub. Serv. Corp.*, Docket Nos. 6946/6988, Order of 5/25/05 at 3.

21. *Cent. Vt. Pub. Serv. Corp.*, Docket Nos. 6946/6988, Order of 5/25/05 at 3 (quoting *Brown v. International Harvester Corp.*, 142 Vt. 140, 142-43 (1982)).

meaning that construction will be delayed and the PTCs will be at risk.[22] GMP asserts that it could not have brought this fact to the Board's attention prior to its Motion for Reconsideration because the time-consuming nature of obtaining the easements was not known until after the close of evidence. The result, GMP claims, is that the Board imposed the pre-construction deadline without knowing that this would result in a delay in commencement of construction which places the economic viability of the project at risk due to loss of the PTCs. GMP argues that this is the sort of unintended consequence Rule 59(e) is intended to address and contends the Board has granted reconsideration requests before in analogous situations.[23]

GMP is correct that we were not aware that the pre-construction deadline we imposed would delay the commencement of construction and place the economic viability of the project at risk due to the potential loss of the PTCs. As such, the imposition of the condition has created an unintended consequence, making this issue appropriate for reconsideration. Additionally, the fact that GMP did not respond to the Towns' arguments on this issue in its reply brief is, in our opinion, not fatal to GMP's request that we reconsider the issue. GMP in fact had already put this issue to the Board for consideration by including the pre-operations deadline in the Natural Resource MOU. Thus, the Board was aware of GMP's position. What the Board was not aware of, and what GMP was unable to call our attention to previously, was the practical impossibility of complying with the condition while maintaining the economic viability of the project. Accordingly, this matter is appropriately before us at this time.

With respect to the deadline itself, we are persuaded by the combination of the arguments GMP has put forth and the apparent support for the amended deadline by ANR. Our primary concern in imposing the pre-construction deadline was that GMP might delay meeting its obligation until the time period just before commercial operations began, when it could find itself with little or no options if parcels that had been previously identified turned out not to be available. Based on the affidavit of Mr. Pughe, it appears GMP has been working steadily since signing the Natural Resource MOU to obtain the required easements, and appears to be making

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22. Pughe Affidavit at ¶ 9; GMP Reply to Towns Response at 3.

23. GMP Reply to Towns Response at 3 (citing *Joint Petition of Green Mountain Power Corp. and Vermont Electric Cooperative, Inc.*, Docket No. 7035, Order of 7/8/05 at 1-2).

progress in that regard. The December 31, 2011, deadline, coupled with the requirement that GMP cease construction if the easements have not been approved and obtained by that date accomplishes two things: first, it gives GMP adequate time to obtain the identified potential easements, or if they are ultimately unavailable, adequate time to work with ANR under the MOU to identify and obtain alternate parcels; and, second, it limits the risk of financial exposure by placing the requirement at a time relatively early in the construction process. That said, we caution GMP that if it decides to proceed with construction and is unable to meet this condition and abandons the project as a result, that recovery from ratepayers of the costs that it incurred will be subject to challenge as described in the DPS response to the GMP motion. We also note that if a failure to meet this condition leads to an abandonment of the project by GMP, the company will not be excused from fully complying with its decommissioning obligations, or its obligation to ultimately obtain appropriate mitigation since the fragmentation effects will not simply end following completion of decommissioning.

We agree with the Towns that the fragmentation effects will begin to occur at the time the Petitioners enter the area and begin clearing activities in preparation for road and crane-path construction. However, the parcels that are being pursued to mitigate the fragmenting impacts of the project are in the vicinity of, but not actually on the project site.[24] The parcels are undeveloped and their undeveloped nature will not be impacted by the commencement of construction prior to their conveyance.[25] Accordingly, allowing construction to commence while imposing a short deadline for obtaining the requisite property rights, will not exacerbate the fragmentation effects of the project, nor compromise the mitigation value of the undeveloped parcels.

GMP is not entirely correct in its assertion that this approach is consistent with Board precedent. In *Deerfield,* we amended our final order to make clear that the petitioner was not permitted to commence site preparation or construction until after it received Board approval of a

24. Pughe Affidavit at ¶ 10.
25. Pughe Affidavit at ¶ 11.

conservation plan conserving high-quality bear habitat at a 4-to-1 ratio (i.e., four acres conserved for every one acre impacted).[26]

However, we believe the instant case is sufficiently distinguishable from *Deerfield* to permit the relief we grant today. In *Deerfield* there was some question as to whether the petitioners could even identify, much less obtain, habitat of sufficient quality and quantity to mitigate the impacts the project would have on bear habitat. In the present case, ANR, the state agency charged with protecting the state's natural resources, has entered into the Natural Resource MOU with GMP, which addresses the habitat fragmentation impacts of the project through GMP obtaining habitat fragmentation-connectivity easements. And, unlike its position in *Deerfield*, ANR (through the MOU) is agreeable to allowing construction to commence before GMP has obtained the necessary mitigation, suggesting that ANR believes that sufficient mitigation in fact can be obtained by GMP in this proceeding. Additionally, unlike in *Deerfield*, parcels that would meet the objectives of the Natural Resource MOU have already been identified and discussions with the landowners are underway. Also, the petitioner in *Deerfield* did not propose to start construction in advance of securing the wildlife mitigation parcels, so the Board was not presented with that issue.

We do realize that there is some risk that GMP will not be able to obtain adequate mitigation by December 31, 2011. However, we believe that risk is sufficiently minimized by the steps we take today by: (1) creating significant incentive for GMP to comply with the December 31, 2011, deadline; (2) restricting the amount of financial exposure from construction should GMP ultimately be unable to comply with the condition; (3) making it clear that a failure to comply with the condition that results in abandonment of the project will not excuse GMP from its decommissioning obligations or its obligation to pursue fragmentation-connectivity easements until adequate mitigation is put in place; and (4) reminding GMP that recovery from ratepayers of any costs incurred in construction of a project that is not completed due to non-compliance with the condition will be subject to challenge. GMP should also bear in mind, that if construction is delayed as a result of difficulty in obtaining the habitat fragmentation-connectivity easements, and it chooses to move ahead with construction of a delayed project and

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26. *Petition of Deerfield Wind*, Docket 7250, Order of 7/17/09 at 8.

loses the PTCs as a result, recovery from ratepayers of any increased costs associated with that loss will also be subject to potential disallowance. Additionally, the parties must bear in mind that we found that this project, subject to certain conditions, will promote the general good of the state. That finding was made, in part, due to the state's legislated policy goals of promoting the construction of renewable resource generating facilities. Our decision today strikes a balance by minimizing potential risks and avoiding an unintended consequence that would run contrary to those legislated policy goals.

We also disagree with the Towns' assertion that the Petitioners must file a detailed construction schedule, followed by testimony from Mr. Sorenson, discovery on that testimony, rebuttal testimony, and technical hearings on the effects of moving the deadline. Moving the deadline to December 31, 2011, does not change the amount of work and its related impacts that will occur by that date. The impacts remain the same whether the easements are obtained pre-construction or by December 31, 2011. There is no additional information required in the record. The record already adequately supports a finding that the impacts will not be unduly adverse provided adequate mitigation is obtained,[27] and moving the deadline does not change that result. Once the easements are filed with the Board for review and approval, per our May 31, 2011, Order, parties with standing on the issue will be provided an opportunity to comment and ask for a hearing on the adequacy of the mitigation at that time.

Condition 17 shall now read:

> GMP shall secure prudent fragmentation-connectivity easements of adequate size and location, pursuant to the requirements of paragraph 3.2 of the Natural Resource MOU, and file them for Board approval. Parties with standing on the issue shall have two weeks to file comments from the time any easements are filed. The easements must be approved, executed, and conveyed by December 31, 2011. If GMP has not met this requirement by December 31, 2011, GMP shall cease all construction activities until such time as the fragmentation-connectivity easements are approved, executed, and conveyed.

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27. As noted above, since the mitigation parcels will be undeveloped parcels located outside the project footprint, commencement of construction will not impact their mitigation value.

Condition 19

Condition 19 currently states:

> Prior to construction, the Petitioners shall submit to the Board and parties, the final System Impact Study ("SIS") for a final determination by the Board regarding whether the SIS fully satisfies any remaining issues associated with system stability and reliability. Parties with standing on the issue will have two weeks to comment on the SIS and any required upgrades at that time. GMP, except as identified in the CVPS MOU, shall be responsible for all costs of system upgrades or changes necessary to ensure that the project does not cause adverse impacts to the transmission system. In addition, the Petitioners must obtain Board approval for any necessary upgrades identified in the SIS prior to construction of the project, including any Section 248 CPGs that may be required for the upgrades.

GMP argues that the pre-construction deadline for submitting the final SIS was not foreseeable because no party proposed it and the deadline should therefore be modified. GMP also argues that the pre-construction deadline is unnecessary because all upgrades that are expected as a result of the SIS have already been included in the final design plans and budget, and that any differences would likely be limited, and that GMP would need to receive Board approval for anything not already approved in the CPG and that such approval would be sought and obtained well in advance of interconnection. Further, because GMP must implement any upgrades identified as necessary by the SIS prior to interconnecting, there is no need for Board review and approval prior to construction. Lastly, GMP argues that the timing of the issuance of the SIS is not something it has control over, and that the pre-construction deadline could result in unnecessary delays with the unintended consequence of delaying construction to the point where the PTCs would be placed at risk.[28]

GMP proposes the following modifications to Condition 19:

> ~~Prior to construction~~ On or before October 1, 2011, the Petitioners shall submit to the Board and parties, the final System Impact Study ("SIS") for a final determination by the Board regarding whether the SIS fully satisfies any remaining issues associated with system stability and reliability. Parties with standing on the issue will have two weeks to comment on the SIS and any required upgrades at that time. GMP, except as identified in the CVPS MOU, shall be responsible for all costs of system upgrades or changes necessary to

28. GMP Motion at 3-8.

> ensure that the project does not cause adverse impacts to the transmission system. In addition, the Petitioners must obtain Board approval for any necessary upgrades identified in the SIS not already included in the CPG prior to construction of ~~the project~~ such upgrades, including any Section 248 CPGs that may be required for the upgrades.[29]

The DPS disagrees with this request, and recommends that a draft SIS be submitted to the Board and parties prior to construction, with the final SIS being submitted on or before October 1, 2011. The DPS proposes the following modification to Condition 19:

> Prior to construction, the Petitioners shall submit to the Board and parties, ~~the final~~ a draft System Impact Study ("SIS"). Prior to October 1, 2011, the Petitioners shall submit to the Board and parties, the final SIS for a final determination by the Board regarding whether the SIS fully satisfies any remaining issues associated with system stability and reliability. Parties with standing on the issue will have two weeks to comment on the SIS and any required upgrades at that time. GMP, except as identified in the CVPS MOU, shall be responsible for all costs of system upgrades or changes necessary to ensure that the project does not cause adverse impacts to the transmission system. In addition, the Petitioners must obtain Board approval for any necessary upgrades identified in the SIS not already included in the CPG prior to construction of ~~the project~~ such upgrades, including any Section 248 CPGs that may be required for the upgrades.[30]

Discussion

We agree with the Department that a draft SIS should be filed prior to commencement of construction and will adopt the DPS' suggested amendments to the condition. It is the intent of this condition to ensure that interconnection is done in a manner that does not cause adverse impacts to system stability and reliability, the details of which need not be entirely finalized prior to commencement of construction. Provided the final SIS is filed by October 1, 2011, it will be available in final form well in advance of interconnection, allowing ample time to complete any identified upgrades. However, requiring GMP to file the draft SIS prior to construction will allow the Board to determine whether or not there may be insurmountable technical issues, or

29. GMP Motion at 3.
30. DPS Response to GMP at 2.

issues the resolution of which might make the project uneconomic. Accordingly, Condition 19 shall now read:

> Prior to construction, the Petitioners shall submit to the Board and parties, a draft System Impact Study ("SIS"). Prior to October 1, 2011, the Petitioners shall submit to the Board and parties, the final SIS for a final determination by the Board regarding whether the SIS fully satisfies any remaining issues associated with system stability and reliability. Parties with standing on the issue will have two weeks to comment on the SIS and any required upgrades at that time. GMP, except as identified in the CVPS MOU, shall be responsible for all costs of system upgrades or changes necessary to ensure that the project does not cause adverse impacts to the transmission system. In addition, the Petitioners must obtain Board approval for any necessary upgrades identified in the SIS not already included in the CPG prior to construction of such upgrades, including any Section 248 CPGs that may be required for the upgrades.

Condition 20

Condition 20 currently reads:

> The Petitioners shall implement all network upgrades recommended by the Feasibility Study for the project.

GMP requests that this condition be eliminated in its entirety because the SIS will supercede the Feasibility Study and establish the upgrades necessary to interconnect the project without adverse impacts to system stability and reliability.[31]

GMP's request appears reasonable and no party has opposed it. We therefore delete Condition 20 in its entirety.

Condition 28

Condition 28 currently reads:

> When the Petitioners file the final design plans for the proposed project, they must demonstrate that remaining archeological studies are completed in accordance with the results of the Phase I studies and any needed Phase II study.

GMP argues that the deadline for demonstrating completion of all archaeological studies was not foreseeable because no party proposed it and the deadline should therefore be modified.

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31. GMP Motion at 8.

GMP also argues that the deadline is unnecessary because the studies need only be completed prior to any earth disturbance in the area to be analyzed. Lastly, GMP argues that the deadline could have the unintended consequence of delaying construction to the point where the PTCs would be placed at risk, because it may need to initiate condemnation proceedings to obtain access to the parcels remaining to be studied.[32]

GMP proposes the following modification to Condition 28:

> ~~When the~~ Petitioners shall have three weeks ~~file the final design plans for the proposed project~~ from the time that they obtain access to all archaeologically sensitive areas, whether by landowner consent or by condemnation decree, to file for Board approval a ~~they must~~ demonstrate~~e~~ion that remaining archaeological studies are completed in accordance with the results of the Phase I studies and any needed Phase II study.

The DPS was the only party with standing on this issue to respond to GMP's request. The DPS does not oppose the relief requested by GMP, but expressed concerns over potential ratepayer impacts should the Board allow construction to proceed and it turns out that GMP is ultimately unable to adequately address archaeological issues, and is thus unable to complete or operate the project. The DPS therefore reserved its right to challenge any attempt to pass through as rates, any costs attributable to construction if GMP is ultimately unable to address archaeological issues and the project is not completed.[33]

Discussion

We agree that an amendment to this condition is reasonable. However, we believe it also must be made clear that no earth disturbing activities may take place in any area until after the required studies are completed and the demonstration has been filed with and approved by the Board. In addition, we caution GMP that if it decides to proceed with construction and is unable to complete or operate the project due to archaeological issues, recovery from ratepayers of the costs that it incurred will be subject to challenge as described by the DPS.

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32. GMP Motion at 3-8.
33. DPS Response to GMP at 1-2.

Accordingly, Condition 28 shall now read as follows:

> The Petitioners shall have three weeks from the time that they obtain access to all archaeologically sensitive areas, whether by landowner consent or by condemnation decree, to file for Board approval a demonstration that remaining archaeological studies are completed in accordance with the results of the Phase I studies and any needed Phase II study. No earth disturbing activities may take place in any such area until after the required studies are completed and the demonstration has been filed with and approved by the Board.

The Albany/Craftsbury Motion

In their motion, the Towns ask the Board to reconsider its findings with respect to: (1) the Petitioners' noise modeling, arguing that it shows the proposed project will not meet the Board's interior noise standards; (2) the interior noise standard, arguing that it must be an instantaneous standard rather than an hourly average, pursuant to World Health Organization ("WHO") guidelines; (3) the Environmental Protection Agency's ("EPA") Sound Levels Document, arguing that they are erroneous and unsupported by the record; (4) economic benefits, arguing that the economic impacts fall disproportionately on the Town of Albany; and (5) the time to respond to compliance filings, arguing that the time to respond is insufficient.

1. Petitioners' Noise Modeling and the Interior Noise Standard

The Towns contend that the Petitioners' sound modeling did not demonstrate that the proposed project will meet the interior standard of 30 dBA because the Petitioner's sound modeling relied on a 15 dBA attenuation assumption. The Towns claim that, according to the assumptions in the WHO Guidelines document and other testimony in the record, it is erroneous to assume that residences will attenuate sound by 15 dBA with their windows open.[34] The Towns assert that approving the proposed project without the Petitioners demonstrating compliance with the noise standard violates the Board's mandate and is not in the public good.[35]

GMP contends that the Towns' claim with regard to sound attenuation is without merit. GMP contends that no witness identified the sound attenuation associated with open windows,

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34. Towns Motion at 2-5; Towns Reply to GMP Response at 4.
35. Towns Reply to GMP Response at 4-5.

and that the Towns fail to demonstrate "why some abstract right to sleep with windows open mandates a certain attenuation standard." GMP states that it is required to meet an interior sound standard and that compliance will be demonstrated by means of a sound-monitoring plan.[36]

Discussion

The Petitioners were the only party to conduct sound modeling and the results of the modeling indicate that the proposed project was expected to meet the exterior standard of 45 dBA. The Petitioners' sound modeling analysis further assumes that sound would be attenuated by 15 dBA to determine an interior sound level. As we stated in our May 31 Order, the WHO Guidelines indicate that exterior sound levels are usually reduced, when windows are slightly open, by 10 to 15 dBA, and the Petitioners' assumptions about attenuation are consistent with values in the WHO Guidelines.

The Towns claim that the sound modeling analysis should assume an attenuation of 10 dBA given that windows will likely be fully open during the summer months. The Towns have not provided any new basis or argument that was not previously considered in the May 31 Order. We conclude that the Petitioners have applied reasonable assumptions in their sound modeling that are supported by the record and have demonstrated that the proposed project will not likely be in violation of the interior noise standard. As we noted in our May 31 Order, the indoor standard of 30 dBA (interior bedrooms)(Leq)(1 hr) must be met regardless of the attenuation characteristics of the existing structure. Accordingly, we deny the Towns' motion on this issue.

2. Interior Noise Standard, Instantaneous Versus Hourly Average

The Towns claim that, according to WHO Guidelines, sleep motility, and therefore undue adverse health effects, begins at 32 dBA. The Towns contend that the noise standard for the proposed project should be an instantaneous interior standard of 30 dBA, rather than hourly, to ensure that 32 dBA is not exceeded at any point during the hour. The Towns argue that wind turbine noise is not continuous in nature, but fluctuates with wind conditions, and can vary by

36. GMP Response to Towns at 3-4.

several decibels (5 to 10 dBA) in higher wind-shear conditions, which causes the "swish-swish" effect or amplitude modulation. The Towns contend that the Board standard will not be protective of public health, since the standard adopted by the Board will allow interior noise to exceed 32 dBA (instantaneous).[37]

GMP maintains that the WHO Guidelines support the Board's hourly standard and the Towns have failed to demonstrate otherwise. GMP asserts that the Towns have failed to demonstrate how often wind-shear conditions occur, why a 5 to 10 dBA variation is significant, and why such a sound variation requires instantaneous testing. GMP further contends the Towns' claim that sleep motility causes an undue adverse health effect is contradicted by the WHO Guideline standard of 40 dBA (exterior)(night)(annual).[38]

Discussion

Our May 31 Order established an indoor standard of 30 dBA (interior bedrooms)(Leq)(1 hr) for the proposed project. Given that the standard is determined by a one-hour averaging period, the standard allows for some noise fluctuations across the one-hour measuring period. We conclude that a 30 dBA standard is appropriate and limits the opportunity for large fluctuations across the one-hour measuring period. First, a 30 dBA level is characterized as a faint noise, below the level typically found in a library (38 dBA) and background noises in a home (40 dBA).[39] Second, the Leq measurement is the average of the sound pressure over an entire monitoring period, with loud and infrequent noises having a greater effect on the resulting level than quieter and more frequent noises.[40]

We conclude that the 30 dBA one-hour standard is protective of human health and are not persuaded by the Towns' claim that undue adverse health effects begin at 32 dBA (instantaneous). While the WHO Guidelines indicate that sleep motility can occur at 32 dBA, the WHO Guidelines do not recommend a 32 dBA (instantaneous) level for the protection of public health. Rather, the WHO Guidelines indicate that the Lowest Observed Adverse Effect

37. Towns Motion at 5-7; Towns Reply to GMP Response at 5-6.
38. GMP Response to Towns at 4-5.
39. Exh. Pet.-KHK-2 at 3.
40. Exh. Pet.-KHK-2 at 6.

Level ("LOAEL") is 40 dBA (exterior)(night)(annual), and this level can be considered a health-based limit necessary to protect the public, including the most vulnerable groups (see Finding 293 in the May 31 Order). Furthermore, the WHO Guidelines indicate that, between 20 to 40 dBA (night)(exterior), the intensity of sleep effects depends on the nature of the source and number of events, with vulnerable groups more susceptible, and concludes that even in the worst cases the effects seem modest (see Finding 295). As we stated in our May 31 Order, both the Department's and Petitioners' health expert concluded that a standard based on a one-hour average is protective of health. We conclude that a one-hour average indoor standard is appropriate. Accordingly, we deny the Towns' motion on this issue.

3. The EPA Sound Levels Document

The Towns contend that Finding 292 regarding the EPA Levels Document is erroneous and unsupported by the record. The Towns claim that the EPA noise standard is not meant to protect the public from sleep disturbance and annoyance, rather it assures adequate speech communication.[41] The Towns also contend that the EPA Levels Document recommends that the EPA noise standard of 55 dBA be adjusted down 10 decibels for quiet suburban or rural communities, another 5 decibels for communities with no prior experience with intruding noise, and another 5 decibels for noise that has tones or is impulsive in character. The Towns therefore claim that the EPA Levels Document supports a noise standard of 35 to 40 dBA.[42] The Towns further contend that the May 31 Order did not accurately address the EPA Levels Document, or how the document suggests that a lower standard is appropriate in certain instances.[43]

GMP contends that the Towns' claims regarding the EPA Levels Document fail to show that the Board mischaracterized the document, and that the Towns identify no legal basis for a requirement that the Board must address the Towns' proposed adjustments.[44] GMP further contends that there is no basis for challenging the Board's required noise standard, because the

41. Towns Motion at 8-9; Towns Reply to GMP Response at 7.
42. Towns Motion at 9-10.
43. Towns Reply to GMP Response at 7.
44. GMP Response to Towns at 5.

Board's decision does not depend on the EPA Levels Document, but rather on the WHO Guidelines.[45]

Discussion

In our May 31 Order, Finding 292 states that the EPA Levels Document "identifies a level of 55 dBA (exterior) as the level that is protective of human health and welfare." The Towns provide no evidence that Finding 292 is erroneous and unsupported by the record. To the contrary, the evidence in the record indicates that the EPA recommended guideline was designed for the protection of human health and welfare.[46] While the EPA Levels Document recommends reductions to the 55 dBA standard to reduce community reaction, but does not state these reductions are necessary to protect human health or to eliminate communication interference.[47] Our May 31 Order did not discuss these adjustments, because we did not rely on the EPA Levels Document to support our interior standard that is protective of sleep disturbance. Rather, the exterior standard in the EPA Levels Document demonstrates a level that is protective of acute health effects and communication. As stated in the May 31 Order, we established our noise standard to be protective of health based on the 2009 WHO Guidelines. As supported by Finding 294, the noise standard for the proposed project is sufficient to protect human health and avoid sleep disturbance and is equivalent to, if not more stringent than, the WHO Guidelines. We conclude that the Towns' claim with regard to Finding 292 is without merit. Accordingly, we deny the Towns' motion on this issue.

4. Economic Benefits and Impacts to the Town of Albany

The Towns argue that the Board's economic analysis failed to consider the disproportionate impact to the Town of Albany, asserting that "almost all of the property devaluation experienced by properties discussed in the Board's finding would occur in Albany, which would receive very little compensation (most likely $10,000/yr) from the Good Neighbor

45. GMP Response to Towns at 5-6.
46. Exh. Pet-KHK-2 at 8-9. The EPA levels Document was published in 1974.
47. Exh. LMG-LB-10.

Fund." The Towns assert that the small benefit from the annual Good Neighbor Fund payments must be balanced against the "many millions of dollars in property devaluation that Albany is expected to suffer."[48] The Towns point to the testimony of Mr. Kane, which states that as many as 120 homes may lie within a three-mile area, much of which lies in Albany, that would experience visual impacts as evidence supporting their assertion that "many millions of dollars of property devaluation" will occur within that town.[49] The Towns also point to an exhibit sponsored by DPS witness Becker, the McCann Appraisal letter, and contend that it demonstrates that homes near wind generation facilities sell for 20% less on a per-foot basis than comparable homes in other locations.[50]

GMP opposes the requested relief, arguing that the Board did not find that the project would actually cause a decrease in property values as described in the Towns Motion, rather it assumed a decrease in value of 10% to all homes within three miles of the project for the sole purpose of comparing potential impacts against overall benefits. GMP also contends that there is no evidence cited by the Towns that supports their claim that any negative economic impacts from the project will fall disproportionately on Albany.[51]

Discussion

We deny the relief requested by the Towns on this issue because the evidence in the record does not support their claims that there will be a widespread property devaluation in Albany. Both of the testifying economics experts determined that there was no basis to conclude that there would be a net decrease in property values on a town-, county-, or region-wide basis. Mr. Becker's testimony regarding the 10% decrease in value for all properties within three miles of the project was only a hypothetical, based on conservative assumptions, so that an overall net benefits analysis could be performed. It does not provide an evidentiary basis for a finding that all properties within three miles of the project actually will experience a 10% decrease in value.

48. Towns Motion at 10-11.
49. Towns Reply to GMP Response at 8-9.
50. Towns Motion at 10, fn. 10.
51. GMP Response to Towns.

Based on the evidence of record, the Towns' claim that Albany's grand list value will decline by "many millions" of dollars is unsupported.

With respect to the McCann Appraisal letter submitted as DPS-JB-6, there is no requirement that the Board rely on every piece of evidence placed before it. Instead, part of the Board's job is to weigh the evidence. The Board reviewed the evidence of record and concluded that the best empirical evidence on the impacts of wind generation facilities on real property values was the Berkeley Report relied upon by the Petitioners' economics expert. We found the Berkeley Report and the testimony of Mr. Becker and Mr. Kavet to be the most persuasive. Based on the evidence of record, the Board found that, "While it is possible that some individual properties may experience negative value impacts as a result of the proposed project, there is no empirical basis to assume that the proposed project will have any negative impacts to aggregate town, county-wide, or regional real property values."[52] Moreover, both Mr. Becker and Mr. Kavet acknowledged that there may be some impacts to specific properties located close to the proposed project site. However, as we stated in our May 31, 2011, Order,

> Section 248 only requires a project to have a net economic benefit. It does not prohibit projects if there are some negative economic impacts, provided those impacts are outweighed by positive impacts so that the net result is economic gain. We do not believe that the potential for a limited number of properties to see some decrease in valuation will offset the millions of dollars in benefits the proposed project will bring the region and the state.[53] Additionally, the best evidence of record indicates very little likelihood of negative impacts to property values.[54]

Because the Board's findings on economic benefit are fully supported by the record, and because there is no reliable evidence in the record to support the significant and widespread property devaluation Albany now alleges, we deny the Towns' requested relief on this issue.

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52. Docket 7628, Order of 5/31/11 at 35 (citing Exh. Pet.-TEK-2 at 5; tr. 2/4/11 at 119 (Kavet); Becker pf. at 5-6, 39-40.

53. *See* Becker pf. at 6-10 (setting forth an analysis based on conservative assumptions regarding negative impacts to property values and demonstrating a net economic gain).

54. Docket 7628, Order of 5/31/11 at 39-40.

5. Time for Responding to Compliance Filings

The Towns initially argued that the two-week period established by the Board for responding to compliance filings was inadequate, and must be expanded to three weeks.[55] However, in their June 30, 2011, reply to GMP's response, the Towns indicated that their primary concern with respect to the compliance filings that had been made was with the deadlines for comment on the noise-monitoring protocol and other noise- or aesthetics-related documents. The Towns indicate that this concern was addressed by our decision to allow parties to file supplemental comments on the Petitioners' June 6, 2011, compliance filing by July 1, 2011, and also extending the deadline for comments on the Petitioners' June 10, 2011, filing from June 24 to July 1, 2011.[56] The Towns further state that they will file motions for deadline extensions on a case-by-case basis going forward should the need arise.

GMP has stated that a two-week comment period is needed only for those filings that are required to be made prior to commencement of construction, and that it would not oppose a longer comment filing deadline provided it does not delay the start of construction, currently planned for August 1, 2011. Given GMP's amenability to longer comment periods for certain filings, we encourage all the parties to seek to reach consensus on which filings can be subject to a longer period, what that period should be, and file an agreement to that effect with the Board.

Lowell Mountains Group, Inc. Motion

In its motion, LMG asks the Board to: (1) grant additional hearings regarding natural resource impacts in light of the Natural Resource MOU; (2) amend its May 31, 2011, Order to find that the record does not establish that the Natural Resource MOU adequately protects the natural environment; (3) conduct a hearing or amend the May 31, 2011, Order to address a lack

55. Towns Motion at 12-13.
56. Docket 7628, Memorandum of 6/24/11.

of evidence on carbon emissions reductions allegedly caused by the project; and (4) expand the period for filing comments on compliance filings from two weeks to four weeks.[57]

1. Additional Hearings on Natural Resource MOU

LMG argues that the Board should conduct additional hearings on the Natural Resource MOU because its introduction on the final day of technical hearings removed issues from the hearing process that were addressed by the MOU, resulted in witnesses being taken out of order and truncated the presentation of evidence on natural resource impacts. LMG asserts that there are natural resource impacts that are not adequately addressed in the Natural Resource MOU which could not have been identified at the time the MOU was produced for introduction into evidence and therefore, a new hearing is required.[58]

GMP opposes LMG's request for a new hearing, arguing that LMG waived its right to make such a request. LMG further contends that even if there was no waiver, a change in one party's position does not remove issues from a litigated proceeding, LMG could have litigated them even with the production of the Natural Resource MOU, LMG fails to explain why it needs more time to examine the Natural Resource MOU, and LMG fails to cite any legal authority in support of its position.

Discussion

We deny LMG's request for an additional hearing on the Natural Resource MOU because it already had the opportunity to cross-examine the witnesses that testified in support of the document, because it fails to identify any issues in its motion that it claims to have been unable to identify at the time the MOU was entered into evidence, and because LMG, when provided an opportunity earlier in this proceeding to seek an additional hearing on the MOU, elected not to do so.

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57. We note that LMG filed a reply to GMP's Response on June 30, 2011. However, LMG's reply provided no further substantive argument not included in its initial motion. Accordingly, our discussion focuses on the initial LMG Motion.

58. LMG Motion at 2-3.

We reject LMG's claim that production of an MOU that changes the positions of the parties that enter it somehow "removes" issues from a litigated proceeding. The same issues present before an MOU is signed remain after it is signed. While the positions of the Petitioners and ANR might have changed following some measure of compromise on both sides, LMG had the opportunity to cross-examine the sponsoring witnesses on any issue addressed by the MOU, and then brief any lack of adequacy in its briefs based on testimony elicited during cross-examination and other evidence in the record. To the extent LMG's concern is based on ANR changing its position, LMG should be mindful that its standing as an intervenor on natural resource issues is based on its representations that its interests were not adequately represented by other parties to the proceeding, including ANR.[59] If LMG made a tactical decision to rely on ANR to fully represent those interests throughout the proceeding, it was a decision it made at its own risk, particularly after it sought intervention on the grounds that ANR in fact did not adequately represent its interests.

We also reject LMG's assertion that it now needs a new hearing to present evidence on natural resource impacts which could not be identified on short notice when the MOU was produced, because LMG does not attempt to identify the issues with which it is concerned. As noted above, LMG had an opportunity to cross-examine the sponsoring witnesses, and we will not simply schedule additional hearings on an unsupported assertion that the MOU fails to adequately address certain impacts that could not be known at the time it was filed. In short, non-specific and unsupported claims that issues were not addressed or that evidence was not adequately presented do not warrant additional hearings, particularly when the complaining party had an opportunity to present its own witnesses to address its concerns and, once the MOU was presented, to cross-examine the sponsoring witnesses.

Lastly, as GMP correctly notes, LMG was specifically offered an opportunity to seek an additional hearing on the Natural Resource MOU but failed to avail itself of that opportunity, instead deciding to raise any questions about the adequacy of the MOU in its brief.[60]

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59. Docket 7628, Order of 9/3/10 at 11. *See also*, LMG Motion to Intervene filed August 12, 2010, at 5-6 (stating that its member interests were distinct from those of ANR).

60. Tr. 2/24/11 at 267 (exchange between Chairman Volz and LMG Counsel Gerhard).

Accordingly, we deny LMG's request for additional hearings on the Natural Resource MOU.

2. Evidentiary Record and the Natural Resource MOU

LMG repeats the arguments that it made in support of an additional hearing on the Natural Resource MOU, and concludes that if no additional hearings are granted by the Board, then the May 31, 2011, Order must be amended to conclude that there is insufficient record evidence to support a finding of no undue adverse impacts to the natural resources addressed by that MOU.

GMP's arguments on this issue are the same as those described in the preceding section.

Discussion

We deny LMG's motion to amend the Order, because the record contains the necessary supporting evidence for the Board to have found, as it did, that with the conditions imposed in the Board's Order, including approval of the Natural Resource MOU, the Petitioners had demonstrated that there would be no undue adverse impacts to the natural environment. In making its argument, LMG is overlooking not only the MOU itself, but the testimony elicited from the sponsoring witnesses during cross-examination. Thus, there is ample record evidence on which the Board based its findings on natural resource impacts.

3. Evidentiary Record and Carbon Emissions

LMG argues that the Board's May 31, 2011, Order "essentially adopts" the Petitioners' position that operation of the project, as a renewable energy resource, will reduce carbon emissions in New England, in spite of there being "absolutely no evidence" in the record to support such a finding. LMG asserts that DPS witness Mr. Lamont testified only to a theoretical reduction in carbon emissions, but was unable to quantify the amount of any reductions or identify which operators specifically would curtail their emissions when the project was running. Without this detailed information, LMG contends, the Board must either schedule an additional hearing on the topic, or amend its Order to eliminate findings associated with reductions in

carbon emissions, without which, LMG asserts, the Board cannot find the project to be in the public good.[61]

In opposing LMG's request, GMP points out that the finding is based on the testimony of Mr. Lamont and Mr. Smith, stating that operation of the project will "offset carbon emissions of the marginal generating unit in New England, without indicating the amount of the offset"[62] and argues that the finding is therefore fully-supported. GMP also notes that the finding in question is associated with the criterion addressing air pollution, and that no party has suggested that operation of the project will result in any polluting emissions.[63]

Discussion

We deny LMG's motion on this issue because the finding is based directly on the testimony of Mr. Smith and Mr. Lamont. There is no requirement that the Board find a specific amount of carbon emissions reduction or identify specific units that would be backed down during specific times. Additionally, the Board's finding of general good looked at numerous factors, only one of which was reductions in carbon emissions. And, while we find that the evidence of record supports a finding that the project's operation will help offset carbon emissions in New England, we note that our determination of general good also rested on the fact that the project will be a source of long-term, stably priced power for GMP and VEC, and because it will assist the state in meeting its legislated policy goals associated with the development of renewable power projects.[64]

4. Time for Responding to Compliance Filings

LMG argues that the two-week review period established by the Board is insufficient for parties with limited resources and should therefore be expanded to four weeks.[65]

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61. LMG Motion at 4-5.
62. GMP Response to LMG at 5.
63. GMP Response to LMG at 5.
64. Docket 7628, Order of 5/31/11 at 144.
65. LMG Motion at 5.

GMP opposes the request because LMG does not specify the compliance filings for which it needs additional time to review, and points out that with respect to expert witness availability, LMG's experts reviewed only aesthetics and noise, and much of the compliance filings on those issues have already been made.

Discussion

We deny the requested relief on this issue because LMG did not provide any particularized information on why the requested relief is appropriate. As stated in a June 24, 2011, Memorandum from the Clerk's Office, "The Board imposed a two-week comment period for responding to compliance filings because it concluded that would be adequate to protect the interests of all parties, striking a balance between providing sufficient time to review and respond to the filings, while still addressing these matters in a timely fashion." LMG makes only generalized statements that fail to demonstrate that the Board did not strike the proper balance. Additionally, at least part of LMG's request on this point is moot as we decided to allow parties to file supplemental comments on the Petitioners' June 6, 2011, compliance filing by July 1, 2011, and also extended the deadline for comments on the Petitioners' June 10, 2011, filing from June 24 to July 1, 2011.[66]

We also deny LMG's request that the Board amend the May 31, 2011, Order to state that it will conduct technical hearings on all of the Petitioners' compliance filings. As we stated throughout that Order, any party that is seeking hearings on compliance filings must do so in response to a particular filing and must explain why a hearing is warranted. LMG's motion fails to meet this standard.

Agency of Natural Resources Motion

In its motion, ANR asks the Board to clarify its discussion regarding significant natural communities or delete the last clause of the first sentence of that discussion as inconsistent with Board precedent. The discussion ANR is concerned about reads as follows:

66. Docket 7628, Memorandum of 6/24/11.

> The two montane forest natural communities are uncommon in the state, but are not rare natural communities; therefore a finding that there will be no undue adverse impact is not required in order for the Board to issue a CPG for the proposed project. Nevertheless, we find that the mitigation and decommissioning measures provided by the Natural Resource MOU, as discussed below as they relate to necessary wildlife habitat and endangered species, will limit the impacts of clearing to being adverse in nature, rather than unduly adverse.[67]

ANR states that the Board has consistently held that the Board's review of a project is not limited to the Act 250 criteria, but rather that the Board must also address whether a project will have an undue adverse impact on the natural environment. ANR proposes that the Board's discussion regarding significant natural communities may be inconsistent with the Board's conclusions in *East Haven*[68] and *Georgia*[69] regarding a project's impacts on the natural environment, and requests that the Board delete or modify the language so that the discussion in the present Order adheres to the Board's precedent. No party responded to ANR's motion and requested relief.

Discussion

ANR's interpretation of the *East Haven* and *Georgia* orders is correct and is aptly applied to the present case. The Board's intent in its discussion was not to deviate from the standard established in those cases. However, the Board recognizes that clarification of its discussion regarding state-significant natural communities may help to avoid confusion in future cases. Therefore, we alter the discussion thus (new language in italics):

> The two montane forest natural communities are uncommon in the state, but are not rare natural communities; therefore a finding that there will be no undue adverse impact *to these communities pursuant to 10 V.S.A. § 6086(a)(8)* is not required in order for the Board to issue a CPG for the proposed project. *Nevertheless, we are required under 30 V.S.A. § 248(b)(5) to find that the proposed project will not have an undue adverse effect on the natural environment, including these montane forests*. We find that the mitigation and decommissioning measures provided by the Natural Resource MOU, as discussed

67. ANR Motion at 1 (quoting Docket 7628, Order of 5/31/11 at 115).
68. *See Petition of EMDC*, Docket 6911, Order of 7/17/06.
69. *See Petition of Georgia Mountain Community Wind*, Docket 7508, Order of 6/11/10.

below as they relate to necessary wildlife habitat and endangered species, will limit the impacts of clearing to being adverse in nature, rather than unduly adverse.

VELCO Motion

VELCO asks the Board to amend its May 31, 2011, Order by deleting Condition 42 and the related text on pages 100-101,[70] and amending the final CPG accordingly, if necessary. In support of its request, VELCO argues that: (1) the Board lacks jurisdiction to impose a takings compensation plan requirement in a proceeding under 30 V.S.A. § 248; (2) even assuming the Board has jurisdiction to impose such a requirement, the condition is not supported by law or fact; and (3) the condition should otherwise be removed for policy, equity and fairness reasons.

Condition 42 currently reads:

> The Petitioners, prior to operation of the project, shall propose a plan for Board approval to provide some form of compensation to adjoining landowners who can demonstrate that residential development of their land which otherwise could have occurred, can no longer happen solely because project-related sound levels at new residences on those parcels or subdividable portions thereof would exceed 45 dBA (exterior)(Leq)(1 hr) or 30 dBA (interior bedrooms)(Leq)(1 hr).

VELCO first argues that the Board is without jurisdiction to impose Condition 42, pointing out that the Board is an administrative body with only the powers "expressly conferred on it by the Legislature, together with such incidental powers expressly granted or necessarily implied . . . ."[71] VELCO continues that the Vermont Supreme Court in its *Bandel* decision has already determined that the sole issue under consideration in a Section 248 proceeding is whether, under the criteria set forth in the statute, a proposed project will promote the public interest, and that individual property rights are not at issue in Section 248 proceedings.[72]

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70. VELCO's motion refers to "Condition 5" because the condition is number 5 on the list at page 102 of the May 31, 2011, Order. However, that list is internal to that particular section of the Order. The Condition is more properly referred to as Condition 42. *See* Docket 7628, Order of 5/31/11 at 166. Accordingly, this Order shall refer to it as Condition 42.

71. VELCO Motion at 3 (quoting *Trybulski v. Bellows Falls Hydro-Electric Corp.*, 112 Vt. 1, 7, 20 A.2d 117, 120 (1941)(citations omitted).

72. VELCO Motion at 3 (citing and quoting *Vermont Elec. Power Co., Inc. v. Bandel*, 135 Vt. 141, 145 (1977)).

VELCO asserts that Condition 42 attempts to do what the Supreme Court expressly prohibited in its *Bandel* decision.

VELCO's next argument asserts that, even if the Board had jurisdiction to impose such a requirement, Condition 42 is at odds with the general tenets of takings law. VELCO asserts that takings law recognizes only two types of claims; the first where there is actual physical occupation of the property, and the second where the property owner is denied all economically viable uses of the property. VELCO states that neither type of claim is present in the instant proceeding. VELCO also argues that the potential deprivation of residential development rights caused by noise cannot support a takings claim because: (1) noise by itself is not a legally recognized physical invasion for takings purposes; (2) takings law requires a complete diminution in property value, whereas Condition 42 would require a compensation plan even without complete diminution; and (3) neither federal nor state takings law suggests that the loss of residential development rights alone is a taking. Lastly, VELCO argues that takings claims are inherently fact dependent, something Condition 42 is not designed to address.[73]

VELCO's final argument asserts that the Board should eliminate Condition 42 for reasons of policy, equity and fairness. First, VELCO asserts that the Board cannot rely on the notion of "fairness" to address individual property rights in a Section 248 proceeding because it is without authority to do so. Second, VELCO argues that it is not fair to subject landowners, the state, and petitioning utilities to a compensation process it ultimately has no authority to enforce, but which by its existence interjects uncertainty, cost and delay into the Section 248 process, and creates false landowner expectations. Third, VELCO asserts that the compensation issue involves complex constitutional issues and was not substantively briefed in the Docket, so the Board should, as a policy matter, avoid deciding the issue. Lastly, VELCO claims elimination of Condition 42 will not prejudice landowners because they have recourse to the courts to seek redress for any takings or other individual property rights claims.[74]

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73. VELCO Motion at 4-6 (citations omitted).
74. VELCO Motion at 6-7.

The DPS supports VELCO's analysis "insofar as it relies on the reasoning employed by Chairman Volz in his concurring opinion."[75] The Department also directs the Board to a case from New Jersey[76] in which the petitioners asked the state utility commission to compel a utility to condemn the petitioners' land. In that case, the Appellate Division of the New Jersey Superior Court found that while the commission could, like the Board, entertain condemnation proceedings brought by utilities, it could not compel a utility to institute such "inverse condemnation" proceedings. The DPS argues that Condition 42 is analogous to the circumstances presented in *Jersey Central* and that claims for inverse condemnation in Vermont must be brought before a trial court, not the Board.[77] The Department recommends removal of Condition 42.[78]

No other party responded to VELCO's motion.

Discussion

We deny VELCO's motion and decline to amend the May 31, 2011, Order as requested because VELCO's arguments reflect a fundamental misunderstanding of the purpose behind Condition 42. Condition 42 is not a mechanism to provide compensation for a constitutional takings claim, and thus VELCO's arguments are essentially inapplicable. Condition 42 is, instead, a mechanism to ensure that construction and operation of the project does not have an undue adverse impact under 30 V.S.A. § 248(b)(5). It is undisputed that this project presents noise impacts; we have imposed a specific condition governing noise levels at residences to address those impacts. But, with a project of this magnitude, in determining whether noise impacts under Section 248(b)(5) are undue, the overall impact on the surrounding area is relevant. While the impacts on each property may differ, the sum of those impacts can affect the balance between the benefits and costs of the project, and thus affect whether the project's overall noise impacts are undue under Section 248(b)(5). Condition 42, like other conditions we

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75. DPS Response to VELCO at 1.

76. *In the Matter of Jersey Central Power and Light Co.*, 166 N.J.Super. 540 (1979) (*"Jersey Central"*).

77. DPS Response to VELCO at 1-2.

78. In its cover letter to its June 14, 2011, Motion for Reconsideration, GMP stated its support for VELCO's motion. Additionally, CVPS filed a letter on June 23, 2011, expressing its support for the motion.

imposed in our approval, is designed to mitigate these adverse impacts so that the project may be found to comply with the Section 248 criteria. It is not, as VELCO suggests, intended as a mechanism to compensate landowners for a specific taking.[79] For this reason, Condition 42 is distinguishable from the Vermont Supreme Court's *Bandel* decision.

The DPS' argument suffers from the same shortcomings as VELCO's in that it assumes the mechanism is designed to provide compensation for constitutional takings, when in fact it is designed to mitigate adverse project impacts to allow a finding of no undue adverse impact.

We also note VELCO's concerns over the possibility that Condition 42 may impact its ability to efficiently site future transmission projects,[80] but find those concerns to be misplaced. Condition 42 is only necessary because the Board has found that the turbines can create undue adverse noise impacts. As a result, the Board adopted a health-based noise standard to prevent these impacts. Condition 42 effectively extends this same consideration to otherwise-allowable residential development on adjoining property. The need for the condition is entirely dependent on the specific facts of this case, and is not intended to, nor should in any way be construed as, setting a precedent for requiring compensation to adjoining property owners for other types of utility projects.[81]

Accordingly, VELCO's motion is denied.

SO ORDERED.

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79. As VELCO has correctly argued, the compensation plan required by Condition 42 does not implicate constitutional takings because it does not address situations of physical occupation or total diminution in value of the impacted property, and the Board's condemnation authority is therefore not implicated.

80. VELCO Motion at 2.

81. For example, in this particular case the project is proposed to be sited in a new, undeveloped location that is entirely within the Petitioners' discretion, the Petitioners could have located the wind turbines substantially farther from the property line (albeit at an economic cost) to avoid undue noise impacts on adjoining properties, and the project's noise is of such magnitude that it could have material adverse health impacts at nearby residences. It appears extremely unlikely that equivalent factual circumstances could be presented in transmission-siting proceedings.

Dated at Montpelier, Vermont, this 12th day of July, 2011.

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

OFFICE OF THE CLERK

FILED: July 12, 2011

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.