

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: 10/5/2012

SECOND ORDER RE ADJOINING LANDOWNER NOISE COMPENSATION PLAN

INTRODUCTION

On May 31, 2011, the Public Service Board ("Board") issued an Order (the "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 (the "Project"). Among other things, the Order required the Petitioners to make a number of post-certification compliance filings. Condition 42 of the Order and CPG required the Petitioners to file a plan for providing compensation to adjoining landowners in the event noise levels from the Project would preclude otherwise allowable residential development on adjoining parcels.

On July 16, 2012, Green Mountain Power Corporation ("GMP") filed its proposed Adjoining Landowner Noise Compensation Plan ("Proposed Plan") for Board review and approval.

Responsive comments were filed by Don and Shirley Nelson, Kevin McGrath and Dyer-Dunn, Inc. ("DDI").

On August 17, 2012, the Board issued an Order requiring GMP to make numerous changes to its Proposed Plan and declining to approve it as filed.¹

On August 28, 2012, GMP filed a revised Adjoining Landowner Noise Compensation Plan ("Revised Plan") for Board review and approval.

On September 14, 2012, responsive comments were filed by DDI ("DDI Comments") seeking a limited number of changes to the Revised Plan.²

DDI's COMMENTS

In the DDI Comments, DDI accepts the majority of the terms and conditions of the Revised Plan. However, DDI requests that certain changes be made to four areas of the Revised Plan.

First, DDI objects to the Revised Plan's requirement that an adjoining landowner's parcel share a boundary with the Project parcel to qualify for participation under the Revised Plan. DDI contends that it would be unfair for landowners that own nearby but non-adjoining parcels to be disqualified from receiving compensation under the Revised Plan in the event their properties experience Project-related noise levels in excess of the Board-imposed standards.³ DDI also states that, assuming GMP opposes DDI's position on this issue, the Board should amend the language of Condition 42 to clarify that it was meant to support the outcome urged by DDI.⁴

Second, DDI requests that language be added to Section III of the Revised Plan that references the Board Orders related to GMP's Noise Monitoring Plan, including the Order approving the Noise Monitoring Plan dated May 16, 2012, so that it is clear which Noise Monitoring Plan is being referred to in Section III.⁵

1. *See generally* Docket 7628, Order of 8/17/12.

2. Comments were also filed by Don and Shirley Nelson. However, those comments were general in nature and did not address the specifics of the Revised Plan. Accordingly, they are not discussed in this Order.

3. DDI Comments at 1-2. DDI frames its objection by opposing the addition of the word "boundaries" to Section I of the Revised Plan. However, as noted by GMP in its response to the DDI Comments, the word "boundaries" was in the original Proposed Plan; it was not added to the Revised Plan.

4. DDI Comments at 2.

5. DDI Comments at 2.

Third, DDI proposes an edit to the first sentence of Section VI of the Revised Plan, which would clarify that the prohibition of residential development on an affected parcel would end "as of the decommissioning of the project," as opposed to the proposed language which states "after the decommissioning of the project." DDI recommends that the first sentence end with its proposed edit, and that the balance of Section VI be stricken in its entirety because it allows for prohibition of residential development on an affected parcel to extend to successor projects on the Project parcel, and permits the right to generate excessive noise in perpetuity.⁶

Lastly, DDI recommends that Section IX of the Revised Plan, which addresses dispute resolution processes, be modified so as to eliminate references to a specific Board Rule and a specific Vermont Rule of Civil Procedure. DDI recommends that if there must be anything in the Revised Plan regarding dispute resolution, then that language should be "direct, clear, and complete," without reference to specific rules, so as to make it easier for *pro se* litigants to participate. DDI also asks that language clarifying issues related to right of appeal be added to Section IX of the Revised Plan if dispute resolution language is to be included.⁷

GMP REPLY COMMENTS

On September 18, 2012, GMP filed comments in reply to DDI's recommendations ("GMP Reply"), agreeing to some of the recommendations while opposing others.⁸

With respect to DDI's objection to the requirement that a parcel of land share a boundary with the Project parcel to qualify for compensation under the Revised Plan, GMP states that DDI's recommendation conflicts with the plain meaning of "adjoining." GMP also notes that this requirement was in its original Proposed Plan and that DDI did not object to it at that time.⁹

GMP does not believe it is necessary to add to Section III of the Revised Plan references to the Board's Orders addressing its Sound Monitoring Plan as recommended by DDI. However, GMP does not object to adding a reference to the May 16, 2012, Order approving the Sound Monitoring Plan.

6. DDI Comments at 2-3.

7. DDI Comments at 3-4.

8. *See generally* GMP Reply.

9. GMP Reply at 1.

With respect to DDI's recommendations regarding Section VI of the Revised Plan, while GMP does not believe it is necessary, GMP does not object to substituting the words "as of the decommissioning of the project" for the current phrase "after the decommissioning of the project" in the first sentence of the section. However, GMP opposes the remainder of DDI's recommended edits to this section because the balance of the section tracks the scope of permissible activities at the Project site under the ridgeline easement required by the Memorandum of Understanding between GMP and ANR dated February 23, 2011 ("Natural Resource MOU"). GMP also asserts that the terms of Section VI favor the landowner because compensation will be premised based on the conveyance of a perpetual easement, when in fact, the negative easement required by Section VI will not be perpetual.¹⁰

GMP also contends that its proposed dispute resolution language, contained in Section IX of the Revised Plan, is needed to ensure that all parties to a dispute under the Revised Plan have clarity about the dispute resolution process. GMP notes that the Board requires *pro se* litigants to adhere to the Board's Rules of Practice, and that providing clarity about what is expected is even more important in cases involving *pro se* litigants.¹¹ Lastly, GMP asserts that adding language regarding appeal rights to the Revised Plan is not necessary because a Board determination regarding a dispute under the Revised Plan would be a final order, subject to a statutory right of appeal under 30 V.S.A. § 12.¹²

DISCUSSION

For the reasons discussed below, we decline to approve the Revised Plan at this time. GMP shall file a new revised version of its Adjoining Landowner Noise Compensation Plan containing the amendments required by this Order for Board review and approval.

First, we are amending Condition 42 of the Order and CPG to account for excess noise level impacts on non-adjointing landowners. While we expect that the landowners most likely to qualify for compensation under the Revised Plan are those whose properties share a boundary

10. GMP Reply at 2.

11. GMP Reply at 2.

12. GMP Reply at 2-3.

with the Project parcel, it is possible that a non-adjoining landowner could experience an impairment of otherwise developable land as the result of noise levels from the Project in excess of the Board-imposed standard. It was not our intention to exclude such landowners from the requirements of Condition 42. Accordingly, we amend Condition 42 as follows:

The Petitioners, prior to operation of the project, shall propose a plan for Board approval to provide some form of compensation to landowners of parcels of land existing as of the date of May 31, 2011, 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).

While this amendment to Condition 42 allows both adjoining and non-adjoining landowners to potentially qualify to participate under the Revised Plan, it restricts participation under the Revised Plan to parcels that existed as of the date the Order and CPG were issued in order to exclude participation by parcels that were created solely for the purpose of receiving compensation under the Revised Plan.

GMP must amend its Revised Plan to comply with the amended Condition 42 and file its revisions for Board review and approval.

Second, given the absence of opposition by GMP to DDI's recommendation, we direct GMP to amend the language of Section III to refer to the Board's May 16, 2012, Order approving the Sound Monitoring Plan. Additional references to earlier Orders related to the Sound Monitoring Plan are not necessary.

Third, again given the absence of opposition by GMP to part of DDI's recommendation, we direct GMP to substitute the words "as of the decommissioning of the project" for the current phrase "after the decommissioning of the project" in the first sentence of Section VI. We disagree with DDI's recommendation that the sentence end after its proposed edit and that the balance of Section VI be stricken. Section VI provides that the prohibition on residential development extends until the time of the decommissioning of the Project or any successor renewable energy technology development project that is subject to a noise standard equal to or more stringent than the standard imposed in this proceeding. The Natural Resource MOU, which was approved by the Order, allows for a limited class of future projects on the Project parcel.

Included in the class of permissible projects are renewable energy technology development projects.¹³ It is, therefore, possible that a new renewable energy project that generates sound levels similar to the Project would be constructed on the Project parcel after GMP decommissions the Project. It makes no sense for the easement required by Section VI of the Revised Plan to cease to exist, and to require the new project developer to acquire another easement, particularly since compensation paid to an adjoining landowner under the Revised Plan would be based on the premise that the required easement is perpetual, when in fact, it is not. We stress that it is our understanding that the language of Section VI of the Revised Plan does not operate to extend the prohibition on residential development beyond GMP's Project operations and decommissioning if an allowed successor project is a telecommunications facility or a renewable energy technology project that does not implicate the need for a noise standard. Our approval is conditioned on that understanding, and if it is counter to GMP's intended meaning of Section VI, GMP shall alert the Board immediately.

There is one issue raised by the language of Section VI which we direct GMP to address when it files revisions in response to this Order. That is, while the prohibition on residential development in the Revised Plan is not perpetual, the right to generate noise in excess of 45 dBA on a qualifying parcel is perpetual. This is unacceptable as it makes no sense given the non-perpetual nature of the prohibition on residential development. GMP shall revise the language of Section VI so that the right to generate excessive noise on a qualifying parcel is co-extensive with the prohibition on residential development.

Lastly, we accept GMP's proposed language on dispute resolution in Section IX of the Revised Plan. All parties that appear before the Board, whether they appear *pro se* or with legal representation, are required to comply with applicable procedural requirements, and having language in the Revised Plan to that effect places potential parties on notice of what is expected of them. We find nothing objectionable in the references to a Board Rule and a Civil Procedure Rule regarding entry onto an adjoining parcel as part of the discovery process and to conduct noise level measurements. These activities would be part of the process for resolving any disputes that may arise under the Revised Plan, and giving parties notice of this fact in advance is

13. Exh. GMP-ANR-1 at 7-8.

not problematic, and may prove useful. We disagree with DDI that language addressing rights of appeal should be added to the Revised Plan. Rights of appeal are established as a matter of law, not by the terms and conditions of the Revised Plan.

CONCLUSION

We decline to approve the Revised Plan. GMP shall file the revisions required by this Order to its Adjoining Landowner Noise Compensation Plan filed August 28, 2012, for Board review and approval.

SO ORDERED.

Dated at Montpelier, Vermont, this 5th day of October, 2012.

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

OFFICE OF THE CLERK

FILED: October 5, 2012

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.