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2011 JUN 14 PM 1:51

June 14, 2011

Mrs. Susan Hudson, Clerk
Vermont Public Service Board
112 State Street, Drawer 20
Montpelier, VT 05620-2701

Re: Docket No. 7628: 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

Dear Mrs. Hudson:

Enclosed for filing are an original and six copies of Vermont Electric Power Company, Inc. and Vermont Transco LLC's *Motion To Amend May 31, 2011 Order.*

Thank you for your attention to this matter. If you have any questions or require any further information, please do not hesitate to contact me.

Sincerely,

S. Mark Sciarrotta

CC: Attached Certificate of Service

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STATE OF VERMONT
DEPT OF PUBLIC SERVICE
MONTPELIER, VT.
05620-2601

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STATE OF VERMONT
PUBLIC SERVICE BOARD

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.	)))))))))	Docket No. 7628

VERMONT ELECTRIC POWER COMPANY, INC. AND VERMONT TRANSCO LLC'S MOTION TO AMEND MAY 31, 2011 ORDER

NOW COME Vermont Electric Power Co., Inc., and Vermont Transco LLC (together, "VELCO,") and move the Vermont Public Service Board to amend "Condition 5"[1] of the May 31, 2011 Order ("Order") issued in this docket. For the reasons set forth herein, and for the reasons set forth in Chairman James Volz' concurring opinion, incorporated herein by reference, the Board should delete "Condition 5" and the accompanying text on pages 100-101 of the Order and amend the final CPG accordingly, if necessary.

In making this Motion, VELCO is mindful of the Petitioners' need to complete the Kingdom Community Wind Project (the "Project") on time, of the challenges faced by the Board in balancing the various interests that affect the public interest, and of the importance of individual landowners' concerns regarding their property rights. Nevertheless, VELCO is compelled to ask the Board to reconsider Condition 5 because of what it views as important

1 Condition 5 provides: (5) 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). Order at pp. 102.

jurisdictional and legal flaws in the Board's decision and analysis, as well as the serious ramifications Condition 5 poses to VELCO's ongoing and future transmission project siting cases. Condition 5 requires a new, Board-approved mechanism to financially compensate individual landowners for a future, hypothetical loss of residential development rights, even though the state and federal courts already provide venues of competent jurisdiction to hear and resolve any such legally cognizable claims. While well-intentioned, Condition 5 is contrary to law, and the uncertainty it introduces will increase the time and expense required to resolve landowner compensation claims for both landowners and utilities, instead of advancing the ostensible goal of Condition 5, which is to efficiently compensate individual landowners for takings or other individual property rights claims. On the other hand, by granting this Motion, the Board will fully preserve the landowners' legal rights, maintain and clarify the Board's "general good of the state" analysis and findings, and not affect the timing of the Project's completion. As noted above, VELCO, as a co-Petitioner in this docket and as a utility that requires the Board's approval prior to constructing electric transmission projects, has a substantial interest in having the Board's Order amended.

MEMORANDUM OF LAW

Amendment Standard

This Motion to Amend, filed pursuant to V.R.C.P. 59(e)[2] invokes the Board's discretion to "open and correct, modify or vacate" its decisions. *Osborn v. Osborn*, 147 Vt. 432, 433 (1986). The purpose of Rule 59(e) is to allow an adjudicative body to avoid, among other things, the unjust result arising from its mistake or inadvertence. *Id.* Under Rule 59(e), the Board "may reconsider issues previously before it, and generally may examine the correctness of the judgment itself." *In re Robinson/Keir Partnership*, 154 Vt. 50, 54 (1990).

Summary of Argument

The Board imposed Condition 5 due to concerns that the Project might, in the future, deprive two individual landowners of the potential to develop new residential structures due

2 V.R.C.P. 59 is applicable here pursuant to Vermont Public Service Board Rule 2.103.

solely to an inability to comply with the interior noise level standards established by the Board and that such a deprivation would be "unfair" and a "taking" of development rights. Order at pp. 101. VELCO respectfully requests that the Board remove Condition 5 because: (1) the Board lacks jurisdiction to impose a takings compensation plan requirement in a § 248 proceeding; (2) even if the Board had jurisdiction to consider imposing such a condition, the condition is supported by neither law nor fact; and (3) it should otherwise be withdrawn for policy, equity, and fairness reasons; indeed, no party properly raised or briefed a takings or other property rights claim.

I. The Board lacks authority to impose a takings-based compensation plan in a § 248 proceeding.

In this proceeding, the Vermont Legislature has limited the Board's jurisdiction to determining whether, under 30 V.S.A. § 248, the Project promotes the general good of the state and satisfies § 248's substantive criteria. It is well-settled that the Board:

> has only such powers as are expressly conferred upon it by the Legislature, together with such incidental powers expressly granted or necessarily implied as are necessary to the full exercise of those granted, and it is merely an administrative board created by the State for carrying into effect the will of the State as expressed.

Trybulski v. Bellows Falls Hydro-Electric Corp., 112 Vt. 1, 7, 20 A.2d 117, 120 (1941) (citations omitted). Moreover, the Vermont Supreme Court has, as the Board acknowledges in its Order, recognized that in a § 248 matter, "[t]he sole issue is the determination of whether or not under the criteria set forth in the statute the proposal for which a certificate is sought advances the public interest." *Vermont Electric Power Company, Inc. v. Bandel*, 135 Vt. 141, 145 (1977) (quoting *Auclair v. Vermont Electric Power Co.*, 133 Vt. 22 (1974)). Particularly relevant here, the Court stated, "Individual property rights not being at issue, they are not a basis for any special recognition of the property owners, nor do they support any special consideration for their protection in these proceedings." *Id.*

In Condition 5, the Board did exactly what *Bandel* prohibits: it made individual property rights an issue in this docket and, further, expressly provided special recognition of and protection of the individual property owners and their individual property rights. *See* Order at pp. 101 ("Nevertheless, the Board is concerned that the argument made by the Days and the Nelsons as the 'taking' of their development rights for residential purposes has a more compelling character than is evident [in *Bandel* (which prohibited such considerations)]."; "[f]or a landowner to be deprived of that potential..."). The Board appears to base Condition 5 upon a concern that, without it, a "taking" of individual landowner residential development rights might later ensue. *See* Order at pp. 101.[3] The Vermont Supreme Court, however, has properly recognized that a takings claim is inherently an individual property right issue. *See*, *Dep't of Forests, Parks and Recreation v. Lysobey*, 2004 VT 104 ¶ (the right to compensation for a taking is "personal to the owner") quoting *Brooks Inv. Co. v. City of Bloomington*, 232 N.W.2d 911, 918 (Minn. 1975) citing *Hoover v. Pierce County*, 903 P.2d 464, 469 (Wash. Ct. App. 1995) (The "right to damages for a[] [taking of] property is a personal right belonging to the property owner, the right does not pass to a subsequent purchaser unless expressly conveyed."). The Board should rescind Condition 5 because it amounts to an impermissible special recognition of individual property owners' rights, which falls outside of § 248's ambit.

In addition, insofar as Condition 5 is based on a constitutional 'takings' theory, *see* Order at 101, the Board lacks the authority to impose it. The Vermont Supreme Court has cautioned that the courts, not administrative boards, have the power to decide constitutional issues. *See Westover v. Village of Barton Electric Dept.*, 149 Vt. 356 (1988). Takings claims are constitutional in nature; therefore, insofar as the Board is attempting to address 'takings' issues through Condition 5, the Board should cede those issues to the courts and withdraw Condition 5. As discussed immediately below, Condition 5 is also undermined by substantive takings jurisprudence upon which it ostensibly relies for support.

II. Condition 5 conflicts with well-established takings law.

Even if the Board had the statutory or constitutional authority to consider requiring a takings-based compensation plan in a § 248 proceeding, Condition 5 squarely contradicts the general tenets of takings law. The Fifth Amendment to the United States Constitution states, in

3 For reasons explained below, *see* supra § II, as a matter of law, takings claims generally do not exist absent a physical occupation of or a complete deprivation of all economically viable use of one's property, situations

relevant part, "nor may private property be taken for public use without just compensation." *See* U.S. CONST. amend. V.[4] *See also*, Vermont Constitution, Art. 2 ("That private property ought to be subservient to public uses when necessity requires it, nevertheless, whenever any person's property is taken for the use of the public, the owner ought to receive an equivalent in money.") The courts have recognized, essentially, two main varieties of actionable takings claims, neither which are present under the circumstances of this case. The courts recognize as viable takings claims involving a physical occupation of one's property. *See, e.g.*, *United States v. Pewee Coal Co.,* 341 U. S. 114 (1951) (seizure and operation of a coal mine to prevent a national strike of coal miners was a taking); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (physical occupation is *per se* a taking). The courts also hold that takings compensation is due when a property owner is denied all economically viable use of the affected property. *See, e.g.*, *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) (establishing three part takings test); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1982) (deprivation of all economically beneficial use of a property can be a taking). This case does not present either a direct, physical taking claim or a "complete deprivation" taking claim.

In the instant docket, the landowners did not allege let alone establish the potential for a direct physical taking or, in the alternative, a compensable regulatory taking, sufficient to justify Condition 5. For several reasons, the alleged deprivation of residential development rights caused by noise would not support a takings claim. First, noise by itself is not a legally recognized physical invasion for takings purposes. *See, e.g.*, *Claassen v. City and County of Denver,* 39 P.3d 710, 713 (CO Ct. App. 2000) (noise alone not sufficient to establish taking claim; a physical invasion of landowner airspace is required to support a takings claim). Second, a landowner must demonstrate a complete diminution of property value to support a takings claim; Condition 5 would, on the other hand, require a compensation plan even without a complete diminution of all property value. Third, neither federal nor state takings law suggests that the loss of *residential* development rights (or any subset of development rights) alone is a

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inapplicable here.

taking. On the contrary, the analysis focuses on the value of the property as a whole, and if a property retains value because, for example, it is already developed or because some other economically viable use exists, no takings compensation is due.

Moreover, even if the Board had jurisdiction and even if there were arguably the potential for an actionable takings claim, the Board should decline to impose Condition 5 because the courts have repeatedly cautioned that takings-based claims are inherently fact-dependent and not amenable to prospective, let alone factually-predetermined analysis. *See e.g., United States v. Caltex, Inc.*, 344 U.S. 149, 156 (1952) ("No rigid rules can be laid down to distinguish compensable losses from noncompensable losses"); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (a takings question "is a question of degree -- and therefore cannot be disposed of by general propositions").[5] Indeed, in light of the factual and legal complexity of takings issues, the Board should withdraw Condition 5 for the basic reason that the takings issue was not briefed at all by the parties in this docket.

III. Sound policy and equity considerations weigh in favor of striking Condition 5

For several reasons, sound policy, equity and "fairness" considerations also weigh in favor of rescinding Condition 5. First, as a threshold matter, "fairness" concerns do not support Condition 5. For the reasons discussed above, as a matter of law, the Board cannot for fairness (or any other reason) address *individual* landowner's property rights in a § 248 proceeding.

Second, even if the Board had authority in a § 248 proceeding to consider fairness on an individual-by-individual basis (which it does not), it is not fair to subject landowners, the State, and petitioning utilities to a compensation process that the Board has no authority, ultimately, to enforce but which, by its very existence, will interject uncertainty, cost, and delay into the process, and unfairly create false landowner expectations. Removal of Condition 5 furthers the State's, the landowners' and VELCO's shared interest in avoiding wasteful litigation in an

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4 VELCO assumes for purposes of the arguments in this Motion only that takings law, invoked by the Board in its Order (*see* Order at pp. 101), is otherwise applicable in the context of a private utility being granted a permit to construct a utility project.

5 Creating a private cause of action in the context of a § 248 proceeding also raises potential serious due process questions including, *e.g.*, jury trial rights.

administrative forum where jurisdiction is highly doubtful, and eliminates the specter of petitioners having to plan for similarly improper conditions in future utility projects

Third, the compensation issue, which at least in part involves constitutional law issues, was not substantively briefed by any party in this docket. The Board should follow the example of the courts that, as a policy matter, avoid deciding legal questions (especially novel and difficult constitutional questions) that are "insufficiently raised and inadequately briefed." *State v. Brillon,* 2010 VT 25 ¶ 5.

Finally, rescission of Condition 5 will not prejudice the affected landowners. In the absence of Condition 5, landowners will still have recourse to the courts to seek redress for any takings or other individual property right claims.

Conclusion

For the foregoing reasons the Board should strike Condition 5 and the accompanying text at pages 100-101 of the Order.

Dated : June 14, 2011 at Montpelier, Vermont.

PETITIONERS VERMONT
ELECTRIC POWER COMPANY, INC. and
VERMONT TRANSCO LLC

By: ______________________________

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