

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7508

Petition of Georgia Mountain Community Wind, LLC,)
for a Certificate of Public Good, pursuant to 30 V.S.A.)
Section 248, authorizing the construction and operation)
of a 5-wind turbine electric generation facility, with)
associated electric and interconnection facilities, on)
Georgia Mountain in the Towns of Milton and Georgia,)
Vermont, to be known as the "Georgia Mountain)
Community Wind Project")

Order entered: 11/29/2012

ORDER APPROVING STIPULATION AND VACATING SCHEDULE

INTRODUCTION

On June 11, 2010, the Public Service Board ("Board") issued an Order ("June 11 Order") and Certificate of Public Good ("CPG") authorizing the construction of a wind generation facility (the "Project") by Georgia Mountain Community Wind, LLC ("GMCW"), subject to certain enumerated conditions.¹ The Board imposed these requirements on its approval of the Project to ensure that construction and operation of the Project would promote the general good of the state. Relevant to today's Order are conditions governing blasting activities and the days and times when construction activities are allowed to take place at the Project site.

By Order issued August 24, 2012, the Board opened an investigation into admitted and possible violations of the June 11 Order and CPG, including an examination of possible sanctions and remedial actions for any violations found to have been committed.²

In today's Order, we approve a stipulation executed by and among GMCW, the Department of Public Service ("Department" or "DPS"), the Agency of Natural Resources ("ANR") and the Neighbor-Intervenors³ (together, the "Stipulating Parties") in resolution of the

1. See Docket 7508, Order of 6/11/10; Certificate of Public Good dated 6/11/10.

2. Docket 7508, Order of 8/24/12 at 4.

3. Daniel and Tina Fitzgerald, Kenneth and Virginia Mongeon, George A. and Kenneth N. Wimble, Scott and Melodie McLane, and Jane and Heidi FitzGerald.

investigation instituted by our August 24, 2012, Order ("Stipulation"). Accordingly, we also vacate the balance of the schedule for this investigation as established in our Order dated October 4, 2012.

PROCEDURAL HISTORY

On July 5, 2012, a group of landowners with property located in the vicinity of the Project site filed a letter with the Board asking the Board to take certain actions with respect to GMCW's blasting activities at the Project site, including fining GMCW for alleged violations of its CPG.⁴

On July 17, 2012, GMCW filed a response to the landowners' letter opposing the relief requested and stating that it had not violated any CPG conditions, except in two instances where notification of blasting to adjoining landowners was delayed by a few hours.⁵

On July 23, 2012, the Department filed a letter regarding some of the issues raised by the landowners. With respect to the allegations of flyrock from blasting landing on neighboring property (the "Fitzgerald property"), the Department stated that there appeared to be a factual dispute as to whether flyrock had been propelled beyond the permit boundary and requested that the Board open an investigation into whether the CPG had been violated.⁶

In response to the information provided by the involved parties, the Board directed GMCW to provide additional information related to its blasting activities in order to determine the appropriate next steps to address any alleged violations, as well as penalties for the violations that GMCW admitted had occurred.⁷

On August 23, 2012, GMCW filed an affidavit from its Site Work Superintendent which acknowledged that some rocks that were on the Fitzgerald property were likely flyrock, and that GMCW would take steps to ensure that no additional flyrock would be propelled onto that property.⁸

On August 23, 2012, the Department filed a letter stating that it had conducted a site visit to the Fitzgerald property on August 17, 2012. The Department stated that blasting activities

4. Docket 7508, Order of 8/6/12 at 1-2.

5. Docket 7508, Order of 8/6/12 at 2.

6. Docket 7508, Order of 8/6/12 at 2-3.

7. Docket 7508, Order of 8/6/12 at 6.

8. Docket 7508, Order of 8/24/12 at 2.

took place the day before, on August 16, which was a state holiday, and noted that the CPG prohibited blasting activities on state holidays. The Department also stated that rock was seen up to approximately 300 feet in from the Fitzgerald property line, and that in some instances it appeared large enough to "possibly cause severe injury." The Department recommended that the Board explore possible sanctions and/or penalties against GMCW for conducting blasting activities on a state holiday, and stated that it would provide in a future filing its recommendation as to whether further investigation into the issue of fly rock containment was warranted.⁹

In response to this second round of information, the Board concluded that there was "substantial evidence that GMCW conducted blasting activities on a state holiday, in direct violation of Condition 13 of its Certificate of Public Good" and that there was "a strong likelihood that flyrock from blasting activities" was landing on the Fitzgerald property, "with allegations that some of the flyrock may have the potential to cause serious injuries."¹⁰ Accordingly, the Board directed GMCW to halt all blasting activities at the Project site until the Board could determine appropriate actions to ensure that GMCW's activities would not present a potential for harm.¹¹ The Board also set a status conference for September 5, 2012, to discuss potential violations and the appropriate remedies that GMCW must undertake to ensure compliance with Condition 13 of its CPG, as well as a schedule to determine possible sanctions related to any violations of the CPG, including blasting activities on a state holiday.¹²

Following the September 5 status conference, parties were directed to file scheduling proposals for addressing alleged and admitted CPG violations.

On September 19, 2012, the parties filed a joint proposed schedule for the remainder of the investigation, which schedule was adopted by Board Order dated October 1, 2012.

9. Docket 7508, Order of 8/24/12 at 2.

10. Docket 7508, Order of 8/24/12 at 3.

11. Docket 7508, Order of 8/24/12 at 3.

12. Docket 7508, Order of 8/24/12 at 4. During the status conference, GMCW represented that all blasting activities at the Project site had been completed. Accordingly, we concluded that no process was needed to determine when blasting activities could resume. Docket 7508, Order of 9/5/12 at 1.

On September 20, 2012, the Neighbor-Intervenors filed a Motion for Attorney's Fees and Costs for the work related to the alleged CPG violations.

On October 2, 2012, the Department, on behalf of itself and the other involved parties, filed a letter requesting that the schedule adopted by Order dated October 1 be revised. The proposed schedule revisions were adopted by Order dated October 4, 2012.

On October 4, 2012, GMCW filed an opposition to the Neighbor-Intervenors' September 20 motion seeking attorney's fees.

On October 4, 2012, the Department filed comments stating it did not object to the Neighbor-Intervenors' September 20 motion seeking attorney's fees.

On October 22, 2012, the Neighbor-Intervenors filed a response to GMCW's October 4, 2012, opposition to their motion seeking attorney's fees.

On November 9, 2012, GMCW, the Department, ANR and the Neighbor-Intervenors filed the Stipulation through which they propose to resolve all of the issues raised among them since the original group of landowners first filed their letter with the Board on July 5, 2012.

On November 14, 2012, the Neighbor-Intervenors filed a Withdrawal of Motion for Attorney's Fees.

DISCUSSION

In today's Order we approve the Stipulation and accept its recommendations in resolution of the issues that have arisen with respect to GMCW's blasting and construction activities that were the subject of this investigation.

In the Stipulation, GMCW acknowledges that it violated pre-blast notification requirements contained in its Board-approved Blasting Plan on June 13 and June 14, 2012.¹³ GMCW also acknowledges in the Stipulation that it conducted construction and blasting activities on August 16, 2012, which was an official state holiday,¹⁴ in violation of Conditions 13 and 15 of its CPG, which prohibit such activities on state and federal holidays.¹⁵ Additionally, the Stipulating Parties represent that a September 14, 2012, field inspection by

13. Stipulation at ¶ 4.

14. August 16th of each year is Bennington Battle Day.

15. Stipulation at ¶¶ 5 & 6.

representatives of the Department, the Department of Public Safety, and GMCW confirmed the presence of flyrock on the Fitzgerald property, noting that a number of trees had impact marks from flyrock. The Stipulating Parties agree that the flyrock most likely resulted from blasting activities associated with building the Project's access road.¹⁶ However, the Stipulating Parties also agreed that there exists potentially conflicting language in the Project's CPG, the approved Blasting Plan, the approved Final Design Plans for the Project, and NFPA 95,¹⁷ which created ambiguity as to when the use of blasting mats to control flyrock would be required. Because of this stipulated ambiguity, the Stipulating Parties did not resolve the question of whether GMCW's failure to use blasting mats was a violation of the CPG.¹⁸ The Stipulation also indicates that GMCW and the Neighbor-Intervenors have reached a separate agreement that addresses the Neighbor-Intervenors' concerns over impacts from project construction and potential CPG compliance issues.¹⁹

GMCW has agreed to pay a one-time penalty totaling \$10,000 for the admitted and alleged violations described in the Stipulation (the "\$10,000 Penalty"). GMCW has also agreed to contribute an additional \$10,000 to a Remediation Fund, to be held in escrow by the Neighbor-Intervenors' attorney, and to be distributed in the Neighbor-Intervenors' sole discretion to remediate any damages caused by the admitted or alleged CPG violations. GMCW may elect to place additional amounts into the Remediation Fund pursuant to any separate agreement reached with the Neighbor Intervenors. Lastly, the Stipulation requires GMCW to comply with a Regulatory Compliance Plan prepared by its General Contractor for the Project.²⁰

Based on the Stipulation, we conclude that GMCW committed the following sanctionable violations: (1) failing to provide pre-blast notification on June 13 and June 14, 2012, within the required time frames as set forth in GMCW's Board-approved Blasting Plan; (2) performing

16. Stipulation at ¶ 13.

17. NFPA 95 is the National Fire Protection Association's Explosive Materials Code, which is incorporated by reference into NFPA 1, the National Fire Protection Association's Fire Code. Vermont's Fire and Safety Code incorporates by reference NFPA 1. Therefore, the provisions of NFPA 95 are applicable to GMCW's Project-related blasting activities.

18. Stipulation at ¶ 14.

19. Stipulation at ¶ 15.

20. Stipulation at ¶¶ 16-18.

blasting and construction activities on a state holiday on August 16, 2012, in violation of Conditions 13 and 15 of the CPG; and (3) allowing flyrock to be cast onto a neighboring property without the consent of the property owner.

We reach our determination on the third described violation without determining whether the decision not to use blasting mats was a violation of the CPG. The CPG requires GMCW to comply with "all local, state, and national regulations and requirements, including those established by the Vermont Department of Public Safety," that are applicable to blasting.²¹ Among those regulations is NFPA 95, which states in relevant part that, "Flyrock shall not be propelled from the blast site onto property not contracted by the blasting operation or onto property for which the owner has not provided a written waiver to the blasting operation."²² It is evident from the Stipulation that a violation of Condition 13 occurred when GMCW failed to prevent flyrock from landing on the neighboring property. We need not reach the question of whether it was a lack of blasting mats that led to the violation. It is up to the licensed blaster with whom GMCW contracted to exercise appropriate skill and judgment and to utilize best practices to prevent flyrock from being thrown, without permission, onto adjoining property in a given situation. GMCW's blasting contractor failed in that regard in this instance. And, while it was failures on the part of GMCW's blasting contractor that led to the flyrock-related violations, as the holder of the CPG issued in this Docket, GMCW is the entity ultimately responsible for compliance with the terms and conditions of the CPG and is therefore liable for the violations.

We accept the Stipulating Parties proposed remedies for the admitted and alleged violations. However, our acceptance of the \$10,000 Penalty should not be taken as an indication that such an amount would have been within the penalty range we would have considered should this matter have been determined through an adversary proceeding. Any violation of the requirements of a CPG is a serious matter. Violations that have the potential to result in a threat to public safety are particularly serious, and we view the admitted and alleged violations as falling into that category given the ultra-hazardous nature of blasting. We have decided to accept the \$10,000 Penalty largely because the parties that were directly aggrieved by GMCW's actions

21. CPG at Condition 13.

22. NFPA 495 § 11.3.2

have agreed to that proposed amount. We are also mindful of the proposed additional \$10,000 Remediation Fund and the apparent existence of a separate agreement with the Neighbor Landowners that more fully addresses their concerns. These are remedies that the Board could not have fashioned under its power to impose civil penalties pursuant to 30 V.S.A. § 30 and they appear to be related to our approval of the Stipulation, including the \$10,000 Penalty. Therefore, while we accept the proposed \$10,000 Penalty, we do so only while being mindful of other important considerations.

CONCLUSION

The Stipulation by and among GMCW, the Department, ANR, and the Neighbor-Intervenors is accepted and approved in resolution of the issues subject to this investigation and GMCW shall comply with all its provisions forthwith. The balance of the schedule for this investigation as established in our Order dated October 4, 2012, is vacated.

SO ORDERED.

Dated at Montpelier, Vermont, this 29th day of November, 2012.

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

OFFICE OF THE CLERK

FILED: November 29, 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.