

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7867

Application of Seneca Mountain Wind, LLC, for)
authority, pursuant to 30 V.S.A. §§ 246 and 248, to)
install four temporary meteorological stations, two)
in the Town of Brighton, Vermont, and one each in)
the towns of Ferdinand and Newark, Vermont)

Order entered: 10/12/2012

ORDER RE: MOTIONS TO INTERVENE

In this Order, I address motions to intervene from the following persons and entities:

William Heath;

Essex County Natural Resources Conservation District ("ECNRCD");

Robert and Shirley Elder (the "Elders");

Mark Whitworth;

Noreen Hession; and,

Lydia McMillian.

I note that each of the movants appears to be proceeding *pro se*. These *pro se* movants are reminded that, even though the Public Service Board ("Board") makes efforts to enable participation in its proceedings by non-attorneys, parties appearing without counsel are still required to adhere to all of the Board's Rules of Practice, as well as all applicable orders, including scheduling orders. In particular, this includes the requirement that copies of all documents filed with the Board be served on all other parties to the proceeding.

Additionally, it appears that this proceeding will have a large number of parties. Accordingly, I encourage parties with similar interests to work together in the preparation of testimony and discovery and the examination of witnesses. To reduce duplicative testimony and examination, Board rules provide that parties may be required to join with other parties "with respect to appearance by counsel, presentation of evidence or other matters." I do not impose any such requirements at this time, but strongly encourage the many intervenors to consult with each

other, especially given the limited and discrete nature of the issues to be examined at the technical hearing. I will not hesitate to impose such requirements in the future if the "interests of justice and economy of adjudication require."¹

WILLIAM HEATH

Mr. Heath filed a request to intervene in this docket on August 6, 2012, asserting that he owns land adjoining the property to be used for the proposed meteorological towers ("MET towers" or the "Project") and that he had not received due notice of Seneca Mountain Wind, LLC's ("SMW") application.² Mr. Heath stated that he had only recently found out about the Project and filed his motion to intervene without the thoroughness that he would have liked.³ Mr. Heath did express concerns about potential impacts to hawks and moose, as well as visual impacts to his property and the area in general, and impacts from the construction of roads necessary to build the proposed project.⁴

No comments were received on Mr. Heath's August 6, 2012, request to intervene.

On August 15, 2012, I issued an Order which addressed, among other things, Mr. Heath's request to intervene.⁵ In the *Third Procedural Order*, I determined that I would take Mr. Heath's intervention request under advisement, and that, at his option, Mr. Heath could supplement his August 6, 2012, filing no later than thirty days after service, pursuant to the *Third Procedural Order*, of SMW's application under 30 V.S.A. § 246.⁶

On September 24, 2012, Mr. Heath supplemented his original request ("Heath Supplement"). In his supplement, Mr. Heath seeks intervention on the issues of aesthetics and the natural environment under 30 V.S.A. § 248(b)(5).⁷ Mr. Heath states that he is concerned about a potential increase in black bear activity on his farm and in his horse pastures as a result of

1. Board Rule 2.209(C). *See also* V.R.E. 403 (allowing exclusion of relevant evidence to prevent "needless presentation of cumulative evidence").

2. Letter of August 6, 2012, from Mr. Heath, to Susan Hudson, Clerk of the Board ("Heath Letter") at 1.

3. Heath Letter at 1.

4. Heath Letter at 1-2.

5. *See* Docket 7867, *Third Procedural Order Re: Notice Requirements, Stay of Docket, and Motion for Intervention* ("Third Procedural Order").

6. *Third Procedural Order* at 7.

7. Heath Supplement.

one of the proposed MET Towers, asserting that the MET tower which was previously erected in the same location, along with other disturbances further down the ridgeline, resulted in such an increase in the past.⁸ Mr. Heath also states that he is concerned about the aesthetic impacts of the proposed MET tower, explaining that the proposed tower would be in the direct viewshed of, and one mile from, his home. He further states that his farm has been the site of numerous photographs and paintings for over 60 years, including being on the cover of Vermont Life magazine, and that strangers stop and ask to take pictures of what they see as the epitome of a Vermont farm.⁹ Mr. Heath states that no other party adequately represents his interests because other parties deal with "umbrella issues," such as wildlife corridors, conservation of large tracts of land, socio-economics, property values and public health and safety, while his interest is singular because one of the MET towers will be in direct proximity to his home, affecting him both visually and physically.¹⁰

On October 1, 2012, the Department of Public Service ("DPS" or "Department") filed comments in support of granting Mr. Heath permissive intervention pursuant to 2.209(B) "to the fullest extent the Board deems appropriate."¹¹ The DPS notes that Mr. Heath cited to ecological and habitat concerns as a basis for intervention, as well as concerns regarding aesthetics.¹² The Department takes no position on whether Mr. Heath's comments on aesthetics raise a substantial issue under the substantive criteria applicable to the proposed Project.

On October 1, 2012, the Town of Newark ("Newark") filed comments supporting Mr. Heath's intervention request. Newark concurs with any objections raised by Mr. Heath regarding aesthetics, orderly development, property values, wildlife habitat and SMW's fitness to construct and operate the proposed Project, and asks the Board to include these issues in future proceedings related to SMW's application.¹³

8. Heath Supplement.

9. Heath Supplement.

10. Heath Supplement.

11. DPS Comments at 1.

12. DPS Comments at 1.

13. Newark Comments at 1–2. I note that not all of the objections listed by Newark were raised by each of the motions to intervene discussed in today's Order, but that all of them were raised by at least one of those motions.

On October 1, 2012, SMW filed comments in opposition to Mr. Heath's intervention request. SMW contends that granting Mr. Heath intervention solely on the grounds that he can view one of the proposed MET towers would be inconsistent with PSB Rule 2.209(B) because anyone with a potential view would be permitted to intervene in what are supposed to be abbreviated proceedings under 30 V.S.A. § 246.¹⁴ SMW also asserts that Mr. Heath's concerns regarding natural resource impacts are unfounded because the proposed tower will be sited in the exact same location as a previous tower, meaning there will be no new environmental impacts caused by the installation of the new tower.¹⁵ SMW further contends that Mr. Heath's interests are adequately represented by existing parties, in particular, the DPS and the Agency of Natural Resources ("ANR"). Lastly, SMW urges the Board to reject the suggestion that aesthetics be included in the upcoming technical hearing because the concerns expressed by Mr. Heath have already been raised by existing parties and the Board found that they did not raise a significant issue with respect to aesthetics.¹⁶

I am granting Mr. Heath's motion to intervene on a permissive basis, but his participation is limited to the issues defined in the *First Procedural Order* and restated in the *Second Procedural Order*.¹⁷ Mr. Heath described with sufficiency his natural resource concerns related to the installation of the new tower, and the Board has in the past found that individual intervenors may bring a perspective sufficiently distinct from those of existing parties to warrant their participation on specific issues.¹⁸

Mr. Heath's participation is limited as noted above because he did not raise any potential issues with respect to aesthetics that I have not already considered in response to prior comments

14. SMW Opposition at 3.

15. SMW Opposition at 3.

16. SMW Opposition at 3. SMW asserts that, if the Board grants Mr. Heath intervention, that it limit his participation to the issues specifically defined in the First and Second Procedural Orders in this Docket. SMW Opposition at 5.

17. Those issues are limited to the possibly adverse effect of the Hawk Rock MET tower installation on black bear food sources and peregrine falcon habitat; the Hawk Rock MET tower installation on rare, threatened, or endangered species or natural communities; the Bull Mountain MET tower installation on black bear food sources; and the Brighton MET tower installation on black bear food sources. Docket 7628, Order of 6/29/2 at 11-12.

18. See *Joint Petition of Green Mountain Power Corp. et al.*, Docket 7628, Order of 9/3/10 at 9-10.

made by existing parties. For the reasons discussed in the *First Procedural Order*, I conclude that Mr. Heath's comments do not raise a significant issue with respect to aesthetics.¹⁹

ECNRCD

On August 27, 2012, ECNRCD filed a motion to intervene ("ECNRCD Motion"), stating that its mission is, in part, to provide for the conservation, development, and use of Vermont's natural resources.²⁰ ECNRCD states that it supplies a resource to landowners, farmers, schools and businesses, and that through partnerships with local, state and federal agencies, ECNRCD coordinates existing resources on a local level to ensure environmental quality and to support the integrity of land uses in Essex County.²¹ According to ECNRCD, it is a subdivision of state government with corporate powers, is governed by landowners residing within its boundaries, is authorized to develop and implement a program of soil and water conservation, and may establish and enforce regulations to prevent the misuse of land within the district by private landowners and others. According to ECNRCD, this makes it well situated to address ecological considerations in Essex County that may be implicated by the proposed project.²² ECNRCD acknowledges that the ECNRCD Motion was filed after the deadline for filing its motion had passed. However, ECNRCD states that there were extenuating circumstances that caused the deadline to be missed, and asks that the Board consider the ECNRCD Motion on its merits.²³

On September 10, 2012, SMW filed its opposition to the ECNRCD Motion, stating that granting the ECNRCD Motion at this stage of the proceeding is neither necessary nor

19. See Docket 7867, Order of 6/29/12 at 13.

20. ECNRCD Motion at 1. On October 1, 2012, Newark filed comments in support of ECNRCD's intervention request. The October 1, 2012, deadline was established for parties to respond to motions filed by the newly-identified adjoining landowners pursuant to the *Third Procedural Order*. See Docket 7867, Order of 9/20/12 at 2. ECNRCD does not fall into that category and Newark's response to the ECNRCD Motion is therefore untimely and has not been considered here.

21. ECNRCD Motion at 1.

22. ECNRCD Motion at 1–2.

23. ECNRCD Motion at 2.

appropriate.²⁴ According to SMW, ECNRCD had ample opportunity to submit comments to the Board regarding SMW's application and, to SMW's knowledge, at no time did ECNRCD avail itself of that opportunity.²⁵ SMW contends that ECNRCD describes its statutory role as developing and implementing a program of soil and water conservation, and points out that the Board already took comment on these topics and that impacts to soil and water resources are not within the scope of issues to be addressed at the technical hearing.²⁶ SMW also asserts that, even if there is some overlap between ECNRCD's interests and the limited issues to be investigated, those interests are adequately represented by ANR, a statutory party to the proceeding. In summary, SMW concludes that ECNRCD has not demonstrated a substantial interest which may be affected by the outcome of this proceeding, nor why any such interests that might exist are not already adequately represented by existing parties. SMW adds that granting ECNRCD intervention at this stage of the proceeding would be prejudicial to SMW because ECNRCD might seek to expand the scope of issues to be heard at the technical hearing, or otherwise participate in a manner that will cause delay and unnecessary expense.²⁷

I am granting the ECNRCD Motion on a permissive basis, but only to the extent that its statutory mission coincides with the issues identified as being subject to the upcoming technical hearing in the *First Procedural Order*.²⁸ SMW's characterization of ECNRCD's mission is too narrow. The ECNRCD Motion describes a broader mission of, in part, providing for the conservation, development, and use of Vermont's natural resources and ensuring environmental quality and supporting the integrity of land uses in Essex County. I conclude that ECNRCD has shown an interest that may be affected by the outcome of this proceeding. Additionally, I

24. SMW Opposition of 10/10/12 at 1. The Certificate of Service that accompanied the SMW Opposition does not indicate that ECNRCD was served a copy of SMW's opposition. As a practical matter, this apparent omission is not important because I am granting the ECNRCD Motion as discussed below. In the future, parties should remember that a document is not considered filed with the Board unless and until all necessary persons and entities are served with copies.

25. SMW Opposition of 10/10/12 at 1.

26. SMW Opposition of 10/10/12 at 1-2.

27. SMW Opposition of 10/10/12 at 2.

28. Those issues are "[T]he possibly adverse effect of: the Hawk Rock MET tower installation on black bear food sources and peregrine falcon habitat; the Hawk Rock MET tower installation on rare, threatened, or endangered species or natural communities; the Bull Mountain MET tower installation on black bear food sources; and the Brighton MET tower installation on black bear food sources." Docket 7867, Order of 6/29/12 at 11-12.

conclude that its interests may not be adequately represented by existing parties, including ANR. Both ANR and ECNRCDC are creatures of the legislature. The legislature apparently saw a purpose in creating resource conservation districts that is distinct from the purposes behind creating ANR. Accordingly, I have no basis for concluding that ANR adequately represents ECNRCDC's interests in this proceeding.

ECNRCDC's intervention is being limited because it had an opportunity to file a motion to intervene prior to the original deadline, of which it was aware.²⁹ While I accept ECNRCDC's explanation for the late-filed nature of its motion, and understand and accept the difficulty of the circumstances surrounding the late filing, I cannot allow ECNRCDC's intervention to create the potential for prejudice to SMW. Accordingly, ECNRCDC's participation is limited to the issues identified in the *First Procedural Order* and ECNRCDC must take the schedule as it finds it.

ROBERT AND SHIRLEY ELDER

On September 24, 2012, the Elders filed a motion to intervene ("Elder Motion"), expressing concerns about the proposed Hawk Rock MET tower and its potential for impacts to nearby conserved lands, rare and irreplaceable natural areas, wildlife habitat, and the natural environment of the area. The Elders question why SMW is leasing conserved lands when it is in the commercial wind generating business, and not forestry.³⁰ The Elders also contend that the proposed Hawk Rock MET tower is inconsistent with the Newark Town Plan.³¹ Lastly, the Elders question how the proposed Project will result in societal benefits relative to aesthetic concerns if the data collected by the Met towers is not made public.³²

On October 1, 2012, the DPS filed comments in support of granting the Elders permissive intervention pursuant to 2.209(B) "to the fullest extent the Board deems appropriate."³³ The DPS notes that the Elders cite to ecological and habitat concerns as a basis for intervention, as

29. ECNRCDC Motion at 2. I respectfully note that, in addition to the District Manager to whom the task of intervention was initially assigned, ECNRCDC has a Board of Supervisors consisting of seven individuals.

30. Elder Motion at 1.

31. Elder Motion at 1.

32. Elder Motion at 1–2.

33. DPS Comments at 1.

well as concerns regarding aesthetics.³⁴ The Department takes no position on whether the Elders' comments on aesthetics raise a substantial issue under the substantive criteria applicable to the proposed Project.

On October 1, 2012, the Town of Newark filed comments supporting the Elders' intervention request. Newark concurs with any objections raised by the Elders regarding aesthetics, orderly development, property values, wildlife habitat and SMW's fitness to construct and operate the proposed Project, and asks the Board to include these issues in future proceedings related to SMW's application.³⁵

On October 1, 2012, SMW filed comments in opposition to the Elders' intervention request. According to SMW, the Elders have failed to identify a particularized interest that may be affected by the outcome of the proceeding, and that any generalized interest they may have is already adequately protected by existing parties.³⁶ First, SMW states that the Elders have no interest in the nearby conservation lands that may be impacted by the proceeding because they are neither the grantors nor grantees of the conserved land. As such, states SMW, they are no different than any member of the general public and have expressed only generalized concerns about nearby lands that they have no legal rights in or obligations to.³⁷ Second, SMW contends that the Elders' claimed interest in the natural environment and wildlife habitat is also too generalized to support their intervention. SMW states that the Elders' third claimed interest, related to societal benefits and aesthetics, is even more generalized than their other asserted interests and the motion must therefore fail.³⁸ Lastly, SMW contends that the interests asserted by the Elders are adequately represented by ANR and the DPS generally, and by Newark Neighbors United ("NNU") specifically; all existing parties to the proceeding.³⁹

I am granting the Elders' motion to intervene on a permissive basis, but their participation is limited to the issues defined in the *First Procedural Order* and restated in the *Second*

34. DPS Comments at 1.

35. Newark Comments at 1-2.

36. SMW Opposition at 4.

37. SMW Opposition at 4.

38. SMW Opposition at 4.

39. SMW asserts that, if the Board grants the Elders intervention, that it limit their participation to the issues specifically defined in the First and Second Procedural Orders in this Docket. SMW Opposition at 5.

Procedural Order. The Elders described with sufficiency their natural resource concerns related to the proposed Project, and the Board has in the past found that individual intervenors may bring a perspective sufficiently distinct from those of existing parties to warrant their participation on specific issues.⁴⁰

The Elders' participation is limited as noted above because they did not raise any issues with respect to aesthetics that I have not already considered in response to prior comments made by existing parties.⁴¹ For the reasons discussed in the First Procedural Order, I conclude that the Elders' comments do not raise a significant issue with respect to aesthetics.

MARK WHITWORTH

On September 24, 2012, Mr. Whitworth filed a motion to intervene seeking to participate on the issues of orderly development of the region (30 V.S.A. § 248(b)(1)), economic benefit to the state and its residents (30 V.S.A. § 248(b)(4)), aesthetics, rare and irreplaceable natural areas, necessary wildlife habitat, and public and quasi-public investments (30 V.S.A. § 248(b)(5)) (Whitworth Motion").⁴²

According to Mr. Whitworth, the proposed MET towers will interfere with the orderly development of the region because it is contrary to the position taken by the Northeast Vermont Development Association ("NVDA") in support of a moratorium on development of new industrial wind energy projects, as well as the recommendations of the Newark Planning Commission as reflected in its Town Plan.⁴³

Mr. Whitworth contends that the proposed MET towers will also have a negative economic impact on the region, citing to third-party studies and anecdotal evidence that commercial-scale wind turbines devalue surrounding properties, and that the presence of the

40. See *Joint Petition of Green Mountain Power Corp. et al.*, Docket 7628, Order of 9/3/10 at 9-10.

41. The Elders do assert that the proposed Project is inconsistent with the Newark Town Plan. By memorandum dated October 2, 2012, the parties were requested to provide legal briefing on the applicability or non-applicability of the revised Town Plan to the application being considered in this proceeding. Following receipt of any legal analysis provided by the parties on this question, I will determine whether or not any additional significant issues were raised with respect to the relevant substantive criteria.

42. Whitworth Motion at 1.

43. Whitworth Motion at 1-2.

MET towers in and of themselves will lead to the perception that turbines will eventually be built, causing a negative economic impact in the surrounding area.⁴⁴

Mr. Whitworth also asserts that the proposed MET towers will negatively impact the scenic and natural beauty of the area, and harm rare and irreplaceable natural areas. First, Mr. Whitworth states that the area contains many scenic resources, including Route 114, from which the proposed MET towers would be visible. Placement of the MET towers in the otherwise undeveloped ridgeline context, according to Mr. Whitworth, would violate clear written community standards as expressed in the Newark Town Plan, and offend the sensibilities of the average person based on a town-wide survey, opposition expressed at the Board's public hearing held on July 17, 2012, and the results of a special town meeting vote. Mr. Whitworth contends that the proposed MET towers provide no societal benefits to weigh against these aesthetic impacts.⁴⁵ Mr. Whitworth also asserts that Hawk Rock is a rare and irreplaceable natural area, and that the Newark Town Plan recognizes the importance of places like Hawk Rock.⁴⁶

Mr. Whitworth further asserts that the proposed MET towers will imperil necessary wildlife habitat, citing a number of U.S. Fish and Wildlife Service guidelines regarding the placement of tower facilities, as well as the recommendation of one expert that towers be placed no closer than 1/4 mile from peregrine falcon nests, and that guyed towers not be used.⁴⁷

Lastly, Mr. Whitworth states that the proposed MET towers will endanger public investment in nearby conservation lands, asserting that the MET towers would industrialize the conserved lands and pose a direct threat to the wildlife and wildlife habitat in those lands.⁴⁸

On September 27, 2012, Mr. Whitworth supplemented his intervention request ("Whitworth Supplement") stating that he is an adjoining property owner and that the proposed Project threatens the market value of his property, the views he enjoys from his home, and enjoyment of wildlife on his property due to the destruction of wildlife habitat on adjoining

44. Whitworth Motion at 3–5.

45. Whitworth Motion at 5–6.

46. Whitworth Motion at 5–7.

47. Whitworth Motion at 7–8.

48. Whitworth Motion at 8–9.

lands.⁴⁹ Mr. Whitworth further states that the proposed Project will threaten the ability of municipal and regional planning commissions to appropriately manage development in the area, as well as his enjoyment of public conservation lands that he has a stake in.⁵⁰ Mr. Whitworth contends that his status as an adjoining property owner means he has a substantial interest in the outcome of this proceeding that is not adequately represented by other parties, and that his intervention will not unduly delay the proceeding nor prejudice the interests of existing parties or the public.⁵¹

On October 1, 2012, the Town of Newark filed comments supporting Mr. Whitworth's intervention request. Newark concurs with any objections raised by Mr. Whitworth regarding aesthetics, orderly development, property values, wildlife habitat and SMW's fitness to construct and operate the proposed Project, and asks the Board to include these issues in future proceedings related to SMW's application.⁵²

On October 4, 2012, the DPS filed comments in response to Mr. Whitworth's intervention request. The DPS states that any bases for intervention articulated in Mr. Whitworth's supplemental filing of September 27 should not be considered due to its untimely nature. The Department further states that Mr. Whitworth cites significant issues with respect to orderly development, economic benefit, aesthetics, wildlife habitat, and public investments, and supports Mr. Whitworth's intervention "to the fullest extent the Board deems appropriate."⁵³ The Department also recommends that Mr. Whitworth explore the possibility of joining with existing intervenors in addressing wildlife habitat issues to promote efficiency of resources in this proceeding.⁵⁴

49. Whitworth Supplement at 1–2.

50. Whitworth Supplement at 2.

51. Whitworth Supplement at 2.

52. Newark Comments at 1–2.

53. DPS Comments at 1. It isn't clear from the Department's comments whether or not it believes Mr. Whitworth actually raises any potentially significant issues, stating only that Mr. Whitworth "cites" to significant issues.

54. DPS Comments at 1.

On October 4, 2012, SMW filed comments in opposition to Mr. Whitworth's intervention request.⁵⁵ According to SMW, Mr. Whitworth has not demonstrated a substantial issue specific to his interests as an adjoining property owner that will be affected by the outcome of this proceeding. SMW further contends that any issues cited by Mr. Whitworth are already adequately represented by existing parties to the proceeding.⁵⁶

I am granting Mr. Whitworth's motion to intervene on a permissive basis, but his participation is limited to the issues defined in the *First Procedural Order* and restated in the *Second Procedural Order*. Mr. Whitworth described with sufficiency his natural resource concerns related to the proposed project, and the Board has in the past found that individual intervenors may bring a perspective sufficiently distinct from those of existing parties to warrant their participation on specific issues.⁵⁷

Mr. Whitworth's participation is limited as noted above because, except as noted below, he does not raise any concerns with respect to his asserted interests that I have not already considered in response to prior comments made by existing parties. Mr. Whitworth does raise the issue of the recently amended Newark Town Plan and its relationship to the orderly development criterion. As noted earlier in this Order, by memorandum dated October 2, 2012, the parties have been asked to provide legal analysis on the applicability or non-applicability of the revisions to the Town Plan to the application being considered in this proceeding. Following receipt of any legal analysis provided by the parties on this question, I will determine whether or not any additional significant issues were raised with respect to the applicable substantive criteria, and whether the scope of the technical hearing will be expanded. A decision to expand the scope of the technical hearing could possibly have implications for the scope of Mr. Whitworth's intervention, as well as that of other existing parties.

55. SMW states that Mr. Whitworth's supplemental filing of September 27 is out of time and should be ignored. However, without waiving its position that the supplemental filing was untimely, SMW addresses its substance in the event the Board decides to give it consideration. SMW Comments at 3. SMW also asserts that, if the Board grants Mr. Whitworth intervention, that it limit his participation to the issues specifically defined in the First and Second Procedural Orders in this Docket. SMW Opposition at 6.

56. SMW Comments at 3–6.

57. See *Joint Petition of Green Mountain Power Corp. et al.*, Docket 7628, Order of 9/3/10 at 9-10.

NOREEN HESSION

On September 24, 2012, Noreen Hession filed a motion to intervene ("Hession Motion") stating that SMW should not be granted a certificate of public good for the proposed MET towers because SMW is not capable of carrying out the proposed Project and "cannot be entrusted with the public good."⁵⁸ Ms. Hession's motion goes on to list a number of shortcomings in SMW's application process, including failure to properly notify all adjoining landowners, actions by SMW that Ms. Hession contend were deceitful, and an environmental assessment report that Ms. Hession contends is "incomplete, inaccurate, and inadequate." Ms. Hession urges the Board to take up the question of SMW's competence as an issue in this proceeding, and reject SMW's application to send a strong signal that the Board will not tolerate incomplete applications nor afford applicants an unlimited number of attempts to "get it right."⁵⁹

On September 27, 2012, Ms. Hession supplemented her intervention request ("Hession Supplement"). Ms. Hession asserts that, as an adjoining property owner, her interests are directly threatened by SMW's unprofessional business practices, lack of competence, and lack of concern for neighboring property owners, wildlife and wildlife habitat.⁶⁰ Ms. Hession contends that her status as an adjoining property owner means she has a substantial interest in the outcome of this proceeding that is not adequately represented by other parties, and that her intervention will not unduly delay the proceeding nor prejudice the interests of existing parties or the public.⁶¹

On October 1, 2012, the Town of Newark filed comments supporting Ms. Hession's intervention request. Newark concurs with any objections raised by Ms. Hession regarding aesthetics, orderly development, property values, wildlife habitat and SMW's fitness to construct and operate the proposed Project, and asks the Board to include these issues in future proceedings related to SMW's application.⁶²

On October 4, 2012, the DPS filed comments in response to Ms. Hession's intervention request. The DPS states that any bases for intervention articulated in Ms. Hession's supplemental

58. Hession Motion at 1.

59. Hession Motion, generally.

60. Hession Supplement at 1.

61. Hession Supplement at 1.

62. Newark Comments at 1-2.

filing of September 27 should not be considered due to its untimely nature. The Department further states that Ms. Hession does not identify a significant issue with regard to any applicable Section 248 criteria. However, the Department believes that Ms. Hession raises concerns regarding SMW's fitness as a developer which may have a bearing on the question of public good if the Board determines that SMW's fitness presents a significant issue in this proceeding. Therefore, the Department does not oppose Ms. Hession's intervention, provided her participation is limited to the issue of SMW's fitness as the project developer.⁶³

On October 4, 2012, SMW filed comments in opposition to Ms. Hession's intervention request.⁶⁴ According to SMW, Ms. Hession has raised only generalized concerns that are adequately represented by existing parties.⁶⁵ SMW asserts that Ms. Hession's concerns over SMW's competence are not relevant to any Section 248 criteria and therefore provided no bases for intervention. This, SMW asserts, is because the competence of a developer is not included among the list of criteria applicable to MET tower projects under Sections 246 and 248.⁶⁶ SMW also contends that any interests that Ms. Hession may have as an adjoining property owner that are relevant to this proceeding cannot support intervention because they are so generalized that if her intervention was allowed, it would be "nearly impossible" to determine when an interest is generalized versus substantial.⁶⁷

I am granting Ms. Hession's motion to intervene on a permissive basis, but her participation is limited to the issues defined in the *First Procedural Order* and restated in the *Second Procedural Order*. Ms. Hession described with sufficiency her natural resource concerns related to the proposed Project, and the Board has in the past found that individual intervenors

63. DPS Comments at 1.

64. SMW states that Ms. Hession's supplemental filing of September 27 is out of time and should be ignored. However, without waiving its position that the supplemental filing was untimely, SMW addresses its substance in the event the Board decides to give it consideration. SMW Comments at 1. SMW also asserts that, if the Board grants Ms. Hession intervention, that it limit her participation to the issues specifically defined in the First and Second Procedural Orders in this Docket. SMW Opposition at 6.

65. SMW Comments at 2.

66. SMW Comments at 2–3.

67. SMW Comments at 2.

may bring a perspective sufficiently distinct from those of existing parties to warrant their participation on specific issues.⁶⁸

However, as explained below, I will not allow Ms. Hession to intervene on the basis of her comments regarding shortcomings by SMW in completing its notification and application process because these comments do not constitute a permissible basis for intervention.

In Section 246, the Legislature has mandated that a proposal to install temporary MET towers "shall be deemed to promote the public good of the state if it is in compliance with the criteria of this section and the board rules or orders."⁶⁹ Therefore, provided SMW demonstrates compliance with the criteria set forth in Section 246 and the Board's Order that establishes the standards and procedures for reviewing MET tower applications,⁷⁰ the public good criterion is met as a matter of law. Accordingly, the scope of review for a MET tower application is limited by law to the substantive criteria set forth in the 246 Standards Order, which incorporates all of the Section 248 criteria retained by Section 246, as well as some additional criteria not so retained. The concerns raised by Ms. Hession regarding SMW's competence do not relate to these criteria. Rather, Ms. Hession's competency argument seeks to call into question whether it would serve the public good to issue a certificate of public good ("CPG") to a developer with an alleged record of incompetence. While questions of character and competency are properly matters for regulatory review and ongoing supervision, the Legislature has elected to remove such considerations from Board review in Section 246 proceedings.⁷¹ This legislative determination does not mean that there is no recourse to address non-compliant acts given that other statutory mechanisms exist to ensure that developers such as SMW conduct their regulated activities competently and lawfully. Specifically, SMW is bound to comply with all applicable statutes and any conditions the Board may impose in the event SMW's application is approved. Failure to do so could lead to civil penalties under 30 V.S.A. § 30, as well as possible CPG

68. See *Joint Petition of Green Mountain Power Corp. et al.*, Docket 7628, Order of 9/3/10 at 9-10.

69. 30 V.S.A. § 246(b) (emphasis added).

70. *Order establishing standards and procedures for issuance of a certificate of public good for a temporary meteorological station pursuant to 30 V.S.A. § 246* dated 3/9/10 ("246 Standards Order").

71. The only time public good becomes an issue under Section 246 is when an applicant has not demonstrated compliance with the applicable substantive criteria. However, if that were the case, the application would be denied without the need to reach the question of public good.

revocation depending on the severity of any such violations. Accordingly, for these reasons, I conclude that it is appropriate to deny Ms. Hession's request to intervene for the purpose of contesting SMW's competency.

LYDIA McMILLIAN

On September 24, 2012, Lydia McMillian filed a motion to intervene on the issues of aesthetics and impacts to the natural environment under 30 V.S.A. § 248(b)(5) ("McMillian Motion"). Ms. McMillian asserts that the MET towers, as well as any eventual wind turbines that might be built in the area, would endanger numerous species of birds, as well as black bear, moose, deer, lynx and other wildlife. Ms. McMillian is also concerned about impacts to the large beaver pond located at the top of her property, and doesn't understand why this type of development would be allowed given the millions of dollars invested to keep the Northeast Kingdom pristine for tourism, recreation, protection of wildlife and the unique ecosystems found there. Ms. McMillian also asserts that no other parties adequately represent her interests because of the depth of her passion to fight the proposed MET towers. Lastly, Ms. McMillian asserts that her intervention would not delay the proceedings or prejudice the interests of existing parties or the public.⁷²

On October 1, 2012, the DPS filed comments in support of granting Ms. McMillian permissive intervention pursuant to 2.209(B) "to the fullest extent the Board deems appropriate."⁷³ The DPS notes that Ms. McMillian cited to ecological and habitat concerns as a basis for intervention, but does not discuss her request for intervention on aesthetics.⁷⁴

On October 1, 2012, the Town of Newark filed comments supporting Ms. McMillian's intervention request. Newark concurs with any objections raised by Ms. McMillian regarding aesthetics, orderly development, property values, wildlife habitat and SMW's fitness to construct and operate the proposed Project, and asks the Board to include these issues in future proceedings related to SMW's application.⁷⁵

72. McMillian Motion at 1.

73. DPS Comments at 1.

74. DPS Comments at 1.

75. Newark Comments at 1–2.

On October 1, 2012, SMW filed comments in opposition to Ms. McMillian's intervention request. SMW restricts its response to concerns raised by Ms. McMillian related to the proposed MET towers, asserting that her concerns about a future potential wind electric generation facility are beyond the scope of the current proceeding. According to SMW, Ms. McMillian's interests related to the proposed Project concern wildlife and aesthetics, are generalized in nature, and are adequately represented by existing parties.⁷⁶

I am granting Ms. McMillian's motion to intervene on a permissive basis, but her participation is limited to the issues defined in the *First Procedural Order* and again restated in the *Second Procedural Order*.⁷⁷ Ms. McMillian described with sufficiency her natural resource concerns related to the installation of the new tower, and the Board has in the past found that individual intervenors may bring a perspective sufficiently distinct from those of existing parties to warrant their participation on specific issues.⁷⁸

Ms. McMillian's participation is limited as noted above because she did not raise any issues with respect to aesthetics that I have not already considered in response to prior comments made by existing parties. For the reasons discussed in the *First Procedural Order*, I conclude that Ms. McMillian's comments do not raise a significant issue with respect to aesthetics.⁷⁹

Additionally, Ms. McMillian's participation is limited to the potential adverse effects from the installation, maintenance, and operation of the proposed MET towers. There is no petition for an actual wind electric generation facility pending before the Board at this time. And, while I accept Ms. McMillian's passion and motivations for wanting to bring the subject of commercial-scale wind facilities into consideration in this proceeding, that topic is not within the

76. SMW Opposition at 5. SMW asserts that, if the Board grants Ms. McMillian intervention, that it limit her participation to the issues specifically defined in the First and Second Procedural Orders in this Docket. SMW Opposition at 5.

77. Those issues are limited to the possibly adverse effect of the Hawk Rock MET tower installation on black bear food sources and peregrine falcon habitat; the Hawk Rock MET tower installation on rare, threatened, or endangered species or natural communities; the Bull Mountain MET tower installation on black bear food sources; and the Brighton MET tower installation on black bear food sources. Docket 7628, Order of 6/29/2 at 11-12.

78. See *Green Mountain Power Corp. et al.*, Docket 7628, Order of 9/3/10 at 9-10.

79. See Docket 7867, Order of 6/29/12 at 13.

scope of what the Board is statutorily directed to consider when processing MET tower applications.⁸⁰

So ORDERED.

Dated at Montpelier, Vermont, this 12th day of October, 2012.

s/ Bridgette Remington
Bridgette Remington, Esq.
Hearing Officer

OFFICE OF THE CLERK

FILED: October 12, 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)

80. While Ms. McMillian's motion addressed the possibility of a future commercial-scale wind generation facility directly, some of the other motions considered in today's Order also raised the possibility of such a future proposal. The restrictions on Ms. McMillian's participation to potential impacts from the proposed MET towers apply equally, and for the same reasons, to all intervenors in this proceeding.