

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: 8/15/2012

**THIRD PROCEDURAL ORDER RE: NOTICE REQUIREMENTS, STAY OF DOCKET,
AND MOTION FOR INTERVENTION**

Introduction

In today's Order, I will clarify the notice requirements for applications filed pursuant to Section 246, stay the proceedings in this docket, and consider a motion for intervention.

On April 12, 2012, Seneca Mountain Wind, LLC ("Seneca") filed an application with the Vermont Public Service Board ("Board"), pursuant to 30 V.S.A. §§ 246 and 248, to install four temporary meteorological stations ("MET towers"), two in the Town of Brighton, Vermont, and one each in the towns of Ferdinand and Newark, Vermont (the "Project").

On April 18, 2012, after Seneca corrected an error with providing adjoining landowners adequate notice, the application was considered complete.¹ Pursuant to Section 246 and the Board's *Section 246 Standards Order*, comments and requests for hearings were accepted for 30 days from the date Seneca's application was considered complete.²

1. See *Memorandum Re: Updated Adjoining Landowners List*, issued by the Clerk of the Board on 5/7/12 (finding Seneca's application complete as of April 18, 2012); letter of April 30, 2012, from Andrew N. Raubvogel, Esq., on behalf of Seneca, to Susan Hudson, Clerk of the Board (confirming that Ken and Joan Gammell received notice of Seneca's application as of April 18, 2012); *Memorandum Re: Notice to Updated Adjoining Landowners List*, issued by the Clerk of the Board on 4/25/12 (requesting comments regarding notice); letter of April 19, 2012, from Andrew N. Raubvogel, Esq., on behalf of Seneca, to Susan Hudson, Clerk of the Board (updating the adjoining landowners map).

2. *Section 246 Standards Order* of 3/9/10 at 4; see also *Memorandum Re: Updated Adjoining Landowners List*, issued by the Clerk of the Board on 5/7/12 (stating that comments regarding Seneca's completed application were due 30 days from April 18, 2012, the date the application was considered complete).

During the formal public comment period, which ended on May 18, 2012, the Board received numerous comments expressing concerns regarding the application and requesting that the Board conduct a site visit, hold hearings, deny the application, and add several environmental-related conditions to any certificate of public good ("CPG") issued for the MET tower installations. Following the public comment period, Seneca filed responses to the public comments and those members of the public who filed comments with the Board were given an opportunity to respond to Seneca's response comments.

On June 29, 2012, I issued the *Procedural Order re: Motions for Intervention and Schedule* ("Procedural Order"), ruling on several motions to intervene and setting a schedule in this docket. In the *Procedural Order*, the Town of Newark ("Newark") and Newark Neighbors United ("NNU") were granted permissive intervention. The *Procedural Order* also initiated a limited evidentiary proceeding on the following discrete issues:

[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; and adopted a schedule for the remainder of this docket.³

On July 17, 2012, I conducted a site visit at the proposed Hawk Rock MET tower site and the Chairman of the Board, James Volz, conducted a public hearing in Newark.

On July 30, 2012, I issued the *Second Procedural Order Re: Motions for Intervention and Procedures for the Remainder of the Docket* ("Second Procedural Order"), ruling on several motions to intervene and establishing procedures for the remainder of the docket. In the *Second Procedural Order*, the Town of Brighton's Planning Commission ("Brighton") was granted permissive intervention, limited to the significant issues specified in the June 29 *Procedural Order*.⁴

On August 6, 2012, William Heath filed two letters with the Board asserting that he is an abutting landowner who did not receive due notice regarding Seneca's application. Mr. Heath's

3. Docket 7867, Order of 6/29/12 at 11–12.

4. See Docket 7867, Order of 7/30/12 at 4 (citing Docket 7867, Order of 6/29/12 at 11–12).

filing included a "tax list" and "tax map" that indicate Mr. Heath's property abutts the property being leased by Seneca. In addition, Mr. Heath has requested leave to intervene in this docket.

On August 6, 2012, Robert and Shirley Elder ("Elders") filed a letter asserting that a portion of their property adjoins the proposed Project site and that they did not receive due notice regarding Seneca's application.

On August 7, 2012, the Clerk of the Board issued a memorandum requesting that comments on the filings made by Mr. Heath and the Elders be submitted no later than 11:30 a.m., Thursday, August 9, 2012.

On August 9, 2012, prior to 11:30 a.m., the Department, Newark, and Seneca filed comments via e-mail regarding Mr. Heath's and the Elders' August 6 filings with the Board. The Department stated that Seneca should be required to prove compliance with the notice requirements of the Board's *Section 246 Standards Order* or demonstrate why notice was not required to be provided to Mr. Heath and the Elders.⁵ Newark requests that the Board require Seneca to demonstrate compliance with the notice requirements of the Board's *Section 246 Standards Order*, and, if Seneca does not demonstrate such compliance, Newark requests that the Board deem Seneca's application incomplete and dismiss the application or stay the proceedings in this docket until Seneca satisfies the notice requirements and adjoining landowners are given a "full and fair opportunity to intervene."⁶

On August 9, 2012, after 11:30 a.m., NNU filed comments via e-mail requesting that the Board engage a third party to verify the accuracy and completeness of Seneca's joiners lists,⁷

5. Letter of August 9, 2012, from John Beling, Esq., on behalf of the Department, to Susan Hudson, Clerk of the Board at 1 (referencing the notice requirements detailed in the Board's *Section 246 Standards Order* of 3/9/10 at 6).

6. Letter of August 9, 2012, from L. Brooke Dingleline, Esq., on behalf of Newark, to Susan Hudson, Clerk of the Board at 1–2 (referencing the notice requirements detailed in the Board's *Section 246 Standards Order* of 3/9/10 at 6). I note here that Newark highlighted the fact that the Newark Planning Commission had raised concerns regarding notice in an earlier filing. *Id.* I also note here that while I appreciate that the August 7 memorandum imposed a very tight deadline for comments, requests to dismiss or stay an application should be filed in the form of a motion and not included within the text of a letter.

7. In addition, NNU requests that the Board adopt a definition for the term "tract of land" that encompasses "all contiguous land in common ownership, regardless of the functional relationship between the parcels." Letter of August 9, 2012, from Deborah T. Bucknam, Esq., on behalf of NNU, to Susan Hudson, Clerk of the Board at 1 (citing *In re Gerald Costello Garage*, 158 Vt. 655, 656 (1992); *In re Stokes Communications Corp.*, 164 Vt. 30, 36 (1995)).

and the Elders submitted, via e-mail, an addendum to their August 6 filing, which provided a parcel identification number for the "Watson parcel," which they assert is the Project property that adjoins their property.

On August 10, 2012, Seneca filed a letter via e-mail objecting to NNU's August 9 filing and requesting that NNU's filing be stricken because the late filing provided NNU with the unilateral advantage of replying to Seneca's earlier August 9 filing. Seneca's August 10 letter also included a response to NNU's arguments regarding the definition of the term "tract of land."⁸

On August 13, 2012, Newark filed a letter responding to Seneca's August 9 and 10 filings. Newark's letter asserts that the Project property must be determined according to the municipal grand list and the boundaries of Seneca's leased properties and refutes Seneca's use of the term "tract of land."

No other comments were received regarding Mr. Heath's and the Elders' August 6 filings.

Section 246 Notice Requirements

The Board's *Section 246 Standards Order* requires that "[t]he applicant must provide written notice, at least 30 days in advance of filing a Section 246 application, to . . . the landowners of record of property, pursuant to the current municipal grand list, adjoining the property on which the project will be located."⁹ On April 18, 2012, after Seneca corrected an error with providing adjoining landowners adequate notice, Seneca's application was considered complete.¹⁰ However, given the new information provided to the Board, discussed below, I now find that Seneca's application is incomplete because Seneca failed to provide due notice to all landowners of record property adjoining the properties leased by Seneca on August 1, 2011, and April 1, 2012.¹¹

8. Seneca's request that NNU's late filing be stricken is improper because NNU's letter is not part of an evidentiary record and, instead, Seneca should have requested that the filing not be considered; however, I note here that I am resolving the notice issue on grounds unrelated to NNU's filing.

9. *Section 246 Standards Order*, Order of 3/9/10 at 6.

10. See footnote 1.

11. See Seneca's MET Tower Application at Attachments A1-A3.

Mr. Heath and the Elders contend that they own property adjoining the property on which the Project will be located and that Seneca did not provide them with notice of its application. Mr. Heath also provided a "tax list" and "tax map" that indicated that Mr. Heath's property abutted the property being leased by Seneca for the Project.¹²

Seneca asserts that Mr. Heath and the Elders are not entitled to notice because they do not own property that adjoins the property on which Seneca's MET tower installations are proposed to be built.¹³ Seneca represents that Mr. Heath's property does not adjoin the Project property itself, but adjoins a property owned by Daniel Ouimette, which is contiguous with the Project property.¹⁴ Seneca also represents that the Elders' property does not adjoin the Project property itself, but adjoins a property owned by Hawk Rock Holdings LLC ("HRH"), which is contiguous with the Project property.¹⁵ Seneca bases its assertion that Mr. Heath's and the Elders' properties do not adjoin the Project property on its representation that Mr. Ouimette and HRH each own several distinct "tracts of land" that have not been merged into unified parcels and remain "distinct legal parcels that have separate chains of title."¹⁶

For the purpose of this docket, it is not controlling that Mr. Ouimette and HRH each owned several distinct legal parcels with separate chains of title. Rather, the key factor here is that Seneca leased several of Mr. Ouimette's properties under one lease and several of HRH's parcels under another lease.¹⁷ It is the leasehold interests held by Seneca that define the

12. Letter of August 6, 2012, from William Heath, to Susan Hudson, Clerk of the Board at Attachments; *see* Seneca's MET Tower Application at Attachments A1-A2 (Ouimette lease) and F (Adjoiners Map).

13. Letter of August 9, 2012, from Andrew N. Raubvogel, Esq., on behalf of Seneca, to Susan Hudson, Clerk of the Board at 1–2. Seneca included a modified version of its *Adjoiners Map*, submitted to the Board on April 19, 2012, that indicates the location of Mr. Heath's and the Elders' properties. *Id.* at Attachment.

14. Letter of August 9, 2012, from Andrew N. Raubvogel, Esq., on behalf of Seneca, to Susan Hudson, Clerk of the Board at 1–2. Daniel Ouimette is the owner of several parcels of land leased by Seneca on August 1, 2011. *See* Seneca's MET Tower Application at Attachments A1 and A2 (listing the Daniel R. Ouimette Trust as the Lessor); *see also* letter of August 9, 2012, from Daniel Ouimette, to Susan Hudson, Clerk of the Board (representing that Mr. Ouimette is the landowner of the MET tower sites in Brighton and Ferdinand, Vermont).

15. Letter of August 9, 2012, from Andrew N. Raubvogel, Esq., on behalf of Seneca, to Susan Hudson, Clerk of the Board at 1–2. HRH is the owner of several parcels of land leased by Seneca on April 1, 2012. *See* Seneca's MET Tower Application at Attachment A3.

16. Letter of August 9, 2012, from Andrew N. Raubvogel, Esq., on behalf of Seneca, to Susan Hudson, Clerk of the Board at 1–2.

17. Seneca's MET Tower Application at Attachments A1–A3.

boundaries of the project property.¹⁸ Thus, pursuant to the Board's *Section 246 Standards Order*, Seneca should have provided written notice, at least 30 days in advance of filing its Section 246 application, to all landowners of record of property adjoining its leased lands as identified in Attachments A1 through A3 of its MET Tower Application. Based on the leases submitted by Seneca with its application and the map submitted by Seneca on August 9, 2012, it appears that Seneca's leased property adjoins Mr. Heath's and the Elders' properties¹⁹ and, therefore, I find that Mr. Heath and the Elders did not receive due notice regarding Seneca's application.

In light of this conclusion, I now find Seneca's application is incomplete. Accordingly, I hereby vacate the existing procedural schedule, established in the June 29 *Procedural Order* and the July 30 *Second Procedural Order*, and stay the proceedings in this docket.

Before any further scheduling order is issued in this docket, Seneca shall: (a) provide written notice and a copy of its MET Tower Application to all landowners of record of property adjoining the property which Seneca leased from Mr. Ouimette and HRH, as detailed in Attachments A1 through A3 of Seneca's MET Tower Application that did not previously receive proper notice;²⁰ and (b) prove compliance with the notice requirements, as clarified in this Order, by submitting a revised Adjoiners Map delineating the property boundaries of all the leased properties with the adjoining properties labeled by each landowner's name²¹ and filing a revised list of adjoiners who received notice of Seneca's application.²² Prior to adopting a new schedule

18. Because I determined that it is the lead hold that defines the project property in this docket, I will not address whether the parties' assertions regarding the definitions of "tracts of land" or the interpretation of the appropriate notice with regard to a town's Grand List.

19. It is possible that there are additional adjoining landowners that did not receive notice. The burden of identifying any additional adjoining landowners and providing them the required notice rests with Seneca.

20. Seneca's written notice shall, in addition to complying with the notice requirements of the Board's *Section 246 Standards Order* and the MET Tower Application, include a copy of the June 29 *Procedural Order*, the July 30 *Second Procedural Order*, and this Order for the adjoining landowners' review.

21. The adjoining properties shall be labeled with the names of the landowner(s) and include both the adjoining landowners who previously received notice of Seneca's application and the adjoining landowners who will be receiving notice as a result of this Order.

22. The revised list of adjoiners shall include both the adjoining landowners who previously received notice of Seneca's application and the adjoining landowners who will be receiving notice as a result of this Order. Seneca shall also indicate when each landowner(s) received notice and a copy of the notice provided to the adjoining landowners receiving notice as a result of this Order.

for this docket, all adjoining landowners receiving notice as a result of this Order, shall be provided with thirty days, from the date notice is received, to file comments and motions to intervene (limited to the significant issues specified in the June 29 *Second Procedural Order*) with the Board.

After Seneca proves compliance with the notice requirements, as clarified in this Order, a memorandum will be issued detailing the procedures for the remainder of this docket.

Motion to Intervene

The June 29 *Procedural Order* established a July 23, 2012, deadline for motions to intervene in this docket. Mr. Heath filed a motion to intervene in this docket on August 6, 2012, asserting that he owns land adjoining the property to be used for the Project and that he had not received due notice of Seneca's application.²³ Mr. Heath stated that he "only recently found" out about the Project and filed his motion to intervene without the thoroughness that he would have liked.²⁴ For the time being, I will take Mr. Heath's present intervention motion under advisement. At his option, Mr. Heath may supplement his motion no later than thirty days after he receives notice, pursuant to this Order, of Seneca's Section 246 application.

So ORDERED.

23. Letter of August 6, 2012, from Mr. Heath, to Susan Hudson, Clerk of the Board.

24. Letter of August 6, 2012, from Mr. Heath, to Susan Hudson, Clerk of the Board.

Dated at Montpelier, Vermont, this 15th day of August, 2012.

s/ Bridgette Remington
Bridgette Remington, Esq.
Hearing Officer

OFFICE OF THE CLERK

FILED: August 15, 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)