

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: 7/30/2012

SECOND PROCEDURAL ORDER RE:
MOTIONS FOR INTERVENTION AND PROCEDURES FOR THE REMAINDER OF THE DOCKET

Introduction

In today's Order, I will rule on the motions for intervention in this docket and otherwise clarify procedures for the remainder of this docket.

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.

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, the *Procedural Order re: Motions for Intervention and Schedule* ("*Procedural Order*") was issued, 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 9, 2012, Michael Boylen filed a letter suggesting a correction in the June 29 *Procedural Order*.

On July 11, 2012, Seneca filed a letter regarding the site visit, public hearing, intervention, discovery, electronic filing, and rebuttal testimony. On July 13, 2012, the Clerk of the Board issued a memorandum seeking comments on Seneca's July 11th filing.⁴

On July 17, 2012, I conducted a site visit at the proposed Hawk Rock MET tower site in Newark. More than a dozen members of the public attended the site visit. On July 17, 2012, Chairman of the Board, James Volz, conducted a public hearing in Newark. More than 100

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

4. Comments were not sought with regard to Seneca's requests regarding the site visit and public hearing given that the public hearing and site visit were scheduled to occur on July 17, 2012, and that the Clerk of the Board issued the *Order of Notice re: Public Hearing* on June 29, 2012, and issued a memorandum regarding the site visit on July 12, 2012.

members of the public attended the public hearing and more than fifty members of the public spoke at the hearing.

On July 23, 2012, the Town of Brighton Planning Commission ("Brighton") and a group of individuals, with Pam Arborio as an appointed contact person, (collectively, the "Arborio Group") filed motions to intervene in this docket.

On July 23, 2012, Newark renewed its motion to intervene in this docket and filed a response to Seneca's July 11th filing.

On July 23, 2012, the Department filed a response to Seneca's July 11th filing.

On July 25, 2012, the Vermont Agency of Natural Resources ("ANR") filed a response to Seneca's July 11th filing.

On July 26, 2012, the Department filed a response to the motions for intervention.

On July 26, 2012, Seneca filed a response to the motions for intervention and responded to comments on its July 11th filing.

Motions to Intervene

In this Order, I will rule on motions to intervene filed by Brighton and the Arborio Group. In addition, I will address the renewed motion to intervene filed by Newark. As a preliminary matter, I note that Brighton and the Arborio Group are planning to represent themselves. I remind the *pro se* parties that, even though the Board typically accommodates participation, by non-attorneys, in its proceedings, they are still required to adhere to all of the Board's Rules of Practice for appearing before the Board.⁵ In particular, this includes the requirement that all filings be served on all other parties to the proceeding. In addition, I encourage parties with similar interests to work together in the preparation of testimony and discovery, as well as the examination of witnesses.

Brighton Planning Commission

In its intervention motion, Brighton expresses concerns about the proposed project's impacts on aesthetics, the local economy, the orderly development of Brighton and the natural

5. See Board Rule 2.201(B) governing *pro se* representation, available at www.state.vt.us/psb/rules/rules.stm.

environment. Brighton Planning Commission's motion also contends that the proposed MET towers do not conform with its zoning requirements.

In reply, Seneca states that it does not object to Brighton's intervention, provided that it is limited to the issues specified in the June 29 *Procedural Order* as they pertain to Brighton (i.e., potential impacts to black bear food sources near the proposed Bull Mountain and Brighton MET tower sites).⁶ The Department also filed a response to Brighton's motion stating that the Department supports Brighton's intervention, provided it is limited to the significant issues regarding habitat and/or wildlife-food-source issues identified in the June 29 *Procedural Order*.⁷

While Section 246 provides that notice of the proceeding must be provided to "the legislative bodies and municipal and regional planning commissions in the communities where the project will be located," it does not confer automatic party status on these local and regional governmental bodies. As the municipal planning commission for the community where Seneca proposes to install two MET towers, Brighton has a substantial interest in this proceeding with respect to the possibly adverse effect of the Bull Mountain and Brighton MET tower installations on black bear food sources. This interest may be affected by the outcome of the proceeding and will not be adequately represented by other parties to this docket. Therefore, I grant Brighton permissive intervention, pursuant to Board Rule 2.209(B), limited to the significant issues specified in the June 29 *Procedural Order*.⁸

Arborio Group

In its intervention motion, the Arborio Group⁹ expresses concern about the proposed project's impacts on the area's eco-system, public health and safety, property values, and the impact of the proposed project on the rural and residential landscape of the area.

6. Letter of July 26, 2012, from Andrew N. Raubvogel, Esq., on behalf of Seneca, to Susan Hudson, Clerk of the Board, at 4.

7. Letter of July 26, 2012, from Aaron Kisicki, Esq., on behalf of the Department, to Susan Hudson, Clerk of the Board.

8. See Docket 7867, Order of 6/28/12 at 11-12.

9. The Arborio Group is composed of the following individuals: Pam and Joe Arborio, Joel Cope, Al and Cathy Kinney, Evie Kinney, Kathleen Nelson, Howard Storm, and John Zuppa. The Arborio Group provided mailing addresses for each individual or couple located in both Island Pond and Brighton, Vermont. Letter of July 23, 2012, from Pam Arborio, to Susan Hudson, Clerk of the Board, at 2.

In reply, Seneca asserts that the Arborio Group's intervention should be denied because it did not provide the information required by Board Rule 2.209 and Board precedent.¹⁰ The Department also filed a response to the Arborio Group's motion stating that the Department supports the Arborio Group's intervention, provided it is limited to the significant issues regarding habitat and wildlife food-source issues identified in the June 29 *Procedural Order*.¹¹

As in other proceedings before the Board, the standard for intervention in a Section 246 proceeding is whether the applicant has "demonstrate[d] a substantial interest which may be affected by the outcome of the proceeding."¹² While the Arborio Group's letter raises several concerns about the proposed project, the Arborio Group did not explain why their concerns raise a substantial interest which may be affected by the outcome of this proceeding.¹³ In addition, although the Arborio Group's letter states that "[w]e have no other means to protect our Homes and our Health against the proposed project . . . ," the Arborio Group failed to explain why its concerns regarding the proposed project will not be adequately protected by other parties, such as the Department or ANR. Therefore, I deny Arborio Group's request to intervene because the request lacks sufficient information upon which to grant intervention.

Town of Newark

Newark filed a motion on July 23, 2012, requesting, among other things, that the Board "reaffirm and/or grant the Town of Newark Intervener Party Status."¹⁴ The June 29 *Procedural Order* granted the Town of Newark permissive intervention, pursuant to Board Rule 2.209(B), limited to the interests identified in the motions of the Selectboard and the Planning

10. Letter of July 26, 2012, from Andrew N. Raubvogel, Esq., on behalf of Seneca, to Susan Hudson, Clerk of the Board, at 4.

11. Letter of July 26, 2012, from Aaron Kisicki, Esq., on behalf of the Department, to Susan Hudson, Clerk of the Board.

12. Board Rule 2.209(B) provides that in exercising its discretion to permit interventions the Board shall consider (1) whether the applicant's interest will be adequately protected by other parties; (2) whether alternative means exist by which the applicant's interest can be protected; and (3) whether intervention will unduly delay the proceeding or prejudice the interests of existing parties or of the public.

13. See footnote 8.

14. Town of Newark, *Motion to Intervene*, filed on July 23, 2012.

Commission. Given that Newark's new motion reiterates its substantial interests expressed by the Newark Planning Commission in its original motion,¹⁵ I deny the Town's new motion.

Newark's July 23rd motion also included a request for the Board to hear evidence on the proposed project's potential adverse impacts on the Orderly Development of the Region and Aesthetics criteria of Section 248. Newark's motion asserts that the public comments made at the July 17th public hearing raised significant issues with regard to the orderly development of the region and aesthetics and also highlights the June 28, 2012, vote by the Northeastern Vermont Development Association ("NVDA") Board of Directors calling for a three-year moratorium of industrial-sized wind projects. Finally, Newark contends that Seneca is not entitled to a rebuttable presumption of no undue adverse impact on the issue of aesthetics¹⁶ because it is proposing to operate the towers for a period of five years and asserts that the information provided by Seneca does not satisfy the aesthetics or orderly development criteria.

First, the formal public comment period in this docket ended on May 18, 2012. Newark's argument incorrectly assumes that the public hearing was an extension of the public comment period. In fact, the July 17th public hearing was undertaken "in the interest of allowing the public to comment on the issues raised in this docket and learn more about the procedures related to the remainder of this docket." Second, the NVDA moratorium is not germane to the review of Seneca's application in this proceeding to install four MET towers.

As for Newark's rebuttable presumption argument, I find it is not relevant to the threshold determination of whether evidence needs to be taken on the aesthetics criterion. In Section 246

15. See Newark's *Motion to Intervene*, filed on July 23, 2012 (raising concerns regarding the proposed project's potential impacts under 30 V.S.A. § 248(b)(1) (Orderly Development of the Region) and 30 V.S.A. §248(b)(5) (Aesthetics)); cf. Docket 7867, Order of 6/29/12 at 6:

The Planning Commission expresses its concerns about the proposed project's impacts on aesthetics, the local economy, natural resources, wildlife, and conservation lands in Newark, and about the potential for impacts in surrounding communities. The Planning Commission's motion specifically contends that the proposed MET towers do not conform with the Newark Town Plan and do not meet the following criteria: 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)); and Aesthetics, Historic Sites, the Natural Environment and Public Health and Safety (30 V.S.A. § 248(b)(5)).

16. See *Sec 246 Standards Order*, Order of 3/9/10 at 3 (establishing a rebuttable presumption of no undue adverse impacts for MET tower installations that will not exceed 200 feet and will not remain in place for more than three years).

cases, the rebuttable presumption is an evidentiary burden-shifting device that does not apply to the Board's initial determination whether a significant issue with regard to aesthetics has been raised in an application or by the comments filed in response to an application. With the time for submitting comments having closed on May 18th, and with a determination already having been made that Seneca's application does not raise a significant issue under Section 248(b)(5) (Aesthetics), I find Newark's effort to now expand the scope of the evidence to be heard in this case to be both untimely and unfounded. Accordingly, Newark's request is denied.

Procedure for the Remainder of the Docket

On July 11, 2012, Seneca requested that I: (a) limit new intervention requests to the "remaining issues identified in the" June 29 *Procedural Order*; (b) provide Seneca with the opportunity to serve discovery on other parties after the other parties submit prefiled testimony on August 20, 2012; (c) require that parties in this docket make filings electronically as well as in hard copy; and (d) provide Seneca with an opportunity to reply to the other parties' prefiled testimony with live rebuttal testimony.¹⁷ Newark, the Department, and ANR filed responses to these requests. I will discuss each of Seneca's requests below. I begin my discussion by reiterating that the June 29 *Procedural Order* established a schedule for an evidentiary proceeding limited to examining the possibly adverse impacts 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.¹⁸

Pursuant to the statutory deadline of Subsection 246(d), the Board is required to issue a proposal for decision ("PFD") within five months of receiving a completed MET tower application. In

17. Letter of July 26, 2012, from Andrew N. Raubvogel, Esq., on behalf of Seneca, to Susan Hudson, Clerk of the Board, at 5 (clarifying the opportunity to provide live rebuttal testimony rather than live sur-rebuttal testimony); letter of July 11, 2012, from Andrew N. Raubvogel, Esq., on behalf of Seneca, to Susan Hudson, Clerk of the Board, at 2 (requesting the opportunity to provide live sur-rebuttal testimony). Seneca's July 11th filing also included requests regarding the site visit and public hearing which will not be addressed in this Order given that the site visit and public hearing were held on July 17, 2012.

18. Docket 7867, Order of 6/28/12 at 11-12.

this docket, that statutorily-mandated deadline dictates that a PFD be issued no later than September 18, 2012.

Intervention

Seneca requested that the Board limit new intervention requests to the "remaining issues identified in the" June 29 *Procedural Order*. This is already the "law of the case" and new intervenors must take this case as they find it. Therefore, the request is denied as moot.

Discovery

Seneca requests an opportunity to conduct discovery on other parties in the interest of procedural fairness, and given that the CPG applicant bears the ultimate burden of proof. Seneca proposes to serve discovery on other parties by August 22, 2012, with responses due by August 24, 2012. The Department, ANR, and Newark oppose Seneca's request asserting that it has provided no basis to support its request for discovery and is unduly burdensome and impracticable.

Seneca's application necessarily must be reviewed within the time limitations imposed under Section 246. The current schedule requires other parties to submit prefiled testimony on August 20, 2012, and sets August 27, 2012, as the Technical Hearing date. Therefore, within the statutorily compressed timeframe of the Section 246 review process, I find that Seneca's request for discovery is impracticable. Accordingly, it is denied. Seneca will have a reasonable opportunity to test the evidence of other parties through cross-examination at the technical hearing.

Electronic Filing

Seneca requests that given the shortness of the filing periods and the deadlines in this docket, that the Board require all parties to file everything in both electronic (e-mail) and hard copy form to all other parties and the Board. As the only party to comment on this issue, Newark stated that it has no objection to the request. Because parties may not have reliable access to high speed internet, I will not impose such a requirement. Thus, parties must submit an original and

three hard copies of filings with the Board. In addition, when filing letters, testimony, briefs, and all other materials with the Board as a part of the proceedings, all parties (but not interested persons) on the service list must be provided with copies. In the interest of time, parties are also requested to submit all materials via e-mail to the Clerk of the Board at psb.clerk@state.vt.us and are encouraged to submit all materials via e-mail to other parties. Documents submitted in .pdf format should be in an "unlocked" format, i.e., searchable and extractable, rather than in an image format. Finally, I would observe that my denial of Seneca's request in no way prevents the parties from reaching an agreement among themselves to make use of electronic process in exchanging documents with each other.

Rebuttal Testimony

Seneca has requested an opportunity to present live rebuttal testimony during the technical hearing because it bears the burden of proof in this docket.¹⁹ ANR asserts that Seneca's initial request for sur-rebuttal is not supportable because the other parties will be filing direct testimony, but that if Seneca is afforded the opportunity for live rebuttal testimony that Seneca be required to identify with specificity, by August 22, 2012, the matters for which it will offer rebuttal testimony. In addition, ANR requests that if Seneca is afforded the opportunity to present live rebuttal testimony, that other parties be permitted to offer live sur-rebuttal testimony. The Department is opposed to granting a blanket allowance of live sur-rebuttal testimony, but proposes that the Board review the prefiled testimony submitted on August 22, 2012, and then, if the Board feels its investigation into specific criteria may benefit from live sur-rebuttal, identify those specific areas at that time. Finally, Newark requests that the Board clarify whether the Board is requiring the parties to present rebuttal evidence as well as direct evidence in the prefiled testimony submitted on August 22 and states that the Town does not object to Seneca

19. Letter of July 26, 2012, from Andrew N. Raubvogel, Esq., on behalf of Seneca, to Susan Hudson, Clerk of the Board; letter of July 11, 2012, from Andrew N. Raubvogel, Esq., on behalf of Seneca, to Susan Hudson, Clerk of the Board.

being allowed to present live sur-rebuttal testimony if other parties are afforded the same opportunity to present live sur-rebuttal testimony.²⁰

First, as a clarification, no party is required to submit rebuttal testimony. That said, I find Seneca's request for an opportunity to present live rebuttal testimony to be reasonable and would be helpful to the Board as the trier-of-fact. However, given the time constraints of this proceeding, I require that Seneca identify with specificity, by August 23, 2012, the matters for which it will offer live rebuttal testimony at the August 27th technical hearing. As for the requests of ANR and Newark for an opportunity to present live sur-rebuttal testimony during the technical hearing, these requests are denied without prejudice to renew them at the technical hearing.

Witness Lists

Seneca and Newark noted that they will not be able to establish final witness lists until after reviewing the prefiled testimony of the other parties to be submitted on August 20, 2012. At the time of its July 11th filing, Seneca stated that it anticipated including three to four witnesses on its final witness list: a company representative, and representatives of its two environmental consultants.

Based on Seneca's and Newark's comments regarding the ability to establish final witness lists, I am requiring all parties to file final witness lists by August 23, 2012.

SO ORDERED.

20. Letter of July 23, 2012, from L. Brooke Dingleline, Esq., on behalf of Newark, to Susan Hudson, Clerk of the Board, at 6.

Dated at Montpelier, Vermont, this 30th day of July, 2012.

s/Bridgette Remington
Bridgette Remington, Esq.
Hearing Officer

OFFICE OF THE CLERK

FILED:

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)