

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7628

Joint Petition of Green Mountain Power Corporation,)
Vermont Electric Cooperative, Inc., and Vermont)
Electric Power Company, Inc. for a certificate of public)
good, pursuant to 30 V.S.A. Section 248, to construct up)
to a 63 MW wind electric generation facility and)
associated facilities on Lowell Mountain in Lowell,)
Vermont, and the installation or upgrade of)
approximately 16.9 miles of transmission line and)
associated substations in Lowell, Westfield and Jay,)
Vermont)

Order entered: 2/16/2012

ORDER RE MOTION FOR RECONSIDERATION
AND NOTICE OF HEARING

INTRODUCTION

On May 31, 2011, the Public Service Board ("Board") issued an Order (the "Order") and Certificate of Public Good ("CPG") in this docket approving, subject to certain conditions, the construction and operation of the proposed wind electric generating facility. Among other things, the Order required the Petitioners to make a number of post-certification compliance filings. Condition 17 of the Order and CPG required Green Mountain Power Corporation ("GMP") to secure habitat fragmentation-connectivity easements pursuant to the requirements of paragraph 3.2 of a Memorandum of Understanding between it and the Agency of Natural Resources (the "Natural Resource MOU"), and file them for Board review and approval.¹ On December 7, 2011, GMP submitted its proposed habitat fragmentation-connectivity easements ("Easements") covering two parcels of land totaling approximately 1,662 acres for party

1. The Order and CPG required GMP to obtain and file the easements for Board review prior to commencing construction of the project. However, by Order dated July 12, 2011, the requirement was modified to allow GMP until December 31, 2011, to obtain and file the easements for Board review. Docket 7628, Order of 7/12/11 at 11.

comment and Board review. On December 23, 2011, the Board issued an Order approving the Easements and directing GMP to file a map showing the boundaries of the Easements and stating that it was prepared to revisit its approval of the Easements if the map indicated any inconsistencies with comments filed by the Agency of Natural Resources ("ANR") in support of the Easements.

On December 29, 2011, GMP filed two maps showing the boundaries of the Easements, referred to as the Boomhour Brook Conservation Plan and the Eden's Echo Forest Conservation Plan.

On January 6, 2012, the Towns of Albany and Craftsbury (the "Towns") and Lowell Mountains Group, Inc. ("LMG") (together the "Movants") filed a Motion for Reconsideration of the Board's December 23, 2011, Order approving the Easements (the "Motion").

On January 18, 2012, GMP filed an Opposition to Motion to Reconsider of Lowell Mountains Group and the Towns of Craftsbury and Albany ("GMP Opposition").

On January 25, 2012, the Movants filed their Reply to GMP's Opposition to Motion for Reconsideration ("Reply").

On January 30, 2012, the Deputy Clerk of the Board issued a memorandum requesting additional information in the form of a map from GMP.

On February 3, 2012, GMP filed the map requested by the January 30, 2012, memorandum.

On February 8, 2012, the Movants filed comments in response to the map filed by GMP on February 3, 2012 ("Towns/LMG Comments").

Also on February 8, 2012, LMG filed a separate Motion for Reconsideration of the December 23, 2011, Order approving the Easements.²

2. It is unclear why LMG filed its own separate motion since LMG had already joined in the Towns' Motion, and counsel for the Towns ultimately filed a Notice of Appearance as co-counsel for LMG with authorization from LMG's counsel of record. LMG confirmed its authorization and reiterated that it joined in the Motion, Reply and Towns/LMG Comments. Letter from attorney Simon to Susan M. Hudson, PSB Clerk filed February 8, 2012. Additionally, the substantive arguments in the LMG motion appear to have been taken largely verbatim from the Towns/LMG Comments, and are limited to the issue of the existence of unconserved lands between the Eden's Echo parcel and the project site. For the reasons discussed on that issue in today's Order, the separate LMG motion is denied.

On February 10, 2012, GMP filed an Opposition to the Motion to Reconsider of Lowell Mountains Group and to the February 6, 2012, comments of the Towns of Albany and Craftsbury.

On February 15, 2012, the Towns and LMG filed a letter in response to GMP's February 10, 2012, filing.

For the reasons set forth below, we are granting, in part, the Movant's Motion and will hold a technical hearing on March 7, 2012. The hearing will be limited to the potential impacts to the intended functions of the Easement parcels from the presence of East Hill Road and the allowable activities within the Easement parcels themselves. We deny the Movants' request that construction activities on the project site cease.

The Movants' Motion

The Movants ask the Board to reconsider its December 23, 2011, Order approving the Easements, and instead find that the Easements do not provide sufficient mitigation to offset what are otherwise unduly adverse environmental impacts from the project, and to order that all construction activities on the project site cease until sufficient mitigation is obtained, or at a minimum, until sufficient information and analysis is provided to the Board so that it can make an informed decision on the adequacy of the Easements.³

The Movants' arguments fall broadly into six categories. The first is a concern that the Easements are separated by East Hill Road, a potentially fragmenting feature that Movants assert renders the Easements insufficient to provide the requisite connectivity.⁴ The second is a concern that activities within the Easements, such as a planned haul-road extension, maple sugaring and timbering, will cumulatively result in fragmentation within the Easement parcels themselves.⁵ Third, the Movants contend that unconserved land that exists between the northern boundary of the Eden's Echo parcel and the Lowell Mountain habitat block means that the Easements do not adequately secure connectivity between the two habitat blocks as described by

3. Motion at 16.

4. Motion at 2.

5. Motion at 3.

ANR.⁶ Fourth, the Movants contend that the memorandum submitted by ANR does not contain sufficient information for the Board to determine compliance with Condition 17.⁷ Fifth, the Movants assert that the Board cannot rely on the ANR memorandum because it is not sworn testimony that has been subject to cross-examination.⁸ And, sixth, the Movants argue that the Board has improperly delegated its decision-making authority to ANR in approving the Easements.⁹

GMP's Opposition

GMP contends that the Motion should be denied because ANR's comments demonstrate that the Easements maintain connectivity between the Lowell Mountain habitat block and the Green River Reservoir habitat block, contain a useful wildlife corridor in the Boomhour Branch stream, allow for continued wildlife movement due to the prohibition of residential development along East Hill Road, fulfill their intended purpose, and are of adequate size and location.¹⁰

GMP argues that the Movants do not provide expert comments that show the Easements are not of adequate size and location, nor do they present any facts that contradict the analysis of ANR. Rather, GMP contends, the Movants simply present their "counsel's analysis based on selective references to prior Board Orders and ANR testimony," and argues that the Board should not substitute the conclusions of the Movants' counsel for those of the expert witnesses from ANR.¹¹

GMP also maintains that the Movants have failed to demonstrate why the Easements will not provide sufficient connectivity absent conserved adjoining parcels, and due to the existence of actual or planned roads within the parcels. GMP asserts that the Movants' position amounts to

6. Motion at 3-5.

7. Motion at 10.

8. Motion at 7-9.

9. Motion at 14-16.

10. GMP Opposition at 2.

11. GMP Opposition at 2.

a requirement that roads between the two habitat blocks be removed and that all lands adjacent to the Easements consist of conserved lands to satisfy Condition 17.¹²

GMP further asserts that the Board appropriately set forth the basis for its December 23, 2011, Order approving the Easements, that the Movants' argument about improper delegation of Board authority to ANR amounts to the Movants simply disagreeing with the fact that the Board, after reviewing the comments of the parties, decided to rely on the analysis and conclusions of ANR's experts rather than the Movants' claims, that the Board's decision was not blind reliance on ANR's representations, but rather was consistent with findings and analysis contained in the Order, and that the Movants have not identified any significant issue that would warrant additional process.¹³

DISCUSSION

For the reasons set forth below, we grant the Motion, in part, because we conclude that the Movants have raised issues sufficient to warrant a hearing on the potential impacts from the presence of East Hill Road and the activities allowed on the Easement parcels.

Condition 17 states:

GMP shall secure prudent fragmentation-connectivity easements of adequate size and location, pursuant to the requirements of paragraph 3.2 of the Natural Resource MOU, and file them for Board approval. Parties with standing on the issue shall have two weeks to file comments from the time any easements are filed. The easements must be approved, executed, and conveyed by December 31, 2011. If GMP has not met this requirement by December 31, 2011, GMP shall cease all construction activities until such time as the fragmentation-connectivity easements are approved, executed, and conveyed.¹⁴

Paragraph 3.2 of the Natural Resource MOU requires GMP to "secure prudent conservation easements of adequate size and location . . . to provide wildlife habitat connectivity

12. GMP Opposition at 2. The Movants clarified in their Reply that they were not claiming that there can be no roads in conserved lands connecting two habitat blocks. Rather, the Movants question the prudence of allowing additional roads (i.e. the planned haul road). The Movants also assert that there has not been sufficient testimony to support the conclusion that existing barriers will not constrain the movement of species through the Easements. Reply at 4.

13. GMP Opposition at 3-4.

14. Docket 7628, Order of 7/12/11 at 161.

to address fragmentation."¹⁵ The Natural Resource MOU requires GMP to consult with and obtain ANR's approval for any parcel that GMP seeks to acquire to satisfy the requirements of ¶ 3.2. Further, it is left to ANR to determine the adequacy of any such parcel under the Natural Resource MOU.¹⁶

GMP has obtained the Easements, and has consulted with and obtained ANR's approval for those Easements. Accordingly, we conclude that GMP has complied with the terms of Paragraph 3.2 of the Natural Resource MOU, which is a component of meeting Condition 17. However, Condition 17 still requires independent review and approval of the Easements by the Board. In today's Order, we conclude, based on our review of all the information submitted with respect to the Easements and our consideration of the Movants' Motion and arguments submitted in support thereof, that additional information is required for us to reach a definitive conclusion that the intended functions of the Easements are not unduly impacted by the presence of East Hill Road and the activities allowed within the Easement parcels. Today's Order should not be read as a decision that the Easements are not compliant with Condition 17. Rather, we have determined that sufficient questions have been raised by the Movants that require additional evidence regarding the adequacy of the Easements.

Our concerns are limited to the potential impacts from the presence of East Hill Road and the activities allowed within the Easement parcels. The Movants' argument with respect to the unprotected nature of the lands north of the Eden's Echo parcel is unavailing. Our review of the map submitted by GMP on February 3, 2012, leads us to conclude that the Movants are mistaken in their assumptions regarding the location of the Eden's Echo parcel relative to the Lowell Mountain habitat block. While the Movants are correct that there are unprotected parcels between the Eden's Echo parcel and the project site, they are incorrect that there are unprotected parcels between the Eden's Echo parcel and the Lowell Mountain habitat block. The map filed on February 3, 2012, shows that the Eden's Echo parcel is entirely within the Lowell Mountain habitat block with its southerly boundary coincident with the habitat block's southerly boundary, and that the Boomhour Brook parcel is entirely within the Green River Reservoir habitat block

15. Exh. GMP-ANR-1 at ¶ 3.2.

16. Exh. GMP-ANR-1 at ¶ 3.2.

with its northerly boundary coincident with the habitat block's northerly boundary. Accordingly, the Easements do in fact provide a corridor between these two habitat blocks consistent with the requirements of Condition 17. Condition 17 does not require GMP to conserve all lands within those habitat blocks, or even as far north as the project site, as the Movants appear to suggest. Rather, it requires that the Easements establish in perpetuity a connection between the two habitat blocks. The map demonstrates that this has been accomplished. Accordingly, no testimony will be entertained on this issue in prefiled testimony or during the technical hearing. Additionally, the Movants' arguments with respect to the sufficiency and unsworn nature of the ANR memorandum, as well as the delegation of authority by the Board, are rendered moot by that aspect of today's decision to hold an evidentiary hearing.

Our decision to take evidence with respect to the potential impacts from the presence of East Hill Road and the activities allowed on the Easement parcels is based on concerns that arose after considering the materials filed by the Movants subsequent to receipt of the maps filed by GMP. While the map filed by GMP on February 3, 2012, demonstrates without question that the connectivity required by Condition 17 has been established from a geographical standpoint, the Movants' concerns with respect to East Hill Road and the activities allowed within the parcels are not addressed by those maps, nor are they adequately addressed by the ANR memorandum. Although we concluded in our December 23, 2011, Order that the ANR memorandum was a sufficient basis on which to find compliance with Condition 17, the questions raised by the Movants subsequent to that determination leave the Board in need of additional information. We are concerned that ANR apparently determined it was not necessary to respond to any of the issues highlighted by the Movants in their Motion and subsequent filings, and instead remained silent. We are also concerned that we had to request, on two occasions, that GMP file maps before we were able to conclusively discern that the Easements did in fact join the two habitat blocks. Given the significance of this issue, we would have expected these parties to be more forthcoming with more detailed information in response to the issues raised by the Movants in their filings seeking reconsideration of our December 23, 2011, Order.

Given the issues raised by the Movants' Motion and related materials that have not been adequately responded to by ANR and GMP, we will convene a technical hearing on March 7,

2012, to take evidence on the potential impacts from East Hill Road and the activities allowed within the Easement parcels on the adequacy of the Easements to serve their intended function. ANR, GMP, the Movants, and any other party having standing have until February 27, 2012, to file expert testimony addressing these two specific topics. Discovery may be taken on any such testimony after the date of filing and prior to the date of the hearing. Given the limited amount of time available in advance of the March 7th hearing, such discovery shall be by deposition only, unless agreed otherwise by the parties.

Parties that wish to cross-examine witnesses during the hearing must submit their cross-examination estimates no later than 12:00 noon on Monday, March 5, 2012. In preparing prefiled testimony and cross-examination estimates, the parties should keep in mind that this hearing is not an opportunity to relitigate issues that were already decided by the Board in this proceeding, and evidence and cross examination must be limited to the specific topics noted above.

CONCLUSION AND NOTICE OF HEARING

For the foregoing reasons, the Movants' Motion is granted, in part, as described above. We deny the Movants' request that construction activities on the project site cease at this time.

The Board will hold a **TECHNICAL HEARING**, pursuant to 30 V.S.A. Sections 10 and 248, on Wednesday, March 7, 2012, at 1:00 p.m. in the Board's Hearing Room on the 3rd floor of the People's United Bank building located at 112 State Street in Montpelier, Vermont. The hearing will be limited to the potential impacts to the intended functions of the Easement parcels from the presence of East Hill Road and the activities allowed within the Easement parcels themselves.

SO ORDERED.

Dated at Montpelier, Vermont, this 16th day of February, 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: February 16, 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.