

STATE OF VERMONT  
PUBLIC SERVICE BOARD

Docket No. 8816

Petition of Swanton Wind LLC for a certificate of )  
public good, pursuant to 30 V.S.A. § 248, for the )  
construction of an up to 20 MW wind-powered )  
electric generation plant to be located in Swanton, )  
Vermont )

SWANTON WIND LLC  
RESPONSE TO MOTIONS TO INTERVENE  
FILED LATE OR BY NON-ELECTRONIC MEANS

NOW COMES Swanton Wind LLC (“Swanton Wind”), Petitioner in the above-captioned matter, by and through the undersigned counsel, to respond to the motions to intervene filed in hard copy on February 16, 2017 by Vermonters for a Clean Environment, Brian and Penny Dubie, Bradley Stott and Jennifer Belanger, Diane Bell and Dennis Hendy, Erynn and Tyrell Boudreau, Mark and Mary Bushey, David Butterfield, Sally and Bruce Collopy, Jessica Decker and Lance Desautels, Luc and Michelle Deslandes, Daniel and Nancy Dunne, Edward and Sarah Ferguson, Ken Fox, Danielle and Ian Garrant, David A. Goodrich, Mary Hunter, Judith and Patrick Luneau, Marianne and Mark Dubie, Leo and Karen Mclaughlin, Kaye Mehaffey, Patricia Messier, Dolores and Kevin Nichols, Carolyn and Clark Palmer, Paula Pearsall, Robert Perkins, Todd W. Poirier, Jeanne Royer, Suzanne Seymour, Terrance Smith, Curtis Swan and Sara Luneau-Swan, Marie and Gilbert Tremblay, Steven Woodward, D. Gregory Pierce and Paula J. Kane, and Patricia Rainville and John Smith. Swanton

Wind also addresses the motion of the Vermont National Guard, which was filed on February 23, 2017, one week after the February 16 intervention deadline. Swanton Wind's response to these motions is set forth in its Memorandum on Intervention, below.

#### MEMORANDUM ON INTERVENTION

Intervention in Public Service Board proceedings is available if a party demonstrates that it meets one of the applicable standards set forth in Board Rule 2.209. Under 2.209(A), a party is entitled to intervene "as of right" if the party establishes one or more of the following: (1) a statute confers on the party an unconditional right to intervene; (2) a statute confers on the party a conditional right to intervene and the condition(s) are satisfied; or (3) the party has a substantial interest that may be adversely affected by the outcome of the proceeding, the proceeding provides the exclusive means by which the party can protect its interest, and the party's interest is not adequately represented by another existing party(ies). Alternatively, permissive intervention under Rule 2.209(B) is available to a party that demonstrates that it has a substantial interest that may be affected by the outcome of the proceeding. When making its determination on permissive intervention, the Board considers whether the party's interest in the proceeding will be adequately protected by other parties; whether there are other means by which the party may protect its interest; and whether the party's intervention will cause undue delay or prejudice the interests of the public or other parties. Moreover, Rule 2.209(C) provides that the Board may impose certain

restrictions on an intervenor participating in the proceeding. Specifically, the Board may restrict such party's participation to only those issues in which the party has demonstrated an interest, may require such party to join with other parties with respect to appearance by counsel, presentation of evidence or other matters, or may otherwise limit such party's participation, all as the interests of justice and economy of adjudication require.

I. ENTITIES SEEKING INTERVENTION

1. Vermont National Guard

The Vermont National Guard (VTNG) moves to intervene in this proceeding with respect to the Project's potential to impact the operations of Vermont Army National Guard rotary wing flights in the northern Champlain Valley. Although VTNG's motion was not timely filed, Swanton Wind does not object to VTNG's participation in this docket, provide it is limited to the issues articulated in its motion, which fall under 30 V.S.A. § 248(b)(5) with respect to 10 V.S.A. § 6086(a)(5)(A) ("will not cause unreasonable congestion or unsafe conditions with respect to use of the . . . airports and airways").

2. Vermonters for a Clean Environment

Vermonters for a Clean Environment (VCE) seeks to intervene with respect to 30 V.S.A. § 248(b)(1) Orderly Development of the Region, § 248(b)(4) Economic Benefit to

the state and its residents, and (b)(5) – apparently with respect to Aesthetics and the Natural Environment. VCE is not entitled to intervention as of right, because no statute confers upon it a right to intervene, and VCE has failed to show that it has a substantial interest that may be adversely affected by the outcome of the proceeding, that the proceeding provides the exclusive means by which VCE can protect its interest, and that VCE’s interest is not adequately represented by existing parties.

Additionally, VCE should not be granted permissive intervention. VCE has not demonstrated that it or its members have a particularized interest with respect to any of the applicable criteria. The organization’s broad mission to “the economic well-being of all Vermonters assuring appropriate use of our resources -- our people, our land, our air and our water, and to pursue the common goals of encouraging economic development with minimal environmental impacts and preserving Vermont's natural beauty” (see Motion to Intervene of Vermonters for a Clean Environment (“VCE Mot. to Int.”) at 2) does not distinguish it from the general public, and does not reflect an interest in any issues that will not be represented in this docket by existing parties including the Department of Public Service, the Agency of Natural Resources, and adjoining landowners Christine and Dustin Lang.

Moreover, to the extent VCE relies on the interests of its individual members as a basis for intervention, VCE has not demonstrated that these interests are particularized. VCE describes the interests of its members as follows: “VCE's members enjoy the scenic

beauty of Rocky Ridge and Fairfield Pond. They appreciate the quiet, rural character of the area and the ability to enjoy listening to and watching birds. They use Fairfield Pond for swimming, fishing and boating. They hike on the ridge and in the woods adjacent to the pond, and seek refuge from urban environments to enjoy the peace and tranquility of Rocky Ridge and its surroundings.” VCE Mot. to Int. at 4. As is further emphasized below with respect to the motions to intervene of individuals who are not adjoining landowners, participating in recreation or owning a non-adjoining property within several miles of the proposed project site does not give one an interest in the Project that is sufficiently distinct from the general public to support intervention.

Further, while VCE claims to have members who reside in Swanton (see VCE Mot. to Int. at 6), affidavits from any such individuals are conspicuously absent from its filing. On the contrary, the affidavits provided in support of its motion to intervene are from individuals who do not live in the immediate vicinity of the proposed project but who purportedly recreate in the area – most notably at Fairfield Pond and on Dubie family property.<sup>1</sup> To the extent that VCE relies in support of its intervention request on

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<sup>1</sup> Affidavits were provided by Lynn McClintock of WILLISTON, Phillip Murdock of ESSEX JUNCTION, VT, Denis Chevalier of WILLISTON, VT, Giles Willey of ESSEX JUNCTION, VT, and Scott Baldwin of BURLINGTON, VT (all of whom assert that they recreate near the proposed project); Gerald Dubie of SHELBURNE, MA (owns lot on Fairfield Pond and has considered building home there, vacations at Fairfield Pond); and Michael Dubie of WILLISTON, VT (has a Fairfield Pond cottage, recreates in the area).

having members who reside in Swanton or other towns in close proximity to the Project parcels, VCE should have to identify those residents and their addresses to ensure that duplicate interests are not being represented in this proceeding. This goes to two factors the Board may consider when evaluating permissive intervention requests: (1) whether an applicant's interest will be adequately protected by other parties (i.e. VCE members who could be impacted by the Project may already have intervened in the case); and (2) whether alternative means exist by which the applicant's interest can be protected (i.e. VCE members who live in close proximity to the Project could seek intervention on an individual basis, and may have pending requests before the Board).

VCE has not demonstrated that it has (or that its members have) a particularized interest in the Orderly Development of the Region. On the contrary, this interest is shared by the general public, and it is adequately represented by existing parties. Any interest that VCE's members in Swanton and Fairfield may have in ensuring that the Project is consistent with orderly development as expressed their town plans will be adequately protected by their duly elected representatives on the town select boards, who are parties to this docket. Likewise, the Northwest Region Planning Commission will adequately protect their interests in the Orderly Development of the Region as expressed in the regional plan. The Department of Public Service and Christine and Dustin Lang will also participate with respect to this criterion.

VCE also seeks to intervene with respect to Sec. 248(b)(4) economic benefit, noting that its mission “includes supporting the economic well-being of Vermonters” and citing its concern that potential impacts from the project will “substantially interfere with residents' peaceful enjoyment of their properties,” and that as a result, the desirability and values of nearby real estate will decrease, in turn “decreasing the grand list of the affected towns,” increasing taxes, and thereby impacting VCE members who reside in the area. To the extent that VCE relies on having members who are residents of Swanton, Fairfield or other “affected towns,” VCE should – as noted above – be required to identify such members. Moreover, the towns of Swanton and Fairfield are parties to this docket, and can adequately represent issues with respect to their grand lists.

It is not entirely clear from VCE's motion which issues under § 248(b)(5) VCE wants to address in this docket. VCE mentions aesthetics and natural resources, and discusses issues related to public health and safety, the natural environment and water purity. VCE has articulated generalized concerns with respect to these criteria, and these concerns will be adequately addressed by existing parties. The Agency of Natural Resources is a party to this docket, and will adequately represent any interests with respect to the natural environment. The Department of Public Service, for its part, will adequately represent the public interest with respect to aesthetics.

Finally, with respect to VCE's proposal to put forward witnesses who will testify as to their experiences at other wind projects,<sup>2</sup> this information is not relevant to the Swanton Wind Project, nor will it inform the Board about the specifics of the project under consideration in this docket. If there is an issue with another project, affected persons have an alternative means to address it: they can file a complaint. Thus, if the Board decides to grant VCE permissive intervention in this docket, Swanton Wind asks that the Board clarify in its order that the scope of VCE's intervention is limited to the impact of the project is being proposed in Docket 8816, and does not extend to other existing projects.

## II. INDIVIDUALS SEEKING INTERVENTION

Thirty-three (33) motions to intervene were filed on behalf of persons living in Swanton or nearby towns. Of these thirty-three, eleven (11) were filed by adjoining neighbors: Patricia Rainville and John Smith; Gilbert and Marie Tremblay; Patrick and Judith Luneau; Dolores and Kevin Nichols; Terrance Smith; Jean Royer; Carolyn and Clark Palmer; Sarah and Edward Ferguson III; Brian and Penny Dubie; Tyrell and Erynn Boudreau; and Mark and Marianne Dubie.<sup>3</sup> Swanton Wind does not object to the

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<sup>2</sup> See VCE Mot. to Int. at 7 ("VCE intends to present witnesses who will testify to the loss of property values and grand lists due to wind projects in other areas of Vermont, as well as witnesses to testify to experiences with flyrock, ice throw and other hazards from operating wind projects in New England.") See also VCE Mot. to Int. at 8 ("VCE will present expert witnesses who will testify about the failures of the stormwater systems at the operating wind projects...").

<sup>3</sup> Although Sally and Bruce Collopy of Fairfield identify themselves as "adjoining property owners," this is not accurate.

permissive intervention of these adjoiners in this docket, with the exception of Mark and Marianne Dubie, who have an alternative means to protect their interest and are pursuing it.<sup>4</sup> However, we ask that, in the interests of justice and economy of adjudication, the Board exercise its authority to limit their intervention to their particular interests as adjoining landowners, as articulated in their respective motions, and that the Board require them to join with respect to discovery and the presentation of evidence. Swanton Wind notes that these neighbors have already coordinated in the filing of their motions, which were mailed together in one package. In many instances, the motions contain identical language to describe purported interests – underscoring not only that coordination amongst this group is possible, but also that the same concerns are shared by different landowners.

Swanton Wind objects to the intervention of persons who are not adjoining landowners, specifically: Bradley Stott and Jennifer Belanger, Diane Bell and Dennis Hendy, Mark and Mary Bushey, David Butterfield, Sally and Bruce Collopy, Jessica Decker and Lance Desautels, Luc and Michelle Deslandes, Daniel and Nancy Dunne, Ken Fox, Danielle and Ian Garrant, David A. Goodrich, Mary Hunter, Leo and Karen Mclaughlin, Kaye Mehaffey, Patricia Messier, Paula Pearsall, Robert Perkins, Todd W.

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<sup>4</sup> Mark and Marianne Dubie and M&M Maple, LLC have filed a lawsuit in Vermont Superior Court against Swanton Wind, LLC and Travis Belisle that seeks damages and injunctive relief with respect to Project activities.

Poirier, Suzanne Seymour, Curtis Swan and Sara Luneau-Swan,<sup>5</sup> Steven Woodward, D. Gregory Pierce and Paula J. Kane. These persons have articulated generalized interests that are not distinct from those of the general public. The interests articulated will be adequately represented by existing parties, notably the Department of Public Service, the towns of Swanton and Fairfield, Christine and Dustin Lang. Granting intervention to individuals who are concerned that they may be able to see or hear the Project from a distance would lead to an unwieldy proceeding, causing undue delay, and prejudicing the interests of the Petitioner and other existing parties.

As there was a great amount of overlap with respect to the criteria and underlying concerns articulated in the thirty-three “individual” motions to intervene, Swanton Wind has chosen to organize its response to these motions by criterion.

30 V.S.A. § 248(b)(1) Orderly Development of the Region

None of the prospective intervenors articulated a particularized interest in Orderly Development of the Region that would support intervention this criterion, and any interest in orderly development will be adequately represented by existing parties,

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<sup>5</sup> Curtis and Sara Luneau-Swan live on property owned by Patrick and Judith Luneau, who have also moved to intervene in this docket. Swanton Wind does not oppose the intervention of Patrick and Judith Luneau, and asserts that Curtis and Sara Luneau-Swan’s participation would be duplicative.

namely the Northwest Regional Planning Commission, towns of Swanton<sup>6</sup> and Fairfield, and Christine and Dustin Lang (who are residents of the region).

30 V.S.A. § 248(b)(2) Need for present and future demand for service; and

30 V.S.A. § 248 (b)(3) System stability and reliability

None of the prospective intervenors articulated a particularized interest in the “need for present and future demand for service” of “system stability and reliability” that would support intervention with respect to these criteria. Jeanne Royer states that she believes she has “distinct experience and perspective that may be useful to the Board,” relative to (b)(2), but does not clarify what this experience and perspective may be. Moreover, her status as an adjoining landowner does not give her an interest distinct from any member of the public. Sally and Bruce Collopy opine on both criteria, but do not articulate a particularized interest in either. Interests in these criteria will be adequately represented by existing parties, specifically the two participating utilities – Burlington Electric Department and Green Mountain Power – and the Department of Public Service.

30 V.S.A. § 248(b)(4) Economic Benefit to the State and its residents

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<sup>6</sup> Moreover, prospective intervenor Sara Luneau-Swan is a member of the Town of Swanton Planning Commission, and can in that capacity participate in promoting the orderly development of the region with respect to this project.

All of the adjoining landowners who have moved to intervene seek to participate with respect to the Economic Benefit criterion. The common argument put forward was: "I understand that in this proceeding my interest in private property may not be considered, however I assert that the Project would not only affect the value of my home, but rather all the homes in the surrounding area thereby affecting the regional and statewide economy." Swanton Wind does not object to the participation of adjoining landowners with respect to property values generally in the vicinity of the Project. However, as noted by the intervenors, their interests in the value of their own land is not relevant to this proceeding.

A few adjoiners also asserted that the Project could impact their livelihood. With respect to the Mark and Marianne Dubie and Brian and Pennie Dubie, the lawsuit filed in Vermont Superior Court (see footnote 4) is an alternative means to protect their shared interest in their maple sugaring operation. With respect to others who assert that the project has the potential to impact their personal finances, e.g. because it will impact their quality of sleep and therefore potentially their earning potential, Swanton Wind asserts that alleged personal impact is not within the scope of the broader "Economic Benefit to the State and its residents" criterion.

Swanton Wind does not object to the participation of adjoining landowners who cited an interest in this criterion, to the extent they seek to address potential impacts the Project could have on them *as adjoining landowners*, notably potential impacts of sound or shadow flicker on sensitive persons or pets, potential impacts to persons or to wells or house foundations from blasting or ice throw.

Swanton Wind underscores that non-adjoining landowners have not articulated how blasting could possibly impact their non-adjoining properties, and that impacts from blasting generally will adequately be represented by the Department of Public Service and the Agency of Natural Resources.

30 V.S.A. § 248(b)(5)/10 V.S.A. §§ 6086(a)(1), (3), and (4): Water pollution, conservation, and burden on water supply

Swanton Wind does not object to adjoining landowners participating with respect to this criterion to the extent that they seek to do so in connection with potential impacts to their own respective properties. For example, many adjoining landowners expressed concern about the volume and quality of water flowing to wells on their property, and Swanton Wind does not object to their participation on this issue.

While many of the parties seeking intervention articulated a generalized interest with respect to runoff that they fear could reach Fairfield Pond and Lake Champlain, no parties, including adjoining landowners, stated a particularized interest that would

support participation with respect to this issue. ANR is charged by statute with protecting these resources.

§ 248(b)(5) and § 6086(a)(8)/Scenic or natural beauty and aesthetics

Swanton Wind does not object to the participation of adjoining landowners on this issue, to the extent that that they could be impacts on their land as adjoiners. None of the non-adjoining landowners have articulated a particularized interest in this criterion, which will be adequately represented by existing parties – most notably the Department of Public Service

Necessary wildlife habitat or endangered species § 248(b)(5)/ § 6086(a)(8)(A)

None of the prospective intervenors articulated a particularized interest in necessary wildlife habitat or endangered species. Most referenced their enjoyment in watching birds and other wildlife pass through their land; this is not tantamount to “necessary” wildlife habitat or a particularized interest in endangered species. Moreover, to the extent that persons proposed an interest in enjoying the wildlife on Mr. Belisle's land, Swanton Wind emphasizes that they do not have a right to that.

The Agency of Natural Resources will adequately represent interests in necessary wildlife habitat and endangered species.

Transportation, § 248(b)(5)/§ 6086(a)(5)

Swanton Wind does not object to adjoining landowners' participation regarding transportation with respect to Project-related traffic potentially affecting access to their residence, to the extent they articulated such an interest in this criterion in their motions.

However, use of Route 105 does not constitute a particularized interest. Moreover, the Vermont Agency of Transportation is a party in the case and could adequately address impacts with respect to Route 105.

Historic Sites, § 248(b)(5)/ 10 V.S.A. § 6086(a)(8)

One adjoining landowner, Terrance Smith, seeks to participate on this issue, as his house is discussed in the Above-Ground Historic Resources Report submitted with Swanton Wind's petition. Swanton Wind does not object to his participation on this issue with respect to his property.

Development affecting public investments, § 6086(a)(9)(K).

None of the prospective intervenors articulated a particularized interest with respect to development affecting public investments. Frequenting public places from which the project can be viewed, such as such as the Missisquoi Rail Trail, does not suffice. This relate to aesthetics, which will be adequately addressed by the Department of Public Service.

CONCLUSION

In accordance with the foregoing, Swanton Wind does not object to limited permissive intervention in this docket by Vermont Army National Guard, or to granting 10 of the 11 adjoining neighbors' motions as set forth above, provided that the adjoining neighbors join in serving discovery and in the presentation of evidence in this docket. Swanton Wind objects to the intervention of VCE and to granting the twenty-two (22) motions to intervene that were filed by individuals and couples who are not adjoining neighbors, a number of whom have cottages on Fairfield Pond and are concerned that they will be able to view the Project from those cottages. VCE and these individuals have only articulated generalized interests that will be represented by existing parties to this docket, including the Department of Public Service and the Langs (and the adjoining neighbors if granted intervention). Granting their motions would be contrary to the interests of justice and economy of adjudication.

Dated at Burlington, Vermont this 15th day of March, 2017.

By: \_\_\_\_\_



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