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	)
powered by up to 7 wind turbines located along	)
Rocky Ridge in Swanton, Vermont	)

SWANTON WIND LLC
RESPONSE TO LANG MOTION AND
MOTION TO LIMIT DISCOVERY PROCEDURES

NOW COMES Swanton Wind LLC ("Swanton Wind"), Petitioner in the above-captioned matter, by and through the undersigned counsel, and responds to Opposition, Objection and Motion to Strike Petitioner's Letter Request for Protective Order/Discovery Limitations, filed on May 31, 2017 by intervenors Christine and Dustin Lang (the "Lang Motion") and moves for limitations on discovery procedures pursuant to Vermont Rules of Civil Procedure (V.R.C.P.) 26(b)(1), which applies in Public Service Board proceedings pursuant to Board Rules 2.103 and 2.214(A). The basis for this motion is set out in Swanton Wind's Memorandum of Law.

MEMORANDUM OF LAW

Background

On May 24, 2017, after the parties failed to reach an agreement on a procedural schedule, Swanton Wind filed a proposed schedule and recommendations for the management of this matter for the remainder of the proceeding. The proposed schedule

and accompanying letter were not filed as a motion or in the style of a motion. Rather, they were filed prior to a noticed status conference whose purpose was "to discuss a schedule for the remainder of the proceeding." Docket No. 8816, *Notice of Hearing,* May 9, 2017. Items in Swanton Wind's letter of May 24th were discussed during the status conference held later that same day. See generally, Docket No. 8816, Transcript 5/24/2017. The Board invited the parties to file proposed schedules, including any responses to Swanton Wind's May 24th filing, by June 2, 2017.

On May 31, 2017, the Langs filed their Motion and mounted a number of procedural challenges to Swanton Wind's May 24th letter and the proposed schedule, which included a recommendation to limit discovery as a way to make the case more manageable with the unprecedented number of parties. Swanton Wind files the instant motion, captioned and formatted as a pleading pursuant to V.R.C.P. 7, to cure whatever procedural deficiencies that the Langs raised and that the Board perceives as a barrier to considering Swanton Wind's recommendations.

Legal Standard

Under V.R.C.P. 26(b)(1), the frequency or extent of use of the discovery methods set forth in V.R.C.P. 26(a)[1] "shall be limited" by the Public Service Board if any one of

[1] V.R.C.P. 26(a) reads: "Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or Rule 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission."

the following determinations is made:

> (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
> (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or
> (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issue at stake in the litigation.

V.R.C.P. 26(b)(1). The Board may act upon its own initiative after reasonable notice. *Id.* Using its authority under Rule 26(b)(1), the Board should adopt the recommendations from Swanton Wind's May 24th filing as reiterated below to prevent unreasonable duplication and undue burden on Petitioner and the other parties.

To protect Swanton Wind and other parties from undue burden and expense, Swanton Wind requests that, with the exception of first-round discovery on non-Petitioners (which in the interests of fairness should not be subject to limitations, consistent with the first-round of discovery on Petitioner), any rounds of discovery served in this docket subsequent to this motion be limited to 50 questions, including subparts. A 50-question limit is used by the New Hampshire Site Evaluation Committee, even for larger energy projects than Swanton Wind's, to provide for an orderly, efficient, and less costly process. See NH Site Evaluation Comm. Rule 202.12(d) ("A person or group of persons who or which are voluntarily or by order participating

in the proceeding together may serve more than one set of data requests on a party, but the total number of data requests served by each person or group, as the case may be, shall not exceed 50, unless otherwise permitted by ruling of the presiding officer or any hearing officer designated by the presiding officer, upon request of the person and a finding that the proposed number of data requests is necessary to address the complexity of relevant issues and would not adversely affect the conduct of the proceeding.")

Such a limitation on the extent of the use of written interrogatories is appropriate because the first-round discovery responses received by Swanton Wind were unreasonably cumulative or duplicative, with different parties asking the same or substantially similar questions. Reasonable limitations on discovery questions moving forward will give the parties incentive to pose non-duplicative, carefully written, and meaningful questions. See V.R.C.P. 26(b)(1)(i). In addition, in light of the approximately 1,000 discovery requests already served on Petitioner and the subsequent rounds of discovery contemplated in the schedules proposed by Petitioner and others, all parties will have ample opportunity by discovery to obtain information sought. See V.R.C.P. 26(b)(1)(ii). Finally, unlimited discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issue at stake in the litigation. Swanton Wind does not have unlimited resources; nor do the other parties to

this proceeding, several of whom have commented on the burdensome nature of managing discovery to-date.[2] The public good is not served by pouring unlimited resources into a proceeding regarding a proposed renewable energy project in a state that needs more renewable energy generation to meet its goals. Accordingly, under V.R.C.P. 26(b)(1) and V.R.C.P. 26(c), in the interests of justice and to protect the parties from undue burden and expense, the Board should limit all subsequent rounds of discovery in this docket, apart from the first round of discovery on non-petitioners, to 50 questions including subparts.

In addition, the Board should limit discovery to written requests, rather than depositions. This docket has an unprecedented number of individual parties, 68 in total, making the use of depositions entirely impractical. A deposition in which any of the 68 individual parties could ask questions of a witness would require securing a large space such as an auditorium to accommodate all of the parties. Moreover, it would take an inordinate amount of time to conduct the deposition if each party wanted to pose questions of the witness. Discovery in this case is "obtainable from some other source that is more convenient, less burdensome, or less expensive" than a deposition: written requests. V.R.C.P. 26(b)(1)(i). Moreover, in light of the approximately 1,000 discovery

[2] *See* Letter from Paula S. Kane to Judith C. Whitney dated June 2, 2017 at 2; *see also* 5/24/17 Tr. at 13, in which Annette Smith of Vermonters for a Clean Environment stated that the proceeding "has resulted in about a thousand discovery questions and it has become an unmanageable amount of material."

requests already served on Petitioner and the subsequent rounds of discovery contemplated in the schedules proposed by Petitioner and others, all parties will have ample opportunity by discovery to obtain information sought. See V.R.C.P. 26(b)(1)(ii). Finally, potentially lengthy depositions conducted in auditoriums would be unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issue at stake in the litigation. V.R.C.P. 26(b)(1)(iii). Again, Swanton does not have unlimited resources. Other parties, including the Citizen Intervenors, have also expressed concern about the burdens of discovery.[3] Accordingly, under V.R.C.P. 26(b)(1) in the interests of justice and to protect the parties from undue burden and expense, the Board should limit discovery in this docket to written questions rather than depositions.

The Lang Motion suggests that limiting discovery procedures at this stage in the proceeding as contemplated by the Vermont Rules of Civil Procedure would prejudice the parties' interests. Lang Motion at 5. But the parameters for discovery suggested by Swanton Wind are being proposed at this stage in the proceeding (which is relatively early, from a procedural standpoint) as common-sense measures in response to the vast number of interrogatories received by the Petitioner in the first round of discovery – many of which were duplicative and which, as noted above, numerous parties indicated

[3] Letter from Paula S. Kane to Judith C. Whitney dated June 2, 2017 at 2.

they found very burdensome to manage. The suggestion that the Langs and other parties "would likely have taken different approaches to discovery had they known constraints would be imposed mid-way through the process" seems disingenuous in light of the approximately 1,000 questions posed by the Langs and other parties. (Would they have asked a still larger number than the burdensome number of requests served?) The imposition of discovery limitations at the close of the first round of discovery on Petitioner is not "mid-stream", but rather is a timely and appropriate response to manage this docket efficiently and in the interests of justice.

Should the Board view Swanton Wind's request as one for a protective order pursuant to V.R.C.P. 26(c), an affidavit is offered in support of the request.[4] See V.R.C.P. 26(h), under which counsel have "an objection to make good faith efforts among themselves to resolve or reduce all difference relating to discovery procedure" prior to filing motions pursuant to V.R.C.P. 26. As indicated in the enclosed Affidavit of Counsel, counsel for Petitioner conferred with the Department of Public Service, who

[4] V.R.C.P. 26(c) states that, "[u]pon motion by a party or by the person from whom discovery is sought, and for good cause shown, any Superior Judge may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense…"A protective order may include, but is not limited to the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the judge; (6) that a deposition after being sealed be opened only by order of the judge; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the judge." V.R.C.P. 26(c).

took on the role of coordinating input on the schedule for this docket. The Department was not willing to support the discovery limitations proposed by Swanton Wind.

CONCLUSION

In accordance with the foregoing, Swanton Wind asks that the Board: 1) limit discovery to written questions and not depositions, and 2) limit all subsequent rounds of discovery in this docket, apart from the first round of discovery on non-petitioners, to 50 questions including subparts.

Dated at Burlington, Vermont this 6th day of June, 2017.

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