

STATE OF VERMONT  
PUBLIC UTILITY COMMISSION

Case 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 powered by up to 7 wind turbines located along Rocky Ridge in Swanton, Vermont	
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Order entered: 08/31/2017

**ORDER RE: SWANTON WIND LLC MOTION FOR RECONSIDERATION**

**I. Introduction**

On July 7, 2017, Swanton Wind LLC (“Swanton Wind”) filed a motion for reconsideration of the Vermont Public Utility Commission’s<sup>1</sup> June 22, 2017, Order postponing the establishment of a schedule in this proceeding until Swanton Wind files a complete and final system impact study (“SIS”) for its proposed wind-powered electric generation facility.

In today’s Order, for the reasons discussed below, we deny Swanton Wind’s motion. We also decline, at this time, to require Swanton Wind to file a curtailment study as requested by the Department of Public Service (“Department”).

**II. Procedural History**

On March 2, 2017, the Vermont Public Utility Commission (“Commission” or “PUC”) issued an Order that, with the exception of certain deadlines related to intervention requests and the first round of written discovery on Swanton Wind, suspended the schedule for this proceeding.

On May 24, 2017, the Commission convened a status conference to discuss a schedule for the remainder of this proceeding. During the status conference it became clear that the

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<sup>1</sup> Pursuant to Section 9 of Act 53 of the 2017 legislative session, the Vermont Public Service Board’s name was changed to the Vermont Public Utility Commission, effective July 1, 2017. For clarity, activities of the Vermont Public Service Board that occurred before the name change will be referred to in Commission documents as activities of the Commission unless that would be confusing in the specific context.

parties would be unable to agree on a schedule. Accordingly, the Commission directed the parties to submit their individual proposals in writing by June 2, 2017.

On June 22, 2017, after reviewing the parties' individual proposals, the Commission issued an order that deferred establishing a schedule for this proceeding until Swanton Wind "supplements its case, at a minimum, by filing a complete and final System Impact Study ('SIS') along with any related prefiled testimony and exhibits." The order also required Swanton Wind to file any supplementation it believes is warranted with respect to any other criteria at the time it files the SIS materials, or to file a certification that it will not be further supplementing its case.<sup>2</sup>

On July 7, 2017, Swanton Wind filed its motion for reconsideration.

On July 24, 2017, the Department filed its response to Swanton's motion.

Also on July 24, 2017, a group of intervenors (the "Citizen Intervenors") filed a response to Swanton Wind's motion.

On July 25, 2017, the Citizen Intervenors filed a second response to Swanton Wind's motion, superseding their filing of July 24<sup>th</sup>.<sup>3</sup>

Also on July 25, 2017, Swanton Wind filed notice of its intent to reply to the Department's response. Swanton Wind ultimately did not file a reply to the Department's response.

Lastly, also on July 25, 2017, the City of Burlington Electric Department filed a letter in support of the Department's position, and the Department filed a letter stating that its position was also supported by intervenors Dustin and Christine Lang<sup>4</sup> and Vermonters for a Clean Environment.

### **III. Positions of the Parties**

#### **Swanton Wind**

Swanton Wind first contends that the Commission's directive that Swanton Wind file a complete and final SIS before this investigation can proceed is not supported by the applicable PUC rules. Swanton Wind cites previous Commission decisions for the proposition that neither

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<sup>2</sup> Docket 8816, Order of 6/22/17 at 6-7.

<sup>3</sup> The Citizen Intervenors' second response was untimely filed and acted to withdraw and replace the timely filing of July 24, 2017. However, given that the filing of July 25, 2017, in large part adopts the arguments made by the Department in its July 24<sup>th</sup> filing, there is no prejudice to Swanton Wind as a result of the late filing.

<sup>4</sup> On August 24, 2017, the Langs withdrew as parties to this proceeding.

Commission rules nor Section 248 require the filing of an SIS prior to the issuance of a CPG. According to Swanton Wind, under Commission Rule 2.208, a petition can only be deemed insufficient if it fails to contain all material required by rule or statute, and, because the Commission has found that such a requirement does not exist in Section 248 or in a Commission rule, the Commission cannot deem the filing incomplete under Rule 2.208. Swanton Wind further points to Commission Rule 5.402(C)(4) for the proposition that once the Commission initiates a Section 248 proceeding, it cannot thereafter suspend the proceeding because of a deficient petition.<sup>5</sup>

Swanton Wind next argues that the Commission's June 22<sup>nd</sup> Order makes factual findings on an ultimate issue in this matter without a hearing, and based only on representations made by counsel in Green Mountain Power Corporation's ("GMP") motion to intervene, in violation of Vermont's Administrative Procedure Act and Swanton Wind's due process rights. Swanton Wind further states that GMP's representations do not actually support the requirement that it file a complete and final SIS because GMP's representations relate to curtailment of existing generation facilities, not system stability and reliability.<sup>6</sup>

Lastly, Swanton Wind argues that the Commission's Order is untimely and unfair. According to Swanton Wind, the Commission's June 22<sup>nd</sup> Order constitutes an "about-face" from previous Commission orders that have approved both generation and transmission projects conditioned on post-CPG review and approval of an SIS. Swanton Wind contends that it is unfair to impose this requirement on it after this case has been active for a period of more than nine months during which it has expended substantial resources.<sup>7</sup>

Swanton Wind asks the Commission to revoke its decision to suspend this proceeding until a final, complete SIS is filed, and asks that the deadline for it to supplement its case on the need criterion, or any other criterion, also be revoked.<sup>8</sup>

#### Department of Public Service

The Department contends that Swanton Wind's motion should be denied because it fails to: (1) recognize the proper role of the Commission in Section 248 proceedings; (2) acknowledge

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<sup>5</sup> Swanton Wind motion at 6-10.

<sup>6</sup> Swanton Wind motion at 10-13.

<sup>7</sup> Swanton Wind motion at 13-15.

<sup>8</sup> Swanton Wind motion at 15, 16.

the “paucity of evidence” that Swanton Wind has proffered on certain Section 248 criteria; and (3) recognize that the burdens Swanton Wind complains of are matched by the burdens imposed upon the private citizens and state agencies involved in this proceeding.<sup>9</sup>

According to the Department, Swanton Wind fails to recognize that the Commission is a quasi-judicial agency with particular expertise in the areas within its jurisdiction, and, when reviewing a Section 248 petition, the Commission is performing a legislative, policy-making function and is therefore not acting in a strictly judicial capacity. The Department contends, therefore, that the Commission does not turn a blind eye to knowledge that it has by virtue of its expertise and experience in regulated utility matters. Rather, it should use that expertise to ensure that it has the necessary information before it in a particular case to make sound decisions.<sup>10</sup>

The Department also asserts that Swanton Wind has not yet provided adequate prefiled testimony for the Commission to make the necessary affirmative findings under 30 V.S.A. §§ 248(b)(3) and (b)(10). According to the Department, Swanton Wind’s testimony cannot support an affirmative finding under these criteria in the absence of the complete and final SIS because what little testimony Swanton Wind did file is premised on the successful completion of the SIS.<sup>11</sup>

The Department further recommends that the Commission balance any costs incurred by Swanton Wind to date as a result of this proceeding having been initiated against the costs incurred by both private citizens and state agencies that are participating in the investigation. The Department asserts that Swanton Wind’s “sunk costs” are not in and of themselves a basis for the Commission to grant Swanton Wind’s motion.<sup>12</sup>

Lastly, the Department asserts that the June 22nd Order does not violate any Commission rules and, in fact, should be broadened to require Swanton Wind to file a curtailment study to assess the potential operational impacts of the project on existing generation resources in the region, particularly renewable generation facilities. The Department contends that such a study is highly relevant to an overall finding of public good under Section 248(a) because the project

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<sup>9</sup> Department response at 2.

<sup>10</sup> Department response at 2-4.

<sup>11</sup> Department response at 4-7.

<sup>12</sup> Department response at 7-8.

has the potential to curtail the operations of existing renewable energy facilities, facilities that were built in pursuit of Vermont's goal of increasing reliance on renewable energy.<sup>13</sup>

The Department asks that Swanton Wind's motion be denied and that the Commission order Swanton Wind to file a curtailment study examining the project's impacts on the operations of existing generation facilities in the northern region of the state. If the Commission grants Swanton Wind's motion, the Department requests that the schedule include a date certain for Swanton Wind to certify that it will not be supplementing its case in support of its petition, with sufficient time thereafter for the filing of dispositive motions.<sup>14</sup>

#### Citizen Intervenors

The Citizen Intervenors largely adopt the positions advanced by the Department.<sup>15</sup>

#### **IV. The Legal Standard**

Swanton Wind has asked the Commission to alter or amend its June 22<sup>nd</sup> order under the provisions of V.R.C.P. 59(e). The disposition of a motion to alter or amend a judgment rests with the discretion of the trial court.<sup>16</sup> Rule 59(e) gives courts "broad power to alter or amend a judgment."<sup>17</sup> In addressing a Rule 59(e) motion, "the court may reconsider issues previously before it, and generally may examine the correctness of the judgment."<sup>18</sup> The purpose of Rule 59(e) is to avoid an unjust result due to mistake or inadvertence of the Commission, as opposed to that of a party.<sup>19</sup> The rule is not intended to permit parties to relitigate issues or correct previous tactical decisions.<sup>20</sup> The motion must "present facts which could not, with the exercise of due diligence by counsel, have been placed before the court before the order complained of was issued."<sup>21</sup>

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<sup>13</sup> Department response at 2, 9-10.

<sup>14</sup> Department response at 10-11.

<sup>15</sup> See generally Citizen Intervenor response filed July 25, 2017.

<sup>16</sup> *Alden v. Alden*, 187 Vt. 591, 592 (2010) (citations omitted).

<sup>17</sup> V.R.C.P. 59(e) Reporter's Notes.

<sup>18</sup> *Drumheller v. Drumheller*, 185 Vt. 417, 432 (2009) (citing *In re Robinson/Keir Partnership*, 154 Vt. 50, 54 (1990) (citations omitted)).

<sup>19</sup> *Osborn v. Osborn*, 147 Vt. 432, 433 (1986).

<sup>20</sup> *In re Cent. Vt. Pub. Serv. Corp.*, Docket Nos. 6946/6988, Order of 5/25/05 at 3.

<sup>21</sup> *Cent. Vt. Pub. Serv. Corp.*, Docket Nos. 6946/6988, Order of 5/25/05 at 3 (quoting *Brown v. International Harvester Corp.*, 142 Vt. 140, 142-43 (1982)).

## V. Discussion

For the reasons discussed below, we find that the Swanton Wind motion does not demonstrate any mistake or inadvertence by the Commission in the June 22<sup>nd</sup> Order, nor does it present any new factual information that could not have been presented previously. Accordingly, we deny the Swanton Wind motion.

### 1. The June 22<sup>nd</sup> Order is consistent with Commission rules.

Swanton Wind's argument regarding Rule 2.208 is based on a misreading of the rule. According to Swanton Wind, the petition cannot be deemed incomplete under that rule because neither Commission rule nor statute requires an SIS to be filed prior to the issuance of a CPG for a project, a fact confirmed in prior Commission decisions.

Rule 2.208 provides that:

Substantially defective or insufficient filings may be rejected by the Commission, provided, that if it will not unreasonably delay any proceeding nor unreasonably adversely affect the rights of any party, the Commission shall allow a reasonable opportunity to a party to cure any defect or insufficiency. A filing which is found to be defective or insufficient shall not be deemed to have been cured until the date on which the last document is filed which removes the defect or makes the filing complete. A filing is substantially insufficient if, inter alia, it fails to include all material information required by statute or rule.

Through inclusion of the phrase "inter alia," the rule does not limit the basis for finding a filing substantially insufficient to a failure to include all material information required by rule or statute. Accepting Swanton Wind's argument would require us to write out the words "inter alia" from Rule 2.208, which we will not do. Section 248 requires the Commission to make affirmative findings under all of the applicable Section 248 criteria before issuing a CPG,<sup>22</sup> and Commission Rule 5.404(C) requires that a "petition must include sufficient information for the Commission to evaluate the proposed project,"<sup>23</sup> supported by prefiled testimony and exhibits that explain how the proposed project complies with each of the separate criteria of 30 V.S.A. § 248(b).<sup>24</sup>

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<sup>22</sup> 30 V.S.A. § 248(a)(b).

<sup>23</sup> Commission Rule 5.404(C)(1).

<sup>24</sup> Commission Rule 5.404(C)(1)(d).

After consideration of the Department's comments on the need for the SIS to be filed prior to any evidentiary hearing on the petition, the Commission concluded that it could not make affirmative findings on criteria (b)(3) or (10) without the SIS in evidence given Swanton Wind's proposal to introduce as much as 20 MW of intermittent generation into a transmission-constrained portion of Vermont's transmission network.

Additionally, Swanton Wind's reliance on Commission precedent that approved generation or transmission facilities subject to a post-CPG review and approval of an SIS is misplaced. In the cases cited by Swanton Wind, the Commission found that sufficient information had been provided by qualified experts to make the required findings prior to a review of the SIS.<sup>25</sup> In the instant proceeding, Swanton Wind's experts' conclusions are preliminary and subject to confirmation by a completed SIS. Given the conditional nature of this testimony, the fact that Swanton Wind plans to introduce up to 20 MW of generation into the grid, and the transmission constraints in the area of the network in which the project is proposed to be located, the information provided by Swanton Wind is insufficient to support the required findings in the absence of a complete and final SIS. Therefore, Swanton Wind has failed to include "sufficient information for the Commission to evaluate the proposed project"<sup>26</sup> under 30 V.S.A. §§ 248(b)(3) and (10), and its filing is therefore substantially insufficient under Commission Rule 2.208.

Lastly, Swanton Wind incorrectly contends that once the Commission initiates a proceeding it can no longer rely on Rule 5.404(C)(4) to suspend that proceeding. The rule provides the Commission with the discretion to decline to initiate a proceeding when a petition fails to include information sufficient for the Commission to evaluate a proposed project under all applicable Section 248 criteria. There is nothing in the plain language of the rule that prohibits the Commission from suspending a proceeding once it has been initiated. The rule

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<sup>25</sup> See, e.g. *Petition of Georgia Mountain Community Wind, LLC*, Docket 7508, Order of 3/19/10 at 4 ("We recognize that there are valid reasons for allowing the SIS to be conducted after a CPG has been issued for a project, and accordingly the Board allowed that in other wind generation cases. However, as those other cases demonstrate, even without an SIS, a petitioner can still provide sufficient evidence to allow the Board to make positive findings on Sections 248(b)(3) and (10). GMCW cites the Board's review of proposed wind projects in Dockets 7156 and 7250; in both cases, the petitioner provided testimony from a qualified witness supporting findings that the proposed project would satisfy Sections 248(b)(3) and (10)").

<sup>26</sup> Commission Rule 5.404(C)(1) and (C)(1)(d).

further provides that the Commission's acceptance of a petition or the initiation of a proceeding thereon does not constitute a determination that Swanton Wind has met its burden of production by providing sufficient information under all applicable Section 248 criteria, and the rule allows the Commission discretion to suspend this proceeding if it determines that such burden has not been met.

This application of Rule 5.404(C)(4) is consistent with Vermont Supreme Court precedent regarding the ability of a court to control its own docket. "The court's discretion to manage its docket, set deadlines, and allocate its resources is equally broad, and subject to reversal only for an abuse of discretion."<sup>27</sup> In this case, the Commission has made a reasonable determination that the parties should not continue to expend substantial resources to litigate this proceeding until after Swanton Wind has filed information sufficient to meet its initial burden of production on all applicable Section 248 criteria.

2. The June 22<sup>nd</sup> Order is consistent with the Vermont Administrative Procedure Act.

Swanton Wind asserts that the Commission, in the June 22<sup>nd</sup> Order, made findings of fact on an ultimate issue in this investigation without proper notice and a hearing, in contravention of the Administrative Procedure Act ("APA") and breaking from statute, rule, and Commission precedent. Swanton Wind contends that the Commission's conclusion that the SIS must be part of the evidentiary record before the Commission can make the required affirmative findings under criteria (b)(3) and (10) is a finding on an ultimate issue in this proceeding, made in violation of the APA and based solely on a representation by counsel for GMP in a motion to intervene.

While our ultimate decision in a case must be based on the evidentiary record pursuant to the APA, a determination of whether Swanton Wind's petition is complete enough to justify proceeding with this investigation is not a finding of fact on an ultimate issue in this case, as Swanton Wind asserts. The ultimate findings would be whether the project can be interconnected without adverse effects on the electrical system and whether the project can be served economically by existing or planned transmission facilities without undue adverse effects on Vermont's electric utilities or their customers. It is those findings that must be made, based

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<sup>27</sup> *Brosnahan v. Brosnahan*, 2015 WL 1761215 (entry order) (citing *Pcolar v. Casella Waste Sys., Inc.*, 2012 VT 58, ¶ 20).



on the evidentiary record after an opportunity for hearing. The determination in the June 22<sup>nd</sup> Order was simply that Swanton Wind had not yet provided enough information for the Commission to make those findings. In so doing, the Commission utilized knowledge based on its own expertise and experience regarding the transmission-constrained nature of the grid in the northwestern portion of Vermont, in light of the very limited and conditional nature of the testimony of Swanton Wind's witnesses on these two criteria.

Lastly, because the June 22<sup>nd</sup> Order provides Swanton Wind with a full and fair opportunity to correct its petition's deficiencies before notice and a hearing on the petition, Swanton Wind's due process rights are preserved by the order.

3. The June 22<sup>nd</sup> Order is neither untimely nor unfair.

The June 22<sup>nd</sup> Order was issued in response to the Department's recommendation, made at a time when the schedule for this proceeding had largely been vacated. Exercising its discretion to manage its docket,<sup>28</sup> the Commission determined it was in the interests of the parties to suspend this proceeding until necessary information was filed by Swanton Wind. We realize that Swanton Wind has expended a significant amount of time and resources on this matter to date. However, so have all the other parties. In balancing these interests, we have determined that the correct approach is to not continue imposing these expenditures on the parties until Swanton Wind files the complete and final SIS.

Additionally, nothing in the June 22<sup>nd</sup> Order requires Swanton Wind to take any actions that it would not otherwise be required to take during the course of this proceeding. As a result, the June 22<sup>nd</sup> Order does not cause Swanton Wind to incur any unnecessary expenses, nor does it deprive Swanton Wind of any of the value it has realized from actions already taken and expenses already incurred.

Lastly, during the 2016 legislative session, the Vermont Legislature passed Act 174. Section 15 of Act 174 created a working group whose directive was to make recommendations designed to increase the ease of public participation in Commission proceedings.<sup>29</sup> The June 22<sup>nd</sup> Order is consistent with this legislative mandate because the parties to this investigation, many of whom are participating *pro se*, will not be confronted with a "moving target" as

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<sup>28</sup> See *Brosnahan*.

<sup>29</sup> See 2016 Acts and Resolves No. 174, Sec. 15(b).

Swanton Wind supplements its case in the later stages of this proceeding. This reasoning also supports our requirement that Swanton Wind either supplement any other areas of its case that it believes are in need of supplementation at the time it files the SIS, or file a certification that no such supplementation will be filed. Accordingly, our denial of Swanton Wind's motion encompasses a denial of Swanton Wind's request to vacate this deadline as well.

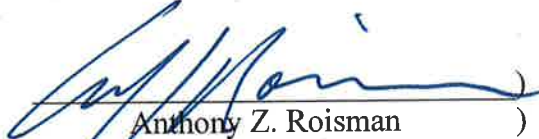
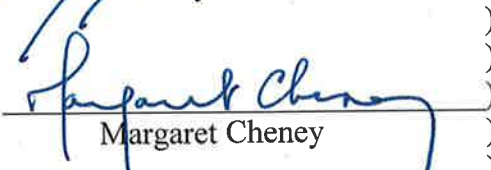
4. The Department's request for a curtailment study.

At this time, we decline to accept the Department's recommendation that we direct Swanton Wind to file a curtailment study. The Department and GMP are both parties to this matter and will have an opportunity to present their respective positions on the proposed project's impacts on the operation of existing generation facilities in the region, including through presentation of their own study if they so choose. If testimony from the Department or GMP raises a significant issue with respect to the proposed project's impacts on the operation of existing generation resources, the ultimate burden of persuasion resides with Swanton Wind and it will need to respond accordingly.

For the foregoing reasons, Swanton Wind's motion for reconsideration of the June 22, 2017, Order is denied.

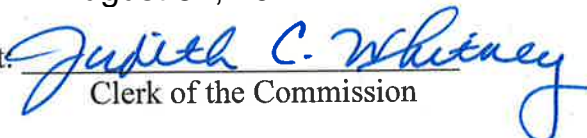
**SO ORDERED.**

Dated at Montpelier, Vermont this 31st day of August, 2017 .

 _____ Anthony Z. Roisman	)	PUBLIC UTILITY
	)	
 _____ Margaret Cheney	)	COMMISSION
	)	
	)	OF VERMONT
	)	
_____ Sarah Hofmann	)	

OFFICE OF THE CLERK

Filed: August 31, 2017

Attest:   
Clerk of the Commission

*Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Commission (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: puc.clerk@vermont.gov)*

PSB Case No. 8816 - SERVICE LIST

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