

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

MOTION IN LIMINE RE DATES OF  
ANR ACTIVITIES IN PETITIONER'S PROCEEDING

NOW COMES Swanton Wind LLC, by and through the undersigned counsel,  
and moves *in limine* for an order defining the scope of evidence required by the  
Supreme Court's mandate and the Public Utility Commission's Remand Order  
implementing it, specifically, evidence of activities undertaken after Swanton Wind  
filed the petition commencing this proceeding.

In accordance with the Vermont Supreme Court's decision and mandate, the  
Commission's Remand Order directs the Agency of Natural Resources to file testimony  
and exhibits "setting forth 'an account of [ANR's] activities in petitioner's proceeding  
and evidence of the reasonable cost of those activities.'" Remand Order, Case No. 8816,  
Order of January 17, 2019. Upon information and belief, the Agency of Natural  
Resources intends to include in its accounting of "activities in petitioner's proceeding"  
activities undertaken *before* Swanton Wind filed its petition with the Commission on

September 9, 2016.<sup>1</sup> Agency activities undertaken before Swanton Wind filed its petition with the Commission in September 2016 (“Pre-Petition Activities”) are outside the scope of the Commission’s jurisdiction and the Section 248b fee. Swanton Wind therefore moves for an order *in limine* directing ANR to limit its accounting of Agency activities “in petitioner’s proceeding” to those undertaken between September 9, 2016, the date Swanton Wind filed its petition with the Commission, and November 27, 2017, the date the petition was voluntarily withdrawn.

The Supreme Court reversed the Commission’s decision denying Swanton Wind a refund of all or a portion of the Section 248b fee based on the Commission’s authority as a court of record in Section 248 proceedings. In re Swanton Wind LLC, 2018 VT 141, ¶ 9; see 30 V.S.A. § 9 (establishing Commission’s authority as a court of record in proceedings within its jurisdiction). The Court explained that the Section 248b fee “must fund Agency activities pursuant to its duties as a party in § 248 proceedings, which include preparing to present evidence by reviewing a § 248 petition.” In re Swanton Wind LLC, 2018 VT 141, ¶ 11. The Agency does not become a party to a Section 248 proceeding, and has no “duties” as a party, unless and until a Section 248 petition is filed with the Public Utility Commission. In fact, the Agency is not among the parties

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<sup>1</sup> “The agency spent a significant amount of time reviewing the potential natural resources impacts associated with the project,” he said. “And that’s not atypical. *There’s a lot of work the agency does with the applicant before they ever file*” for PUC approval.” Court Rules State Has To Refund Fee For Swanton Wind Project That’s On Hold, Vermont Public Radio, Jan. 23, 2019 (quoting Matthew Chapman, General Counsel, Vermont Agency of Natural Resources) (emphasis added) available at <http://digital.vpr.net/post/court-rules-state-has-refund-fee-swanton-wind-project-thats-hold> (last visited on 1/23/2019).

entitled by law to advance notice of a potential Section 248 petition. 30 V.S.A. § 248(f); Pub. Util. Comm'n R. 5.402. Therefore, the Commission must direct the Agency to limit its prefiled evidence to Agency activities in "petitioner's proceeding" and exclude any and all evidence of Pre-Petition Activities undertaken by the Agency.

The interests of justice and administrative efficiency require further direction from the Commission immediately on the scope of the Agency's evidence to ensure compliance with the Supreme Court's mandate without undue burden on Swanton Wind. The Supreme Court's order demonstrates that the Commission and the Agency of Natural Resources were wrong and that Swanton Wind's November 2017 request for a return of all or a portion of its \$100,000 filing fee was reasonable and lawful. Swanton Wind should not have to incur more time and expense to recover its fee by having to file objections or serve discovery on evidence of activities that occurred before a Section 248 proceeding even existed.

For the foregoing reasons, Swanton Wind moves for an immediate order *in limine* that directs the Agency of Natural Resources to limit its prefiled evidence of activities in "petitioner's proceeding" to activities undertaken between September 9, 2016 and November 27, 2017 in Case No. 8816.

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