

STATE OF VERMONT
PUBLIC SERVICE BOARD

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

MOTION TO INTERVENE OF
BRIAN DUBIE AND PENNY DUBIE

Brian Dubie and Penny Dubie (the “Dubies”), jointly under Public Service Board Rule 2.209(A)(3), or alternatively under Board Rule 2.209(B), move to intervene in the above-referenced matter.

The Dubies as adjoining property owners have substantial, specific, and particularized interests that may be adversely affected by the outcome of this proceeding. This proceeding is the only means by which the Dubies can protect their interests, and these interests will not be adequately protected by other parties to this proceeding. The Dubies’ interests are unique to protecting the use and enjoyment of their property and the public areas nearby, and their perspective is sufficiently distinct from that of other parties.

Their intervention will not unduly delay proceedings or prejudice the interests of existing parties or of the public.

Memorandum

The Dubies respectfully move to intervene in this matter based on their substantial, particularized interests in the following issues:

- (i) orderly development of the region, pursuant to 30 V.S.A. § 248(b)(1);

- (ii) economic benefit to the State and its residents, § 248(b)(4);
- (iii) public health and safety, § 248(b)(5);
- (iv) scenic or natural beauty and aesthetics, § 248(b)(5) and § 6086(a)(8); and
- (v) necessary wildlife habitat or endangered species, § 6086(a)(8)(A).

The following argument supports the Dubies' motion to intervene in this matter.

I. Legal Standard

Intervention in proceedings before the Board is governed by Board Rule 2.209. Under Rule 2.209(A), a person upon timely application shall be permitted as of right to intervene in any proceeding:

(1) when a statute confers an unconditional right to intervene; (2) when a statute confers a conditional right to intervene and the condition or conditions are satisfied; or (3) when the applicant demonstrates a substantial interest which may be adversely affected by the outcome of the proceeding, where the proceeding affords the exclusive means by which the applicant can protect that interest, and where the applicant's interest is not adequately represented by existing parties.

Under Rule 2.209(B), a person upon timely application may in the discretion of the Board be granted "permissive intervention" in any proceeding when the applicant "demonstrates a substantial interest that may be affected by the outcome of the proceeding." The Board in exercising its discretion under this rule shall consider:

(1) whether the applicant's interest will be adequately protected by other parties; (2) whether alternative means exist by which the applicant's interest can be protected; and (3) whether intervention will unduly delay the proceeding or prejudice the interests of existing parties or of the public.

The Board has ruled that, "individual intervenors may bring a perspective sufficiently

distinct from those of existing parties to warrant their participation on specific issues.”¹

For example, the Board has found particularized interest based on the following:

1. habitat and natural resources involving deer and black bear;²
2. aesthetics based on proximity to the proposed project;³ and
3. stewardship, use, and enjoyment of public resources;⁴

In proceedings under 30 V.S.A. § 248, the Board does not consider interests in private property.⁵

II. Potential Impact of the Project on the Dubies’ Interests

For four generations, the Dubies’ family has owned nearly 300 acres of land in Fairfield and Swanton. Since 1989, on that land and nearby on McKenzie Road -- named after Mr. Dubie’s grandfather, John McKenzie – the Dubies have lived peacefully with neighbors in the rural setting; and worked diligently with their family in developing a maple sugaring business; and preserved faithfully their family tradition of land use and stewardship.

In contrast, Petitioner on adjoining property would install seven noisy, flickering, ice-throwing turbines, the nearest of which would be 1,200 feet uphill and upwind of the Dubies’ land.

In addition to disrupting the use and enjoyment of the Dubies’ home and property and the operation of their business, the Project would have a significant impact on orderly development,

¹ *Application of Seneca Mountain Wind, LLC*, Docket No. 7867, Order of 10/12/12, at 12.

² *Application of Seneca Mountain Wind, LLC*, Docket No. 7867, Order of 10/12/12, at 2-4, 16-17; *Id.*, Order of 8/9/13, at 6.

³ *Petition of Barton Solar LLC*, Docket No. 8148, Order of 1/21/14, at 3-4.

⁴ *Joint Petition of Green Mountain Power Corporation, Vermont Electric Cooperative, Inc., and Vermont Electric Power Company, Inc.*, Docket No. 7628, Order of 9/3/10, at 12-13.

⁵ *Vt. Elec. Power Co. v. Bandel*, 135 Vt. 141, 145 (1977) (“Proceedings under 30 V.S.A. § 248 relate only to the issues of public good, not to the interests of private landowners who are or may be involved.”).

public safety, aesthetics, and wildlife and habitat.

* * *

The Project purports to advance the public good, however the Dubies assert that any potential good may be outweighed by the likely harm. Accordingly, they move to intervene by right or permission on the following five issues.

1. Orderly Development: 30 V.S.A. § 248(b)(1)

The Dubies as fourth-generation landowners, business owners, sportsmen, and outdoorsmen, have unique experience and particular interest in the orderly development of the region which other parties to this proceeding may not necessarily represent. The Dubies' use and enjoyment of their property and nearby public land for sugarmaking, hunting, fishing, swimming, and appreciation of nature, may be affected by the construction and operation of the Project. Their perspective regarding land use, natural resources, commerce, and conservation, may be useful to the Board in determining the potential nature and extent of the impact of the Project on regional development. Therefore the Dubies' motion to intervene on this issue should be granted.

2. Economic Benefit: § 248(b)(4)

Construction and operation of the Project would have a significant impact on the economy of the State and its residents, specifically by deflating the value of properties in the region, and by interfering with the operations of the Dubies' maple sugaring business.

a. Deflation of Property Values

The impact of Swanton Wind on regional property values should be expected based on the impact of Sheffield Wind and Georgia Wind on regional property values. Specifically, the Boards of Civil Authority of Barton and Georgia reduced the assessed value of homes affected

by the sight and sound, respectively, of nearby turbines. In the present case, the Project would be located closer to surrounding homes than in any existing industrial wind development in Vermont. Accordingly, the impact of this Project on property values is unprecedented and likely greater than elsewhere. Such adverse effect is self-evident: a prospective homebuyer given the choice of living near seven noisy, flickering, ice-throwing turbines, or elsewhere, likely would go elsewhere.

Furthermore, the Dubies assert that the Board in determining the level of deflation in property values caused by the Project should consider the full loss of use and enjoyment, and the loss of future development rights in each property. Specifically, the Board should measure sound and safety levels at the property line of adjoining land as those landowners have a right to full use and future development of their *entire* property, not merely near their home or within attenuating walls. Should the Board not consider full use and future development, and subsequently approve the Project, the Board would effectively grant to Petitioner easements for nuisance noise and hazard without fairly compensating landowners, in violation of Article Two of the Vermont Constitution.

Accordingly, as the Dubies are longstanding homeowners and businessmen with a unique perspective and particular interest in the economy that is not necessarily represented by other parties to this proceeding, they should be allowed to intervene on this issue.

b. Interference with Business Operations

M & M Vermont Maple LLC, is a maple sugaring business that was co-founded in 2004, by the Dubies and Mr. Dubie's brother Mark and his wife Marianne (who live at 1806 McKenzie Road, Fairfield). The business, which now is owned by Mark and Marianne, supports six families, and leases 13,000 maple taps on the Dubies' land.

Construction and operation of the Project may interfere with business operations of M&M Vermont Maple and the Dubies' leases, specifically as ice throw or pieces of blade or debris from the turbines may injure or kill employees, or damage sugaring property or equipment including maple trees, pipeline, and harnessing pipeline. Evidence supporting this claim is found in Petitioner's Exhibit SW-DF-2 which states that turbine blade icing – which would occur during M&M Vermont Maple's operations on the land from November through April -- may cause 2.2-pound ice fragments to be thrown 1,000 feet; and blade failure may cause pieces of blade or debris to be thrown 1,640 feet. Considering that the nearest turbine would be approximately 1,200 feet uphill and upwind from the Dubies' property line, such ice throw or blade failure may be dangerous, destructive, and harmful to M&M Vermont Maple's sugaring operations and the Dubies' leases, and thereby affect the greater economy through lost wages to employees, reduced sales of maple syrup, or decreased spending on sugarmaking equipment or other business supplies.

As the Dubies have a particular interest in the regional and statewide economy, and their unique experience and perspective may be useful to the Board in determining the outcome of this proceeding, the Dubies should be allowed to intervene on this issue.

3. Public Health and Safety: § 248(b)(5)

The Project would be located approximately 4,600 feet uphill and upwind of the Dubies' home, and 1,200 feet from their property line. The turbines would interfere with light from the sun and moon setting over Rocky Ridge on the southwest side of their home and bedroom. The noise and infrasound caused by the Project would travel downhill, downwind, and pervade their land and home. Also as previously stated, ice throw and blade failure may injure or kill the Dubies, their family, friends, or employees. Thus the Project would interfere with the Dubies'

sleep and otherwise subject them and others to potential health and safety risks.

Particularly, the Project would interfere with Mr. Dubie's ability to safely perform his duties as a career airline pilot and captain for a major U.S. carrier. As captain in command, he is required by the Federal Aviation Administration to obtain adequate crew rest in uninterrupted sleep in order to perform his duties and ensure the safety of passengers and crew. When Mr. Dubie reports for work, he must sign a statement under penalty of law certifying that he is "fit for duty" in accordance with Federal Air Regulation FAR 117.5. "Fit for Duty" means that he is, "physiologically and mentally prepared and capable of performing assigned duties at the highest degree of safety." However noise from the Project would prevent Mr. Dubie from obtaining adequate crew rest, specifically as Mr. Dubie is a light sleeper, when awoken during his nighttime sleep cycle he has difficulty returning to sleep. In this case, from atop Rocky Ridge, the Project would generate shadow flicker and persistent, fluctuating sound that would travel downhill on prevailing winds toward the Dubies' home, and into their bedroom facing the Ridge, thus disrupting Mr. Dubie's crew rest and his ability to perform his duties as pilot and captain.

Likewise, the shadow flicker and sound caused by the Project may disrupt Mrs. Dubie's ability to obtain necessary, restorative sleep, thereby affecting her health. Additionally, Mrs. Dubie is prone to motion sickness, and studies have shown that people with such a condition are more sensitive to the sound generated by wind turbines. As Mrs. Dubie spends a significant amount of time outdoors working in the Dubies' garden and orchard, the Project would have an adverse effect on her health.

Finally, as previously stated, the Project may throw ice or pieces of blades or debris onto the Dubies' land thereby injuring or killing the Dubies or others. This concern is amplified by the fact that employees of M&M Vermont Maple, and guests at the Dubies' annual deer hunting

camp, routinely work on and use the Dubies' land from November through April, the time period during which ice is most likely to be thrown from the turbines. Additionally, the Dubies and family, friends, and neighbors regularly hike and ski on trails near the adjoining property line, thereby subjecting them to injury or death caused by thrown ice or debris.

Accordingly, as the Dubies' numerous particular concerns over public health and safety on their property would not be adequately represented by other parties to this proceeding, the Dubies should be allowed to intervene on this issue.

4. Scenic or Natural Beauty and Aesthetics: § 248(b)(5) and § 6086(a)(8)

For the past 28 years, the Dubies have stewarded and improved their land for use and enjoyment by themselves, their children, grandchildren, siblings, families, friends, and neighbors. Visitors regularly enjoy the natural setting, scenic views, and tranquil environs; and outdoor activities including hiking, snowshoeing, cross-country skiing, and working in the garden and orchard. Additionally, for 28 years and counting, the Dubies host a deer hunting camp for family and friends, thereby preserving a tradition that spans four generations of hunting on the family land.

However the surrounding aesthetics of sight and sound, and the widespread enjoyment of the Dubies' land, would be adversely affected by the turbines on Rocky Ridge. The natural scenery would be marred by industry, and the peace would be destroyed by noise.

Moreover, the impact of the Project would extend beyond the Dubies' land to the public areas nearby such as Fairfield Pond and Beach, the Missisquoi Valley Rail Trail, and public roads including Interstate 89 which has been identified in the Swanton Town Plan as the gateway from Canada into the United States. The prominence of Rocky Ridge as the only ridgeline in Swanton; combined with the quantity, size, and scope of the turbines at issue; and their

proximity to Fairfield Pond, the Rail Trail, and the Interstate, would have a significant impact on the visual and audible aesthetics of the surrounding area.

Accordingly, the Dubies' unique perspective as homeowners and stewards of the land, hikers, hunters, and outdoorsmen, may be useful to the Board in determining the potential nature and extent of the impact of the Project on aesthetics. Therefore the Dubies should be allowed to intervene on this issue.

5. Necessary Wildlife Habitat or Endangered Species: § 6086(a)(8)(A)

The Dubies appreciate the wildlife that lives on and visits their land and surrounding areas. In the woods they place game cameras through which they have seen many deer, coyotes, and turkeys. The Dubies, as noted above, annually host a deer camp for family and friends during which they hunt deer on the Dubies' land. However construction and operation of the Project would disrupt the habitat of these animals. For example, as deer during the winter require quiet areas in order to evade predators, the Project and associated noise and vibrations would disrupt the quiet and cause deer to abandon these wintering areas.

In addition, the Dubies regularly observe geese flying back and forth over Rocky Ridge between Fairfield Pond on the east side, and corn fields on the west side. These geese cross the ridgeline at altitudes that would place them at risk of being injured or killed by the proposed turbines.

Likewise, the Dubies have an interest in protecting bald and golden eagles which they have seen flying over Rocky Ridge. Bald eagles, a state-endangered species in Vermont, have in recent years also been observed on nearby Fairfield Pond, as reported by the North Branch

Nature Center in Montpelier, Vermont.⁶ Fairfield Pond has been determined by Vermont Fish & Wildlife Department as potentially suitable habitat for breeding bald eagles.⁷

In sum, the significant area, height, and scope of the Project in this natural setting may adversely affect necessary wildlife habitat or endangered species. The Dubies acknowledge that in this proceeding the Agency of Natural Resources may be best situated to intervene on this issue, however they assert that their perspective as landowners, gardeners, hikers, hunters, and outdoorsmen, may differ from that of other parties, and they may provide useful insight into the extent and nature of the impact of the Project on important wildlife and habitat. Thus in the public interest the Dubies should be allowed to intervene on this issue.

III. Conclusion

The Dubies assert that while this Project is purported to advance the public good, it also raises significant concerns over the public interest. Accordingly, in order to protect themselves, their children, grandchildren, family, and their neighbors throughout the State, the Dubies should be allowed upon the evidence presented herein to intervene in this proceeding.

Respectfully submitted this 16th day of February, 2017.

By: 
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⁶ See 'Birding: Birding Resources: VT eBird Bar Chart' <<http://ebird.org/content/vt/>>, at the North Branch Nature Center (Montpelier, VT) website. 26 January 2017.

⁷ Vermont Fish & Wildlife Department. "Vermont Bald Eagle Recovery Plan." October 2010. Web 27 January 2017.
<<http://www.vtfishandwildlife.com/common/pages/DisplayFile.aspx?itemId=111337>>.

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CERTIFICATE OF SERVICE

We, Brian and Penny Dubie, et.al., certify that on February 16, 2017, copies of the foregoing *Notices of Appearance*, and *Motion to Intervenes of Brian and Penny Dubie, Jeanne Royer, Judith and Patrick Luneau, Karen and Leo McLaughlin, Sally and Bruce Collopy, Kaye and Frank B. Mehaffey, Jr., Terrance Smith, David A. Goodrich, Robert Perkins, Patricia Messier, Sarah & Ed Ferguson, Ian and Danielle Garrant, Curtis Swan and Sara Luneau-Swan, Dan and Nancy Dunne, Erynn & Tyrell Boudreau, Dennis Hendy and Diane Bell, Mary and Mark Bushey, Steve Woodward, Kenneth Fox, Michelle and Luc Deslandes, David Butterfield, Bradley Stott and Jennifer Belanger, Clark and Carol Palmer, Paula Pearsall, Greg Pierce and Paula Kane, Mark and Marianne Dubie, Marie and Gil Tremblay, Patricia Rainville and John Smith, Kevin and Dolores Nichols, Jessica Decker and Lance Desautels, Suzanne Seymour, Mary Hunter, Todd Poirier* in the above-referenced matter, were served via First-Class U.S. Mail on the interested persons designated in the following Service List.

Respectfully submitted this 16th day of February, 2017.

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