
STITZEL PAGE & FLETCHER PC

ATTORNEYS AT LAW

Joseph S. McLean - jmclean@firm SPF.com - (802)660-2555

June 14, 2017

VIA ELECTRONIC FILING

Judith C. Whitney, Clerk of the Board
Vermont Public Service Board
112 State Street, 4th Floor
Montpelier, VT 05620-2701

Re: 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*

Dear Ms. Whitney:

Enclosed for filing with the Public Service Board please find the Northwest Regional Planning Commission's Memorandum in Opposition to Swanton Wind, LLC's Motion to Limit Discovery Procedures.

Please feel free to contact us with any questions. Thank you for your assistance.

Sincerely,



Joseph S. McLean

JSM/EGD/gc

Enclosure

NRPC17-004 (Swanton Wind) JSM to PSB re Opp Motion Limit Disc 17-06-14 cor

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

NORTHWEST REGIONAL PLANNING COMMISSION'S
MEMORANDUM IN OPPOSITION TO SWANTON WIND LLC'S
MOTION TO LIMIT DISCOVERY PROCEDURES

The Northwest Regional Planning Commission (“NRPC”), by and through its attorneys, Stitzel, Page & Fletcher, P.C., hereby submits this memorandum in opposition to Swanton Wind LLC’s Motion to Limit Discovery Procedures (“Petitioner’s Motion”). For the following reasons, and those detailed in the other non-petitioners’ filings opposing Petitioner’s Motion, Petitioner’s Motion should be denied.

I. PETITIONER HAS NOT COMPLIED WITH THE MINIMUM REQUIREMENTS FOR DISCOVERY MOTIONS

Rule 26(h) of the Vermont Rules of Civil Procedure, which governs motions related to discovery procedure such as Petitioner’s Motion, imposes an obligation on the moving party to communicate with the nonmoving parties – *prior to filing any motions* – “to confer about the discovery issues between them in detail in a good faith effort to eliminate or reduce the area of controversy, and to arrive at a mutually satisfactory resolution.” V.R.C.P. 26(h). Only after such making such good faith efforts is the moving party permitted to file its motion. *Id.* If a motion is subsequently filed, it must be accompanied by an affidavit of counsel filing the

motion detailing the movant's good faith efforts made to resolve the issues by agreement, "the dates of the consultation with opposing counsel, and the names of the participants." *Id.* At a minimum, "good faith efforts" for purposes of V.R.C.P. 26(h) requires "a certification that the moving party has *talked* to the other side, or made adequate attempts to do so." *Harleysville Worcester Ins. Co. v. Evergreen Roofing, LLC*, Docket No. No. 43-1-13 Cncv, 2014 WL 6606144 (Vt. Super.) (Toor, J.) ("Ideally, it means meeting in person. A substantive phone call is also sufficient."). Petitioner has failed to comply with each of these minimum requirements.

First and foremost, as indicated by Petitioner's Motion and affidavit with attachments, Petitioner only conferred with the Department of Public Service ("DPS") before filing with the Board. Petitioner made no attempt to consult with opposing counsel for NRPC, the Town of Swanton, the Town of Fairfield, and other key parties prior to filing the motion. This alone requires that Petitioner's Motion be denied. *See Petition of Vermont Gas Sys., Inc. for Auth. to Condemn Easement Rights in Prop. Interests of the Town of Hinesburg, Vermont*, Docket No. 8643, Order re: Motion to Compel (July 14, 2016) (denying discovery motion where movant did not confer with opposing counsel prior to filing).

Furthermore, the affidavit does not contain a sufficient V.R.C.P. 26(h) certification to establish that Petitioner satisfied its pre-filing obligation to communicate with the other parties on its request to drastically limit discovery "and to arrive at a mutually satisfactory resolution." V.R.C.P. 26(h). Paragraph 3 of the affidavit merely states that counsel for Petitioner "initiated and/or was a party

to numerous communications amongst the parties in this matter [with the exception of NRPC and the Town of Swanton] *with respect to scheduling.*” (Emphasis added). With the exception of a single email sent to counsel for DPS on May 19, 2017 – in which Petitioner proposed for the first time that the non-petitioners’ second-round discovery be limited to 50-questions and that depositions be prohibited altogether – the “numerous communications” recounted in Petitioner’s affidavit and supporting attachments were in fact limited to a small handful of emails and phone calls in early May 2017 regarding scheduling in general.

In short, Petitioner made its May 19th proposal to drastically limit the non-petitioners’ rights to discovery, received a response from a single party (DPS) that it did not like, and then proceeded with its filings to the Board. No good faith effort was made to “eliminate or reduce the area of controversy, [or] to arrive at a mutually satisfactory resolution” with DPS, let alone the other parties who were not consulted at all. Petitioner’s failure to communicate with all parties to eliminate or reduce this discovery dispute by mutually satisfactory agreement requires that Petitioner’s Motion be denied. *See Petition of Vermont Gas Sys., Inc. for Auth. to Condemn Easement Rights in Prop. Interests of the Town of Hinesburg, Vermont*, Docket No. 8643, Order re: Motion to Compel (July 14, 2016).

II. PETITIONER’S MOTION FAILS TO DEMONSTRATE GOOD CAUSE EXISTS FOR ISSUANCE OF A PROTECTIVE ORDER

A motion requesting that restrictions be imposed on the non-moving parties’ discovery rights may be granted only “for good cause shown...which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue

burden or expense.” V.R.C.P. 26(c). Petitioner’s Motion posits only that its protective order proposal is “appropriate” in light of the number of first-round interrogatories it received, some of which were cumulative or duplicative, and due to the “unprecedented number of individual parties” in this matter. Petitioner’s Motion at 4, 5. However, the large number of individual parties participating in this docket and the first-round interrogatories propounded are merely the results of Petitioner’s desire to locate a large-scale wind project in close proximity to a populated residential area, as well as the lack of information about the project initially provided with the certificate of public good petition. These self-inflicted wounds are not the result of any “annoyance, embarrassment, oppression, or undue burden or expense” brought about by the non-petitioner parties and therefore cannot constitute good cause for limiting their rights to meaningful discovery on this large-scale project.

For the reasons cited above, and those outlined in the other parties’ filings opposing the request to restrict discovery, Petitioner’s Motion should be denied.

DATED at Burlington, Vermont this 14th day of June 2017.

STITZEL, PAGE & FLETCHER, P.C.
Attorneys for the Northwest Regional
Planning Commission

By: 

David W. Rugh, Esq.
Joseph S. McLean, Esq.
171 Battery Street, P.O. Box 1507
Burlington, VT 05402-1507
(802) 660-2555

STITZEL, PAGE &
FLETCHER, P.C.
ATTORNEYS AT LAW
171 BATTERY STREET
P.O. BOX 1507
BURLINGTON, VERMONT
05402-1507

NRPC17-006 (SWANTON WIND) OPPOSITION TO MOTION TO LIMIT DISC 17-06-14 LIT