

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: 01/03/2018

ORDER RE: CONDITIONAL DISMISSAL

I. Introduction and Procedural History

On November 27, 2017, Swanton Wind, LLC (“Swanton Wind”) filed with the Vermont Public Utility Commission (“Commission”) a notice of withdrawal and voluntary dismissal without prejudice withdrawing its petition in this proceeding.

On December 11, 2017, the Northwest Regional Planning Commission (“NRPC”), *pro se* intervenor Gregory Pierce, and a group of 23 additional *pro se* intervenors (the “citizen intervenors”) each filed comments in response to Swanton Wind’s November 27th filing.

On December 12, 2017, the Towns of Swanton and Fairfield filed comments in response to Swanton Wind’s filing.

On December 13, 2017, the Vermont Department of Public Service (“Department”) and the Vermont Agency of Natural Resources (“ANR”) each filed comments in response to Swanton’s November 27th filing.

On December 21, 2017, Swanton Wind filed a reply to the comments filed by the other parties.

In today’s order we dismiss Swanton Wind’s petition without prejudice conditioned on Swanton Wind making payment to the Department of all outstanding amounts owed to the Department under its bill-back authority pursuant to 30 V.S.A. §§ 20 and 21. We also deny the various requests that we order Swanton Wind to pay the attorney’s fees or costs incurred to date by any other party in this matter, but expressly acknowledge that we will consider such requests

in the future if Swanton Wind subsequently decides to file a new or amended petition for this project or a similar project in the same general location. Lastly, we determine that the Commission is without authority to direct ANR to return the \$100,000 paid to it by Swanton Wind in conjunction with the filing of its petition with the Commission.

II. Positions of the Parties

Swanton Wind

On November 27, 2017, counsel for Swanton Wind filed a letter with the Commission stating “that, pursuant to V.R.C.P. 41(a)(1), Swanton Wind is withdrawing its Petition” in this proceeding, and that such withdrawal constituted a “voluntary dismissal without prejudice.” Swanton Wind also requested that the \$100,000 filing fee that it paid to ANR in accordance with 30 V.S.A. § 248b on September 9, 2016, be returned because the Commission subsequently determined that Swanton Wind’s petition was incomplete.¹

In reply to the non-petitioning parties, Swanton Wind contends there is no basis to award attorney’s fees in this matter and argues that its notice of dismissal was self-executing and acted as a dismissal without prejudice, justifying the closure of this proceeding both without prejudice and without conditions.²

Department of Public Service

The Department recommends that the Commission treat Swanton’s November 27th filing as a request for dismissal by order of the Commission under V.R.C.P. 41(a)(2), rather than a notice of voluntary dismissal by Swanton Wind under V.R.C.P. 41(a)(1). The Department also recommends that the dismissal be without prejudice, but conditioned on Swanton Wind paying the Department’s outstanding costs incurred in hiring outside personnel under 30 V.S.A. §§ 20 and 21, and represents that those costs are less than \$2,000. Lastly, the Department recommends that Swanton Wind be required to pay the attorney’s fees and costs of the other parties to this proceeding due to the incomplete nature of Swanton’s petition. In the

¹ Letter from Leslie A. Cadwell, Esq. to Judith C. Whitney, Clerk of the Commission, dated November 27, 2017.

² Letter from Leslie A. Cadwell, Esq. to Judith C. Whitney, Clerk of the Commission, dated December 20, 2017 (Swanton Wind again asks the Commission to order the return of the \$100,000 fee it paid to ANR).

alternative, the Department recommends that the non-petitioning parties be allowed to file properly supported requests for such fees and costs should Swanton Wind refile its petition in the future.³

Agency of Natural Resources

ANR expresses no concerns over the withdrawal of the petition by Swanton Wind, but opposes the requested return of the \$100,000 filing fee. According to ANR, its staff have already expended time performing technical and legal reviews of Swanton Wind's petition and discovery responses, and have participated in the process before the Commission since the petition was filed in September of 2016. ANR also states that the fee has been deposited into the Natural Resource Management Fund as required by statute, and that Swanton Wind points to no statutory authority that would allow the Commission to direct the return of the fee.⁴

Swanton and Fairfield

The Towns of Swanton and Fairfield recommend that the Commission require Swanton Wind to reimburse the Towns' attorney's fees and costs incurred in this proceeding. According to the Towns, Swanton Wind's filing visited extreme prejudice on them in the form of the expenditure of Town resources and time, and in the form of emotional stress from the prospect of having the project proposed for the area. The Towns request a date certain for the non-petitioning parties to present argument and evidence on why an award of fees and costs is justified. The Towns further represent that if their request is denied, they will renew their request if Swanton Wind again seeks approval of the project in the future.⁵

Northwest Regional Planning Commission

NRPC contends that Swanton Wind's November 27th filing should be treated as a request for dismissal under V.R.C.P. 41(a)(2) and that any dismissal be conditioned upon an award of reasonable intervenor fees and costs. NRPC argues that conditioning dismissal of the petition on the award of fees and costs is warranted because Swanton Wind's petition was substantially insufficient and resulted in the non-petitioning parties unnecessarily incurring costs to protect their interests. In the alternative, NRPC asks that the Commission condition

³ Department Response to Petitioner's Notice of Withdrawal, dated 12/13/17.

⁴ Letter from Leslie A. Welts, Esq. to Judith C. Whitney, Clerk of the Commission, dated December 13, 2017.

⁵ Letter from Edward G. Adrian, Esq. to Judith C. Whitney, Clerk of the Commission, dated December 12, 2017.

dismissal on the non-petitioning parties being allowed to file a similar request in the future if Swanton Wind again seeks Commission approval of its project.⁶

Gregory Pierce

Mr. Pierce contends that the dismissal of Swanton Wind's petition should be with prejudice. According to Mr. Pierce, Swanton Wind is not entitled to voluntarily dismiss its petition under V.R.C.P. 41(a)(1) and the Commission should therefore exercise its discretion under Rule 41(a)(2) to dismiss the petition with prejudice. Mr. Pierce urges that such an approach is justified because Swanton Wind's petition could never have been granted based on its contents as filed. Mr. Pierce points to the missing System Impact Study, the failure to address transmission constraints in the area proposed for the project, and technical issues (such as sound) as flaws in the petition that warrant dismissal with prejudice. Mr. Pierce also opposes the return of the \$100,000 fee paid to ANR by Swanton Wind because it would be "grossly unfair to all other parties."⁷

Citizen Intervenors

The citizen intervenors also contend that any dismissal of Swanton Wind's petition should be with prejudice. According to the citizen intervenors, the amount of litigation that occurred prior to Swanton Wind's November 27th filing counsels against allowing a voluntary dismissal under V.R.C.P. 41(a)(1). Instead, the citizen intervenors argue, the Commission should exercise its discretion to dismiss with prejudice pursuant to Rule 41(b). The citizen intervenors also object to the return of the \$100,000 fee paid by Swanton Wind to ANR. Lastly, the citizen intervenors state their intent to seek recovery of the fees and costs they have incurred to date in this proceeding if Swanton Wind refiles its petition at a later date.⁸

III. Discussion

1. Dismissal of Petition.

V.R.C.P. 41(a)(1) provides that "an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party

⁶ Letter from Joseph S. McLean, Esq. to Judith C. Whitney, Clerk of the Commission, dated December 11, 2017.

⁷ Pierce objection dated December 11, 2017.

⁸ *Pro se* intervenors' request and objection dated December 11, 2017.

of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action.”

Swanton Wind contends that its November 27th filing meets the requirements of Rule 41(a)(1) and that this action was effectively terminated by virtue of that filing.

Swanton Wind’s position ignores long-standing Commission precedent to the contrary. The Commission has consistently explained that Rule 41 does not neatly address actions before the Commission because those actions typically do not contemplate an answer from other parties. As a result, the Commission has treated dismissal notices like Swanton Wind’s as motions for dismissal pursuant to Rule 41(a)(2) once a case has been engaged in response to a petition. A great deal of process has already occurred in this matter, with significant resources expended by all involved. It is clear that this proceeding has progressed well beyond the answer threshold contemplated in Rule 41, and a voluntary dismissal under Rule 41(a)(1) is therefore inappropriate.

The cases cited by Swanton Wind in its reply comments do not compel a different result. The order closing the case in Case No. 8847⁹ treated the dismissal notice as a motion to dismiss pursuant to Rule 41(a)(2). The fact that the Commission exercised its discretion to dismiss the matter without conditions and without prejudice is not relevant to Swanton Wind’s filing. What is relevant is that the notice of withdrawal was treated by the Commission as a motion under Rule 41(a)(2). Swanton Wind also mistakenly cites to Case No. 17-3665-PET¹⁰ in support of its position in this matter. The order cited to by Swanton Wind describes a withdrawal notice that was filed by the petitioner less than one month after the petition was filed and, unlike in this case, before any significant activity had taken place in the proceeding.

Accordingly, we are treating Swanton Wind’s November 27th filing as a motion to dismiss pursuant to V.R.C.P. 41(a)(2), which states in relevant part that “an action shall not be dismissed at the plaintiff’s instance save upon order of the court and upon such terms and conditions as the court deems proper.” Additionally, dismissals under Rule 41(a)(2) are without prejudice, “[u]nless otherwise specified in the order.” As a result, we must consider the comments of the non-petitioning parties with respect to whether the dismissal should be

⁹ *Petition of Vermont Green Line Devco, LLC*, Case No. 8847, Order of 12/15/17.

¹⁰ *Petition of Sybac Solar, LLC*, Case No. 17-3665-PET, Order of 8/29/17.

with or without prejudice, and whether any conditions should be imposed on the dismissal, namely whether attorney's fees should be awarded and whether Swanton Wind should be required to make payment to the Department of any outstanding billback expenses incurred by the Department pursuant to 30 V.S.A. §§ 21 and 21. These matters are addressed individually, below.

2. Dismissal Without Prejudice.

No party is opposed to the dismissal motion. However, a number of the commenting parties contend that the dismissal should be with prejudice, in large part because they do not believe that the filing was made in good faith given its alleged deficiencies.

We disagree and are granting the request to dismiss without prejudice.

The applicable rule presumes that dismissals are made without prejudice. We are not persuaded that there is sufficient reason for the dismissal to be made in contravention of that presumption because it would act as an adjudication on the merits of the case. Rule 41(a) provides that such an outcome is appropriate if Swanton Wind refiles its petition at a later date and then seeks dismissal a second time. We see no reason to depart from this practice.

While we ultimately concluded in this matter that there were shortcomings in Swanton Wind's case in the form it was filed, for us to determine that the initial filing was made in bad faith would require us to assume that Swanton Wind knew its filing could not be approved as filed, and based on the comments of some of the non-petitioning parties, that it could never be approved. Such a conclusion would be at odds with the significant resources expended by Swanton Wind in this matter and we decline to reach that conclusion based simply on the allegations made by some parties.

3. Disposition of Attorney's Fees and Costs.

The Department, NRPC, and the Towns of Swanton and Fairfield all argue that the circumstances of this case justify an award of attorney's fees against Swanton Wind. Each of these parties asserts that Swanton Wind's actions in filing its petition and prosecuting its case caused them to incur unnecessary expenses protecting their interests because the project could never have been approved based on the information provided to date. According to these parties, this case justifies both a departure from the so-called "American Rule" and an award of attorney's fees and costs against Swanton Wind.

By law, the Commission is vested with “the powers of a court of record in the determination and adjudication of all matters over which it is given jurisdiction.”¹¹ We have previously construed this authority to mean that the Commission has the power “to award attorney’s fees in litigation that is properly before us in the same manner as a Vermont court would be authorized to award attorney’s fees.”¹² However, our decision on a request for attorney’s fees is informed by the American Rule, which applies in Vermont courts and which holds that attorney’s fees generally are not awarded absent statutory authority or an enforceable contractual agreement.¹³ We have on occasion departed from the American Rule to award attorney’s fees in exceptional circumstances, such as when a discovery sanction is warranted, or when it is appropriate to offset the additional litigation costs incurred by one party in responding to another party’s untimely or inefficient actions in presenting its case.¹⁴ Given the existence of the American Rule, all parties to Commission proceedings must participate with the expectation that they will bear their own expenses.

We are not persuaded that the exceptional circumstances needed to depart from the application of the American Rule are present in this case and therefore deny the requests for attorney’s fees made by the Department, NRPC, and the Towns of Swanton and Fairfield. Again, as in our reasoning above related to whether to dismiss this case either with or without prejudice, we are unable to determine that Swanton Wind filed its case in bad faith and without a belief that the project could ever be approved.

We find this case more akin to the withdrawal of a petition by Vermont Gas Systems, Inc. (“VGS”) in Docket 8180. In that case, VGS sought to withdraw its petition to construct a gas pipeline into Addison County, Vermont, and across Lake Champlain to the International Paper mill at Ticonderoga, New York. VGS sought withdrawal of that petition only after extensive work was undertaken by all parties and after a significant expenditure of resources by some on attorney’s fees. The Commission concluded, in spite of allegations to the contrary, that there were no specific facts to support a conclusion that VGS had acted in bad faith or

¹¹ 30 V.S.A. § 209.

¹² *Petition of Vermont Gas Systems, Inc.*, Docket 8180, Order of 6/5/15 at 9 (*citing and quoting* Docket 6860, Order of 9/26/06 at 2).

¹³ *Id.* (citations omitted).

¹⁴ *Id.* (citations omitted).

presented the Commission and other parties with unreasonable representations regarding the substance of its case.¹⁵ As a result, the Commission denied the pending requests for attorney's fees, and we do so here as well.

However, in Docket 8180 the Commission did exercise its discretion under V.R.C.P. 41(a)(2) and conditioned the dismissal on allowing the parties to again file their respective requests for attorney's fees if VGS decided to renew its petition for the project at a later date.¹⁶ We conclude that this is an appropriate approach to take in this matter as well. Therefore, the Towns' request that the Commission establish a date certain for presentation of argument and evidence on the appropriateness of awarding attorney's fees in this matter is denied. However, we will consider such requests in the future if Swanton Wind decides to file a new or amended petition for this project or a similar project in the same general location.

4. Department of Public Service Billback Costs.

The Department requests that we exercise our discretion to condition dismissal of Swanton Wind's petition on Swanton Wind making payment of outstanding invoices for costs incurred by the Department pursuant to 30 V.S.A. § 20 and allocated to Swanton Wind pursuant to 30 V.S.A. § 21. We find the Department's request reasonable and grant it.

Section 20 of Title 30 authorizes the Department to retain outside assistance for its participation before the Commission in response to petitions filed pursuant to 30 V.S.A. § 248. Section 21 of Title 30 authorizes the Department to allocate the costs it incurred under § 20 in this proceeding to Swanton Wind. The Department represents that the outstanding amount due is no more than \$2,000 and Swanton Wind has not challenged the Department's allocation of costs under 30 V.S.A. § 21. Therefore, the dismissal of Swanton Wind's petition is conditioned on Swanton Wind paying to the Department, within 30 days of the date of this order, all outstanding balances incurred by the Department pursuant to 30 V.S.A. § 20 and allocated to Swanton Wind pursuant to 30 V.S.A. § 21. The Department shall notify the Commission promptly regarding Swanton Wind's compliance, or lack thereof, with this condition.

¹⁵ *Id.* at 10-11.

¹⁶ *Id.* at 11 (“Thus, in the event VGS revives the Project in the future by filing a second petition for regulatory approval to construct the Project, the existing parties to this Docket shall have the option of filing a motion with the [Commission] for an opportunity to demonstrate that they are entitled to an assessment of such attorney's fees and costs incurred in this Docket as the [Commission] deems proper.”).

5. Disposition of ANR Filing Fee.

Swanton Wind has asked the Commission to direct ANR to return the \$100,000 fee that Swanton Wind paid to ANR pursuant to 30 V.S.A. § 248b. That statute requires applicants such as Swanton Wind to pay a fee, at the time of application, to support the role of ANR in responding to petitions filed under 30 V.S.A. §§ 248 and 248a. There is no provision in the statute that grants the Commission authority to direct a refund of any fee paid at the time of application, nor did Swanton Wind point us to any such authority. Therefore, we conclude that the Commission is without authority to direct the refund of any fee paid to ANR pursuant to 30 V.S.A. § 248b and Swanton's request that we do so is denied.

IV. Conclusion

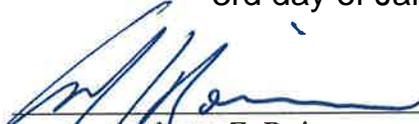
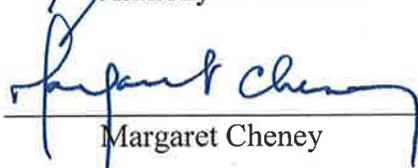
For the reasons discussed herein, Swanton Wind's request to dismiss this proceeding without prejudice is granted, subject to the following conditions:

1. Within 30 days of the date of this order, Swanton Wind, LLC ("Swanton Wind") shall make payment to the Vermont Department of Public Service ("Department") all outstanding amounts for costs incurred by the Department in this matter pursuant to 30 V.S.A. § 20 and allocated to Swanton Wind by the Department pursuant to 30 V.S.A. § 21.

2. In the event Swanton Wind decides to file a new or amended petition for this project, or a similar project in the same general location, the existing parties to this proceeding shall have the option of filing a motion with the Commission for an opportunity to demonstrate that they are entitled to an assessment of such attorney's fees and costs incurred in this proceeding as the Commission deems proper.

SO ORDERED.

Dated at Montpelier, Vermont this 3rd day of January, 2018

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

OFFICE OF THE CLERK

Filed: January 3, 2018

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)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Commission within thirty days. Appeal will not stay the effect of this Order, absent further order by this Commission or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Commission within twenty eight days of the date of this decision and Order.

PSB Case No. 8816 - SERVICE LIST

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