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VERMONT PUBLIC
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October 31, 2016

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

Re: Docket 8816
Motions to Intervene: Vermont Division of Historic Preservation; Christine & Dustin Lang

Dear Ms. Whitney:

For filing in the above-referenced docket, please find enclosed an original and six copies of Petitioner Swanton Wind, LLC's response to the proposed intervention of Christine and Dustin Lang.

With respect to the motion to intervene filed by the Vermont Division of Historic Preservation on October 25, 2016, Petitioner welcomes the Division's participation as a party on the issue of historic sites.

Thank you for your attention to this filing. Please contact me should you have any questions.

Best regards,

Alison Milbury Stone

Enclosure(s)

Cc: Attached Service List

STATE OF VERMONT
PUBLIC SERVICE BOARD

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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 to be located in Swanton,)
Vermont)

PETITIONER'S RESPONSE TO LANG MOTION TO INTERVENE

NOW COMES Petitioner Swanton Wind LLC, by and through the undersigned counsel, and offers the following Memorandum of Law in response to the motion to intervene filed in the above-captioned docket on behalf of Christine and Dustin Lang (Movants) on October 24, 2016 (Lang Motion to Intervene). While Movants have not demonstrated that intervention as of right is merited, Petitioner does not object to the Langs' permissive intervention in this docket provided it is limited to the areas specified herein.

Memorandum of Law

Movants seek intervention as of right under Public Service Board Rule

2.209(A)(3),¹ or alternatively, permissive intervention under Board Rule 2.209(B).²

¹ Rule 2.209(A) states: "Upon timely application, a person shall be permitted to intervene in any proceeding... (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."

² Pub. Serv. Bd. R. 2.209(B) states: "Upon timely application, a person may, in the discretion of the Board, be permitted to intervene in any proceeding when the applicant demonstrates a substantial interest which may be affected by the outcome of the proceeding. In exercising its discretion in this paragraph, the Board

With respect to the "substantial interest which may be adversely affected by the outcome of the proceeding" that must be demonstrated for intervention under either of these Rule 2.209 subsections, Movants state that they are "adjoining property owners" who have "substantial, particularized interests protected by Section 248 and the incorporated criteria of Act 250 that are likely to be adversely affected by the outcome of the proceedings in this matter."³ They assert that they "anticipate, at a minimum, being directly negatively affected by elements of the [Swanton Wind] project" in relation to the following Section 248 criteria: 30 V.S.A. § 248(b)(1),(3),(4),(5).⁴ Movants also suggest that they have substantial interests with respect to the following Act 250 criteria, which are given due consideration under Section 248(b)(5): "10 V.S.A. § 6086(a)(1)(C)(E) and (G), (3),(4)(5), and (8)."⁵ The only clarification in the Lang Motion to Intervene itself as to the nature of Movants' asserted "substantial interests" with respect to these listed

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."

³ Lang Motion to Intervene at 1.

⁴ Although Movants only include the statutory citations, Petitioner notes that the cited sections deal with the following areas: 248(b)(1) – orderly development of the region; 248(b)(3) – system stability and reliability; 248(b)(4) – economic benefit; 248(b)(5) – aesthetics, historic sites, air and water purity, the natural environment, the use of natural resources, and the public health and safety, with due consideration having been given to the criteria specified in 10 V.S.A. §§ 1424a(d) and 6086(a)(1) through (8) and (9)(K), impacts to primary agricultural soils as defined in 10 V.S.A. § 6001, and greenhouse gas impacts.

⁵ Lang Motion to Intervene at 2. These Act 250 criteria deal with the following areas: 10 V.S.A. § 6086(a)(1)(C) – water conservation; § 6086(a)(1)(E) – streams; § 6086(a)(1)(G) – wetlands; § 6086(a)(3) – burden on existing water supply; § 6086(a)(4) – soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result; § 6086(a)(5) – unreasonable congestion or unsafe conditions with respect to use of the highways, waterways, railways, airports and airways, and other means of transportation existing or proposed; § 6086(a)(8) – the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas.

criteria are the statements that Movants' home "adjoins the property upon which this development project is proposed" and that "[t]he project would be visible and audible from their home, which is also at a lower elevation than the project."⁶ The Lang Motion to Intervene is also "supported" by affidavits from Movants (both Christine and Dusting Lang), although neither the motion nor the affidavits clarifies which paragraphs in the affidavits might support intervention with respect to which Section 248 criteria, leaving the Board and Petitioner to try to make inferences in order to assess whether Movants have demonstrated substantial interests with respect to various criteria.

Movants should not be granted intervention as of right under Board Rule 2.209(A)(3) because they have failed to establish the requisite criteria to support such intervention—namely that the proceeding affords the "exclusive means" by which they can protect "a substantial interest which may be adversely affected by the outcome of the proceeding," which interest is "not adequately represented by existing parties." While the Lang Motion to Intervene baldly states this to be the case,⁷ Movants offer no support for their assertion.

Petitioner does not, however, object to Movants' permissive intervention in this docket under Board Rule 2.209(B), but requests that, should the Board use its discretion

⁶ Lang Motion to Intervene at 1.

⁷ *Id.* at 2.

to grant such intervention, Movants' participation be limited to issues that affect their particular interests as adjoining landowners where those interests are not already represented by another existing party. Accordingly, Petitioner does not object to Movants' participation with respect to 30 V.S.A. § 248(b)(5)/10 V.S.A. § 6086(a)(8) -- Aesthetics as to views from the project from their home, noise generated by the project that will be audible at their home, and shadow flicker; 30 V.S.A. § 248(b)(5) – Public Health and Safety with respect to ice throw; or 248(b)(5) with respect to the Project's potential to impact water flowing to their well. Nor does Petitioner object to Movant's participation on how construction traffic may impact access to their home.

If the Board finds that Movants' intervention in this docket is appropriate, and is considering allowing Movants to participate in areas other than those that Petitioner lists in the preceding paragraph, Petitioner requests that Movants be required to more clearly articulate their particular interests as to each of the Section 248 and or Act 250 criteria that they wish to offer evidence on and why those interests are substantial. Moreover, if the Board permits Movants to participate with respect to areas in which existing parties have overlapping interests, such as the Vermont Agency of Natural Resources with respect to the natural environment and the Vermont Department of Public Service with respect to economic benefits, system stability and reliability and

public health and safety, Movants be required to coordinate with the applicable existing parties when conducting discovery and preparing prefiled testimony on these areas.⁸

Finally, with respect to Paragraph 3 in the Affidavits of Dustin and Christine Lang, respectively, in which Movants assert their interest in using Petitioner's adjoining property for recreation, Petitioner notes two incontrovertible facts. First, the Langs have no legal right to enter the private property on which the project is proposed for their personal enjoyment and recreation. Second, the Langs' deed is subject to the Declaration of Planned Community for Rocky Ridge, which reserved the developer's right to use his remaining lands for "a commercial logging operation, a quarry and/or an electrical generation wind farm, which development would be accessed from Route 105 utilizing Rocky Ridge Road."⁹ Therefore, to the extent that the Langs' rest their motion to intervene on an entitlement or expectation to use land on Rocky Ridge for recreation, the motion should be denied because the Langs have no such entitlement and any such expectation is per se unreasonable.

CONCLUSION

In sum, Movants Christine and Dustin Lang have not established that intervention as of right under Public Service Board Rule 2.309(A)(3) is appropriate,

⁸ For example, concerns about views of the project from public places (*see* Aff. of Dustin Lang at 21) are not particular to the Langs and will be addressed by the Department of Public Service in the context of this proceeding. Similarly, the Project's potential to impact wildlife habitat and birds such as geese (*see e.g.* Affidavit of Dustin Lang at 12, 22) and will be addressed by the Vermont Agency of Natural Resources in this docket.

⁹ Declaration of Planned Community for Rocky Ridge, Section 7.01.A.

Petitioner does not object to a grant of permissive intervention with respect to issues that affect Movants' particular interests as adjoining landowners where those interests are not already represented by another existing party. Should the Board see fit to allow the Langs to participate in areas that will be addressed by existing parties, Petitioner asks that Movants and the existing parties be required to coordinate when conducting discovery and pre-filing testimony in any such areas.

Dated at Burlington, Vermont this 31st day of October, 2016.



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