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ADMITTED TO PRACTICE:
VERMONT
FEDERAL DISTRICT COURT VERMONT
FEDERAL DISTRICT COURT MASSACHUSETTS
1ST AND 2ND CIRCUIT COURTS OF APPEAL
U.S. SUPREME COURT

29 December 2016

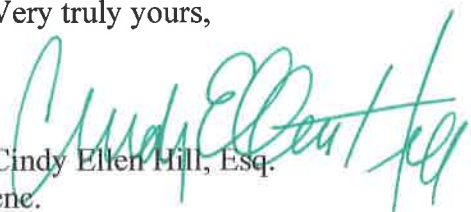
Judith Whitney, Clerk
Vermont Public Service Board
112 State Street #4
Montpelier VT 05620

RE: Petition of Swanton Wind LLC, Docket 8816
INTERVENORS CHRISTINE LANG AND DUSTIN LANG'S
MOTION TO DISMISS OR ALTERNATIVELY DEEM APPLICATION
INCOMPLETE

Dear Mrs. Whitney,

Enclosed please find an original and six copies of the Intervenors' Motion to Dismiss or Alternatively Deem Application Incomplete, and Certificate of Service for same.

Very truly yours,


Cindy Ellen Hill, Esq.
enc.

DEC 30 '16 AM 8:54
VT PUBLIC SERVICE BRD
JW
MC
SDH
JC
GF
MK
DW

**STATE OF VERMONT
PUBLIC SERVICE BOARD**

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Docket No. 8816

Petition of Swanton Wind LLC)

**INTERVENORS CHRISTINE LANG AND DUSTIN LANG'S
MOTION TO DISMISS PETITION
OR ALTERNATIVELY DEEM PETITION INCOMPLETE**

Now come Christine Lang and Dustin Lang and do hereby Move this honorable Board pursuant to Board Rules 2.103, 2.105, 2.206, 2.208 and 5.400 et seq. and the Vermont Rules of Civil Procedure Rule 7(b) and 12(b)(6), to Dismiss the Petition in the above-captioned matter, or alternatively to deem the Petition incomplete for failure to fulfill the Petition requirements specified by the Rules of this Board.

In Support of this Motion, Intervenor state that Petitioner failed to include in or with their Petition information and evidence required by Board Rule to be included in said Petition. These deficiencies include failure to notify adjoining property owners of the filing of the Petition as required by Board Rule; failure to appropriately identify the project parcel or parcels, thus insufficiently identifying the location of the proposed project in contravention of Board Rules, and failure to demonstrate that Petitioner has legal control over portions of the proposed project area; failure to include with their Petition evidence in support of each of the §248 criteria; and failure to assess alternatives to the proposed project as required by §248(b) and Board Rules.

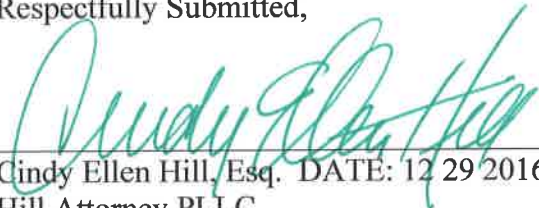
Such deficiencies comprise a failure to state a claim before this Board on which relief can

be granted, *VRCP 12(b)(6)*; such deficiencies also render the Petition incomplete, *Board Rule 5.402(C)(4) and 2.208*.

In making this Motion, Intervenors in no way waive their right and ability to further object to the content or admissibility of any additional portions of this or subsequently-filed testimony or evidence in this matter.

In further support of this Motion, the Intervenors attach a Memorandum of Law hereto.

Respectfully Submitted,



Cindy Ellen Hill, Esq. DATE: 12 29 2016
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STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 8816

Petition of Swanton Wind LLC)

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INTERVENORS CHRISTINE LANG AND DUSTIN LANG'S
MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS PETITION
OR ALTERNATIVELY DEEM PETITION INCOMPLETE

Intervenors Christine and Dustin Lang submit this Memorandum in Support of their contemporaneously-filed Motion to Dismiss Petition or Alternatively Deem Petition Incomplete.

CONTENTS

<u>INTRODUCTION</u>	p.2
<u>I. Failure to Notify Adjoining Property Owners</u>	p.2
<u>II. Failure to Appropriately Identify Project Parcel, and</u> <u>Lack of Legal Control</u>	p.5
<u>III. Insufficient Evidentiary Support</u>	p.9
<u>IV. Failure to Assess Alternatives</u>	p.10
<u>CONCLUSION</u>	p. 11

INTRODUCTION

Board Rule 5.400 et seq. sets out the requirements for petitions for electrical generation facility projects such as the one in the instant matter. Rule 5.402 sets out with particularity the notice and filing requirements for such petitions. Board Rule 5.402(C)(4), this Board may deem a petition incomplete when it does not sufficiently address the notice and filing requirements of Rule 5.402. An incomplete petition is deemed not filed unless and until the deficiencies are corrected.

Board Rule 2.208 also more generally addresses defective filings, stating:

Substantially defective or insufficient filings may be rejected by the Board, provided, that if it will not unreasonably delay any proceeding nor unreasonably adversely affect the rights of any party, the Board shall allow a reasonable opportunity to a party to cure any defect or insufficiency. A filing which is found to be defective or insufficient shall not be deemed to have been cured until the date on which the last document is filed which removes the defect or makes the filing complete. A filing is substantially insufficient if, inter alia, it fails to include all material information required by statute or rule.

The Petition here is incomplete, as more fully set out below.

I. Failure to Notify Adjoining Property Owners

Board Rule 5.402(B) requires Petitioner to notify adjoining landowners at the time the Petition is filed with the Board. Rule 5.402(B) further requires that:

(3) Petitioner must use good faith efforts to notify adjoining property owners. Unless otherwise shown, good faith efforts shall mean utilizing the certified grand list as it existed no more than 60 days prior to the date notice is provided to identify adjoining property owners. Petitioner shall include a statement with the petition that it has complied with this provision and include in the statement

the date the grand list was certified.

Here, Petitioner failed to notify adjoining property owners of the filing of the Petition as required by Board Rule. Petitioner failed to notify adjoining landowners including, but not limited to:

Swanton Parcel No. RC 0001
Sony Ovitt
1 Ruths Drive
St. Albans, Vermont

Swanton Parcel No. RC 0002
Benjamin Pfiel and Rebecca Green
2 Ruths Drive
St. Albans, Vermont

Vermont Land Trust
8 Bailey Avenue
Montpelier VT 05602

Vermont Housing and Conservation Board
58 East State Street
Montpelier VT 05602

The first two parcels adjoin the Bourbeau parcel, Swanton Parcel No. PO 0057, which is indicated on the project site plans as comprising a locus parcel of the project. Swanton Parcels No. RC 0001 and RC 0002 are directly across Sheldon Road from the Sheldon Road frontage of Swanton Parcel No. PO 0057.

The Vermont Land Trust and Vermont Housing and Conservation Board, along with the Vermont Department of Agriculture, Food and Markets (which Petitioner notified as a statutorily required state agency, though not as an adjoining landowner) are record owners of the development rights and conservation easement as well as a right of first

refusal of a substantial portion of Swanton Parcel No. PO 0057 as well as adjoining parcel Swanton Parcel No. SL 0151.

Board Rule 5.402(B)(2) indicates that notification to adjoining landowners shall be to those who own property in fee simple. However, where development rights have been transferred, the record title owner and the owner of the development rights each own a portion of the fee simple: the fee has been split as a portion of the proverbial bundle of sticks of land ownership has been transferred, in perpetuity, to another entity. Such transfers of less than fee simple ownership to implement legislative conservation purposes are authorized by 10 VSA Chapter 155. As vested deed record owners of a portion of the fee simple interests in both the locus parcel and an adjoining parcel, the Vermont Land Trust and the Vermont Housing and Conservation Board, along with the Vermont Department of Agriculture, Food and Markets, should receive notice of the Petition as adjoining landowners.

Additionally, Petitioner failed to include in its Petition the date upon which the Swanton grand list was certified. Indeed, the Petition states only that the list of adjoining landowners “was compiled using the Town of Swanton tax maps and online property data information” without certifying that it came from the town grand list at all.

The Petition indicates that in 2015, the 45-day notice was sent to the ‘then-adjoining landowners’, but no list of the landowners notified with that 2015 45-day notice was included either with the 45-day notice or with the Petition. If the lists are one and the same, then the adjoining property owners list was compiled well before the 60 days prior

to filing as required by Rule.

II. Failure to Appropriately Identify Project Parcel, and Lack of Legal Control

Vermont Statute, Board Rules, and principles of jurisdiction and standing, require the Petitioner to identify the locus parcel or parcels on which the proposed project would be located, and to have legal authority to propose such project.

30 VSA §248 requires notification and hearing relative to a proposed project predicated on identification of the county in which the project is located (§248(a)(4)(A) and (D)); the town and city in which the project will be located (§248(a)(4)(C)). The statute requires identification of whether the ‘tract’ on which the project will be located contains agricultural soils (§248(a)(4)(F)(1)); and the identification of each tract which shall receive physical disturbance in the implementation of the project (§248(A)(4)(J)(ii)).

Board Rule 5.402(A)(4) requires notification of a proposed project to “include sufficient information to understand the overall proposed project”. The Petition under Board Rule 5.402(C) must also “include sufficient information for the Board to evaluate the proposed project.”

Here, Petitioner has failed to identify the parcels, and the owners of those parcels, on which the proposed project would be located, thus insufficiently identifying the location of the project and providing inadequate information for review of the project.

Here the Petition identifies the site as ‘private land’, *Petition paragraph 2*, as private land over which Swanton Wind has ‘site control’, *Petition paragraph 3*, and states that the Project Site is described in prefiled testimony, *Petition paragraph 6*.

The Testimony of Travis Belisle describes the project site as “along an approximately one-mile section of hilltop that I own in Swanton, Vermont.” *Prefiled Testimony of Travis Belisle, p. 2*. Shortly thereafter, however, he submits conflicting testimony:

As I mentioned, the Project is proposed for a location on an approximately 1-mile section of hilltop in Swanton, which is known locally as “Rocky Ridge.” My family owns most of the land on which the turbines will be located, and Swanton Wind is leasing a portion of adjacent land owned by neighbors to complete the Project site.

Prefiled Testimony of Travis Belisle, p. 5.

This ‘portion of adjacent land’ is never identified by parcel number, and the owners’ names are never revealed in the testimony and exhibits accompanying the Petition.

Examination of the parcel map of the Town of Swanton compared to the project site information reveals a very different picture of the project location: more than half of the project --the T intersection of the constructed roadway, and four of the seven proposed turbines, as well as significant length of roadway and settling ponds--will be located on Swanton Parcel No. PO 0057. This parcel is owned by the Bourbeaus along with ownership interests in a substantial portion of the parcel being owned by The Vermont Land Trust and Vermont Housing and Conservation Board, and the Vermont Department of Agriculture, Food and Markets. An additional significant portion of Swanton Parcel No. PO 0057 is under silvicultural current use and subject to an approved forestry plan.

Failure to identify the project locus parcel and to identify the owners of that parcel circumvents the notice requirements of 30 VSA §248 and fails to provide this Board with sufficient information to understand the project proposal.

The failure to provide indicia of legal control over more than half of the proposed project site also implicates standing and thus the jurisdiction of this Board to consider this Petition.

The concept of “standing” is intertwined with the idea that a legal “case” must be present for a court to exercise jurisdiction. Standing is “a legally protectable stake or interest that a person has in a dispute that entitles him to bring the controversy before the court to obtain judicial relief.” *West’s Encyclopedia of American Law, edition 2, citations omitted.*

An applicant submitting a Petition for a project over which he or she has not demonstrated legal control and the lawful ability to implement such project should it be approved is *de facto* requesting an advisory opinion of this Board. In order for a Vermont Court to rule on substantive issues, a case must involve “either a ‘live’ controversy, or the parties must have a ‘legally cognizable interest in the outcome’ of the case throughout the entire proceeding.” *Paige v. State of Vermont et al.*, 2013 VT 105; *In re S.N.*, 2007 VT 47, ¶ 5, 181 Vt. 641, 928 A.2d 510 (mem.) (quoting *In re P.S.*, 167 Vt. 63, 67, 702 A.2d 98, 100 (1997)). “Unless an actual or justiciable controversy is present, a declaratory judgment is merely an advisory opinion which we lack the constitutional authority to render.” *Doria v. Univ. of Vt.*, 156 Vt. 114, 117, 589 A.2d 317, 318 (1991).

This Board’s Interconnection Rules require submission of evidence of lawful authority to proceed with the project. Rule 5.504(B)(2) requires:

- (2) Documentation of site control, which may be demonstrated through:

- (a) Ownership of, a leasehold interest in, or a right to develop a site for the purpose of constructing a Generation Resource;
- (b) An option to purchase or acquire a leasehold site for such purpose; or
- (c) An exclusivity or other business relationship between the Generation Resource and the entity having the right to sell, lease or grant the Generation Resource the right to possess or occupy a site for such purpose.

Board Rule 5.504(B)

Petitioner further does not put forth any lawful basis to indicate that he has the right to access the project site through Rocky Ridge Road. Although his testimony indicates that when he established the Rocky Ridge planned community, the foundational documents reserved the right to develop his remaining adjoining uphill parcel, he presents no testimony or evidence whatsoever of his right to utilize Rocky Ridge Road for a development pursued by a legal entity other than Travis Beslisle; and he presents no testimony or evidence whatsoever of his right to utilize Rocky Ridge Road for purposes of development of any parcels of land other than the immediately adjoining parcel owned by Travis Beslisle--and indeed he can not present such evidence or testimony as he has no such right.

Here, the Petitioner's conflicting testimony regarding whether the project is to be located on land owned by the Belisles or leased from an unnamed someone else, with no evidence whatsoever that Petitioner has been lawfully authorized by the actual landowners to pursue this Petition, and with no evidence that Petitioner has the lawful authority to utilize the proposed access road for the purposes of developing land of another, renders the Petitioner without standing and this Board without jurisdiction to accept and process the Petition.

III. Insufficient Evidentiary Support

Board Rule 5.402(C)(1)(d) requires that a Petition must include “[p]refiled evidence (testimony and exhibits) that explains how the proposed project complies with each of the separate criteria of 30 V.S.A. § 248(b); including the criteria specified in of 10 V.S.A. § 1424a(d) and 10 V.S.A. § 6086(a)(1) through (8) and (9)(K), incorporated through Section 248(b)(5).”

Upon granting of the Intervenor’s Objections to Testimony previously filed, the Petitioner has failed to include with their Petition evidence in support of each of the §248 criteria.

Additionally, irregardless of whether Intervenor’s Objections to Testimony are sustained, the Petition fails on its face to include evidence or testimony regarding the following §248 criteria:

30 VSA §248(b)(2): Demand

(2) Is required to meet the need for present and future demand for service which could not otherwise be provided in a more cost-effective manner through energy conservation programs and measures and energy-efficiency and load management measures, including those developed pursuant to the provisions of subsection 209(d), section 218c, and subsection 218(b) of this title. In determining whether this criterion is met, the Board shall assess the environmental and economic costs of the purchase, investment, or construction in the manner set out under subdivision 218c(a)(1) (least-cost integrated plan) of this title and, as to a generation facility, shall consider whether the facility will avoid, reduce, or defer transmission or distribution system investments.

The Petition contains no testimony whatsoever regarding analysis of the demand for

service to be satisfied by the project, the potential for energy conservation and load management programs to address this demand, and whether the facility will avoid, reduce, or defer transmission or distribution system investments. Indeed, it is not possible for Petitioner to present such evidence at this time since they are uncommitted as to where the electricity from the proposed project would be sold.

30 VSA §248(b)(5): Greenhouse gas impacts.

Petitioner does not present evidence sufficient to evaluate the greenhouse gas impacts of the proposed project. The Petition does not contain analysis of the fossil fuel consumption relative to building the 2.5 mile road network, fossil fuel consumption relative to the manufacture and transportation of the turbine, emissions from fossil fuel plants necessary for back-up to the intermittent output of the proposed project, or the greenhouse gas impacts of clearing forestland for construction and maintenance of the proposed project.

The Petition should accordingly be dismissed, or deemed incomplete unless and until such time as the Petitioner produces such testimony -- in admissible form -- and submits it as an amendment to its Petition.

IV. Failure to Assess Alternatives

Board Rule 5.402(A)(4) requires that “[w]ith the construction plans, the petitioner shall include a description of its evaluation of alternatives to the proposed project and the reasons why those alternatives were rejected.”

Petitioner submitted no assessment of alternatives whatsoever, either with the 45-day notice or with the Petition. The use of the word "shall" under Vermont law indicates that the requirement is mandatory. *In re Appeal of Stephen Green*, 2006 VT 88; *Simpson v. Rood*, 2003 VT 39. "Generally, the imperative 'shall' indicates that the provision is mandatory." *State v. Hemingway*, 2014 VT 48.

Petitioner's utter failure to include an evaluation of the alternatives comprises a deficiency in the 45 day notice and in the Petition; the Petition should accordingly be dismissed, or deemed incomplete unless and until such time as the Petitioner produces such evaluation, sends it to the parties entitled to 45 days notice and, after the elapse of 45 days, submits it as an amendment to its Petition.

CONCLUSION

For the foregoing reasons and in the interests of justice and efficient judicial administration the Petition in this matter should be dismissed, or alternatively this Board should deem the Petition incomplete unless and until such time as appropriate filings to correct its deficiencies are filed with this Board and served on all parties and all persons entitled to notice of the Petition filing.

Respectfully Submitted,



Cindy Ellen Hill, Esq. DATE: 12-29-2016
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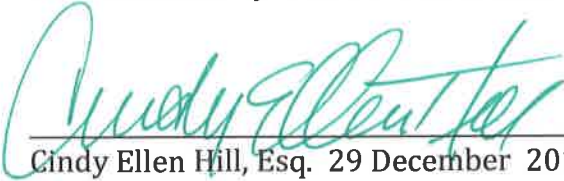
STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 8816

Petition of Swanton Wind LLC)

CERTIFICATE OF SERVICE

I, Cindy Ellen Hill, attorney for Intervenors Christine and Dustin Lang in the above captioned matter, do hereby certify that I service the foregoing **INTERVENORS CHRISTINE LANG AND DUSTIN LANG'S MOTION TO DISMISS OR ALTERNATIVELY DEEM APPLICATION INCOMPLETE** upon the parties identified in the service list provided to me by the PSB clerk as of this date, attached, by first class mail, and by electronic mail where email addresses were known.



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