

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 to be located in Swanton,)
Vermont)

SWANTON WIND OPPOSITION TO LANG MOTION TO DISMISS
OR ALTERNATIVELY DEEM APPLICATION INCOMPLETE

NOW COMES Swanton Wind, LLC, Petitioner in the above-captioned matter, by and through the undersigned counsel, and opposes the Motion to Dismiss or Alternatively Deem Application Incomplete filed on or about December 29, 2016 by Intervenors Christine and Dustin Lang (“Lang Motion”). In support of its opposition to the Lang Motion, Swanton Wind submits the following Memorandum of Law.

Memorandum of Law

Christine and Dustin Lang are intervenors who were granted party status in this case on a limited number of criteria: orderly development of the region (30 V.S.A. § (b)(1)); economic benefit to the state (*id.* § 248(b)(4)); aesthetics and public health and safety (*id.* § 248(b)(5) and 10 V.S.A. § 6086(a)(8)); water conservation and burden on existing water supply (10 V.S.A. § 6086(a)(1)(C) and (3)); and transportation as it pertains to the Langs’ use of Rocky Ridge Road (10 V.S.A. § 6086(a)(5)). *Procedural Order re: Interventions*, Docket No. 8166, Order of 11/18/2016 at 3-5. The Langs move to dismiss on grounds that Swanton Wind’s petition for a certificate of public good (“CPG”) fails to

JAN 17 17 49:19
VT PUBLIC SERVICE BOARD

state a claim upon which relief may be granted per V.R.C.P. 12(b)(6). Alternatively, the Langs ask the Board to deem the petition incomplete because, they claim, (1) certain adjoining landowners did not receive notice of the petition as required by Public Service Board Rule 5.402; (2) the petition fails to show site control and does not identify the parcels or the owners of the parcels that will be used for construction and operation of the project; (3) the petition lacks evidence on need (30 V.S.A. § 248(b)(2)), greenhouse gas emissions (*id.* § 248(b)(5)), and the alternatives considered per Rule 5.402(A)(4). Lang Motion at 2-11. Swanton Wind addresses each of the Langs' arguments in turn below.

I. The Langs' Motion To Dismiss Must Be Denied Because Swanton Wind's Petition States A Claim Upon Which The Board May Grant Relief

Rule 12(b)(6) of the Vermont Rules of Civil Procedure, applicable to Public Service Board proceedings per Public Service Board Rule 2.103, allows the Board to dismiss a petition if the Board finds that "there exist no facts or circumstances that would entitle the [petitioner] to relief." *Richards v. Town of Norwich*, 169 Vt. 44, 48-49, 726 A.2d 81, 85 (1999). Because a Rule 12(b)(6) motion tests the law of a petitioner's claim and not the facts supporting it, the Board must accept as true all facts in the petitioner's pleadings and all reasonable inferences that may be derived therefrom, and it must disregard all contrary or contradictory assertions by the opposing party *Powers v. Office of Child Support*, 173 Vt. 390, 395, 795 A.2d 1259, 1263 (2002); *Town of Norwich*, 169 Vt. at 48-49. Under this controlling standard, the Board must deny the Langs' Motion to Dismiss.

Swanton Wind's petition contains the factual allegations necessary to state a claim under Section 248(a)(2)(A) of Title 30. See 30 V.S.A. § 248(a)(2)(A) (requiring a CPG prior to site preparation or construction of a grid-connected electric generation facility). The petition describes Swanton Wind's proposed electric generation project: an up to 20 MW, 7 turbine project, with turbines having a maximum hub height of 96 meters above ground level ("AGL"), a maximum rotor diameter of 116 meters, and a maximum height of 499 feet AGL at the highest point. Swanton Wind Petition at ¶¶ 2, 4. The petition describes the project's components to include "an underground electrical line between the wind turbines; an overhead line from the wind turbines to the point of interconnection with an existing Green Mountain Power 34.5 kV electric line; communications, electrical and meteorological equipment and associated cabling; an improved and new access road and crane path from Rocky Ridge Road to the Project Site and between the wind turbines; and a small structure to enclose Supervisory Control and Data Acquisition ("SCADA") equipment." *Id.* at ¶ 4. Swanton Wind's petition was accompanied by prefiled testimony from 17 witnesses and more than 50 exhibits, including civil engineering drawings showing the location of project components. The testimony and exhibits together address each of the applicable Section 248(b) criteria. See 30 V.S.A. § 248(b) (enumerating the substantive review criteria applicable to a proposed electric generating plant). In addition, Swanton Wind filed a Rule 5.402(C)(1)(e) index with the petition to help guide review of the materials according to the statutory criteria.

Therefore, accepting as true the facts in Swanton Wind's petition and supporting prefiled evidence, the petition plainly states a claim for relief that only the Public Service Board may grant, namely a Section 248 CPG authorizing the construction of the Swanton Wind Project. 30 V.S.A. § 248. Accordingly, dismissal under Rule 12(b)(6) is not appropriate and the Board must deny the Langs' motion.

II. Swanton Wind's Petition Was Complete When Filed, But An Opportunity To Cure Per Board Rule 2.208 Is Required If The Board Finds Otherwise

In the alternative to dismissal under Rule 12(b)(6), the Langs move for a Board determination under Board Rule 2.208 that Swanton Wind's petition was incomplete when filed on September 9, 2016. Lang Motion at 2-11. Board Rule 2.208 gives the Board discretion to reject "substantially defective or insufficient filings," meaning filings that do not include "all material information required by statute or rule." Pub. Serv. Bd. R. 2.208. The Board also has the discretion under Rule 2.208 to allow a reasonable opportunity to cure any insufficiency or defect in a filing if doing so will not "unreasonably adversely affect the rights of any party." *Id.* As described in more detail below, Swanton Wind's petition was complete when filed. However, if the Board finds any deficiency in notice or identifies material omissions from the filing, the Board should allow Swanton Wind an opportunity to cure through a supplemental filing as Rule 2.208 allows.

A. Any Defect In Notice To Adjoining Landowners Has Been Cured

The Langs point out that two adjoining landowners were omitted from the list of adjoining landowners entitled to notice of the filing under the Board's Rules. Lang Motion at 2-3. The landowners own parcels located on Ruths Drive, across Sheldon Road. Swanton Wind agrees that these landowners were inadvertently omitted from the adjoining landowner list and appreciates the error being brought to its attention. A notice of the filing has now been sent to these landowners, a copy of which is attached. Swanton Wind has cured any defect in notice and the Langs' motion must be denied.

B. Easement Holders And Owners Of Conservation Rights Are Not "Fee Simple" Owners Entitled To Notice As Adjoining Landowners

The Langs also claim that Swanton Wind failed to notify owners of development rights and conservation easements in adjoining lands and a portion of a host parcel. Lang Motion at 4. They argue that owners of development rights and conservation easements are also fee simple owners of the property and are "adjoining landowners" within the meaning of Board Rule 5.402(B). Lang Motion at 4. *See* Pub. Serv. Bd. R. 5.402(B) (defining an "adjoining landowner" for purposes of notice of a Section 248 petition as the fee simple owner of the adjoining land). Significantly, the Langs offer no legal authority to support their argument, except to state that Title 10, chapter 155 authorizes "[s]uch transfers of *less than fee simple ownership*" to implement State conservation objectives. Lang Motion at 4 (emphasis added). The Langs thus appear to acknowledge what is axiomatic: the owner of conservation rights does not own the conserved property in fee simple because less

than a fee simple interest is conveyed. Swanton Wind did not err by omitting easement holders and owners of conservation rights from the list of adjoining landowners in this case as they are not the fee simple owners of the land and are not, therefore, adjoining landowners under the Board's rule. The Langs' motion must be denied.¹

C. Site Control

The Langs argue that Swanton Wind's petition was incomplete because it did not include any evidence of site control to establish that Swanton Wind has the legal right to build the project in the proposed location on Rocky Ridge. Lang Motion at 5. They assert that "[f]ailure to identify the project locus parcel and to identify the owners of that parcel circumvents the notice requirements of 30 V.S.A. § 248 and fails to provide the Board with sufficient information to understand the project proposal." *Id.* at 7. The Langs go even further by arguing that without evidence of site control over the land proposed for use by the project, Swanton Wind lacks standing to bring the petition and the Board lacks jurisdiction to adjudicate it. *Id.*

The Langs' site control argument is not supported existing law, law that the Langs do not even acknowledge in their motion. Nearly forty (40) years ago, the Vermont Supreme Court reaffirmed that property rights are not an issue for consideration in

¹ Any error in notice cannot be considered material to Swanton Wind's petition because, as explained in the next section, property rights are not an issue in these proceedings. The Vermont Supreme Court made this clear decades ago: "Individual property rights not being at issue, they are not a basis for any special recognition of the property owners, nor do they support any special consideration for their protection in these proceedings. In short, they are irrelevant and cannot be the basis for inadequate notice based on those special concerns." *Vt. Elec. Co. v. Bandel*, 135 Vt. 141, 145, 375 A.2d 975, 978 (1977).

Section 248 proceedings. *Vt. Elec. Co. v. Bandel*, 135 Vt. 141, 145, 375 A.2d 975, 978 (1977).

In fact, at that time, the Court “consider[ed] it settled law that proceedings under 30 V.S.A. § 248 relate only to the issue of public good, not the interests of private landowners *who are or may be involved.*” *Id.* (emphasis added). Section 248(b) lays out the review criteria that the Board must utilize when considering a request for a CPG and those criteria do not include proof of site control.

That proof of site control is not an element of Section 248 is apparent from the statute itself. Section 248(a)(2)(B) prohibits a company from exercising eminent domain over property needed to construct an electric generation or transmission project unless and until the Board finds the proposed project satisfies the Section 248(b) criteria and issues the project a CPG. 30 V.S.A. § 248(a)(2)(B). Thus, Section 248 by its own terms does not make site control an element that must be satisfied to obtain a CPG.

The Langs alternatively argue that the Board’s interconnection rule (Rule 5.500) requires proof of site control. Lang Motion at 7-8. See Pub. Serv. Bd. R. 5.504(B)(2). While true, the point is irrelevant because this proceeding arises under Section 248 of Title 30, not Rule 5.500, and site control is not an issue under well settled law. Moreover, the Langs are without standing to enforce the interconnection rule because they have no legal interest at stake in the rule’s enforcement generally, and in this case specifically they were denied party status on the question of electric system stability and reliability, the criteria relevant to interconnection. *Procedural Order re: Interventions*, Docket No. 8166, Order of 11/18/2016 at 3-5. Since site control is not an element of Section 248 and the Langs lack

standing on interconnection issues, the Board should reject their motion to find the petition deficient.

D. The Project Location Is Well Documented In The CPG Petition Materials

The Langs also claim that Swanton Wind's petition contains insufficient information about the location of the land on which the project is proposed, thereby leaving the Board with "inadequate information for review of the project." Lang Motion at 5. The claim is without merit.

The locus of the land to be used for the project is clearly identified on the site plans offered as Exhibit SW-IAJ-2. The information on these plans provides specific locational information, including the latitude and longitude of the project. See Exhibit SW-IAJ-2 at 1. Exhibit SW-IAJ-2 also shows the project location on a USGS map that depicts the project layout in the context of surrounding communities. *Id.* Next to the USGS map is second map that is overlaid on an orthophoto with the project parcels' boundaries shown, along with the project's latitude and longitude (again). *Id.*

In addition to the site plans, the project location is discussed and depicted in other exhibits, such as the Natural Resource Assessment (Exhibit SW-DB-2), archeology report (Exhibit SW-EC-3), and FAA No Hazard Determinations (Exhibit SW-RD-3), among others. There is simply no basis for the Langs to claim that the petition lacks sufficient locational information about the project and the property that will host it. The Langs' motion to find the petition deficient under Board Rule 2.208 must be denied.

E. Swanton Wind's Petition Is Not Deficient As It Includes Prefiled Evidence On Need, Greenhouse Gas Emissions, And Alternatives

The Langs next argue that the petition is deficient because it does not contain evidence on three required criteria: need under 30 V.S.A. § 248(b)(2), greenhouse gas emissions under 30 V.S.A. § 248(b)(5), and alternatives under Public Service Board Rule 5.402(A)(4). Lang Motion at 9-11. The argument is, again, without merit. The Langs may not agree with the persuasiveness or weight to be accorded the evidence, but Swanton Wind's petition provides evidence on all three issues, two of which the Langs have no standing to raise because they are outside the scope of the Langs' intervention.

Need – Section 248(b)(2)

Need for the project under Section 248(b)(2) is addressed in the testimony of John Zimmerman. Zimmerman pf. at 5-13. The Langs do not have standing on this issue as the scope of their intervention does not include this criterion. *Procedural Order re: Interventions*, Docket No. 8166, Order of 11/18/2016 at 3-5. In any event, Swanton Wind's September 9 filing made a prima facie case on the need criterion. Mr. Zimmerman's testimony identifies the need for renewable power locally and regionally, discusses utility integrated resource plans that identify the future need for renewable energy to meet their demand, and addresses the need identified in the Vermont Electric Plan for locally produced renewable energy. Zimmerman pf. at 5-13; Exhibit SW-JZ-3. Mr. Zimmerman also testifies that the state and region's need for renewable energy cannot be met by conservation or load management measures. Zimmerman pf. at 6. Swanton Wind's

September 9 petition was materially complete when filed because all of the applicable review criteria, including need, were addressed.

Greenhouse Gas – Section 248(b)(5)

Like the issue of need, the question of impact on greenhouse gases from the Swanton Wind Project is outside the scope of the Langs' intervention and they have no basis to challenge the sufficiency of the petition on that issue. *Procedural Order re: Interventions*, Docket No. 8166, Order of 11/18/2016 at 3-5. Further, the petition and supporting materials make a prima facie case on greenhouse gas emissions through the prefiled testimony of Martha Staskus at page 12 and Exhibit SW-RWH-2 at pages 2 and 16. The Langs' motion to find the petition deficient on the issue of greenhouse gas impacts also must be denied.

Alternatives – Board Rule 5.402(A)(4)

Finally, the Langs argue that Swanton Wind did not satisfy the requirement of Board Rule 5.402(A)(4) by failing to include a discussion of alternatives in its 45-day notice. Lang Motion at 10-11. Any omission in the 45-day notice has since been cured by Swanton Wind's September 9 submission and the discussion in it of various alternatives that led to the proposal before the Board. For example, Mr. Zimmerman testifies that neither conservation nor load management are reasonable alternatives to satisfy the need for renewable energy, and he describes the alternatives for energy sales that the project has explored. Zimmerman pf. at 6, 9. Ms. Staskus and Mr. Jewkes discuss the alternative site plans and project commitments that were considered to address stakeholder input

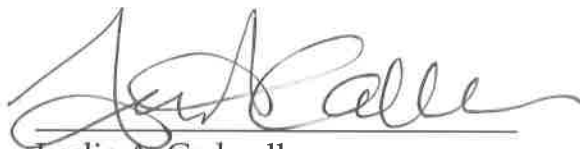
and environmental site constraints. Staskus pf. at 10; Jewkes pf. at 5-7. Accordingly, the Swanton Wind's September 9 filing was not deficient and the Langs' motion must be denied.²

Conclusion

Swanton Wind's petition was complete when filed and presented sufficient information to withstand a motion to dismiss under Rule 12(b)(6) and a deficiency claim under Board Rule 2.208. The Langs will have an opportunity to conduct discovery to explore their questions about Swanton Wind's proposal and the evidence offered in support of it. If in the unlikely event that the Board finds some deficiency in Swanton Wind's petition, it should afford the company a reasonable opportunity to cure.

Dated at Castleton, Vermont this 13th day of January, 2017.

SWANTON WIND, LLC



Leslie A. Cadwell
Legal Counselors & Advocates, PLC
PO Box 827
Castleton, VT 05735
(802) 342-3114
lac@lac-lca.com
Its Attorneys

² To the extent the Langs' argument can be interpreted as a demand that Swanton Wind provide a least-cost alternatives analysis in its filing, the argument is misplaced. Non-utility generators like Swanton Wind are not subject to the requirement to provide such an analysis or an integrated resource plan. *See In re Rutland Renewable Energy*, Docket No. 8188, Order of 3/11/2015.

