

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 MEMORANDUM
IN RESPONSE TO SWANTON AND FAIRFIELD'S
LETTER JOINING EVIDENTIARY OBJECTIONS FILED BY INTERVENORS
CHRISTINE AND DUSTIN LANG

NOW COMES Swanton Wind, LLC, by and through the undersigned counsel, and responds to the Public Service Board's Order of January 12, 2016 directing Swanton Wind to respond to a letter filed by the Town of Swanton and Town of Fairfield's in which the Towns state their support for and join in evidentiary objections made by intervenors Christine and Dustin Lang on December 19, 2016 ("Lang Motion"). Swanton Wind provides the following memorandum in support of its opposition to granting relief to the Town on objections where the Langs lack standing.

Memorandum

Ryan Darlow

The Towns join in the Langs' objection to prefiled evidence of Ryan Darlow, a Project Engineer with Vermont Environmental Research Associates. They object to Exhibit SW-RD-3, the Federal Aviation Administration's ("FAA") No Hazard to Air Navigation Determinations for the Project and to Mr. Darlow' testimony discussing the

determinations. The asserted objections are: (1) the exhibit is hearsay per V.R.E. 801 and 802; (2) Mr. Darlow offers inadmissible lay opinion testimony on an area that requires specialized knowledge, specifically on aviation safety, see V.R.E. 701, 703; and (3) Mr. Darlow lacks personal knowledge of the information in his testimony as required by V.R.E. 602. Lang Mot. at 5.

The Board should overrule the objection to Mr. Darlow's testimony and Exhibit SW-RD-3 because the testimony and the exhibit are admissible and will assist the Board's consideration of the public health and safety criterion under 30 V.S.A. § 248(b)(5) in this matter.

Prefiled Testimony at Page 2, Lines 3 through 9

Mr. Darlow's testimony at page 2, lines 3 through 9 is admissible because it is factual testimony that does not require any specialized knowledge or skill. The testimony describes Mr. Darlow's role in conducting the analyses in the exhibits that accompany his testimony. It requires only Mr. Darlow's personal knowledge, which is obvious from the face of the question and answer at page 2, lines 3 through 9. The objection should be overruled.

Prefiled Testimony at Page 5, Line 13 through Page 6 Line 3

On page 5, line 13 through page 6, line 3, Mr. Darlow's testimony identifies Exhibit SW-RD-3 (FAA Determination of No Hazard to Air Navigation), explains what it is, and states when Swanton Wind applied for received the determinations from the

FAA. This testimony is factual testimony that the Langs and the Towns fail to demonstrate requires qualifications “in the field of aeronautics, airplane safety or airfield operations.” Lang Motion at 5. Mr. Darlow’s role providing technical support for renewable energy projectd managed by his employer, VERA, *see* Darlow pf. at 1 and Exhibit SW-RD-1, provides the basis for his personal knowledge of these facts, facts that the Langs and the Towns do not dispute. *See also* Darlow pf. at 6 (describing the communications from the Agency of Transportation regarding FAA determinations of no hazard to air navigation). The testimony is admissible and provides the Board with information that is helpful to its determination of the issues in this matter. The Board should overrule the objection to the testimony.

Prefiled Testimony at Page 6, Lines 4 through 17

Mr. Darlow’s testimony at page 6 lines 4 through 17 is admissible factual testimony providing further description of the FAA determinations of no hazard to air navigation received by the Project and the significance of preliminary notifications issued by the FAA. Again, the Langs and the Towns do not explain why specialized knowledge in “aeronautics, airplane safety, or airfield operations” is required for Mr. Darlow to testify to these facts. In fact, Mr. Darlow explains that it is the FAA that is responsible for reviewing potential impacts to aviation from development that extends into airspace, a fact that is not subject to dispute and is within the Public Service Board’s own body of knowledge given its expertise in permitting energy projects where FAA no

hazard determinations are required. *See, e.g., In re Washington Elec. Coop., Inc.*, Docket No. 8721, Order of 5/26/2016 (making findings and conclusions on FAA determination of no hazard to air navigation in Section 248 proceeding on upgrades to a landfill gas-to-energy project); *In re North Springfield Sustainable Energy Project, LLC*, Docket No. 7833, Order of 2/11/2014 (same in a proceeding for a biomass electric generating station); *In re Deerfield Wind, LLC*, Docket No. 7250, Order of 1/8/2016 (approving wind developers' s compliance filing regarding FAA no hazard to air navigation determinations); *In re Green Mountain Power Corporation*, Docket No. 7558, Order of 2/8/2010 (making findings regarding FAA no hazard to air navigation determinations in context of a petition for a meteorological station CPG).

At most, Mr. Darlow's testimony requires some knowledge of FAA regulations. Mr. Darlow's experience in providing technical support for renewable energy projects generally, and wind projects in particular, provides him with the requisite experience and training to offer testimony on the FAA no hazard to air navigation process. His testimony is both relevant to the issues in the matter and is reliable on its face because it contains an accurate description of the FAA process as applied to Swanton Wind. The Board should overrule the objection and admit Mr. Darlow's testimony at page 6, lines 4 through 17 at the technical hearing.

Prefiled Testimony at Page 6, Line 18 through Page 7 Lines 1 through 6

The Langs, joined by the Towns, object to Mr. Darlow's factual description of communications in the fall of 2015 with the Agency of Transportation about the need for FAA determinations of no hazard to air navigation. Like Mr. Darlow's other factual testimony, the testimony is based on Mr. Darlow's personal knowledge as an employee of VERA providing technical support for VERA's portfolio of renewable energy projects. Darlow pf. at 1 and Exhibit SW-RD-1. The testimony is admissible and will assist the Board in its determination of the issues in this matter. The objection should be overruled.

Exhibit SW-RD-3 – FAA Determinations of No Hazard to Air Navigation

The Langs, joined by the Towns, argue that Exhibit SW-RD-3 is inadmissible because it is hearsay. Lang Motion at 5. While generally inadmissible, the Board may admit hearsay if "it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs." 3 V.S.A. § 810. In this case, the Board regularly relies on the FAA determinations of no hazard to air navigation when evaluating whether a Section 248 project will have an undue adverse impact on the relevant Section 248(b) criteria. *See, e.g., In re Washington Elec. Coop., Inc.*, Docket No. 8721, Order of 5/26/2016; *In re North Springfield Sustainable Energy Project, LLC*, Docket No. 7833, Order of 2/11/2014; *In re Deerfield Wind, LLC*, Docket No. 7250, Order of 1/8/2016; *In re Green Mountain Power Corporation*, Docket No. 7558, Order of 2/8/2010 (making findings regarding

FAA no hazard to air navigation determinations in context of a petition for a meteorological station CPG). Mr. Darlow's testimony provides ample factual support for the admission of Exhibit SW-RD-3, which contains information that "reasonably prudent [people]," namely the Public Service Board, use when considering whether to approve a Section 248 petition. The objection to the admission of Exhibit SW-RD-3 should be overruled.

Adam Gravel

The Towns join the Langs' objection to testimony offered by Adam Gravel on the Project's potential impact to bats and to an expert report offered as Exhibit SW-AG-2. Lang Objection at 12. They pose two objections. First, they assert that Mr. Gravel illegally collected data by placing an acoustical detector on a meteorological mast that is the subject of an unresolved permitting dispute. *Id.* at 12. They offer no legal support for this objection, nor any support for their claim that the data was "gathered illegally." Swanton Wind is aware of no law that makes it illegal for a scientist to collect acoustical data with the permission of a landowner, even if the structure used to support the acoustical instruments should have been permitted, an issue that Swanton Wind does not concede and on which there is no final order from the Board.

Moreover, the Langs and the Town point to no permit requirement that Swanton Wind or its consultants violated by placing acoustical equipment temporarily on land in Swanton, Vermont; nor was any permit required to install a temporary mast for the

purpose of placing such equipment. The objection to Mr. Gravel's testimony and Exhibit SW-AG-2 on grounds that the data he used was "gathered illegally" must be overruled because it has no basis in law.

The second objection the Langs, joined by the Towns, make claims that Mr. Gravel's testimony and Exhibit SW-AG-2 do not meet the test for reliability required for expert witness testimony. Lang Motion at 12. Again, the objection should be overruled because Mr. Gravel's testimony provides factual information based on his personal knowledge in addition to expert information, and his testimony and exhibits provide sufficient indicia of reliability to meet the requirements of V.R.E. 702.

Mr. Gravel's testimony at page 5, line 18 through page 6, line 21 is admissible as factual testimony and as relevant and reliable expert testimony. The testimony is within Mr. Gravel's area of expertise as established by his testimony at pages 1 and 2 and Exhibit SW-AG-1, and he has experience testifying as a credible witness before the Public Service Board on similar issues in other wind projects. Gravel pf. 2; Exhibit SW-AG-1. Mr. Gravel's testimony provides a basis for his opinions and summarizes the results of the acoustical monitoring his company performed for Swanton Wind. Most importantly, Mr. Gravel's testimony and Exhibit SW-AG-2 on their face provide enough information for the Board to find them reliable and admissible under Rule 702.

In addition to laying out his qualifications and experience, Mr. Gravel testifies that the acoustical monitoring performed for the Project was consistent with a work plan

developed with the Vermont Agency of Natural Resources (VANR) using U.S. Fish and Wildlife Service (USFWS) guidelines. Gravel pf. at 4, 5-6. Exhibit SW-AG-2 provides more details of VANR's approval of the work plan and its requests for analysis of SM3 detector data using two automated programs. Exhibit SW-AG-2 at 4, 5. Exhibit SW-AG-2 explains that the survey methods used was "well above the required USFWS survey effort for detecting northern long-eared bats and Indiana bats," *id.* at 6, and it provides citations throughout to relevant authorities on detecting bat activity and evaluating potential impacts on bats from wind projects. *See id.* at 28 (literature listing). This testimony and Mr. Gravel's extensive experience with acoustical monitoring to detect bat species in Vermont and New England are enough to find Mr. Gravel's testimony and Exhibit SW-AG-2 sufficiently reliable to be admitted into the record as expert evidence. The objection to Mr. Gravel's testimony and exhibit on bats should be overruled and the testimony should be admitted at the technical hearing.

John Zimmerman

The Towns join the Langs in objecting to the "entirety" of John Zimmerman's prefiled testimony on relevance grounds and as inadmissible expert testimony for lack of indicia of reliability. Lang Objection at 19. Mr. Zimmerman's testimony is both relevant and reliable, and it is admissible under V.R.E. 702.

Mr. Mr. Zimmerman's testimony addresses (1) the Project's compliance with land conservation measures in the town or regional plans currently in effect; (2) the

local property tax revenue that Swanton Wind anticipates contributing to the Town of Swanton over the life of the Project; (3) the plans for sale of the Project's output, including RECs; (4) how the Project satisfies the Section 248(b) criteria on need (§ 248(b)(2)) and is consistent with utility integrated resource plans and the state electric plan (§§ 248(b)(6) & (7)); and (5) what impact the Project has on the state's electric utilities and their customers (§ 248(b)(10)). All of these areas are within Mr. Zimmerman's experience and expertise as a decades-long leader in the development of renewable energy projects generally and wind projects in particular, experience that is set out in detail on his resume offered as Exhibit SW-JZ-1. Aside from the financial analysis on taxes included in his testimony, which goes unmentioned in the Langs' motion and the Towns' letter, Mr. Zimmerman's testimony does not address scientific matters at all. His testimony is comprised of facts, policy, and opinions pertaining to the Section 248(b) criteria enumerated above that is based on his personal knowledge of the Project, the documents he cites in support of his testimony (e.g., utility IRPs, Vermont Electric Plan, town plans) and his experience and expertise in renewable energy power plant development, siting, economics, and regulation; power off-take agreements; long-term fuel source availability and contracts; electrical interconnection issues; and energy, capacity and REC price issues, among other relevant areas. Exhibit SW-JZ-1. Mr. Zimmerman's testimony and the experience laid out in his resume provide the indicia of reliability necessary to admit his testimony on all matters of specialized knowledge

reflected therein. Moreover, under Rule 705, Mr. Zimmerman may “testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the [Board] requires otherwise.” V.R.E. 705. The testimony is admissible expert witness testimony and the objection should be overruled.

The Langs’ objection, adopted by the Town, is really an attack on the credibility of Mr. Zimmerman’s evidence and the weight the Board should accord it. The objection claims Mr. Zimmerman’s testimony is based on “erroneous facts” but does not identify what facts are “erroneous.” Lang Motion at 19. To the extent that the objection is aimed at Mr. Zimmerman’s testimony on Swanton Wind’s preferred power sales, neither the Langs nor the Town have any support to claim that the facts in his testimony are “erroneous.”

The same is true for the Langs’ and the Towns’ objection to Mr. Zimmerman’s testimony that load management and conservation measures cannot meet the demand for renewable energy. Lang Motion at 19. Not only is Mr. Zimmerman’s experience and expertise in this area sufficient to support his opinion, his opinion has support in Board orders approving renewable energy projects based on the need for renewable energy specifically, as opposed to need for energy or capacity generally to provide service. *See, e.g., In re Rutland Renewable Energy, LLC*, Docket No. 8188, Order of 3/11/2015. While the need for renewable energy identified in other cases may be different from the need Mr. Zimmerman discusses in his testimony, the Langs’ and the Towns’ assertion that

additional information is needed to support the reliability of Mr. Zimmerman's testimony for purposes of admissibility is without support. Again, the challenge the Langs and the Towns make to Mr. Zimmerman's testimony goes to its weight, not to its admissibility.

Suzanne Jamele

Ms. Jamele is an expert architectural historian whose historic resources report contains appendices documenting some of the materials that Ms. Jamele relied upon in preparing her report. See Exhibit SW-SJ-2 at 4-5; Jamele pf. at 3-5. The Langs and the Towns object to the admission of certain of these materials on hearsay grounds, because she did not prepare them as allegedly required by V.R.E. 602 and 901, and because she lacks qualifications to attest to their content. Lang Motion at 16. The objection should be overruled because Ms. Jamele is an expert witness who may rely on information provided outside of the hearing that others prepared and which she relied upon. V.R.E. 703; 3 V.S.A. § 810. Furthermore, Ms. Jamele need not have prepared the documents to include them in an expert report, nor to testify as to what the documents are per Rule 901, so long as she has personal knowledge of the documents per Rule 602, which her testimony and her report demonstrates that she does because they were used for her own analysis.

Finally, the Langs and the Town object to certain appendices in Ms. Jamele's report because they claim they will be duplicative, cumulative, and confusing. Lang

Motion at 16. Swanton Wind disagrees. The appendices will allow the Board and the parties with standing to evaluate Ms. Jamele's work more completely by understanding her reference points. Moreover, this proceeding does not involve a lay jury but an administrative body with particular expertise in the matters under its jurisdiction. Swanton Wind is confident that the Board will not be confused by Ms. Jamele having included certain materials prepared for the Project and which she relied upon in preparing her report and rendering her opinion in this matter.

Conclusion

For the foregoing reasons, and those set forth in Swanton Wind's first response, the Board should overrule the Langs' objections to the admission of Swanton Wind's testimony and exhibits.

Dated at Castleton, Vermont this 27th day of January, 2017.

By: 

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