

STATE OF VERMONT  
PUBLIC SERVICE BOARD

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: 3/2/2017

**ORDER RE: LANG MOTION TO DISMISS**

**I. Introduction and Background**

On December 30, 2016, intervenors Dustin and Christine Lang filed with the Vermont Public Service Board (“Board”) a motion to dismiss the petition in this proceeding, or in the alternative to deem the petition incomplete (the “Lang Motion”).

On January 17, 2017, Swanton Wind, LLC (“Swanton Wind”) filed its opposition to the Lang Motion.

On January 26, 2017, the Board issued an Order directing Swanton Wind to file a supplemental response to the Lang Motion.

On February 10, 2017, Swanton Wind supplemented its opposition in response to the Board’s January 26<sup>th</sup> Order.

No other parties filed any responses.

For the reasons discussed below, in today’s Order the Board denies the Lang Motion. In denying the Lang Motion, we are not engaging in an assessment of the prefiled testimony and exhibits submitted by Swanton Wind with regard to Swanton Wind’s evidentiary burden in this proceeding. We are instead only ruling that Swanton Wind has submitted testimony and exhibits sufficient to survive the Lang Motion.

## II. Positions of the Parties

### The Langs

The Langs assert that the petition and accompanying testimony and exhibits are incomplete because they fail to meet the requirements of Board rules related to the filing of a complete petition. As a result, the Langs argue that the petition fails to state a claim on which relief can be granted and should be dismissed pursuant to V.R.C.P. 12(b)(6), or deemed incomplete pursuant to Board Rules 5.402(C)(4) and 2.208.

The Langs contend that Swanton Wind failed to give notice of its petition to all adjoining landowners as required by Board Rule 5.402(B), including two entities that possess conservation easements, development rights, and a right of first refusal to adjoining parcels of land. The Langs further contend that Swanton Wind failed to provide the certification required by Board Rule 5.402(B)(3) that Swanton Wind properly utilized the Swanton grand list to identify adjoining landowners entitled to notice of the petition.

The Langs also assert that Swanton Wind has failed to accurately identify the project parcel and has failed to demonstrate that it has legal control over that parcel. According to the Langs, the testimony of Mr. Belisle is conflicting, stating in one place that he owns the parcel on which the project will be located, yet stating in another that he owns most of land on which it will be located and will be leasing the remaining land from someone else. According to the Langs, this makes it impossible for the Board to fully understand and evaluate the project. Citing to the Board's rule on interconnection, the Langs further contend that Mr. Belisle has not demonstrated that he has a legal interest in the entirety of the project parcel and therefore Swanton Wind is without standing to bring the petition and the Board is without jurisdiction to entertain it.

Lastly, the Langs argue that the petition failed to include testimony that addresses each of the applicable criteria under Section 248 and therefore must be deemed incomplete. The Langs base their argument on their pending objections to the admissibility of certain testimony and exhibits and further contend that the petition and testimony fail to address the criteria regarding the need for the project, greenhouse gas impacts, and alternatives to the project.

Swanton Wind

Swanton Wind contends that its petition and testimony contain sufficient factual allegations addressing each of the criteria under Section 248 to state a claim upon which the Board can grant the relief Swanton Wind has requested and its petition therefore passes muster under V.R.C.P. 12(b)(6).

Swanton Wind also states that its petition was complete when filed, but that in the event the Board determines otherwise, it should be allowed a reasonable opportunity to cure any deficiencies.

Swanton Wind agrees with the Langs that it failed to provide notice of the petition to two adjoining landowners. Swanton Wind asserts that this failure to provide notice was inadvertent, that the notice has since been provided, and that any defect has therefore been cured.

Swanton Wind disagrees with the Langs that it was required to give notice of the petition to the two entities that possess conservation easements, development rights, and a right of first refusal to adjoining parcels of land because those entities are not “fee simple” owners of the parcels in question.

Swanton Wind also argues that, while Board Rule 5.402(B)(3) requires Swanton Wind to make “good faith” efforts to identify adjoining landowners for the purpose of providing notice of the petition, the rule does not require the use of the Swanton grand list in making such identifications. Consequently, Swanton Wind asserts that the certification cited by the Langs is not required in this case because Swanton Wind relied on tax maps and online property data information to identify adjoining landowners instead of the Swanton grand list.

Swanton Wind also argues that a demonstration of site control is not a requirement for a Section 248 petition because the Vermont Supreme Court has ruled that individual property rights are not an issue under Section 248, site control is not a criterion to be addressed under Section 248, and the statute itself contemplates the granting of a certificate of public good in advance of a condemnation action by a utility seeking to construct a project subject to review under Section 248. Swanton Wind further contends that the Langs’ reliance on the site-control requirement of the Board’s interconnection rule is misplaced because this case is being reviewed under Section 248, not Board Rule 5.500, and because the Langs have no standing to

seek enforcement of that rule. Swanton Wind also disagrees with the Langs that the petition fails to properly identify the project parcel, citing to several exhibits including topographic maps and site plan drawings in support of its position.

Lastly, Swanton Wind contends that its petition does in fact address the issues of need, greenhouse gas emissions, and alternatives to the project. To the extent Swanton Wind failed to include a discussion of alternatives to the project in its 45-day prefiling notice as required by Board Rule 5.402(A)(4), Swanton Wind claims that any such deficiency has been cured by including an alternatives analysis in its prefilled testimony.

### **III. Discussion**

For the reasons discussed below, we deny the Lang Motion. We address each issue raised in the Lang Motion separately and explain our reasons for our denial as to each.

#### **1. Failure to notify adjoining property owners**

The Langs assert that Swanton Wind failed to provide proper notice of the petition to two adjoining landowners as well as two entities that hold conservation easements, development rights, and a right of first refusal to adjoining parcels of land (“limited rights”).

We find that Swanton Wind has appropriately cured the lack of notice to the two adjoining fee-simple landowners identified in the Lang Motion by subsequently providing such notice. Swanton Wind provided notice by letter dated January 12, 2017, and the intervention deadline was February 16, 2017, giving these two landowners more than a month to familiarize themselves with the project and decide whether to intervene. Additionally, the project appears to have received widespread publicity so it is unlikely that area landowners would be unaware of the proposal. Given these factors, we find it unlikely that these two adjoining landowners have suffered any prejudice by receiving late notice and decline to dismiss the petition on that basis.

We also deny the Lang Motion with respect to the two entities that hold limited rights to adjacent land parcels. Board Rule 5.402(B) requires Swanton Wind to provide notice that it filed its petition to adjoining landowners. Board Rule 5.402(B)(2) defines adjoining landowners as those owning adjoining lands in fee simple. The legal authority cited by the Langs does not support their position. Chapter 155 of Title 10 authorizes municipalities, state

agencies, and certain organizations to obtain specified property rights to achieve a variety of goals associated with land preservation.<sup>1</sup> The property rights described in that chapter include a variety of fee-simple interests, such as fee simple or fee simple subject to a right of occupancy or leaseback.<sup>2</sup> None of the fee simple interests in the statute encompasses the limited rights described by the Langs. Rather, those rights fall under the statutory authorization to obtain property rights that are less than fee simple. Additionally, the statute also recognizes preemptive rights and rights of purchase as something other than fee simple.<sup>3</sup> The Langs have failed to demonstrate that the two entities holding the limited rights are fee-simple owners of the parcels in question and we therefore deny their motion on this point.

The Langs further contend that Swanton Wind failed to provide the certification required by Board Rule 5.402(B)(3) that Swanton Wind properly utilized the Swanton grand list to identify adjoining landowners entitled to notice of the petition.

We disagree with the Langs' interpretation of Board Rule 5.402(B)(3). The rule states in relevant part, "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." The introductory clause "Unless otherwise shown" is a clear indication that reliance on the grand list is not the only means that may be used to identify adjoining landowners. If the petitioner does not rely on the grand list as described in the rule, the petitioner's efforts may be called into question. In the instant case, the petitioner has acknowledged that two adjoining landowners were inadvertently left off the list of those that were provided notice of the petition, but corrected that error as soon as it was brought to its attention. We see no evidence of a lack of good faith in Swanton Wind's efforts to identify and provide notice to adjoining landowners and therefore deny the Lang Motion on this issue.

## **2. Failure to properly identify project parcel and lack of legal control**

The Langs assert that the testimony of Travis Belisle is inconsistent regarding the extent of his ownership over the project parcel and how much of that parcel actually belongs to

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<sup>1</sup> 10 V.S.A. § 6301.

<sup>2</sup> 10 V.S.A. § 6303(a)(1) – (4).

<sup>3</sup> 10 V.S.A. § 6303(a)(5), (7).

another individual or entity. According to the Langs, this is a failure to adequately identify the project parcel such that the Board is unable to adequately understand and review the proposed project.

We disagree with the Langs. While Mr. Belisle's narrative prefiled testimony does not go into great detail regarding the extent of his ownership of the project parcel versus how much of the parcel will be leased from another individual or entity, we do not find this to be a sufficient basis to grant the Lang Motion.

The Lang Motion is without merit on this point because it fails to acknowledge that the petition and prefiled testimony were accompanied by several exhibits that describe in detail the proposed project's layout and location, including the site plan and elevation drawings, and serve to supplement Mr. Belisle's narrative description of the project parcel.<sup>4</sup> Therefore, we deny the Lang Motion on this point.

We also find no merit in the Langs' contentions regarding lack of site control, Swanton Wind's alleged lack of standing, and the Board's alleged lack of jurisdiction to hear this case. As an initial matter, we note that when the Board conducts a review under 30 V.S.A. § 248, it is engaging in a legislative, policy-making process<sup>5</sup> and is therefore not strictly acting in a judicial capacity. Additionally, the authority to entertain petitions filed pursuant to 30 V.S.A. § 248 is firmly within the Board's jurisdiction.<sup>6</sup> Lastly, a demonstration of site control is not a prerequisite to Board review of a petition filed pursuant to Section 248. Accordingly, we deny the Lang Motion on this point.

### **3. Insufficient evidentiary support**

The Langs base a portion of their argument regarding insufficient evidentiary support on their previously filed objections to the admissibility of certain prefiled testimony and exhibits filed by Swanton Wind. In a separate order, we overrule the Langs' objections to admissibility and therefore deny their instant motion to the extent it is based on those objections.

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<sup>4</sup> Exhibit SW-IAJ-2.

<sup>5</sup> *In re UPC Vermont Wind, LLC*, 2009 VT 19, ¶ 2 (citations omitted).

<sup>6</sup> See 30 V.S.A. §§ 203, 209, and 248.

The Langs also assert that the petition, prefiled testimony, and exhibits fail to address the need for the project<sup>7</sup> and greenhouse gas impacts.<sup>8</sup>

We disagree with the Langs. The testimony of Mr. Zimmerman addresses the need for the project, the renewable energy it will produce, and the demand it will meet. We find that Mr. Zimmerman's testimony is sufficient to survive the Lang Motion on this criterion.

Like the need criterion, we find that the prefiled testimony and exhibits submitted by Swanton Wind on greenhouse gas impacts are sufficient to survive the Lang Motion. The economic impact analysis submitted by Richard Heaps<sup>9</sup> addresses the economic impacts of greenhouse gas emissions should the project be built and operated. Additionally, page 12 of the prefiled testimony of Martha Staskus addresses the question of greenhouse gas impacts from the project. Therefore, the Lang Motion is denied on this point.

#### **4. Alternatives analysis**

The Langs contend that Swanton Wind failed to include an analysis of alternatives to the proposed project in Swanton Wind's 45-day pre-filing notice letter as required by Board Rule 5.402(A)(4).

Swanton Wind does not appear to contest this allegation, but instead argues that any deficiency in the 45-notice letter was cured by the filing of its petition and prefiled testimony, which did contain such an analysis.

Section 248(f) of Title 30 requires petitioners under Section 248 to provide a 45-day advance notice of their intent to file a petition to the municipal and regional planning commissions of jurisdiction where a project will be located. Board Rule 5.402(A) requires that such notice also be provided to affected municipal legislative bodies, and further specifies the required content for such notice, which includes an analysis of alternatives to the proposed project.<sup>10</sup> It appears that Swanton Wind did not include the required alternatives analysis when it provided its 45-day notice to the relevant entities.

We do not view Swanton Wind's failure to include the alternatives analysis in its 45-day notice to the relevant regional planning commission, in this case the Northwest Regional

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<sup>7</sup> 30 V.S.A. § 248(b)(2).

<sup>8</sup> 30 V.S.A. § 248(b)(5).

<sup>9</sup> Exhibit SW-RWH-2

<sup>10</sup> PSB Rule 5.402(A)(4).

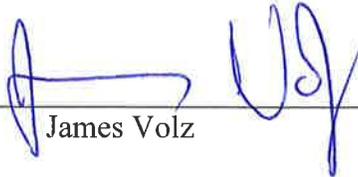
Planning Commission (“NRPC”), or to the Town of Swanton planning commission and legislative body (collectively “the Town”) as fatal to its petition. The purpose of the 45-day notice is to provide information to the relevant entities to assist in their determinations of whether to provide comments or recommendations to the Board, or whether to intervene in a proceeding. In this case, the NRPC and the Town received the 45-day notice and have already decided to intervene in this matter, and both are represented by counsel. Given the specific facts of this case, we deny the Lang Motion based on deficiency of notice.

#### **IV. Conclusion**

For the foregoing reasons, the Langs’ motion to dismiss the petition in this proceeding, or in the alternative to deem the petition incomplete, is denied.

**SO ORDERED.**

Dated at Montpelier, Vermont this 2nd day of March, 2017.

 _____ ) James Volz )	) PUBLIC SERVICE ) )	
 _____ ) Margaret Cheney )		) BOARD ) )
 _____ ) Sarah Hofmann )		

OFFICE OF THE CLERK

Filed: March 2, 2017

Attest: Julie C. Whitney  
Clerk of the Board

*Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) or any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@vermont.gov)*

PSB Case No. 8816 - SERVICE LIST

Parties:

Edward Adrian, Esq.  
Monaghan Safar Ducham PLLC  
156 Battery Street  
Burlington, VT 05401  
eadrian@msdvt.com

(for Selectboard and Planning Commission of  
the Town of Swanton) (for Town of Fairfield)

^Dale Azaria, Esq.  
Vermont Division for Historic Preservation  
1 National Life Drive  
Davis Building, 6th Floor  
Montpelier, VT 05620-0501  
dale.azaria@vermont.gov

(for Vermont Division for Historic  
Preservation)

^Jennifer Belanger, *pro se*  
4 Marcel Drive  
St. Albans, VT 05478

^Diane Bell, *pro se*  
P.O. Box 1603  
Williston, VT 05495  
Diane.lizzyb@gmail.com

^Erynn Boudreau, *pro se*  
13 Rocky Ridge Road  
Saint Albans, VT 05478  
erynn.hale@gmail.com

^Tyrell Boudreau, *pro se*  
13 Rocky Ridge Road  
St. Albans, VT 05478  
erynn.hale@gmail.com

^Mark Bushey, *pro se*  
2499 Highgate Road  
Saint Albans, VT 05478  
markb12@comcast.net

^Mary Bushey, *pro se*  
2499 Highgate Road  
Saint Albans, VT 05478  
marybushey@comcast.net

^David Butterfield, *pro se*  
1954 Sheldon Road  
Saint Albans, VT 05478  
Dave@vttireonline.com

Leslie A. Cadwell, Esq.  
Legal Counselors & Advocates, PLC  
P.O. Box 827  
Castleton, VT 05735  
lac@lac-lca.com

(for Swanton Wind LLC)

^Bruce Collopy, *pro se*  
157 Swizler Point  
Fairfield, VT 05455  
collopyfamilyfarm@gmail.com

^Sally Collopy, *pro se*  
157 Swizler Point  
Fairfield, VT 05455  
collopyfamilyfarm@gmail.com

^Jessica Decker, *pro se*  
2 Marcel Drive  
Saint Albans, VT 05478

^Lance Desautels, *pro se*  
2 Marcel Drive  
St. Albans, VT 05478

^Luc Deslandes, *pro se*  
1914 Sheldon Road, Apt. A  
Saint Albans, VT 05478  
mdandld@comcast.net

^Michelle Deslandes, *pro se*  
1914 Sheldon Road, Apt. A  
St. Albans, VT 05478  
mdandld@comcast.net

^Brian Dubie, *pro se*  
770 McKenzie Road  
Fairfield, VT 05455  
briandubie@gmail.com

^Marianne Dubie, *pro se*  
1086 McKenzie Road  
Fairfield, VT 05483  
grnmtmaple@gmail.com

^Mark Dubie, *pro se*  
1086 McKenzie Road  
Sheldon, VT 05483  
markddubie@gmail.com

^Penny Dubie, *pro se*  
770 McKenzie Road  
Fairfield, VT 05455  
pennydubie@gmail.com

^John K Dunleavy  
Vermont Agency of Transportation  
One National Life Drive  
Montpelier, VT 05633  
[John.Dunleavy@vermont.gov](mailto:John.Dunleavy@vermont.gov)

(for Vermont Agency of Transportation)

^Daniel Dunne, *pro se*  
1185 Davis Avenue  
Dunedin, FL 34698  
dan.m.dunne@gmail.com

^Nancy Dunne, *pro se*  
1185 Davis Avenue  
Dunedin, FL 34698  
nanadd100@gmail.com

^William F. Ellis  
McNeil, Leddy & Sheahan  
271 South Union Street  
Burlington, VT 05401  
wellis@mcneilvt.com

(for City of Burlington Electric Department)

^Edward Ferguson, III, *pro se*  
19 Rocky Ridge Road  
Saint Albans, VT 05478  
sarahferguson333@gmail.com

^Sarah Ferguson, *pro se*  
19 Rocky Ridge Road  
St. Albans, VT 05478  
sarahferguson333@gmail.com

^Kenneth Fox, *pro se*  
1736 Reynolds Road  
Fairfield, VT 05455  
lumar@myfairpoint.net

^Danielle Garrant, *pro se*  
1 Tremblay Road  
Saint Albans, VT 05478

^Ian Garrant, *pro se*  
1 Tremblay Road  
St. Albans, VT 05478

^David A. Goodrich, *pro se*  
2717 Nodyne Drive  
Nashville, TN 37214  
xkejagman68@aol.com

^Dennis Hendy, *pro se*  
P.O. Box 1603  
Williston, VT 05495  
djhendy1@gmail.com

^Cindy Ellen Hill, Esq.  
Hill Attorney PLLC  
144 Mead Lane  
Middlebury, VT 05753  
lawyerhill@yahoo.com

(for Christine Lang) (for Dustin Lang)

^Mary Hunter, *pro se*  
87 Lebel Drive  
Saint Albans, VT 05478

^Paula J. Kane, *pro se*  
12 Farrar Street  
Saint Albans, VT 05478-1540

Melanie Kehne, Esq.  
Office of the Attorney General  
109 State Street  
Montpelier, VT 05609-1001  
melanie.kehne@vermont.gov

(for Vermont Agency of Agriculture, Food and  
Markets)

Aaron Kisicki, Esq.  
Vermont Department of Public Service  
112 State Street  
Montpelier, VT 05620-2601  
aaron.kisicki@vermont.gov

(for Vermont Department of Public Service)

^Judith Luneau, *pro se*  
141 Sweet Hollow Road  
Sheldon, VT 05483  
hillandale@gmail.com

^Patrick Luneau, *pro se*  
141 Sweet Hollow Road  
Sheldon, VT 05483  
hillandale@gmail.com

^Sara Luneau-Swan, *pro se*  
141 Sweet Hollow Road  
Sheldon, VT 05483  
hillandale@gmail.com

^Owen McClain, Esq.  
Sheehey Furlong & Behm P.C.  
30 Main Street  
P.O. Box 66  
Burlington, VT 05402  
omclain@sheeheyvt.com

(for Green Mountain Power Corporation)

^Karen McLaughlin, *pro se*  
90 Lebel Drive  
St. Albans, VT 05478  
lkbmclaughlin@comcast.net

^Leo McLaughlin, *pro se*  
90 Lebel Drive  
Saint Albans, VT 05478  
lkbmclaughlin@comcast.net

Joseph S. McLean, Esq.  
Stitzel, Page & Fletcher, P.C.  
171 Battery Street  
P.O. Box 1507  
Burlington, VT 05402-1507  
jmclean@firmspf.com

(for Northwest Regional Planning  
Commission)

^Frank B. Mehaffey, *pro se*  
32 Lebel Drive  
St. Albans, VT 05478

^Kaye Mehaffey, *pro se*  
32 Lebel Drive  
Saint Albans, VT 05478

^Patricia Messier, *pro se*  
70 Sholan Road  
Saint Albans, VT 05478

^Dolores Nichols, *pro se*  
15 Rocky Ridge Road  
St. Albans, VT 05478  
doloresN81@comcast.net

^Kevin Nichols, *pro se*  
15 Rocky Ridge Road  
Saint Albans, VT 05478  
doloresN81@comcast.net

^Carolyn Palmer, *pro se*  
63 Swanton Hill Road  
Fairfield, VT 05455

^Clark Palmer, *pro se*  
63 Swanton Hill Road  
Fairfield, VT 05455

^Paula Pearsall, *pro se*  
64 Lamoille Terrace  
Milton, VT 05468-3964  
paulapearsall@myfairpoint.net

^Robert Perkins, *pro se*  
573 Simone's Road  
Fairfield, VT 05455  
perkinsrp@yahoo.com

^D. Gregory Pierce, *pro se*  
12 Farrar Street  
St. Albans, VT 05478-1540  
greg.pierce9@myfairpoint.net

(for Vermont National Guard)

^Gonzalo Pinacho  
Vermont National Guard  
Vermont National Guard  
789 Vermont National Guard Road  
Colchester, VT 05446  
gonzalo.pinacho.mil@mail.mil

^Todd W. Poirier, *pro se*  
1992 Sheldon Road  
Saint Albans, VT 05478

^Patricia Rainville, *pro se*  
1952 Sheldon Road  
St. Albans, VT 05478

^Jeanne Royer, *pro se*  
2066 Sheldon Road  
Saint Albans, VT 05478-9704  
jeanneroyer25@gmail.com

David W. Rugh, Esq.  
Stitzel, Page & Fletcher, P.C.  
171 Battery Street  
P.O. Box 1507  
Burlington, VT 05402-1507  
drugh@firmspf.com

(for Northwest Regional Planning  
Commission)

^Suzanne Seymour, *pro se*  
448 White Camps Road  
Fairfield, VT 05455  
planetmassagevermont@gmail.com

^Annette Smith  
Vermonters for a Clean Environment, Inc.  
789 Baker Road  
Danby, VT 05739  
vce@vce.org

(for Vermonters for a Clean Environment, Inc.)

^John A. Smith, *pro se*  
1952 Sheldon Road  
Saint Albans, VT 05478  
johna.smith@newtecgroup.net

^Terrance Smith, *pro se*  
2070 Sheldon Road  
Saint Albans, VT 05478

Alison Milbury Stone, Esq.  
Legal Counselors & Advocates, PLC  
PO Box 194  
Burlington, VT 05402  
Alison@lac-lca.com

(for Swanton Wind LLC)

^Bradley Stott, *pro se*  
4 Marcel Drive  
Saint Albans, VT 05478

^Curtis Swan, *pro se*  
141 Sweet Hollow Road  
Sheldon, VT 05483  
hillandale@gmail.com

^Gilbert Tremblay, *pro se*  
4 Tremblay Road  
St. Albans, VT 05478  
gilmarie@comast.net

^Marie Tremblay, *pro se*  
4 Tremblay Road  
Saint Albans, VT 05478  
gilmarie@comcast.net

Leslie A. Welts, Esq.  
Office of General Counsel, Vermont Agency  
of Natural Resources  
1 National Life Drive, Davis 2  
Montpelier, VT 05620-3901  
leslie.welts@vermont.gov

(for Vermont Agency of Natural Resources)

^Steven Woodward, *pro se*  
2040 Sheldon Road  
Saint Albans, VT 05478  
casewood123@gmail.com

^Motion to Intervene pending.