STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7508

Petition of Georgia Mountain Community Wind, LLC, for a Certificate of Public Good, pursuant to 30 V.S.A. Section 248, authorizing the construction and operation of a 5-wind turbine electric generation facility, with associated electric and interconnection facilities, on Georgia Mountain in the Towns of Milton and Georgia, Vermont, to be known as the "Georgia Mountain Community Wind Project"	))))))))

Order entered: 1/26/2017

ORDER DENYING MCLANE MOTIONS FOR RELIEF

I. Introduction

On June 11, 2010, the Vermont Public Service Board ("Board") issued a Certificate of Public Good ("CPG") that authorized the construction of a wind electric generation facility (the "Project") by Georgia Mountain Community Wind, LLC ("GMCW"), subject to certain conditions, including conditions 23, 24, and 25, which provide as follows:

> GMCW shall construct and operate the Project so that it emits no prominent discrete tones pursuant to American National Standards Institute (ANSI) standards at the receptor locations; and Project- related sound levels at any existing surrounding residences do not exceed 45 dBA(exterior)(Leq)(1 hr) or 30 dBA (interior bedrooms)(Leq)(1 hr).
>
> In the event noise from operation of the Project exceeds the maximum allowable levels, the Petitioner shall take all remedial steps necessary to bring the sound levels produced by the turbine(s) into compliance with allowable levels, including modification or cessation of turbine(s) operation.
>
> GMCW shall submit, for Board approval, a noise monitoring plan to be implemented during the first full year of operation. The plan shall establish a monitoring program to confirm under a variety of seasonal and climatic conditions compliance with the maximum allowable sound levels described above. Parties will have three weeks, from

the date this plan is filed with the Board, to comment on the plan. GMCW cannot commence operations until the plan is approved.[1]

On November 3, 2015, and March 21, 2016, Melodie and Scott McLane filed motions for relief with respect to the sound levels produced by the Project, as well as the protocols governing the resolution of complaints regarding those sound levels (the "November 3 Motion" and "March 21 Motion," together the "McLane Motions").[2]

For the reasons explained below, in today's Order the Board denies the McLane Motions.

II. Procedural History

On November 3, 2015, and March 21, 2016, the McLanes filed the McLane Motions.

On December 1, 2015, GMCW responded to the November 3 Motion ("GMCW Response").

On December 18, 2015, the Department of Public Service ("DPS" or "Department") filed its response to the November 3 Motion ("Department Response").

On April 8, 2016, GMCW filed its response to the March 21 Motion ("GMCW 2nd Response").

On April 18, 2016, the McLanes filed additional comments related to their March 21 Motion ("McLane Reply").[3]

III. Positions of the Parties

McLanes

The McLane Motions seek relief because, according to the McLanes: 1) the sound monitoring that took place during the first year of Project operations failed to measure compliance with the applicable sound standards because the turbines were rarely at full power

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1. *See*, Docket 7508, CPG dated 6/11/10 at ¶¶ 23-25. An amended CPG was issued on November 9, 2012. However, the amendments to the CPG did not affect the conditions at issue in this Order.

2. The McLanes' March 21, 2016, filing also contained a complaint alleging that the Project operated under icing conditions in violation of its CPG and winter operating protocol, which the McLanes assert also resulted in excessive sound levels from the Project. The Board has opened a separate investigation into the Project's operation during icing conditions. *See*, Docket 8734, Order of 5/25/16.

3. The McLane Reply filing also contained additional comments on their complaint about Project operations during icing conditions. As noted previously, the Board is addressing that issue separately from this matter. Accordingly, the Board does not address those complaints in this Order.

output during the monitoring periods;[4] 2) the sound monitoring and complaint resolution protocol (the "Protocol") used to address Project-related sound complaints is too burdensome and does not produce appropriate results;[5] 3) residents living near the Project cannot sleep due to Project sound levels;[6] and 4) the existing sound limit is too high and fails to account for the full acoustic spectrum.[7]

The McLane Motions assert that, based on the claims listed above, the Board should: 1) revise the Protocol to create a direct number for neighbors to call in order to document the exact operational and weather conditions at the time of a complaint; 2) require GMCW to immediately reduce Project output whenever such a complaint is received; 3) require real time, continuous, full-spectrum sound monitoring for the life of the Project; and 4) establish a mechanism for immediately reducing Project power output when neighbors experience sleep disruption.[8]

The McLanes also contend that the relief they seek is warranted because sound level readings they have taken outside their home indicate that the Project has operated well above the 45 dBA one-hour equivalent limit imposed on the Project. According to the McLanes, sound levels from the Project were well in excess of the applicable limit for several hours on March 14, 2016.[9]

Lastly, in the McLane Reply, the McLanes request additional relief in the form of daily curtailment of turbine operations between 8:00 P.M. and 8:00 A.M. subject to a sound level limit

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4. November 3 Motion at 2.

5. November 3 Motion at 3; McLane Reply at 3. The McLane Reply was appended to another document and its pages were not numbered separately. As a result, page 3 of the McLane Reply is numbered as page 9 of 10. Citations to the McLane Reply will use the corrected page number.

6. November 3 Motion at 3-4.

7. November 3 Motion at 4-5. The November 3 Motion also sought to add the City of Burlington Electric Department ("BED") as a party under the belief that BED was the Project operator. BED pointed out that this was not correct in a filing made on November 9, 2015. The March 21 Motion did not repeat the request to join BED. Accordingly, we understand the McLanes to have withdrawn that request and therefore do not address it in this Order.

8. November 3 Motion at 6-7; March 21 Motion at 3; McLane Reply at 4 (original numbered as page 10).

9. McLane Reply at 3 (original numbered as page 9).

of 37 dBA, as well as appointment of independent counsel to represent them in this proceeding.[10]

GMCW

GMCW states that the November 3 Motion seeks to reopen the CPG and the Protocol based on arguments that either were already raised in this proceeding prior to the Board issuing the CPG for the Project, or that the McLanes opted not to raise during the comment period on the proposed Protocol. According to GMCW, neither the Board's Rules nor the Vermont Rules of Civil Procedure allow such a result without a more robust showing.[11]

According to GMCW, the November 3 Motion is in the nature of a request for relief from judgment and should be reviewed under V.R.C.P. 60(b)(6). GMCW asserts that Rule 60(b)(6) does not provide the McLanes with a basis for the relief they seek because the McLanes made a decision not to pursue the issues they raise in the November 3 Motion at the time they were originally under consideration by the Board. According to GMCW, the McLanes "had every opportunity to bring their concerns about the complaint protocol and sound standard to the Board," but chose not to do so.[12]

GMCW also asserts that, even if the November 3 Motion were not barred as an attempt by the McLanes to revisit their previous litigation decisions, the claims asserted therein do not constitute the type of extraordinary circumstances that would justify relief under V.R.C.P. 60(b)(6). GMCW first states that the November 3 Motion should be denied because it improperly construes the Protocol as requiring monitoring during times of maximum power output, rather than maximum sound output. Second, GMCW argues that, contrary to the McLanes' assertions, the Protocol is not burdensome and only requires that a complaining party "provide some basic data about the time, date, and location of the complaint, along with a description of the weather conditions and offending sound." Third, GMCW argues that statements in the November 3 Motion regarding other neighbors of the Project being unable to

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10. McLane Reply at 4 (original numbered as page 10).

11. GMCW Response at 1.

12. GMCW Response at 4-5.

sleep are "rumors and innuendo" that the Board cannot consider in its decision, that the McLanes do not have standing to represent anyone other than themselves, and that their statements about other neighbors constitute inadmissible hearsay. Fourth, GMCW asserts that the McLanes' request to alter the applicable sound standard is improper under Rule 60(b)(6) because it is a matter that was already considered and decided by the Board.[13]

In its April 8, 2016, response to the March 21 Motion, GMCW asserts that the McLanes' request for relief should be denied because the complaint described in the March 21 Motion is based on unreliable data. According to GMCW, the sound level readings taken by the McLanes are not reliable because they do not represent Project-only sound levels and therefore cannot be used to determine Project compliance with the applicable sound standards. GMCW also claims that historical data shows that total sound levels outside the McLane residence can be in excess of 55 dBA even when the wind speeds at the Project site are low.[14]

Department

The Department recommends that the Board deny the November 3 Motion because, at this time, there is no basis to conclude that operation of the Project results in an undue, adverse impact on public health and safety.[15]

According to the Department, the November 3 Motion seeks to reopen the question of whether the sound standard imposed by condition 23 of the Project's CPG is protective of public health and safety. The Department asserts that initiating such an inquiry is only appropriate when information is presented that demonstrates that Project operations result in an undue, adverse impact on public health and safety. According to the Department, the November 3 Motion presents no such information.[16]

The Department states that the McLanes "provide no evidence to suggest that the project's operation has created an undue adverse effect on *public* health, aside from their own

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13. GMCW Response at 5-9.

14. GMCW 2nd Response at 2-4.

15. Department Response at 1, 7. The Department did not file a response to the March 21 Motion.

16. Department Response at 3-4.

personal experience, and allegedly that of a neighbor."[17] The Department further states that it has investigated "whether sufficient evidence exists to suggest that the CPG noise limits may not be adequately protective of public health and safety, and it has not found such evidence."[18]

At the time of its filing, the Department observed that it had received approximately 77 complaints related to sound levels from the Project, of which 76 originated from just three households. According to the Department, "the limited number of GMCW complainants contacting the Department does not support a finding of a public health impact."[19]

The Department notes that it has also consulted with the Vermont Department of Health ("VDH") and has "relied on VDH's expertise in assessing potential public health impacts at this, and other electric generation or telecommunications facilities in the state."[20] The Department states that VDH has no evidence at this time that suggests that Project operations are having an undue, adverse impact on public health.[21]

The Department also opposes any relief that would provide residents access to real-time monitoring information and turbine shutdown capabilities because the relief is inconsistent with the requirements of condition 23 that sound level readings be "scrubbed" to isolate Project-only sound levels, and that compliance be measured against a one-hour equivalent sound level. The Department is also critical of the McLanes' request to revisit the overall sound limits established by condition 23 because it "is not clear about what issues the McLanes seek to review beyond the potential inclusion of infrasound and amplitude modulation as part of the CPG noise limit."[22] Additionally, according to the Department, "the Motion does not identify any basis to question the utility and fairness of the 'project-related' and one-hour Leq average requirements."[23]

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17. Department Response at 4 (emphasis in original).

18. *Id.*

19. Department Response at 3, 5.

20. Department Response at 5.

21. *Id.* The Department notes that VDH continues to study the issue.

22. Department Response at 7.

23. Department Response at 7.

The Department concludes its analysis with the observation that the Board is not the proper venue in which the McLanes should be seeking relief because there has been no information presented that supports a determination that the Project is having an undue impact on the health and safety of the general public. Therefore, the Department suggests that the McLanes' complaints would be more appropriately advanced in civil court in the form of a private nuisance or personal injury claim.[24]

IV. Discussion

The McLane Motions seek relief in the form of: 1) revisions to the Protocol to create a direct number for neighbors to call to document the exact operational and weather conditions at the time of a complaint; 2) a requirement that GMCW immediately reduce Project output in response to such a complaint; 3) real time, continuous, full-spectrum sound monitoring for the life of the Project; and 4) a mechanism for immediately reducing Project power output when neighbors experience sleep disruption.[25]

Although we are mindful of the distress the McLanes describe with respect to their experiences living in proximity to the Project, we deny the McLane Motions because they lack a legal foundation. The motions were not filed within a reasonable amount of time after the final judgment was entered in this Docket and do not set forth the kind of extraordinary circumstances that warrant relief. As such, the McLane Motions are an attempt to correct previous litigation decisions the McLanes made at the time the Board was originally considering both the applicable sound standards and the Protocol.

The McLane Motions seek relief from the Board's final Order and CPG authorizing the construction and operation of the Project. Specifically, the McLanes request that we significantly alter the terms and conditions related to sound levels under which the Project must operate.

Requests for relief from judgment are reviewed pursuant to V.R.C.P. 60(b), which provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the

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24. Department Response at 1, 7.

25. November 3 Motion at 6-7; March 21 Motion at 3; McLane Reply at 10.

> following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Motions for relief under reasons (1), (2), or (3) of Rule 60(b) must be filed not more than one year after the judgment, order, or proceeding was entered or taken.[26] The Order approving the Project was entered on June 11, 2010, and the Order approving the Protocol was entered on December 20, 2012. As a result, the McLanes are time-barred from seeking relief for the first three enumerated reasons. Additionally, there is no allegation that the Board's Orders approving the Project and the Protocol are void or have been satisfied or discharged, or that a prior supporting judgment has been reversed, or that it is no longer equitable for the Orders to have prospective application. Therefore, the only potential avenue for the relief sought by the McLanes is found in Rule 60(b)(6).

Rule 60(b), in general, "is not designed to afford parties simply a second, better opportunity to litigate issues already contested and decided in a previous proceeding,"[27] and "should be applied only in extraordinary circumstances."[28]

More specifically, Rule 60(b)(6) is not an "open invitation to reconsider matters" decided during the technical hearing phase of this proceeding.[29] "Rather, Rule 60(b)(6) is intended to accomplish justice in extraordinary situations that warrant the reopening of final judgments after a substantial period of time."[30] However, a motion under Rule 60(b)(6) must be made within a

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26. V.R.C.P. 60(b).

27. *Pirdair v. Medical Center Hosp. of Vt.*, 173 Vt. 411, 415 (2002).

28. *John A. Russell Corp. v. Bohlig*, 170 Vt. 12, 24 (1999) (citations omitted).

29. *Olde & Company, Inc. v. Boudreau*, 150 Vt. 321, 324 (1988).

30. *Riehle v. Tudhope*, 171 Vt. 626, 627 (2000) (citations omitted).

reasonable time. Whether a motion is filed within a reasonable time must be determined based on the facts and circumstances of a given case.[31] And, while the grounds for relief under Rule 60(b)(6) "are broad and the rule must be interpreted liberally to prevent hardship or injustice, there are necessarily limits on when relief is available."[32] Certainty and finality must be considered so that litigation can reach its end.[33] Accordingly, relief will not be granted "'from tactical decisions that in retrospect may seem ill advised.'"[34]

The final Board Order establishing the sound level limits for the Project was issued on June 11, 2010.[35] On August 6, 2010, the Board issued an Order denying a reconsideration request that, in part, related to the sound standards applicable to the Project. The Order approving the Protocol was issued on December 20, 2012. The Project commenced operations on December 31, 2012. The McLane Motions were filed on November 3, 2015, and March 21, 2016, approximately three years after the Project commenced operations. According to the McLanes, they have filed approximately 25 sound-related complaints since the Project began operations at the end of 2012, and they "could have filed dozens more."[36] It is clear that the McLanes had concerns about the sound standards and the Protocol early on in Project operations. However, the McLanes did not file their first motion seeking relief from the Board's Orders approving the Project's sound limits and the Protocol until almost three years later, with no explanation for the delay. Given the facts and circumstances of the case, we conclude that a three-year delay in filing their requests for relief, without any explanation for that delay, cannot be considered a request made within a reasonable time. GMCW should be able to rely on the

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31. *Riehle*, 171 Vt. at 627, 630 (citations omitted).

32. *Richwagon v. Richwagon*, 153 Vt. 1, 4 (1989) (citations omitted).

33. *Richwagon*, 153 Vt. at 4 (citations omitted).

34. *Richwagon*, 153 Vt. at 4 (*quoting Okemo Mountain, Inc. v. Okemo Trailside Condominiums, Inc.*, 139 Vt. 433, 436 (1981)).

35. *See* Docket 7508, Order of 6/11/10 at 55-58.

36. March 21 Motion at 3.

finality of the Board's earlier Orders absent compelling circumstances justifying the McLanes' delay in seeking the relief they now request – circumstances that have not been presented.

We acknowledge that the McLanes filed their March 21 Motion based on alleged violations of the sound level limit on March 14, 2016. If the McLanes were asking the Board to investigate whether a violation occurred, and if so, to impose a civil penalty on GMCW pursuant to 30 V.S.A. § 30, we would consider the request timely.[37] However, the relief the McLanes seek in the March 21 Motion is substantively identical to that sought in the November 3 Motion – a revision of the sound standards and Protocol applicable to the Project. The concerns underlying that request were known to the McLanes shortly after the Project commenced operations and are not related to an alleged violation at a single point in time. Accordingly, the March 21 Motion fails because it too was not filed within a reasonable time of the issuance of the Board's Orders from which the McLanes now seek relief.

The McLane Motions also fail because they do not establish the type of extraordinary circumstances that would justify reopening this proceeding to reconsider the sound standards or Protocol in the manner requested. First, the sound standards and Protocol are intended to protect the public health and safety. Thus, in order to justify reopening the record in this proceeding to reexamine the standards and Protocol, a showing must be made that, notwithstanding compliance with these standards, the Project is having an undue, adverse impact on public health and safety. The Department reports that it has received approximately 77 sound-related complaints regarding the Project, of which 76 were from just three households. The McLanes acknowledge that they lodged approximately 25 of those complaints. While the number of complaints may raise concerns, no party has presented evidence demonstrating that the sound standards are not protective of public health and safety. Therefore there has been no demonstration of the type of extraordinary circumstances that would justify the relief sought by the McLanes.

Second, we are not persuaded by the McLanes' assertion that the complaint process set forth in the Protocol is unduly burdensome. The Protocol requires that a complainant provide

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37. The McLanes' complaints related to March 14, 2016, allege both increased sound levels from the Project and operation of the turbines with ice accumulating on the blades. The Board is looking into the operational conditions of March 14, 2016, as a separate matter. *See* Docket 8734, Order of 5/25/16.

basic information regarding the time and location of the complaint, a description of the sound complained of, and a description of the weather conditions at the time of the complaint. The McLanes have made no showing as to why this requirement is unduly burdensome or how it gives rise to the type of extraordinary circumstances that would justify relief under Rule 60(b)(6).

Third, on its face, the McLanes' request for relief reflects a misunderstanding of how sound monitoring was performed during the first year of Project operations. The McLanes assert that the monitoring was faulty because the turbines were not operating at maximum power output enough of the time when monitoring was taking place, resulting in an inaccurate understanding of the true sound levels from the Project. However, the Protocol does not require monitoring at maximum power output. Rather, it requires that monitoring occur when the turbine sound output is within one decibel of its maximum.[38] Therefore, the McLane Motions fail to demonstrate that the sound monitoring conducted pursuant to the Protocol failed to capture accurate measurements of the Project's sound output.

Fourth, the data collected by the McLanes on March 14, 2016, cannot be used as a basis for assessing compliance of the Project with the applicable sound standards, a matter which we view as separate and apart from the question of the appropriateness of the standards and Protocol. The information collected by the McLanes cannot be used to assess compliance because the McLanes did not isolate Project-only sound levels pursuant to the procedures set forth in the Protocol. The Protocol requires rigorous analysis of sound data to ensure that only Project-related sound levels are being compared against the allowable limits. Even with the McLanes' asserted efforts to minimize background sound when taking sound level readings, it does not necessarily follow that the sound levels registered on their monitor do not reflect a combination of Project sound levels and other existing background sound levels occurring both naturally in the environment and as a result of human activity.

Our consideration of whether the McLane Motions establish the type of extraordinary circumstances that would warrant relief under Rule 60(b)(6) is informed in part by the extraordinary nature of the relief sought by the McLanes. The McLanes are seeking to revise the existing sound standards and Protocol, which were established based on a fully developed

38. Protocol at 2.

evidentiary record in a litigated proceeding. The substantive effect of instituting the complaint process urged by the McLanes would be that the McLanes and some limited number of unidentified neighbors would at times essentially assume operational control over the facility. To reopen this proceeding to consider such extraordinary relief without the benefit of a compelling *prima facie* showing of extraordinary circumstances would subvert the purpose of Rule 60(b), which is to ensure that the reliability of a final judgment is only disturbed for very limited and compelling reasons.

Lastly, the McLane Motions must be denied because Rule 60 is not intended to afford litigants an opportunity to correct decisions they made during the litigation process that in hindsight may seem ill advised.[39] The McLanes were parties to this proceeding at the time the sound standards were litigated, and continued to be parties throughout the time the Protocol, which also contains the sound standards, was being reviewed and considered by the Board. The McLanes had ample opportunity to oppose or advocate for changes to the standards and the Protocol at the time the Board was reviewing the Protocol but chose not to do so. Rule 60(b)(6) is not intended to create an opportunity after final judgment to contest the standards and the Protocol on grounds that could or should have been raised prior to final judgment or on a more timely basis after final judgment. This litigation must come to an end at some reasonable point so that GMCW can rely on the finality of the Board's decision in conducting its operations. Absent a compelling demonstration of hardship or injustice in the form of an undue, adverse impact on the health of the public, there is no legal basis for permitting the McLanes an additional opportunity to now reopen our final Order in this case to relitigate matters previously decided.

In reaching our decision in today's Order, we do not disregard the experiences the McLanes have described. Rather, our decision today has been guided, as it must be, by the statute applicable to the construction and operation of generation facilities in Vermont – namely, 30 V.S.A. § 248. Under that statute we must consider whether a facility will have an undue, adverse impact on public health and safety. On its face, the public health standard is not intended

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39. *Richwagon*, 153 Vt. at 4 (*quoting Okemo Mountain, Inc. v. Okemo Trailside Condominiums, Inc.*, 139 Vt. 433, 436 (1981)).

to prevent any and all impacts to every individual. As a result, we conclude that the individuals who have voiced complaints about sound levels from the Project do not collectively raise a public health concern that provides a basis for reopening this proceeding to grant the relief sought by the McLane Motions. We are mindful of the distress the McLanes have expressed concerning their circumstances. However, the Board has "only such powers as are expressly conferred upon it by the Legislature, together with such incidental powers expressly granted or necessarily implied."[40] The Board's authority derives from statute, and not from the common law. As a result, the Board's authority does not extend to reviewing claims of personal injury or private nuisance.[41] Nothing in our Order today prevents the McLanes from seeking any individual relief that may be available to them in a forum that has the requisite authority to review their personal circumstances and to take action as may be warranted.

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40. *Green Mountain Power Corp. v. Sprint Communications*, 172 Vt. 416, 419 (2001) (citing *Trybulski v. Bellows Falls Hydro–Electric Corp.*, 112 Vt. 1, 9 (1941)).

41. *Id.*

Dated at Montpelier, Vermont, this 26th day of January, 2017.

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PUBLIC SERVICE

BOARD

OF VERMONT

OFFICE OF THE CLERK

FILED: January 26, 2017

ATTEST: Judith 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) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@vermont.gov)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and Order.

PSB Docket No. 7508 - SERVICE LIST

Sent 1/26/2017 DMM

Parties:

AV 1/25/17

Aaron Kisicki, Esq.
Vermont Department of Public Service
112 State Street
Montpelier, VT 05620-2601

Brian S. Dunkiel, Esq. (For Georgia Mountain Community Wind, LLC)
Andrew N. Raubvogel, Esq.
Dunkiel Saunders Elliott Raubvogel & Hand, PLLC
91 College Street, PO Box 545
Burlington, VT 05402-0545

~~Judith Dillon, Esq.~~
~~David Englander, Esq.~~
Vermont Agency of Natural Resources
1 National Life Drive, Davis 2
Montpelier, VT 05620-3901

Joseph S. McLean, Esq. (For Town of Georgia)
Stitzel Page & Fletcher, PC
171 Battery Street, P.O. Box 1507
Burlington, VT 05402-1507

Sanford Miller, Town Manager
Town of Milton
43 Bombardier Road
Milton, VT 05468-3205

William F. Ellis, Esq. (For City of Burlington Electric Department)
McNeil, Leddy & Sheahan
271 South Union Street
Burlington, VT 05401

Greta Brunswick
Northwest Regional Planning Commission
155 Lake Street
St. Albans, VT 05478

~~Daniel P. Richardson, Esq.~~
~~Tarrant, Gillies, Merriman & Richardson~~
~~PO Box 1440~~
~~Montpelier, VT 05601-1440~~

(For George A. Wimble, Kenneth N. Wimble, Kenneth and Virginia Mongeon, Daniel and Tina FitzGerald, Jane Fitzgerald, and *Scott and Melodie McLane)

Docket ~~PSB~~ ✓
~~BULK~~
BINDER ✓
STAFF ✓
COMPUTER ✓
~~WEB~~

Kevin S. and Cynthia L. Cook, *pro se*
23 Hillside Place
Milton, VT 05468

Matthew and Kimberly Parisi, *pro se*
1627 Georgia Mountain Road
Fairfax, VT 05454

~~C. Daniel Hershenson, Esq.~~
~~Nathan H. Stearns, Esq.~~
~~Hershenson, Carter, Scott & McGee, P.C.~~
~~PO Box 909~~
~~Norwich, VT, 05055-3344~~

(For Scott McLane for purposes relating to determining appropriate set-back distance only)

Morris L. Silver, Esq.
Stage Road - P.O. Box 606
Benson, VT 05731-0606

(For Central Vermont Public Service Corporation)

*Notice of Appearance pending.

Interested Persons:

James Volz, Sarah Hofmann, Margaret R. Cheney, Board Members
John Cotter, David Watts, PSB

Kenneth A. Nolan
City of Burlington Electric Department
585 Pine Street
Burlington, VT 05401

(All notices and orders)

Darlene Ross, *pro se*
Citizens for the Preservation of Georgia Mountain
7 Edgewater Terrace
Milton, VT 05468

John Zimmerman
Vermont Environmental Research Associates
1209 Harvey Farm Road
Waterbury Center, VT 05677

George A. Wimble, II
P.O. Box 22
Fairfax, VT 05454

Pam & Jeff Gratton
732 Georgia Mtn. Rd.
Fairfax, VT 05454

Claudine C. Safar, Esq. (For Bob and Tammy Avonda)
Lynn Lynn & Blackman, PC
76 St. Paul Street, Suite 400
Burlington, VT 05401

Justin Lindholm (Attendee at site visit)
PO Box 6166
Rutland, VT 05702

Reggie Johnson
Shirley Phillips
1198 Georgia Mountain Road
Fairfax, VT 05454

Scott & Melodie McLane
1179 Georgia Mountain Road
Fairfax, VT 05454

Daniel & Tina Fitzgerald
PO Box 77
Milton, VT 05468

Kenneth & Virginia Mongeon
20 Ted Road
Milton, VT 05468

~~JoAnn Q. Carson (Court Reporter)~~
11 Northshore Drive
Burlington, VT 05408

Kim Sears (Court Reporter)
18 Paddock Lane
Williston, VT 05495