STATE OF VERMONT
PUBLIC SERVICE BOARD

CPG #NMP-6633

Application of Seymour Lake Solar LLC for	**)**
a certificate of public good, pursuant to 30 VSA	**)**
§§219a and 248 and Board Rule 5.100 for a 500kW	**)**
interconnected group net-metered photovoltaic	**)**
electric power system in Morgan, Vermont	**)**

MEMORANDUM IN SUPPORT OF THE TOWN OF MORGAN'S MOTION FOR RECONSIDERATION

Now Comes the Town of Morgan and does hereby submit this Memorandum in support of its Rule 59 Motion for Reconsideration submitted contemporaneously herewith. The legal standard for reconsideration is set out in that Motion. In further support of the Motion, Affidavits of witnesses for the Town are appended hereto.

CONTENTS

III. The present Final Order and CPG must be reconsidered, as they evince a manifest error of law in dismissing issue regarding deeded water rights on the Project locus parcel, which implicates both the Applicant's lawful site control as well as unconstitutional taking and thus is an issue pertaining to consideration of public good. **p.24**

IV. The Final Order and CPG should be rescinded and the matter set for hearing: The record lacks sufficient evidence on which to make positive finding on the §248 criteria of historical sites until the archaeological investigation is complete.

V. The Final Order and CPG should be rescinded and the matter set for hearing: The record sufficiently raises substantive, specific impacts on the §248 criteria regarding wetlands, water resources, and soil erosion.

VI. The Final Order and CPG should be rescinded and the matter set for hearing: The record sufficiently raises substantive, specific impacts on the §248 criteria regarding orderly development and aesthetics.

VII. The Final Order and CPG should be rescinded and the matter set for hearing: The PSB does not have authority to waive hearing all together; the record reflects a substantial showing of material issues warranting a hearing; and due process was violated where Town representatives were told by the PSB that a hearing would be held, but the CPG issued without hearing.

a) The PSB's statutory authorization to "modify" hearing process does not extend to empowerment to eliminate public hearings and deeply curtail technical hearings, such as the denial of hearing here.

b. Hearing should have been granted where the Town's comments, and other materials on the record, make a substantial showing of significant issues pertaining to review criteria.

c. Due process was violated where the Town acted in reliance on the Board members' clear statements at the site visit that a hearing would be forthcoming, but the CPG was issued without a hearing.

VIII. The Final Order and CPG should be rescinded: The record lacks sufficient information on which to base an affirmative finding that the Project is in the public good.

CONCLUSION

MEMORANDUM

INTRODUCTION

The Town of Morgan has moved pursuant to the Vermont Rules of Civil Procedure Rule 59 that this Board reconsider its Order and CPG of 8/26/2016 regarding this matter. Such reconsideration is warranted by numerous errors of law and fact embodied in such Order and CPG, as more fully set forth below. The Order and CPG should be rescinded, and the Application denied due to having been submitted in violation of VEC's net metering cap limitations; or alternatively, set for technical hearing with opportunity for submission of prefiled testimony and discovery.

The Town of Morgan hereby repeats and incorporates by reference its prior submitted comments in this Docket; any failure to raise an issue herein that was previously raised by the Town in its comment letters is not waived by that omission in this filing. The Town objects to the Final Order and CPG in regards to each factual and legal point on which the Final Order and CPG did not adopt the comments presented by the Town.

I. The present Final Order and CPG must be reconsidered, as they evince manifest errors of law and fact in allowing this Application to proceed in violation of 30 VSA §219 net metering cap limitations and group net-metering requirements.

A. Net Metering Cap Violation

The Vermont net metering statute, 30 VSA §219a, as applicable to this Project, states:

> (h)(1) An electric company:

> (A) Shall make net metering available to any customer using a net metering system or group net metering system on a first-come, first-served basis until the cumulative output capacity of net metering systems equals 15 percent of the distribution company's peak demand during 1996; or the peak demand during the most recent full calendar year, whichever is greater. However, after reaching this cap, an electric company may continue to accept solar net metering systems of 15 kW or less without prior Board approval. For other net metering systems, the Board may raise the 15 percent cap on petition of an electric company. In determining whether to raise the cap, the Board shall consider the following:
>
> (i) the costs and benefits of net metering systems already connected to the system;
>
> (ii) the potential costs and benefits of exceeding the cap, including potential short- and long-term impacts on rates, distribution system costs and benefits, reliability, and diversification costs and benefits; and
>
> (iii) the environmental benefits and costs.

30 VSA §219a(h)(1).

However, that statute then has a specific provision regarding the allocation of net metering capacity towards that cap for electric cooperatives -- such as the operative utility here, the Vermont Electric Coop. Under this specific provision, an electric coop that engages in a pilot project shall have that pilot project counted as 4% of its capacity towards that 15% net metering cap, with the remainder, that is, at most 11%, evenly divided between calendar years 2014, 2015 and 2016. The statute states as follows:

> (n) An electric cooperative under chapter 81 of this title may engage in a pilot project involving a solar generation facility or group of solar generation facilities to produce power to be consumed by the company or its customers.
>
> (4) If an electric cooperative elects to implement a pilot project under this subsection, then:
>
> > (A) the allocation of the pilot project toward the cooperative's cumulative output capacity under subdivision (h)(1)(A) of this section shall be four percent; and
> >
> > (B) any remaining unallocated capacity of the cooperative under subdivision (h)(1)(A) of this section as of the effective date of this subsection shall be allocated equally among calendar years 2014, 2015, and 2016, with any unused capacity in 2014 carried forward to and allocated equally between the other two years.

30 VSA §219a(n)(4).

The Department in the present case submitted comments requesting that the CPG in this case be subject to conditions "related to Vermont Electric Cooperative, Inc.,'s ("VEC") net-metering cap. This Board then noted that these proposed conditions "are no longer relevant given that the CPG will be issued in 2016, not 2015." *8-26-2016 Order, fn. 4.*

This footnoted finding contravenes this Board's prior findings regarding VEC's net-metering cap, and compounds this Board's prior and ongoing procedural error in regards to the handling of VEC's net-metering cap.

VEC calculates its statutory net metering cap based on the *date of CPG application,* not on the date the CPG is granted. *NMP-7180, letter of Lisa Morris, VEC Energy Services Planner, March 24, 2016.* That method had been effectively adopted, by an inappropriate procedure, by this Board in *Application of Fournier and Sons, Inc., Docket CPG #NM-6221 Order of 9/21/15.*

The application for the present Project was filed, according to this Board, on September 4, 2015 *(Order of 8/26/2015 p. 1)*, and according to VEC, on September 8, 2015 *(NMP-7180, attachment to letter of Lisa Morris, VEC Energy Services Planner, March 24, 2016).* In either case this application for a CPG was adopted prior to this Board's ruling in *Fournier* on September 21, 2015. Yet the application for a CPG for this Project was filed well after VEC reached its 2015 cap in the late spring of 2015. *Application of Fournier and Sons, Inc., Docket CPG #NM-6221 Order of 9/21/15, p.1.*

The Application for this Project was accordingly unlawfully submitted in excess of VEC's 2015 net-metering cap. The Application should have -- and on reconsideration, should be -- rejected as failing to meet §219 requirements.

Well after the submission of the Application for this Project, which should have been rejected as being in excess of the net-metering cap, this Board then engaged in what effectively comprised either a rulemaking proceeding without following lawful rulemaking notice procedures, or a decision to allow VEC to exceed their 2015 cap but without going through the statutorily-required petition and finding process to do so.

In the *Application of Fournier and Sons, Inc., Docket CPG #NM-6221 Order of 9/21/15,* at p. 4, this Board adopted a new procedure by which VEC could accept applications for interconnection in 2015 in excess of the 2015 cap, but apply those applications to their 2016 net metering cap. This Board adopted this new rule, or over-the-cap process, for the convenience of the DPS which "wishes to avoid a flood of applications in early January 2016." *Id. p. 3.*

The ruling *Application of Fournier and Sons, Inc., Docket CPG #NM-6221 Order of 9/21/15* far exceeded the scope of determining the status of that one single application before this Board; it created a rule regarding the process of VEC over-the-net-metering-cap applications. It therefore comprised *de facto* rulemaking without appropriate lawful rulemaking notice, hearing, and adoption. Although it applied to anyone wishing to submit a CPG application in 2015 after the 2015 net

metering cap was met in VEC territory, there was no public notice prior to its adoption.

"Because of the general applicability of a rulemaking proceeding, it can have a broader effect, beyond the named parties" of a contested case. *Beaupre v. Green Mountain Power, 172 Vt. 583 (2001).* Agency statements generally applicable to *classes* of individuals or entities also comprise rulemaking. *Parker v. Gorczyk, 173 Vt. 477 (2001).* Although here the 'rule' would only be applicable to one utility and thus not an "agency statement of general applicability" it is still a rule. *3 VSA §801(b)(9).* This point is underscored by the fact that §219 contains separate provisions regarding net-metering cap annual allocations pertaining to electric cooperatives, of which there are only two; a rule pertaining to this process will by necessity be applicable only to the two electrical cooperatives and not to all other utilities in the state.

Since VEC calculates its net-metering cap database on the platform of date-of-CPG-application, the request of VEC and the DPS in *Application of Fournier and Sons, Inc., Docket CPG #NM-6221 Order of 9/21/15* to continue processing applications in 2015 over the cap was, effectively, a request by VEC to exceed its net metering cap in that year -- and yet this request did not follow the petitioning process of *§219a(h)(1)*. No public notice was made regarding the request, and this Board did not make the statutorily-required findings upon which the grant of such petition must be grounded.

In short, this Application was submitted at a time when VEC was rejecting applications as being in excess of their 2015 net metering cap. It should have been rejected outright at this time. This Board then retroactively either *de facto* adopted a rule in violation of rulemaking process, or *de facto* granted VEC permission to exceed their 2015 cap; either way, in the context of a single CPG application which did not provide any notice to the public and stakeholders in the VEC net-metering

application process, this Board permitted VEC to process applications in 2015 which were above the cap.

This Application should have been rejected at the time of receipt -- at the time of filing the Application for CPG -- and should accordingly be rejected now on reconsideration. The after-the-fact justification of acceptance of the Application was produced by an unlawful process, and this Application should not be permitted to benefit from that process.

B. Group Net-Metering Requirements

This application also does not meet the criteria of a group net-metering solar electric power system under §219a, and this Application should also be rejected on reconsideration on those grounds. Board Rule 5.102 defines group net metering as follows:

> (H) "Group net metering" means **a group of customers, or a single customer with multiple electric meters**, located within the same electric company service territory, where the customer or customers have elected to combine meters in order to offset that billing against a net-metered system.

This Board's final Order in this Application indicates at Finding 3 that "The Applicant has identified the **meters** to be included in the group by number and location." The Applicant here, however, has identified only *one* customer with *one* meter, and one customer with one meter does not comprise a "group" any more than one bird makes a flock. In the present case, the Applicant initially identified that one customer and one meter to be Jay Peak -- an assertion which turned out to be materially false. After then-executive of Jay Peak, Bill Stenger, publically denied affiliation with this solar project, and this was pointed out in the Town of Morgan

comments, the Applicant's November 16, 2105 Response to Comments withdrew their assertion that Jay Peak was the customer, and now states that the one meter other than the service production meter affiliated with the array "will be Cory Carpenter Sr.'s meter, VEC Account #308745601."

Regardless of Applicant's initial material misstatement regarding the project off-taker, they still identify only one customer and one customer meter. This does not comprise a group.

Furthermore, the PSB Rules definition of "net metering system" is:

> (L) "Net metering system" means a facility, as defined in this subsection, that is no more than 500 kW capacity; operates in parallel with facilities of the electric distribution system; is intended primarily to offset part or all of the customer's or group's own electricity requirements; is located on the customer's or a member of the group's premises; and employs a renewable energy source produced using a technology that relies on a resource that is being consumed at a harvest rate at or below its natural regeneration rate pursuant to 30 V.S.A. § 8002(2); or is a combined heat and power system with a capacity up to 20 kW that meets the definition of a combined heat and power facility under 10 V.S.A. § 6523(b)(2). A net metering customer or group may employ one or more net metering systems.

The Project is clearly not located on Mr. Carpenter's "premises." It comprises neither a group of customers, or a single customer with multiple meters. It is one customer and one meter. The proposal accordingly does not meet the Board's required elements for comprising a 'group net metering' facility.

The Public Service Board's explanation of net metering posted on the website repeats this focus on the consumer's premises, stating:

> **In practice, net metering allows the owners of certain small electric generating systems to receive credit for the electricity produced by those systems, above what the owners consume *on the premises*.**

http://psb.vermont.gov/utilityindustries/electric/backgroundinfo/netmetering (Emphasis added.)

This definition is consistent with the Federal Public Utility Regulatory Policies Act of 1978 (PURPA), as amended in relative part by the Energy Policy Act of 2005(EPACT), which states as the federal standard:

> **Electrical utilities shall make available upon request net metering service to any electric consumer that the electric utility serves. For purposes of this paragraph, the term "net metering service" means service to an electric consumer under which the electric energy *generated by that electric consumer from an eligible on-site generating facility* and delivered to the local distribution facilities may be used to offset electric energy provided by the electric utility to the electric consumer during the applicable billing period.**

16 USC §2621(d)(11). (Emphasis added).

The Vermont Public Service Department's explanation to the public of what net metering is and how it works reflects the purpose of customers generating their own power primarily for their own use, and then being able to access utility-generated power when their own production falls short, or selling excess power into the system when the customer generates more than he or she will use in that billing cycle. The illustration accompanying the Department's public explanation shows the anticipated typical net metering project -- a solar panel on a customer's

residential rooftop.

http://publicservice.vermont.gov/topics/renewable_energy/net_metering

To allow an electrical generation facility to proceed as a net metering facility for the benefit of a 'consumer' if that consumer engages in non-existent or miniscule electric consumption for the primary purpose of creating marketable credits would comprise a "practice designed or intended to circumvent the statute", *Order, CPG #NM-5017, p. 3,* and should not be the basis for a Certificate of Public Good.

Accordingly the "consumer" being served by this project must be identified so that this Board, and the stakeholders, can determine whether the project is on that consumer's 'premises' and whether it is 'primarily to offset' that consumer's electric usage.

Net metering projects are analogous to 'home occupations' under zoning regulations. Town zoning regulations allow homeowners to operate businesses, within certain parameters, on their own properties because this is a fundamental part of the Vermont rural economic and social culture. The home-occupation homeowner can have employees or offer products for sale within the parameters set by town zoning regulations and state statute. However, a homeowner can not lease their front lawn to a neighbor and have the neighbor's business on the leased land qualify as a 'home occupation.'

Similarly the definition of 'net metering systems' demonstrates that its intention is to allow room for a person who is installing a solar generation facility on

their own property for their own benefit to be able to share that benefit with, say, neighbors whose yards are too shady to allow for their own solar panels -- much like the home occupation owner can employ a person or two within their business. But, a situation such as this proposed project, in which the landowner will not benefit from the net metering array, removes the project from the 'home occupation' arena and places it squarely in the position of a purely commercial venture.

This purported group net metering project has no group and bears no affiliation to the electric needs of the single named customer. The CPG granted for same should accordingly be rescinded on reconsideration to avoid a manifest error of fact and law on this point.

II. The present Final Order and CPG must be reconsidered, as they evince manifest errors of law and fact in waiving the SIS requirement after Fast Track failure; where more than limited facilities upgrades are required for the project and where the evidence is insufficient to support affirmative finding on system reliability and stability.

This Board waived a key provision of its interconnection rules for this project in the Final Order and CPG-- a waiver that the PSB is not authorized by law to grant, and which in this case is inappropriate given the state of the evidence on the record pertaining to the Fast Track review.

In order for a finding of the PSB to be warranted by the evidence, there must be substantial evidence in the case to support it. *Petition of Citizens Utilities Co.,* 117 Vt.

285 (1952); *City of Newport v. Newport Electric Division of Citizens Utilities Co.,* 116 Vt. 103 (1950). This Board's Final Order, findings 16 and 17, state:

> 16. VEC conducted an initial Fast Track screening to assess the ability of the project to safely interconnect with VEC's distribution system. The Project failed one criterion, Criterion 3, of the Fast Track screening. Exh. SLS-5.
>
> 17. Notwithstanding the Project's failure of Criterion 3, VEC has concluded that a System Impact Study is not necessary to safely interconnect the Project if system upgrades are completed prior to Project interconnection. Exh. SLS-5.

These two findings erroneously characterize the content of the VEC Fast Track analysis. The Fast Track analysis for this Project states, "The proposed project does not meet all 5.505(b) criteria and **is therefore not eligible as a Fast Track application**. However, I don't believe that the one criterion that the project fails to meet will justify the need for a full system impact study." *Exh. SLS-5 Page 1, emphasis added.* Nowhere does the Fast Track analysis state that the Project can safely interconnect into the system without further analysis; the Board, in its Final Order, simply assumed this conclusion, which is not supported by VEC's Fast Track study. Nowhere does the Fast Track analysis

indicate that a Feasibility or Facilities Impact Study would not be necessary; a number of material responses in the Fast Track analysis in fact point to the contrary.

The Fast Track analysis as submitted does not support an affirmative finding under §248 that this Project can safely interconnect without affecting system stability and reliability. The Applicant has accordingly failed to meet their burden on this point.

The Fast Track analysis does clearly state that the Project has failed the Fast Track analysis ***"and is therefore not eligible as a Fast Track application."*** This Board ignored that assertion in its findings and Order. The failure of Fast Track Criterion #3 here is no minor failure--it is materially significant. The VEC engineer who prepared the report did not express the magnitude of the failure in terms of ratios, as some other utilities are inclined to do. However, the math is readily apparent from the information provided by VEC: Assuming a 95% power factor, the 500kW project exceeds the 100kVa line fuse by 526%, which is 35 times the regulatory limitation. Assuming the same 95% power factor, the 500kW project comprises 68% of the substation peak load, about 4.5 times the regulatory limit (and enough to implicate reverse power flow). Despite these whopping failures on not only the line fuse but also at the substation level, this Fast Track analysis does not state what equipment would be necessary to rectify the failure, leaving a void in the record as to whether these changes comprise only the 'limited preparations' which might avoid more in-depth study, or not.

While this is the only criterion for which VEC clearly states that the proposed Project would fail the Fast Track, vague language and missing information indicate that the record can not support an affirmative finding on other criteria as well. Criterion #4

states that "VEC would expect the proposed inverter based solar project can meet this standard," and Criterion #5 states that "VEC would expect the proposed project(s) can meet this standard." That troublesome "s" on "project(s)" aside, this is not language clearly indicating that the Project meets these two criteria.

More troubling is the VEC Fast Track entry regarding Criterion #6. The statement that "the generator will be connected phase to ground" implies a single-phase interconnection, yet this will be a three-phase interconnection. The response does not indicate whether the connection will be delta to grounded wye, or grounded wye to grounded wye. It does not mention the specifics of the interconnecting transformer, and only suggests that a "grounding bank may be required" to prevent over-voltages, without specifying the size or type. This absence of information again does not permit a factual finding regarding whether the system adaptations necessary for this project are only "limited preparations" or not.

On the issue of "limited preparations", this project will require about a half-mile of three-phase line down a public roadway. While this may not be technologically complex, in terms of cost, and in terms of the fact that it will be outside the Project locus parcel, within the public right-of-way, and will impact aesthetics by escalating the appearance of the wires along the public roadway, this Project element can not be said to comprise only "limited preparations" that do not necessitate a Facilities Study.

PSB Rules regarding net metering interconnection state:

> **5.111 Interconnection Requirements**
> Net metering facilities of 150 kW or less in capacity shall be installed and operated in accordance with Appendix A, the Net Metering Technical

> Specifications (Tables 1 through 5). Net metering systems greater than 150kW in capacity, shall follow the interconnection procedures contained in Board Rule 5.500.

Fast Track Analysis is required under PSB regulations 5.500 et seq.; the Appendix A technical specifications for net metering system interconnection requirements under 5.100 et seq. are not relevant to this project, as they apply only to projects up to 150kW.

The PSB Rules contained in Section 5.500, Interconnection Procedures for Proposed Electric Generation Resources (See Addendum) apply to all electric generation resources over 150kW, without exception and without provision for waiver. Section 5.501, Applicability, states: **"This Rule applies to all proposed interconnections of Generation Resources within the State of Vermont...**".

The General Procedures for interconnections of electrical generation facilities, PSB Rule 5.503(A), states:

> Applications for proposed Generation Resources which are determined to be complete in accordance with 5.504 a***nd which satisfy all of the Fast Track Criteria of Section 5.505(B)***, shall follow the Fast Track process specified in 5.506. Complete Applications for proposed Generation Resources that ***do not meet all of the Fast Track Screening Criteria shall be evaluated*** through the appropriate Feasibility, Systems Impact and/or Facilities Studies as set forth in Section 5.507 of this Rule. ...

PSB Rule 5.503(A), emphasis added.

Rule 5.505(B) sets out the specific Fast Track screening criteria. Fast Track Analysis is meant to be a coarse screen that allows easily connectible projects to proceed to an Interconnection Agreement without having to do any additional Studies. Among these criteria is Criterion #3, which states:

> For interconnection to a Radial Feeder, the aggregated generation, including the proposed Generation Resource, on the circuit ***will not exceed 15% of the line section annual peak load as most recently measured at the substation.*** A line section is that portion of a distribution system connected to a customer bounded by Automatic Disconnect Devices or the end of the distribution line.

PSB Rule 5.505(B), emphasis added.

Use of the regulatory imperative "**shall**" is pervasive in the Board's interconnection rules. Applications that do not meet all of the Fast Track Screening Criteria **shall** be evaluated through the appropriate Feasibility, Systems Impact and/or Facilities Studies as set forth in Section 5.507 of this Rule. *Board Rule 5.503(A) emphasis added*. Applications ... **shall** not be eligible for Fast Track if the proposed Generation Resource does not satisfy all of the Fast Track Criteria. *Board Rule 5.507(A) emphasis added.* There is nothing in these imperative rules to suggest that the net metering statute requires waiving the additional substantial study requirements upon failure of Fast Track Criteria.

The use of the word "shall" under Vermont law indicates that the requirement is mandatory. *In re Appeal of Stephen Green*, 2006 VT 88; *Simpson v. Rood*, 2003 VT 39. "Generally, the imperative 'shall' indicates that the provision is mandatory." *State v. Hemingway*, 2014 VT 48. Here, the PSB rule states that projects that fail Fast Track **shall** be evaluated by one of the procedures set forth in Rule 5.507 -- at the Petitioner's expense. If the parties find this inconvenient, the lawful response is a petition for a rulemaking change, not ignoring the mandatory rule.

"It is axiomatic that an administrative agency must follow its own substantive regulations in decided contested cases." *Bishop v. Town of Barre*, 140 Vt. 564 (1982), citing *Nzomo v. Vermont State Colleges*, 136 Vt. 97 (1978) and *Note, Violations by Agencies of Their Own Regulations*, 87 Harv.L.Rev. 629 (1974).

An administrative agency must abide by its regulations as written until it rescinds or amends them. *In re Peel Gallery of Fine Arts*, 149 Vt. 348 (1988), citing *United States v. Nixon*, 418 U.S. 683 (1974), and *Bishop*, supra.

Regulations should be changed through the rulemaking process, not by individual adjudications. "It is hornbook administrative law that an agency need not -- indeed should not -- entertain a challenge to a regulation in an individual adjudication." *NRDC v. U.S. Nuclear Regulatory Commission*, U.S. Court of Appeals D.C. Circuit, 2016 WL 1639661 (Decided April 26, 2016), quoting *New Jersey Department of Environmental Protection v. NRC*, 561 F.3d 132 (3rd Cir. 2009).

This Vermont Supreme Court employs a deferential standard in reviewing an agency's interpretation of its own regulations. *Conservation Law Foundation v. Burke,* 162 Vt. 115 (1993). "In these days of heightened complexity in utility regulation... [this Court] will not invade the province of the PSB and operate as an appellate or substitute PSB." *In re New England Telephone and Telegraph Company,* 131 Vt. 470 at 474 (1973) citing *Bacon v. Boston&Maine Railroad*, 83 Vt. 528 (1910). Agencies cannot, however, interpret those regulations in such as way as to negate them, or in clear derogation of their obvious plain meaning.

In *Conservation Law Foundation v. Burke, supra,* the Agency of Natural Resources issued a permit for a medical incinerator despite the fact that the facility would violate air contaminant emissions standards, after the agency found these regulatory contraventions would be 'de minimis'. *Conservation Law Foundation at 120.* The superior court found, and the Vermont Supreme Court upheld the finding, that ANR's regulations did not permit it to grant de minimis exemptions. *Id at 121.* The Court further noted that de minimis exemptions are similarly not permitted in zoning matters. *Id., citing In re Cumberland Farms, Inc.,* 151 Vt. 59 (1989).

In *Conservation Law Foundation v. Burke,* ANR had also found that emissions from construction of a new medical incinerator would be offset by reductions in emissions from older incinerators. However, the Vermont Supreme Court deemed this an unreasonable interpretation of its regulations given that those regulations were silent as to whether such offset analysis was authorized. The Court stated, "We decline to read an offset authorization into a silent rule...". *Id. at 121.*

Conservation Law Foundation and the principles of review of agency regulatory analysis it embodies are directly relevant here. Our present case is not a matter of this Board interpreting technical provisions of its regulations to which deference may be rightly afforded. This case presents a legal question of whether this Board has the lawful authority to waive mandatory provisions of its regulations -- terms spelled out by 'shall' -- when both the authorizing legislation nor those regulations speak are silent as to any grant of waiver or exemption authority.

Here the Final Order does not merely interpret regulatory terms -- it plainly waives the requirement that the interconnecting utility, at the Applicant's expense, engage in further studywhen a project fails the Fast Track interconnection regulations. VEC stated that this Project probably doesn't need a full System Impact Study -- but VEC never said that the Project does not require some form of further study, nor that the Project could be safely interconnected absent such study. Abrogating established PSB procedures to the regulated utilities exceeds the PSB's authority. *North v. City of Burlington Electric Light Department,* 125 Vt. 240 (1965*) citing Carpenter v. Home Telephone Co.,* 122 Vt. 50 (1960).

Nothing about the regulation or its authorizing statute is unclear, nor is the application of this PSB rule to the facts at hand in any way obscure or open to interpretation. ("We apply the plain meaning of a statute where the language is clear and unambiguous." *In re Verizon New England, Inc.*, 173 Vt. 327 at 335 (2002) citing *Reed v. Glynn,* 168 Vt. 504, 506 (1998)) The PSB Order states that "the Project failed Criterion 3 of the Fast Track Analysis and would, therefore, be required to undergo a System Impact Study as required by the Rule. However, here the interconnecting utility has determined that the criterion failure is not relevant to the Project's ability to interconnect with its system and that interconnection could occur without adverse impacts on stability and reliability...". But this is in error: VEC's Fast Track analysis does not say that.

The Final Order goes on to state that "In this case, the Board is relying on VEC's knowledge and assessment of its system to conclude that the Project can be safely and

reliably interconnected. Accordingly we waive the requirement for further studies dictated by Board Rule 5.503." Again, the VEC Fast Track analysis does not say this; VEC explicitly states that the Project is not eligible to proceed as a Fast Track application.

The Systems Impact Study which would otherwise have been required is described in *Board Rules 5.507(F)* (*See Addendum*). That study would have included a Distribution System Study, a Transmission System Study, or both, and specifies the precise components to be included in those studies--components which were not included in the Fast Track Supplemental Analysis here. *Board Rule 5.507(F)(2).* The Rule describes what other projects must be taken into account, including the cumulative impact of all generation resources in the interconnection queue for that distribution circuit. *Board Rule 5.507(F)(3)*. PSB Rules also mandate that the cost of the studies be borne by the project proponent, thus avoiding shifting the cost of further study to the ratepayers. *Board Rule 5.507(F)(1) and (4)*.

While the Legislature has stated that net metering application and review procedures should be simplified as appropriate, *30 VSA 219a(c)(2)(C)*, the notion of what is "appropriate" has never included circumventing interconnection standards designed to ensure the stability and reliability of an electrical power distribution system serving thousands of customers and playing an integral role in the local and state economy. PSB Interconnection Rules for net metering generation resources are adopted pursuant to the authorizing legislation of *30 VSA 219a(i)(3)*, and as such are inherently

those regulations that the PSB has determined "are necessary to protect public safety and system reliability."

The authorizing statute states that a net metering system "shall be deemed to promote the general good of the State if it is in compliance with the criteria of this section and board rules and orders." *30 VSA 219a(c).* That authorizing statute additionally permits the PSB in adopting regulations, to "waive the requirements of section 248 of this title that are not applicable to net metering systems...", *30 VSA 219a(c)(2)(A)*, but nowhere does it authorize the PSB to allow waivers or exceptions to provisions of the PSB's duly adopted Rules. The "PSB's powers include only express legislative grants of power...". *In re Investigation of November 15, 1990 Rate Design Filing of Vermont Power Exchange*, 159 Vt. 168 (1992).

The legislatively-expressed encouragement of alternative energy generation development does not prevent the PSB from denying CPGs where proposed projects do not meet the requisite statutory or PSB rules. *In re Halnon*, 174 Vt.514 (2002). As in telecommunications regulation, new issues are arising due to the proliferation of merchant-built generator resource facilities while "the prevailing regulatory regime -- rooted as it is in legacy technology -- applies to products and services far from contemplation at the time the regime developed." (*Global Naps Inc. v. Verizon New England*, 454 F.3d 91 (2nd Cir. 2006)) However, the mere fact that things are changing at a fast pace does not create new realms of legal authority where none previously existed; the PSB can not decide *sua sponte* that it has new powers to waive regulations absent statutory authority.

Fast Track Criteria #3 is not mere administrative protocol to be brushed aside when inconvenient for a net metering project, but rather reflects a standard necessary for system reliability and public safety. The Solar American Board for Codes and Standards (Solar ABCs, a U.S. Department of Energy-funded collaboration of experts) states that the purpose of the 15% load criterion is "to flag interconnection applications that may impact distribution system operation, safety or reliability--and thus prevent unintended islanding." *Updated Recommendations for Federal Energy Regulatory Commission Small Generator Interconnection Procedures Screens, July 2010,* p. 4.

These *Recommendations* also note -- in discussion as to whether FERC should raise its limit from 15% to 30% -- that industry experts were split as to whether this standard should be relaxed at all, where "[m]any of the SMEs who voted against raising the limit cited safe operations (islanding) as the issue. ... [S]etting the level higher than necessary increases risk and may lead to grid problems, inviting potential backlash that could damage any progress being made in adopting PV." *Id.* at p. 9.

Vermont's regulatory standard for this criterion remains at 15% -- and not unreasonably so. Many utilities set distributed generation standards at an even lower limit to protect their systems, such as Hydro One in Canada, which limits solar penetration to 7% to 10% of the peak feeder load. *Technical Review of Hydro One's Anti-Islanding Criteria for Microfit PV Generators,* 2011, at p. 5.

Regardless of the regulatory reasonableness of Hydro-Quebec's 7% versus Vermont's 15% versus FERC's 30%, the Fast Track analysis for this project indicates that the Project fails the load on the line fuse at 526% and on the substation at 68%.

The Final Order and CPG in the instant case does not set out the basis for which the PSB determined that it could create a waiver process, what criteria would support a waiver, or why the instance case could be authorized to interconnect under Fast Track procedures while the Order cited above notes that failure of Fast Track Criterion 3 means the project is ineligible to move forward on the Fast Track. There must be a "full disclosure of the criteria underlying" the order for this Court to uphold its validity. *In re Petition of Burlington Electric Light Department,* 149 Vt. 300 at 303 (1988). "Though the Board's expertise is at the heart of the deference give[n?] its decisions, that expertise is not a license to shroud its reasoning in an all-encompassing explanation that a particular decision is simply necessary to yield what the Board perceives is the correct result." *In re Green Mountain Power Corp*, 192 Vt. 378 at 382 (1994). Remand is appropriate when this Court is left in the position of speculating on the basis of the decision reached. *Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Corporation,* 167 Vt. 228 (1997).

This Final Order and CPG should accordingly be rescinded and the Applicant directed to proceed in accordance with the Board's Interconnection Rules by engaging in a System Impact Study, Facilities Study or Feasibility Study, at Applicant's expense. The results of such study should be submitted on the record with opportunity for the parties to comment. Alternatively, a technical hearing should be held regarding the §248 criteria of system stability and reliability.

III. The present Final Order and CPG must be reconsidered, as they evince a manifest error of law in dismissing issue regarding deeded water rights on the Project locus parcel, which implicates both the Applicant's lawful site control as well as unconstitutional taking and thus is an issue pertaining to consideration of public good.

The record does not reflect that the Applicant has sufficient legal control over the locus parcel to lawfully effectuate this project given the asserted deeded water rights of adjoining landowner Susan Draper; this Board accordingly erred in issuing the CPG and Final Order.

PSB Rule 5.111 requires net metering projects of this size to comply with the PSB Rules 5.500 regarding interconnection agreement. Those interconnection rules require that the application for interconnection include 'documentation of site control' 5.502(2).

Applicant here has indicated that the underlying property is owned by David Blittersdorf. The record reflects, however, that adjoining property owner Susan Draper also has deeded property rights in that parcel -- specifically, water rights to a spring or 'water box' along Valley Road. Water rights inherently include the right to access that water source and to install and maintain a line to that water source, especially where, as here, the owner of same has indicated that she draws her drinking water from this source.

The PSB here erred in dismissing Ms. Draper's record assertions of deeded water rights, as well as issues regarding the property boundary, as mere private claims. While this Board routinely disregards claims of nuisance or diminishment of property value of adjoining landowners, such claims don't in themselves implicate elements of a net metering application or §248 criteria. Issues of property boundary location, deeded water rights, or other easements and title interests, however, directly implicate the issue of whether the Applicant has lawful site control over the Project locus. These issues also implicate the question of whether the Project meets required setbacks, and whether those setbacks should be measured from the easement line where others have deeded interests in a subject parcel.

The 5th Amendment to the US Constitution states "... nor shall private property be taken for public use, without just compensation." Similarly, the Vermont Constitution, Chapter 1 Article 2 states, "That private property ought to be subservient to public use when necessity requires it, nevertheless, whenever any person's private property is taken for the use of the public, the owner ought to receive an equivalent in money." The PSB's issuance of a CPG for this Project in derogation of Susan Draper's deeded property rights would comprise a taking of private property without just compensation, in contravention of the United States and Vermont Constitutions.

Here, the issue of property boundaries was raised by Ms. Draper, and the Applicant responded to her comments by indicating that the property lines indicated on the site plan are not accurate, and that accurate lines are indicated by a survey in the Applicant's possession. That survey was never submitted into the record, leaving this

question -- and the application information which flows from it including the location of setbacks -- unresolved.

The issue of Ms. Draper's deeded water rights was also raised on the record, and this was also not resolved with any information in the record. The location of that well or water box, together with the location of the line from that well to Ms. Draper's house, and the width of a sufficient easement to assure maintenance access to it, should be included on a revised site plan submitted on the record for comment.

Absent such information, the state of the record is that the extent of Applicant's lawful site control for the project parcel has been substantively questioned, and those questions are not resolved. There is therefore insufficient evidence on the record for this Board to have concluded that the Applicant has lawful site control, and this Board erred in finding to the contrary -- a finding which may comprise an unconstitutional taking of private property. This Final Order and issuance of a CPG should accordingly be reversed; a technical hearing is required to establish on the record, subject to discovery and cross examination, the extent of the lawful authority of the Applicant over the project area.

IV. The Final Order and CPG should be rescinded and the matter set for hearing: The record lacks sufficient evidence on which to make positive finding on the §248 criteria of historical sites until the archaeological investigation is complete.

Vermont statute requires that electric generation facilities meet certain criteria under 10 VSA §6086(a)(8), including having no undue impact on historic sites. *30 VSA §248(b)(5)*.

The Applicant submitted an archaeological review of the project Parcel. *Exh. SLS-7.* That submission stated that the project area has a low sensitivity score of 26, below the threshold of 32 that is used by the State to indicate sensitivity. *Exh. SLS-7 p.2.* The Applicant did not notify the Vermont State Division of Historic Preservation or request their input regarding this Project proposal.

The Vermont State Division for Historic Preservation, when notified by ANR regarding the Project, significantly disagreed with the Applicant's assertion. DHP concluded that the Applicant's consultant did not correctly apply the site assessment models, and that the Project site scores at least 58 points, well above the threshold of 32 for archaeological sensitivity. DHP also noted the "advantageous overlook over the Lake Seymour basin by the southern part of the project area, which could have been particularly attractive for settlement and use during the early part of the Native American record in Vermont" -- an observation which also relates directly to the Project's aesthetic analysis. This overlook alone, in DHP's estimation, adds another 32 points to the archaeological assessment. *Comment letter of DHP, October 1, 2015.*

The DHP recommended that archaeological studies be carried out early enough in the process "that mitigation measures that may be necessary can be satifactorily planned and accomplished prior to construction." *Id. p. 2 Recommendation #3.*

That DHP's assessment, so starkly in contrast with that submitted by the Applicant, creates a conflict of evidence in the record so strong as to, in itself, warrant hearing. Recommendation #3 makes hearing on this criterion imperative. Recommendation #5 states, "Mitigation may include but is not limited to further site evaluation, data recovery, redesign of one or more proposed project components, or

modification of the buffer zone boundaries or the specific conditions that refer to same." Recommendation #6 states, "Proposed mitigation measures will be discussed with and approved by the VDHP prior to implementation."

The aesthetic impact of the Project, the proximity of the Project to wetlands and parcel boundaries, are likely to be substantially affected by any mitigation measures resultant from the completion of the archaeological studies, especially by any mitigation requiring 'redesign of one or more proposed project components.' The Final Order and CPG should be rescinded, and the directed archaeological studies submitted on the record before the PSB and subject to comment and hearing. Prior to submission of these studies, there is insufficient information in the record on which to make a positive determination that this Project will not unduly impact historic sites, specifically archaeological sites. To have issued the CPG in the absence of such information comprises a manifest error of law and fact.

V. The Final Order and CPG should be rescinded and the matter set for hearing: The record sufficiently raises substantive, specific impacts on the §248 criteria regarding wetlands, water resources, and soil erosion.

The Order and CPG of 8/26/2016 apply an erroneous legal standard to the Town's comments regarding wetlands, water quality and soil erosion. The Order conflates the Town's comments regarding wetlands -- presented as Section 2 of the Town comment letter of September 30th -- with their comments regarding Water Quality, presented as Section 1 of their comments. *Order of 8/26/2016 at p. 12. (The Town's comments are incorporated herein by reference.)* The conflation presents a manifeset error of law, in that soil erosion is a conditionally waived §248 criteria while wetlands is not conditionally waived. By considering the Town's wetlands comments as soil erosion comments, this Board has inappropriately shifted the

burden to the Town, rather than to the Applicant, in regards to the impact of this Project on adjacent wetlands.

The Town's comments specifically regarding wetlands were provided by Dr. Charles Kilpatrick, a full professor of Biology at UVM. These comments raise a critical factual issue: That the wetlands adjacent to the project comprise Northern White Cedar Swamps, an ecological habitat that are uncommon in Vermont. Dr. Kilpatrick had fully anticipated being able to provide prefiled testimony regarding this important type of wetland at hearing. *See Affidavit of Charles Kilpatrick, attached.* The State of Vermont recognizes the importance of this habitat; the Vermont Department of Forest and Parks avers in its publications that Northern White Cedar Swamps are frequently home to rare plants as well as a number of bird species of special interest.
http://www.vtfishandwildlife.com/common/pages/DisplayFile.aspx?itemId=245038

Northern White Cedar Swamps were the subject of a three-year intensive EPA-funded study by the Vermont Fish and Wildlife Department's Nongame and Natural Heritage program, and **according to DEC, comprise rare and irreplaceable natural areas within the meaning of Act 250 protections.**
http://dec.vermont.gov/sites/dec/files/wsm/mapp/docs/bs_vernalpoolreport.pdf
Vermont Wetlands Bioassessment Program, An Evaluation of the Chemical, Physical and Biological Characteristics of Seasonal Pools and Northern White Cedar Swamps, Vermont DEC and Vermont Fish and Wildlife NNHP, 2003 p. 84, 85.

Such information --already known by the State -- is among the testimony Dr. Kilpatrick anticipated providing at hearing on this matter. The Town's comments regarding wetlands are substantive and specific to this particular location and project, and its proximity to an uncommon and important wetland habitat which is far different from and far richer than the usual lowlands cattail-dense drainage area.

The Board's Order finds that the Northern White Cedar Swamp was identified, but makes no finding regarding the Town's unrebutted expert comments pertaining to potential impact of the Project on that Northern White Cedar Swamp. The burden is on the Applicant to demonstrate on the record that the Project will not create an adverse impact on wetlands. On this §248 criteria, the Applicant does not have the benefit of the presumption of compliance; the Final Order and CPG should accordingly be rescinded and a technical hearing set regarding the impact of this project on the Northern White Cedar Swamp wetlands community adjacent to the project site.

In regards to impacts on soil erosion and water quality, the Town of Morgan submitted site-specific substantive comments provided by qualified experts pertaining to unique factors relative to this Project site, including the slope, and the fact that Lake Seymour is supported by a relatively small drainage basin and thus is uniquely sensitive to run-off impacts.

This Board's Order inappropriately relies on the Applicant's unsupported assertions that the impacts raised by the Town are 'unlikely'. The Order also inappropriately relies on ANR's silence on the issue as comprising assent to the Applicant's unsupported assertions. The unrebutted expert submission on the record presents a strong likelihood of soil erosion and run off that will impact the adjacent wetlands as well as water quality in nearby streams and Lake Seymour. The Town's comments in regards to soil erosion and water quality are sufficient to overcome the presumption of waiver on these criterion.

The Order and CPG should be rescinded and the matter set for technical hearing, with ANR explicitly directed to consult with Vermont DEC regarding stormwater impacts, and to consult with Vermont DEC and the Fish and Wildlife Department regarding impacts on the Northern White Cedar Swamp, adjoining streams and Lake Seymour.

VI. The Final Order and CPG should be rescinded and the matter set for hearing: The record sufficiently raises substantive, specific impacts on the §248 criteria regarding orderly development and aesthetics.

a. Orderly Development

Section §248(b)(1) requires the PSB to find, prior to issuing a CPG, that the project will not unduly interfere with the orderly development of the region with due consideration having been given to the recommendations of the municipal and regional planning commissions, the recommendations of the municipal legislative bodies, and the land conservation measures contained in the plan of any affected municipality. *30 VSA §248(b)(1); In re UPC Vermont Wind, LLC,* 2009 VT 19.

Here, the Town raised significant, specific issues pertaining to orderly development of the region, made specific substantive recommendations, raised land conservation measures and interrelated aesthetic standards in its Town Plan, **including explicitly that the Town Plan specifically prohibits new generation facilities within the viewshed of the Seymour Watershed areas of Routes 111, 114 and 105** -- but unlike *UPC Vermont Wind*, where three public hearings and a ten-day evidentiary hearing were held before the PSB ruled on this criteria, the PSB here denied hearing. *Town Comments of Sept. 30, 2015 p. 22-23.*

While the requirement to provide 'due consideration' means that municipal enactments are advisory, not controlling, *Id. ¶17,* it does require that the PSB 'consider' the arguments. *Id. ¶18.* Here the PSB wrongly failed to substantively

consider the Town's Comments regarding orderly development, and failed to appropriately consider or grant hearing on the specific, substantive orderly development issues raised.

Consideration of municipal treatment of solar development has been freshly reviewed by this Court. *In re Petition of Rutland Renewable Energy, LLC*, 2016 VT 50. The split decision there examined hearing officer's findings after orderly development and aesthetics were fully vetted through technical hearing on the Standard Offer project involved. Here, hearing was effectively denied by the PSB's issuance of a CPG without granting hearing, and after rejection of a portion of the Town's comments.

Among the specific points raised by the Town in its multiple filings here regarding orderly development, standards of the Town plan, and specific community aesthetic standards, are the explicit Town Plan prohibition of new generation facilities within the viewshed of the Seymour Watershed areas of Routes 111, 114 and 105 unless mitigated in such a way as to completely avoid the visual impact. This matter should be reopened for technical hearing on the §248 criteria of orderly development.

b. Aesthetics

In its review of the Quechee standard for this Project, this Board erred in stating that "the Project would not violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area." As stated above, the Town of Morgan Town Plan contains a specific standard for the views from the Lake and specifically for the views from Route 111 -- the precise view implicated by this Project. The implications of this specific standard at the least require that this Project should be the subject of a technical hearing on orderly development and aesthetics.

One aspect of the Project erroneously ignored by this Board in its Final Order and CPG is that of the installation of a half-mile of three-phase power lines along Valley Road, and crossing Valley Road, all within view from Route 111 at the Lake. The Applicant presented no visual depiction of what these new lines would look like, though it is clear that they must cross the road by necessity as the present power lines go up the easterly side of Valley Road while the project is on the westerly side. From observation in other parts of the state it is clear that three-phase lines are significantly larger and more visible than single phase lines, including the use of highly visible attachment devices on the poles and along the lines. This Board made no findings pertaining to the aesthetics of this element of the Project; the matter should be rescinded and scheduled for technical hearing, or at the least for the submission of additional materials subject to comment by the Parties, regarding the aesthetic impact of the three-phase lines.

The Final Order and CPG for this Project make a factual and legal error in finding the Applicant's proposed screening plan sufficient when it is woefully inadequate to provide appropriate mitigation for the Project's adverse aesthetic impacts. A small handful of 8' trees does little to nothing to mitigate the visual impact of 7 acres of 18' high moving industrial components.

The Final Order and CPG also do not take into account the aesthetic impact of the fact that the proposed panels move throughout the day, creating an ever-changing visual impact highly likely to draw the eye to the Project. The Application should be scheduled for technical hearing regarding aesthetic mitigation, or at the least, the Applicant should be ordered to submit a landscaping plan, including a planting plan and maintenance schedule, developed in conjunction with the Town and abutting landowners.

Such an order would be consistent with prior Board orders regarding aesthetic mitigation in net metering cases. Reasonable aesthetic mitigation for a 150kW solar array in an open field includes engaging the services of a landscape professional and expending upwards of $13,000 on plantings. For example, the *Report and Recommendation Regarding the Farm at South Village Inc.'s Compliance with its Certificate of Public Good* notes that developer FSV engaged the services of a gardener and landscaper to prepare a vegetative screening plan, and that this plan -- including planting over 270 plants of varying indigenous, decorative or edible varieties -- was reviewed by Dr. Leonard Perry of UVM. The plan cost $3,000 to prepare and $13,000 to

implement. *Report and Recommendation Regarding the Farm at South Village Inc.'s Compliance with its Certificate of Public Good, Docket No. 8406, Order, September 25, 2015.*

Mitigation of the Norwich Technologies array included installation of crabapple trees of such a size and density to immediately mitigate the view on one side of the project; planting 310 linear feet of 8' - 10' high evergreens spaced 18" apart on another side of the project; and planting another 60 linear feet of closely-spaced evergreens and deciduous shrubs to fill a gap in existing vegetation on a third side of the project. The fourth side of that project was blocked by dense hardwood forests. *Petition of Norwich Technologies, CPG NMP-7039, Order, January 28, 2016.*

It is appropriate, where the applicant has not done so, to required that the applicant "submit a planting plan... [that] shall depict the location and species of plantings... a schematic showing the location of all... plantings, a planting schedule, and maintenance measures (to include replacing dead plants if necessary) to ensure the plantings persist and serve the intended function as a screen for the life of the project." *Application of Hauenstein Solar, CPG #NM-3578, Order, December 31, 2015.*

These requirements imposed by this Board in other net-metering cases are clearly commonly available mitigation measures that a reasonable person would take to mitigate the adverse aesthetic impact of a solar electrical generation facility in a rural area characterized by natural landscape elements.

Evidence on the record in this case is also insufficient to determine the visual impact of this Project during the leaf-off season -- a significant portion of the year. The

photos supporting the Application are taken at the height of full foliage, when the Project would be least visible from the lake and public roadways. Technical hearing, or at least an order requiring additional information including a winter viewshed analysis, is required on this element.

The Final Order and CPG also erroneously rely on the testimony of John Zimmerman regarding aesthetic impact. The Applicant asserts that John Zimmerman is their "aesthetic expert". However, Mr. Zimmerman's affidavit asserts only that he is "the owner of Vermont Environmental Research Associates, Inc." which the Application identifies as the project developer.

In the absence of a winter viewshed analysis, and on the basis of aesthetic testimony presented by the project developer without the presentation of any evidence indicating this individual qualifies as an aesthetic expert, the record is insufficient to support an affirmative finding that the applicant has taken reasonable aesthetic mitigation measures. The Final Order and CPG should accordingly be rescinded, and the matter set for technical hearing regarding the §248 criterion regarding aesthetics; alternatively, at the least, the Applicant should be required to submit a landscaping, planting and maintenance plan by a qualified aesthetic professional, and such submissions should be subject to comment by the Parties.

VII. The Final Order and CPG should be rescinded and the matter set for hearing: The PSB does not have authority to waive hearing all together; the record reflects a substantial showing of material issues warranting a hearing; and due process was violated where Town representatives were told by the PSB that a hearing would be held, but the CPG issued without hearing.

a) The PSB's statutory authorization to "modify" hearing process does not extend to empowerment to eliminate public hearings and deeply curtail technical hearings, such as the denial of hearing here.

The PSB has acted arbitrarily and capriciously, and committed an abuse of discretion in denying hearing altogether for this project, and for establishing an uncertain, yet extremely high, bar that prevents hearing in most net metering cases.

The statutory authority granted by 30 VSA §219a is to modify the rules of 30 VSA §248 regarding hearings -- not to eliminate or deny them:

> (c) The Board shall establish by rule or order standards and procedures governing application for, and issuance or revocation of a CPG for net metering systems under the provisions of section 248 of this title. A net metering system shall be deemed to promote the public good of the State if it is in compliance with the criteria of this section and board rules or orders. In developing such rules or orders: ...
>
> (2) With respect to a net metering system ... the Board:
>
> (A) may waive the requirements of section 248 of this title that are not applicable to net metering systems, including criteria that are generally applicable to public service companies as defined in this title;
>
> (B) may modify notice and hearing requirements of this title as it deems appropriate;
>
> (C) shall seek to simplify the application and review process as appropriate; and

(D) shall find that such rules are consistent with State power plans.

30 VSA 219a (Addendum)

The notice and hearing requirements of this title, 30 VSA § 248, include the PSB holding a nontechnical public hearing on each petition; then holding a technical hearing; to provide service of the application to numerous state agencies and municipal and regional public bodies; and to post notice in a newspaper and on the PSB website prior to hearing. *30 VSA §248(a)(4)(A) through (D).*

In short, the 248 hearing requirements are extensive -- a fully noticed public hearing *and* a fully noticed technical hearing on each and every petition filed. This is the regime that the authorizing statute, 30 VSA 219a, empowered the PSB to "modify". *30 VSA 219a(c)(2)(B).* The importance of this regime has been recognized by this Court, holding that the statutory provisions "clearly indicate that a Certificate of Public Good cannot be issued without advertising and public hearing. This provision is obviously so that all who wish to be heard may appear before the Commission to give their evidence upon a matter of public importance involving a duty to the public." *In re Hathorn's Transportation Co.,* 121 Vt. 349, 354 (1960). "The Vermont Legislature has given the PSB statutory authority to grant a franchise, in the form of a 'certificate of public good,' but only after a period of public notice and an opportunity for a public hearing to determine whether the award of such a franchise promotes the good of the state. ... The requirement that a franchise be awarded pursuant to public notice and public hearing

ensures that the property right thus created serves the public good." *In re Petition of Vermont Electric Power Producers, Inc.*, 165 Vt. 282 at 290 (1996).

The "factors to be considered in the promulgation of such regulations are set forth in the statute." *In re Peel Gallery of Fine Arts,* 149 Vt. 348 (1988); the authorizing statute does not empower the PSB to "waive" or "deny" such hearings -- only to "modify notice and hearing requirements." *30 VSA 219a(c)(2)(B).*

The rule adopted by the PSB purportedly by virtue of this authority eliminates the public hearing altogether. The rule envisions only the daunting-sounding "technical evidentiary hearing" defined as "a quasi-judicial proceeding, under the Board's Rules of Practice, where all parties have the opportunity to present evidence and to cross-examine witnesses presented by other parties." *PSB Rule 5.102(S) (Addendum).* This description parallels the requirements of a contested case hearing found in *3 VSA §809-§812*. It eliminates the 'legislative, policy-making process' aspect of §248 proceedings. *In re Petition of Vermont Electric Power Company, Inc.,* 2006 VT 69 *(citations omitted).*

The interested party braving a "technical evidentiary hearing" must first attempt to determine how to meet the PSB's elusive hearing threshold:

> Anyone requesting a hearing must make a showing that the application raises a significant issue regarding one or more of the criteria listed in Section 5.108 or the criteria conditionally waived in that section. Such a showing must go beyond general or speculative claims, and provide specific information regarding potential impacts for the criteria.

PSB Rule 5.110(C)(Addendum)

The PSB effectively decides "on a case by case basis" which matters get a technical hearing, "but the Board did not offer any guidelines or promulgate any rules regarding what criteria it would use in making this decision." *In re Programmatic Changes to Standard-Offer Programs,* 2014 VT 29.

The net result is that the legislative hearing process of 30 VSA §248, requiring two different types of hearing ensuring a wide array of public and affected individual participation, has been all but eliminated -- a step which far exceeds the statutory authority to 'modify' the notice and hearing procedures. Abrogating established procedures exceeds the PSB's authority. *North v. City of Burlington Electric Light Department,* 125 Vt. 240 (1965*) citing Carpenter v. Home Telephone Co.,* 122 Vt. 50 (1960).

The only case in Vermont touching on the definition of the word "modify" is *OCS/Glenn Pappas v. Nan O'Brien,* 2013 VT 11, which contemplates modification of child support. That definition, under a variety of state and uniform statutes, is "a change... that affects the amount, scope or duration of the order....". *Id. ¶27* In this context, a "modification" clearly does not include a termination such as the PSB has effected here.

The definition of "modify" was far more extensively analyzed by Justice Scalia in *MCI Telecommunications Corp. v. AT&T,* 512 US 219, 114 S.Ct. 2223 (1994). The U.S. Supreme Court held that the Federal Communication Commission's authority to 'modify' certain requirements of the Communication Act did not permit that agency to make basic and fundamental changes in the regulatory scheme. *Id.* Specifically, the FCC's

elimination of tariff filing requirements for certain long-distance carriers was not an authorized 'modification'. *Id.*

Interpreting the phrase, "modify every requirement", Justice Scalia wrote that "The word 'modify' .... has a connotation of increment or limitation. Virtually every dictionary we are aware of says that 'to modify' means to change moderately or in a minor fashion. ... 'Modify,' in our view, connotes moderate change[1]." *Id. 225 and 227.*

The FCC, and the PSB in the instant case, exceeded their statutory powers in radically altering when only 'modification' was authorized. An agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear. *Id. at 229, citations omitted.* Rule-making authority of Vermont agencies including the PSB are limited to that of the enabling legislation. *Petition of Vermont Welfare Rights Organization,* 132 Vt. 622 (1974); *In re Vermont Verde Antique International, Inc.,* 174 Vt. 208 (2002); *In re Baptist Fellowship of Randolph, Inc.,* 144 Vt. 636 (1984); *Lemieux v. Tri-State Lotto Commission,* 164 Vt. 110 (1995). Here, in the denial of hearing, the PSB exceeded that authority.

b. Hearing should have been granted where the Town's comments, and other materials on the record, make a substantial showing of significant issues pertaining to review criteria.

Public Service Board Rules 5.110 (C) state that anyone requesting a hearing must make a showing that the application raises a significant issue regarding one or

[1] This several-page exposition on the origins and dictionary treatment of the word 'modify' was itself the subject of a Safire column. *On Language: Scalia v. Mirriam-Webster*, New York Times November 20, 1994.

more of the criteria listed in Section 5.108 or the criteria conditionally waived in that section. Such a showing must go beyond general or speculative claims, and provide specific information regarding potential impacts for the criteria.

Here, the Town's submitted comments, together with other materials in the record, made a substantial showing of significant issues pertaining to several review criteria, thus warranting a hearing.

As stated elsewhere in this Memorandum, the Town of Morgan raised significant issues regarding wetlands, water quality and soil erosion. Their comments were not general or speculative; they included specific examples of the impacts caused by other projects including one in nearby Barton, Vermont, a project which, given its proximity, faces similar issues of soil, terrain and rainfall. The Town identified their experts -- including a high school science teacher in a leadership role regarding local water quality, a UVM biology professor, and a second UVM biology professor who is also a world-recognized naturalist -- who contributed to these comments. Such assertions by qualified experts personally familiar with the location of the proposed Project and specifically pertaining to this Project can not be said to be "general or speculative claims."

Similarly, Town comments regarding aesthetics were site-specific, and were neither general nor speculative -- the Town submitted photos in which they demonstrated the visibility of this Project from public vantage points using a segment of white board far smaller than the project panels to illustrate that visibility. The Town comments noted the visibility from public roadways as well as from the public recreation area of a popular

local beach, and from the Lake itself, which is an important environmental, recreational and economic resource to the area. These comments are not general or speculative -- they are site-specific, substantive, and substantially tied to the aesthetic issues arising at this specific Project site.

The comments of others also raised specific, substantial issues pertaining to this Project. The DPS raised issues regarding aesthetics as well as the issues pertaining to VECs net metering cap. ANR stated that the Project raises significant issues regarding wetlands -- issues which Town comments provided by qualified experts indicate were not resolved by ANR's suggested conditions. VDHP's comments raise significant issues regarding archaeological resources, and more critically, that the Applicant submitted misinformation regarding such resources. Susan Draper's comments raise significant issues regarding legal site control over the property. The Fast Track analysis -- the only document by which VEC weighs in on this Project -- clearly states that this Project is not eligible for Fast Track application, and thus raises issues regarding system stability and reliability that can not be answered without further study.

Collectively, it is clear that this Project raises substantial, site-specific issues on numerous §248 criteria. The Final Order and CGP should accordingly be rescinded, and the matter set for technical hearing.

c. Due process was violated where the Town acted in reliance on the Board members' clear statements at the site visit that a hearing would be forthcoming, but the CPG was issued without a hearing.

Members of the Public Service Board clearly indicated to representatives of the Town of Morgan, more than once, at the site visit, that a hearing would be held in this case at which time they would have opportunity to present testimony and evidence. *See Affidavits, attached.* The Town relied on these representations and did not seek to submit additional comments or to submit testimony, awaiting the scheduling order regarding hearing, prefiled testimony and discovery deadlines. *See Affidavits, attached, especially Affidavit of William Davies, Town Counsel, and Affidavit of Larry Labor, Selectboard Chair.*

The representation that a hearing would be forthcoming at which testimony and evidence could be presented, followed by a decision that did not allow for such testimony, evidence and hearing, comprises a manifest injustice, and violates due process by depriving the Town of Morgan -- a statutory party -- the right to be heard. The Final Order and CPG should accordingly be rescinded on reconsideration, and this matter set for technical hearing to correct this violation of procedural and substantive due process.

VIII. The Final Order and CPG should be rescinded: The record lacks sufficient information on which to base an affirmative finding that the Project is in the public good.

Ultimately, this Board must ascertain whether a proposed Project is in the public good. *30 VSA 248.* Here, the record lacks sufficient information on which to

base an affirmative finding of public good. The Project does not meet §219 criteria and PSB rules regarding qualifying as a group net metering project; the Applicant provided misinformation in their application regarding the off-taker and regarding the Project's potential impact on historic sites; the Applicant did not provide testimony of a qualified expert on aesthetics; the RECs are being retained by the Applicant and thus the project does not contribute to the State's renewable energy goals; and the Project is over the 2015 net metering for VEC. The issuance of a CPG for this Project means that other projects in VEC's territory that may better serve the good of the state -- such as those where the RECs are retired -- can not be built.

This Board's finding that the Project is in the public good was therefore in error, and the Final Order and CPG should be rescinded.

Conclusion

For the foregoing reasons, pursuant to the Vermont Rules of Civil Procedure and interpreting case law, this Board should reconsider its Order and CPG of 08/26/2016 to avert manifest errors of fact, law and justice. The Order and CPG should be rescinded, and the Application denied due to having been submitted in violation of VEC's net metering cap limitations; or alternatively, set for technical hearing with opportunity for submission of prefiled testimony and discovery.

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