

AM

Holland and Derby Citizens for Responsible Energy (HDCRE)  
c/o Vicky Farrand-Lewis  
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Email: vfarrandlewis@yahoo.com

April 8, 2013

Vermont Energy Generation Siting Policy Commission  
C/O Ann Margolis (Vermont Department of Public Service)  
112 State Street  
Montpelier, VT 05620

2013 APR 17 A  
STATE OF VERMONT  
DEPT. OF PUBLIC SERVICE  
MONTPELIER, VT.  
05620-2601

Re: Holland Derby Citizens For Responsible Energy (HDCRE) Comments and suggestions to the Energy Generation Siting Policy Commission (Commission), pertaining to the siting of Wind Generating Facilities (WGF) under the § 248 process.

Commission Members, Eastman, McCarren, Bodett, Johnstone and Symington.

We, the HDCRE, would like to thank you for the opportunity allowing us to provide our comments and suggestions for the record, as you determine guidance and recommendations under Executive Order No. 10-12 (10/2/12).

My name is Vicky Farrand-Lewis and I am the Coordinator/Secretary for the HDCRE. We formed as a group of local residents in response to a proposed two commercial wind turbine project known as the "Derby Line Wind Project" (DLWP) located on the U.S. Canadian border. The project was proposed and withdrawn by Encore Redevelopment and then closed by the Vermont Public Service Board (PSB) under Docket No. 7832 on June 18, 2012.

As we were granted intervener status by the PSB for the above project, we have a great deal of direct experience, that we now offer to the Commission in the form of the following comments and suggestions:

1. Developers should be required to show that they have "site control" and "financial capacity" of a proposed generating facility, prior to filing an application for a Certificate of Public Good (CPG). This is currently required for decommissioning access and funding only. Developers that only have an "Option" for the site, as compared to lease or ownership control, should not be allowed to file an application until proof of a commitment to the site and financial ability to develop it is obtained. Not having this criteria apply could potentially engage the State's resources prematurely for a project that may fail, as in the DLWP.

2. Developers should be required to notify all adjoining land owners prior to filing an application for a CPG and then be permitted to follow the schedule provided. If the notification of adjoining landowners is found to be deficient, then the developer's schedule should be required to start anew. Not having this criteria apply, allows a developer to continue while potential newly notified adjoining, who may want to intervene, must "take the case as they find it". This currently puts an undue burden on participants of an § 248 CPG process by giving them less time to respond than is statutorily required, as happened in the DLWP.
3. Electric utility transmission system capacity should not be exceeded by the proposed intermittent WGF potential output. ISO New England Regional Electricity Generating Requirements should be adhered to prior to the consideration of a CPG application. These issues have proven to be a serious and as yet unresolved constraint to both current and future WGF's.
4. Available Wind Potential Capacity Factor of any site should be studied by meteorological testing towers for a period of not less than one year to ensure that all seasons potential data are reviewed properly. Wind efficiencies at recently constructed WGF's have proven to be less than anticipated.
5. Host Towns of a potential WGF should have veto power in order to maintain local control and prevent wasting valuable resources of State Agencies and local municipalities. Additionally, Governor Shumlin has in numerous interviews and debates stated unequivocally that renewable energy projects will not be forced on Towns that do not want them. Whether by current Town Plan, revised Town Plan or future vote, Town Administrators and residents know what is best for them. Not allowing for local control, would then allow for the tyranny of the majority to violate the rights of the minority. It would also expose the State to the liability of forcing a project on a Town that does not want it.
6. If a Town's Plan does not specifically address a potential WGF or its wishes are not respected by the State, then the local Regional Planning Commission should have veto power for many of the same issues as in item 5 above.
7. A utility that serves the region of a proposed WGF should also have veto power, due to its technical capability, local experience and detailed knowledge of ISO New England compliance. Not allowing a utility a veto would then be forcing it to buy power from and install the transmission lines to a WGF that would not meet the needs of its rate payers and remove the utility's ability to make independent decisions.
8. Act 250 criteria should be applied to WGF CPG applications. Act 250 offers the experience of landmark, precedent setting, environmental protections and public trust. The § 248 requirements are perceived to be too narrow in scope and a developers objectivity to study their own proposals does not lend public acceptance to the process.

9. The health, safety and welfare of surrounding residents around a proposed WGF should be determined prior to a CPG being issued. Sound Decibel levels should not exceed those established by the World Health Organization (WHO) (currently 35db), not those arbitrarily determined by State regulators (currently 45 db). Setback distances to an occupied dwelling should fall within the ranges set by the WHO, manufacturers of turbines and bordering communities if applicable. In the DLWP previous Canadian setbacks of over 1600 feet were apparently respected under the legal concept known as "comity", when the turbine closest to the Canadian border was withdrawn. Currently Quebec is instituting a minimum setback to WGF's of 2 km (1.24 miles) from a home and 1 km (.62 miles) from a public road. Property values have proven to be negatively effected in Derby, where the DLWP was proposed. The precedent was set by the Board of Civil Authority assessed value reduction of the late George Buzzell, due to his property's proximity to a wind turbine.
10. A CPG for a WGF should be for the entire facility, not for individual turbines located within the project boundary. This was attempted by the DLWP Developer in the hope of meeting the limiting requirements of the SPEED program under the § 248 process.
11. Host Towns of a proposed WGF should be notified immediately when a developer starts to receive assistance from any State agency. This transparency would prevent the appearance of the State keeping a secret of a proposed WGF. Host Towns should be granted a minimum of 180 days to respond to a WGF proposal, allowing adequate time to comprehend the volumes of technical, legal and statutory requirements. Host Towns should be provided monetary assistance from the developer of a WGF, proportional to the States assistance in time, effort and money provided to the developer. Without such assistance to adequately participate in the § 248 process, Towns are forced to reallocate much needed funds, if available, from other municipal functions.
12. Once a developer of a WGF is granted a CPG for a project, they should be required to complete the construction of the facility prior to any transfer of ownership. Without this requirement, a developer could sell the CPGs on the open market, thereby making a millionaire out of a speculator. This would also potentially allow a developer to escape contractual obligations and commitments to a host Town and possible surrounding towns as well.
13. If a developer of a WGF withdraws the project on their own, through no fault of the State, Towns and Intervenors, then they should be required to reimburse the State Agencies for their assistance in time effort and money, on behalf of Vermont taxpayers. Although the developer of the DLWP did withdraw the project under the described circumstances, the developer, to our knowledge, has not yet reimbursed the State Agencies involved.

14. Our legal advisors have concluded, as others now believe, that § 248 is unconstitutional. Allowing an unelected appointed body (the PSB) with no legislative, or judicial oversight, to change the rules of the § 248 process as it sees fit, on behalf of the applicant only, is partly the basis of this contention. Further, as the PSB has established it operates under the Vermont Rules of Civil Procedure, this conflict becomes even more evident. As such those that stand behind an unconstitutional law should know it is not a law. It will afford no protection to those who abuse it and we would warn that public official protection's will turn into personal and civil liabilities.

Finally, in response to accusations made by Chad Farrell of Encore Redevelopment to the Commission on November 30, 2012 (see transcript pages 58-64) regarding intervenors, the public and his experience with the DLWP, we will allow the PSB record of Docket No.7832 to speak for itself by providing the following for your review:

1. HDCRE second to last Motion dated and filed June 8, 2012.
2. PSB Order Re: Closing Docket Entered June 18, 2012.
3. Final Motion of Richard H. Saudek Esq. on behalf of Intervenor Stanstead, Quebec dated and entered June 15, 2012. Please note that Richard H. Saudek of Cheney, Brock & Saudek, P.C. also represented some of the intervening surrounding Vermont Towns to the DLWP of Holland, Derby Center and the Town of Derby.
4. HDCRE Final Motion dated and entered June 15, 2012.
5. PSB Memorandum Dated June 22, 2012.

Thank you for your time and consideration to the above matters. We hope that we have been of assistance, regarding our experience, as your Commission determines guidance and recommendations to the Governor via Executive Order 10-12 (10/2/12).

Sincerely,



Vicky Farrand-Lewis  
HDCRE Coordinator/Secretary

cc: HDCRE Members  
Legal Advisors

**Holland and Derby Citizens for Responsible Energy (HDCRE)**  
**c/o Vicky Farrand- Lewis**  
**391 Whittier Road, Derby Line, VT 05830 802 895-2781**  
**Email: vfarrandlewis@yahoo.com**

Date: June 8, 2012

VIA HAND DELIVERY & US MAIL

Mrs. Susan Hudson, Clerk  
Vermont Public Service Board  
112 State Street, Drawer 20  
Montpelier, VT 05620-2701

RE: Docket No. 7832 - Derby Line Wind Project  
Holland and Derby Citizens for Responsible Energy Response to Memorandum of June 4, 2012  
RE: Petitioner's Notice of Dismissal

Dear Mrs Hudson:

In response to the above noted memorandum, HDCRE offers the following:

1) The Petitioner's application of December, 2011 was characterized by a minimal amount of information compared to that typically contained in an application for projects such as these. This was evidenced, among other things, by the comments of Mr. Cotter at the Pre-Hearing Conference, the interrogatories of the Department of Public Service, and the lack of fulfillment of the promises made to surrounding communities and citizens about the content of the application and subsequent submissions to augment it.

2) Some representations made by the Petitioner allowing the Board to waive certain criteria may have been misrepresentations such as two 2.3 MW turbines proposed for a total 2.2 MW or smaller renewable energy project under the Standard Offer Contract ( with no apparent certainty to date); the initial filing requesting one C.P.G. versus the apparent ultimate filing for two C.P.G.s; and statements concerning compliance with notification requirements.

3) The Petitioner failed to notify adjoiners in a timely fashion. In fact, the Petitioner presented an extremely aggressive initial schedule at the same time as not all adjoiners and entities had been legally notified.

4) Through their own admission, the Petitioner has wasted the Board's time, expertise, and scarce resources. This has resulted from such actions as miscalculating the responses by a number of Towns, inciting an International controversy for a variety of reasons including lack of notification consistent with the Canadian Accommodation's Law , and appearing not to follow the advice of the Board. The Canadian controversy appears to have resulted in the necessity of reducing the scope of the project by fifty percent.

5) The municipalities adjoining the project ( the Village of Derby Line, the Town of Holland, and the Town of Stanstead, P.Q.) have all voted to oppose the project. In fact, the Holland Selectboard, on June 4, 2012, voted to oppose the project knowing that it might be for only one location. It can be anticipated that similar opposition will occur, possibly with more acumen, if the project is resurrected.

6) There continue to be questions regarding: the financial capacity of the Petitioner to complete the project and fully comply with potential conditions imposed by the Board, the viability of their site control, and the true intent of the Petitioner as to whether they intend to build the project or merely sell the CPGs and/or Standard Offer Contract.

7) Concerning V.R.C.P Rule 41(a)(1)(I), the Petitioner believes that no Board order or action is necessary for dismissal. We disagree. It is our understanding that this Rule allows voluntary dismissal if no pleadings or significant effort in response to various motions have occurred. In this instance, significant effort by private individuals and elected public officials at no small expense ( attorneys' fees, postage, mileage, etc.) by a number of entities including four Intervenor communities and other Intervenors has occurred. In addition, responses to a variety of issues have been made ( and responses given by the Petitioner) by the Agency of Natural Resources, Department of Public Service, and the HDCRE itself. Clearly, the request for dismissal without prejudice by the Petitioner is not applicable in this case as the request is, at best, not consistent with the spirit and intent of the law given the actions of all involved. It is further our understanding that dismissal without prejudice may occur only in instances in which the court has no jurisdiction over the matter. In this instance, the Public Service Board clearly has such jurisdiction and authority to dismiss either with or without prejudice.

In conclusion, the request for dismissal is an attempt to remedy a defective application and mistakes made by the Petitioner by requesting to return to Docket No.7832 at a later date and to continue as if no mistakes had been made. HDCRE believes that all of the problems with this application have been created by the Petitioner. If the Docket as it exists were to be reopened, it would merely compound the problems already inherent therein and result in a protracted process to the detriment of the citizenry, more paramount municipal functions, and State time and resources. A dismissal without prejudice raises the distinct possibility ( whether perceived or legally permissible ) that this project can return without being the subject of appropriate scrutiny afforded by potential imminent decisions by the Vermont Legislature and local Regional Planning Commission ( NVDA). Both entities are considering moratoriums on turbine projects until rigorous analysis and recommendations are prepared. While such a possibility might result in a future Board decision inconsistent with the intent of the Legislature, to the ordinary Vermonter, it clearly would appear at best unfair, and at worst nefarious.

Based upon the facts, we do not believe that any due deference should be afforded this Petitioner and request that Docket No 7832 be dismissed with prejudice..

Thank you for the opportunity to comment.

Sincerely,

A handwritten signature in black ink that reads "Mitch Wonson". The signature is written in a cursive, flowing style.

Michael. L. "Mitch" Wonson  
President, HDCRE

cc: Service List

STATE OF VERMONT  
PUBLIC SERVICE BOARD

Docket No. 7832

Petition of Encore Derby Line Wind, LLC, for )  
certificates of public good, pursuant to 30 )  
V.S.A. Section 248, authorizing: (1) the )  
construction of a wind turbine and electric )  
generation facility at the Grand View Farm )  
located in Derby Line, Vermont; and (2) the )  
construction and installation of a separate wind )  
turbine and electric generation facility at )  
Smugglers Hill Farm located in Derby Line, )  
Vermont, together to be known as the "Derby )  
Line Wind Project" )  
)

Order entered:

6/18/2012

**ORDER RE: CLOSING DOCKET**

**I. INTRODUCTION**

On December 9, 2011, Encore Derby Line Wind, LLC ("Encore") filed with the Public Service Board ("Board") its petition seeking two individual certificates of public good authorizing it to construct and operate two separate wind turbine projects on two separate parcels of land, of up to 2.2 MW each. A prehearing conference in this Docket was held on February 13, 2012, and a site visit and public hearing were held on March 26, 2012.

On May 24, 2012, Encore filed a Notice of Voluntary Dismissal ("Dismissal Notice") of its petition pursuant to V.R.C.P. 41(a)(1)(i) notifying the Board that it was withdrawing the Smugglers Hill Farm project from the Standard Offer program, and that it would focus its efforts on the Grand View Farm project. Encore stated that it would attempt to address questions and concerns from members of affected communities prior to filing a new petition for the Grand View Farm project.<sup>1</sup>

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1. Letter from Leslie A. Cadwell, Esq., to Susan M. Hudson, Clerk of the Board, dated May 24, 2012, at 1-2.

On June 7, 2012, the Department of Public Service filed comments supporting the voluntary dismissal of Encore's petition.<sup>2</sup>

On June 8, 2012, comments were filed on the Dismissal Notice by Holland and Derby Citizens for Responsible Energy ("HDCRE"), John and Sherry Wagner, and the Town of Holland. HDCRE's comments state that voluntary dismissal is not available to Encore because the parties have engaged in significant efforts in response to Encore's petition, and that the spirit of the rule would be violated if Encore were allowed to dismiss the action without prejudice simply by filing the Dismissal Notice. HDCRE further contends that significant shortcomings and mistakes existed in Encore's initial filing and that additional mistakes have been made since that time. HDCRE views the Dismissal Notice as an attempt by Encore to remedy a defective application by allowing Encore to reopen the Docket as it exists at a later date which, HDCRE contends, would simply compound the problems that currently exist to the detriment of other parties. HDCRE also asserts that dismissal without prejudice is only available where a court has no jurisdiction over a case. Because the Board does have jurisdiction over Encore's petition, HDCRE states that the Board has discretion to dismiss the petition with prejudice, which HDCRE requests.<sup>3</sup>

John and Sherry Wagner express concerns over what they believe were serious misrepresentations by Encore throughout the proceeding. The Wagners contend that dismissal of the proceeding without prejudice cannot be achieved because they, along with other parties, have already made filings in the Docket and expended significant time researching the proposed projects, attending town select board meetings and meetings with other interested parties. Because of this, the Wagners believe that the Docket must be dismissed with prejudice.<sup>4</sup>

In its comments, the Town of Holland notes that its select board has voted to oppose both of the proposed projects.<sup>5</sup>

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2. DPS Comments.

3. HDCRE Comments at 2.

4. Wagner Comments.

5. Holland Comments.

## II. DISCUSSION

Voluntary dismissal of an action by the plaintiff is only available under V.R.C.P. 41(a)(1) before an adverse party serves an answer or a motion for summary judgment (or by a stipulation signed by all the parties). Since the Board's Rules generally do not envision an answer, and because proceedings had already commenced in this docket, including a prehearing conference, it is not clear that voluntary dismissal under V.R.C.P. 41(a)(1) is available.<sup>6</sup> Consequently, we are treating the notice as a motion for dismissal pursuant to V.R.C.P. 41(a)(2).

V.R.C.P. 41(a)(2) permits dismissal of an action at the plaintiff's instance by an order of the court upon such terms and conditions as deemed proper by the court. Unless otherwise specified in the dismissal order, the dismissal is without prejudice.<sup>7</sup>

We are granting the motion and are dismissing this proceeding without prejudice. Encore's Dismissal Notice is an attempt to alleviate some of the controversy associated with the Smugglers Hill Farm project, the closer of the two projects to the border with Canada. Encore also wishes to take some additional time to attempt to respond to concerns and questions of members of the surrounding communities before submitting a petition for just the Grand View Farm project. We conclude this is a reasonable request.

We reject the requests of HDCRE and the Wagners that the dismissal be made with prejudice. V.R.C.P. 41(a)(2) expressly states that dismissal at the plaintiff's instance is without prejudice unless otherwise ordered.<sup>8</sup> Both HDCRE and the Wagners have misread V.R.C.P. 41(a). HDCRE believes that voluntary dismissal without prejudice is available only where the court lacks jurisdiction over the claim, and the Wagners believe that dismissal without prejudice is only available if no responsive pleadings have been filed. These views are incorrect. Under V.R.C.P. 42(a)(2) dismissal without prejudice may be ordered by a court of competent jurisdiction after responsive pleadings are filed. Both HDCRE and the Wagners list a number of what they see as shortcomings and misrepresentations by Encore during this proceeding. However, neither HDCRE nor the Wagners explain why these should require dismissal with

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6. See, for example, Docket 7397 (Order of 11/13/08); Docket 7419 (Order of 5/21/09).

7. V.R.C.P. 41(a)(2).

8. V.R.C.P. 41(a)(2).

prejudice. While we understand the desire of the intervenors to see both of the proposed projects halted at this juncture, there is no legal basis for dismissing the proceeding with prejudice. We do stress, however, that Encore will not be permitted to simply reopen Docket 7832 and continue from the point at which it filed its Dismissal Notice. We fully expect Encore, if it does decide to continue its efforts with respect to the Grand View Farm project, to file a new petition with supporting testimony and exhibits addressing each applicable Section 248 criterion, and prior to such a filing, to serve required notices on all entities and persons entitled to such notice under Section 248 and PSB Rule 5.400.

**III. ORDER**

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED by the Public Service Board of the State of Vermont that:

1. The motion for dismissal is granted without prejudice.
2. This docket shall be closed.

Dated at Montpelier, Vermont, this 18<sup>th</sup> day of June, 2012.

s/James Volz )

) PUBLIC SERVICE

s/David C. Coen )

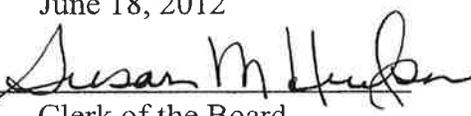
) BOARD

s/John D. Burke )

) OF VERMONT

A TRUE COPY  
OFFICE OF THE CLERK

FILED: June 18, 2012

ATTEST:   
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@state.vt.us) 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.*

LAW OFFICES

**CHENEY, BROCK & SAUDEK, P.C.**

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Montpelier, Vermont 05602

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June 15, 2012

HAND DELIVERED

Susan M. Hudson, Clerk  
Vermont Public Service Board  
112 State Street - Drawer 20  
Montpelier, VT 05602-2701

**Re: Comments of the Town of Stanstead on Request of  
Encore Derby Line Wind, LLC to Extend  
Commissioning Milestone**

Dear Sue:

The Town of Stanstead submits that the Board should not grant the request of Encore Derby Line Wind, LLC to extend its milestone commissioning date.

According to its request, Encore Redevelopment acquired development rights to the project February 2012, after having effectively taken control in mid-2011. By this time, Encore's predecessors in interest had sat on their rights for a year and a half. Encore argues that it went to work on the permit process soon after it took control of the project, but it turned out to be too late to receive the necessary permits (including a CPG after inevitable appeals) to assure that the plant would be built and running by mid-January 2013.

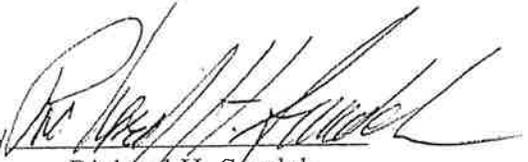
The problem with Encore's position is that it should have foreseen that it almost certainly would take more than a year to get through the regulatory and appeal process. Even if the Board had scheduled its prehearing conference within a month of Encore's filing, the likelihood of having discovery, hearings and a decision in less than about eight months was slim and, as Encore remarks in its request, "appeals of [the Board's] decisions in wind energy cases by opponents is a virtual certainty." Even an expedited appeal would last beyond January 15, 2013.

In other words, Encore made a poor bet when it took charge of the project. Surely, if it had bought the project today – seven months before the milestone date, it couldn't seriously argue that it was without fault. Given the regulatory hurdles that it had to clear and the fact that resistance to wind machines was growing to a fever pitch, the fact that it started work on the project a year ago was still a big gamble.

Further, as a matter of public policy it would be inappropriate to allow one developer to sit on its rights and then sell to a new developer, thereby giving the new developer the argument that it wasn't his fault and therefore the time should be extended. In order to be fair to the many developers who have shown an interest in building SPEED plants, a buyer shouldn't be allowed to come in late and have the clock start ticking again.

Sincerely yours,

Town of Stanstead, P.Q.

By   
Richard H. Saudek  
Its Attorney

cc.: Service List

PSB Docket No. 7832 - SERVICE LIST

Parties:

John Beling, Esq., Director for Public Advocacy  
Aaron Kisicki, Esq.  
Vermont Department of Public Service  
112 State Street  
Montpelier, VT 05620-2601

Leslie A. Cadwell, Esq. (For Encore Derby Line Wind, LLC)  
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Richard H. Saudek, Esq. (For Town of Derby, Village of Derby Center,  
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Michael L. Wonson (Copies of all filings must be sent to Vicky Farrand-Lewis  
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\*\*Terry & Lynda Hartley  
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(For Group Intervenors)  
(And on behalf of themselves)

\*Julie Fauteux & Stephane Grenier  
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\*Suzanne & Benoit Grenier  
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\*Bernadette Frechette & Luc Grenier  
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\*Nathalie Houde & Louis Grenier  
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Stanstead, Quebec J0B 3E1

\*Edith Lindblom-Warthin  
2005 Herrick Road  
Derby, VT 05829

\*Brian Bidwell  
1052 Goodall Road  
Holland, VT 05830

\*Motion to Intervene pending.

Interested Persons:

John Cotter, Esq., Hearing Officer  
Ed McNamara, Esq., David Watts, PSB

**Holland and Derby Citizens for Responsible Energy (HDCRE)  
c /o Vicky Farrand- Lewis  
391 Whittier Road, Derby Line, VT 05830 802 895-2781  
Email: vfarrandlewis@yahoo.com**

Date: June 15, 2012

VIA HAND DELIVERY & US MAIL

Mrs. Susan Hudson, Clerk  
Vermont Public Service Board  
112 State Street, Drawer 20  
Montpelier, VT 05620-2701

RE: Holland and Derby Citizens for Responsible Energy response to Memorandum of June 6, 2012 RE: Encore Derby Line LLC Request for Milestone Extension

Dear Mrs Hudson:

In response to this memorandum and the letter from Gravel & Shea of May 24, 2012 ( Encore letter) requesting a Milestone Extension for Encore Derby Line Wind, LLC ( Encore), HDCRE offers the following:

1) While we realize that this response is not technically part of Docket No. 7832 ( but admittedly do not understand the legal reasons as the Public Service Board ((PSB)) has not ruled on the Motion To Dismiss), the events surrounding that application for a Certificate of Public Good ( the application) are inextricably related to this request, as demonstrated by the Encore letter. As such, we will discuss them only in that context.

2) It is our understanding that Milestone Extensions shall be granted only in instances where the circumstances resulting in noncompliance with the parameters concerning duration of a contract are beyond the control of the entity to whom it was assigned.

3) We understand that Standard Offer contracts require completion within three years. As such, Encore should have been fully aware of the time constraints and legal ramifications of such a contract upon assuming control of the project. The fact that Encore did not fulfill the terms of the contract in a timely fashion is not the fault of Blue Wave Capital wasting one half of the allowable time period (as suggested initially in the Encore letter), but rather Encore's miscalculations regarding the time necessary to complete the project. It is logical to assume that Encore took over the project knowing the time constraints and felt it could successfully proceed consistent with the required schedule ( the critical path timeline attachment in the Encore letter presenting a twenty-five month schedule not withstanding).

4) Encore then seems to assign blame to the PSB for a delay in scheduling the prehearing conference. While we may not understand the typical timing of PSB actions, any developer should realize that a submission approximately two weeks before the Christmas holidays is unlikely to be processed as quickly as a submission at another time. Further, a knowledgeable developer must include some measure of potential bureaucratic delay in any viable development timeline, particularly when submitting an application so lacking in the basic information

necessary for a comprehensive review and ultimate approval. As noted in PSB Scheduling Order of March 2, 2012: “ ... Encore would have been better served had it filed its petition many months before it did.”

5) Encore then proceeds to assign blame to Mother Nature ( the same entity they laud for providing a viable site for their project). This tactic is disingenuous at best, particularly when the potential for inclement weather is understandably high at this location in March.

6) Despite representations to the contrary, on at least two occasions the Petitioner failed to properly notify adjoining communities and property owners pursuant to legal requirements. Encore presented an extremely aggressive schedule at the prehearing conference at the same time they should have been cognizant of the fact that all legal notification had not been made. The requisite Canadian notification was a subject of discussion at this time and, after a delay, was ultimately required. As noted in PSB Memorandum of May 15, 2012 from Hearing Officer John J. Cotter, Esq., Re: Encore request to change order: “Encore chose not to provide notice to Stanstead ... Encore did not fully comply with the requirements of PSB Rule 5.403(B)(1)...”. While a reasonably aggressive schedule was still in effect and Encore did not feel the need to request dismissal under it, in April it was ascertained that all adjoining in the United States had not been properly notified. This failure was referenced in the PSB Order RE: Motion to Amend Schedule of May 15, 2012 : “ The need to provide notice to these adjoining landowners at this stage of the proceeding was due to Encore’s failure...”. This omission created delayed requests for intervention resulting initially in a suspended schedule and ultimately in a revised schedule for the project. It was only at this time that Encore finally determined the schedule could not result in successful conclusion of the project within the context of their contractual obligations and filed the Motion to Dismiss and the Milestone Extension request.

7) Encore suggests that investing “ hundreds of thousands of dollars” somehow gives credence to their request. We do not see how this is germane to the issue at hand. Various intervenors have invested significant expense and time ( some of which has been billed as attorney’s fees and a considerable amount donated pro bono). Further, we do not doubt considerable State resources have been expended. A competent developer should be aware of the risk versus reward of a venture such as this, prior to embarking upon it.

In summary, Encore believes that all delays were the fault of other entities, while assuming no culpability of their own. The delays in this project were entirely the result of Encore by: 1) failing to either understand or comply with the time constraints of the Standard Offer contract ( by assuming they could proceed on an aggressive schedule which did not account for mis-steps or potential intervention), 2) not complying with standard Board requirements ( by failing to notify adjoining despite allegations that such had been done on a number of occasions), 3) filing a defective application ( such as requesting two 2.3 MW turbines for a 2.2 MW project and providing insufficient information which raised significant issues resulting in multiple interventions), and 4) failing to account within the project time line for the fact that, in their own words: “Wind cases attract more controversy than other generation technologies...”. The Standard Offer contract is valid for three years. The holders of the contract under consideration and their assignees failed to fulfill the terms of that contract. Despite protestations to the contrary, this failure was clearly a result of their own actions.

Therefore, based upon the facts, no extension is warranted, and HDCRE respectfully asks that the Request for Milestone Extension be denied. The extension request is an attempt by Encore to ignore their own errors and continue the project as if it were a new Standard Offer contract, potentially avoiding new Legislative initiatives. If the project were to continue, based upon the record of this developer all of us will likely be subject to the same lack of information, misinformation, and dissimulation which so plagued the initial proposal in our communities.

We appreciate the opportunity to comment and are available for further input on this issue as the process proceeds.

Sincerely,

A handwritten signature in black ink, appearing to read "Mitch Wonson". The signature is fluid and cursive, with the first name "Mitch" and last name "Wonson" clearly distinguishable.

Michael. L. "Mitch" Wonson  
President, HDCRE

cc: Service List  
John Spencer, SPEED Facilitator



State of Vermont  
**Public Service Board**

MEMORANDUM

To: SPEED Facilitator

Cc: Docket No. 7832 Service List

From: Susan M. Hudson, Clerk of the Board *sh*

Re: Extension of Commissioning Milestone

Date: June 22, 2012

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Encore Derby Wind, LLC ("Encore") filed a petition pursuant to 30 V.S.A. § 248 to construct two wind turbines in Derby Line, Vermont; Encore's Section 248 petition is being addressed in Docket No. 7832. Encore also holds two separate contracts, one for each proposed turbine, with the Vermont SPEED Facilitator through the standard-offer program created pursuant to 30 V.S.A. Ch. 89. Issues related to the standard-offer program are separate and apart from the Section 248 process and Docket No. 7832.<sup>1</sup>

On May 24, 2012, Encore filed a letter with the Public Service Board ("Board") requesting a waiver of the commissioning milestone in its standard-offer contract for its Grand View Farm wind generation project, one of the two proposed turbines that are the subject of Docket No. 7832. Encore states that the original standard-offer contract was executed by Bryan and Susan Davis on January 15, 2010; the contract was assigned to Blue Wave Capital in early 2010, and assigned once again to Encore in February 2012.<sup>2</sup> Encore requests "a commissioning milestone extension that provides sufficient time to complete all appeals in the event that the Board" issues a certificate of public good pursuant to 30 V.S.A. § 248. Encore asserts that "a reasonable commissioning deadline under the circumstances is July 15, 2015."

Encore contends that:

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1. The Docket No. 7832 service list was used solely to request comments from potentially interested persons.
  2. Encore represents that it "effectively took control over the project in late June 2011 to take advantage of efficiencies in environmental review, engineering, and permitting for two nearby wind energy projects each consisting of a single 2.2 MW maximum capacity turbine."

good cause exists to extend the commissioning milestone because construction is not possible before receiving a Certificate of Public Good . . . and there is no likelihood that the Board can reasonably deliberate on the merits of the project in time to allow Encore to complete construction this year.

Encore further states that extending the commissioning milestone would be consistent with the legislative intent of promoting technological diversity in the standard-offer program and that an extension for the project "also acknowledges that different technologies have different development and permitting timelines."

On June 5, 2012, the Department of Public Service ("Department") filed a letter supporting a one-year extension of the commissioning milestone. The Department states that the project will increase diversity in the standard-offer program, promote community-scale renewable energy projects, and promote the goals of the Comprehensive Energy Plan. The Department further states that, since taking control of the project, Encore has been pursuing the project aggressively. Finally, the Department recommends that the extension be limited to one year, and, if the Board issues a CPG that is subsequently appealed, then Encore could request a further extension at that time.

On June 13, 2012, John and Sherry Wagner filed a letter objecting to Encore's request. The Wagners assert that any delays in the permitting process are due to Encore's failure to properly notify adjoining property owners, both within the U.S. and within Quebec.

On June 14, 2012, Jeanne Dickinson filed a letter asserting that the delays in the Section 248 proceeding are due to Encore's failure to provide adequate notice to abutting landowners. Ms. Dickinson further addresses whether the proposed project will promote the general good.

On June 14, 2012, Lagueux Road Committee ("LRC") filed a letter objecting to Encore's request. The LRC contends that the delays in the permitting process are due to the fact that Encore did not provide notice of the proposed project to adjoining landowners as required.

On June 15, 2012, the Town of Stanstead ("Stanstead") filed a letter objecting to Encore's request. Stanstead contends that an extension of the milestone is not appropriate because "Encore's predecessors in interest had sat on their rights for a year and half." Stanstead argues that Encore should have foreseen that it would likely take more than a year to get through the permit and appeals process. Stanstead further states that:

as a matter of public policy it would be inappropriate to allow one developer to sit on its rights and then sell to a new developer, thereby giving the new developer the argument that it wasn't his fault and therefore the time should be extended. In order to be fair to the many developers who have shown an

interest in building SPEED plants, a buyer shouldn't be allowed to come in late and have the clock start ticking again.

The purpose of the commissioning milestone is to ensure that the standard-offer program meets that statutory goal of "rapid deployment." The milestones were established at the inception of the standard-offer program, in 2009, and at that time no objection was raised to including a three-year commissioning milestone in the standard-offer contract.<sup>3</sup> In late 2009 the Board issued an order denying a request by a hydroelectric developer to automatically extend milestones for hydroelectric facilities subject to Federal Energy Regulatory Commission ("FERC") jurisdiction. The Board determined that it was appropriate to allow such plant owners to request extensions to the commissioning milestone provided that the owner demonstrate that it has "made all reasonable efforts to obtain FERC approval as quickly as possible."<sup>4</sup>

On May 18, 2012, Act 170 became effective. The Act includes the following specific language regarding the grant of extensions to a commissioning milestone:

At the request of a plant owner, the board may extend a period described in subdivision (1) of this subsection (j) [creating commissioning milestones for specific categories of resources] if it finds that the plant owner has proceeded diligently and in good faith and that commissioning of the plant has been delayed because of litigation or appeal or because of the need to obtain an approval the timing of which is outside the board's control.

30 V.S.A. § 8005a(j)(1)(B).

There is some dispute regarding whether Encore has proceeded diligently and in good faith in the permitting process. Encore contends that "[u]nanticipated scheduling delays early in the § 248 proceeding" made a January 2013 commissioning date impossible. Several commenters state that Encore's failure to provide adequate notice to adjoining landowners created delay in the Section 248 process.

While Encore submitted a Section 248 petition even before it had been assigned the standard-offer contract, the permitting delays were largely a result of Encore's failure to provide adequate notice to adjoining landowners. Even if the Section 248 process had not been delayed by this failure, the schedule for the proceeding was extremely aggressive and it is unclear whether it would have needed to be expanded for some other reason.

Notwithstanding the question of whether Encore has made reasonable efforts to obtain Board approval, Encore knowingly took ownership, in February 2012, of a standard-offer contract that contained a requirement that the project be commissioned by January 15,

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3. See, Docket 7533, Order of 9/30/09 at 28-29.

4. Docket 7533, Order of 10/28/09.

2013. In doing so, Encore took a risk that it could obtain approval and construct a wind generation facility within one year. The decision to take that risk was within Encore's control. If the Board were to evaluate requests for milestone extensions based solely upon the actions taken once a particular entity was assigned a standard-offer contract, the milestone in the contract would be essentially meaningless and would open the door to gaming the milestones. For example, if a project with a standard-offer contract was unable to meet a milestone contained in the contract it should not be able to transfer the contract to a new entity and therefore, in essence, restart the milestone deadline. Such a possibility runs counter to the purpose of the milestones, which are to require rapid deployment of standard-offer projects by requiring legitimate projects to meet certain steps that will lead to commissioning within a reasonable time period.<sup>5</sup>

With respect to the issue of technological diversity in the standard-offer program, Encore and the Department are correct that technological diversity is an important component; however, the desire for technological diversity should not override the need for meaningful program requirements.

For the reasons set forth above, the Board has concluded that the commissioning milestone in Encore's standard-offer contract will not be extended.

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5. We note that the most recent revision to the standard-offer contract requires a plant owner to file a petition pursuant to Section 248 within eighteen months of executing the standard-offer contract. This milestone was not included in the contract that Encore has had assigned to it.