

**STATE OF VERMONT
PUBLIC SERVICE BOARD**

McLane Motion for Relief re Georgia Mountain) December 18, 2015
Community Wind, LLC)

**REPLY OF THE DEPARTMENT OF PUBLIC SERVICE IN RESPONSE
TO MELODIE AND SCOTT McLANE’S MOTION FOR RELIEF,
MOTION TO JOIN BURLINGTON ELECTRIC DEPARTMENT
AS A PARTY, AND RESPONSE TO COMMENTS**

The Department of Public Service (“Department” or “DPS”), by and through undersigned counsel, submits the following reply in response to Melodie and Scott McLane’s Motion for Relief, Motion to Join Burlington Electric Department as a Party, and Response to Comments (“Motion”), dated November 2, 2015, and Georgia Mountain Community Wind, LLC’s (“GMCW”) Opposition to McLane Motion for Relief and Joinder of BED and Response to McLane Comments on Noise Complaint (“GMCW Response”), dated December 1, 2015. The Department has reviewed the Motion and the GMCW Response, and recommends that the Board not initiate a formal investigation in response to the Motion. The Department has no basis to conclude, at this time, that the GMCW wind facility’s operation may pose an undue adverse effect on the public health and safety. It does, however, recognize the impact of the facility’s operation on the McLane’s health and/or use and enjoyment of their property, and suggests that McLane’s may find acceptable relief in a forum other than the Public Service Board (“Board” or “PSB”).

BACKGROUND

On November 3, 2015, Melodie and Scott McLane filed their Motion, which seeks, among other things, a Board review of “its sound standard for operating wind turbines,” “a revision of the GMW sound monitoring protocol . . . such that the turbine power output is required to be reduced immediately when neighbors, including the McLanes, cannot sleep,” and joinder of Burlington Electric Department (“BED”) – who, the McLanes argue, is the operator of the GMCW turbines and “has the technical ability to reduce the power output of the . . . turbines.” Motion at 4, 6. BED filed a letter in response to the Motion on November 5, 2015, explaining that it is neither the operator of the GMCW facility, nor does it have the “technical capability or the contractual right” to reduce turbine output. Letter from William Ellis, on behalf of BED, to Susan Hudson, Clerk of the PSB, *re Petition of Georgia Mountain Community Wind*, Nov. 5, 2015 at 2.

GMCW filed a request on November 9, 2015 seeking postponement of a response to the Motion until after resolution of a noise complaint made by the McLanes on September 18, 2015. The Department filed comments on November 12, 2015 not objecting to GMCW’s request. On November 13, 2015, the Board denied GMCW’s request but provided additional time to respond to the Motion. The Board has since opened an investigation to examine the McLane’s noise complaint in Docket 8613.

On December 1, 2015, GMCW filed its Response to the Motion. The GMCW Response argues that the McLanes have no basis under PSB Rule 2.221 and/or V.R.C.P. 60 to obtain the relief sought in the Motion.

DISCUSSION

The Department has received a number of noise complaints related to the GMCW facility since the start of project operation. The Department's division of Consumer Affairs and Public Information ("CAPI") receives these complaints through a variety of sources, including notice from GMCW of receipt of a complaint, direct contact from a complainant, and from the Public Service Board ("PSB" or "Board"). CAPI has recorded approximately seventy-seven (77) noise-related complaints near GMCW, and with the exception of one complaint, all came from one of three residences. To date, CAPI has logged twenty-two (22) complaints it classifies as noise-related from the McLanes.

Noise complaints generally speak to the question of whether a wind facility is being operated in compliance with applicable Certificate of Public Good ("CPG") requirements. In the instance of GMCW, CPG Condition 23 requires that:

GMCW shall construct and operate the Project so that it emits no prominent discrete tones pursuant to American National Standards Institute (ANSI) standards at the receptor locations; and Project-related sound levels at any existing surrounding residences do not exceed 45 dBA(exterior)(Leq)(1 hr) or 30 dBA (interior bedrooms)(Leq)(1 hr).

Determinations of CPG compliance are squarely within the Board's general supervisory jurisdiction. 30 V.S.A. §§ 203, 209(a). Indeed, the PSB has recently opened proceedings to examine claims related to CPG noise limit compliance at GMCW and the Sheffield Wind facility, including an investigation into a noise complaint lodged by the McLanes on September 18, 2015. Likewise, the Kingdom Community Wind facility in Lowell is currently subject to continuous monitoring in response to a penalty investigation initiated in 2013.

The McLanes' Motion focuses on an issue separate and very different from CPG compliance. The Motion, at its core, seeks to reopen the question of whether Condition 23 is

protective of the public health and safety. That question is not appropriate for the Board or the Department to pursue unless and until evidence is presented to suggest that operation of the turbines creates an undue adverse effect on the public health and safety. No such evidence has been provided to date.

The Board made a number of findings in the Docket 7508 Final Order in support of its ultimate finding that the noise levels produced by the Project will not have an undue adverse impact on public health. Docket 7508, *Petition of Georgia Mountain Community Wind, LLC*, Final Order, June 11, 2010 at 5, Finding 163. This includes a finding that noise levels will be in compliance with the World Health Organization nighttime noise impact criterion of 45dBA. *Id.*, Finding 164. It is also important to note that the Board explicitly recognized that the project's operation "will likely be audible at some outdoor locations, including residential locations, in the area surrounding the Project site." *Id.* In sum, the Board has made the determination that the sound limits contained in Condition 23 are protective of public health and safety.

The McLanes' Motion, on the other hand, seeks to challenge the Board's 2010 findings with respect to noise and public health and safety. Such a challenge is well within the McLanes' right to request. In order to properly place such a challenge before the Board, however, some credible threshold showing needs to be made that the CPG sound limits are not, in fact, protective of public health and safety. The McLanes provide no evidence to suggest that the project's operation has created an undue adverse effect on *public* health, aside from their own personal experience, and allegedly that of a neighbor. The Department has also investigated whether sufficient evidence exists to suggest that the CPG noise limits may not be adequately protective of public health and safety, and it has not found such evidence.

The Department has consulted with the Department of Health (“VDH”) when examining the question of whether the operation of the GMCW turbines may be causing an undue adverse effect on public health and safety. VDH is the state agency with the requisite expertise to properly analyze health complaints and make epidemiological determinations as to individual and/or public health impacts. The Department has therefore relied on VDH’s expertise in assessing potential public health impacts at this, and other electric generation or telecommunications facilities in the state. VDH does not have any evidence at this time to suggest that operation of the project creates an undue adverse impact on public health.

VDH notes, however, that its epidemiological monitoring of any and all health impacts from commercial wind facility operation is ongoing. It seeks to establish a long-term, constructive line of communication with any individual affected by noise and his or her physician. Additionally, VDH continues to review new scientific literature as it is released to update and improve its understanding of the nexus between noise and any associated health risks.

While the Department does not support a re-examination of the project CPG noise limits at this time, it finds the issues raised in the Motion to be credible and serious. The Department has no reason to think that the sleep disturbances and other health impacts cited by the McLanes are fabricated or exaggerated. Nor does the Department have cause to question the veracity of the McLanes’ description of the range or severity of their health symptoms. The same can be said of the complaints the Department has received from other residents living near the GMCW and other commercial wind sites. In short, the limited number of GMCW complainants contacting the Department does not support a finding of a public health impact. It is, however, indicative of a significant impairment of the quality of life for some nearby residents.

The Public Service Board does not appear to be the appropriate forum in which to litigate these individual health complaints. Rather, the Department suggests it would be more appropriate for the McLanes and other complainants to bring their claims to Vermont Superior Court in the form of a nuisance and/or personal injury suit. This recommendation is consistent with the position the PSB recently took in response to concerns raised by state legislators over noise complaints at the Board. *See* Letter from James Volz, Chair of PSB, to Vermont Sen. Degree, and Reps Branagan, Gamache, Fiske and Savage *re Inquiry concerning sound complaints from wind generation facilities*, Sept. 24, 2015.

Lastly, the Department opposes Board consideration of the McLanes Motion now because the relief sought is incompatible with the requirements of Condition 23. Condition 23 obligates GMCW to ensure that “Project-related” sound levels do not exceed 45dBA outside a residence or 30dBA at an indoor bedroom, as expressed as a one-hour Leq average. The McLanes’ request that they and other residents effectively have access to real-time monitoring and facility shutdown capabilities ignores Condition 23’s requirement that sound data used to make CPG compliance determinations must be analyzed and “scrubbed” to reflect the removal of background noise and expressed as one-hour Leq averages.

The Motion also seeks a review of the overall Project CPG noise limit, which may include an examination of the efficacy of the “project-related” and one-hour Leq average requirements in Condition 23. The Motion, however, is not clear about what issues the McLanes seek to review beyond the potential inclusion of infrasound and amplitude modulation as part of the CPG noise limit. Likewise, the Motion does not identify any basis to question the utility and fairness of the “project-related” and one-hour Leq average requirements.

CONCLUSION

The Department recognizes the severity of the issues raised in the Motion on the McLanes' quality of life, and for those similarly affected by the operation of the facility. However, the limitation on the Public Service Board's jurisdiction to consideration of public – versus private or individual – health and safety impacts, coupled with the lack of evidence to support a public health risk finding by the Department of Health with respect to operation of the GMCW turbines, leads the Department of Public Service to recommend that the Board deny the McLanes' Motion, and decline to open further investigation or take additional action at this time. The McLanes may, however, find relief in response to their private nuisance and/or personal injury claims in Vermont Superior Court.

Dated at Montpelier, Vermont this Eighteenth day of December, 2015

Respectfully submitted,

VERMONT DEPARTMENT OF PUBLIC SERVICE



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