

STATE OF VERMONT
PUBLIC SERVICE BOARD

CPG No. NM-52

In Re: Petition of Richard Pollack requesting a)
certificate of public good for an interconnected)
net metered wind-generated electrical power)
system located on petitioner's property on Windy)
Ridge in Charlotte, Vermont)

Order entered: 12/20/2001

I. INTRODUCTION

This case involves an application filed by Richard Pollack ("Applicant" or "Petitioner") on September 27, 2001, requesting a certificate of public good ("CPG") pursuant to 30 V.S.A. §§ 219a and 248 and Vermont Public Service Board Rule 5.100, for a wind turbine net metering system ("the Project"). The Project is located on the Applicants' property in Charlotte, Vermont. In accordance with the instructions delineated in Section 5 of the Board's Net Metering application form, the Applicant sent notice to four neighboring landowners, among other interested parties, on September 21, 2001.

On October 4, 2001, Joan and Fred Krech, neighboring landowners who had received such notice, filed a letter with the Board and requested a hearing on the application. Mr. and Mrs. Krech, whose property is an adjoining parcel due south of the Applicants' property, cited negative aesthetic impacts from the Project as justification for their request.

The Board also received a letter from Roger W. Barnes that expressed concerns about the aesthetics of the project; however, Mr. Barnes did not request a hearing.

A prehearing conference in this proceeding was held on November 7, 2001, at the Charlotte Town Offices located on Ferry Road in Charlotte, Vermont. In addition to the prehearing conference, a site visit at the Applicants' property was also conducted, immediately prior to the prehearing conference. The following persons entered appearances either prior to or at the prehearing conference and were admitted as parties: Petitioner Richard Pollack; Aaron Adler, Esq., for the Vermont Department of Public Service ("Department"); adjoining landowners

Joan and Fred Krech; adjoining landowner Clark Hinsdale; Town of Charlotte Zoning Board, by Jonathan Fisher, Chairman; and Renewable Energy Vermont, by David Blittersdorf.

At the prehearing conference, the first question addressed was whether the Krechs had raised a substantial issue with respect to any of the criteria of 30 V.S.A. § 248 applicable to net metering projects.¹ The Hearing Officer ruled that the Krechs had succeeded in demonstrating that the Project, given the high visibility of the Project in the area, raises a significant issue under 30 V.S.A. § 248(b)(1) regarding orderly development of the region and 30 V.S.A. § (b)(5) and 10 V.S.A. § 6086(a)(8) regarding aesthetics and scenic and natural beauty.² Based on this ruling, further discussions were held as to the process that would be followed to resolve this docket.

As a result of these discussions, the parties agreed to meet as soon as possible to attempt to resolve their differences regarding the impacts of the Project. If these informal discussions were unsuccessful, the parties agreed to meet with a facilitator (either a representative of the DPS or the Board) on November 14, 2001, to try to resolve their differences immediately before a scheduled technical hearing.

The parties met with a Board facilitator³ on November 14, 2001, to discuss possible settlement. Because these negotiations were unsuccessful, the technical hearing was held as scheduled at 7:00 p.m. at the Charlotte Town Offices. At the technical hearing, evidence was presented by the respective parties in support of and in opposition to the Project. Parties in attendance were Petitioner Richard Pollark, adjoining property owners Joan and Fred Krech, and the Charlotte Zoning Board represented by Jonathan Fisher.

II. FINDINGS AND DISCUSSION

Based on the evidence of record and the testimony presented at the hearing, I hereby report the following findings to the Board in accordance with 30 V.S.A. § 8.

1. These criteria under 30 V.S.A. § 248(b) include (b)(1) (orderly development of the region), (3) (stability and reliability), (5) (environmental considerations), and (8) (outstanding resource waters). Under 30 V.S.A. § 248(b)(5), the Board must give due consideration to 10 V.S.A. § 6086(a)1(B) (waste disposal), 1(D) (floodways), 1(E) (streams), 1(F) (shorelines), 1(G) (wetlands), 4 (soil erosion), 8 (aesthetics, historic sites, natural areas), and 8(A) (necessary wildlife habitat and endangered species).

2. Accordingly, these are the only criteria addressed in this decision. See Board Rule 5.102(G).

3. Mr. Gregg Faber served as the facilitator. Because he served in this capacity, he has not participated further in the Board's review of this docket.

1. The proposed wind turbine facility includes a three-bladed Bergey Excel wind turbine with a 20-foot diameter swept area, installed on a 98-foot tall tilt-up tubular tower. The tower will be supported by 4 guy wires anchored 37 feet from the tower base. The rated power output of the wind turbine is 10,000 watts. Exh. Pet. 2.

2. The Project is located on the Applicant's property on Windy Ridge Road in Charlotte, Vermont, approximately 1/4 mile east of U.S. Route 7. The parcel of land consists of 5 acres of meadowland located next to the last house on the road. Windy Ridge Road is approximately equidistant between Route 7 and Mt. Philo Road, and runs parallel to both roads. Id.

3. The area in which the Project is located is rural residential with a mixture of single family residences and active and inactive dairy farms. The area is zoned for five-acre lots, but many nearby parcels are ten acres or more. The terrain is mostly open fields with some small wooded areas and hedgerows between lots, giving an overall impression of an open rural area. Id.

4. The turbine tower will be located approximately 100 feet from the Applicant's house, with the base about 15-20 feet lower than the house's foundation. The Applicant's house is approximately 32 feet tall. Adjacent to the house is a large maple tree that is about 60 feet tall. Therefore, the top of the turbine blade will be about 30-35 feet taller than the adjacent tree, and about 55-60 feet taller than the Applicant's house. Tr. at 10-13.

5. The Project will be visible from surrounding properties and roads, with clear views of the turbine from many points along Mt. Philo Road. The tower will be approximately 1500 feet from the closest view point on Mt. Philo Road. The turbine will also be visible from Mt. Philo State Park, but at a much greater distance, and from various points along Route 7. Tr. at 8-10; exh. Pet. 2.

6. When viewed from the Mt. Philo Road area east of the turbine, the tip of the turbine blade will be level with, or extend above, the ridge line of the distant Adirondack Mountains to the west, depending on the viewer's perspective. Nevertheless, the turbine will be only a small part of an expansive, panoramic view. When viewed from the top of Mt. Philo, the turbine will be visible, but the top of the turbine blades will not extend above any distant ridge line because of the

relative height of Mt. Philo. The turbine will be only a small feature of a very wide panoramic view from the top of Mt. Philo. Tr. at 8-10; exh. Pet. 1.

7. The Krechs' residence is located immediately to the south of the Project on Windy Ridge Road, about 350 feet from the turbine site. When viewed from the rear porch of the Krechs' house, the turbine will be to the right of the primary view, outside of a 90-degree viewing cone. Nevertheless, the Project will be clearly visible from most locations on the northern and eastern sides of the Krechs' property. Tr. at 9; exh. Pet. 2.

30 V.S.A § 248(b)(1): Orderly Development of the Region

8. The Project will not interfere with the orderly development of the region, given the land conservation measures as described in the Charlotte Town Plan. This finding is supported by the findings above and findings 9-20 below.

9. The Town of Charlotte has a duly adopted town plan which was originally adopted on March 6, 1990. The town plan was readopted on March 7, 1995, and on March 7, 2000. Exh. Krech 1.

10. Although the Town Plan contains references to renewable energy resources, it does not specifically address wind turbines. Objective 4.8, under "sound conservation practices", is "(t)o encourage energy conservation and the development and use of renewable energy resources through land use planning which enables village patterns of settlement that reduce travel requirements, planning for bicycle lanes, and protection of productive woodlands. The town will promote energy efficiency in its own buildings, vehicles, and operations." Id. at 5.

11. The Town Plan also includes the following statement under section 5.10 Energy: "(b)ecause this is an Act 200 plan, energy is a required element. However, energy was not an issue that was specifically addressed in the two years of work on the plan. The town does not have an Energy Coordinator or Energy Committee. The town remains at the beginning of the process of energy planning." Id. at 85.

12. The Town Plan enumerates several goals for the future of the town in Section 2. Goals. Specifically, Goal 1 is: "To maintain and protect Charlotte's rural character and heritage." Id. at 4.

13. The Town Plan also enumerates several objectives under this goal. Objective 1.1 is the preservation of "the quality of the landscape through the protection of open spaces, panoramic views of the Green Mountains, Adirondacks, and Lake Champlain, and valuable natural resources." Id.

14. Section 5 of the Town Plan, "Charlotte Tomorrow," includes the following provisions under General Policies and Strategies (section 5.6):

The town will protect the opportunities for the public to enjoy views and vistas identified in the town plan through the zoning and subdivision regulations.

Amend the standards in the subdivision regulations to reference and provide protection of views and vistas, meadows and pastures outside the agricultural districts, geological sites, and natural areas.

Within two years develop a map of "viewsheds" of the views and vistas and establish criteria for protection of the viewsheds through a scenic overlay.

Id. at 80.

15. Section 4.4.5 of the Town Plan, "Special Features", identifies significant open spaces, scenic views, vistas and roads. Nineteen specific views and vistas are listed, including "northwest to southeast from Mt. Philo State Park (V1)" and "west off Mt. Philo Road, south of the base of Mt. Philo State Park (V2)." These views are specifically delineated on the "Cultural and Recreational Resources" map on page 54. Id. at 36 and 54.

16. Under Section 5.1.2, "Land Use Strategy," the plan creates six land use districts: Village Residential, Commercial, Industrial, Rural, Conservation, and Shoreland. Id. at 67-73, 88.

17. The Project is located in the Rural District, as indicated on the map entitled "Future Land Use" contained in the Town Plan. Id. at 88.

18. The Town Plan describes the Rural District as intended for agricultural, forestry, rural housing, recreation, and resource protection purposes. Id. at 70.

19. The Town Plan provides that significant resources to be protected in the Rural District include open space, scenic vistas and views in the Scenic Corridor District. Id.

20. The Town of Charlotte Planning Commission has reviewed the Project and has determined that the wind turbine, while it will be located in a critical viewshed, "will not interrupt the view significantly enough to require a hearing." This opinion by the Planning Commission was developed after discussions with the Petitioner and a neighbor at public meetings, as well as a site visit. In reaching this conclusion, the Planning Commission also considered the recommendation of the Town Planner which suggested that the Project "will not negatively impact the view from locations V1 or V2 identified in the Charlotte Town Plan (2000)." Exhs. Pet. 3 and 4.

Discussion

In order to be in compliance with 30 V.S.A. § 248(b)(1), a project "must not unduly interfere with the orderly development of the region with due consideration having been given to the recommendations of the municipal legislative bodies, and the land conservation measures contained in the plan of any affected municipality." As noted in the findings above, the Charlotte Town Plan contains several specific references to the protection of views, vistas and open spaces. In addition, the Town Plan also specifically identifies views from Mt. Philo State Park and from along Mt. Philo Road to the south of the State Park as views to be protected and preserved. The Project, as noted in the findings, is located in the Rural District, which is intended for agricultural, forestry, rural housing, recreation, and resource protection purposes. Significant resources to be protected in this district include open space, and scenic vistas and views.

While the Town Plan does not prohibit wind turbines in the Rural District or other districts, it evinces a clear intent to protect scenic views and vistas. To the extent that a wind turbine or other large structure obstructs the scenic views and vistas described in the Town Plan, it would not conform to the clear intent of the Plan. In this case, however, the Project, due to its specific siting, will not directly obstruct the views and vistas of adjoining landowners and other members of the public. While it will be visible from adjoining properties and from specific critical view points such as Mt. Philo State Park and along Mt. Philo Road, the effect on these views will not be significant enough to violate these provisions of the Town Plan. I reach this conclusion because of the distance of the Project from these view points, because the top of the turbine blades will not significantly extend above the skyline of the distant Adirondack Mountains, and

because the Project will not be located directly in any neighbor's primary view. My conclusion is further reinforced by the determination of the Charlotte Planning Commission that the visual effect of the project is not significant enough to require a hearing. Therefore, I conclude that the Project is in conformance with the land conservation measures contained in the town plan and will not unduly interfere with the orderly development of the region.

30 V.S.A § 248(b)(5): Aesthetics, Historic Sites, Air and Water Purity, the Natural Environment and Public Health and Safety

21. The Project will not have an undue adverse effect on the aesthetics and scenic and natural beauty of the area. This finding is supported by findings 1-8 above, and 22-24 below, with due consideration given to 10 V.S.A. § 6086(a)(8).

22. The Applicant will paint the Project's facilities a uniform, flat, muted, light gray color, and will use a tubular pole tower rather than a lattice structure to decrease its visibility and help it blend into the background. Also, the Petitioner proposes to locate the tower at a lower elevation than that of the site with the best wind resource on his property. He has made this decision to minimize its exposure to neighbors and the surrounding area, even though it will reduce potential energy production. Exh. Pet 2; tr. at 35.

23. Based on the experience of a similar turbine located in Charlotte, the Project should not generate a significant amount of noise. The Applicant has agreed to a condition that would address any noise issues that may arise from the turbine after it is installed. Tr. at 37-38.

24. The Applicant has agreed to additional conditions related to the aesthetics of the project, including a requirement to remove the turbine if it does not produce electricity for a period of six months, a prohibition against lighting the tower, and a prohibition against any changes without approval by the Board. Tr. at 38-39.

Discussion

In order to reach a determination as to whether the Project will have an undue adverse effect on the aesthetics of the area, the Board employs the two-part test first outlined by the Vermont Environmental Board in Re: Quechee Lakes Corp., #3W0411-EB and #3W0439-EB,

Findings of Fact, Conclusions of Law, and Order (Nov. 4, 1985) [EB #241], and further defined in numerous other decisions.⁴

Under the Quechee analysis, first a determination must be made as to whether a project will have an adverse impact on aesthetics and the scenic and natural beauty. In order to find that it will have an adverse impact, a project must be out of character with its surroundings. Specific factors considered in making this evaluation include the nature of the project's surroundings, the compatibility of the project's design with those surroundings, the suitability of the project's colors and materials with the immediate environment, the visibility of the project, and the impact of the project on open space.

The Project is located in a rural residential neighborhood characterized by several single family homes on large lots, some working dairy farms and open farmland, pastures and meadows. The Applicant's lot, on which the Project is located, is open and largely unwooded, although there is a 60-foot tall tree adjacent to the house. The next tallest feature in the immediate vicinity is the Applicant's home which is, at the apex, approximately 32 feet tall. The area, due to its open character, affords scenic views of Lake Champlain and the Adirondack Mountains to the west.

Although the Project will be located near the Applicant's home and will be partially obscured by it, the 108-foot-tall structure will be clearly visible from many adjacent areas. The Project, with a turbine swept area 20 feet in diameter, its overall height of 108 feet, its modern look, and the lack of any other structures of equivalent height in the area, will be out of character with its surroundings. Consequently, I conclude that the Project will have an adverse effect on the scenic and natural beauty and aesthetics of the area.

The next step in the two-part Quechee test, once a conclusion as to the adverse effect of the Project has been reached, is to determine whether the adverse effect of the Project is "undue." An adverse effect is considered undue when any one of the following questions is answered in the affirmative:

4. E.g., Re: John A Russell Corporation and Crushed Rock, Inc., #1R0489-6-EB, Findings of Fact, Conclusions of Law, and Order at 9-10 (Aug. 19, 1999) [EB#723]; Re: James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership, #8B0444-6-EB(Revised), Findings of Fact, Conclusions of Law, and Order at 24-25 (Aug. 19, 1996) [EB#629R].

1. Does the Project violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area?
2. Has the Applicant failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the Project with its surroundings?
3. Does the Project offend the sensibilities of the average person? Is it offensive or shocking because it is out of character with its surroundings or significantly diminishes the scenic qualities of the area? See, e.g., Russell, supra at 10; Hand, supra at 25-29; Quechee Lakes, supra at 19-20.

Regarding a clear written community standard regarding aesthetics, Charlotte's Town Plan, as noted in the findings above, contains several statements about preservation of the town's rural character and protection of scenic views and vistas. Therefore, I conclude that the Town Plan represents a clear written community standard regarding aesthetic and scenic and natural beauty. However, as I have found above, the Project is not inconsistent with the relevant sections of the Plan and, therefore, does not violate that clear written community standard.

In terms of mitigation, the Applicant has, as noted above, taken various steps to harmonize the project with its surroundings. These include painting the tower and turbine a uniform, dull, light grey color; use of a less visible tubular rather than a lattice-type tower; and locating the turbine on his property in an area that minimizes its visibility to his neighbors, the Krechs. In addition, the Petitioner has agreed to conditions that limit the noise from the project and prevent any lighting on the tower.⁵ Therefore, I conclude that the Applicant has taken generally available mitigating steps which a reasonable person would take to harmonize the project with its surroundings.

Finally, I find that the Project will not offend the sensibilities of the average person, nor is it shocking or offensive because it is out of character with its surroundings or significantly diminishes the scenic qualities of the area. I reach this conclusion because this Project will be located at a site that is neither directly in the immediate view of any neighboring residences such that it significantly interferes with a primary view, nor will it be highly prominent in any other longer distant views given the distances involved from area viewing locations such as Mt. Philo

5. The specific conditions are set forth in the attached Order.

State Park or Mt. Philo Road. Clearly the Project will be visible from surrounding areas, but the distances involved and the broad panorama of the view serve to minimize its significance to the extent that it will not be shocking or offensive.

Based upon the conclusions reached in the above discussion, I conclude that the Applicant has shown that the project will not have an undue adverse effect on aesthetics and the scenic and natural beauty of the area pursuant to 10 V.S.A. § 6086(a)(8). Therefore, the Project is also in compliance with 30 V.S.A. § 248(b)5 and should be approved as designed, subject to the conditions to which the Applicant has agreed.

III. Recommendation

Based on the review of the record in this docket and the reasons set forth in the above discussion, I recommend the Board approve the Applicant's petition for net metering with the conditions noted above.

A Proposal for Decision pursuant to 3 V.S.A. § 811 has been served upon the parties to this case.

Dated at Montpelier, Vermont, this 10th day of December, 2001.

s/Peter B. Meyer
Peter B. Meyer
Hearing Officer

IV. BOARD DISCUSSION

We adopt the Hearing Officer's proposed findings of fact and conclusions with one exception. The only comments received from the parties on the proposal for decision were from the Department. Specifically, the Department suggests that the Hearing Officer's discussion about the Charlotte Town Plan on page nine of the Proposal was less than precise regarding the elements of the Plan that are "clear written community standards." We agree; thus, we substitute the following paragraph as suggested by the Department with the proposal's paragraph regarding the characteristics of a "clear written community standard" (the first paragraph on Page 9) in relation to aesthetics and scenic and natural beauty:

Several of the Town Plan provisions discussed in the above findings represent clear written community standards regarding aesthetics and scenic and natural beauty. As I have found above, the Project is not inconsistent with the Town Plan provisions discussed earlier and, therefore, does not violate any clear written community standards regarding aesthetics contained in those provisions.

We also commend the Hearing Officer and the parties for their efforts in this docket which have led to the prompt resolution of the issues raised and allowed us to issue a final decision without undue delay.

V. ORDER

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

1. The findings of fact, conclusions, and recommendation of the Hearing Officer in this case, except as amended in our Discussion above, are adopted.
2. Applicant's petition for a Certificate of Public Good pursuant to 30 V.S.A. § 248 is approved.
3. A Certificate of Public Good for Applicants' net metering project shall be issued.
4. Operation and maintenance of the net metering system shall be in accordance with the plans and evidence submitted in this proceeding. Any material or substantial change in the project is prohibited without prior Board approval.

5. The net metering system shall comply with applicable existing and future statutory requirements and Board Rules and Orders.

6. This Certificate shall not be transferred without prior approval of the Board. The holder of this Certificate must notify the Board, the Vermont Department of Public Service, and the appropriate electric utility of any proposed transfer of the Certificate.

7. If the turbine does not produce electricity for a period of 6 months, the Applicant must remove the tower and turbine from the site within 3 months, unless extended by the Board.

8. At a 300-foot radius from the base of the tower, the sound level from the turbine shall not exceed 50dB. If, upon request by an interested party, the Town of Charlotte's Administrative Officer agrees it is necessary to have sound testing done, or if the Board orders sound testing, the Applicant shall pay the first \$500 in costs for a sound study, the balance to be paid by the person(s) initiating the request.

9. There shall be no lights on or off the structure, nor shall the tower be illuminated in any way.

10. The tower and turbine shall be painted a dull, light grey color.

DATED at Montpelier, Vermont, this 20th day of December, 2001.

s/Michael H. Dworkin)
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s/David C. Coen)
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)
s/John D. Burke)

PUBLIC SERVICE
BOARD
OF VERMONT

OFFICE OF THE CLERK

FILED: December 20, 2001

ATTEST: s/Susan M. Hudson
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 of any technical errors, in order that any necessary corrections may be made.

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.