STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7201

Petition of Vermont Electric Cooperative, Inc., for a Declaratory Ruling that VEC's Distribution Line Upgrade required by the Berkshire Cow Power project in Berkshire, Vermont, is not subject to 30 V.S.A. Section 248	)))))

Order entered: 8/24/2006

I. INTRODUCTION

This case involves a petition by Vermont Electric Cooperative, Inc. ("VEC"), filed with the Public Service Board ("Board") on June 29, 2006, for a declaratory ruling that an upgrade to a distribution line required to interconnect the proposed Berkshire Cow Power, LLC ("Berkshire") project is not subject to 30 V.S.A. § 248. For the reasons set forth below, we deny VEC's petition and rule that a distribution line that is being upgraded solely to interconnect the proposed Berkshire project is reasonably related to the proposed generation project and must therefore be reviewed under Section 248. However, we also conclude that this requirement does not constitute a substantial burden.

II. BACKGROUND

On March 30, 2006, Berkshire filed a petition, pursuant to Section 248(j), to construct a methane fueled electric generating facility. On April 6, 2006, the Board sent a letter to Berkshire, informing it that the petition could not be processed under Section 248(j) without additional information.[1] Included in this information request was the following language: "Berkshire Cow Power must file information addressing whether the power lines necessary for interconnection would have any aesthetic or other environmental impacts."

On May 26, 2006, VEC filed a letter explaining that there were two components necessary to interconnect the proposed project. The first involved upgrading a distribution line

1. Berkshire filed addition information regarding the proposed project on July 10, 2006.

on Berkshire Center Road and King Road, which would be necessary regardless of whether the proposed Berkshire project was constructed. The second component consists of upgrades to distribution lines on Richford Road. The Richford Road upgrades would consist of adding a third phase to 5,000 feet of existing two-phase distribution line. This upgrade would require no modification to the existing structures. Additionally, VEC would need to convert 6,000 feet of single-phase distribution line on Richford Road to three-phase distribution, requiring some modifications to the existing structures and resulting in some increase in pole heights, although any height increase would be limited to less than ten feet. The upgrade would increase the capacity of the lines from the existing 7.2 kV to 12 kV. The May 26 letter contended that the upgrades were subject to the jurisdiction of the District Environmental Commission and therefore not subject to Section 248 review.[2] VEC further requested that the Board advise VEC if the Board disagreed with VEC's jurisdictional assessment.

On June 9, 2006, the Clerk of the Board issued a memorandum stating that Board staff had made a preliminary determination that staff agreed with VEC's contention that the Berkshire Center Road and the King Road upgrades did not need to be reviewed under Section 248, based on VEC's representation that these upgrades would be necessary regardless of whether the proposed Berkshire project was constructed. However, because the Richford Road upgrades would be necessary only because of the proposed Berkshire project, the VEC distribution line is "directly related to the generation project, over which the Board clearly has jurisdiction, [and] the upgrade of the distribution line must be reviewed under Section 248." The June 9 memorandum emphasized that the determination was made "only by Board staff and not the Board itself. If VEC would like a formal determination from the Board, it may request one pursuant to Board Rule 2.403."

On June 29, 2006, VEC filed its Petition for a Declaratory Ruling.

A Hearing Officer held a prehearing conference on August 9, 2006, to discuss VEC's petition and the impact of VEC's petition on the proposed Berkshire project. At the prehearing

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2. VEC represented that it had received a Jurisdictional Opinion from the District 6 Environmental Coordinator that no Act 250 permit was necessary for the Richford Road upgrade.

conference, the parties[3] indicated that VEC's petition could be resolved by briefs and stated their intent to request that the Board hear and decide the case directly in order to provide a more expedited ruling. Briefs and a motion for expedited Board decision were filed on August 18, 2006.

The Board grants the request for the Board to hear this case directly.

III. Positions of the Parties

VEC contends that the Board's precedent does not support the June 9 preliminary determination and that the "Board has long acknowledged the legislative design that grants the Board jurisdiction over transmission and generation facilities under 30 V.S.A. § 248 and grants the District Environmental Commissions jurisdiction over distribution facilities under Act 250."

VEC examines the Board's standard of review, first articulated in Docket 6884,[4] that Section 248 review includes facilities "reasonably related" to a generation or transmission project. VEC reviews the language of an Attorney General's Opinion that interpreted the exemption in Act 250 for generation or transmission facilities subject to review under Section 248 and which was cited in the Board's development of the reasonably related standard:

> where a proposed improvement bears a reasonable relationship and can be considered to be a part of an electric transmission or generation facility, having in mind the broad meaning to be ascribed to the word 'facility,' it is my opinion the exemption applies and no Act 250 permit can be required prior to construction.[5]

VEC argues that the June 9 preliminary determination is inconsistent with the language of the Attorney General's Opinion that an improvement must be "considered to be *a part of* an electric transmission or generation facility" for the exemption from Act 250 to apply. VEC contends that, "[e]ven applying the broadest definition of 'facility,' the VEC distribution upgrade cannot be considered to be 'a part of' the BCP generation facility."

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3. The Hearing Officer granted permissive intervention, pursuant to Board Rule 2.209(B), to Berkshire in this Docket and granted Central Vermont Public Service Corporation permission to file an amicus brief in this Docket.

4. Docket 6884, Order of 4/21/04 at 17–18.

5. Op. Vt. Att'y Gen., No. 715 (August 5, 1971) at 172.

VEC contends that Board precedent supports VEC's view that the distribution upgrades should not be considered to be "a part of" the proposed Berkshire project. VEC states that in "the cases involving wind measurement towers, for example, it is a reasonable conclusion that, ascribing a broad meaning to a wind generation facility, a wind measurement tower should be considered 'a part of' the facility."[6] VEC also points to a trash-to-electricity project where the Board found that a trash separation facility "was reasonably considered to 'a part of' the generation project where the trash to be incinerated would ultimately power the project."[7]

VEC contends that a key feature of these projects "is that the same entity owns and operates both the generation project and the related construction that was found to be 'a part of' the project. The identity of ownership underscores that the related facility, while not a generation facility *per se*, is an integral part of the larger generation project." VEC contends that, because it will not own or operate the Berkshire project and is not a joint petitioner in the Section 248 petition, the "VEC distribution upgrade is not 'a part of' the generation project, but merely a necessary infrastructure provided by a third party to support the project." VEC argues that Section 248 requires the Board to address whether there is sufficient infrastructure to support a project, such as educational or municipal services, but that does not give the Board jurisdiction to review an improvement to a municipal or educational expansion required to accommodate a project reviewed under Section 248.

VEC also argues that "good policy requires the Board to streamline, not complicate, review of small generation projects." In particular, VEC contends that requiring review of interconnecting distribution lines "impedes the clear state policy to encourage development of small generator projects, particularly farm methane projects."

The Department of Public Service ("Department") filed a letter in support of VEC's petition arguing that, while "the Board's precedent on 'reasonably related' projects under § 248 is sound, application of that precedent to distribution upgrades necessary for methane generation projects like the one proposed by Berkshire Cow Power LLC's is not." The Department contends

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6. Citing to Docket 7037, Order of 7/29/05 at 6–9.

7. Citing to Docket 4813-B, Order of 2/4/93 at 5.

that the proposed Berkshire project is different from other projects reviewed by the Board because (1) the project would be owned by farmers whose principal business is not the generation of electricity, (2) distribution, rather than transmission, lines would be used to interconnect the generation project with the local distribution utility, and (3) the local distribution utility does not need approval under Section 248 to extend its distribution facilities. The Department contends that "[i]n light of these distinguishing characteristics, application of the Board's 'reasonably related' precedent to distribution facility upgrades needed to interconnect farm-based methane generators interjects unnecessary process and cost to the § 248 proceeding." The Department argues that this last point is strengthened by the fact that "the line has already been determined to raise no issue under the State's land use development law, the law that would otherwise apply to the line in general."

The Department argues that, if the Board does conclude that Section 248 review of the distribution line upgrades is required, the Board should conclude that no further review is necessary.

Central Vermont Public Service Corporation ("CVPS") filed an amicus brief in support of VEC's petition. CVPS argues that the Board should adopt a functionality test to determine whether an electric line is a transmission line within the meaning of Section 248. CVPS cites to a Board order that provided the following definitions of distribution and transmission lines:

> An 'electric transmission facility' within the meaning of 30 V.S.A. § 248 is a line and/or related facilities (including any substation), the purpose of which is the transporting of electric power at any voltage in bulk from a source or sources of supply to other principal parts of the system or to a distribution system.
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> A 'distribution line or facility' is a line and/or related facilities (including pad or pole mounted line transformers), the purpose of which is to serve individual customers at any voltage not to exceed 34.5 kV; this definition does not include any line and/or facilities at any voltage if such lines and/or facilities function as a transmission facility.

CVPS argues that, pursuant to these definitions, the upgrades necessary to interconnect the proposed Berkshire project constitute distribution lines.

CVPS contends that Section 248 review "should not extend to any construction merely *related to* a jurisdictional project." To support this contention, CVPS states:

> For example, it is common practice for the Board to review earth works, driveways and plantings that are within project boundaries when considering whether to approve the development of jurisdictional facilities (like substations and transmission lines) even though these features, standing alone do not meet the jurisdictional threshold under Section 248. This is different from the case at bar where the distribution facilities are already subject to review under Act 250 and they are not within the project boundary of the Berkshire project.

CVPS further contends that "[n]o fair construction of the definition of the Berkshire Project could define the VEC distribution upgrades as part of the generating project" and if the Board were to conclude otherwise "creates the risk that the Board and the Environmental Court will construe jurisdiction under Section 248 and Act 250 differently creating confusion and the opportunity for administrative chaos."

Additionally, CVPS contends that the "VEC project is for all practical purposes no different than a three-phase upgrade made necessary by the presence of a new three-phase customer, or by the need to redistribute loads on existing distribution circuits." CVPS further argues that "[e]stablishing a different rule for certain distribution upgrades will make compliance with Board Rules and Section 248 difficult and confusing."

Finally, CVPS contends that the Board's ruling on this issue will have serious implications for other distributed generation projects. In particular, CVPS is concerned that requiring Section 248 review of distribution facilities which interconnect generation projects could add significant time and expense to such projects. CVPS further argues that asserting Board jurisdiction over distribution lines connected to generation facilities could lead to the review of distribution lines emanating from a substation.

Berkshire filed a letter stating that, if the Board finds that the distribution line upgrade is subject to Section 248 review, there will be a delay in the project which would result in a serious financial impact on Berkshire. Berkshire further contends that methane-fueled generation facilities "are valuable projects and the State should be doing everything in its power to encourage them.

IV. DISCUSSION

We begin by clarifying the Board's understanding of one of the significant factual issues involved in this petition. Based on VEC's representations, the Richford Road distribution line would not need to be upgraded but for the proposed Berkshire Project.[8] This is in contrast to CVPS's contentions that "the distribution upgrades are required for the safe and reliable operation of the VEC distribution system, not the Berkshire Project . . . ."[9]

Board precedent established a standard, as VEC acknowledges, that Section 248 review applies to facilities that are reasonably related to a generation or transmission facility. This standard was first articulated in Docket 6884;[10] however, the Board has a long history of reviewing facilities that are not, in isolation, generation or transmission facilities. For example, substation improvements typically include a review of any substation access road. Although the Board has no inherent authority over roads, any improvements to the access roads, although outside the substation fence, are directly related to the substation, would not be constructed but for the substation project, and are reviewed as part of the Section 248 review of the substation improvements. Additionally, in Docket 6884, the Board clarified why Section 248 review is appropriate for certain wind measurement towers. In that docket, the Board determined that a wind measurement tower, which is not, by itself, a generation or transmission facility, is a necessary precursor to a wind generation facility, and therefore is directly related to a wind generation facility, for which review under Section 248 is necessary. This reasonably related standard governs the Board's review of Section 248 projects.

CVPS provides several arguments as to why the Richford Road upgrades should be considered distribution lines. That point is largely irrelevant, as there is no dispute that the upgrades involve distribution lines. The relevant inquiry, as noted above, is whether the distribution upgrade is reasonably related to the Berkshire project which, as a generation facility, clearly falls within the scope of Section 248.

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8. VEC Petition at 1.

9. CVPS amicus brief at 7.

10. Docket 6884, Order of 4/21/04 at 17-19.

As for whether particular facilities fall under the jurisdiction of the Board or the District Environmental Commissions, that issue is determined by reference to the definition of "development" in Act 250. "Electric generation or transmission facilities that require a certificate of public under 30 V.S.A. § 248 are defined out of the term 'development' by 10 V.S.A. § 6001(3)(D)(iii), and therefore do not trigger Act 250 jurisdiction."[11] Again, the pertinent question is whether the upgrade of the distribution lines is reasonably related to the proposed Berkshire project such that the upgrades should be considered a part of the generation project and therefore reviewed under Section 248.

VEC has stated that, but for the proposed generation project, the upgrades to the Richford Road distribution lines would not be necessary. Conversely, without a method of interconnecting the proposed Berkshire project, there could be no generation facility. Therefore, the upgrade to the distribution line is a necessary component of the proposed generation project. Consequently, the distribution line is not only reasonably related to the proposed generation project, but is a necessary component of the project, and thus must be reviewed under Section 248 as part of the project. The connection between the distribution line upgrades and the proposed Berkshire project is even more direct than the connection between a wind measurement tower and a wind generation facility or the connection between an access road and a substation. Indeed, requiring separate review of the interconnecting line and the generation project would be similar to the Board approving a new substation under Section 248 but requiring the utility to receive local planning permission for the access road.

This analogy highlights one of the benefits of requiring Section 248 review of interconnecting distribution lines. In this instant case, the District Commission has determined that an Act 250 permit is not required. However, it is possible that an interconnecting distribution line for a future methane-fired farm project could require an Act 250 permit, thereby requiring the petitioner and the local distribution utility to receive permits under both Section 248 and Act 250, as well as possible local approvals. Since the Board has jurisdiction over the interconnecting line, Act 250 does not apply, local review is preempted, and the permitting

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11. See, e.g., *Glebe Mountain Wind Energy, LLC*, Docket No. 234-11-05 (Vermont Environmental Court, 2006).

process is thereby simplified. The applicant may obtain a permit by making one filing with the Board.

Relating to the question of jurisdiction, in a recent Jurisdictional Opinion, the Chief Coordinator of the Natural Resources Board examined whether there was Act 250 jurisdiction over three proposed wind measurement towers.[12] The Jurisdictional Opinion concluded, based in part on the jurisdictional analysis contained in the Board's final order in Docket 6884, that there was no Act 250 jurisdiction over the wind measurement towers because the measurement towers "are electric generation facilities within the meaning of 10 V.S.A. § 6001(D)(ii) and, therefore, do not require an Act 250 permit."

VEC contends that the issue of ownership is significant in determining whether a project component is an integral part of the project such that the component must be reviewed under Section 248. This argument is unconvincing. Simply because a company such as VEC has not joined a petition to construct a generation facility does not mean that the company is required to be a co-petitioner for a necessary project component.[13]

The Department correctly points out that methane generation projects are on a different scale than other Section 248 projects. However this point is largely irrelevant. The Vermont legislature has determined that the Board must review generation projects under Section 248 and Board precedent requires that we include all reasonably related components of the project as part of that review. The Department does not provide any rationale as to why the Board should have two standards of review: one for small farm projects and a second for larger projects. Providing different scopes of review for generation projects based on size or whether the petitioner is a farm would appear to create inequity in a forum that is based upon impartial judicial review. While the legislature might carve out an exception here, we are reluctant to do so.

CVPS argues that, by requiring Section 248 review of the upgraded distribution lines, the Board would be establishing different rules for certain distribution lines, thus making compliance

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12. *East Mountain Development Corporation, LLC*, Jurisdiction Opinion #7-221 (Natural Resources Board, June 1, 2005).

13. For example, in Docket 6911 the Board reviewed a wind generation facility proposed by a merchant generator and reviewed a separate petition by the local distribution company to construct a 34.5 kV transmission line to interconnect the generation facility in a separate docket.

with Section 248 difficult and confusing. We do not agree. The Board's ruling is clear and limited: review of a proposed project under Section 248 requires a review of all reasonably related facilities, including distribution lines that are being upgraded for the sole purpose of interconnecting a generation project.

Similarly, several parties have argued that review of distribution lines interconnecting a small renewable generation facility would be unsound policy. While there is clear legislative intent to promote renewable energy projects, the legislature has not altered Section 248 to lessen the requirements for renewable projects. Consequently, renewable energy projects must undergo the same standard of review as any other project.

We emphasize that by requiring review of the upgraded distribution line we are not imposing an insurmountable burden on VEC or Berkshire. VEC has represented that, for 5,000 feet of the upgrade, no modifications are required to the existing structures. For the remaining 6,000 feet of line, VEC appears to contend that the modifications to the pole structures would be relatively minor. VEC and Berkshire could file a joint amended petition with supplemental testimony to satisfy the required showing.[14] Considering that VEC has represented that the distribution upgrades are limited and the District 9 Environmental Coordinator has determined that the upgrades do not represent a substantial change, the required supplemental testimony should not need to be extensive, particularly as the Board had asked, in its April 6 letter, only for information addressing whether the power lines necessary for interconnection would have any aesthetic or other environmental impacts."

V. CONCLUSION

For the reasons stated above, VEC's petition for a declaratory ruling that an upgrade to a distribution line required to interconnect the proposed Berkshire Cow Power, LLC project is not subject to 30 V.S.A. § 248 is denied.

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14. VEC would need to be a co-petitioner in order to receive the necessary certificate of public good to upgrade the Richford Road distribution line.

VI. ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that an upgrade to the Richford Road distribution line required to interconnect the proposed Berkshire Cow Power, LLC project, is subject to review under 30 V.S.A. § 248.

Dated at Montpelier, Vermont, this 24th day of August, 2006.

s/James Volz	)	
	)	PUBLIC SERVICE
	)	
s/David C. Coen	)	BOARD
	)	
	)	OF VERMONT
s/John D. Burke	)	

OFFICE OF THE CLERK

FILED: August 24, 2006

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 (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: Clerk@psb.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.