

VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Ch. 151

Re: *Central Vermont Public Service Corp.* Land Use Permit Applications
and Verizon New England #2W1146-EB (Jamaica) and [Docket #817]
#2S0301-1-EB (Cavendish) [Docket #818]

MEMORANDUM OF DECISION AND REMAND ORDER

This proceeding consists of two appeals by the Central Vermont Public Service Corporation (CVPS) from permit conditions imposed by the District 2 Environmental Commission (Commission) in *Central Vermont Public Service Corporation and Verizon New England*, Land Use Permit #2W1146 (Docket #817), and from the denial by the Commission of a request to amend a permit condition in *Central Vermont Public Service Corporation*, Land Use Permit Amendment #2S0301-1 (Docket #818). These appeals were consolidated at the request of CVPS. In this Memorandum of Decision, the Environmental Board (Board) takes official notice of the Commission decision in Docket #818 and remands that matter to the Commission.

I. Procedural History

Jamaica - Docket #817

On May 6, 2002, CVPS and Verizon New England (Verizon) filed Land Use Permit Application #2W1146 with the Commission, seeking authorization to construct 3,300 feet of single-phase electrical distribution line and telephone line along Schoolhouse Road in Jamaica, Vermont (CVPS/Verizon Project or Jamaica Project).

On October 30, 2002, the Commission issued Land Use Permit #2W1146 (Permit #2W1146) and accompanying Findings of Fact, Conclusions of Law, and Order (Jamaica Decision).

On November 13, 2002, CVPS filed an appeal from Permit #2W1146 and the Jamaica Decision with the Board, alleging that the Commission erred in its imposition of Conditions 9, 10 and 11 in Permit #2W1146 and in its conclusions concerning 10 V.S.A. §6086(a)(8)(A), (9)(A), (9)(C), (9)(H) and (10)(Criteria 8(A), 9(A), 9(C), 9(H) and 10).

Cavendish - Docket #818

On September 13, 2002, CVPS filed Land Use Permit Amendment Application #2S0301-1 with the Commission seeking to delete Condition C from Land Use Permit #2S0301. The Commission denied CVPS's request in a November 7, 2002 Memorandum of Decision.

On November 19, 2002, CVPS appealed this denial to the Board, alleging that the Commission erred in its conclusions concerning *Stowe Club Highlands* and in its refusal to delete Condition C.

Consolidated Appeal

These two appeals were consolidated at CVPS's request.

On December 20, 2002, Board Chair Marcy Harding convened a Prehearing Conference with the following participants:

CVPS, by Timothy Upton
Agency of Natural Resources (ANR), by Warren Coleman, Esq. and Gina Campoli
Chandler Electric Company, by Charles Chandler

Prior to the prehearing conference the following informed the Board of their intent to participate as parties: the Windham Regional Commission by James Matteau, the Jamaica Planning Commission by Elaine Beckwith, and the Vermont Department of Public Service by Aaron Adler, Esq. Also prior to the prehearing conference, John C. White, an adjoining property owner in Docket #818, informed the Board of his desire to participate in this proceeding, as did Warner Manzke, the landowner in Docket #817.

On December 24, 2002, the Chair issued a Prehearing Conference Report and Order (PCRO). Among other things, the PCRO identified preliminary and merits issues, and provided an opportunity for certain persons to file petitions for party status.

On December 31, 2002, Chandler Electric Company filed a petition for party status. The Board deliberated on the petition on January 15, 2003, and denied the petition by Memorandum of Decision issued on January 17, 2002.

On February 19, 2003, the Board deliberated on the remaining preliminary issue, *Stowe Club Highlands*. By Memorandum of Decision issued February 28, 2003, the Board ruled that *Stowe Club Highlands* does not apply in Docket #818. A Scheduling Order setting the matter for hearing was issued on the same date.

On April 16, 2003, the Board deliberated on the Cavendish matter.

II. Official Notice

The Board takes official notice of the Commission's Memorandum of Decision dated November 7, 2002, pursuant to the Vermont Administrative Procedures Act. 3 V.S.A. § 810(4). The Vermont Administrative Procedures Act authorizes the Board to take official notice of judicially cognizable facts in contested cases such as Act 250 appeals. 3 V.S.A. § 810(4); *see also*, 3 V.S.A. § 801(b)(2)(contested cases). According to the Vermont Rules of Evidence, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready

determination by resort to sources whose accuracy cannot reasonably be questioned." V.R.E. 201(b); *see also*, 3 V.S.A. § 810(1) (rules of evidence apply in contested cases); *In re Handy*, 144 Vt. 610, 612 (1984).

In this case, the Board is taking official notice of the Commission's decision for the fact that the Commission did not reach the merits of the amendment application because it held that the application failed the *Stowe Club Highlands* test. This is a judicially cognizable fact. The Board also notes that taking official notice of the Commission decision at this time will avoid an unnecessary hearing in the Cavendish matter. Official notice may be taken whether requested or not and may be taken at any stage of the proceeding. 3 V.S.A. § 810(4); *In re Nelson Lyford*, Declaratory Ruling #341, Findings of Fact, Conclusions of Law, and Order at 3-4 (Dec. 24, 1997)(citing V.R.E. 201(c) and (f)).

III. Discussion

The Prehearing Conference Report and Order identified the merits issue for the Cavendish matter as follows: "Whether, if the answer to Preliminary Issue 2 is in the affirmative, Permit #2S0301 should be amended to delete Condition C." Preliminary Issue 2 was whether the application passed the *Stowe Club Highlands* test, and the Board has ruled that *Stowe Club Highlands* does not apply. Ordinarily, the Board could proceed to the merits once the *Stowe Club Highlands* hurdle is crossed. But in this case, the Commission never reached the merits of the amendment application because it held that the application failed the *Stowe Club Highlands* test.

Without a ruling on the merits by the Commission, the Board lacks subject-matter jurisdiction to review the application on appeal. *In re Taft Corners Associates*, 160 Vt. 583, 591 (1993)(citing *In re Juster Associates*, 136 Vt. 577, 581 (1978)(Board has no authority to decide issues that were not ruled upon by the District Commission because "[i]nitial consideration of a land use proposal is a function assigned by the Legislature to the District Commission.")). Accordingly, the Board cannot consider the Merits Issue identified in the PCRO for the Cavendish matter.

Remand is appropriate so the Commission can rule on the merits of the amendment application. This remand returns jurisdiction over the Cavendish matter to the Commission. Jurisdiction over the Jamaica matter remains with the Board.

IV. Order

1. The Board takes official notice of the Memorandum of Decision issued by the District 2 Environmental Commission on November 7, 2002 in *Central Vermont Public Service Corporation*, Land Use Permit Amendment Application #2S0301-1.

2. *Central Vermont Public Service Corporation*, Land Use Permit Amendment Application #2S0301-1, is REMANDED to the District 2 Environmental Commission. This matter is no longer consolidated with *Central Vermont Public Service Corporation and Verizon New England*, Land Use Permit Application #2W1146-EB.
3. The hearing currently set for April 23, 2003 will be held on *Central Vermont Public Service Corporation*, Land Use Permit Application #2W1146 only.

DATED at Montpelier, Vermont this 17th day of April, 2003.

ENVIRONMENTAL BOARD

/s/Patricia Moulton Powden

Patricia Moulton Powden, Chair

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