

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

Re: *Central Vermont Public Service Corp.*  
*and Verizon New England*

Land Use Permit Applications  
#2W1146-EB (Jamaica) and  
#2S0301-1-EB (Cavendish)

**MEMORANDUM OF DECISION**

This proceeding consolidates 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-EB in Jamaica, and from the denial by the Commission of a request to amend a permit condition in *Central VT Public Service Corporation*, Land Use Permit Amendment #2S0301-1-EB in Cavendish. This Memorandum of Decision addresses whether *Stowe Club Highlands* applies to the Cavendish amendment application. As set forth below, the Board holds that it does not.

**I. Procedural History**

On January 17, 2003, the Board issued a Memorandum of Decision denying the petition for party status of Chandler Electric Company.<sup>1</sup> The procedural history preceding that Memorandum of Decision is set forth therein. The Board deliberated on the remaining preliminary issue in this case on February 19, 2003.

**II. Issue**

The remaining preliminary issue, as defined in the PCRO, is whether, based on the competing policy considerations of flexibility and finality articulated in *Re: Stowe Club Highlands*, #5L0822-12-EB, Findings of Fact, Conclusions of Law, and Order (Jun. 20, 1995), *aff'd, In re Stowe Club Highlands*, 166 Vt. 33 (1996), the Board will consider CVPS's application to amend Permit #2S0301.

**III. Discussion**

The Board can consider CVPS's amendment application if the *Stowe Club Highlands* test does not apply. If the test does apply, the Board can consider the application only if considerations favoring flexibility outweigh considerations favoring finality. *In re Stowe Club Highlands*, 166 Vt. 33 (1996). The Board recently adopted a *Stowe Club Highlands* rule, EBR 34(E), effective January 15, 2003. Although EBR 34(E) became effective after this appeal was filed, it can be applied here to the extent that it benefits the applicant. *See, e.g., Re: Swedish Ski Club of Vermont Land Trust*,

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<sup>1</sup> Terms defined in the January 17, 2003 Memorandum of Decision are used herein without definition.

Declaratory Ruling #411, Findings of Fact, Conclusions of Law, and Order, at 8 (Jan. 16, 2003).

CVPS argues that *Stowe Club Highlands* does not apply because the condition in question, Condition C, was not essential to the issuance of Permit #2S0301. Under EBR 34(E), the *Stowe Club Highlands* analysis applies to "applications to amend permit conditions which were included to resolve issues critical to the district commission's . . . issuance of prior permit(s) pursuant to the criteria of 10 V.S.A. § 6086(a)." EBR 34(E). Therefore, the *Stowe Club Highlands* analysis does not apply if the condition in question was not included to resolve issues critical to the Commission's issuance of Permit #2S0301.

Condition C of Permit #2S0301 states that:

No further line extension shall be made within this project area in Cavendish, Vermont without all plans for all such extensions being filed with and approved by the District Environmental Commission 2 in their entirety.

Permit #2S0301, Condition C (Nov. 19, 1975).

In support of its argument, CVPS notes that there are no findings relating to the Condition C, such as findings on line extensions or impacts of growth, and no conclusions expressly refer to the condition, in the decision accompanying Permit #2S0301. (CVPS Memo, at 1-2.) The Board notes that the permit is one page long, and the decision is two pages long, with a total of eight numbered findings. Both were issued in 1975, and there was no reason before EBR 34(E) was adopted this year for a Commission to add express references in permits and decisions concerning which issues or conditions were critical. The absence of such express references in the prior permit and decision is not necessarily dispositive on the question of applicability. Nevertheless, there is no indication in the permit or decision that Condition C was imposed to resolve any issue critical to the issuance of Permit #2S0301.

CVPS argues that the following Entry of Appearance in the #2S0301 permit proceeding by the Vermont Agency of Natural Resources (then the Agency of Environmental Conservation, or AEC) supports its position:

The [Environmental] Advisor raises the questions of the long range effects of the road improvement in the 2500' power line extension. It is extremely difficult to assess such long range effects, yet it is well understood by planners that such extensions cause spin-off development. The Commission, the applicant and the town should attempt to address this issue.

(CVPS's Memorandum, at 2 quoting Nov. 17, 1975 Entry of Appearance by AEC.) CVPS argues that this shows that the AEC was concerned primarily with long-range effects of road improvements, not line extensions, so Condition C could not have been imposed to address any issue concerning line extensions. (CVPS's Memorandum at 2-3.) However, both line extensions and road improvement are mentioned as sources of concerns regarding long-range effects and spin-off development in the entry of appearance CVPS quotes. This Entry of Appearance, therefore, is not dispositive on this question.

CVPS correctly notes that the Board's decision in *Washington Electric Cooperative, Inc.*, #5W1036-EB, Findings of Fact, Conclusions of Law, and Order (Dec. 19, 1990), could not have been in the Commission's mind when it issued Permit #2S0301 in 1975. This does not necessarily mean that the Commission did not impose Condition C to address AEC's concerns regarding long-range effects of line extensions and road improvement. Nevertheless, it is clear that the Commission did not rely on *Washington Electric Cooperative, Inc.* in issuing the permit.

There is no indication in the permit, decision or elsewhere that the Commission included Condition C to address any issue critical to the issuance of Permit #2S0301.

Therefore, the Board concludes that *Stowe Club Highlands* and EBR 34(E) do not apply to the Cavendish amendment application. This consolidated matter can be set for hearing on the merits.

#### IV. Order

1. *Stowe Club Highlands* and EBR 34(E) do not apply to Land Use Permit Amendment Application #2S0301-1.
2. The Chair shall issue a Scheduling Order setting this consolidated matter for hearing.

DATED at Montpelier, Vermont this 28<sup>th</sup> day of February, 2003.

ENVIRONMENTAL BOARD

/s/Patricia Moulton Powden  
Patricia Moulton Powden, Chair  
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