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

Re:	*Central Vermont Public Service Corp. and Verizon New England (Jamaica)*	Land Use Permit #2W1146-EB

MEMORANDUM OF DECISION ON MOTIONS TO ALTER

The Agency of Commerce and Community Development (ACCD), Central Vermont Public Service Corporation (CVPS) and Department of Public Service (DPS) move to alter the Board's Findings of Fact, Conclusions of Law, and Order issued September 2, 2003 (Decision). As discussed below, and in a decision issued today in the CVPS Guilford case, *Re: CVPS (Guilford)*, #2W1154-1-EB, Memorandum of Decision on Motion to Alter (Dec. 19, 2003). the Environmental Board (Board) grants CVPS's motion in part, denies it in part, and denies the motions of ACCD and DPS.

I. Procedural History

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

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

On November 13, 2002, CVPS filed an appeal from the Commission Permit and Commission Decision (Docket #817) with the Environmental Board (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).

At the request of CVPS, this appeal was consolidated with the appeal of CVPS from the Commission's November 7, 2002 Memorandum of Decision in Land Use Permit Amendment Application #2S0301-1 (Docket #818). A joint prehearing conference was held on December 20, 2002. A Prehearing Conference Report and Order (PCRO) was issued on December 24, 2002. Among other things, the PCRO identified preliminary and merits issues, and provided an opportunity for certain persons to file petitions for party status.

On February 19, 2003, the Board deliberated on the remaining preliminary issue in Docket #818, and by Memorandum of Decision issued February 28, 2003, the Board ruled that *Stowe Club Highlands* does not apply in that proceeding. A Scheduling Order setting the consolidated matter for hearing was issued on the same date. The Board also deliberated on Docket #818 on April 16, 2003. A Memorandum of Decision and Remand Order was issued on April 17, 2003

remanding the Docket #818 matter to the Commission for consideration of the application on its merits.

On April 23, 2003, the Board convened a public hearing in Docket #817, Chair Moulton Powden presiding. The Board conducted a site visit, admitted exhibits, and heard testimony. Immediately after the hearing, the Board commenced deliberations. The Board also deliberated on May 21, 2003.

On June 3, 2003, the Board issued a Hearing Recess Order requesting additional evidence and setting a reconvened hearing for July 2, 2003. The Agency of Commerce and Community Development entered an appearance through its General Counsel, John Kessler, Esq.

On July 2, 2003, the Board reconvened the hearing, admitted exhibits and heard testimony. The Board deliberated immediately after the hearing, and also deliberated on August 6, 2003 and August 27, 2003. Based upon a thorough review of the record, related argument, and the parties' proposed findings of fact and conclusions of law, the Board declared the record complete and adjourned.

On September 2, 2003, the Board issued its Findings of Fact, Conclusions of Law, and Order, and Land Use Permit #2W1146-EB. CVPS filed a Motion to Alter on September 30, 2003 and ACCD and DPS filed Motions to Alter on October 2, 2003. The Windham Regional Commission filed its opposition to the Motions to Alter on October 26, 2003. The Board deliberated on November 12, 2003.

II. Discussion

ACCD, CVPS and DPS have filed separate motions to alter the Decision. In general, the moving parties do not object to the Board's issuance of a permit, but are critical of the Board's reference to EBR 34(A) as it applies to utility projects. The moving parties also argue that the Board and district commission should not consider secondary impacts of utility projects, particularly where those impacts are residential homes, even though no such impacts were found in this case. They also raise several broad policy question that go beyond the scope of these appeals. In addition, CVPS requests that certain extraneous findings and conclusions be deleted. The Windham Regional Commission opposes the motions.

The Board addresses each motion in turn.

A. CVPS's Motion to Alter

CVPS does not object to the Permit, but asks the Board to make several changes in the Decision. CVPS's central arguments are that no permit amendment should be required for any substantial or material change to a permitted utility project, and that the Board and commissions should not review secondary growth

impacts of utility lines over which the utility has little or no control. CVPS also asks the Board to delete certain extraneous findings and conclusions, and to alter the Decision with respect to certain issues raised under Criterion 10.

1. Amendment Jurisdiction

CVPS argues that the portion of the Board's decision noting the applicability of EBR 34(A) creates a "sea change in Act 250 jurisdiction." (CVPS Motion, at 6.) To the contrary, the Decision does not change the way Act 250 jurisdiction applies to utility projects. It simply cites current law. A permit amendment is required for any material or substantial change to a permitted utility project. EBR 34(A).

This appeal does not present the Board with the question of whether amendment jurisdiction should attach to any particular project. The Board could consider such a question only in a Declaratory Ruling request brought pursuant to 10 V.S.A. § 6007(c). *See, The Stratton Corporation*, #2W0519-17(Revised)-EB, Dismissal Order, at 4-5 (Jan. 15, 2001)(Board lacks subject-matter jurisdiction to consider Act 250 jurisdictional issue not ruled upon by a district coordinator). This appeal concerns Conditions 9, 10, and 11 of the Commission Permit, and whether the Project can comply with Criteria 8(A), 9(A), 9(C), 9(H) and 10 without these conditions.

The challenged conditions required Permittees to obtain a jurisdictional opinion or Project Review Sheet (an abbreviated form of a jurisdictional opinion) before agreeing to provide any new service drop or line extension off the permitted project, to determine whether a permit amendment was required, and also required that Permittees provide notice in the land records and to any person who inquires about connecting to the permitted line:

> 9. The permittees shall provide a copy of this Permit and Findings of Fact and Conclusions of Law to any person seeking information regarding connecting to or extending the line approved in this permit. The permittees shall inform potential customers that service lines or extensions may require an Act 250 permit amendment and that prior to issuing a permit, the Commission will need to conclude the project conforms to the relevant Act 250 Criteria.
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> 10. Prior to contracting to provide either a service line or extension of the line approved in this permit, the permittees shall request and obtain a Project Review Sheet or a jurisdictional opinion as to whether the proposed work constitutes a material or substantial change, thereby requiring a permit amendment.

> 11. For the purpose of giving adequate notice to all property owners or potential purchasers that may be impacted by the conditions of this permit, CVPS shall complete the following steps to ensure adequate notice in the Jamaica Land Records:
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> 1) All future easements received by the permittees for service lines or line extensions shall include a specific reference to this permit and the book and page in which it is recorded.
> 2) CVPS shall prepare and record in the Jamaica Land Records a notice disclosing the fact that this permit requires that future service lines or extensions be reviewed by the District 2 Environmental Commission Coordinator to determine if an Act 250 permit is required. The notice shall list the properties which are or may be serviced by this line, including all properties over which the permittees have an easement for the utility line subject to this permit, as well as all abutting property owners to the west of the Manzke property at the terminus of the line extension authorized in this permit. The list shall include the names of all property owners and the book and page references to the deeds to the properties and any easements granted to the permittees. The notice shall include specific references to this permit and the book and page in which it is recorded. The notice shall be recorded in the grantee/grantor index under the names of all persons whose property is referenced in this condition.

Commission Permit, Conditions 9, 10, and 11.

In the Decision the Board deleted the challenged conditions and held that the Project complied with the criteria on appeal. The Board also noted in the Decision that EBR 34(A) requires a permit amendment for any change to the Project that could have significant impact under any Act 250 criterion.

CVPS argues that utility line extensions should not be subject to EBR 34(A) for several reasons. Its first argument is that EBR 2(A)(1)(m) defines development to include certain line extensions, and that line extensions should come under Act 250 jurisdiction only when they constitute development under that definition. The definition of development applies to determine whether an Act 250 permit is required in the first place, not whether a permit amendment is required. Act 250 requires, in relevant part, that a permit be obtained for any "development." 10 V.S.A. § 6081(b); *see also, id.* § 6001(3)(defining development); EBR 2(A)(defining development). Once a permit is obtained, however, a permit amendment is required for any substantial or material change to the "permitted project." EBR 34(A). Not every line extension is off a permitted project. EBR 2(A)(1)(m) describes when a line extension that is not off a permitted project will trigger original Act 250 jurisdiction. The

inclusion of line extensions in the definition of development does not exempt them from Rule 34(A).

As CVPS notes, there are special definitions of "development" applicable to electrical distribution or communication lines and related facilities. *See,* EBR 2(A)(1)(m). However, none of these provisions exempts utility projects from amendment jurisdiction under EBR 34(A). In fact, one of these rules provides that a "substantial change" shall be "as defined in Rule 2(G) and shall include . . . the addition above the ground of more than ten feet in height to a pole, including the length of any apparatus attached to the pole to the extent such apparatus extends vertically above the pole." EBR 2(A)(1)(m)(i)(c). As discussed below, substantial change to a permitted project is one of the triggers for amendment jurisdiction. The rules clearly contemplate amendment jurisdiction over utility line projects.

Next, CVPS cites the definition of involved land at EBR 2(F)(3) in support of its argument that EBR 34(A) should not apply to utility projects. Like the definition of development, however, the definition of involved land goes to original, not amendment jurisdiction. The land governed by a land use permit need not remain limited to that land involved in the original permit. A permittee may expand onto new property and that expansion may constitute a substantial and material change. The definition of involved land cited by CVPS does not indicate that EBR 34(A) should not apply to utility projects.

CVPS also argues that *Re: CVPS*, #7C0734-EB, Memorandum of Decision (Aug. 6, 1991) indicates that line extensions off permitted projects do not require permit amendments. In that case the Board noted that the district commission could put a condition in a utility's permit to require a permit amendment for any future extension. *Id.* at 2. This does not mean that EBR 34(A) does not apply to extensions that are substantial or material changes, it merely notes that a district commission has the authority to go beyond that and require an amendment application for every extension where needed for compliance with Act 250. This case does not support CVPS's argument.

CVPS also makes several assertions regarding the administrative and policy aspects of amendment jurisdiction and utility projects, to support its argument that EBR 34(A) should not apply. EBR 31(A), which governs Motions to Alter, provides in relevant part that: "New evidence may not be submitted unless the board or district commission, acting on a motion to alter, determines that it will accept new evidence." Because the jurisdictional issue CVPS seeks to resolve is not and cannot be presented in this appeal, the Board declines to reopen the hearing to take new evidence.

In its motion, CVPS contends that: "Act 250 was never intended to latch on to a group of poles and follow the expansion and reconstruction of the grid as it grows

and moves over time, creating an ever-expanding web of jurisdiction." (CVPS Motion, at 14-15.) Act 250 was intended "to protect and conserve the environment of the state and to insure that these lands and environment are devoted to uses which are not detrimental to the public welfare and interests." Findings and Declaration of Intent, 1969, No. 250 (adj. Sess.), § 1, eff. April 4, 1970; *see also, In re Agency of Transportation*, 157 Vt. 203, 208 (1991)(Act 250 is broad legislation designed to preserve the state's environment)(citing *In re Hawk Mountain Corp.,* 149 Vt. 179, 184, 542 A.2d 261, 264 (1988)). To allow a permitted project to change in a way that could have significant impact under Act 250, without further Act 250 review, would negate the purpose of Act 250.

CVPS acknowledges that Rule 34(A) applies to changes in design during or after construction of a permitted utility project. Under the current regulatory framework, it is not clear how other subsequent substantial or material changes to these types of projects could be treated any differently. The law currently requires permit amendments for substantial or material changes to permitted utility projects. The Board has no authority to issue a decision exempting CVPS from this requirement in the context of this appeal. This portion of CVPS's Motion to Alter must therefore be denied.

2. Secondary Impacts

CVPS makes several arguments concerning how secondary impacts of utility projects should be reviewed. In this case, however, the Board found no significant secondary impacts. As a result, many of the arguments and broad policy questions raised by CVPS concern preexisting case law,[1] not this appeal.

CVPS argues that the fiscal criteria should not require review of impacts from "non-jurisdictional" development, such as residential homes not regulated by Act 250. Under the fiscal criteria, the question is not whether there is jurisdiction over any secondary development, but whether and to what extent such impacts exist. Whether there is jurisdiction over secondary development is irrelevant. In any event, the Board found no such impacts in this case.

CVPS also contends that utility projects that facilitate the development of higher-value homes would be more likely to get Act 250 approval than utility projects that facilitate lower-value homes, due to the impact on the municipal tax base. Despite CVPS's argument, on page 4 of its Motion, the Decision does not indicate

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[1] *See, e.g., Re: Washington Electric Cooperative, Inc.*, #5W1036-EB, Findings of Fact, Conclusions of Law and Order at 8-10 (Dec. 19, 1990)(utility project application denied because utility applicant failed to provide a reasonable study of growth impacts). The Board did not require such a study in this appeal.

that the Board has adopted a policy concerning housing of any type. Certainly a utility project's secondary contribution to the tax base is a legitimate consideration under the fiscal criteria, but it is only one factor of many. *See, e.g., Re: St. Albans Group and Wal*Mart Stores, Inc.*, #6F0471-EB, Findings of Fact, Conclusions of Law, and Order (Altered) (June 27, 1995); *aff'd, In re St. Albans Group and Wal*Mart Stores, Inc.,* 167 Vt. 75 (1997). In this case, however, the Board has ruled that the homes served in this case were not facilitated by the Project. The Board cannot address CVPS's argument on the facts of this case.

CVPS also raises questions about Act 250 review of service connections in the future. Again, answers to such specific questions will depend on the facts of the given case, and those facts are not presented in this appeal. To clarify, however, the Board and district commissions are not authorized to grant or deny electric or telephone service, and cannot mandate the redesign of homes or other development over which there is no Act 250 jurisdiction. The Board and district commissions are authorized only to apply Act 250, which necessarily entails examination of secondary growth impacts.

Contrary to CVPS's assertion on page 17 of its Motion, reviewing secondary impacts of utility line projects subject to Act 250 does not constitute "the 'back-door' imposition of zoning." It is part of the application of Act 250. Generally speaking, if a proposed utility line extension would lead to significant development in an environmentally sensitive area, that would need to be considered in reviewing the utility's permit application. The Decision noted that Jamaica has not adopted zoning, and that the town and regional plans were less than clear in any attempt to limit development in the vicinity of Old Schoolhouse Road. However, the Board is required to examine proposed developments for secondary growth impacts and it properly did so here. No such impacts were found.

The Decision does not extend the law on secondary impacts. To the contrary, the Board concluded that no significant growth would be facilitated by the Project. Apart from the findings and conclusions discussed below, there is no reason to alter the secondary growth discussion in the Decision.

3. Request to Delete Findings and Conclusions

CVPS requests that the Board delete certain findings and conclusions concerning school enrollment and capacity and the assessed value of homes using the line. (Motion at 5-6.) Specifically, CVPS requests that the Board delete Findings 9 and 16, 19, and the last sentence of Finding #23, and certain conclusions concerning school enrollment and capacity and the assessed value of homes using the line. Since the Board concluded that the homes served by the Project would have been built regardless of the availability of utility service, this request can be granted. An altered decision shall be issued without these findings and conclusions.

B. ACCD's Motion to Alter

ACCD objects to portions of the Decision that state that a permit amendment will be required for any change to the Project, such as a line extension or service drop, which could cause significant impact under Act 250. (*See, e.g.,* ACCD's Motion at 2.) ACCD argues that these provisions of the Decision revive the conditions of the Commission Permit that were deleted by the Board. As discussed above, the deleted conditions required that the Permittees obtain a jurisdictional opinion (JO) on whether a permit amendment would be required for future changes to the Project, and required the Permittees to provide notice about the applicability of Act 250 to the Project in the land records and to potential customers who inquire about hooking onto the Project.

EBR 34(A), on the other hand, requires a permit amendment for any change to a permitted project that could have significant impact under any Act 250 criterion, EBR 2(G)(defining "substantial change"), or that could have significant impact on any finding, conclusion, term or condition of the permit and which affects values protected by the Act 250 criteria, EBR 2(P)(defining "material change"). Board rules establish a minor amendment process for material changes. EBR 34(C). No permit amendment is required for project changes that do not have the potential for significant environmental impact.

The JO and notice requirements in the challenged conditions are not contained in EBR 34. Contrary to ACCD's argument, on page 2 of its Motion, neither CVPS nor any future homeowner who may seek a service drop of the permitted line must obtain a JO on whether a permit amendment is required.

ACCD also states that it is concerned about a reference in the Decision to impact fees under the financial criteria. Specifically, ACCD cites an "apparent conclusion that it would be a reasonable form of mitigation to impose an impact fee on a Vermont family that creates a certain level of need for municipal and governmental services when seeking a service drop to their home." (ACCD Motion at 3.) To be clear, the Board did not find any secondary growth impacts in this case and imposed no impact fee. Any such fees would be borne by the developer, not the homeowner in ACCD's hypothetical. Again, Act 250 does not regulate private homes that do not trigger Act 250 jurisdiction.

ACCD incorporated into its Motion the entire Motion to Alter it filed in the *CVPS Guilford* case. This portion of ACCD's request is denied for the reasons set forth in the *CVPS Guilford* decision issued today. *Re: CVPS (Guilford)*, #2W1154-1-EB, Memorandum of Decision on Motion to Alter (Dec. 19, 2003).

C. DPS's Motion to Alter

Like ACCD and CVPS, DPS asks the Board to hold that EBR 34 does not apply to utility projects. Specifically, DPS asks the Board "to find that the policy of requiring review of utility line extensions . . . under EBR-34 . . . is an improper application of the Board's authority." Like the other moving parties, however, DPS points to nothing in the law that would exempt electric utilities from EBR 34.

Contrary to DPS's assertion, the Decision does not "create" any new obligation to seek a permit amendment under EBR 34. The Decision simply states that this is the current rule. Nor does the Decision require that utilities provide notice to potential customers for each subsequent line extension. EBR 34 requires a permit amendment only for substantial or material changes to the permitted project. It is up to utility permittees whether and how to inform potential customers of applicable permitting requirements.

DPS argues that the decision will impose additional recordkeeping and notification costs which will have to be borne entirely by requesting customers. According to DPS, the utility cannot spread such costs among ratepayers without showing a general benefit to the ratepaying public. As stated above, the Board declines to reopen the hearing in this matter to take new evidence on administrative burdens. The Decision imposes no notification requirement, and no new recordkeeping requirement. In the Board's opinion, any utility's compliance with Act 250 does provide a general public benefit.

In its motion, DPS acknowledges that it is "appropriate that local town or state policymakers are concerned about growth that may stem from a utility plant extension," but argues that the town should not transfer planning responsibility to the utility companies and ratepayers. (DPS Motion at 1.) The Board notes now, as it did in the Decision, that local planning and zoning could have provided clearer guidance in this case. However, the Act 250 permit application was granted because no provision of the town or regional plan was violated and because the Project will cause no significant secondary growth. Regardless of the strength and specificity of local planning and/or zoning, which factor into review under Criterion 10, the Board and commissions must examine any secondary impacts under other criteria.

DPS also argues that secondary growth impacts from utility projects cannot be addressed effectively through individual permits that apply only to utility lines or extensions over 2,200 feet in length, and that this will result in a jurisdictional "hodge-podge." As noted in the Decision, Act 250 is not designed to address the effects of incremental growth. It was intended to be used in conjunction with state, regional and local land use planning and zoning, which are better suited to that task.

Moreover, Act 250 was intended to guard against the environmental impacts of large-scale development. The statute and rules establish certain "bright-line" tests

for jurisdiction which, like any other jurisdictional threshold, may appear arbitrary in isolation, and which result in Act 250 jurisdiction extending to some projects but not others. Once a project gets an Act 250 permit, that permit runs with the land and its conditions apply to the project tract regardless of who may own it in the future. A substantial or material change to a permitted project, by definition, is one that may cause environmental impacts under Act 250. *See*, EBR 2(G); EBR 2(P). Whether a permitted project is a utility line or some other commercial, industrial or residential development, substantial or material changes cannot be made without a permit amendment under current law. EBR 34(A). This is consistent with the purpose of Act 250.

IV. ORDER

1. CVPS's Motion to Alter is GRANTED in part and DENIED in part. Altered Findings of Fact, Conclusions of Law and Order and Land Use Permit Amendment #2W1154-1-EB are issued herewith.

2. ACCD's Motion to Alter is DENIED.

3. DPS's Motion to Alter is DENIED.

DATED at Montpelier, Vermont this 19th day of December, 2003.

ENVIRONMENTAL BOARD

_/s/Patricia Moulton Powden__
Patricia Moulton Powden, Chair
George Holland*
Samuel Lloyd
Donald Marsh
Patricia Nowak*
Alice Olenick
Jean Richardson

***** Board Member George Holland CONCURS in part and DISSENTS in part, and is joined by Board Member Patricia Nowak:

I concur with the majority in granting CVPS's motion in part and deleting unnecessary findings and conclusions. These findings and conclusions concern what might, in another case, be considered secondary impacts. While I agree with the majority that no such impacts were found here, I continue to dissent from any mention of Board precedent that would indicate that it is appropriate to include unregulated residential development in the Act 250 permitting process for utility line extensions.

Also, I am persuaded by the moving parties that the special definitions of development and involved land for utility projects should be read to exempt utilities from amendment jurisdiction under EBR 34. Given the majority's decision that EBR 34 applies to utilities, I continue to hope that changes will be made to exempt utilities like CVPS from this requirement.

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