

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

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

Land Use Permit Amendment
Application #2W1154-1-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The Central Vermont Public Service Corporation (CVPS) appeals from the denial of land use permit amendment application #2W1154-1, for the construction of approximately 3,700 feet of utility line along Melendy Hill Drive in the town of Guilford, Vermont (Project). As set forth below, the Vermont Environmental Board (Board) grants this permit amendment application and remands to the District 2 Environmental Commission (Commission) for issuance of a permit amendment consistent with this decision.

I. Procedural History

On September 10, 2002, CVPS and Verizon New England (Applicants) filed land use permit application #2W1154 with the Commission. While that permit application was being processed, adjoining landowners William Lax and Sydney Crystal filed a request for an interim permit for a line extension of one pole to serve their property. The Commission bifurcated the application and issued an initial permit #2W1154 (Initial Permit), for the line extension serving the Lax/Crystal property. The Initial Permit and accompanying decision (Initial Decision) made clear that the Commission would include any impacts from this portion of the project, as well as address conformance with applicable local and regional plans, in its final decision on the entire project.

On December 20, 2002, the Commission issued its Findings of Fact, Conclusions of Law, and Order (Commission Decision) denying application #2W1154-1 for the Project.

On January 3, 2003, CVPS filed an appeal from the Decision, alleging that the Commission erred in its conclusions concerning 10 V.S.A. § 6086(a)(6), (7), (9)(A), (9)(H) and (10)(Criteria 6, 7, 9(A), 9(H), and 10).

On January 28, 2003, then-Board Chair Marcy Harding convened a prehearing conference with the following participants: CVPS, by Timothy Upton; Verizon New England, by Jean Kingston, Esq.; Agency of Natural Resources (ANR), by Warren T. Coleman, Esq.; Guilford Planning Commission, by Rick Zamore. Prior to the prehearing conference, adjoining property owners William Lax and Sydney Crystal, and the Windham Regional Commission, notified the Board of their intent to participate as parties in this proceeding.

On January 30, 2003, the Chair issued a Prehearing Conference Report and Order (PCRO). Among other things, the PCRO identified issues and parties.

On February 3, 2003, CVPS filed objections to the PCRO. On February 18, 2003, the Town of Guilford filed a response to CVPS's objections to the PCRO. The Board deliberated on February 19, 2003.

On February 24, 2003, the Board issued a Memorandum of Decision on CVPS's objections to the PCRO. A Revised Memorandum of Decision was issued on February 28, 2003, adding the dissenting opinion of one Board member. Also on February 28, 2003, CVPS filed a Motion to Alter the Memorandum of Decision. The Board deliberated on March 19, 2003. On March 26, 2003 the Board issued a Memorandum of Decision denying the Motion to Alter.

On May 14, 2003, the Board convened a public hearing in this matter, Chair Patricia Moulton Powden presiding. The Board conducted a site visit and made observations on the record, admitted exhibits and heard testimony, and commenced deliberations immediately after the hearing. 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. The matter is now ready for final decision.

II. Issues

The issues on appeal are as follows:

1. Whether the Project complies with Criterion 6 (educational services).
2. Whether the Project complies with Criterion 7 (municipal services).
3. Whether the Project complies with Criterion 9(A)(impact of growth).
4. Whether the Project complies with Criterion 9(H)(costs of scattered development).
5. Whether the Project complies with Criterion 10 (town and regional plan).

III. De Novo Review and Official Notice

A. De Novo Review

Generally, the Board hears appeals from district environmental commission decisions *de novo*. See 10 V.S.A. § 6089(a)(3). In a *de novo* proceeding, the Board hears the matter anew, as if there had been no prior hearing before the district commission. *In re Killington, Ltd.*, 159 Vt. 214, 214 (1992)(citing *In re Green Peak Estates*, 154 Vt. 363, 372 (1990)). Thus, the Board cannot consider any exhibit or testimony submitted to the Commission, including the application, unless it is introduced into this proceeding as an exhibit and admitted by the Board, or unless it is officially noticed by the Board.

In this case, the Board has taken official notice of several documents in the Commission file, as set forth below. However, the Board has not taken notice of the entire Commission file. See, *In re White*, 172 Vt. 335 (2001).

B. Request for Official Notice of Windham Regional Plan, Initial Permit, and Initial Decision

The Windham Regional Commission requested that the Board take official notice of the Windham Regional Plan, the Initial Permit and the Initial Decision. CVPS had no objection to the Board taking official notice of the entire Commission file, but did object to taking notice of the permit and decision without having the entire file in evidence.

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 contents of the Windham Regional Plan, the Initial Permit and the Initial Decision are not subject to dispute, so this material is appropriate for official notice. Accordingly, the Board granted the Windham Regional Commission's request at the hearing in this matter.

IV. Findings of Fact

To the extent that any proposed findings of fact are included herein, they are granted; otherwise, they are denied. See *Secretary, Agency of Natural Resources v.*

Upper Valley Regional Landfill Corp., 167 Vt. 228, 241-242 (1997); *Petition of Village of Hardwick Electric Department*, 143 Vt. 437, 445 (1983). Topic headings are for organizational purposes only. Facts stated and terms defined in the procedural summary are incorporated herein.

Background

1. In 2001, Applicants received two separate requests for electric and telephone service to properties (the Bernhard property and the Lax/Crystal property) on Melendy Hill Drive in Guilford, Vermont.
2. The combined line extension projects were constructed without a permit in 2001. CVPS discovered the error in 2002, and applied for an Act 250 permit.
3. After that application was filed, requests were made to add a line extension to the Moulton property and a one-pole line extension to the Lax/Crystal property.
4. The Lax/Crystal home is at the end of Melendy Hill Drive, and at the end of the utility line.
5. On October 22, 2002, the Commission authorized the installation of temporary service to the Moulton property for medical reasons.
6. William Lax and Sydney Crystal requested expedited approval of their one-pole extension to facilitate some construction on their home. On November 8, 2002, the Commission issued Land Use Permit #2W1154 authorizing the installation of one additional pole on the Lax property.
7. On December 20, 2002, the Commission issued the Decision denying Land Use Permit Application #2W1154-1 for the initial line extensions serving the Lax/Crystal and Bernhard properties.
8. On December 31, 2002, CVPS filed an appeal of the Commission's Decision, in which it alleged that the Commission erred in its conclusions regarding Criteria 6, 7, 9(A), 9(H), and 10.

The Fiscal Criteria: 6, 7, 9(A) and 9(H)

9. Public schools serving the town of Guilford are the Guilford Central School and Brattleboro High School. The current enrollment of the Guilford Central School is 211, with a capacity of 300. The current enrollment of Brattleboro High School is 1,033, with a capacity of 1,475.

10. Single-phase overhead electric lines are valued at \$28,200 per mile, plus \$602 per customer. This assessment is subject to depreciation.
11. The 2002 property tax rate for Guilford was \$3.16 per \$100 in assessed value. The assessed value of the electric line, as proposed, was \$25,074.72 in 2002, which would produce approximately \$792.35 in property tax revenues for the year.
12. The Lax/Crystal property is assessed at \$52,600, but this does not include the value of the house. The Bernhard property is assessed at \$192,500. The Moulton property has not been assessed in its current configuration.
13. The construction and maintenance of the poles and wires involved in the line extension will not result in any direct costs to the Town of Guilford for educational or municipal services.
14. The Lax/Crystal home would have been built regardless of the availability of electric and telephone lines. Neither of the properties served by the initial proposed line extension was served by electricity in May 2001, but each was developed nonetheless. Also, the Moulton home was built without any assurance that electric and/or telephone service would be available.
15. Properties with direct access to utility services may be less expensive to develop than those without such access.
16. The availability of electric utility service may encourage or facilitate additional development, but is not the sole factor or cause of such development.
17. Homes can be and are built in remote locations without taking service from the electric grid.
18. Under the terms of CVPS's approved line extension tariff, the cost of extending distribution lines to serve new homes is borne entirely by the requesting customer. No public funds are used for this construction.
19. If additional users wish to connect to a line extension after it is built, then those users are responsible for paying a portion of the initial construction costs for a defined number of years. For the first five years after construction, additional users must pay 100% of their share of construction costs, based on their location, plus 100% of the cost of any additional facilities. These costs are thereafter depreciated in a straight line for a period of ten years, so that at the end of fifteen years after construction, additional users may attach to a line extension free of charge, by paying only for the facilities necessary to reach their own premises.

20. The proposed line extension serves three homes, and is located on three parcels of land, each comprising more than fifty acres.
21. The line is located along an existing private road, Melendy Hill Drive, which extends from a Class 3 town road, Melendy Hill Road. Melendy Hill Drive has been improved somewhat, but remains fairly narrow and in less than prime condition. It is wide enough for one car to travel easily, but somewhat difficult for two cars to pass. Both roads are steep in places.
22. Significant improvements will not be made to Melendy Hill Drive.
23. Service was originally extended to Melendy Hill Road from Route 5 in 1947. The line existed in what was a remote area for more than twenty years before being extended to the south, in the direction of the project, by 5 poles in 1968. It was another two decades before the next extension of 6 poles occurred in 1987. Eleven years later, it was extended again in 1998.
24. There have been approximately 20 new homes built on Melendy Hill Drive and Melendy Hill Road in the past 20 years. There are approximately eight homes on Melendy Hill Drive. Six of these have been built since 1998.
25. Since 1947, there have been significant changes in real estate markets, the quality of roads and road maintenance, and other factors that influence growth.
26. There was a home past the Lax/Crystal home a long time ago. All that remains is the cellar hole and stone walls.
27. Between 1970 and 2000 the population of Guilford increased from 465 to 649. Growth rates during these three decades were 38.3% in the 1970s, 26.7% in the 1980s, and 5.4% in the 1990s. Regional population grew by 11,467, with Guilford's percentage increasing from 3.2% to 4.4% of total regional population. The pace of growth in Guilford slowed in the 1990's and has remained relatively stable since.
28. CVPS provided data on 37 utility line extensions over 1,000 feet in length in CVPS's Brattleboro district from 1990 through the fall of 2001. CVPS's Brattleboro district includes Brattleboro, substantial sections of Guilford, Marlboro, Dummerston, Newfane, Townshend, Jamaica, Wardsboro, and Stratton, and small areas in Athens, Dover and Vernon, Vermont. This data does not include connections to line extensions built before 1990 or applied for after September 21, 2000.

29. This data indicates that of 37 initial extensions, 24 were subsequently extended or had from one to six new connections. Only four out of the 37 extensions had more than six service drops (new lines off the main extension to serve customers) added. These serve planned housing developments in Brattleboro. Other than these four, no line extension had more than one service drop added per year.
30. Of the line extensions surveyed by CVPS, the Project has more connections than any other extension in Guilford. It is one of the shortest initial extensions with one of the highest numbers of connections outside of Brattleboro.
31. Other than the Project and the four extensions in Brattleboro, it is not clear whether any of these extensions were put into remote rural areas along improved town trails or Class IV roads, similar to the Project site.
32. No party presented any evidence suggesting that the Town of Guilford will not be able to provide necessary services now or at any time in the future as a result of this line extension.
33. CVPS has received no additional requests for service along Melendy Hill Drive.
34. The Town of Guilford has no zoning or subdivision regulations.
35. The land surrounding the Project has no apparent severe limitations on development in terms of slope, soils, or drainage.
36. The Project is not a compact, existing community center with mixed uses including a significant residential component, and it is not physically contiguous to such an existing settlement.
37. In 2002 CVPS paid \$32,345.19 in property taxes to the town for its share of electric and joint-use distribution facilities in Guilford. Single-phase overhead lines are valued at \$28,200.00 per mile, plus \$602.00 per customer.
38. The Town of Guilford does not have a duly adopted capital improvement program.

Criterion 10 - Conformance with Town and Regional Plans

39. The Guilford Town Plan (adopted Sept. 13, 1999) and the December 2001 Windham Regional Plan apply to the Project.

40. The Guilford Town Plan includes the following policy on Public Utility Corridors:

The development, expansion, and maintenance of public utilities including telecommunication towers and governmental facilities should occur within or parallel to highway or public utility rights-of-way corridors so that they may be readily maintained and in order both to reduce adverse physical and visual impact on the landscape and to achieve greater efficiency in the expenditure of public funds – this provision includes the possibility of placing wires a short distance from the road in a field to preserve a tree line.

Guilford Town Plan, at 22.

41. The Public Utility Corridors policy references another policy at Section IV, which states:

2. the development, expansion, and maintenance of public utilities including telecommunication towers and governmental facilities should occur within or parallel to highway or public utility rights-of-way corridors so that they may be readily maintained and in order both to reduce adverse physical and visual impact on the landscape and to achieve greater efficiency in the expenditure of public funds - this provision includes the possibility of placing wires as short distance from the road in a field to preserve a tree line (see also XII, 2).

Guilford Town Plan, at 10.

42. The Guilford Town Plan contains the following policy concerning preservation of important natural and historic features of the Vermont landscape:

2. To require, where possible, that public utilities and transportation facilities integrate their use of corridors in order to minimize their impact on the environment.

Guilford Town Plan, at 12.

34. The Project site is in Rural Productive Lands under the Land Use section of the Guilford Town Plan.

35. The Guilford Town Plan describes Rural Productive Lands as follows:

Rural Productive Lands include the remaining lands outside the village, hamlet and rural residential areas. These lands have significant economic value when in

productive use or contain areas with valuable natural resources that need protection. Such lands include prime agricultural soils, productive forest areas, agricultural and forest lands enrolled in the Use Value Appraisal Program, sand/gravel/mineral deposits and operations, significant wildlife habitats, fragile areas, wetlands, steep slopes, uplands, floodplains, shorelands, and large undeveloped areas.

Guilford Town Plan, at 26.

36. Guilford Town Plan Policies for Rural Productive Lands are:

- To avoid extension of roads, energy transmission facilities and other services through significant wildlife habitats and other fragile areas.
- To ensure protection of valuable natural resource areas.
- To avoid the fragmentation of wildlife habitat by protecting wildlife corridors that join large tracts of Rural Productive land.
- To encourage the use of innovative land-saving techniques such as cluster development and fixed area density allocation to protect agricultural, forest, and mineral resource lands from developments and fragmentation.
- To protect fish and wildlife habitats; federally identified endangered and threatened species; unique and fragile natural areas; wetlands; shorelands; floodplains; aquifer recharge areas; steep slopes and high elevations; ridgelines; and essentially undeveloped forest lands that have limited access to an improved public road from development that would negatively impact the resource.

Guilford Town Plan, at 26-27.

36. The Windham Regional Plan establishes several regional land use categories: Regional Centers, Regional Growth Centers, Resort Centers, Villages, and Rural Lands.

37. The Windham Regional Plan states, in the section entitled "Rural Lands," that:

In spite of difficult access, topography, or lack of wastewater treatment facilities . . . many areas of rural lands have attracted more residential development. Such development is an appropriate use at low densities in many areas, but it has encouraged and will continue to encourage rural sprawl if it becomes the dominant

settlement pattern throughout the Region's rural lands. This rural sprawl has caused the fragmentation of large land parcels containing significant productive rural lands and resource protection areas.

Rural lands are easily transformed into suburbia. First come the needs for transportation and utilities as roads are widened, then paved and lined with poles for electricity, telephone, and cable. . . . The crux of the issue is the concept of rural living and its relation to suburban lifestyles. . . .

The following rural lands categories are designed to reduce this fragmentation, protect important resources and provide for areas in which residential development can occur while maintaining the rural landscape.

Windham Regional Plan, at 22.

38. The Rural Lands categories are: Hamlets, Rural Residential Lands, Productive Rural Lands and Resource Lands.
39. The project is located partially on Resource Lands and partially on Productive Rural Land. Resource Lands surround the Lax/Crystal home. Some of the Project site is on Productive Rural Lands.
40. Resource Lands are described in the Windham Regional Plan as follows:

Resource lands are predominated by lands requiring special protection or consideration due to their uniqueness, irreplaceable and fragile nature, or important ecological function. Resource lands include fish and wildlife habitats, areas hosting state Natural Heritage or federally identified endangered and threatened species, unique and fragile natural areas, wetlands, shore lands, floodplains, aquifer recharge areas, steep slopes, lands over 2,500 foot elevation, ridgelines, essentially undeveloped forest lands having limited access to improved public roads and regionally significant scenic corridors and areas. Resource lands of special value should be preserved and protected to the greatest extent possible. Any development or land use in these areas should be designed to have a minimal impact on the resource. It is important to limit and manage human interaction in resource areas. Resource lands also

include those areas that are currently in some form of legal conservation such as public ownership, private non-profit ownership for conservation purposes, or conservation easements. The most appropriate land uses for resource lands are conservation, forestry, recreation, and low impact, very low-density rural uses.

Windham Regional Plan, at 23.

41. The Windham Regional Plan contains the following policies for Productive Rural Lands:

1. Ensure that new development reflects existing settlement patterns, is low in intensity, and does not conflict with the use and management of forest, agricultural and mineral resource lands, but rather sustains these natural resource commodities.
2. Support a mix of rural land use including agriculture, housing, home businesses, small-scale commercial and industrial uses, commercial forestry and outdoor recreation, so long as these uses are compatible with one another and do not cause excessive noise, pollution, or disturbance.
3. Support long-term management of agricultural and forest lands for uses that promote a sustained yield of crops and timber products.
4. Encourage the use of innovative land saving techniques such as cluster development and fixed area density allocation to protect agriculture, forest, and mineral resource lands from development and fragmentation.
5. Support protection of green space, particularly along streams and rivers, and other important lands that are valued for trails, open space, wildlife habitat and scenic enjoyment.

Windham Regional Plan, at 101.

42. The Windham Regional Plan contains the following policies for Resource Lands:

1. Insure that new development reflects existing settlement patterns, is low impact and intensity and does not conflict with the resources, but rather sustains these natural resources.

2. Insure protection of fish and wildlife habitats; areas hosting Natural Heritage or federally identified endangered and threatened species; unique and fragile natural areas; wetlands; shore lands; floodplains; aquifer recharge areas; steep slopes; lands over 2500 foot elevation; ridge lines; essentially undeveloped forest lands which have limited access to an improved public road; and regionally significant scenic corridors and areas from development that would negatively impact the resource.
3. Encourage protection of green space, particularly along streams and rivers, and other important lands that are valued for trails, open space, wildlife habitat and scenic enjoyment.
4. Avoid extension of roads, energy transmission facilities, and other services into and through Resource Lands.
5. Construct corridors for new energy transmission facilities only when needed, and then adjacent to and parallel to existing operational energy transmission facility corridors. Minimize their visual impact on ridge lines, slopes and open areas, and avoid important natural and historic resources.
6. Avoid fragmentation of wildlife habitat by protecting wildlife corridors that join large tracts of resource land.

Windham Regional Plan, at 101-102.

43. It is not possible to serve the Lax property without placing facilities in areas designated as Resource Lands in the Windham Regional Plan.
44. The Windham Regional Plan Policies begin with six Growth-Related Goals, which include: "New development should be required to pay its own way, that is, to either provide or contribute fairly toward the provision of facilities and services needed to support that development." Windham Regional Plan, at 99.
45. The Windham Regional Plan's section on Energy contains a subsection entitled, "Current Issues," which includes a paragraph entitled, "Restructuring of Vermont's Electric Utility Industry." This paragraph discusses statewide policies on restructuring of the electric industry, and states in part that: "Under the restructuring, each of the electric utilities' current three components, generation, transmission, and distribution, would be broken out into four separate companies for the generation, transmission, distribution, and retail sales of electricity." Windham Regional Plan, at 68.

46. William Lax and Sydney Crystal enjoy the natural resources and beauty of their land, including the wildlife that uses the land, and they are highly motivated to protect these resources. This is the main reason they chose to build their home in this remote location.

IV. Conclusions of Law

A. The Fiscal Criteria: Criteria 6, 7, 9(A) and 9(H)

CVPS has appealed several Act 250 criteria having to do with fiscal impacts of the proposed project on local governments. The fiscal criteria on appeal are Criteria 6 (impact on educational services), 7 (impact on municipal and local governmental services), 9(A) (impact of growth), and 9(H) (costs of scattered development). The requirements for these criteria are set forth below.

"[T]he common element in each of the fiscal criteria is the protection of government finances from burdens imposed by new development." *Re: St. Albans Group and Wal*Mart Stores, Inc.*, #6F0471-EB, Findings of Fact, Conclusions of Law, and Order (Altered) at 19 (June 27, 1995); *aff'd, In re St. Albans Group and Wal*Mart Stores, Inc.*, 167 Vt. 75 (1997)(*St. Albans Wal*Mart*). In this case, it is clear that the poles and wires from the Project itself will not burden government finances in any significant manner. The bigger issue is indirect impacts from growth that may be facilitated by this line extension.

1. Secondary Growth, Generally

CVPS argues that the Project will not cause or facilitate any significant growth. As the Board has held the *Washington Electric Coop* case, a claim that the project will not encourage growth is not enough under the financial criteria:

Simply asserting that the area around the project is near the growing City of Barre is not enough; nor is it sufficient to merely counter that assertion by saying that the project will not encourage growth. What the Board needs, in addition to an analysis of power lines built in similar locations, is an assessment of those factors present in the area which may promote or discourage growth such as resources in the area, soil characteristics, topographic limitations, and access to employment.

Washington Electric Cooperative, Inc., # 5W1036-EB, Findings of Fact, Conclusions of Law, and Order at 6 (Dec. 19, 1990).

In support of its claim, CVPS has submitted an analysis of 37 utility line extensions over 1,000 feet in length in CVPS's Brattleboro district. This analysis includes the line extension along Melendy Hill Road and Drive, and four line

extensions in Brattleboro that serve planned housing developments. This analysis shows that, other than the four lines in Brattleboro, the maximum rate of development has been one new service drop per year. It also shows that the Project is one of the shortest initial extensions with one of the highest numbers of connections outside of Brattleboro, and that it has more connections than any other extension in Guilford. While it is not clear how many of the other lines studied extended into similarly remote and less developed areas, this data does show that growth is not rampant in this area. This indicates that significant additional development along the Project site is unlikely. In addition, the Board must assess other factors in the area that might promote or discourage growth. *Washington Electric Cooperative*, Findings, Conclusions and Order at 6.

The Town of Guilford has no zoning or subdivision ordinance that would limit or prohibit further development along Melendy Hill Drive. There are some wet areas along the Project site, but no indication that this would inhibit further residential development in any significant manner. The Project site is in close proximity to downtown Guilford, and within commuting range of Brattleboro and Vernon. However, there was no evidence that the demand for housing serving these job markets is increasing or that there are any other pressures to develop along the Project site. In fact, although the line has been in place for some time now, CVPS has had no additional requests for electric service along Melendy Hill Drive.

Perhaps the most important growth factor in this case is the road. Melendy Hill Road is a Class 3 road and is in fairly good condition, but it is rough in some places. Melendy Hill Drive, the private road at the end of Melendy Hill Road is also fairly rough as presently maintained. Together, Melendy Hill Drive and Melendy Hill Road are wide enough to accommodate one car width easily, but with limited passing opportunities. They are also quite steep in some places. Should the condition of this road improve significantly, it could facilitate further development along the Project site. However, there was no evidence that this road would be improved significantly.

In many cases it will be difficult to predict whether and how much secondary growth will be facilitated by a new utility line. In this case there is sufficient evidence, without sophisticated studies, to show that this Project is unlikely to facilitate significant growth. Moreover, any new line extension or service drop with potential for significant growth or other Act 250 impacts will require an amendment to the

permit.¹ As discussed below, the Board concludes that the Project complies with the fiscal criteria on appeal.

CVPS argues that it should not be made to account for secondary impacts of its lines, in part because of its statutory mandate to provide electric service. The Board recognizes that 30 V.S.A. § 2801 requires CVPS to provide electric service to customers upon request, but the Board reads this statute as subject to other applicable laws, including Act 250. See, *In re Agency of Transportation*, 157 Vt. 203, 208 (1991)(Act 250 applies despite existence of other permit and approval processes)(cited in *OMYA, Inc. v. Town of Middlebury*, 171 Vt. 532, 533 (2000)(mem.)). Nothing exempts CVPS from Act 250, and the Board must apply it here.

Also, the Board understands the concerns of the Guilford and Windham Regional planning commissions that incremental growth may creep into relatively undeveloped areas like that surrounding the Project site. The Board cannot and will not turn a blind eye to significant growth impacts of a given project, however, there is no indication of such impacts in this case. Act 250 review focuses on the individual project, the impacts of reasonably foreseeable growth that is facilitated by that project -- in the context of the project's benefits -- and, where appropriate, mitigation of growth costs through impact fees or other conditions.² A strong town plan, accompanied by clear zoning regulations and the enforcement thereof, offer communities very effective tools for controlling growth. The Town of Guilford has not adopted zoning, and, as discussed below, the applicable town and regional plans do not clearly prohibit utility line extensions in the area of the Project site. Act 250 was never intended to enforce comprehensive land use planning goals that are not clearly stated in the town or regional plans.

1

EBR 34. To be clear, Act 250 requires review of the utility line and the secondary impacts of that line, not review of the individual residences that are or will be connected to that line. A request for electric or other utility service by a prospective residential customer does not trigger Act 250 jurisdiction over that customer's residence. But the Act 250 impacts of residences and any other development that will be attracted to an area because of the utility project must be considered in reviewing the utility's application for a land use permit.

2

See, e.g., 10 V.S.A. §§ 6086(a)(6) and (7)(requiring imposition of impact fees to mitigate impacts of growth on educational and other local services); *id.* § 6086(a)(9)(A)(allowing imposition of conditions to mitigate impacts of growth); see also, I Richard O. Brooks, *Toward Community Sustainability: Vermont's Act 250* § 9(A) at 16 (1996 & Supp. 1997)(concluding that the effectiveness of Criterion 9(A) to control gradual growth is limited).

2. Criterion 6

Under Criterion 6, the Board must determine whether the Project will "cause an unreasonable burden on the ability of a municipality to provide educational services." 10 V.S.A. § 6086(a)(6). The burden of proof is on the opponents under Criterion 6. 10 V.S.A. § 6088(b). The applicant, however, must first provide sufficient information for the Board to make affirmative findings. *See, e.g., Re: Fair Haven Housing Limited Partnership, #1R0639-2-EB, Findings of Fact, Conclusions of Law, and Order at 14 (Apr. 16, 1996); St. Albans Wal*Mart, Findings, Conclusions and Order at 50.* A permit may not be denied under Criterion 6, but the Board may impose conditions to alleviate any burden created by the proposed project. 10 V.S.A. § 6087(b); *Re: Horizon Development Corporation, #4C0841-EB, Findings of Fact, Conclusions of Law, and Order at 18 (Aug. 21, 1992) (finding that proposed subdivision will not create an unreasonable burden if residential construction is completed in phases).*

Under Vermont's school financing system, non-capital costs of additional students would be financed by the State Education Fund. However, if the Project caused an increase in the number of students that was sufficient to require extra facilities or other capital investment, such costs would be the responsibility of local governments. Thus, in determining whether the development will cause an unreasonable burden on the municipalities ability to provide services, the first step is to determine whether the development will cause an increase in the number of students and whether the local schools can absorb any increase without additional capital expenditures.

CVPS has proven that the local schools are not close enough to capacity for the Project to cause any significant impact in terms of capital costs. Therefore, CVPS prevails on Criterion 6 unless the opponents prove: (i) that the project will impose a burden on the town; (ii) that this burden is unreasonable; and (iii) that an impact fee is an appropriate remedy for the burden. *See, e.g., Fair Haven Housing, Findings, Conclusions and Order at 14; Re: Clarence and Norma Hurteau, #6F0369-EB, Findings of Fact, Conclusions of Law, and Order at 9 (Apr. 24, 1989, as corrected May 9, 1989)(town failed to meet burden of proof as to (i), (ii), and (iii) above).*

No party has produced such evidence. Therefore, the Board concludes that the Project complies with Criterion 6.

3. Criterion 7

Criterion 7 requires the Board to determine whether "the development will not place an unreasonable burden on the ability of the local government to provide municipal or governmental services." 10 V.S.A. § 6086(a)(7). The Board cannot deny a permit under Criterion 7, but may impose reasonable conditions to alleviate

any burdens created by the proposed project. 10 V.S.A. § 6087(b); *Re: Town of Stowe, #100035-9-EB*, Findings of Fact, Conclusions of Law, and Order at 36 (May 22, 1998). The opponent bears the burden of proof on Criterion 7, 10 V.S.A. § 6088(b), but the applicant must produce enough evidence for the Board to make affirmative findings on Criterion 7. *Re: Fair Haven Housing Limited Partnership, #1R0639-2-EB*, Findings of Fact, Conclusions of Law, and Order at 14 (Apr. 16, 1996); *St. Albans Wal*Mart*, Findings, Conclusions and Order at 50.

Criterion 7 covers a wide range of services, including fire protection (both voluntary and paid), police, solid waste disposal (landfill or other), sewage treatment, water systems, rescue (both voluntary and paid), and road maintenance. *Re: Barre Granite Quarries, LLC, and William and Margaret Dyott, #7C1079(Revised)-EB*, Findings of Fact, Conclusions of Law, and Order at 80 (Dec. 8, 2000).

CVPS has demonstrated that the Project will not place an unreasonable burden on the local government's ability to provide these services, and no other party has proved otherwise. The Board therefore concludes that this Project complies with Criterion 7.

4. Criterion 9(A)

Criterion 9(A) requires the Board to review the impact that the proposed project will have on the ability of the town and region to accommodate two separate items: (a) growth that will occur generally regardless of the proposed project; and (b) growth that will occur specifically because of the proposed project. *Re: Maple Tree Place Associates, #4C0775-EB*, Findings of Facts, Conclusions of Law, and Order at 49 (June 25, 1998). Criterion 9(A) provides:

In considering an application, the District Commission or the Board shall take into consideration the growth in population experienced by the town and region in question and whether or not the proposed development would significantly affect their existing and potential financial capacity to reasonably accommodate both the total growth and the rate of growth otherwise expected for the town and region and the total growth and rate of growth which would result from the development if approved. After considering anticipated costs for education, highway access and maintenance, sewage disposal, water supply, police and fire services and other factors relating to the public health, safety and welfare, the district commission or the board shall impose conditions which prevent undue burden upon the town and region in accommodating growth caused by the proposed development or subdivision. Notwithstanding section 6088 of this title the burden of proof that proposed development will significantly affect existing or potential financial capacity of the town and region to accommodate such growth is upon any party opposing an application, excepting however, where the town has a duly adopted capital improvement program the burden shall be on the applicant.

10 V.S.A. § 6086(a)(9)(A).

Guilford does not have a duly adopted capital improvement program, so the burden of proof under Criterion 9(A) is on any party opposing the application. *Id.* As the applicant, CVPS bears the burden of producing enough evidence for the Board to make positive findings. *Re: Fair Haven Housing Limited Partnership, #1R0639-2-EB, Findings of Fact, Conclusions of Law, and Order at 14 (Apr. 16, 1996); St. Albans Wal*Mart, Findings, Conclusions and Order at 50.*

The Board must consider the following factors in reviewing a project under Criterion 9(A):

- a. The growth in population experienced by the town and region in question.
- b. The total growth and rate of growth which is otherwise expected for the town and region.
- c. The total growth and rate of growth for the town and region which will result from the proposed project if approved.
- d. The anticipated costs for education, highway access and maintenance, sewage disposal, water supply, police and fire services and other factors relating to public health, safety, and welfare.
- e. Based on (a) through (d), that the proposed project will not cause an undue burden on the existing and potential financial capacity of the town and region in accommodating growth caused by the proposed project.

*St. Albans Wal*Mart, Findings, Conclusions, and Order at 30.* Between 1970 and 2000 the population of Guilford increased from 465 to 649. Growth rates during these three decades were 38.3% in the 1970s, 26.7% in the 1980s, and 5.4% in the 1990s. Regional population grew by 11,467, with Guilford's percentage increasing from 3.2% to 4.4% of total regional population. The pace of growth in Guilford slowed in the 1990's and has remained relatively stable since.

The poles and wires of the Project itself will have no direct impact on growth or growth rates in this town and region, and will not entail any significant costs for education, highway access and maintenance, police and fire services, or other relevant factors relating to public health, safety and welfare. As noted above, the key issue in this appeal is whether the Project will have secondary or indirect impacts. *See, Washington Electric Coop., Findings, Conclusions and Order at 5 (without review of secondary impacts under Criterion 9(A), Act 250 review would be rendered meaningless); see also, Re: Gary Savoie d/b/a WLPL and Eleanor Bemis, #2W0991-EB, Findings of Fact, Conclusions of Law, and Order at 16-17 (Oct. 11, 1995)(Board has "interpreted Criterion 9(A) to encompass new development which may be attracted to an area by the creation of new infrastructure such as a power line or a sewer line.")(citing Washington Electric Coop., Findings, Conclusions and*

Order at 7-9; *Re: Village of Ludlow*, Declaratory Ruling # 212 (Dec. 29, 1989)); *Re: Taft Corners Associates, Inc.*, #4C0696-11-EB, Memorandum of Decision at 8 (Mar. 31, 1992).

"[E]lectric power is essential to most development activities and especially residential development." *Washington Electric Coop*, Findings, Conclusions and Order at 5. In addition, utility lines and other infrastructure such as sewer and drinking water can "influence both the amount and rate of growth a town or region experiences." *Re: Department of State Buildings*, #2S0609-EB, Findings of Fact, Conclusions of Law, and Order (Jun. 3, 1985); *see also, Re: Town of Stowe*, #100035-9-EB, Findings of Fact, Conclusions of Law, and Order at 38-39 (May 22, 1998)(finding that sewer line would "will allow for growth that would not have otherwise occurred," and holding that applicant failed to meet burden of producing evidence on development potential and impacts). The Board has also held that it could "discern no difference between electricity and sewer service as infrastructure items" where impacts of growth are concerned. *Town of Stowe*, Findings, Conclusions and Order at 38.

As CVPS points out, there are differences in terms of how various infrastructure projects are financed. Whether a project is publicly or privately financed will factor into its review under the fiscal criteria, but this distinction does not mean that a privately financed project should avoid review under the fiscal criteria. The infrastructure project proposed in this case is the result of several individual customers' requests for electric and/or telephone service, and is not of the same scale as a major water or sewer line. In fact, the evidence in this case indicates that the Project will have no significant effect upon total growth or rates of growth in Guilford or the Windham County region. *See, Re: The Home Depot USA, Inc., and Ann Juster and Homer and Ruth Sweet*, #1R0048-12-EB Findings of Fact, Conclusions of Law, and Order at 49 (Aug. 20, 2001)(if project will not result in growth, project complies with Criterion 9(A)).

Accordingly, the Project will have no significant adverse impact on costs of governmental services or other factors relating to public health, safety, and welfare.

In sum, the Project will not cause an undue burden on the existing and potential financial capacity of the Town of Guilford and Windham County Region to accommodate growth. Therefore, the Project complies with Criterion 9(A).

5. Criterion 9(H)

Criterion 9(H) provides:

The district commission or board will grant a permit for a development or subdivision which is not physically contiguous to an existing settlement whenever it is demonstrated that, in addition to all other

applicable criteria, the additional costs of public services and facilities caused directly or indirectly by the proposed development or subdivision do not outweigh the tax revenue and other public benefits of the development or subdivision such as increased employment opportunities or the provision of needed and balanced housing accessible to existing or planned employment centers.

10 V.S.A. § 6086(a)(9)(H). The burden of proof on Criterion 9(H) is on the applicant.
10 V.S.A. § 6088.

Criterion 9(H) requires a more strict review of scattered development than of development adjacent to an existing settlement, recognizing that scattered development can have adverse primary and secondary impacts. Criterion 9(H) is intended to "preserve the viability of the traditional community centers of Vermont, . . . and to ensure that any growth outside of the traditional centers would not have an adverse financial impact on state and local government." *St. Albans Wal*Mart*, Findings, Conclusions and Order at 40-41.

Under 10 V.S.A. 6086(a)(9)(H), the Board must first determine whether the proposed project is physically contiguous to an existing settlement. If the proposed project is neither an existing settlement itself, nor physically contiguous to such a settlement, then the applicant must demonstrate that the project's tax revenues and other public benefits outweigh the additional costs of public services and facilities caused by the project.

In this case there is no dispute that the Project is not physically contiguous to an existing settlement. It is not a community center that contains a mix of land uses in close proximity. See, *St. Albans Wal*Mart*, Findings, Conclusions and Order at 40-41 (defining "existing settlement"). It is a utility line going up a hill into a relatively rural area with sparse residential development. Since the Project is not physically contiguous to any existing settlement, the question is whether the Project's tax revenues and other public benefits outweigh any additional costs of public services.

The Project does generate some revenue for the Town of Guilford through property taxes, as does the Lax/Crystal property. As stated above, there is no evidence that the Project will create any significant public costs. The cost/benefit balance clearly weighs in CVPS's favor.

Accordingly, the Board concludes that the Project complies with Criterion 9(H).

B. Criterion 10

CVPS also has appealed Criterion 10. Criterion 10 requires that the Board determine whether the Project “is in conformance with any duly adopted local or regional plan or capital program of Title 24.” 10 V.S.A. § 6086(a)(10). The applicable plans in this case are the Guilford Town Plan and the Windham Regional Plan. The burden is on the applicant to prove compliance with Criterion 10. 10 V.S.A. § 6088(a).

1. Windham Regional Plan

The Windham Regional Plan divides Rural Lands into four categories: Hamlets, Rural Residential Lands, Productive Rural Lands and Resource Lands. The Plan states that these categories are designed to address fragmentation associated with rural sprawl. Under the Windham Regional Plan, the Project goes through an area classified as Resource Lands. Resource Lands completely surround the Lax/Crystal home. The Project also goes through Productive Rural Lands.

To determine whether a proposed development or subdivision complies with a town or regional plan, the Board first looks to whether there are provisions in the plan which evince a specific policy with respect to the project. A provision evinces a specific policy if it:

1. pertains to the area or district in which the project is located;
2. is intended to guide or proscribe conduct or land use within the area or district in which the project is located; and
3. is sufficiently clear to guide the conduct of an average person, using common sense and understanding.

Re: Barre Granite Quarries, LLC, #7C1079 (Revised)-EB, Findings of Fact, Conclusions of Law and Order at 90 (Dec. 8, 2000)(citing Duppstadt, Findings, Conclusions and Order at 45; Re: Herbert and Patricia Clark, Application #1R0785-EB, Findings of Fact, Conclusions of Law and Order at 40 (April 3, 1997); Re: The Mirkwood Group and Barry Randall, #1R0780-EB, Findings of Fact, Conclusions of Law, and Order at 29 (Aug. 19, 1996)). If there are no specific provisions in the town or regional plan which apply to the project, then the project complies with Criterion 10. *Re: Kiesel, #5W1270-EB, Findings of Fact, Conclusions of Law, and Order (Altered) at 47 (Aug. 7, 1998), rev'd on other grounds, In re Kiesel, 171 Vt. 124 (Dec. 29, 2000).*

The Resource Land Policies of the Windham Regional Plan are as follows:

1. Insure that new development reflects existing settlement patterns, is low impact and intensity and does not conflict with the resources, but rather sustains these natural resources.
2. Insure protection of fish and wildlife habitats; areas hosting Natural Heritage or federally identified endangered and threatened species; unique and fragile natural areas; wetlands; shore lands; floodplains; aquifer recharge areas; steep slopes; lands over 2500 foot elevation; ridge lines; essentially undeveloped forest lands which have limited access to an improved public road; and regionally significant scenic corridors and areas from development that would negatively impact the resource.
3. Encourage protection of green space, particularly along streams and rivers, and other important lands that are valued for trails, open space, wildlife habitat and scenic enjoyment.
4. Avoid extension of roads, energy transmission facilities, and other services into and through Resource Lands.
5. Construct corridors for new energy transmission facilities only when needed, and then adjacent to and parallel to existing operational energy transmission facility corridors. Minimize their visual impact on ridge lines, slopes and open areas, and avoid important natural and historic resources.
6. Avoid fragmentation of wildlife habitat by protecting wildlife corridors that join large tracts of resource land.

In a prior case, the Board has held that these provisions of the Windham Regional Plan are specific and enforceable. *Re: Mill Lane Development Co., Inc., #2W0942-2-EB, Findings of Fact, Conclusions of Law, and Order at 35-36 (Dec. 17, 1999).* In that case the Board held that a proposed 10-lot residential subdivision complied with these Resource Lands policies. *Id.*

The Project complies with the first Resource Lands policy because it is low impact and intensity and does not conflict with the resources. This is true of poles and wires of the Project itself, as well as the homes associated with the Project, in particular the Lax/Crystal residence. Although these homes are not impacts of the Project because they were or would have been built regardless of the availability of landline utility service, it is worth noting that Mr. Lax and Ms. Crystal have taken protection of the area's wildlife and other natural resources to heart and that they will be excellent stewards of their land. The Board also notes that the housing associated with the Project reflects existing settlement patterns along Melendy Hill Road and Melendy Hill Drive. These conclusions apply to the second, third and sixth

Resource Lands policies as well. This Project and the homes associated with it to date comply with these policies.

a. *Energy Transmission and Distribution*

The fourth and fifth Resource Lands policies concern "energy transmission facilities." CVPS argues that these provisions do not apply to the Project because the Project involves energy distribution, not energy transmission lines. The Windham Regional Commission counters that this policy was meant to include just the type of energy distribution line at issue here. CVPS points out that the Windham Regional Plan uses both terms, distribution and transmission, elsewhere. The Board recognizes that the proper term of art for the utility line is energy distribution, but the plain meaning of the word "transmission" includes distribution. In other words, these provisions apply to the Project.

The fourth Resource Lands policy is to: "Avoid extension of roads, energy transmission facilities, and other services into and through Resource Lands." In this case, the one-pole extension at the end of the line has been approved and no appeal has been taken from that permit. The line that is at issue in this appeal is not being extended any further into or through Resource Lands. This Project does not violate the fourth Resource Lands policy.

The fifth Resource Lands policy is to: "Construct corridors for new energy transmission facilities only when needed, and then adjacent to and parallel to existing operational energy transmission facility corridors. Minimize their visual impact on ridge lines, slopes and open areas, and avoid important natural and historic resources." This energy transmission facility is needed for three homes, and is adjacent to and parallel to the preexisting line on Melendy Hill Road. The line runs along the roadside for the most part and has minimal visual impact on ridgelines, slopes and open areas. There was no evidence that any part of the line should have been relocated to avoid any such visual impact. Accordingly, the Project complies with these sections of the Windham Regional Plan.

b. *Rural Productive Lands*

The Windham Regional Plan also contains policies for Rural Productive Lands. Most of these policies echo the basic tenets of the Resource Lands policies in language and spirit, and the Project is in compliance with them for the reasons discussed above. The Board notes that the fourth Rural Productive Lands policy, "to encourage innovative land-saving techniques such as cluster development . . .," is more aspirational in nature than specific and enforceable, as indicated by the plan's use of the word "encourage." In sum, there are no specific, enforceable provisions of the Windham Regional Plan that would be violated by the Project.

c. Argument that Regional Plan Conflicts with Town Plan

CVPS argues that the town and regional plans conflict, and that only the town plan should apply because the Project will have no regional impact.³ The Board has held that when town and regional plans do not conflict, a project will be reviewed for its conformance with both plans. *Re: Green Peak Estates, #8B0314-2-EB*, Findings of Fact, Conclusions of Law, and Order (Jul. 22, 1986), *aff'd, In re Green Peak Estates*, 154 Vt. 363 (1990). Where the town and regional plans conflict, the regional plan applies only if the project has substantial regional impacts. If the project does not have substantial regional impacts, then the town plan, not regional plan, applies. *Re: Richard Provencher, #8B0389-EB*, Findings of Fact, Conclusions of Law, and Order (Jan. 19, 1988). Contrary to CVPS's position, the Board concludes that the Guilford Town Plan does not conflict with the Windham Regional Plan in any significant respect. In fact, there are marked similarities in several applicable provisions. Therefore, the Board need not determine whether the Project has a substantial regional impact. Both plans apply to the Project.

2. Guilford Town Plan

The Guilford Town Plan contains several general policies, some of which have been highlighted by the parties. The Board finds one such policy sufficiently specific to be enforceable under Criterion 10. The policy is: "To require, where possible, that public utilities and transportation facilities integrate their use of corridors in order to minimize their impact on the environment." As discussed above, the Project supplements an existing utility line along a Class 3 and private road, and there is no evidence that the Appellants could have done more to minimize environmental impacts. The Project complies with this policy.

The Guilford Town Plan divides land into Rural Productive, Rural Residential, and Hamlet land use categories. The Project is in a Rural Productive land use area. The Town Plan's policies for Rural Productive lands are:

3

More specifically, CVPS argues that the Commission held that the town and regional plans conflict, and that this is evidence that they conflict. Although the Commission's decision can have no bearing on the Board's *de novo* review, the Board notes for purposes of clarification that the Commission did not hold that the town and regional plans were in conflict. Rather, the Commission found that the regional plan provisions were enforceable under Board precedent, and found that the town plan was not sufficiently specific to be enforceable under Act 250. This is not the same as a holding that the plans are in conflict.

- To avoid extension of roads, energy transmission facilities and other services through significant wildlife habitats and other fragile areas.
- To ensure protection of valuable natural resource areas.
- To avoid the fragmentation of wildlife habitat by protecting wildlife corridors that join large tracts of Rural Productive land.
- To encourage the use of innovative land-saving techniques such as cluster development and fixed area density allocation to protect agricultural, forest, and mineral resource lands from developments and fragmentation.
- To protect fish and wildlife habitats; federally identified endangered and threatened species; unique and fragile natural areas; wetlands; shorelands; floodplains; aquifer recharge areas; steep slopes and high elevations; ridgelines; and essentially undeveloped forest lands that have limited access to an improved public road from development that would negatively impact the resource.

Guilford Town Plan, Pages 26-27. As with the parallel provision in the Windham Regional Plan, the fourth of these policies is not "intended to guide or proscribe conduct or land use . . . and . . . sufficiently clear to guide the conduct of an average person, using common sense and understanding." *Re: Barre Granite Quarries, LLC, #7C1079 (Revised)-EB, Findings of Fact, Conclusions of Law and Order at 90 (Dec. 8, 2000)(citing Duppstadt, Findings, Conclusions and Order at 45; Re: Herbert and Patricia Clark, Application #1R0785-EB, Findings of Fact, Conclusions of Law and Order at 40 (April 3, 1997); Re: The Mirkwood Group and Barry Randall, #1R0780-EB, Findings of Fact, Conclusions of Law, and Order at 29 (Aug. 19, 1996))*. This policy is not enforceable under Act 250. With respect to the other policies, the Project complies with them for the reasons discussed above.

The Project complies with the Guilford Town Plan, the Windham Regional Plan, and Criterion 10.

C. Remand

The Board has issued positive findings and conclusions on Criteria 6, 7, 9(A), 9(H), and 10, and the Commission has issued positive findings and conclusions on all other applicable criteria. Because the Board has not heard the other criteria, it remands to the Commission for issuance of a permit consistent with this decision. *In re Juster Assoc.*, 136 Vt. 577, 581 (1978)(Board is not vested with concurrent jurisdiction with Commission to hear and decide the same matters). No further hearing is necessary, as positive findings and conclusions have been made on all applicable criteria.

V. ORDER

1. Official notice is taken of Land Use Permit #2W1154 and accompanying Findings of Fact, Conclusions of Law and Order issued by the District 2 Environmental Commission on November 8, 2002, and the Windham Regional Plan.
2. The Project complies with 10 V.S.A. § 6086(a)(6), (7), (9)(A), (9)(H) and (10)(Criteria 6, 7, 9(A), 9(H), and 10), and all merits issues are answered in the affirmative.
3. This matter is REMANDED to the District 2 Environmental Commission for issuance of Land Use Permit Amendment #2W1154-1-EB, consistent with this decision.

DATED at Montpelier, Vermont this 2nd day of September, 2003.

ENVIRONMENTAL BOARD

/s/Patricia Moulton Powden
Patricia Moulton Powden, Chair
George Holland*
Samuel Lloyd
Donald Marsh†
Patricia Nowak*†
Alice Olenick
Richard C. Pembroke, Sr.**
Jean Richardson

† Board Members Donald Marsh and Patricia Nowak did not participate in the Board's August 27, 2003 deliberations, but have reviewed and join in this decision as noted herein.

*** 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 the granting of Land Use Permit Amendment Application #2W1154-1-EB. However, I dissent those provisions of the decision that address inclusion of the residential development and any subsequent secondary residential development into the Act 250 permitting process for this utility line extension.

I agree with the arguments of CVPS that the utility line extension should stand alone in the permitting review and not include residences served by the utility unless that residential development by itself triggers Act 250 jurisdiction. CVPS has no control over the type, size, location, appearance or value of residences that request

electrical service. Further it has no control over the number of school-age children that may or may not live in a home, nor the tax revenue the property will generate. CVPS is simply required to provide electric service on demand. All design and construction costs are borne by the requester. Further line extensions and service drops are subject to any new requesting customer sharing in the initial construction cost for a period of up to fifteen years, a requirement that acts to dampen added development along the utility line, should any development ever in fact occur.

Attempting to include a new home or two into the Act 250 permitting process for the utility line's Act 250 permit is nothing more than a backdoor attempt to try and regulate residential development of a type specifically excluded from Act 250 review. It is a misguided use of the law and injects uncalled-for state authority in a matter that inarguably rests with the community to resolve through better written town plans and/or enactment of local zoning. Additionally, attempting to include analysis of secondary growth as well in the review can be likened to a will-o'-the-wisp attempt to predict development that is entirely unpredictable.

I further take issue with the Environmental Board comparing electrical distribution lines to sewer or water lines as a precursor to development. The latter two utilities are specifically planned, sized and constructed to accommodate and encourage new development. They require large amounts of capital up front to install, a feat normally only accomplished by a municipality or large developer. The development and any secondary growth are highly predictable. Electrical service, on the other hand, is planned, sized and constructed in *response* to a request for service to a proposed development. In the case of a new home this is oftentimes after the home's construction.

The *Washington Electric Coop* decision should be revisited by the Environmental Board in light of this case as well as the closely related Jamaica CVPS case. CVPS's ten-year study of utility line extensions and follow-on growth clearly demonstrates that a *Washington Electric Coop* approach to Act 250 electric distribution line permitting is unnecessary.

I would hope that changes could be made to clarify electric line extensions for new home construction and remove CVPS and other electrical communication providers from the burdensome permitting process as it was applied in this instance. Further, the changes should include provisions that exempt the utility from filing for an amendment to a permitted project for future extensions or service drops *unless* on their own they trigger Act 250 jurisdiction. It is apparent from testimony at the hearings in this case that this is exactly how it is now being done state-wide in the Act 250 process.

The Environmental Board should come to realize, as have the Department of Public Service and the Agency of Commerce and Community Development, that utility companies must be relieved of the responsibility of providing unnecessary, and

oftentimes inventive, evidence and analysis on Act 250 criteria. The majority's decision does not do this.

Board Member Patricia Nowak joins in this partial concurrence and partial dissent.

**** Board Member Richard C. Pembroke, Sr. CONCURS in part and DISSENTS in part, as follows:**

I concur in the granting of this permit application, but dissent from portions of the majority's decision. The Project in this case is the utility line extension, not the homes that are or may be served by it. It is fundamentally unfair that CVPS should have to address environmental impacts of the single-family homes it serves, when it only proposes to install poles and wires. Utilities like CVPS and Verizon cannot control the environmental impacts of single-family homes. Such homes, are, for the most part, unregulated by Act 250. Neither the Windham Regional Plan nor the Guilford Town Plan specifically prohibits such residential development, and Guilford has not adopted zoning. Simply put, there is no comprehensive regulation of residential development in Guilford. CVPS should not be made to bridge this gap.

I agree with CVPS and Board Member George Holland that utility line extensions are different from other infrastructure projects such as roads and sewer lines. It is much more difficult to predict any secondary growth in the case of a utility line, particularly given the facts in this case.

In addition, I agree with Mr. Holland that utility line extensions should be exempted from the permit amendment requirements of Rule 34. If an extension is long enough to warrant initial Act 250 jurisdiction, as was the case here, a permit should be required. But future extensions and service drops should not require further review, regardless of the potential for environmental impact. A permit should only be required for any utility line, extension, or service drop that constitutes a separate development under Act 250, and each should be reviewed as a standalone project.