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

RE: Maple Tree Place Associates by
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Memorandum of
Decision,
Land Use Permit
#4C0775-EB

This decision pertains to various motions and requests regarding interlocutory appeal filed in this matter by the State Agency of Natural Resources (the Agency), the City of Burlington (Burlington), the City of South Burlington (South Burlington), the City of Winooski (Winooski), the Williston Citizens for Responsible Growth (CRG), the Vermont Natural Resources Council (VNRC) (collectively, the Appellants) and the Conservation Law Foundation of New England (CLF). The motions and requests pertain to orders of the District #4 Environmental Commission relating to the application of Maple Tree Place Associates (the Applicant) for a land use permit under 10 V.S.A. Chapter 151.

ISSUES

The issues before the Environmental Board are:

a. Whether the motions regarding interlocutory appeal were timely filed.

b. Whether the various "cross-appeals" filed in this matter are properly before the Board.

c. Whether the Board should grant permission to hear the interlocutory appeals concerning:

1. the District Commission's denials of various Appellants' requests for party status;

2. the District Commission's denial of the Agency's motion to delay the District Commission's proceedings until action is taken by the Public Service Board (PSB) regarding the relocation of a transmission line crossing the property for which the Applicant seeks a permit;

3. the District Commission's denial of Burlington's motion that Vermont Electric Power Company (VELCO), **owner of the transmission line, be** determined a necessary co-applicant under Board Rule 10(A).

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For the reasons stated below, the Board has determined to accept the various motions regarding interlocutory appeal as timely in this case. The Board has also concluded that the cross-appeals are admissible in this case. Further, the Board has determined to deny the motions for permission to take interlocutory appeal because the standards of Board Rule 43(A) have not been met.

BACKGROUND

The Applicant has applied to the District Commission for a permit to construct a retail shopping facility in Williston, Vermont.

On October 7, 1988, the District Commission issued a preliminary hearing report and party status order (the October 7 order) with regard to this application. In pertinent part, the October 7 order ruled that:

a. The Agency was admitted as a statutory party.

b. Ms. Jean G. Pecor, a putative member of CRG, was granted party status as an adjoining property owner under Criteria 1 (air pollution) and 5 (traffic), but was denied participation with respect to Criteria 7, 9(A), 9(K) and 10.

c. CRG was granted party status under Board Rule 14(B) (2) with regard to Criteria 1 (air pollution), 5 (traffic), 9(A) (impact of growth), and 9(K) (public investments): but was denied participation under Criteria 7 and 10.

d. VNRC was granted party status under Board Rule 14(B) (2) with regard to Criteria 1 (air pollution) and 9(A) (impact of growth).

e. Burlington was granted party status under Board Rule 14(B)(1) with respect to Criteria l(B) (waste disposal, sewage), 6 (educational services), 7 (municipal services), 9(A) (impact of growth) and 9(H) (costs of scattered development); but was denied participation under Criteria 1 (air pollution), l(B) (solid waste disposal), 5, 8, 9(F), 9(J), 9(K), and 10.

f. South Burlington was granted party status under Board Rule 14(B) (1) with regard to Criteria 1 (air pollution), 5 (traffic safety and congestion), 6 (educational services), 7 (municipal services) and 9(A) (impact of growth); but was denied participation under Criterion 10.

g. Winooski was granted party status under Board Rule 14(B) (1) with respect to Criteria 5 (traffic), 7 (municipal services), 9(A) (impact of growth) and 9(H)

(costs of scattered development); but was denied participation under Criteria 1 (air pollution) and 9(K).

The October 7 order also denied a motion for continuance by the Agency based on a relocation of a VELCO transmission line which crosses the proposed site of the retail shopping facility. The motion requested that the District Commission delay its proceedings until the issuance by the PSB of (1) a determination as to the scope of its review of the transmission line relocation, and (2) a Certificate of Public Good for the relocation pursuant to 30 V.S.A. § 248. In addition, the October 7 order ruled that VELCO was not required to be a co-applicant, although the order does not make clear who moved the District Commission in this regard.

On October 17, 1988 the Appellants (except Winooski) filed motions with the District Commission requesting permission to file interlocutory appeals. The Agency's motion sought to appeal the District Commission's ruling not to delay the proceedings until action is taken by the PSB. The motions of Burlington and South Burlington sought to appeal the above denials of party status. The motion of CRG, filed jointly with VNRC, sought reconsideration of the "order denying them party status on criterion ten," and failing that, leave to file an interlocutory appeal concerning this denial.

Apparently due to confusion concerning Board Rule 43 regarding interlocutory appeals, the Agency filed an "Interlocutory Appeal" with the Board on October 19, 1988, alleging the same grounds as in its October 17 motion to the District Commission. On October 20, 1988, both Burlington and the City of Burlington refiled with the Board the same motions they had filed with the District Commission on October 17. VNRC and CRG did not refile their motions with the Board at this time.

In response to these motions, the Board issued a Notice of Prehearing Conference on October 24, 1988. Among other items, this notice specified that a prehearing conference would be held on November 2, 1988, and that parties wishing to file "cross-appeals" should do so within fourteen days of the date of the notice.

On October 26, 1988, the District Commission issued a revised preliminary hearing report and party status order

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[1]The **October 7 order does not grant or deny** VNRC party status with regard to Criterion 10. VNRC maintains that it requested party status on this criterion. The Applicant disputes this contention.

(the October 26 order). In relevant part, the October 26 order changed its denial of party status to Burlington under Criteria 1 (air pollution) and 5 (traffic safety and congestion) to allow participation under these criteria if an ongoing study by the Chittenden County Regional Planning Commission (CCRPC) indicates traffic impacts in Burlington. The October 26 order also amended the party status determination concerning Winooski to deny participation under Criterion 10 but allow participation on Criterion 1 (air pollution). In all other respects the various grants and denials of party status to the Appellants remained the same. However, the District Commission added in the October 26 order the following justification of its party status decision: "[T]he District Commission may exercise its discretion to deny a 14(B) party status request despite an adequate showing when it feels that a statutory party such as a regional planning commission is in a position to address regional concerns shared by a 14(B) party."

Winooski, explicitly in response to the Board's October 24 prehearing conference notice, filed a "notice of cross-appeal" with the Board on October 27, 1988. This notice sought to appeal the District Commission's denial of party status to Winooski under Criteria 1 (air pollution) and 9(K). The notice also stated that the District Commission's order (presumably the October 7 order) had not ruled on Winooski's request for party status under Criterion 10, that Winooski was seeking clarification of this matter from the District Commission, and that if denied party status under Criterion 10, Winooski was cross-appealing such denial.

Chairman Wilson held a prehearing conference in this matter in Essex Junction on November 2, 1988. As indicated in the prehearing conference report and order of November 16, 1988, at this conference the parties agreed to file briefs concerning various issues relating to the interlocutory appeals. A briefing schedule was set, and oral argument was scheduled for November 29, 1988.

Also on November 2, Burlington, Winooski and CRG/VNRC filed motions for interlocutory appeal with the Board regarding the October 26 order. Winooski's motion sought to appeal the party status denials under Criteria 1 (air pollution) and 9(K). Burlington's motion sought to appeal (a) the District Commission's denials of party status to Burlington as stated in the October 26 order, (b) its decision not to require VELCO to be a co-applicant, and (c) its conditioning the grants of party status to Burlington under Criteria 1 (air pollution) and 5 (traffic safety and congestion) on the identification of impacts by the ongoing CCRPC study. Burlington also attached a lengthy written legal argument to its motion. The CRG/VNRC motion sought to appeal the denial of party status to "them" under Criterion 10, and to cross-appeal the October 7 order in connection

with the District Commission's denial of party status on Criteria 7 and 10. The CRG/VNRC motion also attached their October 17 motion to the District Commission for reconsideration and alternatively leave to file interlocutory appeal.[2]

Extensive briefing activity followed. Memoranda in support of interlocutory appeal were submitted to the Board by the Agency on November 14 and by South Burlington on November 15. On that last date, the Applicant filed with the Board a memorandum of law in opposition to the motions to permit interlocutory appeals.

CLF joined the fray on November 22, 1988 by filing a request with the Board to be made a party for the sole purpose of addressing the issues raised by the motions to permit interlocutory appeal. CLF attached to its request a comprehensive brief on the underlying issues of party status and intervention in proceedings before the district commissions and the Board.

On November 23, 1988, the Applicant filed with the Board a supplemental opposition memorandum. On that date, Burlington, Winooski, and CRG/VNRC filed memoranda with the Board in reply to the Applicant's initial memorandum.

The Board heard oral argument regarding the various motions and requests relating to interlocutory appeal in the St. Albans Bay Town Office on November 29, 1988. At the hearing, the Applicant submitted a memorandum in opposition to CLF's request to be a party before the Board with regard to the interlocutory appeals in this matter, and requested further time in which to submit a memorandum in opposition to CLF's memorandum regarding party status and intervention. Chairman Wilson granted the Applicant's request, allowing the Applicant one week to file such a memorandum, and ruled that CLF was admitted as a party under Board Rule 14(B) (2) for the purpose only of addressing the issues raised by the interlocutory appeals.

The Applicant submitted a supplemental memorandum in opposition to CLF's memorandum on December 6, 1988. As briefing is now complete and oral argument has been heard, this matter is now ready for decision.

DISCUSSION

Three issues are raised by the motions for permission to take interlocutory appeal: (a) the timeliness of the motions, (b) the admissibility of the "cross-appeals" filed

[2] South Burlington and the Agency did not file and have not filed motions for interlocutory appeal regarding the October 26 order.

in this matter, and (c) the adequacy of the motions with regard to the criteria delineated in Board Rule 43(A). These issues will be addressed in turn.

I. Timeliness

Board Rule 43, entitled "Appeals to the Board Before Final Decision of District Commissions," states:

> (A) Motion for Interlocutory Appeal. Upon motion of any party, the board may permit an appeal to be taken from any interlocutory (preliminary) order or ruling of a district commission. .. . The motion shall be made within 10 days after entry of the order or ruling appealed from.

Board Rule 43(A) (emphasis supplied). This rule must be applied to two sets of appeals: those from the October 7 order and those from the October 26 order.

A. The October 7 Order

The Applicant has objected to the motions seeking interlocutory appeal of the October 7 order on the basis that they were not timely filed. Specifically, the Applicant objects that the motions were not filed with the Board but with the District Commission within the ten-day period, and that the motions were not refiled with the Board until after that period expired. The Applicant argues that Board Rule 43(A) requires filing with the Board, and that filing with a district commission is not adequate under the rule.

The Appellants maintain that their motions were timely and adduce several arguments in support. The Agency argues that it was advised by the District #4 Coordinator to file its motion appealing the October 7 order with the District Commission, which it did on October 17. Several Appellants also argue that no prejudice accrues to the Applicant because motions to appeal the October 7 order were filed with the Board after October 17. Further, South Burlington argues that Board Rule 43(A) simply states that a motion must be "made," without specifying whether it must be made to the Board or the District Commission, and that therefore the filings with the District Commission on October 17 must be considered as meeting the terms of the rule.

The Board has determined that the Applicant's interpretation of Rule 43(A) is the better interpretation. Rule 43 is entitled "Appeals to the Board. ..." (emphasis supplied). The Board therefore today clarifies and states that Rule 43 requires an interlocutory appeal to be filed

with the Board no later than ten days following the entry of the order or ruling of the district commission that is the subject of the appeal.

Nevertheless, the Board has also determined that it will consider the motions filed on October 17 with the District Commission to have been timely filed. The Board makes this determination because of ambiguity in its rule stemming from the words "[u]pon motion of any party. ..." This phrase does not specify with whom an interlocutory appeal should be filed, and the Board concedes that the language may have misled the Appellants. Accordingly, in the interest of fairness, the Board will consider the interlocutory appeals from the October 7 order timely in this case, but also indicates that future interlocutory appeals must be filed with the Board.

B. The October 26 Order

The Applicant further objects that the motions appealing the October 26 order are not timely. The Applicant argues that the period during which interlocutory appeal motions should have been filed began to run on October 7 with the initial order. In the Applicant's view, the issuance of a revised order on October 26 did not cause a new ten-day period to commence because the two District Commission orders were substantially the same, and because parties should not receive a second chance to file interlocutory appeals merely because a District Commission restates an initial order. The Applicant also appears to argue that the October 26 order was invalid because the District Commission did not have the authority to reconsider its order.

Those Appellants who filed motions to take interlocutory appeals from the October 26 order maintain that their motions were timely. Burlington argues essentially that the October 26 order was not the same because in that order the District Commission reconsidered its rulings with regard to Burlington's party status requests, and considered for the first time Burlington's request that VELCO be determined a co-applicant. Burlington also argues that the October 26 order is valid because the District Commission has the power to reconsider its actions under Board Rule 31(A). Finally, both Winooski and CRG/VNRC argue that the District Commission's October 26 order is valid because administrative bodies have the inherent power to reconsider their actions.

The Board has determined that the October 26 order was within the District Commission's authority. Board Rule 31(A), entitled "Motions to alter decisions," states that "[a] party may file within 15 days from the date of the decision such motions as are appropriate with respect to the decision. The board or district commission shall act upon

such motions promptly." Based on Burlington's representation that it filed a motion to alter under Board Rule 31(A) on October 17, 1988, the Board has determined that it was proper for the District Commission to act on this motion in issuing its October 26 order.[3]

The Board has also determined that the motions for permission to take interlocutory appeal from the October 26 order were timely filed. Board Rule 31(A) provides concerning motions to alter decisions that:

> [t]he running of the time in which to appeal to the board or the supreme court shall be terminated by a timely motion filed under this rule. The full time for appeal shall commence to run and is to be computed from issuance of a decision on said motion.

In view of this provision, Burlington's motion tolled the period for appeal of the October 7 order because the motion was filed within ten days of this order. The issuance of the October 26 order started a new period for appeal under Board Rule 43, allowing the parties ten further days to move for permission to take interlocutory appeal of the District Commission's decision.

Having determined the October 26 order valid and appeals from the order allowable within ten days after October 26, the Board rules that the motions for permission to take interlocutory appeal from the October 26 order were timely filed. All of them were filed no later than November 2, 1988, less than ten days following the order.

II. The Cross-Appeals

Winooski and CRG/VNRC have each filed "cross-appeals" in this matter. Procedurally the filing of "cross-appeals" was inappropriate, because the Board had not yet determined whether to allow any appeals in this case. However, the Board's own October 24 prehearing notice stated that cross-appeals could and had to be filed within 15 days of the date of the notice. For this reason, and because Winooski and CRG/VNRC filed their cross-appeals within 15 days, the Board will admit their cross-appeals in this case. But because cross-appeals are not yet appropriate, the Board will treat these cross-appeals as motions for leave to take interlocutory appeal.

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[3]The Applicant argues that Rule 31(A) applies only to alteration of permit decisions. The Board does not interpret Rule 31(A) in such a limited manner.

III. The Motions to Take Interlocutory Appeal

Board Rule 43(A) allows the Board discretion to accept interlocutory appeals. The rule provides that the Board "may permit" such an appeal if the order or ruling appealed from (a) involves a controlling question of law (b) as to which there is substantial ground for difference of opinion and (c) an immediate appeal may materially advance the application process. Each of these three criteria must be met for the Board to accept an interlocutory appeal. In addition, the Board has stated that interlocutory appeals "are an exception to the customary appellate route and should be entertained only in unusual circumstances." Re: Howard and Louise Leach, Land Use Permit Application #6F0316-EB, Memorandum of Decision at 2 (June 3, 1985).

These principles must be applied in evaluating the motions for permission to take interlocutory appeal on three different matters: (a) the District Commission's denials of party status, (b) the District Commission's refusal to stay the proceedings until action is taken by the PSB, and (c) the District Commission's refusal to require VELCO to be a co-applicant.

A. The Party Status Denials

Those Appellants appealing party status denials argue that the denials in this case trigger a question suitable for interlocutory appeal, that is, whether the District Commission may deny party status under Board Rule 14(B) despite an adequate showing that the person requesting party status meets the requirements of having an affected interest under Rule 14(B) (1) or of materially assisting the District Commission under Rule 14(B)(2). The Board analyzes this question under the standards enumerated in Rule 43(A).

1. Controlling Question of Law

The Appellants argue that this question meets the standards enunciated in Re: Pyramid Co. of Burlington, 141 Vt. 294 (1982), concerning controlling questions of law under Vermont Rules of Appellate Procedure 5(b), and that therefore the question of party status must be considered a controlling question of law under Board Rule 43(A). In support of this contention, they assert that if the Board does not decide these issues now, the matter will be appealed to the Board following the District Commission's final decision on the application, and that the Board would then be required to decide the party status issues and remand the matter to the District Commission. The Appellants also argue that this question is controlling because it involves a fundamental right: the opportunity to be heard. In addition, the Appellants argue that the question of party status is a question of law and not fact

because in their view the District Commission is obliged by law to admit a person as a party if that person meets the factual prerequisites of Rule 14(B) (1) or 14(B) (2).

The Applicant argues that the question of party status is one of fact. Specifically, the Applicant asserts that party status determinations are committed to the District Commission's discretion, and that all discretionary decisions are factual in nature.

While the Board believes that the analysis in the Pyramid case of the "controlling question of law" standard is instructive, the Board does not completely accept it with regard to analyzing that standard under Rule 43(A). The Board will explain how its standard differs from the Pyramid case as it applies its standard in two steps, looking first to whether the issue addressed here is a "question of law," and second to whether it is "controlling."

"Question of Law." The Board has determined that the denial of party status in this case raises a question of law. The Board interprets the meaning of "question of law" as used in Rule 43(A) differently from the Supreme Court's interpretation in the Pyramid case of this phrase as used in V.R.A.P. 5(b).

In Pyramid, the Court stated that "[a] question of law is one capable of accurate resolution by an appellate court without the benefit of a factual record. If factual distinctions could control the legal result, the issue is not an appropriate subject for interlocutory appeal." 141 Vt. at 304. The Board finds this standard inadequate under Rule 43(A). Instead, the Board has determined that an issue is a "question of law" if no facts are required to resolve the issue or if a factual record has been previously developed by the district commission in a manner that allows the Board to assume the relevant facts without engaging in factual determinations.

In this case, the District Commission's factual record allows the Board to assume those facts relevant to whether the District Commission properly denied party status. Specifically, based on the District Commission's statement that it was denying party status despite adequate showings under Rule 14(B), the Board can assume that the parties met the factual prerequisites of either Rule 14(B) (1) or 14(B) (2). Thus, the only remaining inquiry for the Board is a question of law: whether, despite a showing that Rule 14(B)'s party status prerequisites were met, the District Commission still possessed the legal authority to deny party status.

In this regard, the Board has noted a Supreme Court decision concerning "question of law" under V.R.A.P. 5(b) which is not completely in accord with the analysis

enumerated in Pyramid. In State of Vermont, Agency of Transportation v. City of Winooski, 147 Vt. 649 (1986) (memorandum decision), the Court stated that:

> Before questions are certified to the Vermont Supreme Court before final judgment, they should be factually developed to a point susceptible of a determination which has actual application to the situation of the parties. Only those questions should be certified up before judgment which bring with them a framework sufficient to allow this Court to issue a decision which will be pertinent and inevitable in the disposition of the case below. Powers v. State Highway Board, 123 Vt. 1, 5, 178 A.2d 390, 393 (1962).

147 Vt. at 650. In requiring that questions certified for interlocutory appeal be "factually developed" so that an adequate determination can be made, the Court implied that a factual record can and must be used sometimes in determining questions of law. If this is true, then a question of law is not necessarily one which must be resolved without resort to a factual record. Instead, a question of law need only be one which can be answered without fact-finding.

In addition, the Board believes that today's decision does not conflict with Re: Richard Roberts Group, Inc. and Salmon Hole Associates, Land Use Permit Application #2W0771-EB, Memorandum of Decision (July 22, 1988). The Board determined there that, to decide whether a district commission abused its discretion in granting party status, the Board would need to hold a hearing and take testimony. In effect, the Board concluded that it could not assume the facts at issue. In Salmon Hole, the Board was persuaded in part by the arguments of VNRC, which stated that the grant of party status in that case did not present a question of law, and that "[i]f the Environmental Board were to grant this motion [to take interlocutory appeal on party status], it would then be required to schedule a de novo hearing on the issue of whether VNRC and SACC can materially assist District Commission #2." Such fact-finding is not necessary in the present case.

'Controlling.' Although the Board has ruled that the question of party status denial presented here is one of law, the Board has also determined that this question is not controlling. In Pyramid, the Court stated concerning the term "controlling" that "[t]his factor requires a practical application that focuses on the potential consequences of the order at issue." 141 Vt. at 303 (emphasis supplied). The Court added that to be "controlling" means that reversal of the decision being appealed should result in an immediate effect on the course of litigation and in some savings of resources either to the court system or the litigants. Id.

The Board accepts this reasoning with regard to Rule 43(A) and looks therefore to the consequences of the District Commission's decision. If interlocutory appeal were the sole avenue of appeal concerning party status, then the consequences of denying the Appellants' motions could be extremely serious: the Appellants could lose the opportunity to be heard concerning a denial of party status. In such a case, the Board would believe a controlling question of law was raised.

However, interlocutory appeal is not the only means of appeal regarding party status denials. Any person denied party status may appeal that denial to the Board following a district commission's decision to approve or deny a permit application. Board Rule 40(A) states:

> Any party aggrieved by an adverse determination by a district commission may appeal to the board and will be given a de novo hearing on findings, conclusions and permit conditions issued by the district commission.

In addition, in Re: Sherman Hollow, Land Use Permit Application #4C0422-5-EB, Memorandum of Decision (February 4, 1988), the Board stated that:

> a party's right to request a de novo appeal by the Board is limited to those criteria upon which the person was granted party status in the District Commission proceedings.
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> The right to appeal other criteria can be granted only if a successful argument is made that either a person requested party status on a criterion and was wrongly denied such status or, as provided by Rule 40(C), "substantial inequity or injustice would result. ..."

Id. at 4 (emphasis supplied). Further, in Re: Burlington Street Department, Land Use Permit Amendment Application #4C0516-1-EB, Findings of Fact, Conclusions of Law and Order (April 13, 1983), Burlington challenged Winooski's right to appeal, under Rule 40 following a district commission's final decision on a permit application, a denial of party status to Winooski on Subcriteria 9(A), 9(B) and 9(C). The Board upheld Winooski's right to make this appeal after the district commission's final decision, ruling also that interlocutory appeal would not have been appropriate for appealing the denial of party status. The Board stated that Winooski's appeal should have been framed as a 'renewed request for party status on Subcriteria 9(A), 9(B), and 9(C) for the Board's direct consideration." Id. at 4, 6 (emphasis supplied).

The Board interprets Rule 40 in conjunction with these prior decisions as allowing persons denied party status by a district commission the right to appeal that denial to the Board following the district commission's final decision

approving or denying the application in question. This right applies whether the person was denied on all criteria for which the person requested party status or was granted status on some criteria but denied status on others. The Board further interprets Rule 40 to allow the Board, if it finds that a person denied party status by a district commission on a particular criterion should in fact be granted such status, to consider directly the person's testimony and evidence regarding the criterion at issue, without remanding the matter to the district commission.

In view of this interpretation, denial of the present motions regarding interlocutory appeal does not leave the Appellants without an opportunity to appeal the District Commission's denial of party status, and therefore the consequences of the District Commission's order are not so grave as to be "controlling."

Moreover, the Board does not believe that reversal of the District Commission's decision would necessarily result in savings of resources on the part of the District Commission, the Board or the parties. If the Board were to decide this issue now, the District Commission might then be required to take more evidence than it otherwise would concerning the criteria on which parties have been newly admitted. This could result in lengthier hearings and deliberation. Further, the Board believes that in this case an appeal will result to the Board concerning the District Commission's final decision regardless of the resolution of the interlocutory matters before the Board. Accordingly, the Board rules that the question of party status is not "controlling."

2. Materially Advancing the Application Process

The Appellants argue that granting interlocutory appeals on the issue of party status would "materially advance the application process" for a variety of reasons that are somewhat hypothetical. Most concretely, they argue that if the Board decided these issues now, it would not be required to decide them when the final decision of the District Commission is appealed to the Board. They also argue that were the Board to consider these issues at a later appeal, delay would be caused because the Board would then be required to remand the issues to the District Commission (a position which the Board has stated it does not accept). In opposition, the Applicant argues that the District Commission's final decision will be appealed to the Board in any event.

The Board has determined that interlocutory appeal on the question of party status would not "materially advance the application process" for two reasons, each of which is sufficient ground to separately support its decision. First, the Board believes that an appeal of some aspects of

the District Commission's final decision is likely. Second, if the Board reversed the District Commission's decision, the District Commission might be required to hear more evidence than it otherwise would from parties newly admitted on certain criteria. This could lengthen the process of hearing and deliberation.

Accordingly, the Board declines to take interlocutory appeal concerning the party status issues because the Board has determined that the questions presented are not "controlling' questions of law the decision of which would "materially advance the application process." Because of the grounds on which the Board is denying the motions concerning interlocutory appeal with regard to party status, it does not address here the issues raised by CLF's memorandum concerning the questions underlying these motions.

B. The Motion to Delay Pending Action by the PSB

The Agency argues that the following issue is suitable for interlocutory appeal: whether the District Commission erred in refusing to delay its proceedings concerning the application in question until the PSB determines the extent of its jurisdiction in this matter and issues a Certificate of Public Good pursuant to 30 V.S.A. § 248 for the proposed relocation of a VELCO transmission line. The Agency distinguishes this case from Pyramid on the basis that Pyramid construed V.R.A.P. 5(b), which requires as a criterion for interlocutory appeal that the appeal must have at least the potential to materially advance the termination of the litigation. In contrast, this case involves Board Rule 43(A), which requires that interlocutory appeals materially advance the application process. The Agency contends that the Board should interpret its language more liberally than did the Court in Pyramid, and in so doing, should find that the application would be advanced by delay pending action by the PSB. The Agency appears to be arguing that the application process would be advanced by resolution of whether the PSB will allow the line to be moved.

The Board has determined that the language of Board Rule 43(A) concerning "advancement of the application process" provides somewhat more flexibility than does V.R.A.P. 5(b), which addresses "termination" of litigation. However, the Board has concluded (as the Applicant argues) that this criterion mandates that an interlocutory appeal must somehow "advance" the application process by moving it forward. The Board has determined that, if it were to require the District Commission to delay until the PSB takes action, the Board would not cause forward movement of the application process. As the Agency stated at oral argument, there is no certainty that the PSB will take action at any particular time concerning the VELCO transmission line relocation. Thus, the result of reversing the District

Commission's decision could be to consign this application to lengthy delay. Accordingly, the Board declines to hear interlocutory appeal concerning the PSB issue because such appeal would not materially advance the application process.

C. VELCO's Co-applicancy

Both Burlington and the Agency assert that the following issue is suitable for interlocutory appeal: whether VELCO, as owner of a transmission line crossing the property for which the Applicant seeks a permit, must be a co-applicant pursuant to Board Rule 10. In particular, Burlington argues that the District Commission's hearings would be wasted without VELCO's participation as a co-applicant because at the end of the hearings the parties might find that the PSB will not permit the relocation of the transmission lines. The Agency argues that the necessity of co-applicancy is "a question of law." In opposition, the Applicant essentially argues that VELCO has already approved the movement of the line.

The Board has concluded that in this case the question of VELCO's co-applicancy does not meet the second criterion of Board Rule 43(A), that the question be one on which there is "substantial ground for difference of opinion." As elucidated in Pyramid regarding V.R.A.P. 5(b), the Board believes that this standard requires the belief that "a reasonable appellate judge could vote for reversal of the challenged order." 141 Vt. at 307. In this instance, the relocation of VELCO's transmission line is wholly outside the jurisdiction of the Board and the District Commission. 10 V.S.A. § 6001(3). This lack of jurisdiction was the basis of the District Commission's finding that VELCO was not a necessary co-applicant. Accordingly, no reasonable appellate judge could reverse the District Commission's decision, and the standard for interlocutory appeal under Board Rule 43(A) is not met. The Board therefore declines to accept the interlocutory appeal concerning the co-applicancy issue.

ORDER

1. The motions for permission to take interlocutory appeal are timely.

2. The cross-appeals filed in this matter are admissible before the Board.

3. The motions to take interlocutory appeal and cross-appeals are hereby denied.

Dated at Montpelier, Vermont, this 22nd day of December, 1988.

ENVIRONMENTAL BOARD

BY: Leonard U. Wilson, Chairman
Ferdinand Bongartz
Lawrence H. Bruce, Jr.
Elizabeth Courtney
Jan S. Eastman
Arthur Gibb
Samuel Lloyd
Roger N. Miller
W. Philip Wagner