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STATE OF VERMONT
ENVIRONMENTAL BOARD
MONTPELIER, VERMONT 05602
802-828-3309

DATE: December 28, 1990
TO: Parties
FROM: Stephen Reynes, Chairman *Stephen Reynes*
RE: Washington Electric Cooperative
Land Use Permit #5W1036-EB
Dissenting Opinion

The Board's decision in the above matter, dated December 19, 1990, indicated that four members dissented and that a dissenting opinion would be issued separately in the near future. Enclosed is a copy of that dissenting opinion,

SR/h

Enclosure

A:mem.we (P2)

455.

Dissenting Opinion of Chairman Stephen Reynes, joined by Board Members Arthur Gibb, Samuel Lloyd, and Philip Wagner

The majority concludes **"that** the Applicant has not met its burden of production on Criteria 7, 8 and 9(A), and its burdens of production and persuasion on Criteria 9(B) through (L) and **10."** We respectfully submit that the Applicant has met its burdens and agree with the District Commission that a permit should be issued.

The burden of proof for Criterion 7, 8, 8(A) and 9(A) is on those parties opposing the application. 10 V.S.A. §§ 6088 and 6086(a)(9)(A). Here there are no findings or conclusions demonstrating the undue or unreasonable adverse impacts under those **criteria.**^{1/} Nor is there a conclusion that the project lacks conformance with the local or regional plans under Criterion 10.

The majority opinion is instead premised on a failure of production of sufficient evidence for affirmative findings and conclusions. It is evident, however, that there are findings to demonstrate that the impact of the line itself is minimal. For example, the line will be constructed within the right of way of an existing town road; the installation of the poles and wire will be entirely performed from the existing road; the line will be paid for by the resident; the line will not require any services from the town; the single wooden poles will typically be shorter in height than the existing forest; **"tree wire"** will be utilized to minimize the area needed for the line; the poles are located so as to avoid wetlands or streams; and no topsoil will be removed. See **Findings 4-10** and 15.

The asserted failure of evidence rather is directed toward factors related to the potential for growth that might be caused by the line. A reading of the conclusions of law section of the majority opinion leaves the impression that there is little or no information in the record which goes to those issues. For example, the majority opinion states:

¹**Indeed**, the closest thing to a negative finding under Criteria 7, 8, 8(A), or 9 is that bears will be discouraged from crossing the town highway during construction of the line. See also Exhibit #40, a letter from the District Wildlife Manager and certified Biologist of the Department of Fish and Wildlife, Agency of Environmental Conservation, dated February 7, 1990, which states that "this project will not 'destroy or significantly imperil necessary wildlife habitat or any endangered species' as defined by Criterion 8(A) of Act 250." The majority does conclude positively for the Applicant under Criterion 8(A) at page 10; we concur with the majority **on** that point.

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: resources in the area, soil characteristics, topographic limitations, access to employment, etc. Such information has not been offered by any party.

Id. at 9. With regard to the statement that the Board "**needs**" an analysis of power lines built in similar locations, it is at least unusual to require information on the impact of similar development elsewhere, especially at the risk of denial for failure of information. Indeed, the most relevant case cited in the majority opinion, Re: Department of State Buildings, #2S0609-EB (June 3, 1985) (granting a permit for a sewer line extension of more than two miles), has no findings as to similar development elsewhere. Providing information and analysis on similar development elsewhere may be a way for an applicant to help prove its case, but the Act does not require an applicant to offer such evidence. Nor does the Act authorize denial on the basis of absence of information on similar development elsewhere. 10 V.S.A. § 6087(a).

With regard to factors which may promote or discourage growth, such as "resources in the area, soil characteristics, topographic limitations, access to employment, etc.," the opinion states that "[s]uch information has not been offered by any party." Id. The majority opinion also states that "[g]eneral information about the suitability for development of the land along the route of the power line would not be difficult to ascertain." Those statements ignore findings which describe the topography, area land use, and that the line would run along the town road "through the middle of a large tract of land which includes the Washington State Forest, the Washington Wildlife Management Area, [and] Duplissey Swamp," and that "[w]etlands exist on either side of Town Highway #1 in this area." See Findings 4 and 5. The Board may infer from those facts that there are significant limitations and barriers to development. Such statements also ignore other evidence in the record, such as Exhibit #26 (photographs) and maps and drawings within the application, showing the Washington State Forest and other areas, such as Exhibit #19. There is also evidence in the record as to the zoning along the proposed route, which at least the Chairman of the Board of Selectmen believes is adequate to address growth. See Exhibit #6 at p.3, and Exhibit 20. The majority may disagree with such evidence,

but, in our view, it is not correct to say that there is no such information and then deny for failure of production of evidence.

The majority cites Department of State Buildings, #2S0609-EB (June 3, 1985) as an example of a case where there was evidence relating to potential growth impacts from a proposed sewer line extension. We believe that the foregoing demonstrates that there is evidence in this case which is relevant to potential growth, as above, and that the Applicant has met its burdens.

It should be noted that the only finding which arguably demonstrates a plan compliance issue is Finding 25, but there is no conclusion of law as to lack of compliance with either the local or regional plan. Moreover, it cannot be said that the Applicant has failed to meet its burden of production on that issue when the plans in their entirety are part of the record (Exhibits #3, 21, and 39), together with testimony relating to compliance. See, e.g., Exhibit #6 at p.3 as to the Town Plan and Exhibit #8 as to the Regional Plan.

The quoted language in Finding 25, excerpted from the 1985 Regional Plan, states in part that "[n]ew, major development and growth outside of the existing settlements is to be discouraged until such time as the public facilities, services and structures in the existing settlements are used to their fullest capacity" Extending electric power along a maintained town road to two existing houses is not, in our view, "new, major development and growth." See Finding 18. The only indication here of additional usage is that of one other resident who would like to connect to the line. Id.

Further, we also note that 10 V.S.A. § 6042 of Act 250 states:

(17) Planning for Transportation and Utility Corridors

The development and expansion of governmental and public utility facilities and services should occur within highway or public utility rights-of-way corridors in order to reduce adverse physical and visual impact on the landscape and achieve greater efficiency in the expenditure of public funds.

It seems to us that this proposal is in accord with that principle.

Whatever may happen along Town Highway No. 1 in the future is not in the Applicant's control, noting its statutory duty to provide power to petitioners within its service area. 30 V.S.A. § 2801. If a development is proposed of such proportions as to come under the jurisdiction of Act 250, that will be reviewed on its own merits, but that is not proposed now. See, In re Vermont Gas Systems, 150 Vt. 34, 38-39 (1988); see also, In re Agency of Administration, 141 Vt. 68, 76 (1982). Development may also trigger review under local ordinances, but again, there are no plans in this record for development to be served by this line. See Exhibit #5 at p.2 (testimony of Mr. Galfetti, the person who, with his wife, applied for electric power at their property, as per Exhibit #15).

Further, some of the majority's findings and at least some of the additional studies which are sought journey into unduly speculative and remote evidence. Finding 13 is illustrative of the nature of such evidence:

The proposed project itself will not immediately increase the Town's population. If the proposed project were to encourage persons to move to the area of Town Highway #1, the project might result in such a population increase.

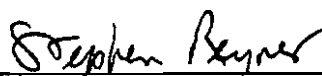
(Emphasis added.) See also Findings 7 and 19. If, for instance, a study were performed of the employment situation now and as projected in Barre, based upon certain assumptions, and then with some further assumptions sought to relate that situation to growth that may occur along this line extension, that study, with its challengeable assumptions, would be of either limited or no value, or simply irrelevant, for deciding this application. See V.R.E. 401 and its Reporter's Notes (evidence that is too remote may be irrelevant); V.R.E. 402; 3 V.S.A. § 810(1); DeKoeber v. DeKoeber, 146 Vt. 493, 495-96 (1986); see also, In re Vermont Gas Systems, 150 Vt. 34, 38-39 (1988).

A person attempting to get electric power at two existing houses along a maintained town highway should not find that objective denied or further delayed by such speculative and laborious studies.

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What the majority seeks, and in its absence why it denies, in our judgment goes beyond what is required and reasonable under the Act in these circumstances. We believe that the Applicant has met its burdens of production and proof, and that the opposition has not. This record does not support findings or conclusions that the proposed project is detrimental to the public health, safety or general welfare. See 10 V.S.A. § 6087(a). If the application were to serve a major development, that might be a different situation with greater likelihood of significant identified and identifiable impacts. As it is, we conclude that the law, on this record, calls for the issuance of a land use permit.

Dated at Montpelier, Vermont this 28th day of December, 1990.



Stephen Reynes, Chairman
Arthur Gibb
Samuel Lloyd
W. Philip Wagner

A:DISSENT.WE (P2)