Citizens' Guide to the Vermont Public Service Board's Section 248 Process

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Several people contributed time and effort reviewing drafts of this Guide. The Board extends its gratitude to these individuals. The Board especially appreciates the contribution of Carter Scott, a former legal intern with the Board, who was responsible for the early drafts of this Guide.

Any thoughts or questions regarding this Guide should be directed to the Clerk of the Board: 802-828-2358 or clerk@psb.state.vt.us.

Overview

The Vermont General Assembly, by enacting Section 248 of Title 30, required companies to obtain approval from the Public Service Board (Board) before beginning site preparation or construction of electric transmission facilities, electric generation facilities and certain gas pipelines within Vermont. Section 248 also requires Board approval for some long-term contracts for purchasing power from outside Vermont and for some investments in transmission and generation facilities outside Vermont.

This Guide provides a general introduction to the process used by the Board to consider requests for approval pursuant to Section 248. It is not intended to provide all information necessary to participate in a Section 248 proceeding. The Board is a quasi-judicial agency that is required to function in a manner similar to a court. Participation in a particular case would require a review of legal requirements as applied to the unique circumstances of that case. It is not possible to distill the numerous possible situations into an introductory guide. It would likely prove helpful for those interested in participating in a Section 248 proceeding to visit the Board's offices and review the file of a previous Section 248 case. This review would provide examples of the various documents and processes discussed in this Guide.

The Public Service Board

The Public Service Board (Board) is a quasi-judicial agency that regulates electric power companies, telephone service providers, cable television providers, pipeline gas companies and some private water companies. As a quasi-judicial body, the Board conducts evidentiary hearings and issues decisions (typically referred to as Orders) that can be appealed to the Vermont Supreme Court. The Board also has the authority to promulgate rules on utility matters. The Board's rules include procedural requirements applicable to anyone who participates in Board proceedings, and substantive requirements that Vermont utilities must comply with.

The Board itself consists of a full-time Chairman and two part-time Board Members, all of whom are appointed for staggered six-year terms by the Governor. The Board is staffed by attorneys and experts, including: financial analysts, environmental analysts, engineers, and policy analysts. For a majority of the cases, the Board assigns its staff to serve as Hearing

Officers. In such cases, the Hearing Officer presides over the case and prepares a Proposal for Decision (PFD) for the Board's consideration and ultimate determination.[1]

Due to the quasi-judicial nature of the Board, certain types of communication between Board members or staff and other persons, referred to as "ex parte" communications, are prohibited by the following Vermont state law:

> members or employees of any agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor; in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate.[2]

Section 248

Section 248 establishes requirements for the approval of in-state electric transmission and generation construction projects, as well as certain other types of projects. Prior to beginning site preparation or constructing a proposed project, the petitioner must receive a certificate of public good from the Board.[3] When determining whether to grant a certificate of public good for a proposed project, the Board considers whether the proposed project meets ten statutory criteria (see 30 V.S.A. § 248, Appendix A, attached). These criteria include site-specific environmental criteria incorporated from Act 250, in addition to general issues such as need, reliability, and economic benefit.

How to Participate in the Section 248 Process

There are two ways to participate in the 248 process: as a formal party to a case, and as a member of the public. Formal parties may provide testimony and participate in evidentiary hearings. All formal parties must follow the Board's procedural rules,[4] and are subject to the rules governing discovery and cross-examination. The Board's rules incorporate the Vermont

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[1]While this guide will refer mostly to the Board, the Hearing Officers perform many of the functions outlined in this guide.

[2]3 V.S.A. § 813.

[3]In addition to Section 248 approval, the petitioner must also obtain all other required state and federal environmental permits.

[4]The Board's rules can be found at the Board's website: http://www.state.vt.us/psb/rules.stm.

Rules of Civil Procedure[5] and the Vermont Rules of Evidence.[6] Members of the public may speak at public hearings and send the Board written comments, but may not participate in evidentiary hearings. More information about how members of the public may participate in the Section 248 Process is included in the section below titled "Public Hearing."

Some entities are automatically formal parties to the Section 248 cases. These include:

- the company that filed the request for Board approval (the "Petitioner");
- the Department of Public Service, which represents the public interest in cases before the Board and is responsible for long-range utility planning for the State: and
- the Agency of Natural Resources, which manages the State's natural resources and oversees Vermont's environmental regulations.

Members of the public and organizations may become formal parties to the case through the intervention process described below. People and organizations that meet these criteria may be granted party status by the Board, and are known as "intervenors." Examples of intervenors are landowners, environmental organizations, public interest groups and business organizations. The process for becoming an intervenor is described in the section below titled "Intervention - Becoming a Party to a Case."

Although not automatically parties to the case, certain state agencies and affected towns and local and regional planning commissions are required by statute to receive notice, pursuant to 30 V.S.A. § 248(A)(4)(C). In addition, plans for construction of facilities covered by Section 248 must be provided by the petitioner to the relevant municipal and regional planning commissions at least 45 days prior to the date that the petition is filed with the Board.[7] The Board has recently proposed a new Board Rule 5.400, which would provide for individual notice to adjoining landowners and increase to 60 days the time period for notice to municipal and regional planning commissions.

Individuals and organizations can also request that they be added to the Board's mailing

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[5]Vermont Rules of Civil Procedure can be found at: http://198.187.128.12/vermont/lpext.dll?f=templates&fn=fs-main.htm&2.0

[6]Vermont Rules of Evidence can be found at: http://198.187.128.12/vermont/lpext.dll?f=templates&fn=fs-main.htm&2.0

[7]See Section 248(f).

list as an "interested person," in which case they would receive notices and orders that the Board issues in the case. However, interested persons typically do not receive copies of other documents, such as filings made by parties to the proceeding. Notices and orders issued by the Board are posted on the Board's website, www.state.vt.us/psb.

There are several steps between the filing of a petition for a certificate of public good and the final order from the Board approving, denying or modifying the proposed project. These are described below.

Petition

The Board's Section 248 process begins when the utility or individual seeking to construct the proposed project files a petition for a certificate of public good with supporting prefiled testimony and exhibits. Once the Board has accepted a petition, it assigns a docket number to the case. This docket number should be referenced in all correspondence and inquiries regarding the case.

Prehearing Conference

The Board holds a prehearing conference to determine how the case will be managed. The Board will generally identify potential parties, identify the issues necessary to resolve the case, and establish a schedule for the case, which includes: the site visit, public hearing, deadlines for the filing of motions to intervene, discovery, the filing of prefiled testimony, the evidentiary hearings, and briefs.

Following the prehearing conference, the Board will issue a Prehearing Conference Memorandum that addresses the issues described above. The Prehearing Conference Memorandum will also include a "service list," which is a list of all parties and interested persons.

When filing letters, testimony, briefs, and all other materials provided to the Board as a part of the proceedings, all parties (but not interested persons) on the service list must be provided with copies. All correspondence and filings must be addressed to the Clerk, Public Service Board, and must refer to the Docket number.

Site Visit

The Board will generally conduct a site visit to the affected area in order to get a better sense of possible impacts from the proposed project. The site visit will typically include a discussion of the following matters: a description of the proposed project and its location(s); a viewing of the existing conditions at the location(s) of the proposed project; and an explanation of how the existing conditions would be altered by the proposed project. The site visit may also include identification of relevant landscape features, discussion of how such landscape features have affected or potentially should affect the project design and location, identification of and visits to potential alternative locations for the proposed project, and any other relevant matters for which a first-hand viewing of the site(s) may assist in understanding the issues before the Board. These site visits are not a part of the evidentiary record and are not relied upon in the final order, unless the Board, enters observations or facts from the site visit into the record at the evidentiary hearings on its own motion, or grants a party's request to do so.

Public Hearing

Section 248 requires the Board to hold a public hearing in at least one county in which the project is proposed. The purpose of the public hearing is to allow the Board to hear comments and concerns regarding the proposed project from the general public. The comments are transcribed by a court reporter for later reference and become part of the case's public file. While these comments do not become part of the evidentiary record (under Vermont law the Board's decision must be based upon the evidence presented by formal parties during the evidentiary hearing), public comments play an important role by raising new issues or offering perspectives that the Board should consider and ask parties to present evidence on.

In order for those attending to become more familiar with the proposed project, the Board usually asks the petitioner to provide a brief description of the proposed project at the beginning of the public hearing. In order to provide for an efficient and orderly comment period, there will generally be a sign up sheet for individuals who wish to speak. The time allotted for each individual to speak will depend on several factors, including the number in attendance and any scheduling limitations on the Board's ability to use the available location.

The public is also encouraged to submit written comments to the Board electronically or via regular mail. Such written comments are treated the same way as public comments made at the public hearing. Please reference the Docket number when submitting a written comment.

Email: clerk@psb.state.vt.us

Mail: Vermont Public Service Board
112 State Street, Drawer 20
Montpelier, VT 05620-2701

Intervention — Becoming a Party to a Case

Typically, the next step after the prehearing conference is to determine who the formal parties to the case are. As explained earlier, some entities are automatically formal parties to a case. Other individuals or organizations may become formal parties as intervenors, if they meet certain criteria. Intervenors have the same rights and obligations as the other formal parties, including the requirement that parties follow the Board's procedural rules.[8] An intervenor may provide testimony[9] and participate in the evidentiary hearings and will be subject to the rules governing discovery and cross-examination.

In order to intervene one must file a motion to intervene explaining the nature of the interest which may be affected by the outcome of the proceeding. Typically, motions to intervene must address the following standards, as described in Board Rule 2.209(A) and (B) (See Appendix C, attached):

(1) the person demonstrates substantial interest which may be adversely affected by the outcome of the case;

(2) whether the applicant's interest will be adequately protected by other parties;

(3) whether alternative means exist by which the applicant's interest can be protected; and

(4) whether intervention will unduly delay the proceeding or prejudice the interests of existing parties or the public.

Persons wishing to intervene in a Board case should read closely Board Rule 2.209

[8]The Board's procedural rules can be found at the Board's website: http://www.state.vt.us/psb/rules/rules.stm.

[9]See Board Rule 2.213(C) which describes the required format for written testimony.

(Appendix C of this Guide) and tailor any motion to intervene to their particular circumstances.

The motion to intervene, as well as any other filings in the case, must be filed with the Board and all parties.[10] Existing parties may comment on the intervention requests and the Board will issue an order granting or denying the motion to intervene.

In order to manage the case efficiently, the Board may restrict an intervenor's participation to the specific issues in which the intervenor may be affected, or may require that parties work cooperatively. See Board Rule 2.209(C) (Appendix C).

Often intervenors are represented by an attorney. Individuals may, however, represent themselves without the assistance of counsel (a "pro se" representation). Additionally, the Board may allow partnerships, corporations, and associations to be represented by an officer or an employee designated in writing by an officer of the corporation or association.[11] It is important to understand that when individuals appear pro se, they have most of the rights and responsibilities of an attorney.[12] If a pro se representative is unable to comply with its obligations under Board rules and Vermont law, the Board retains authority to require the party to retain counsel.

A motion to intervene must be accompanied by a Notice of Appearance, which lists the name and contact information for the individual or group.

Prefiled Testimony

The petitioner files written testimony and exhibits with the original request for a certificate of public good. Other parties are provided the opportunity to file written testimony and exhibits after an opportunity to ask the petitioner about its filing during a process called "discovery" (explained below), and before the evidentiary hearing. Parties' ability to present evidence is generally limited to their prefiled testimony and exhibits. Any factual matters that a party wishes to convey to the Board must be contained in its prefiled testimony and exhibits. Witnesses who provide testimony should also provide some basis for the opinions they express.

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[10] Potential intervenors should request a service list for the docket from the Clerk of the Board.

[11] See Board Rule 2.101(B).

[12] See Board Rule 2.201(B).

For complex cases there may be additional rounds of testimony to respond to what other parties have submitted, referred to as "rebuttal" and "surrebuttal" testimony. The scope of prefiled testimony is narrowed with each round of testimony such that it may address only the testimony filed in the previous round. While rebuttal and surrebuttal testimony is normally submitted in the same manner as prefiled direct testimony, there are occasions when such testimony is conducted live during the evidentiary hearings.

Any objections to the admissibility of prefiled testimony or exhibits must be filed with the Board in writing no more than 30 days from the date the testimony or exhibit was prefiled, or five days before the date on which the testimony or exhibit will be offered into the evidentiary record, whichever occurs sooner.[13] Assuming the testimony is entered into the record, the witness is then subject to cross-examination on the testimony. Intervenors are also allowed to cross-examine the witnesses of the other parties.[14] The parties' testimony and exhibits, if admitted,[15] become part of the evidentiary record upon which the Board may rely in its final order.

Discovery

Discovery is an opportunity to ask parties about what their witnesses have said and the exhibits they have provided. Discovery can be either written, called "interrogatories" or "requests for information," or oral, called "depositions." Written discovery is served on parties by mail or by hand (parties may also agree to conducting discovery through e-mail), and is typically in the form of written questions (e.g., What is Ms. Smith's basis for her belief that . . .) or document requests (e.g., Please provide all the documents Mr. Johnson relied on in coming to the conclusion that . . .). Depositions are an opportunity to ask questions of other parties'

[13]See Board Rule 2.216(C).

[14]In larger cases with a significant number of parties, the Board may require the parties to propose a schedule for presenting witnesses and to provide estimates for the amount of time they each will need to conduct cross-examination of the others' witness(es). In such cases, once a schedule for witnesses is adopted by the Board, parties will be required to adhere to the schedule. Accordingly, being organized and prepared prior to cross-examining a witness is important.

[15]The testimony and exhibits of all parties are subject to evidentiary rules and may be admitted only if they are in conformance with these rules.

witnesses before the hearing and outside the presence of the Board. In certain circumstances, transcripts of depositions can be entered into evidence at the hearing. The purpose in asking these questions is many-fold, including understanding a party's position, formulating responsive testimony, and preparing cross-examination.

When a party has a good faith reason to believe that it does not need to provide answers or documents, they may object to the question or request. At that point parties are obligated under the Vermont Rules of Civil Procedure to work in good faith to resolve the dispute. If no such agreement can be reached, parties may go to the Board for resolution of the issue. Discovery is not automatically part of the evidentiary record, although parties may seek to introduce it as evidence either in prefiled testimony or seeking to introduce a witnesses' written responses to discovery questions during the cross-examination of that witness.

Evidentiary Hearings

The evidentiary hearings are very much like a trial, except that testimony is prefiled in written form in advance of the hearing. During the evidentiary hearing, the prefiled written testimony is entered into the evidentiary record under oath in lieu of it actually being given live at the hearing. During the evidentiary hearings, witnesses are called to testify under oath and may be cross-examined by parties and the Board. Unless specifically authorized by the Board, parties may not use the evidentiary hearings to provide new testimony, not already included in their prefiled testimony and exhibits, from their witnesses.

Briefs

At the close of the evidentiary hearings parties may file briefs with the Board. Briefs are not evidence. Rather, they provide the parties an opportunity to cite pertinent facts from the record, cite applicable statutes, rules, regulations, and precedent, and explain their position for the Board to consider including in the final order. Typically, two rounds of briefs are filed, an initial brief, and a reply brief. A reply brief, if needed, is limited to responding to arguments raised by other parties in their initial briefs. It is not an opportunity to raise new issues.

Decision

Once the evidentiary hearings have been completed and the parties have been given the opportunity to submit briefs, the Board will issue a decision. This final Order must be based on the evidentiary record, and will include findings of fact under the Section 248 criteria (including the incorporated Act 250 criteria) as well as conclusions of law.

If the Board does not hear the case directly, the Hearing Officer will issue a proposal for decision. Parties will then have the opportunity to file written comments on the proposal for decision and ask for oral argument before the Board. The proposal for decision and any comments on it are submitted to the members of the Board for review and issuance of a final order.

Final Board Orders are subject to motions for reconsideration under the Rules of Civil Procedure. Any final decision by the Board may be appealed to the Vermont Supreme Court. Any appeals from a Board Order are governed by the Rules of Appellate Procedure.

Alternative Section 248 Procedures — Subsections 248(j) and 248(k)

Subsection 248(j)

This subsection provides for expedited review of proposed projects which meet certain criteria. Under the circumstances described in 30 V.S.A. § 248(j), if the Board finds that the project is of limited size and scope, does not raise a significant issue according to the requisite criteria, and the public interest is satisfied by the Section 248(j) procedures, the Board may issue an order without holding public or evidentiary hearings. Interested parties identified by statute, or those that request notification of specific types of petitions, will receive notice of a Section 248(j) petition. The Board also provides public newspaper notice of Section 248(j) petitions. The notice issued by the Board provides a deadline by which public comments on the petition may be filed. Specifically, the comments should address whether the petition raises a significant issue with respect to the criteria of Section 248(b). If the Board determines that the petition does raise a significant issue with respect to these criteria, it will hold evidentiary hearings on the

criteria at issue.

Section 248(k)

The statute allows the Board to waive, for a limited time, the requirement to obtain a certificate of public good prior to site preparation or construction if the following conditions are met:

(A) good cause exists because an emergency situation has occurred;
(B) the waiver is necessary to provide adequate and efficient service or to preserve the property of the public service company devoted to public use; and
(C) taking into account any terms, conditions, and safeguards that the board may require, the waiver will promote the general good of the state.

Upon the filing of a petition under Section 248(k), the statute requires that the Board hold an expedited preliminary hearing. The statute provides the Board with flexibility in determining the appropriate notice of the hearing to affected municipalities, regional planning commissions, and state agencies.

This subsection applies only to emergency situations and is not intended to circumvent the usual review process pursuant to Section 248. Generally, a project that receives approval under Section 248(k) must receive a certificate of public good, filed for through the regular Section 248 or Section 248(j) process. If a certificate of public good is not granted in this later process, the project must be removed and the site returned to its prior condition.

Appendices

Attached are appendices that include the full text of 30 V.S.A. § 248 (including the incorporated environmental criteria, Board Rule 2.201 – Practice Before the Board, Board Rule 2.209 – Intervention. The statutes and rules may change from time to time. Therefore parties may want to consult the Vermont Legislature's website for the most recent version of Section 248 (http://www.leg.state.vt.us/statutes/statutes2.htm)[16] and the Board's website for the most recent version of its rules (http://www.state.vt.us/psb/rules/rules.stm).

[16] Please note that Section 248 is contained within Chapter 5 of Title 30.

Appendix A 30 V.S.A. §248

(Also Available at Public Service Board Website http://www.state.vt.us/psb/ ; "Vermont Statutes")

30 V.S.A. § 248. New gas and electric purchases, investments, and facilities; certificate of public good.

(a) (1) No company, as defined in section 201 of this title, may:

(A) in any way purchase electric capacity or energy from outside the state, for a period exceeding five years, that represents more than one percent of its historic peak demand, or

(B) invest in an electric generation or transmission facility located outside this state unless the public service board first finds that the same will promote the general good of the state and issues a certificate to that effect.

(2) Except for the replacement of existing facilities with equivalent facilities in the usual course of business, and except for electric generation facilities that are operated solely for on-site electricity consumption by the owner of those facilities:

(A) no company, as defined in section 201 of this title, and no person, as defined in 10 V.S.A.§ 6001(14), may begin site preparation for or construction of an electric generation facility or electric transmission facility within the state which is designed for immediate or eventual operation at any voltage, and

(B) no such company may exercise the right of eminent domain in connection with site preparation for or construction of any such transmission or generation facility, unless the public service board first finds that the same will promote the general good of the state and issues a certificate to that effect.

(3) No company, as defined in section 201 of this title, and no person, as defined in 10 V.S.A. § 6001(14), may in any way begin site preparation for or commence construction of any natural gas facility, except for the replacement of existing facilities with equivalent facilities in the usual course of business, unless the public service board first finds that the same will promote the general good of the state and issues a certificate to that effect pursuant to this section.

(A) For the purposes of this section, the term "natural gas facility" shall mean any natural gas transmission line, storage facility, manufactured-gas facility, or other structure incident to any of the above. For purposes of this section, a "natural gas transmission line" shall include any feeder main or any pipeline facility constructed to deliver natural gas in Vermont directly from a natural gas pipeline facility that has been certified pursuant to the Natural Gas Act, 15 U.S.C. § 717a et seq.

(B) For the purposes of this section, the term "company" shall not include a "natural gas company" (including a "person which will be a natural gas company upon completion of any proposed construction or extension of facilities"), within the meaning of the Natural Gas Act, 15 U.S.C. § 717a, et seq., provided however, that the term "company" shall include any "natural gas company" to the extent it proposes to construct in Vermont a natural gas facility that is not solely subject to federal jurisdiction under the Natural Gas Act.

(C) The public service board shall have the authority to, and may in its discretion, conduct a proceeding, as set forth in subsection (h) of this section, with respect to a natural gas facility proposed to be constructed in Vermont by a "natural gas company," for the purpose of developing an opinion in connection with federal certification or other federal approval proceedings.

(4) (A) With respect to a facility located in the state, the public service board shall hold a nontechnical public hearing on each petition for such finding and certificate in at least one county in which any portion of the construction of the facility is proposed to be located.

(B) The public service board shall hold technical hearings at locations which it selects.

(C) At the time of filing its application with the board, copies shall be given by the petitioner to the attorney general and the department of public service, and, with respect to facilities within the state, the department of health, agency of natural resources, historic preservation division, scenery preservation council, state planning office, agency of transportation, the agency of agriculture, food and markets and to the chairperson or director of the municipal and regional planning commissions and the municipal legislative body for each town and city in which the proposed facility will be located.

(D) Notice of the public hearing shall be published in a newspaper of general circulation in the county or counties in which the proposed facility will be located two weeks successively, the last publication to be at least 12 days before the day appointed for the hearing.

(E) The agency of natural resources shall appear as a party in any proceedings held under this subsection, shall provide evidence and recommendations concerning any findings to be made under subdivision (b)(5) of this section, and may provide evidence and recommendations concerning any other matters to be determined by the board in such a proceeding.

(b) Before the public service board issues a certificate of public good as required under subsection (a) of this section, it shall find that the purchase, investment or construction:

(1) with respect to an in-state facility, will not unduly interfere with the orderly development of the region with due consideration having been given to the recommendations of the municipal and regional planning commissions, the recommendations of the municipal legislative bodies, and the land conservation measures contained in the plan of any affected municipality. However, with respect to a natural gas transmission line subject to board review, the line shall be in conformance with any applicable provisions concerning such lines contained in the duly adopted regional plan; and, in addition, upon application of any party, the board shall condition any certificate of public good for a natural gas transmission line issued under this section so as to prohibit service connections that would not be in conformance with the adopted municipal plan in any municipality in which the line is located;

(2) is required to meet the need for present and future demand for service which could not otherwise be provided in a more cost effective manner through energy conservation programs and measures and energy-efficiency and load management measures, including

but not limited to those developed pursuant to the provisions of sections 209(d), 218c, and 218(b) of this title;
(3) will not adversely affect system stability and reliability;
(4) will result in an economic benefit to the state and its residents;
(5) with respect to an in-state facility, will not have an undue adverse effect on esthetics, historic sites, air and water purity, the natural environment and the public health and safety, with due consideration having been given to the criteria specified in 10 V.S.A. § 1424a(d) and § 6086(a)(1) through (8) and (9)(K);

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INCORPORATED CRITERIA OF SECTION 248(b)(5)

10 V.S.A. §1424a(d): Outstanding Resource Waters

(d) In making its decision, the board may consider, but shall not be limited to considering, the following:

(1) existing water quality and current water quality classification,
(2) the presence of aquifer protection areas,
(3) the waters' value in providing temporary water storage for flood water and storm runoff,
(4) the waters' value as fish habitat,
(5) the waters' value in providing or maintaining habitat for threatened or endangered plants or animals,
(6) the waters' value in providing habitat for wildlife, including stopover habitat for migratory birds,
(7) the presence of gorges, rapids, waterfalls, or other significant geologic features,
(8) the presence of scenic areas and sites,
(9) the presence of rare and irreplaceable natural areas,
(10) the presence of known archeological sites,
(11) the presence of historic resources, including those designated as historic districts or structures,
(12) existing usage and accessibility of the waters for recreational, educational, and research purposes and for other public uses,
(13) studies, inventories and plans prepared by local, regional, statewide, national, or international groups or agencies, that indicate the waters in question merit protection as outstanding resource waters,
(14) existing alterations, diversions or impoundments by permit holders under state or federal law.

10 V.S.A. §6086. Issuance of permit; conditions and criteria

(a) Before granting a permit, the board or district commission shall find that the subdivision or development;

(1) Will not result in undue water or air pollution. In making this determination it shall at least consider: the elevation of land above sea level; and in relation to the flood plains, the nature of soils and subsoils and their ability to adequately support waste disposal; the slope of the land and its effect on effluents; the availability of streams for disposal of effluents; and the applicable health and environmental conservation department

regulations.

(A) Headwaters. A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other applicable criteria, the development or subdivision will meet any applicable health and environmental conservation department regulation regarding reduction of the quality of the ground or surface waters flowing through or upon lands which are not devoted to intensive development, and which lands are:

(i) headwaters of watersheds characterized by steep slopes and shallow soils; or

(ii) drainage areas of 20 square miles or less; or

(iii) above 1,500 feet elevation; or

(iv) watersheds of public water supplies designated by the Vermont department of health; or

(v) areas supplying significant amounts of recharge waters to aquifers.

(B) Waste disposal. A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other applicable criteria, the development or subdivision will meet any applicable health and environmental conservation department regulations regarding the disposal of wastes, and will not involve the injection of waste materials or any harmful or toxic substances into ground water or wells.

(C) Water conservation. A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other applicable criteria, the design has considered water conservation, incorporates multiple use or recycling where technically and economically practical, utilizes the best available technology for such applications, and provides for continued efficient operation of these systems.

(D) Floodways. A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other applicable criteria:

(i) the development or subdivision of lands within a floodway will not restrict or divert the flow of flood waters, and endanger the health, safety and welfare of the public or of riparian owners during flooding; and

(ii) the development or subdivision of lands within a floodway fringe will not significantly increase the peak discharge of the river or stream within or downstream from the area of development and endanger the health, safety, or welfare of the public or riparian owners during flooding.

(E) Streams. A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other applicable criteria, the development or subdivision of lands on or adjacent to the banks of a stream will, whenever feasible, maintain the natural condition of the stream, and will not endanger the health, safety, or welfare of the public or of adjoining landowners.

(F) Shorelines. A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other criteria, the development or subdivision of shorelines must of necessity be located on a shoreline in order to fulfill the purpose of the development or subdivision, and the development or subdivision will, insofar as possible and reasonable in light of its purpose:

(i) retain the shoreline and the waters in their natural condition,

(ii) allow continued access to the waters and the recreational opportunities provided by the waters,

(iii) retain or provide vegetation which will screen the development or subdivision from the waters, and

(iv) stabilize the bank from erosion, as necessary, with vegetation cover.

(G) Wetlands. A permit will be granted whenever it is demonstrated by the applicant, in addition to other criteria, that the development or subdivision will not violate the rules of the water resources board, as adopted under section 905(9) of this title, relating to significant wetlands.

(2) Does have sufficient water available for the reasonably foreseeable needs of the subdivision or development.

(3) Will not cause an unreasonable burden on an existing water supply, if one is to be utilized.

(4) Will not cause unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result.

(5) Will not cause unreasonable congestion or unsafe conditions with respect to use of the highways, waterways, railways, airports and airways, and other means of transportation existing or proposed.

(6) Will not cause an unreasonable burden on the ability of a municipality to provide educational services.

(7) Will not place an unreasonable burden on the ability of the local governments to provide municipal or governmental services.

(8) Will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas.

(A) Necessary wildlife habitat and endangered species. A permit will not be granted if it is demonstrated by any party opposing the applicant that a development or subdivision will destroy or significantly imperil necessary wildlife habitat or any endangered species, and

(i) the economic, social, cultural, recreational, or other benefit to the public from the development or subdivision will not outweigh the economic, environmental, or recreational loss to the public from the destruction or imperilment of the habitat or species, or

(ii) all feasible and reasonable means of preventing or lessening the destruction, diminution, or imperilment of the habitat or species have not been or will not continue to be applied, or

(iii) a reasonably acceptable alternative site is owned or controlled by the applicant which would allow the development or subdivision to fulfill its intended purpose.

(9)(K) Development affecting public investments. A permit will be granted for the development or subdivision of lands adjacent to governmental and public utility facilities, services, and lands, including, but not limited to, highways, airports, waste disposal facilities, office and maintenance buildings, fire and police stations, universities, schools, hospitals, prisons, jails, electric generating and transmission facilities, oil and gas pipe

lines, parks, hiking trails and forest and game lands, when it is demonstrated that, in addition to all other applicable criteria, the development or subdivision will not unnecessarily or unreasonably endanger the public or quasi-public investment in the facility, service, or lands, or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to the facility, service, or lands.

END OF INCORPORATED CRITERIA

* * *

(6) with respect to purchases, investments, or construction by a company, is consistent with the principles for resource selection expressed in that company's approved least cost integrated plan;

(7) except as to a natural gas facility that is not part of or incidental to an electric generating facility, is in compliance with the electric energy plan approved by the department under section 202 of this title, or that there exists good cause to permit the proposed action;

(8) does not involve a facility affecting or located on any segment of the waters of the state that has been designated as outstanding resource waters by the water resources board, except that with respect to a natural gas or electric transmission facility, the facility does not have an undue adverse effect on those outstanding resource waters;

(9) with respect to a waste to energy facility, is included in a solid waste management plan adopted pursuant to 24 V.S.A. § 2202a, which is consistent with the state solid waste management plan; and

(10) except as to a natural gas facility that is not part of or incidental to an electric generating facility, can be served economically by existing or planned transmission facilities without undue adverse effect on Vermont utilities or customers.

(c) In the case of a municipal plant or department formed under local charter or chapter 79 of this title or a cooperative formed under chapter 81 of this title, any proposed investment, construction or contract which is subject to this section shall be approved by a majority of the voters of a municipality or the members of a cooperative voting upon the question at a duly warned annual or special meeting to be held for that purpose. The municipal department or cooperative shall provide to the voters or members, as the case may be, written assessment of the risks and benefits of the proposed investment, construction or contract which were identified by the public service board in the certificate issued under this section. The municipal department or cooperative also may provide to the voters an assessment of any other risks and benefits.

(d) Nothing in this section shall be construed to prohibit a company from executing a letter of intent or entering into a contract before the issuance of a certificate of public good under this section, provided that the company's obligations under that letter of intent or contract are made subject to compliance with the requirements of this section.

(e) Before a certificate of public good is issued for the construction of a nuclear fission plant within the state the public service board shall obtain the approval of the general assembly and the assembly's determination that the construction of the proposed facility will promote the general welfare. The public service board shall advise the general assembly of any petition submitted under this section for the construction of a nuclear fission plant within this state, by written notice delivered to the speaker of the house of representatives and to the president of the senate.

The department of public service shall submit recommendations relating to the proposed plant, and shall make available to the general assembly all relevant material. The requirements of this subsection shall be in addition to the findings set forth in subsection (b) of this section.

(f) However, plans for the construction of such a facility within the state must be submitted by the petitioner to the municipal and regional planning commissions no less than 45 days prior to application for a certificate of public good under this section, unless the municipal and regional planning commissions shall waive such requirement. Such municipal or regional planning commission may hold a public hearing on the proposed plans. Such commissions shall make recommendations, if any, to the public service board and to the petitioner at least 7 days prior to filing of the petition with the public service board.

(g) However, notwithstanding the above, plans involving the relocation of an existing transmission line within the state must be submitted to the municipal and regional planning commissions no less than 21 days prior to application for a certificate of public good under this section.

(h) The position of the state of Vermont in federal certification or other approval proceedings for natural gas facilities shall be developed in accordance with this subsection.

(1) A natural gas facility requiring federal approval shall apply to the public service board for an opinion under this section (on or before the date on which the facility applies for such federal approval in the case of a facility that has not applied for federal approval before January 16, 1988). Any opinion issued under this subsection shall be developed based upon the criteria established in subsection (b) of this section.

(2) If the board conducts proceedings under this subsection, the department shall give due consideration to the board's opinion as to facilities of a natural gas company, and that opinion shall guide the position taken before federal agencies by the state of Vermont, acting through the department of public service under section 215 of this title.

(3) If the board conducts proceedings under this subsection, it may consolidate them, solely for purposes of creating a common record, with any related proceedings conducted under subdivision (a)(3) of this section.

(i) (1) No company, as defined in sections 201 and 203 of this title:

(A) may invest in a gas-production facility located outside this state, or

(B) may execute a contract for the purchase of gas from outside the state, for resale to firm-tariff customers, that

(i) is for a period exceeding five years, or

(ii) represents more than ten percent of that company's peak demand for resale to firm-tariff customers, without approval by the board, after giving notice of such investment, or filing a copy of that contract, with the board and the department at least 30 days prior to the proposed effective date of that contract or investment.

(2) The department and the board shall consider within 30 days whether to investigate the proposed investment or contract.

(3) The board, upon its own motion, or upon the recommendation of the department, may determine to initiate an investigation. If the board does not initiate an investigation within such 30 day period, the contract or investment shall be deemed to be approved. If the board determines to initiate an

investigation, it shall give notice of that decision to the company proposing the investment or contract, the department, and such other persons as the board determines are appropriate. The board shall conclude its investigation within 120 days of issuance of its notice of investigation, or within such shorter period as it deems appropriate. If the board fails to issue a decision within that 120 day period, the contract or investment shall be deemed to be approved. The board may hold informal, public or technical hearings on the proposed investment or contract.

(4) Nothing in this subsection shall prohibit a company from negotiating or adjusting periodically the price of other terms of supply through a supplement to such a contract, provided that the supplement falls within the terms specified in such a contract, as approved. The board's authority to investigate such adjustments under other authorities of this title shall not be impaired. Such a company shall file with the department and the board a copy of any such supplement to the contract or other documentation that states any terms that have been renegotiated or adjusted by the company at least 30 days prior to the effective date of the renegotiated or adjusted price or other terms.

(5) Nothing in this subsection shall be construed to prohibit a gas company from executing a development contract, a contract for design and engineering, a contract to seek regulatory approvals for a gas-production facility, or a letter of intent for such purchase of gas that makes the company's obligations under that letter of intent subject to the requirements of this subsection, prior to the filing with the board and department of such notice or proposed contract or pending any investigation under this subsection.

(j) (1) The board may, subject to such conditions as it may otherwise lawfully impose, issue a certificate of public good in accordance with the provisions of this subsection and without the notice and hearings otherwise required by this chapter if the board finds that:

(A) approval is sought for construction of facilities described in subdivision (a)(2) or (3) of this section;

(B) such facilities will be of limited size and scope;

(C) the petition does not raise a significant issue with respect to the substantive criteria of this section; and

(D) the public interest is satisfied by the procedures authorized by this subsection.

(2) Any party seeking to proceed under the procedures authorized by this subsection shall file a proposed certificate of public good and proposed findings of fact with its petition. The board shall give written notice of the proposed certificate to the parties specified in subdivision (a)(4)(C) of this section, to any public interest organization that has in writing requested notice of applications to proceed under this subsection and to any other person found by the board to have a substantial interest in the matter. Such notice shall be published on two occasions at least one week apart. Such notice shall request comment within 21 days of the last publication on the question of whether the petition raises a significant issue with respect to the substantive criteria of this section. If the board finds that the petition raises a significant issue with respect to the substantive criteria of this section, the board shall hear evidence on any such issue.

(k) (1) Notwithstanding any other provisions of this section, the board may waive, for a specified and limited time, the prohibitions contained in this section upon site preparation for or construction of an electric transmission facility or a generation facility necessary to assure the stability or reliability of the electric system or a natural gas facility, pending full review under this section.

(2) A person seeking a waiver under this subsection shall file a petition with the board and shall provide copies to the department of public service and the agency of natural resources. Upon receiving the petition, the board shall conduct an expedited preliminary hearing, upon such notice to the governmental bodies listed in subdivision (a)(4)(C) of this section as the board may require.

(3) An order granting a waiver may include terms, conditions and safeguards, including the posting of a bond or other security, as the board deems proper, considering the scope and duration of the requested waiver.

(4) A waiver shall be granted only upon a showing that:

(A) good cause exists because an emergency situation has occurred;

(B) the waiver is necessary to provide adequate and efficient service or to preserve the property of the public service company devoted to public use;

(C) measures will be taken, as the board deems appropriate, to minimize significant adverse impacts under the criteria specified in subdivisions (b)(5) and (8) of this section; and

(D) taking into account any terms, conditions and safeguards that the board may require, the waiver will promote the general good of the state.

(5) Upon the expiration of a waiver, if a certificate of public good has not been issued under this section, the board shall require the removal, relocation or alteration of the facilities subject to the waiver, as it finds will best promote the general good of the state.

(*l*) Notwithstanding other provisions of this section, and without limiting any existing authority of the governor, and pursuant to subdivisions 9(10) and (11) of Title 20, when the governor has proclaimed a state of emergency pursuant to section 9 of Title 20, the governor, in consultation with the chair of the public service board and the commissioner of the department of public service or their designees may waive the prohibitions contained in this section upon site preparation for or construction of an electric transmission facility or a generation facility necessary to assure the stability or reliability of the electric system or a natural gas facility. Waivers issued under this subsection shall be subject to such conditions as are required by the governor, and shall be valid for the duration of the declared emergency plus 180 days, or such lesser overall term as determined by the governor. Upon the expiration of a waiver under this subsection, if a certificate of public good has not been issued under this section, the board shall require the removal, relocation, or alteration of the facilities, subject to the waiver, as the board finds will best promote the general good of the state.

Appendix B Public Service Board Rule 2.201 Practice Before the Board

(*Also available at* http://www.state.vt.us/psb/rules/rules.stm).

(A) Notice of appearance. Attorneys shall file a written notice of appearance with respect to any matter in which they are representing a party. Except in the case of a consumer filing a consumer complaint, pro se representatives shall likewise file a notice of appearance. Except as otherwise provided by law, a party whose attorney has failed to comply with this requirement, or a party appearing by a pro se representative who has failed to comply with the requirements of this rule, shall not be entitled to notice or service of any document in connection with such matter, whether such notice or service is required to be made by the Board, by a party or by a person seeking party status. A copy of each notice of appearance shall, on the same day on which it is filed, be served by the party filing the same upon all persons or parties on whose behalf a notice of appearance has been filed. A list of such persons and parties will be provided by the clerk upon request.

(B) Pro se appearances. For purposes of these rules a person appearing pursuant to the authority of this section shall be known as a pro se representative. In its discretion, the Board may permit persons who are not attorneys to appear before it as follows: a partnership may be represented by a partner, and a corporation, cooperative or association may be represented by an officer thereof or by an employee designated in writing by an officer thereof. Such permission shall be given in all proceedings unless, because of their factual or legal complexity or because of the number of parties, the Board is of the opinion that there is a substantial possibility that the participation of a pro se representative will unnecessarily prolong such proceeding or will result in inadequate exposition of factual or legal matters. Notwithstanding the foregoing, any individual may be a pro se representative in his or her own cause. This rule shall in no respect relieve any person or party from the necessity of compliance with any applicable rule, law, practice, procedure or other requirement. Except as provided in Rule 2.201(D), anyone appearing as a pro se representative shall be under all the obligations of an attorney admitted to practice in this state with respect to the matter in which such person appears.

Appendix C Public Service Board Rule 2.209 Intervention

(*Also available at* http://www.state.vt.us/psb/rules/rules.stm).

(A) Intervention as of right. Upon timely application, a person shall be permitted to intervene in any proceeding (1) when a statute confers an unconditional right to intervene; (2) when a statute confers a conditional right to intervene and the condition or conditions are satisfied; or (3) when the applicant demonstrates a substantial interest which may be adversely affected by the outcome of the proceeding, where the proceeding affords the exclusive means by which the applicant can protect that interest and where the applicant's interest is not adequately represented by existing parties.

(B) Permissive intervention. Upon timely application, a person may, in the discretion of the Board, be permitted to intervene in any proceeding when the applicant demonstrates a substantial interest which may be affected by the outcome of the proceeding. In exercising its discretion in this paragraph, the Board shall consider (1) whether the applicant's interest will be adequately protected by other parties; (2) whether alternative means exist by which the applicant's interest can be protected; and (3) whether intervention will unduly delay the proceeding or prejudice the interests of existing parties or of the public.

(C) Conditions. Where a party has been granted intervention, the Board may restrict such party's participation to only those issues in which the party has demonstrated an interest, may require such party to join with other parties with respect to appearance by counsel, presentation of evidence or other matters, or may otherwise limit such party's participation, all as the interests of justice and economy of adjudication require.

(D) Procedure. An application to intervene shall be by motion made in accordance with these rules. The motion shall be made within a reasonable time after the right to intervene first accrues and shall specifically state the manner in which the condition of this rule are satisfied.