STATE OF VERMONT
PUBLIC SERVICE BOARD

Petition of Beaver Wood Energy Fair Haven, LLC for a Certificate of Public Good, pursuant to 30 V.S.A. § 248, to install and operate a Biomass Energy Facility and an integrated wood pellet manufacturing facility located north of Route 4 in Fair Haven, Vermont, to be known as the "Fair Haven Biomass Project"	Docket No. 7679
Petition of Beaver Wood Energy Pownal, LLC for a Certificate of Public Good, pursuant to 30 V.S.A. § 248, to install and operate a Biomass Energy Facility and an integrated wood pellet manufacturing facility located north of the old Green Mountain Racetrack in Pownal, Vermont, to be known as the "Pownal Biomass Project"	Docket No. 7678

PETITIONERS' REPLY MEMORANDUM RELATING TO INITIAL JURISDICTIONAL ISSUE

NOW COME Beaver Wood Energy Pownal, LLC and Beaver Wood Energy Fair Haven, LLC (collectively "BWE"), and respectfully submit this Reply Memorandum Relating to Initial Jurisdictional Issue.

Introduction

None of the Parties that have filed memorandums of law pertaining to the initial jurisdictional issue have advanced compelling legal or policy arguments that would justify requiring BWE to obtain two comprehensive land use permits for a single project.[1] It remains clear that if the Board does not exercise jurisdiction over the entire Projects, there will be redundant and overlapping review of the Projects' environmental impacts, a loss of judicial efficiency, a significant likelihood of conflicting mandates, and a serious

[1] Certain parties have objected that Mr. Bousquet's qualifications were not set forth in his affidavit. However, BWE's memorandum also cited to Mr. Bousquet's testimony, which includes a detailed description of his qualifications and experience. *BWE Memorandum at 2, fn. 1.*

delay in the permitting process. Without a common permitting path for the integrated facilities, one or both pellet facilities may be eliminated in order to avoid costly delays in permitting, development, financing and construction of a facility, leading to an increase in the cost of power produced by the stand-alone generating facility, an overall reduction in facility efficiencies and a significant reduction in job creation and tax revenues for the State of Vermont. Furthermore, such a ruling would discourage the development of any future combined heat and power facility of any design or variety in Vermont. None of the foregoing consequences are in the public interest or in any way consistent with clearly expressed state policies of promoting renewable energy and energy efficiency.

Act 250 was created to provide for comprehensive review of all of a project's environmental impacts. Act 248 was intended to fulfill that same purpose with respect to electrical generating facilities. The whole point of a comprehensive environmental review is to have all of a project's environmental impacts reviewed and assessed by a single forum, not to create permanent bureaucratic fiefdoms of conflicting authority. It was never contemplated that a project would have to obtain both an Act 250 permit and approval under Section 248. While there may not be an express carve out for projects like the one proposed by BWE, the simple explanation for this omission is not that the legislature intended that there be dual and parallel review in separate forums, but rather that such projects were not contemplated when the statutes were drafted. Therefore, the decision to extend jurisdiction over the pellet facilities should be guided by the overall purpose of the statutes, the policies underlying the statutes, and not a cramped and narrow interpretation of the Board's jurisdictional grant. The State has a clearly delineated policy of providing one-stop shopping with respect to comprehensive land use permits.

In addition, prior Board precedent clearly establishes that non-generating components of a project, for example a trash separator, are within the scope of the Board's jurisdiction. Accordingly, prior Board precedent and State policy support the Board's exercise of jurisdiction over the pellet facilities.

I. The Elimination of the Pellet Facility will Result in a Less Efficient Project.

NRB argues that the integration of the pellet facility does not make the generating facility more efficient. This counter-argument is without any merit. By capturing and using the waste heat from the electrical facility in the pellet manufacturing process, the Projects make more efficient use of the renewable natural resource that fuels the facility. By capturing the waste heat, the Projects will each recover over 31,000 MWh of energy on an annual basis or 62,000 MWh annually combined, energy that otherwise dissipate into the atmosphere and with a value in excess of one million dollars per year. To suggest that this does not result in a more energy efficient project is simply disingenuous. NRB goes on to concede that any aspect of a project that results in increased energy efficiency, reduces environmental impacts, and thereby benefits ratepayers, may be subject to Board jurisdiction. *NRB Memorandum* at 10. That is the case here, and, accordingly, the Board should exercise jurisdiction over the pellet facilities.

II. Requiring the Pellet Facility to Obtain an Act 250 Permit will Result in Redundant Review of the Projects' Environmental Impacts.

NRB contends that the District Commissions' review of the Projects will not be redundant. *NRB Memorandum at 14 and 19.* However, earlier in its brief, NRB concedes that the District Commissions will consider not just the impacts of the pellet facility, but also all other development proposed in and around the same site, in other

words, the District Commission will consider the environmental impacts caused by both the pellet and electrical generating facilities. *NRB Memorandum at 13-14.* The only difference noted by NRB is a slightly different standard that allows the Board to weigh the Projects' overall positive impacts on society as a whole. This is precisely the outcome intended by the Legislature in giving the Board jurisdiction over such Projects which would otherwise be virtually impossible to construct.

III. The Case Law Cited by the Other Parties Does Not Support the Separation of the Two Aspects of the Projects for Permitting Purposes.

In their motion, Projects' Opponents (those parties that filed a joint opposition, the Projects' Opponents) cite to the Board's decision in Docket No. 7201, in which Vermont Electric Cooperative, Inc. petitioned the Board to upgrade an electric distribution line to interconnect a proposed Berkshire Cow Power generation project. The question in that case was whether the distribution line, typically subject to Act 250 jurisdiction, nonetheless was subject to Board jurisdiction insofar as its upgrade was directly related to the power project.

Although Opponents gloss over the point in their Brief, the decision to which they refer was not the Board's primary decision, but rather was a more limited decision on a motion to reconsider the earlier one. In the first decision, the Board analyzed the scope of its jurisdiction. *In re Petition of Vermont Electric Coop.*, Docket #7201, Order (August 24, 2006). In the second decision, the Board did not modify or call into question its jurisdictional analysis set forth in the first decision. *See In re Petition of Vermont Electric Coop.*, Docket #7201, Order re Motion for Reconsideration (Sept. 15, 2006). Rather, the Board noted that, after the first decision had been issued, the parties had raised new issues that had not previously been raised. In particular, in the second

decision, the Board held that the distribution line upgrade was "part of the electric grid that is outside the control of the applicant" and, as a result, could not be considered to be a part of the project. Of course, the pellet facilities at issue in this case are not part of a larger electric grid; and, unlike the case in the *VEC* case, the pellet facilities *will be* in control of the applicant. Accordingly, as the Board considers whether the pellet facilities should be deemed to be a part of the project, and subject to Board review, the first *VEC* decision (hereinafter the "VEC Decision") is more relevant than the second.

In the *VEC Decision*, the Board made it clear that "Section 248 review applies to facilities that are *reasonably related* to a generation or transmission facility." *VEC Decision* at 7 (emphasis added). This is a standard that first was articulated in the UPC Wind case. *VEC Decision* at 7. In the *UPC* case, the Board distinguished the "reasonably related" standard from the "directly related" standard, which had been applied by the Environmental Board. The PSB held that the "Environmental Board did not provide any rationale to support the 'directly related' standard", and expressly rejected that standard in favor of the broader "reasonably related" standard articulated by the Attorney General. *See UPC.* at 18 (concluding that "we find the Attorney General's opinion to be more persuasive"). Having adopted the "reasonably related" standard, the Board then applied it to the anemometers at issue in the *UPC* case. The Board noted that the anemometers were needed to determine the economic feasibility of constructing the wind generation facility. As such, the Board found that the anemometers were "not only reasonably related, but directly related, to a generating facility." Id. at 19.

Although this standard was first adopted in the UPC case, the Board has made it clear that it "has a long history of reviewing facilities that are not, in isolation, generation

or transmission facilities." *VEC Decision* at 7. In the *VEC* case itself, before learning that the proposed distribution line upgrade was intended to be a part of an electric grid outside of the petitioner's control, the Board held that the upgrade was "not only reasonably related to the proposed generation project, but is a necessary component of the project, and thus must be reviewed under Section 248 as part of the project." *VEC Decision* at 8. Had the distribution line not been a part of a larger grid and/or had been controlled by the petitioner, it is clear that the Board would have asserted jurisdiction over it because it was reasonably related to a generation facility, despite the fact that distribution lines are typically subject to Act 250.

Interestingly, in the *VEC Decision*, the PSB presaged the situation presented in this matter. In the *VEC case*, the project proponent was attempting to avoid PSB jurisdiction because it had received a jurisdictional opinion from the District Commission that an Act 250 permit was not required for the project. As the PSB stated, however, "it is possible that an interconnecting distribution line for a future methane-fired farm project could require an Act 250 permit, thereby requiring the petitioner and the local distribution utility to receive permits under both Section 248 and Act 250, as well as local approvals." The PSB made it clear in the *VEC* case (as well as elsewhere) not only that it considered the review under Act 250 to be duplicative of the review under Section 248, but also that that it viewed such overlap as something to be avoided. *See VEC Decision* at 8; *see also* UPC Decision at 18 (noting that "the substantial overlap between Act 250 review and the Board's analysis under Section 248 demonstrates that the Vermont General Assembly was seeking to avoid duplication of effort by exempting transmission and generation facilities from Act 250 review"). The Board stated that "since the Board has jurisdiction

over the interconnecting line, Act 250 does not apply, local review is preempted, and the permitting process is thereby simplified." In this Board's view, this was a good thing, because the "applicant may obtain a permit by making one filing with the Board." For the reasons stated in Beaver Wood's prior filing, this rationale favoring a single, holistic review applies with equal force here. This Board should assert jurisdiction over the biomass facilities, as well as the pellet facilities that are directly related – and certainly are reasonably related[2] – to the biomass facilities.

The DPS cites no precedent in support of its position, merely opining that given the lack of supporting precedent, no jurisdiction exists. This directly contradicts its own conclusion that the standard is subjective, *i.e.* whether an improvement is "reasonably related" to power generation, that requires the Board to exercise its judgment. If one applies the DPS's illogic, the Board could never exercise its discretion in the first instance. This is because the first time the issue would be submitted to the Board there would be no prior precedent, eliminating the "reasonably related" standard altogether with the result that Board could not assert jurisdiction over any peripheral aspect of a power project without an express statutory exemption. This is clearly inconsistent with prior Board precedent that provides that Board must inquire as to whether the proposed improvement is reasonably related to the electrical facility, not merely review past decisions and, if there is no prior decision directly on point that it can point to, decline jurisdiction. Prior precedent should inform the Board's decision, not foreclose the Board's exercise of its own discretion. Accordingly, the lack of a case directly on point,

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[2] Importantly the NRB concedes that the pellet facilities are related to the electrical facilities. *NRB Memorandum at 3.* It reaches its conclusion that no Board jurisdiction exists over the pellet facilities by applying the wrong standard, as noted by the DPS. When one applies the correct standard as iterated by BWE and the DPS and then determines that the pellet facilities are related to the electrical facilities as conceded by the NRB, it is clear that the Board has jurisdiction over the pellet facilities.

does not signal the end of the Board's consideration, rather it is the starting point for the making of determination as to whether the pellet facilities are reasonably related to the electrical facilities.

IV. The Board will Conduct a Comprehensive Environmental Review of the Projects.

Both NRB and the Projects' opponents have argued that the Projects must undergo Act 250 review, or else the Projects will evade a comprehensive environmental review. The PSB has previously considered, and flatly rejected this argument, stating that it "ignores the fact that Section 248, by incorporating by reference many of the Act 250 criteria, serves the same function as a land use statute." *UPC* at 18, n.7.

V. The Meridian Group Decision Clearly Supports the Board's Exercise of Jurisdiction Over the Pellet Facilities.

In *Petition of Meridian Group, Inc., Docket No. 4813-B, Declaratory Ruling (Feb. 4, 1993)*, the petitioner sought to redevelop, in two stages, an existing but defunct trash incinerator project. Phase one of the project involved the installation of new trash separation equipment that separated out heavy materials from light materials, and also sought authorization to operate the plant as a stand-alone transfer station. Phase two involved obtaining approval for the operation of the facility, including the incinerator, which would burn the lighter materials. It was undisputed that the trash separation equipment was not an "electric generation facility", nor that if proposed by itself it would have fallen under the jurisdiction of Act 250. Despite that fact – and despite the fact that the petitioner was seeking approval of phase one *only* – the hearing officer nonetheless held that because it was a key component of the overall project, which involved a

generation facility, the trash separation equipment was subject to PSB jurisdiction. This decision directly contradicts NRB's argument that Board jurisdiction is solely limited to electrical facilities as a trash separator clearly does not generate electricity.

The Hearing Officer's finding that the trash separation equipment was a "key component" of the overall project was based upon, among other things, his determination that it made the project economically viable and reduced overall emissions, two factors that were key to an essential finding of public good. In asserting jurisdiction over phase one of the project, the hearing officer noted that "the Legislature has given the Board the primary responsibility for the review of the environmental and land use implications of the construction of all aspects of electric generation facilities." *Meridian at 4.* The pellet facilities are a key component of the Projects, make them more economically viable, and have a positive environmental impact on the Projects by capturing waste heat, two factors that will be key to the Board's public good determination. Furthermore, the pellet facility is just as integral to the proposed Projects as the garbage separator was in the *Meridian Group* case, especially when one takes into the account that the *Meridian Group* case involved a two phase construction plan and BWE proposes simultaneous construction of the two facilities. Accordingly, under the standard established by the Board in Meridian case, the Board should exercise jurisdiction over the pellet facilities.

VI. 10 V.S.A. § 8506 Further Supports BWE's Arguments.

Projects' Opponents have argued that the risk of parallel or redundant review is nominal. On the contrary, the risk is real and significant. This is clearly illustrated by the Legislature's enactment of 10 V.S.A. § 8506 which strongly signaled a desire that a project's environmental impacts be considered by a single forum. The Legislature

realized that project permits issued to an electrical facility, for example prior to the passage of section 8506 an air permit, had to be appealed to the Environmental Court thus creating overlapping review. Redundant review would occur because the Board would be considering all of a project's environmental impacts as part of its Section 248 review so certain impacts, in this example air quality impacts, would undergo simultaneous review in separate forums. To avoid such a segregation of jurisdiction and to ensure a holistic single forum review of an electrical generating facility, the Legislature mandated that all such permits must be appealed to the Board, not to Environmental Court. 10 V.S.A. § 8506(a). If the Board elects not to exercise jurisdiction over the pellet facility, it will be setting up a likely scenario of simultaneous appeals of the Projects' permits to separate forums. As previously noted, every other permitting entity has treated the pellet and electrical facilities as a single project and issued a single permit encompassing both aspects of the Projects. For example, if the pellet facilities are not subject to Board jurisdiction, their air permits, the very same permit that was issued to the electrical facility, must be appealed to Environmental Court while the an appeal of the electrical facilities' air permits must go to the Board. This is exactly the scenario the Legislature sought to avoid by enacting section 8506. Accordingly, the Board should exercise jurisdiction over the integrated facilities.

VII. NRB's Slippery Slope Argument is Without Merit.

NRB and other parties have suggested that by asserting jurisdiction over the pellet facilities, the PSB will slide upon a slippery slope and essentially preempt Act 250 jurisdiction and local review altogether. They portend, for example, that a developer as an afterthought will append a generation facility to its condominium project in order to

evade Act 250 and local review. First, one could not, even if one wanted to, construct condos on the same site as an electrical facility for safety reasons, because of the noise generated by the facilities, and for a host of other equally obvious reasons. Accordingly, a condo project could never be fully integrated with an electrical facility in the same manner that the pellet facilities are in this case. At most, they would be connected by an underground pipe and, as such, segregating the two aspects of the project for permitting purposes would be relatively easy.

Furthermore, in virtually every case it will be perfectly clear whether a generation facility is being proposed as a secondary use to a commercial project, or whether – as is the case here – a secondary, commercial use is being proposed in connection with a generation facility to improve efficiencies and eliminate wasteful loss of energy. Will there be close cases where a line will need to be drawn? Of course, but this is done all of the time, without excessive hue and cry. The very nature of a subjective standard such as whether one aspect of a project is "reasonably related" to another requires the Board to exercise its discretion and judgment. Accordingly, the slippery slope suggested by the Projects' opponents simply does not exist.

VIII. The Doctrine of Concurrent Jurisdiction Supports the Board's Exercise of Jurisdiction over the Integrated Facilities.

Even should the Board find that it lacks jurisdiction over any portion of the Projects, the doctrine of concurrent jurisdiction supports the Board's exercise over the entire integrated facilities. "In general, where two tribunals have concurrent jurisdiction, the first tribunal to obtain jurisdiction should adjudicate the case, and the second should defer to the first." Barnet Hydro Co. v. Pub. Serv. Bd., 174 Vt. 464, 467, 807 A.2d 347,

350 (2002) (although both the PSB and Superior Court had concurrent jurisdiction, the Superior Court was right to defer to the PSB who had opened a docket and began investigation before the producers filed suit). (citing City of So. Burlington v. Vermont Elec. Power Co., 133 Vt. 438, 443, 344 A.2d 19, 22 (1975). ("In general, as between two tribunals with concurrent subject matter jurisdiction, the one which first acquires such jurisdiction should exercise it, and the second in point of time should defer to the first."). In this instance, a significant number of improvements will be shared by the two facilities. Clearly, the doctrine of concurrent jurisdiction mandates the Board assume jurisdiction over all shared aspects of the Projects as it acquired jurisdiction first. In addition, the Projects share single permits such as air permits, stormwater discharge permits, and others. As the Board acquired jurisdiction over these permits first, the doctrine of concurrent jurisdiction mandates that Board assume exclusive jurisdiction over the environmental impacts regulated by the shared permits.

CONCLUSION

For all the forgoing reasons, BWE respectfully requests that the Board review the environmental impacts associated with the fully integrated Projects making a separate Act 250 proceeding unnecessary.

Dated at Rutland, Vermont this 14th day of February, 2011.

KENLAN, SCHWIEBERT, FACEY & GOSS, P.C.

By _____
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