



November 30, 2015

Mr. Wayne Jortner
Vermont Department of Public Service
112 State Street
Montpelier, VT 05620

RE: Windham Regional Comments on the Structure of the Public Advocacy Division

Dear Mr. Jortner:

On behalf of the Windham Regional Commission (WRC) I am writing to comment on the structure of the Public Advocacy Division of the Public Service Department. We learned second hand during the second week of November that the Public Service Department had been asked by the Legislature to provide a report by December 15, 2015, analyzing the structure of its Public Advocacy Division and whether alternate structures could result in improved benefits for utility ratepayers. We received greater clarity about the full scope of the report during the Department's public hearing held in Brattleboro on November 18th.

The WRC is the regional planning commission for 27 towns, including the 23 towns of Windham County; the towns of Readsboro, Searsburg and Winhall in Bennington County; and the town of Weston in Windsor County. Regional planning commissions and their regional plans have standing in both Section 248 and 248a proceedings, and the WRC has actively engaged in both. We have also been active in energy and telecommunications planning, we are a partner in the implementation of Clean Energy Development Fund initiatives in Windham County, and we were very engaged in the proceedings of the Energy Siting Commission which released its report in 2013.

As a preface to our comments, I will note that our engagement with staff of the Public Advocacy Division (PAD) of the Public Service Department (PSD) has been positive. PAD and other PSD staff have been accessible to us and always willing to entertain phone calls or meetings. However, while the PAD's own stated purpose is to represent the public interest in proceedings before the Public Service Board, with regulated utilities, and with numerous federal agencies, it is ultimately structured to represent the public interest as interpreted by the Executive Branch through an appointed Commissioner.

The task of the WRC is, by statute, to represent the policies contained within the Windham Regional Plan and the positions of its commissioners. Whether the WRC is engaged with the PAD in informal conversation or

formally through participation in a docket before the Public Service Board, it is understood that the position represented by the PAD and PSD is that of the Executive Branch. This is not a problem as we understand that the Executive Branch must have the ability to implement policy through its agencies. A problem does arise, however, when it comes to access and meaningful participation in the certificate of public good and other permitting processes of the Public Service Board. The solution to this problem most likely belongs with the Public Service Board rather than the Public Service Department.

In Public Service Board (PSB) proceedings it is the Public Advocacy Division's responsibility to represent the position of the Executive Branch. The Department has automatic standing in those proceedings, and it has bill back authority to cover costs associated with engagement in PSB proceedings. Regional commissions, on the other hand, must request intervenor status in PSB proceedings, as must municipalities. The costs of engagement by intervenors in the PSB's quasi-judicial processes can be considerable and even prohibitive. Because of the costs, the WRC has participated *pro se* in PSB dockets, including the very extensive and complex dockets related to Entergy Vermont Yankee. We would not have been able to participate in most of these dockets were it not for extraordinary uncompensated volunteer commissioner time that adds up to several hundred hours. The cost of our actual staff time in these dockets since 2009 exceeds \$100,000. While we have been able to present a position of great substance, not being able to afford legal counsel puts us at a considerable procedural and tactical disadvantage in the quasi-judicial proceedings of the PSB.

I raise the statutory standing of the WRC and our financial ability to engage in PSB processes to demonstrate that the fundamental issue at hand is equity of access to and meaningful engagement in PSB processes by those parties who have standing in Sections 248 and 248a and, in the case of regional commissions, a statutory responsibility per Title 24, Chapter 117 § 4345a to, "Appear before the Public Service Board to aid the Board in making determinations under 30 V.S.A. § 248." The inequity of access and meaningful engagement is not only justifiably frustrating for regions and towns, but negates the efficacy of the very plans that regional planning commissions and towns spend years developing and to which the PSB is required by statute to give due consideration (Section 248) or substantial deference (Section 248a).

Perhaps because of its title, the perception exists that the Public Advocacy Division of the Public Service Department is responsible for facilitating access to and meaningful engagement in PSB processes. While they have certainly been helpful to us in describing PSB processes and what is expected of intervenors, the PSD is ultimately a statutory party represented by the PAD before the Board and cannot be a neutral advocate for the policies of the WRC or any other intervenor. Functioning as a public advocate could clearly create a conflict of interest.

This issue was discussed at length by the Energy Generation Siting Policy Commission established by Executive Order (No. 10-12) on October 2, 2012. Recommendation 11 of the Siting Commission is most germane to the task currently before the PSD, and it is the organizational and institutional structure that the WRC recommends.*

* Pages 50-51;
http://sitingcommission.vermont.gov/sites/cep/files/Siting_Commission/Publications/FinalReport/Final%20Report%20-%20Energy%20Generation%20Siting%20Policy%20Commission%2004-30-13.pdf

4.6 Improve the Siting Process for Increased Transparency, Efficiency, and Predictability

The Commission heard from a wide range of parties, from communities to regional planning commissions to developers, who felt that there exists a significant lack of communication and critical information-sharing on the process and timing of an application, both in the pre-application and the CPG phase of the siting process. This translates into a perceived lack of transparency in the process.

The vast majority of cases before the PSB are heard by Hearing Officers, who preside over a docket on behalf of the PSB once a petition is filed. Bound by rules prohibiting *ex parte* communication, they have restricted authority to communicate with individual parties, except through formal written communications or unless all parties receive the communication simultaneously. The way the *ex parte* rules are currently carried out by Hearing Officers is seen by many as preventing them from providing necessary assistance to individual parties on the purely procedural aspects of the siting process. Parties feel that there is no way to ask simple questions and get simple answers on procedural issues. This creates a system where both formal parties and the public feel that the PSB process can be a 'black box'.

Recommendation 11: The PSB shall hire a Case Manager to provide guidance on all aspects of the siting application process to all parties.

The Commission recommends that the position of 'Case Manager' be created at the PSB to provide guidance on all aspects of the siting application process to all parties particularly as they relate to timing. In addition, the Case Manager would provide oversight for ensuring that the PSB and/or multiagency improved website remains up to date with appropriate docketing information. The intent is to have a person available to all parties who has more flexibility to deal with the entire range of procedural issues, and communicate freely with all parties, from the beginning of the application process through the final CPG permitting. The Case Manager would provide technical assistance especially to affected communities and intervenors, and facilitate resolution of issues among parties outside the formal proceeding. Moreover, the Case Manager would be able to identify issues early in the process and move cases towards settlement in many topics, leaving only the most difficult to go to the Hearing Officers or the Board. It is recommended that the position be a statutory position.

The Commission recommends that this position be at the PSB rather than the PSD because the latter is a statutory party in siting cases, along with ANR. Most of the relevant parties were clear in requesting procedural guidance from a person who was independent of either ANR or PSD, but who was also well versed in all of the siting requirements.

The Case Manager would, among other responsibilities:

- oversee and communicate compliance with screening and application checklists for each Tier

- *work with PSD and ANR to ensure that the public engagement and natural resource assessment requirements are communicated to all parties and are met for an application to be 'deemed complete'*
- *communicate whether statutory timelines (under Recommendation 13) are adhered to by all parties (applicant, PSD, ANR, PSB)*
- *provide oversight for ensuring that the improved website remains up to date with appropriate docketing information*

The Commission understands that the PSB recognizes the need to explicitly encourage Hearing Officers to communicate directly with all parties and the public about timing, filing formats and other procedural issues. This will also allow them to provide all the necessary information directly to the Case Manager to carry out his/her functions effectively.

The WRC supports this Case Manager function and approach for all situations in which the WRC and municipalities seek to engage effectively in any of the PSB's quasi-judicial processes.

We are not commenting here about the standing of regional and town plans within the PSB process, with this singular exception. Both the Public Service Commissioner and the Secretary of Natural Resources have expressed their support for comprehensive regional energy planning. The Energy Siting Commission also made recommendations related to regional energy planning and the standing of regional energy plans in statute and in the PSB certificate of public good decision making process. If regional energy plans are to have meaningful standing, then regional planning commissions must have access to the process that is reflective of their capacity to represent and support their plans.

The WRC is disappointed with the absence of notice we and our towns received from PSD concerning the matter at hand and the hearing scheduled for Brattleboro. The WRC learned of the hearing second hand and was able to give our towns less than a week's notice about the hearing. The scope of what the hearing was about – to provide a report by December 15, 2015, analyzing the structure of its Public Advocacy Division and whether alternate structures could result in improved benefits for utility ratepayers – did not make it clear that regional and town concerns might be addressed in this process and, thus, we and they were unable to prepare substantive comments ahead of the hearing. At the hearing the WRC requested an extension of the comment period and that was denied. That left us with 12 days from the hearing, including Thanksgiving week, to develop comments, necessarily shortcutting our own processes within the WRC. This unfortunately somewhat mirrors the Public Service Board's response to Act 199 in 2014, where regional planning commissions were left to find out second hand that deliberations were being held on critical definitions contained within 248a, in which regional and municipal plans have standing. In that case the state's 11 regional planning commissions as a group had to struggle to get a time extension in order to comment and we reached out to the PAD for support. I am happy to say that the PAD was supportive of our position before PSB staff. But while these two instances of lack of notice do not necessarily make a trend, they do underscore our concern that engagement by regional planning commissions in state energy and telecommunications CPG petition review continues to be marginalized and not given much value. While I mentioned that our typical experience with the Department has been positive, the absence of direct notice and engagement around this important issue is disappointing.

Sincerely,

A handwritten signature in black ink, appearing to read "C. Campany". The signature is fluid and cursive, with a large initial "C" and a long, sweeping tail.

Chris Campany,
Executive Director