

IN THE SUPREME COURT OF THE STATE OF VERMONT

In Re: Docket No. 7156 Public Service Board	)	
Amended Petition of UPC Vermont Wind, LLC, for a	)	Supreme Court
Certificate of Public Good, pursuant to	)	Docket No. 2007-456
30 V.S.A. § 248, et al	)	Appealed from the PSB

APPELLANT'S BRIEF

C. Daniel Hershenson, Esq.
Hershenson, Carter, Scott & McGee, PC
P. O. Box 909
Norwich, VT 05055-0909

Anthony Z. Roisman, Esq.
National Legal Scholars Law Firm, P.C.
Stonewall Farm
84 East Thetford Road
Lyme, NH 03768

STATEMENT OF THE ISSUES

1. Whether the Board, in violation of 30 V.S.A. §248(b), failed to make positive findings on all criteria, as required, prior to granting the CPG; 7
2. Whether the Board committed error when it concluded that the project would not unduly interfere with orderly growth in the region under 30 V.S.A. §248(b)(1); 12
3. Whether the Board's decision contravenes 3 V.S.A. §812 in that its conclusions regarding aesthetic impacts are not supported by the Board's findings of fact; . 17
4. Whether the Board's conclusions with regard to the project's impacts under 10 V.S.A. §6086(a)(8) are contrary to both Environmental Board and Public Service Board precedent interpreting whether a project's adverse aesthetic impacts are "undue" under the *Quechee* aesthetics test. 19

TABLE OF CONTENTS

Statement of the Issues	i
Table of Contents	ii
Table of Cases.	iv
Statement of the Case	1
Standard of Review	5
Summary of Argument	5
Argument	7
A. The Board, in violation of 30 V.S.A. §248(b), failed to make positive findings on all criteria, as required, prior to granting the CPG	7
B. The Board committed error when it concluded that the project would not unduly interfere with orderly growth in the region under 30 V.S.A.	12
1. The 2006 Regional Plan became effective prior to the date of UPC's Amended Petition and should be utilized in reviewing UPC's application	12
2. The proposed project is substantially inconsistent with the Regional Plan's provisions defining orderly growth	13
a. Adverse impacts will be substantial	14
b. Large scale commercial wind projects were found by NVDA to be unacceptable under the Regional Plan	15
C. The Board's decision contravenes 3 V.S.A. §812 in that its conclusions regarding aesthetic impacts are not supported by the Board's findings of fact	17
D. The Board's conclusions with regard to the project's impacts	

under 10 V.S.A. §6086(a)(8) are contrary to both Environmental Board and Public Service Board precedent interpreting whether a project's adverse aesthetic impacts are "undue" under the <u>Quechee</u> aesthetics test	19
1. The proposed project creates an adverse aesthetic impact	20
2. The adverse aesthetic impact is "undue"	21
a. The proposed project violates a clear written community standard contained in the Regional Plan which is intended to preserve the aesthetics or scenic beauty of the area	22
b. The proposed project will be aesthetically shocking and offensive	28
c. There has been essentially no mitigation offered by UPC of these adverse impacts	32
Conclusion	33

TABLE OF CASES AND OTHER AUTHORITIES

Caledonia Publishing Co. Inc. v. Dep't. of Employment and Training, 151 Vt. 256 (1989)	17
Dessureau v. Maurice Memorials, Inc., 132 Vt. 350 (1974)	17
Nile and Julie Duppsstadt, Land Use Permit Application #4C1013-EB (corrected), Findings of Fact, Conclusions of Law, and Order, dated 4/30/99	28
In Re Burlington Broadcasters, Inc., #4C1004R- EB, Decision dated 11/25/03.	13
In Re Buttolph, 138 Vt. 573 (1980)	18, 19
In re Dep't. of Public Serv., 157 Vt. 120 (1991)	13
In re Green Mountain Power, 131 Vt. 284 (1973)	11
In re Green Mountain Power Corp., 147 Vt. 509 (1986)	10
In re Halnon, 174 Vt. 514 (2002)	8, 20, 33
In re Leonard R. Lemieux, #3R0717-EB, Findings of Fact, Conclusions of Law, and Order (1995)	26, 27
In re Maher, 132 Vt. 560 (1974)	11
In re McGrath, 138 Vt. 77 (1980)	17
In re McShinsky, 153 Vt. 586 (1990)	28
In re Orzel, 145 Vt. 355 (1985)	5, 17
In re Pollack, CPG NM-52 (2001)	33
In re Quechee Lakes Corp., #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law, and Order dated 11/4/85	20
In re Quechee Lakes Corp., 154 Vt. 543 (1990)	8, 19-22, 24, 28, 30-33
In re Rendell-Baker, 140 Vt. 110 (1981)	5
In re Ross, 151 Vt. 54 (1989)	13

In re Savoie, #2W0991-EB(Reconsideration)(1997)	27
In re Tanger, #3W0125-EB, Findings of Fact, Conclusions of Law and Order, dated 5/22/90	26
In re Times and Seasons, LLC, Land Use Permit Application #3W0839-2-EB, Findings of Fact, Conclusions of Law and Order dated 8/15/05	24, 31
In re Peter S. Tsimortos, #2W1127-EB (2003)	27
In re Twenty-Four Vt. Utilities 159 Vt. 339, 358-59, 1306-07 (1992)	10
In re Vt. Elec. Power Co., Inc., ("VELCO") for a Certificate of Public Good, Order (7/17/03) PSB#6792 at 37-38	9
In re Vt. Elec. Power Co., Inc., 131 Vt. 427 (1973)	10
In re Vt. Elec. Power Co., Inc., 2006 Vt. 69 (2006)	10
In re Vt. Health Service Corp., 155 Vt. 457 (1990)	11
In re Young, 134 Vt. 569 (1976)	17
Robert B. and Deborah J. McShinsky, #3W0530-EB, Findings of Fact, Conclusions of Law, and Order, dated 4/21/88, (affirmed)	28
New England Power Co., v. Town of Barnet, 134 Vt. 498 (1976)	18
North Shore Development, Inc., #4C0626-5-EB Findings of Fact, Conclusions of Law, and Order, dated 12/29/88	28
Smith v. Winhall Planning Comm'n, 140 Vt. 178 (1981)	12, 13
Southwestern Vermont Health Care Corporation, #8B0537-EB, Findings of Fact, Conclusions of Law and Order (2001)	28, 29
The Mirkwood Group, #1R0780-EB, Findings of Fact, Conclusions of Law and Order (1990)	25

VERMONT STATUTES and MISCELLANEOUS

3 V.S.A. §801	11
---------------------	----

3 V.S.A. §809(a)	11
3 V.S.A. §809(c)	11
3 V.S.A. §812	6, 7, 17, 19
3 V.S.A. §812(a)	5, 17
10 V.S.A. §1424(a)(d)	19
10 V.S.A § 6086(a)(1) through (8) and (9)(K)	19
30 V.S.A. §248	1, 8, 9
30 V.S.A. §248(b)	7
30 V.S.A. §248(b)(1)	12
30 V.S.A. §248(b)(4)	5, 8
30 V.S.A. §248(b)(5)	19, 21
Board Rule 5.407	12

STATEMENT OF THE CASE

This is an appeal from a decision dated August 8, 2007 issued by the Vermont Public Service Board ("Board") granting to UPC Vermont Wind, LLC ("UPC") a Certificate of Public Good ("CPG") to construct and operate sixteen 2.5 MW wind turbines in Sheffield, Vermont.

On October 12, 2006, UPC filed with the Board an amended petition for a CPG under 30 V.S.A. §248 to construct and operate sixteen 2.5 MW turbines in Sheffield, Vermont. The amended petition significantly modified a previous petition submitted by UPC on February 22, 2006 by altering the type, number, and location of its proposed turbines. **PC 8.**

The turbines are proposed to be erected across almost 3 miles on the summit of Granby Mountain and adjacent ridgelines in Sheffield, Vermont; will be approximately 420 feet tall when the rotor blades are in the vertical position, **PC 3**, and will be at elevation ranges from 1,970 to 2,540 feet. **PC 14.** Each turbine will be affixed to a reinforced concrete foundation approximately 20 feet in diameter and 30 feet in depth; or alternatively, 55 feet in width and 10 feet in depth, **PC 16-17**, and will require a step-up transformer that weighs seven tons, contains approximately 500 gallons of oil and will be placed on 10 by 10 foot concrete pads near the base of the turbines. **PC 17.**

The layout of the turbines will require two separate electrical collector lines. One line will run underground between the individual turbines while another line runs overhead from the ridgeline down to the substation. **PC 17-18.** The overhead lines will be carried to the substation on poles reaching 65 feet in height. Each turbine site will require construction of a lay-down area consisting of a 1.8 acre cleared and graded circle around each

turbine. Substantial construction will be required to accommodate the large transport vehicles, cranes, construction equipment and new utility poles. UPC proposes cutting and clearing 79 acres to effectuate construction with 29 of the 79 acres being permanently cleared. These totals include 7.6 miles of on-site roads, at least 16 feet wide, and turbine access roads along the ridgelines that are 36 feet wide. Of the 7.6 miles of road, 5.25 miles of roadway is entirely new. **PC 19.**

The revised turbine layout calls for eight of the 16 turbines' nacelles to be lit at night with synchronized red, pulsating L-864 lights. **PC 18.**

The Town of Sheffield, located in Caledonia County, is covered by and subject to the Regional Plan for the Northeast Kingdom ("Regional Plan") prepared by the Northeastern Vermont Development Association ("NVDA"). The Regional Plan was adopted by NVDA on June 29, 2006 and became effective August 4, 2006, prior to UPC's submission of its amended petition. **PC 262.**

Chapter IV, Volume I of the Regional Plan, entitled "Historical, Cultural and Scenic Resources," states: "[f]uture development should follow traditional development patterns, while providing for economic development opportunities and livable communities." **PC 268** (emphasis supplied). The concept of defining orderly growth and protection of "scenic resources" as preserving "traditional development patterns" is restated and re-emphasized in the Regional Plan's section entitled "Future Land Use and Development Goals." **PC 264.** "Traditional development patterns" are specifically defined in the "Land Use" section entitled "Existing Land Use and Development Trends," and this section rejects development which is not "compatible with existing land uses," or development which does not adhere to the

"traditional development patterns" described above. **PC 272.** The project will have a "substantial regional impact" as that term is defined in the Regional Plan. **PC 275.**

The Regional Plan contains two sections, Volume I, Chapter II and Volume II, Chapter II, which deal directly with the region's energy strategy as a component of orderly growth. Volume I, Chapter II cites 12 "Regional Energy Goals" and 18 energy "Strategies." Nowhere in the Regional Plan's delineated energy goals section is large scale wind energy mentioned as a goal and in fact, the only reference to wind energy is language encouraging development of "small renewables such as wind and solar." **PC 266-67.** Similarly, to assist local agriculture and forestry, the Regional Plan encourages "small-wind."

Volume II, Chapter II explains in detail why neither the Regional Plan's "goals" nor "strategies" include any reference to large scale wind development. Specifically, the Regional Plan states that an initial draft of the Regional Plan supported the construction of commercial wind turbines, but this position was abandoned in the Regional Plan's final version because "the vast majority" of citizens in the Northeast Kingdom were "adamantly opposed" to a Regional Plan supporting construction of industrial-sized wind turbines, such as proposed here. **PC 277.**

Aesthetic experts Kane, Jewell, Brown and Dodson independently found and determined that the project's visibility would be open and direct from a variety of critical viewing locations. **PC 206-09; 211, 214; 250-56; 290.** Moreover, due to the prominent nature of the ridgelines slated for development, the turbines will be highly visible from numerous public and private locations in most directions. **PC 304-a, 304-b.**

All the experts agreed that the site proposed for development is in a rural, forested

landscape characterized as an area where new development will result in adverse aesthetic impacts. *E.g.*, **PC 255, 302**. This landscape was described as sensitive to visual impacts based on its high level of intactness, strong sense of contrast, and sense of order. **PC 303**. The proposed incongruous large scale industrial development on these ridgelines will impact not only the viewsheds of thousands of motorists traveling south on Interstate Route 91, the state's "gateway" interstate, but will also impact approximately 12,000 summer visitors to Crystal Lake State Park and the surrounding lakefront area. **PC 236**. The project will have significant and profound impacts on the hiking trails in the Willoughby Lake area and from the National Natural Landmark Area. **PC 192-94; 314-19**. These significant visual impacts are in addition to the visual impacts which will be incurred by the residents of Sutton, many of whom reside within two to three miles of the project site, and the thousands of vacationers and commuters who utilize Route 5. *E.g.*, **PC 173-78; 179-84; 195-202**.

The turbines are not to scale with any existing similar or observable structures within the viewing locations examined by the aesthetic's experts as part of their evaluations. In fact, there are no structures similar in size to the proposed turbines for which a comparison can even be made within the project's vicinity. From Interstate Route 91 southbound for a driving distance of 3 miles, in Sheffield, at least 12 turbines will be very prominent, eight of which will be visible to motorists at close range. The turbines would represent an incongruous industrial land usage and would be totally out of context with other land uses in the area. **PC 305-08; 312**.

From the Crystal Lake State Park Beach at least 13 turbines will be prominently visible on the ridgeline directly across the lake. A visitor standing on the beach looking

across the lake will have a direct view of these turbines which span almost the entire width of the lake. Of course, for those people boating on the lake, as they approach the east end of the lake the turbines will loom over that portion of the lake at a distance of approximately two miles. Similar views of the UPC proposed turbines would exist on Route 5 in Barton as a motorist travels along the southeastern portion of Crystal Lake. **PC 309-11**, and from Route 5 in Sutton for almost the entire length of the roadway. **PC 198; 281.**

STANDARD OF REVIEW

An administrative agency's conclusions of law, pursuant to 3 V.S.A. §812(a), will not be upheld unless they are fairly and reasonably supported by the decision's findings of fact. *In re Orzel*, 145 Vt. 355, 359, 491 A.2d 1013, 1015 (1985). Further "[w]hether the findings of fact fairly and reasonably support the conclusions of law is for [the Supreme] Court to determine". *In re Rendell-Baker*, 140 Vt. 110, 112-13, 436 A.2d 739, 740-41 (1981).

SUMMARY OF ARGUMENT

In this case, the Board failed to find, as statutorily required, that the project "will result in an economic benefit to the state and its residents." 30 V.S.A. §248(b)(4). The Board specifically found that UPC had failed to negotiate stably priced power contracts with Vermont utilities, and the absence of said contracts would not provide an economic benefit to Vermonters sufficient to offset the project's significant environmental impacts as found by the Board. In lieu of the specific finding required by statute, the Board conditioned the CPG on UPC making "all reasonable efforts" to enter into said contracts with Vermont utilities, and directed UPC to produce copies of such contracts for the Board's review and approval and for the other parties "comment." The Board's failure to find compliance with

the statutory mandate contained in §248(b)(4) prior to issuing a CPG, and its failure to provide the other parties to this proceeding with a meaningful opportunity to present evidence and argument with regard to any future UPC evidentiary submissions with regard to this issue, was error.

The Board further committed error when it concluded that the 2006 Regional Plan did not apply to UPC's amended petition, notwithstanding the fact that UPC's amended application substantially altered the project, was required under the Board's own rules, and the 2006 Regional Plan had become effective prior to UPC filing its amended petition. When the Board did, nevertheless, evaluate the project under the 2006 Regional Plan to determine whether or not the UPC project would unduly interfere with orderly growth in the region, the Board ignored the clear and explicit language of the Regional Plan, which excludes commercial wind turbines from the region. Instead, after specifically finding that commercial wind development is inconsistent with portions of the Regional Plan, and finding that given the size and number of the turbines proposed they will constitute a large scale commercial development and thus be inconsistent with the land uses described as traditional in the rural area where the turbines are proposed, the Board inconsistently and inconceivably found the project would not unduly interfere with orderly growth in the region. The Board's conclusion is not supported by the Board's findings or the Regional Plan itself and is contrary to specific language in the Regional Plan explaining why commercial wind turbines would interfere with the region's orderly growth.

With regard to the Board's conclusions with respect to the project's aesthetic impacts, the Board deviated significantly from the precepts contained at 3 V.S.A. §812 and produced

no findings of fact to support the conclusions drawn with regard to 10 V.S.A. §6086(a)(8). The Board's findings of fact are a combination of either conclusory statements which are themselves unsupported, or recitals of testimony, neither of which meet the criteria of 3 V.S.A. §812, and provide no legal support for the Board's aesthetic impact conclusions.

Finally, the Board committed error in concluding that the proposed project would not have a "undue" adverse effect on aesthetics or scenic and natural beauty under 10 V.S.A. §6086(a)(8) when it failed to apply existing precedent to determine whether or not the proposed project would violate a clear written community standard contained in the Regional Plan; would be shocking or offensive to the average person; and whether UPC had provided sufficient mitigation to reduce the project's aesthetic impacts.

ARGUMENT

A. The Board, in violation of 30 V.S.A. §248(b), failed to make positive findings on all criteria, as statutorily required, prior to granting the CPG.

"Before the Board issues a CPG . . . it *shall* find" that certain criteria are met. 30 V.S.A. §248(b)(emphasis added). Here, rather than make those findings, the Board deferred action on critical issues, but nonetheless granted the CPG making resolution of these outstanding issues conditions subsequent to be met at some future time.¹

¹ The conditions subsequent include: 1) Whether UPC could negotiate an acceptable stably price contract for the sale of the electricity, a condition the Board concluded must be met or the CPG could not be approved, **PC 40; PC 128-129**. 2) Whether an adequate plan to determine damage to water wells from blasting would be developed, **PC 52-53;73**; 3) Whether an adequate plan to address heavy traffic through adjacent towns would be developed, **PC 59**; 4) Whether an acceptable decommissioning plan would be developed, **PC 109**; 5) Whether land leases provided adequate assurance that the leased lands would be accessible for all activities mandated by the permit, **PC 111**; 6) Whether the design details are acceptable. *Id.*

The Board's treatment of a critical issue, namely, whether the project meets the requirements of 30 V.S.A. §248(b)(4), illustrates a serious legal deficiency in its decision. Section 248(b)(4) requires that the Board find UPC has proven that the proposal "will result in an economic benefit to the state and its residents." *Id.* The Board found UPC had failed to carry its burden and failed to meet this critical requirement:

The volatility of the regional power market and the price increases expected in this market lead us to conclude that UPC's proposed indexed contracts with Vermont utilities may not provide an economic benefit to Vermonters sufficient to justify the impacts of the Project.

PC 39-40.² Having found that UPC failed to meet its (b)(4) burden, the Board should have rejected the proposal. Instead, the Board ruled that:

Because stably priced power contracts represent substantial potential economic benefits that have not been included in the Project as currently proposed, and in light of the not insignificant impacts from the construction and operation of the Project, we conclude that the general good will not be promoted unless we condition our approval of the Project on the requirement that UPC make further efforts to enter into stably priced contracts with the Vermont utilities.

PC 40. The Board ruled further that:

we condition the CPG on UPC making all reasonable efforts to enter into diverse, longterm, stably priced power contracts with Vermont utilities. UPC must produce copies of such contracts entered into with Vermont utilities for Board review and approval, prior to commencement of construction.

Id.; **PC 127-129.** Thus, in violation of §248(b), an issue, resolution of which was essential

² There is no question that UPC bears the burden of proof with regard to each of the criteria for a CPG under 30 V.S.A. §248. *In re Halnon*, 174 Vt. 514, 517, 811 A.2d 161, 165 (2002). UPC also "bears the risk of non-persuasion." *In re Quechee Lakes Corp.*, 154 Vt. 543, 553, 580 A.2d 957, 963 (1990).

to establishing compliance with the statutory requirements, was extracted from the hearing and left to resolution after issuance of the CPG.

Reason dictates that, if the project's benefits are too small to offset its many adverse impacts,³ the balance does not improve by merely requiring UPC to "make further efforts" to obtain stably priced contracts. If "further efforts" fail, the same inadequate benefits and substantial adverse impacts remain.

Moreover, by proceeding to resolve the case subject to a condition subsequent, the Board has violated its own precedent without any justification for the departure.

the situations in which the Board relies upon post-certification review should be limited; post-certification review must not be a substitute for submission of adequate evidence in a petitioner's direct case demonstrating consistency of the project with Section 248. The Board, with the affirmation of the Supreme Court, has permitted its use in those limited situations in which it would be financially impractical to require a petitioner to complete full engineering designs before knowing that a project may be approvable.

In re Joint Pet. of Vt. Elec. Power Co., Inc., ("VELCO"), and Citizens Commc'ns Co., d/b/a Citizens Energy Serv., ("Citizens"), for a Certificate of Public Good, Order (7/17/03) PSB#6792 at 37-38 (footnotes omitted). There is neither evidence nor findings to support a conclusion that requiring UPC to secure stably priced power contracts for this project before deciding whether to grant a CPG would have been "financially impractical." *Id.*

Finally, the use of the condition subsequent in a case such as this violates this Court's precedent regarding limited use of such conditions. Specifically, the Court has held that the

³The Board found that ". . . the construction of sixteen turbines on an undeveloped ridgeline would result in significant environmental impacts." PC 3.

Board can reach a decision without considering all relevant issues when setting rates, but only if the issues were not "substantive issues mandated by statute for consideration." *In re Green Mountain Power Corp.*, 147 Vt. 509, 516, 519 A.2d 595, 600 (1986). Whether the proposal is a net benefit to the state and its residents is a "substantive issue, mandated by statute for consideration." 30 V.S.A §248(b)(4).

The Board compounded its legal error by denying the parties the right to fully confront UPC's post-CPG filings, limiting participation to filing comments without benefit of discovery or cross-examination. The unresolved issues are precisely the type of subjective issues, involving UPC's intent and conduct, *i.e.*, whether "reasonable efforts" were made and the contract contained "appropriate terms and conditions, including price stability," that can only fully be tested in an adjudicatory hearing.

This Court addressed the use of conditions subsequent by the Board in *In re Vt. Elec. Power Co., Inc.*, 131 Vt. 427, 434-35, 306 A.2d 687, 691-92 (1973), *In re Petition of Twenty-Four Vt. Utilities* 159 Vt. 339, 358-59, 1306-07 (1992); and *In re Vt. Elec. Power Co., Inc.*, 2006 VT 69, ¶20, 179 Vt. 370, 895 A.2d 226 (2006). In these cases, the common rationale underlying the decision to allow the Board to use a condition subsequent when issuing a CPG was that resolution of the condition subsequent would not impact the initial decision to issue a CPG.

First, the Board has already ruled that the issue to which the condition subsequent is addressed is essential to the CPG. **PC 40**. This ruling is exacerbated in that the only right the Board has agreed to preserve is the right to comment. **PC 129**. Discovery, evidentiary hearings and the right to cross-examine are not provided.

Given the above, RPI's rights to meaningfully participate in this proceeding are guaranteed, in part, by the Vermont Administrative Procedure Act. 3 V.S.A. §801 *et seq.* For example, 3 V.S.A. §809(a) states that "in a contested case, all parties shall be given an opportunity for hearing after reasonable notice." Further, "[o]ppportunity shall be given all parties to respond and present evidence and argument on all issues involved." 3 V.S.A. §809(c).

This Court has said "[i]t is essential to due process that the right to a hearing be granted at a meaningful time and in a meaningful manner." *In re Maher*, 132 Vt. 560, 563, 326 A.2d 142, 144 (1974). "The fairness of the whole procedure must be in accord with due process principles [and] crucial to that determination is whether or not the parties were given an adequate opportunity to prepare and respond to the issues raised in the proceeding." *In re Vermont Health Service Corporation*, 155 Vt. 457, 461, 586 A.2d 1145, 1147-48 (1990) (quoting *In re Green Mountain Power*, 131 Vt. 284, 293, 305 A.2d 571, 577 (1973)) (quotations omitted).

No justification is given, nor could it be given, for the Board's departure from the narrow exceptions created by the Board and approved by this Court for the use of conditions subsequent. There is no basis in the record or finding in the decision why UPC could not and should not have been required to present all necessary evidence to resolve these issues prior to reaching a decision on the CPG. In fact, as the record clearly demonstrates and the Board so found, UPC failed to prove the project would result in an economic benefit to the state and its residents. On this basis alone, the CPG should have been denied.

B. The Board committed error when it concluded that the project would not unduly interfere with orderly growth in the region under 30 V.S.A. §248(b)(1).

Pursuant to 30 V.S.A. §248(b)(1), the Board may not issue a CPG unless it finds that the proposed 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.

Id. The Board failed to obey the legal standards for making these determinations. Additionally, the Board misread and totally misapplied the Regional Plan's specific provisions which conclude that large, commercial-scale wind turbines located on high ridgelines are unacceptable. **PC 26.**

1. The 2006 Regional Plan became effective prior to the date of UPC's Amended Petition and should be utilized in reviewing UPC's application.

The Board found that "UPC, on September 25, 2006, filed rebuttal testimony and exhibits that resulted in a substantially modified proposal for the project. On September 28, 2006, the Board issued an order stating that the changes to the Project required an amendment to the petition." **PC 8.** Board Rule 5.407 provides, in relevant part, that "[f]or the purpose of this subsection, a substantial change is one that has the potential for significant impact with respect to any of the criteria of Section 248(b) or on the general good of the state under Section 248(a)". Since UPC's Amended Petition constituted a substantial change in the project, the Regional Plan in effect on the date of the Amended Petition must be applied. *See Smith v. Winhall Planning Comm'n*, 140 Vt. 178, 181, 436 A.2d 760, 761-

(1981); *In re Ross*, 151 Vt. 54, 56, 557 A.2d 490, 491 (1989); *In re Petition of Dep't. of Public Serv.*, 157 Vt. 120, 127, 595 A.2d 1303, 1307 (1991).

Here, the Board reached the opposite conclusion although it offers no legal reasoning to sustain its reliance on *Smith*. When UPC filed its Amended Petition, the “substantial change” it proposed involved, *inter alia*, changing the turbines’ number, size, and location. Thus, like the initial application in *Ross* that was found to have “inadequate specificity” to create a vested right in the prior law, *Ross*, 151 Vt. at 57-60, the initial Petition here did not create any vested right in UPC given that its subsequent proposal was substantially different from its original proposal. *Cf. In Re Burlington Broadcasters, Inc.*, #4C1004R-EB, Decision dated 11/25/03 at n. 2 (no vested rights where the applicant makes substantial or material changes to the original proposal).

2. The proposed project is substantially inconsistent with the Regional Plan’s provisions defining orderly growth.

Notwithstanding the Board’s erroneous conclusion that the 2006 Regional Plan did not apply, it evaluated UPC’s proposed project under that Plan and stated that “commercial wind development is inconsistent with portions of the Regional Plan,” and “[g]iven the size and number of the turbines proposed, we conclude that they will constitute a large scale commercial development and thus be inconsistent with the land uses described as traditional in a rural area.” **PC 26**. Nevertheless, the Board ignored its own findings and concluded that the project met the requirements of §248(b)(1) since it would “impact only one small part of the region,” and because “the Plan specifically recognizes that commercial scale wind energy ‘needs to be considered as a resource.’” *Id.* There is no evidence in the record or Board

findings to sustain either of these conclusions. There is, however, direct evidence that these conclusions are wrong.

a. Adverse impacts will be substantial.

Orderly growth under the Regional Plan excludes development which is not "compatible with existing land uses," or development which does not adhere to the region's "traditional development patterns" described above. **PC 264, 268, 272, 276.** Moreover, the Regional Plan states that: "[R]ural areas receive very little commercial or industrial development unless it occurs in an established industrial park, in an area specifically designated in the local zoning bylaw, or occurs in an appropriate scale for its rural surroundings." **PC 274.** The proposal at issue is an extensive industrial development covering miles of visually sensitive ridgeline. It is not in an established industrial park, nor an area designated for such development in a local zoning bylaw, and as the Board found, is not at an appropriate scale for its rural surroundings. It is, thus, inconsistent with the Regional Plan's future land use provisions, orderly growth visions, strategies for growth in the region and the aesthetic standards intended to be applied in the rural areas of the region.

Further, the Board's conclusion that even though the proposal is "inconsistent with the land uses described as traditional in a rural area" it is nonetheless only a "small part of the region" and thus, not really inconsistent with the Regional Plan, directly contravenes the Plan's provisions which specify what constitutes a "substantial regional impact." The Regional Plan defines "substantial regional impact" as:

1. Projects that would have substantial and ongoing impact on two or more municipalities, including the host municipality.

2. Projects that would likely have substantial impacts on the resources within the region that is widely used by people outside of the municipality in which it is located.
3. Projects that may affect development patterns to the extent that the character or identity of neighboring municipalities is significantly affected. **PC 275.**

As evidenced by the testimony submitted in this proceeding by the towns of Barton, Westmore, and Kirby, and based upon all the aesthetic's expert's testimony, it is clear that UPC's project will have a substantial and ongoing visual impact on "two or more municipalities," and substantially impact widely used resources of the Region outside the Town of Sheffield, including Crystal Lake State Park and Lake Willoughby Natural Area. **PC 158-172.** Notwithstanding these substantial regional impacts, the Board made no effort to reconcile the Regional Plan's clear definition of a substantial regional impact with its own unsupported assertion that the impacts from sixteen 420 foot high wind turbines stretching over the highest ridgelines in the area for a distance of almost three miles are acceptably small. If this project is too small for the Board to consider it significant, it is difficult to imagine that the Board would find any project that is inconsistent with the Regional Plan's goals sufficiently large to fail §248(b)(1)'s requirements.

b. Large scale commercial wind projects where found by NVDA to be unacceptable under the Regional Plan.

The Board also wrongly concluded that the Regional Plan "specifically recognizes that commercial scale wind energy 'needs to be considered as a resource.'" **PC 26-27.** Nowhere does the Regional Plan endorse the idea of "commercial scale wind energy." Rather, the Regional Plan contains 12 "regional energy goals" and 18 energy "strategies."

Absent from this list of regional energy goals is any mention of commercial scale wind energy development. The only mention of wind is in the “Strategies” section where reference is made to “small renewables, such as wind and solar” and “small-wind” to “assist local agriculture and forestry. **PC 266-267.**

The omission of commercial scale industrial wind turbines from the goals and strategies sections of the Regional Plan's energy provisions was not inadvertent. In preparing the "Energy Strategy" section of the Regional Plan, NVDA states that its initial approach was to support commercial wind tower construction. This position was altered following two public hearings held by NVDA on the proposed Regional Plan in the fall of 2005. With regard to these hearings, the Regional Plan states as follows:

At the hearings, public comment continually criticized the energy section of the Plan, specifically the position on commercial-scale wind energy generation... In both hearings, NVDA received support of the proposed position from a few individuals, but the vast majority was adamantly opposed. . . **PC 272** (emphasis supplied.)

The Board ignored this overwhelming evidence by utilizing out of context phraseology and “writing into” the Regional Plan an imaginary tolerance for large commercial wind projects.

Finally, in total disregard of the Regional Plan, the Board ignored the vital components of a proper evaluation related to commercial scale wind proposals contained in the Regional Plan. **PC 27; 278.** Specifically, notwithstanding the Regional Plan's failure to endorse large scale wind turbines, the Regional Plan recognizes that applications, such as UPC's, will still come before the Board, and be subject to the Board's review. Consequently, the Regional Plan requests that the Board consider five criteria: consistency of the proposal with regional and local plans; weighing negative impacts on all impacted towns; weighing

the visual impact on the essential character of the area; minimizing visual impacts and decommissioning. **PC 278.** With the exception of a preliminary decommissioning plan, UPC's proposal fails to comply with any of the criteria which the Regional Plan requests the Board apply in conducting its review.

C. The Board's decision contravenes 3 V.S.A. §812 in that its conclusions regarding aesthetic impacts are not supported by the Board's findings of fact.

An administrative agency's findings must be supported by evidence in the record, and the conclusions drawn by the administrative agency must be supported by its findings. Stated generally, an administrative agency's conclusions of law in a final decision will be upheld on appeal where they are fairly and reasonably supported by the decision's findings of fact. *The Caledonia Publishing Co. Inc. v. Department of Employment and Training*, 151 Vt. 256, 260, 559 A.2d 678, 681 (1989) (citing *Orzel*, 145 Vt. 355, 359, 491 A.2d 1013, 1015 (1985)); 3 V.S.A. §812(a).⁴ This Court has held, however, that while an administrative agency's findings of fact "will not be set aside unless clearly erroneous, conclusions of law are not so protected." *In re McGrath*, 138 Vt. 77, 82, 411 A.2d 1362, 1365 (1980) (citing *In re Young*, 134 Vt. 569, 570, 367 A.2d 665, 666 (1976) (per curiam)).

Further it is for this Court to determine whether as a matter of law the findings of fact fairly and reasonably support the conclusions of law." *Id.* (citing *Dessureau v. Maurice Memorials, Inc.*, 132 Vt. 350, 353, 318 A.2d 652, 654 (1974)). Moreover, mere recitals of

⁴ 3 V.S.A. §812(a) states in pertinent part as follows: "A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings."

testimony are insufficient to support an administrative agency's conclusions of law. *In Re Buttolph*, 138 Vt. 573, 574-75, 420 A.2d 859, 860-61 (1980).

Here, with regard to the visual aesthetics impacts under 10 V.S.A. 6086(a)(8), the Board set forth 21 findings of fact, identified as findings 171 through 191. **PC 62-64**. The decision, on its face, demonstrates that seven of the 21 findings of fact are not findings, but rather, conclusions of law. *Id.* These conclusions, delineated as "findings," are totally unsupported by any findings otherwise contained in the decision. For example, finding 183 which states "the view of the project from Interstate 91 would not be unduly adverse" is, at best, a conclusion and refers only to a testimonial recital made during the hearings.

Likewise, the Board's conclusion as to whether the Regional Plan constitutes a clear written community standard with regard to aesthetics under the *Quechee* test is totally unsupported by any finding contained in the decision. Rather, the Board's conclusion with regard to this issue wholly fails to identify the section of the Regional Plan it is relying upon, since specific sections of the Regional Plan are not identified in its findings. While there are brief references to language in the Regional Plan set forth in the decision's aesthetic conclusion, there is no finding to contextualize these references to the Regional Plan or relate the references to the Board's conclusion. The absence of findings in the decision and its reliance upon recited testimony constitute "no more than a bare notice of decision." *New England Power Co., v. Town of Barnet*, 134 Vt. 498, 503, 367 A.2d 1363, 1367 (1976).

In *Buttolph*, the Court concluded that a decision of the Water Resource Board was "entered without legal support," where the decision lacked sufficient findings of fact to support the Board's conclusions. *Id.* The Court stated:

It is quite apparent from a review of the findings as adopted and revised that at least two of the enumerated factors . . . were not found upon at all . . . if th[at] contention is accurate, a finding to that effect would seem to be required by the statute This being a contested case under the Administrative Procedure Act, findings of fact are required, supported by an explicit statement of the underlying facts. 3 V.S.A. §812.

Buttolph at 574, 420 A.2d at 860 (1980). Thus, the Court held, "Recitals of evidence cannot support an order . . . [and] [e]ven if the purported findings could be labeled as 'conclusory findings,' a matter of some doubt, they do not meet the criteria of 3 V.S.A. §812." *Id.* (citations omitted).

In the instant matter, the Board's visual aesthetic impact findings, are, minimally, equally as deficient as those found by the Court in *Buttolph*. Accordingly, the Board's conclusions are "without legal support."

D. The Board's conclusions with regard to the project's impacts under 10 V.S.A. §6086(a)(8) are contrary to both Environmental Board and Public Service Board precedent interpreting whether a project's adverse aesthetic impacts are "undue" under the *Quechee* aesthetics test.

30 V.S.A. §248(b)(5) states, in relevant part, that:

(b) before the Public Service Board issues a Certificate of Public Good that is required under subsection (a) of this section, it shall find that the purchase, investment or construction:

(5) with respect to an in-state facility will not have an undue adverse affect on aesthetics, historical 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. §1424(a)(d) and 6086(a)(1)

through (8) and (9)(K).⁵

In determining whether a particular project complies with 10 V.S.A. §6086(a)(8), the Board has adopted the two-part "*Quechee* test" originally established by the Natural Resources Board and its predecessor the Environmental Board. *Halnon*, 174 Vt. at 515, 811 A.2d at 163. The Board must first ask whether the project will have an adverse effect on aesthetics or natural or scenic beauty. *In re Quechee Lakes Corp.*, #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law, and Order dated 11/4/85. If the Board determines that the project creates an adverse effect on aesthetics or natural or scenic beauty, the second question the Board must answer is whether that effect is undue. *Id.*

1. The proposed project creates an adverse aesthetic impact.

Under the *Quechee* test, the primary question to be answered is whether "the proposed project will be in harmony with its surroundings - will it 'fit' the context in which it will be located? *Id.* at 18.

To answer this question, the Board must evaluate a series of subquestions related to the project's compatibility with its surroundings. Specifically, whether the project is located in an urban, rural or recreational area; what land uses presently exist; what is the topography like; what other structures exist in the area; what is the vegetation in the area; and does the area have any particular scenic values? *Id.* at 18. The proposed project is then evaluated compared to its surroundings, including review of the project's scale and mass in context with its surroundings. *Id.*

⁵ 10 V.S.A. 6086(a)(8) reads in relevant part as follows: "[B]efore granting a permit the District Commission shall find that the subdivision or development will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics"

In *Quechee*, the Environmental Board, in performing this analysis, emphasized two factors which were critical to any adverse aesthetics determination, namely: (1) the land uses surrounding a project; and (2) landforms within the proposed project area that are especially sensitive to change such as ridgelines, steep slopes, shorelines and flood plains. *Id.* at 19. Specifically, the Environmental Board stated that special attention should be given to accessing whether the scenic qualities of these sites will be maintained. *Id.*

In this proceeding, the Board concluded that “[n]o party disputes that the project would have an adverse aesthetic impact. The proposed turbines are out of character with the surrounding area.” PC 65.

2. The adverse aesthetic impact is “undue.”

As defined in the *Quechee* test, the second prong of the *Quechee* test requires a determination as to whether or not a project's adverse impact is "undue." Under the *Quechee* test, an adverse impact would be found to be undue, and therefore violate 10 V.S.A. §6086(a)(8) and 30 V.S.A. §248(b)(5), if the Board reaches a positive conclusion with regard to any one of the following: (1) Does the project violate a clear, written community standard intended to preserve the aesthetics or scenic natural beauty of the area; (2) Does the project offend the sensibilities of the average person? Is the project offensive or shocking because it is out of character with its surroundings or significantly diminishes the scenic qualities of the area; (3) Has the applicant failed to take generally available mitigating steps which a reasonably person would take to improve the harmony of the proposed project with its surroundings?

The Board, after first concluding that "the project would have an adverse impact on

the aesthetics of the area due to the introduction of large turbines into a sensitive visual environment," PC 62, concluded that the project's adverse aesthetic impacts would not be "undue" under the second prong of the *Quechee* test. To reach this conclusion, the Board disregarded both prior Environmental Board and Public Service Board precedent. Without any findings to support its conclusions, the Board determined that there was no clear written community standard applicable to this project; that the project would not offend the sensibilities of the average person or be offensive or shocking; and that the applicant had taken generally available mitigating steps which a reasonable person would take to improve the harmony of the proposed project with its surroundings. The Board's conclusions are legally inconsistent with the interpretations of 10 V.S.A. §6086(a)(8) as generally applied by both the Environmental Board and Public Service Board.

a. The proposed project violates a clear written community standard contained in the Regional Plan which is intended to preserve the aesthetics or scenic beauty of the area.

The Board concluded that there was no clear written community standard in the Regional Plan related to aesthetics or scenic and natural beauty with which to measure the project. Nevertheless, even a cursory reading of the Regional Plan when compared to interpretive post-*Quechee* decisions issued by the Environmental Board on this issue demonstrate that the Board's conclusions are erroneous and the project violates the clear written community standard related to aesthetics and scenic and natural beauty contained in the Regional Plan.

The Regional Plan, in its "Land Use" section, contains unambiguous language which is clearly intended to preserve the scenic, natural beauty of the area. The Regional Plan

identifies the location where the UPC project is to be located as in a "rural area" district,⁶ and states that "these areas should receive very little commercial or industrial development, unless it occurs in an established industrial park, in an area specifically designated in the local zoning bylaw, or occurs in an appropriate scale for its rural surroundings." **PC 274-75.** There is no dispute that the summit of Granby Mountain and adjacent ridgelines are neither established industrial parks nor are they areas specifically designated for commercial or industrial development by virtue of a local zoning bylaw. More importantly, the turbines proposed to be built in the Regional Plan's designated rural area district are clearly not at an appropriate scale for their rural surroundings. In fact, the Board made this specific finding when it found that the turbines would be "out of character with the surrounding area." **PC 65.**

The Regional Plan contains clear aesthetic standards on where development should occur. The "Future Land Use and Development Goals" section of the Regional Plan states unequivocally that "traditional development patterns should be maintained and new development should be encouraged to follow these patterns" (emphasis supplied) **PC 264**, and "new development should be compatible with existing land uses and agree with local plans." **PC 268.** Similarly, in the "Historical, Cultural and Scenic Resources" section, the first "goal" is: "Future development should follow traditional development patterns while providing for economic development opportunities and livable communities." **PC 268** (emphasis supplied). This same development standard is repeated in the section entitled

⁶ The rural area district is one of five land use districts specifically designated in the Regional Plan. **PC 273.**

"Future Land Use and Development Goals," which concludes "traditional development patterns should be maintained and new development should be encouraged to follow these patterns." **PC 279** (emphasis supplied). Additionally, the Regional Plan further provides that: "[n]ew development should be compatible with existing land uses and agree with local plans." **PC 264**. This development standard is explained in more detail where "traditional development patterns" are defined as "development in the valleys and along the waterways of the region." **PC 272**. This definition tacitly excludes ridgeline development as a component of the region's "traditional development patterns." Thus, the Regional Plan identifies the location and context or "harmony" of any new development. The proposed UPC wind turbines, sited directly on area ridgelines, would neither follow traditional development patterns in the area nor be compatible with existing land uses, and, thus, this development would violate the clear written community standard intended to preserve the aesthetics of the region as contained in the Regional Plan.

The Environmental Board, in interpreting its decision in *Quechee*, has consistently found language in other regional and municipal plans which is similar to that contained in the Regional Plan, to constitute a clear, written standard with regard to aesthetics. For example, in *In re Times and Seasons, LLC and Hubert K. Benoit*, Land Use Permit Application #3W0839-2-EB, Findings of Fact, Conclusions of Law and Order dated 8/15/05, the Board found with regard to the Two Rivers Ottauquechee Regional Plan ("TRORP") that "[c]ertain types of areas are specifically mentioned as worthy of aesthetic protection: scenic vistas as viewed from a public highway, . . . and "areas of high scenic quality which are noted examples of the dominant characteristics of the area." *Id.* at 30 (citations omitted). In these

areas TRORP suggests that "siting of proposed buildings or structures should be planned as to minimize any blocking or interruption of (such) scenic vistas, . . . and "buildings should be planned so that building form, massing, and other features are compatible with dominant patterns of the areas or site and in ways that reduce the appearance scale of the project on the site,"*Id.* (citations omitted); the Board found this language constitutes an aesthetic standard. *Id.* at 30-31. The Environmental Board further held that the following was a clear written community aesthetic standard:

Where a land development subdivision is proposed in the foreground of a highly scenic location with distant views, design plans should work toward the goal of retaining or enhancing the view. New buildings or structures should be as unobtrusive as reasonable. To accomplish this, structures or buildings are encouraged to be designed so as to be compatible with the traditional pattern, scale, size, form, etc., and not unnecessarily block distant views from highways noted as especially scenic . . . Design of structures which is not excessive and do not unduly compete with the existing natural or cultural focal point is encouraged.

Id. at 48 (emphasis added).

In *The Mirkwood Group*, #1R0780-EB, Findings of Fact, Conclusions of Law and Order (1990), the Environmental Board found development of a radio tower in the town's conservation district violated this aesthetic standard in the zoning ordinance:

The development of [conservation district lands] should be discouraged due to unfavorable slopes, shallow or otherwise fragile soil conditions, and unique scenic value. These areas play a positive role in the ecology of the town and are important sources for the town's water systems . . . Likewise, the town should provide for adequate safeguards to protect higher elevations and streambanks from deterioration or destruction through development.

Id. at 9.

In *In re Steven B. Tanger*, #3W0125-EB, Findings of Fact, Conclusions of Law and Order, dated 5/22/90, the Environmental Board relied upon the town of Hartford Master Plan language intended to “discourage” strip development along its highways since it would create an image contrary to the actual character of the town. *Id.* at 14. The Environmental Board concluded in *Tanger*:

The Town of Hartford Master Plan (1987) contains two clear, written statements concerning strip development. Each of these statements individually demonstrates that the Hartford Community considers strip development to be antithetical to preserving views and the image of the Town. The plan specifically recommends discouraging further strip development along highways. Accordingly, the Board concludes that the proposed project violates clear, written community standards.

Id.

In *In re Leonard R. Lemieux*, #3R0717-EB, Findings of Fact, Conclusions of Law, and Order (1995), at pages 4-6, the Environmental Board found that the following language constituted a clear, written community standard intended to preserve the aesthetics of the town:

17. The Town Plan provides:

One of Chelsea's most important assets is the way the Town looks . . . landscape quality is an elusive but important consideration in land-use decision-making. There are many benefits to be derived from identifying, retaining and improving key elements of the Town's visual quality:

A high quality town landscape is one that can be viewed and appreciated by both residents and visitors;

Retaining a high-quality landscape encourages community pride. Chelsea's desire for thoughtful use of its land is closely linked to the high quality of the Town's landscape;

18. It is the policy of the Town Plan that "Chelsea should actively protect its aesthetic heritage and its most important views." It is a recommendation of the Town Plan that the Town promote conservation and preservation of Chelsea's wooded hilltops and scenic resources.

Based upon the language set forth above at Findings 17 and 18, the Environmental Board concluded in *Lemieux*:

The protection of Chelsea's aesthetic heritage and scenic vistas is a dominant policy of the Town Plan. The Town Plan promotes the protection of Chelsea's aesthetic heritage and important views for reasons beyond mere aesthetics. The Town Plan links economic development and tourism to the retention of a high quality landscape.

Id. at 6.

The aesthetic language contained in the town and regional plans identified above, as well as the language contained in *Southwestern Vermont Health Care Corporation*, #8B0537-EB, Findings of Fact, Conclusions of Law and Order (2001); *In re Gary Savoie*, #2W0991-EB(Reconsideration)(1997); and *In re Peter S. Tsimortos*, #2W1127-EB (2003), are, like the language in the Regional Plan, statements of goals and policies, not regulatory prohibitions. Nonetheless, as with the Regional Plan here, those statements of goals and policies, when read as a whole, were found to contain aesthetics standards with regard to what can be developed, where it can be developed, the extent of such development, and, if development occurs, how the development must fit into the existing uses in the area. In ignoring equally clear, if not clearer language in the Regional Plan, the Board departed from well-recognized precedent and, without legal justification, failed to find that the Regional Plan contains a clear written community aesthetic standard which is violated by this commercial scale wind proposal in this rural setting.

b. The proposed project will be aesthetically shocking and offensive.

A development will also be found to create an "undue" adverse aesthetic impact under the second prong of the *Quechee* test if it is found to be shocking and offensive to the average person. The Environmental Board has consistently found that a project which is "so out of character with its surroundings that it significantly diminishes the aesthetic qualities of the area" will be deemed to be shocking, offensive, and undue. *See, e.g., Southwestern Vermont Healthcare Corporation, supra; North Shore Development, Inc., #4C0626-5-EB* Findings of Fact, Conclusions of Law, and Order, dated 12/29/88; *Nile and Julie Duppsstadt, Land Use Permit Application #4C1013-EB (corrected), Findings of Fact, Conclusions of Law, and Order, dated 4/30/99; Robert B. and Deborah J. McShinsky, #3W0530-EB, Findings of Fact, Conclusions of Law, and Order, dated 4/21/88, (affirmed); In re Robert B. and Deborah J. McShinsky* 153 Vt. 586, 572 A.2d 916 (1990). A sampling of Environmental Board decisions underscores the meaning and purpose of this portion of the *Quechee* test. For example, in *McShinsky, supra*, the Board held as follows:

The Board believes that a 20 vehicle RV campground located in a four acre open field on the banks of the White River, in a scenic area extensively used by the public for recreation, would be so out of character with its surroundings as to be shocking to the sensibilities of the average person. The massive size and high density of brightly colored RVs would significantly diminish the scenic qualities of the area.

Id. at 7 (emphasis supplied).

In its decision in *North Shore*, the Environmental Board held that "the mid-rise, as proposed, offends its sensibilities because the visual effect of the building is so totally out of context when viewed from the lake. *North Shore*, at 12. (emphasis supplied).

As the Board's own findings and the expert testimony demonstrates, the proposed industrial scale, steel turbines are not merely out of character, but are grossly out of character with the scenic natural surroundings of Granby Mountain and its adjacent ridgelines, and would significantly diminish the aesthetic qualities of the area, both for the recreational users of the Willoughby State Park and Willoughby National Natural Landmark Area and the thousands of long duration viewers either engaging in recreational activities on Crystal Lake or residing in homes adjacent to the roadways to the east of the project site or traveling on Interstate Route 91 or Route 5.

The magnitude of the impact of these huge turbines on this rural setting is evident from the photo-simulations and the testimony of the aesthetic experts offered during the hearings. William Jewell, an aesthetics expert testifying on behalf of Sutton, analyzed the project and concluded that the project would be totally out of harmony with the surrounding lands. **PC 292-a, 293.** Mark Kane, an aesthetics expert testifying on behalf of the Department of Public Service, determined that the UPC proposed project would result in an adverse impact because: 1) the landscape context is sensitive to impacts; 2) the introduction of wind turbines at the scale and mass proposed is incompatible with the general natural condition of the landscape; 3) the presence of moving structures with day and night lighting would be unique and out of character against the largely static and intact conditions that presently exist; and 4) the project would be visible from a variety of vantage points, including some with cultural and recreational importance. **PC 302-303.**

Harry Dodson, an aesthetics expert testifying on behalf of RPI, found, in part:

. . . our studies clearly show that the turbines will be highly visible

from a wide range of important locations in the area. It is difficult, if not impossible, for structures this tall and massive, with large moving components and flashing night beacons, to be in harmony with their rural surroundings and to 'fit' in the context of their setting. For this reason, it is difficult to conceive how one could consider the facility's impact not to be adverse under the pertinent *Quechee* analysis.

PC 211.

Robert Brown, an aesthetics expert also testifying on behalf of RPI, similarly concluded, based upon his extensive analysis, that the project would have an adverse aesthetic impact.

In rendering his conclusion, Mr. Brown stated as follows:

Not only would the turbines be out of scale, they would be a repeating, modern form wholly out of context. They would dwarf the surrounding forestland so that it would appear as a lawn rather than a forest and the hills would appear as insignificant as the rough along a fairway, they are a repeating, modern form like nothing else in the NEK. The NEK is not slick, not modern, not rich, not high tech. It is a place without brick or glass dipped steel office buildings and similar trappings found in more urbanized America. These sleek, modern, high tech turbines are proposed for inclusion in a community of clapboard farmhouses, log cabins, trailer homes and weathered barns in a landscape of rugged topography covered with spruce and fir trees, maple, ash and cherry. They certainly are not compatible with what already exists and would, in my opinion, diminish the rugged and wild landscape by instantly 'taming' it with their sheer scale.

PC 204.

UPC's proposed industrial turbines are, in terms of mass, scale and land use, so out of context with their proposed rural natural surroundings that they will not only diminish but will fundamentally alter the surroundings and the public's aesthetic perception of the area.

Notwithstanding the clear meaning and intent of this subcriteria encompassed in the *Quechee* test, the Board found that the proposed project would not be shocking or offensive based upon the following rationale:

. . . A large number of the public comments received in this docket focused on the fact that the project would impair the aesthetic qualities of the ridgelines.⁷ We recognize that scenic qualities of the area are important to its residents and there will always be some resistance to any change in the landscape. However, the *Quechee* test does not guaranty that the aesthetics qualities of an area will not change. The majority of the views of the project are from a distance such that the size would not be overwhelming. Viewed from such distances the average person would not find the scale of the project shocking or offensive. **PC 69** (emphasis supplied) (footnote omitted).

There is no qualitative subtest in the *Quechee* decision which requires that a project be deemed shocking or offensive from all or even a majority of viewsheds. The fact that the Board concluded that from a "majority" of the views of the project the viewer would be too distant for the project to be overwhelming creates the inescapable inference that from many other important viewpoints the project would be shocking or offensive.

The question as articulated by the Environmental Board in interpreting this section of the *Quechee* test is not whether the project is offensive from a majority of viewing locations but whether or not sixteen 420-foot tall wind turbines spread over miles of ridgeline in an otherwise rural area "is so out of character with its surroundings that it significantly diminishes the aesthetic qualities of the area and therefore causes an adverse effect which is undue." *In re Times and Seasons, LLC, supra*, at 31. By UPC's own admissions and exhibits, the views from Interstate 91 will extend for miles for the southbound traveler at distances as close as 2.5 miles. In this viewshed the turbines will be prominent, mid-ground features in an otherwise undisturbed rural landscape. **PC 305-08, 312**. Similarly, the views from Route

⁷ In fact as the record discloses the citizens who appeared before the Regional Planning Commission were adamantly opposed to commercial wind turbine development as were the citizens who appeared before the board in its public meeting sessions.

5 will be as close as 2.6 miles from the turbines, and the turbines will be visible from numerous locations on this heavily used roadway as it traverses the entire town of Sutton.

PC 281. With regard to Crystal Lake State Park, the view of the turbines will be uninterrupted and will be the focal point of the view from the Crystal Lake State Park Beach.

PC 309-11. These views will be at a distance of a little over 5 miles from the beach and approximately 2 miles from recreational boaters on the lake. The views are wholly inconsistent not only with the viewers expectation of the scenic natural recreational experience, but also with one of the clear purposes for which the park was originally created.

The park has an estimated total annual attendance of approximately 12,000 visitors per year.

PC 236.⁸

c. There has been essentially no mitigation offered by UPC of these adverse impacts.

Finally, with regard to whether or not UPC took generally available mitigating steps which a reasonable person would take to improve the harmony of the project with its surroundings, the Board first concluded that it was not possible to provide screening for a 420-foot wind turbine and consequently mitigate the visibility of the project and then found that UPC had taken some mitigating steps, including painting the proposed turbine colors so that they would blend more easily with the sky and siting the project near an existing transmission line. **PC 68.** The Board's acceptance of these minimal mitigation efforts is contrary to the *Quechee* test's directives and to the Board's prior decisions, CPG NM-25

⁸ The Department of Historic Preservation testified the views of the turbines from Crystal Lake State Park Beach would be "very intrusive" and that the disruption of the viewshed by the project will result in an undue adverse effect. PC 235-36.

(2001) (*affirmed*) *Halnon*, 174 Vt. 514, 517 (2002) and *In re Petition of Richard Pollack*, CPG NM-52 (2001).

In *Halnon*, the Board rejected mitigation efforts consisting of an applicant's mere painting of a wind turbine as acceptable mitigation and rejected the application under the second prong of the *Quechee* test where the applicant failed to offer information which would allow the Board to evaluate alternative turbine locations. The Board held at page 25 of its decision that the applicant had the burden of proof under the *Quechee* test to show compliance with its provisions, and had neither offered significant reasons why the turbine could not be relocated, nor an assessment of the reasonable range of alternative sites with detailed comparisons of problems and costs. Similarly, in this case, UPC has offered no rationale why alternative sites, placement of the turbines at lower elevations, or shorter turbines would not mitigate the visual impacts found to exist by the Board. There is no evidence in the record, nor did UPC offer any alternative sites or turbine models which would reduce the visual impact of its proposal, and, in fact, the Board made no findings at all with regard to this issue. Absent such evidence, it was error for the Board to find UPC had taken generally available mitigating steps to improve the harmony of the proposed wind turbines with their surroundings.

CONCLUSION

For the reasons stated, the decision of the Public Service Board should be reversed and UPC's amended application for a CPG to construct and operate sixteen 2.5 MW wind turbines in Sheffield, Vermont should be denied.