

February 22, 2009

Thomas S. Burack, Chairman

Site Evaluation Committee

New Hampshire Department of Environmental Services

29 Hazen Road, Box 95

Concord, New Hampshire 03301-0095

RE: Application of Granite Reliable Power, LLC

Docket No. 2008-04

Dear Mr. Burack:

Enclosed for filing with the New Hampshire Site Evaluation Committee with reference to the above-captioned matter, please find one original and nine copies of an objection to the Applicant's contested motion to strike prefiled testimony of Will Staats and Jillian Kelly on behalf of the New Hampshire Fish and Game Department.

Thank you for your attention to this matter.

Very truly yours,

Kathlyn J. Keene

Kathlyn J. Keene

Intervenor

(603) 586-7052

Enclosure - Objection

cc: Service List

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

Docket No. 2008-04

**RE: APPLICATION OF GRANITE RELIABLE POWER, LLC
FOR A CERTIFICATE OF SITE AND FACILITY
TO CONSTRUCT AND OPERATE
THE GRANITE RELIABLE POWER WINDPARK**

**KATHLYN KEENE, INTERVENOR'S OBJECTION TO THE APPLICANT'S CONTESTED
MOTION TO STRIKE PREFILED TESTIMONY**

**OF WILL STAATS AND JILLIAN KELLY ON BEHALF OF
THE NEW HAMPSHIRE FISH AND GAME DEPARTMENT**

NOW COMES Kathlyn Keene, ("the Intervenor"), objecting to the motion filed by Granite Reliable Power, LLC, by its attorney, Susan S. Geiger, a contested motion to strike the prefiled testimony of Will Staats and Jillian Kelly submitted on behalf of the New Hampshire Fish and Game. In objection of this Motion, the Intervenor states as follows:

1.) On December 19, 2008, the New Hampshire Fish and Game Department ("Fish and Game") submitted the joint prefiled testimony of Will Staats and Jillian Kelly ("prefiled testimony") in the above-captioned matter. The cover letter to the prefiled testimony asserts that the SEC "has an independent responsibility to comply with RSA-212-A:9, III- Conservation Programs". The cover letter also states that Fish and Game "expects that the enclosed testimony will be vital in the Subcommittee's determination of the effect of this proposal on endangered and threatened species in the state, pursuant to RSA Chapter 212-A. Letter of Carol B. Henderson to Thomas S.

Burack, Chairman, December 19, 2008.

2.) The applicant asserts that the above-referenced prefiled testimony is improper for various procedural and substantive reasons discussed below:

A. Under RSA 162-H:6-a, VI, only those agencies "with jurisdiction" are authorized to provide testimony and evidence to the Site Evaluation Committee ("SEC") in adjudicative hearings relating to renewable energy facilities. While the term "agencies with jurisdiction" is not defined in RSA 162-H, the phrase "state agencies having jurisdiction, under state or federal law, to regulate the construction or operation of the proposed facility" appears twice in RSA 162-H:6-a, I. Thus, it is logical to conclude that the subsequent reference to "agencies with jurisdiction" appearing in RSA 162-H:6-a, VII refers back to the earlier phrase "state agencies having jurisdiction" under state or federal law, to regulate the construction or operation of the proposed facility..." That interpretation is reasonable given that these are the agencies that are required to receive copies of the SEC application, as well as testimony, exhibits and sufficient information to satisfy their individual application requirements, including completed application forms. See RSA 162-H:a,I. Absent the SEC process, these are the agencies (e.g. Department of Environmental Services) that would be issuing individual permits pursuant to their particular permitting processes. As the SEC is aware, these agencies (i.e. "agencies with jurisdiction") and their representatives do not submit prefiled testimony with the Committee. Rather, they provide reports to the SEC. See RSA 162-H:6-a, V and VI. In fact, such final reports were filed by the Department of Environmental Services on February 10, 2009. The Fish and Game Department, by contrast, has no jurisdiction,

under state or federal law, to regulate the construction or operation of the renewal energy facility. Therefore, because it lacks status as an agency "with jurisdiction", Fish and Game is not authorized to provide testimony or evidence in connection with the adjudication of GRP's application.

The applicant's attorney asserts that Chapter 162-H:6 uses the phrase "agencies with jurisdiction" is not defined in Chapter 162-H and goes on to self interpret what this phrase might mean. Her assertions are based on the phrase appearing twice in Chapter 162-H:6. She also asserts that based on this interpretation the Fish and Game Department would not qualify as a participating agency or department and is not qualified to submit prefiled testimony.

To retort the applicant attorney's assertions:

I.) Under Chapter 162-H:3 -Site Evaluation Committee states the following:

The site evaluation committee shall consist of the commissioner of the department of environmental services or assistant commissioner as designee, the director of the division of water, the commissioner of the department of resources and economic development or the director of the division of economic development as designee, the commissioner of the department of health and human services or one of the 2 most senior administrators within the department responsible for the management of public health services as designee, THE EXECUTIVE DIRECTOR OF THE FISH AND GAME DEPARTMENT , the director of the office of energy and planning or deputy director as designee, the director of the division of parks and recreation, the director of the division of forests and lands, the director of the division of air resources, the commissioners of the public utilities commission, and a staff

engineer designated by the commissioners of the public utilities commission. The commissioner of the department of environmental services shall be chairperson of the committee, and the chairperson of the public utilities commission shall be vice-chairperson. The legislative body recognizes the importance of the Fish and Game department in this role as an agency with the responsibility for the conservation, protection and management of wildlife populations and the habitats within the state of New Hampshire by including this department as part of the Committee to review and decide on renewable energy facilities . Therefore, the applicant's assertion that the intent of Chapter 162-H would not include this department is absurd. There is nothing in Chapter 162-H that limits any department, agency or parties to file prefiled testimony. If the presiding officer was of the mind to believe this, he would have stricken the prefiled testimony when it was submitted on December 19, 2008. The applicant's attorney could have filed an objection to the submission of this prefiled testimony back in December of 2008 . The fact that the Applicant's Attorney ignored this until February 12, 2009 shows that this was not an important issue to be raised to the Committee and is of little importance now.

II.) The parties involved in this application process have used the Fish and Game department's prefiled testimony to form opinions and actually has formed the basis for prefiled testimonies. To try to strike this testimony now, late in the application process, would only cause immense hardship for all the work that has been done by individuals and organizations involved.

III.) Should the prefiled testimony remain, it would be wrong for the Fish and Game department to file supplemental testimony to rebut what they have reported

in their original testimony.

Applicant's attorney also asserts the following:

-

B. The submission of Fish and Game's prefiled testimony and filing of its counsel's appearance pursuant to New Hampshire Administrative Rule 202.04 (which governs a party's or a party's representative's appearance) evidence Fish and Game's intent to participate in these proceedings as a party and in an advocacy/adversarial role. Such participation is impermissible as it is totally inconsistent with the statutory scheme of RSA 162-H as well as the Committee rules which state that Staff "shall participate in adjudicative proceedings on an advisory basis". NH Admin. Rule Site 202.05 (a).

Significantly, no employees of any other state agencies have submitted prefiled testimony in the instant proceedings, presumable because they are adhering to the provisions of RSA 162-H, the above-referenced rule and long standing agency practice of providing reports to the Committee.

-

To retort the applicant attorney's assertions:

I.) The Applicant's attorney is working on the assumption of "her interpretation" of the Committee's Administrative rules and the interpretation of Chapter 162-H. The declaration of purpose of Chapter 162-H was for the legislative body to recognize the importance of sites for energy facilities would have a significant impact on the welfare of the population, the economic growth of the state and the environment of the state..... It goes on to point out.....that a procedure for enforcement of compliance in the planning, siting, construction and operation of energy facilities.....and continues by saying the legislature recognizes that

the selection of sites and the routing of associated transmission lines will have a significant impact upon the welfare of the population, the location and growth of industry, and the use of the natural resources of the state.

II.) This is only the "second" application in New Hampshire to be filed for an industrial wind facility. The project is immense and encompasses a large area of environmentally sensitive acreage's in the northern reaches of New Hampshire. Because of its immense size and its unique environmental issues, it probably seems obscure that the Fish and Game department would file prefiled testimony. But when you get into the construction and disturbance of an unfragmented wilderness area, you realize that it is a must that the Fish and Game have filed their testimony. After reading the testimony you are drawn to the conclusion of its great importance for contributing to factors that should not go unnoticed by the SEC making this enormous decision. I again will reiterate that the Applicant's attorney has made a last ditch effort to file a motion to strike this testimony for mundane reasons. To do so will harm the integrity of the application process for the reasons that I have stated previously.

-

Applicant's attorney also asserts the following:

C. As explained above, the Fish and Game does not have standing to present testimony or evidence in this case. Thus, if it wishes to participate as a party to these proceedings, it must request the Committee's permission to intervene under RSA 541--A:32. However, Fish and Game has not sought permission from the Committee for its late-filed appearance or its intervention in the above captioned proceeding. The Committee's Order and Notice of Public Information Hearing, Site Inspection Visit and Pre-Hearing Conference dated

August 27, 2008 established September 18, 2008 as the deadline for motions to intervene. Three months later, on December 19, 2008, Fish and Game submitted its prefiled testimony, and on December 22, 2008, Fish and Game's attorney filed an Appearance "as counsel for the New Hampshire State Agency of Fish and Game Department". The fact that Fish and Game is a state agency does not able it to ignore, violate or otherwise avoid the rules and statutes that apply to the SEC process to the orders governing the schedule of the instant docket.

To retort the applicant attorney's assertions:

The Fish and Game department filed its prefiled testimony on December 19, 2008 of which not one party to this application filed an objection to the presiding officer. On December 22, 2008, Evan Mullholland, attorney for Fish and Game filed an appearance with the SEC. Again, there was no objection from any parties in this process. Including, but not limited to , the applicant and his attorneys. Two months later, along comes Applicant's attorney, Susan Geiger, filing a motion to strike Will Staats and Jillian Kelly's prefiled testimony. I think to bother the SEC with this mundane issue at this point in the application process is a deliberate inconvenience to all parties involved. It is far too late for this motion. Mr. Douglas Patch, Counsel for the Applicant and colleague of Susan Geiger was a vice chair of the SEC prior to private practice. Mr. Patch should know better than to bring this issue up at this point. He is well aware of the procedures and should have done so back in December.

-
Applicant's attorney also asserts the following:

D. Fish and Game's reliance on RSA 212-A:9, III, as authority for its ability to submit

prefiled testimony in this proceeding is misplaced. Fish and Game asserts that it is authorized to review this project and offer comments pursuant to RSA 212-A:9. Prefiled Testimony of Will Staats and Jillian Kelly on behalf of the New Hampshire Fish and Game Department, p.5, lines 10-11. RSA 212-A:9, III, provides, in pertinent part as follows:

All other state departments and agencies, to the extent, consistent with their authorities and responsibilities, shall assist and cooperate with the executive director in furtherance of the purpose of this chapter for the conservation of endangered or threatened species. They shall take such action as is reasonable and prudent to insure existence of such species or result in the destruction or modification of habitat of such species which is determined by the executive director to be critical.

To the extent that Fish and Game relies on RSA 212-A:9, III for the proposition that the SEC must consider the prefiled testimony regarding the project's effect on endangered species, that argument must fail in light of RSA 212-A:13, II which provides that none of the provisions of RSA 212-A, nor any rule promulgated under that chapter, shall "in any way interfere" with the siting or construction of "any energy facility as defined in RSA 162-H:2." There mere filing of Fish and Game's prefiled testimony constitutes interference's of the type this is prohibited by RSA 212-A:13, III. In addition to that procedural interference, the substance of Fish and Game's prefiled testimony constitutes interference within the meaning of RSA 212-A:13, III. Because Fish and Game has prefiled testimony pursuant to its perceived authority under RSA 212-A, and because that testimony is adverse to (and therefore interferes with) GRP's position, interests and plans

to construct an energy facility as defined in RSA 162-H:2" (i.e. a renewable energy facility defined in RSA 162-H, XII), the prefiled testimony is clearly prohibited by RSA 212-A:13, III and therefore must be stricken from the record of this proceeding.

In addition, notwithstanding its invocation of RSA 212-A:9, III, Fish and Game's testimony admits that "critical habitat has not been defined or designated for any species in New Hampshire." Prefiled Testimony of Will Staats and Jillian Kelly on behalf of the New Hampshire Fish and Game Department, p.5, lines 17-18. Thus, to the extent that Fish and Game asserts that the SEC must consider the prefiled testimony regarding the GRP project's effect on certain wildlife habitat, that argument is totally undercut by Fish and Game's own admission that the executive director has not made a determination under RSA 212-A:9, III that such habitat is "critical".

3. Under RSA 541-A:33, the presiding officer may exclude irrelevant and immaterial evidence from the record of an administrative proceeding. The information contained in Fish and Game's prefiled testimony is irrelevant as a matter of law given the provisions of RSA 212-A:13, III. Accordingly, it should be stricken from the record in this case.

4. Pursuant to NH Admin. Rule Site 202.14 (d) and (e), on February 11, 2009, Attorney Douglas Patch forwarded a draft copy of this motion by electronic mail to the parties in this proceeding in an effort to obtain concurrence with the relief sought within. The following responses to the request for concurrence were received prior to the filing of the motion: Ms. Lisa Linowes, on behalf of Industrial Wind Action Group, indicated that she does not support the motion as presented; Counsel for the Public, Senior Assistant Attorney General Peter Roth indicated that he does not concur with the motion;

Assistant Attorney General Evan Mullholland, on behalf of the New Hampshire Fish and Game Department, indicated that he did not consent and will be filing an objection to the motion; Intervenor Kathlyn Keene indicated that she does not concur with the motion; and Dr. David Publicover, on behalf of the Appalachian Mountain Club indicated that he does not concur with the motion. The remaining parties did not respond to Attorney Patch's electronic mail message prior to the filing of the within motion.

To retort the applicant attorney's assertions:

I.) The applicant's attorney asserts that under Chapter 212-A:13, III, the Fish and Game's prefiled testimony is irrelevant to these proceedings. Section 13, III of Chapter 212-A conflicts with Chapter 162-H:1 recognizes the need to protect the environment. The fact the Department of Fish and Game is part of the Committee that will make a decision on this application acknowledges the importance of their input.

II.) The Applicant's attorney points out that the presiding officer has the authority under RSA 541-A:33 to exclude irrelevant and immaterial evidence from a record of an administrative proceeding. Fish and Games prefiled testimony does discuss endangered species, however, also includes the habitat. The habitat in this area is a refuge for the endangered species and provides environmental value as well. Without proper vernal pools and certain tree growth, such as spruce fir and the biodiversity of the area, nothing would exist, including the water shed area. Therefore a ruling would be necessary for the conflicts that exist in Chapter 162-H:1 and Chapter 212-A:13, III before Applicant's attorney can assert such allegations.

WHEREFORE, in view of the foregoing objection, the Intervenor respectfully requests that this honorable Committee:

- A. Deny the motion to strike from the record of this proceeding the prefiled testimony of Will Staats and Jillian Kelly on Behalf of the New Hampshire Fish and Game Department.**
- B. Allow the New Hampshire Fish and Game Department or any of its employees or representatives to present testimony or evidence at the adjudicative hearings, and**
- C. Order such further relief as it its deemed appropriate.**

Respectfully submitted,

Kathlyn J. Keene, Intervenor

Dated: February 22, 2009

cc: Service List (via electronic mail)