

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE
DOCKET NO. 2008-04**

Application of Granite Reliable Power, LLC for a Certificate of Site and Facility

**Order Denying Motions for Rehearing Filed by the Applicant,
Counsel for the Public and Industrial Wind Action Group, and
Order Granting, In Part, and Denying, In Part, Motion for
Rehearing Filed by New Hampshire Fish and Game**

Issued November 9, 2009

I. Procedural History

On July 15, 2009, the Subcommittee of the Site Evaluation Committee issued its Decision granting a Certificate of Site and Facility (Certificate) to Granite Reliable Power, LLC, a subsidiary of Noble Environmental Power (collectively referred to as “Applicant”). The Decision was issued after the Subcommittee held adjudicatory hearings on nine separate days, hearing from twenty-two witnesses and considering in excess of 120 exhibits. In addition to the adjudicatory proceedings, the Subcommittee held two public hearings in Coos County and visited the proposed site. The Subcommittee’s final decision was the result of a rigorous review of the Application, the testimony, the exhibits and the arguments of all parties.

On August 14, 2009, the Applicant, Counsel for the Public, the Industrial Wind Action Group (IWAG) and New Hampshire Fish and Game (NHF&G) each filed Motions for Rehearing, Reconsideration and/or Clarification or Amendment with the Subcommittee. On September 28, 2009, the Site Evaluation Committee held a hearing at which time the Motions were considered.

II. Standard of Review

Any order or decision of the Committee may be the subject of a motion for rehearing or of an appeal in the manner prescribed by statute. RSA 541:2. A request for rehearing may be requested by “any party to the action or proceeding before the commission, or any person directly affected thereby.” RSA 541:3. The motion for rehearing must specify “all grounds for rehearing, and the commission may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion.” *Id.* Any such motion for rehearing “shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable.” RSA 541:4.

“The purpose of a rehearing is to direct attention to matters said to have been overlooked or mistakenly conceived in the original decision, and thus invites reconsideration upon the record which that decision rested.” Dumais v. State of New Hampshire Personnel Commission, 118 N.H. 309, 311 (1978) (internal quotation and citation omitted). A rehearing may be denied when

the Commission either finds, no “good reason” or good cause. The Commission may deny a rehearing when the entity requesting the rehearing fails to explain why the “new evidence” was not presented at the original hearing. See, O’Loughlin v. New Hampshire Personnel Commission, 117 N.H. 999, 1004 (1977); Appeal of Gas Service, Inc., 121 N.H. 797, 801 (1981).

III. Discussion

A. Applicant’s Contested Motion for Rehearing

On August 14, 2009, the Applicant filed a Motion for Rehearing, Reconsideration and/or Clarification. Through its Motion, the Applicant requested clarification from the Subcommittee regarding whether the language related to the Applicant transferring the assets “by sale or other method to any person or entity without the prior written approval of the Subcommittee,” also applied to certificates of collateral security which the Applicant may need to obtain for financing of the project. Contested Motion for Rehearing, Reconsideration and/or Clarification, ¶ 3 and 4. The Applicant further argued that the Condition reserving the right of the Subcommittee to “take appropriate action” if it finds that an unreasonable adverse impact on any species is occurring, after providing notice and an opportunity to be heard, will prevent the Applicant from obtaining financing for the project and therefore should be amended. Contested Motion for Rehearing, Reconsideration and/or Clarification, ¶ 5 and 6.

Nothing in the Decision indicates that it was the intention of the Subcommittee to require prior written approval of certificates of collateral security. In fact, that provision of the Certificate does not prohibit the granting of a security interest by certificates of collateral, mortgage or any other means, but pertains only to ownership.

The Subcommittee has appropriately designated the authority to monitor the project, in particular, that portion of the Project that impacts the natural environment, to the NHF&G pursuant to RSA 162-H:4, III. The authority to enforce the certificate remains with the Subcommittee and not NHF&G pursuant to RSA 162-H:4, III. The Subcommittee heard extensive evidence concerning the potential effects of the project on the natural environment and determined that monitoring was required. Monitoring would be a wasteful endeavor without a means to resolve issues that arise – particularly issues that affect a basic obligation of the Subcommittee to balance the need for energy against the effect on the environment. See, RSA 162-H:1. If there is an adverse impact on any species, the appropriate authority to resolve the issue is the Subcommittee, not NHF&G. The Subcommittee is bound by its statutory mandate in this regard.

For the Reasons stated above, the Applicant's Motion for Rehearing is Denied.

B. Motion for Rehearing by Counsel for the Public

On August 14, 2009, Counsel for the Public filed a Motion requesting a rehearing through which Counsel for the Public argued that the Applicant did not demonstrate adequate financial capability. Counsel for the Public raised concerns regarding the source of funds, the amounts,

and the terms of funding. Motion of Counsel for the Public for Rehearing, ¶ 10. Counsel for the Public claimed that this leaves the public without assurance that the project will be constructed and operated in continuing compliance with the certificate. *Id.* Counsel for the Public suggests that the only way to have such assurance is to compare “the budget for the project and the financial resources at hand to measure the likelihood of success or failure.” Motion of Counsel for the Public for Rehearing, ¶ 11. Counsel for the Public suggests that the Committee should “reconsider and revise the Decision to make an express ruling of law that ‘financial capability’ means that the Applicant must demonstrate that it has actual capital or credit to construct and operate the proposed project on hand or committed.” Motion of Counsel for the Public for Rehearing, ¶ 14. The Applicant filed an objection to the Motion of Counsel for the Public.

Pursuant to the Certificate, the Applicant:

shall not commence construction as “commencement of construction” is defined in NH RSA 162-H:2,III, until such time as construction financing is completely in place. The Applicant shall notify the Subcommittee when construction financing is in place and shall generally advise the Subcommittee of the name and address of the lender or lenders providing such financing. Nothing in this condition or in this Order shall prohibit the owners of the land on which the Project is to be constructed from continuing with logging activities in areas below 2700 feet in elevation. Certificate pp. 2-3

In devising this condition, the Subcommittee relied upon testimony submitted by the Applicant in finding that the Applicant intended to rely upon traditional project financing to fund the Project. Petitioner’s Exhibits 5 and 6. Projects considered by the Site Evaluation Committee in the past have often relied, at least in part, on project financing. The Applicant expressed confidence in its ability to secure financing and agreed to the condition that construction not begin until such financing is secured. In addition, the Applicant demonstrated, by its past experience in New York, that it has the ability to obtain financing. Petitioner’s Exhibits 5 and 6. The Applicant also presented evidence and testimony about its potential eligibility for the Investment Tax Credit and the American Rehabilitation and Recovery Act could result in a grant of up to thirty percent of the construction costs. Petitioner’s Exhibit 6. The Applicant was also in negotiation for a long term power purchase agreement with a regulated New Hampshire utility, which would make the project more attractive to investors. Petitioner’s Exhibits 5 and 6; Decision, p. 31. The Subcommittee also relied upon the testimony presented by Counsel for the Public’s witness, Mr. Sundstrom, who acknowledged that the Applicant had demonstrated the capability of undertaking successful financing for a project of this size. T. 3/16/09 p. 179; Decision, p. 32. Mr. Sundstrom also stated that the Applicant had taken the correct approach in formulating a plan to secure financing. T. 3/16/09 pp. 167; 179-180; 195. In acknowledgment of the difficult financial times, the Subcommittee determined that the need to provide proof of secured financing prior to commencement of construction provided the necessary assurance that the project, once begun, would not be abandoned.

Counsel for the Public expressed many of the same concerns and requested similar conditions as now requested be placed upon the Applicant at the time of the hearing and does not provide “new” or different evidence or argument at this time. Therefore, the Subcommittee denies the Motion for Rehearing based upon the fact that no new or different evidence that would

change the Subcommittee's previous determinations has been presented. O'Loughlin v. New Hampshire Personnel Committee, 117 N.H. 999, 1004.

Further, the Subcommittee finds that Counsel for the Public's request that "financial capability" be interpreted to mean, "actual capital or credit to construct and operate the proposed project on hand or committed," interprets the language of NH RSA 162-H:16, IV(a) in a restrictive manner incompatible with its plain meaning. The Subcommittee's current conditions assure that financing sufficient to construct the project is in place prior to the commencement of construction. Coupled with Noble's demonstrated ability to develop similar projects, and the current plan for financing as presented in the testimony and evidence provides that the Applicant has the financial capability to finance and construct the Project within the terms and conditions of the Certificate.

The Motion for Rehearing filed by Counsel for the Public is Denied.

C. Motion of Industrial Wind Action Group (IWAG) for Rehearing

IWAG filed a Motion for Rehearing on August 14, 2009. Through its Motion for Rehearing, IWAG raised eight issues for rehearing. First, IWAG argued that the Subcommittee did not conduct the appropriate "alternatives analysis" necessary in order to consider options to minimize the impact on the natural environment. IWAG argues that the Subcommittee did not properly apply the criteria as set forth in NH RSA 162-H, but instead relied upon "business criteria" such as the location that maximizes profitability. Second, IWAG argued that the Agreement between Coos County and Granite Reliable Power, specifically that portion of the Coos Agreement pertaining to decommissioning, was vague and provides no detail on the financial vehicle used as the decommissioning fund and therefore does not adequately insure that the fund will be available should it become necessary to decommission the site. IWAG suggested that the Subcommittee set a bond that would "reflect the full decommissioning costs, excluding salvage value." Third, IWAG argued that the Subcommittee's findings that the Project will not injure property values in the area was lacking evidentiary support. Fourth, IWAG challenged the Subcommittee's finding that there would be no negative effect on tourism. IWAG argued that there was no evidence in the record to substantiate the Subcommittee's finding relative to possible effects on tourism. Fifth, IWAG requested that the Subcommittee add additional conditions to the Order requiring submission of the final System Impact Study (SIS) to the Subcommittee and parties and allow the parties to file comments on the SIS. IWAG argued that the increased transmission to the Coos County loop could adversely impact anticipated revenues for existing energy projects and alter the economic opportunities for the region. Sixth, IWAG argued that because Public Service Company of New Hampshire (PSNH) had refused to negotiate a power purchase agreement with Clean Power Development for a proposed biomass plant in Berlin, the Subcommittee should require an executed power purchase agreement between the Applicant and PSNH prior to construction. Seventh, IWAG suggested that the Subcommittee add/change three conditions regarding the impact the Project may have on the natural environment. Those three conditions should be (i) that the Subcommittee require that the pre-construction wildlife studies be completed prior to issuing its Order, (ii) that the Subcommittee establish criteria or method for determining what triggers an unreasonable adverse impact on any species to trigger the Subcommittee taking appropriate action, and (iii) that the

Subcommittee's delegation of authority to NHF&G and the Applicant to conduct wildlife review was in error and this authority should have been granted to a "technical committee" with the costs of such committee born by the Applicant. IWAG's final argument involves its April 16, 2009 motion seeking withdrawal of Director Normandeau, which IWAG again raises through its Motion for Rehearing.

IWAG expressed many of the same concerns and requested similar relief in the first instance, including consideration of alternatives, costs of decommissioning, impact on property values, impact on tourism, purchased power agreement, impact on natural environment, and disqualification of Director Normandeau. IWAG does not provide "new" or different evidence or argument at this time. Therefore, the Subcommittee denies the Motion for Rehearing based upon the fact that no new or different evidence that would change the Subcommittee's previous determinations has been presented. O'Loughlin v. New Hampshire Personnel Committee, 117 N.H. 999, 1004.

The Subcommittee also finds that its review and decision adequately addressed all issues now raised again by IWAG. Specifically, the Subcommittee found that the Applicant engaged in the requisite analysis and considered alternatives in granting the Applicant's Application for site plan approval. The Subcommittee undertook an independent analysis of the alternatives and considered the facts that the Applicant: (1) screened alternative sites in New England and New York, (2) considered construction of more turbines in that same location with less megawatt capacity, (3) considered existing roadways and transmission lines in seeking alternative locations, and (4) considered decreasing the size of the project. Decision, pp. 26-27. The Subcommittee considered: (1) the possibility of approving a smaller project and prohibiting construction on Mount Kelsey and Dixville Peak as part of a smaller project, and (2) the impact of the High Elevation Mitigation Agreement and only approved the project once it was satisfied that the Mitigation Agreement reasonably mitigated and compensated for the potential effects of the proposed project in high elevation areas. Decision, p. 27. IWAG has not presented any new evidence or information that would require a different result.

The Subcommittee questioned the Applicant's witnesses regarding decommissioning costs and the Decommission Fund during the course of the proceedings. Mr. Lyons testified that, in order to "not tie up" a large sum of money, the agreement would consider that the decommissioning amount would subtract salvage costs from the gross decommissioning costs in order to make sure the funds were available. T. 3/10/09, p. 105. The evidence elicited during the hearing demonstrated a concern regarding the Decommissioning Fund remaining unfunded for ten years. T. 3/13/09 pp. 29-32 and 214-218. The Coos Agreement, as made part of the Decision, contains a provision to assure that funds would be available for decommissioning prior to year ten of the project. See, Coos Agreement attached to Certificate. IWAG has not presented any evidence to demonstrate that the Coos Agreement is insufficient.

The Applicant's witness, Jean Vissering, was extensively questioned by both the representative of IWAG and others regarding her methodology, her findings, and the impact on both private real estate holders as well as the impact on public land users during the deliberative sessions. Reports provided by the Applicant to the Subcommittee indicate that there has been no study finding a negative impact on the property values of private property surrounding sites

similar to the Project. T. 3/9/09, p. 112. Therefore, IWAG's claim regarding property values is without merit.

The Subcommittee, by a preponderance of the evidence, found that the Project will not have unreasonable adverse effects on the aesthetics of the area and therefore would not have a negative impact on tourism. Decision, p. 43. In so finding, the Subcommittee relied upon the testimony and study prepared by Ms. Vissering. The Subcommittee approved the Project with the provision that "the Applicant, in cooperation with NHF&G shall use its best efforts to maintain the integrity of the Coos Trail while also assuring the safety of the public using the trail. It is recognized that this will require the re-location of a portion of the Coos trail." Order, p. 5. The Subcommittee also requested additional information and enhanced photos, specifically the view from Lake Umbagog, when it considered this issue. IWAG has presented no new evidence regarding aesthetics.

The Subcommittee finds that the System Impact Study (SIS) and results are not within the mandate of the Subcommittee. The Subcommittee has no authority or control over the Independent System Operator (ISO) and, therefore, it would not be appropriate for the Decision or Certificate to require the action suggested by IWAG. If the ISO finds that upgrades need to be made to the Coos County loop in order to accommodate the Project, the Applicant will have to comply with that direction in order to provide power to the system. It should also be noted that the Applicant presented evidence that it will be necessary to re-sag the Coos loop as part of the interconnection process. T. 3/9/09, pp. 211-215. There is no question that the interconnection process will require effort on the part of the Applicant. The Subcommittee was fully aware of that fact and IWAG presents no new evidence or argument in this regard.

The Subcommittee's current conditions assure that financing sufficient to construct the project is in place prior to any construction. This fact, coupled with Noble's demonstrated ability to develop similar projects, and the current plan for financing as presented in the testimony and evidence, proves that the Applicant has the financial capability to finance the Project. Petitioner's Exhibits 5 and 6. Having found that the Applicant has the financial capability, the additional requirement of having the Applicant provide a purchase power agreement prior to commencement of construction is not necessary.

The Subcommittee added numerous conditions to its Order, which will adequately ensure that the Project will not have an unreasonable adverse effect on the natural environment. In drafting these conditions, the Subcommittee relied upon: (1) three seasons of nighttime migration radar surveys conducted over a two-year period, (2) Breeding Bird Surveys from the Spring of 2007 and the Spring of 2008, (3) a Fall 2007 raptor study, (4) three full seasons of acoustic bat detector surveys, (5) a Winter Track Survey in 2007, (6) a 2007 Reconnaissance-Level Rare Plant Survey, (7) a Spring 2008 Natural Community Characterization, and (8) a Spring 2008 Rare Plant Survey. See, Decision pp. 48-51. The Subcommittee also relied upon the extensive testimony of four wildlife biologists and the Chief of Wildlife for NHF&G. Decision, pp. 51-52. It was the opinion of Wildlife Biologists Staats and Kelley that the High Elevation Mitigation Settlement Agreement adequately mitigated any impact the project would impose on high elevation parcels. Also, Dr. Publicover, wildlife biologist from the Appalachian Mountain Club (AMC), opined that the High Elevation Mitigation Settlement Agreement provided "sufficient

mitigation to compensate for the Project's impact to high-elevation ecosystems, habitats and species and resolves any and all concerns regarding the issue of high-elevation mitigation." Update to Pre-filed Testimony, Ex. AMC 15. IWAG presents no new evidence pertaining to unreasonable adverse impacts to the natural environment.

Finally, for the reasons articulated by the Chair of the Subcommittee during the April 17, 2009 deliberative session, and as stated in the Decision of the Subcommittee, no disqualifying conflict of interest existed regarding Director Normandeau and the Subcommittee finds, again, that there were no grounds for recusal of Director Normandeau in respect to the Decision. Nonetheless, the Subcommittee notes that Director Normandeau recused himself from consideration of the motions for rehearing due to conversations that he had with his staff after the filing of the NHF&G Motion for Rehearing.

For the Reasons stated above, IWAG's Motion for Rehearing is Denied.

D. Fish and Game Department Motion for Rehearing

On August 14, 2009, New Hampshire Fish and Game (NHF&G) filed a Motion for Rehearing or Amendment. Through its Motion, NHF&G requested that the Subcommittee amend the Certificate to require the Applicant make a one-time payment of \$25,000, to be made by a date no later than thirty days from the date the Certificate in this matter is final, to NHF&G for the work involved in the tasks requiring NHF&G consultation. NHF&G requested that the Certificate be amended to require the Applicant to transfer fee title to the entire 620 acre wetland mitigation parcel to NHF&G. It also requested that the Certificate be amended to specify that all fee transfers from the Applicant to NHF&G be made by deed including an acceptance line for signature by a NHF&G official.

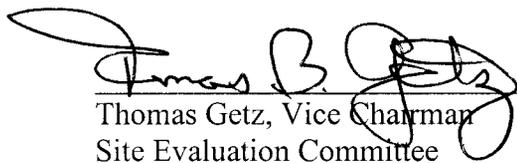
The Applicant filed a response to the Motion for Rehearing stating that it does not object to providing payment to NHF&G "once the work has been completed and invoices are submitted to and approved by the Subcommittee Chairman for the work detailed". Applicant's Response to Motion of New Hampshire Fish and Game Department for Rehearing or Amendment, ¶ 3. The subcommittee finds the Applicant's response to present a reasonable manner for reimbursement of NHF&G's costs. The Applicant, and other Parties, have assented to the requests made by NHF&G regarding the transfer of the title to the wetland mitigation parcel.

Accordingly, the Subcommittee directs the Applicant to reimburse NHF&G in the amount of \$25,000 once the work has been completed and invoices are submitted to the applicant and approved by the Subcommittee Chairman for work detailed by NHF&G related to the work required by NHF&G per the Subcommittee's original Order. Further, the Subcommittee directs the Applicant to transfer fee title to the entire 620 acre wetland mitigation parcel to NHF&G and that all fee transfers from the Applicant to NHF&G be made by deed including an acceptance line for signature by a NHF&G official.

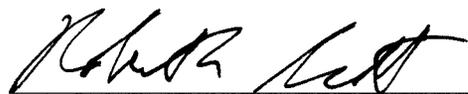
IV. Conclusion

Having considered the motions filed by the parties and determining that, with the exception of the motion filed by NHF&G, there is not good cause for rehearing of the Decision and Certificate, the motions filed by the Applicant, Counsel for the Public and IWAG are hereby **DENIED**.

The motion for rehearing or amendment filed by NHF&G is hereby **GRANTED IN PART, AND DENIED IN PART**, as set forth above.


Thomas Getz, Vice Chairman
Site Evaluation Committee

Dated: 11/9/09


Robert Scott, Director
Department of Environmental Services

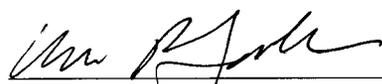
Dated: 11/12/09


Donald M. Kent, Administrator
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William Janelle, Assistant Director
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Dated: 11/9/09