THE STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

Motion of Granite Reliable Power, LLC, To Amend Certificate of Site And Facility with Request for Expedited Relief	)	Docket No. 2014-03

OBJECTION OF COUNSEL FOR THE PUBLIC
TO EXPEDITED MOTION BY GRANITE RELIABLE POWER LLC
TO AMEND THE CERTIFICATE OF SITE AND FACILITY

Counsel for the Public, Peter C.L. Roth, by his attorneys, the Office of the Attorney General, hereby objects to the Expedited Motion By Granite Reliable Power LLC To Amend The Certificate Of Site And Facility (the "GRP Motion"). Counsel for the Public objects because the motion lacks appropriate evidentiary support, the motion seeks relief contrary to the representations and assurances made by current ownership in 2011, it seeks to undermine a key element of a carefully crafted set of conditions, without which, the project would likely not have been approved and finally, and because there is no basis for expedited determination. In support hereof, Counsel for the Public respectfully represents as follows:

1. On July 15, 2009, the Committee entered its Decision Granting Certificate of Site and Facility With Conditions (the "Decision"). Along with the Decision, the Committee entered its Order and Certificate of Site and Facility (the "Order"). Appendix V to the Decision was the High Elevation Mitigation Settlement Agreement entered into between GRP, the New Hampshire Fish & Game Department, and the Appalachian Mountain Club (the "HEMSA").

2. On November 9, 2009, the Committee denied various motions for rehearing.

3. On April 15, 2010, the New Hampshire Supreme Court entered an order declining to accept an appeal of the Decision and Order by the Industrial Wind Action Group pursuant to Supreme Court Rule 10.

4. On February 8, 2011, the Committee entered a Decision and Order Approving Transfer of Ownership Interest In Granite Reliable Power LLC (the "Brookfield Decision").

5. On March 11, 2014, Granite Reliable Power LLC ("GRP") filed the GRP Motion.

6. On March 13, 2014, the presiding officer entered his Order and Notice of Public Meeting to consider the GRP Motion.

7. The GRP seeks to amend the terms of the Order requiring compliance with certain terms of the HEMSA, Order pp. 3-4, which require revegetating the road on Mt. Kelsey to a width of 12 feet, HEMSA, ¶ A.5, and requiring revegetation of all areas above 2,700 feet in accordance with a plan to be developed by GRP and Fish & Game. Order, p. 4. The stated basis for the relief is that last summer one of the turbines on Mt. Kelsey required unscheduled maintenance due to a bearing failure and a crane larger than the 12 foot road width had to be brought up the road. GRP Motion, pp. 2-3. From this "unscheduled" event, GRP concludes that now "periodic maintenance" will continue to require the larger crane and that the road width will always need to be larger. *Id*. p. 3.

8. GRP alleges that expedited relief is required so that it can begin revegetation work this spring and because it believes AMC and Fish & Game will assent.

ARGUMENT

I. There Is No Evidence Presented That Supports The Relief Requested

In seeking to amend a certificate GRP should be prepared to present evidence that the project as modified would still meet the criteria set forth in RSA 162-H:16. *See* RSA 162-H:5, I (projects must be built, operated and maintained in accordance with certificate). The proposed change potentially implicates the Committee's 2009 findings with respect to aesthetics, water quality, and the natural environment. The motion was not accompanied by any prefiled testimony as required by N.H. Admin. R., Site 202.22. The GRP Motion itself makes only a conclusory allegation that the Committee's findings will not be changed. GRP Motion, p. 4. Allegations are not evidence. *See State v. Booton*, 114 N.H. 750, 758 (1974); *Piper v. B. & M. R.R.*, 75 N.H. 435, 447 (1910).

It is important to remember that the reason for the conditions and the HEMSA was because Mt. Kelsey in particular

> encompass[es] high elevation ecosystems of particularly high quality, and that the development of [the project] will impact these habitats and wildlife species of conservation concern that are known to or may potentially utilize them, including but not limited to American marten, Bicknell's thrush, three-toed woodpecker and Canada lynx.

HEMSA, p. 1 (*Whereas* no. 8.); *see* Decision, p. 19 ("The environment in these areas is a sensitive habitat characterized by older growth spruce fir forest. The high elevation spruce forest forms the habitat for several species of concern in New Hampshire."); Decision, p. 48; Application, v. 1, pp. 12, 80 (describing the high elevation forests as "mainly undisturbed by commercial forestry practices").[1] The evidence presented showed that the Mt. Kelsey high

[1] The Canada lynx (*Lynx canadiensis*) is listed as endangered, the American marten (*Martes americana*) and the American three-toed woodpecker (*Picoides dorsalis*), are both listed as threatened.

elevation areas were "among the last remaining areas of contiguous high elevation spruce fir forest in New Hampshire." Decision, p. 52. The evidence showed that the project "would have an unreasonable adverse impact" on those forests and the species of concern that inhabited it. *Id*. In short, Mt. Kelsey is (or was) a natural resource of great importance and a rare and special habitat for threatened and endangered species. Changing the conditions that were imposed to protect that habitat and promote its recovery from the intrusion by the project should not be allowed by the Committee without a compelling show of evidence that the changes will not further harm the environment.

The project was designed with a significant and highly engineered storm water runoff and wetlands protection system. Calculations of the impact of the roadway and the functionality of the system may have taken into account the intended twelve foot road width on Mt. Kelsey. GRP does not mention this issue and there is no evidence that it has discussed it with Environmental Services to determine whether the proposed changes will affect the functionality of the systems, water quality, or the viability of wetlands and other jurisdictional features in the area.

Not only is the GRP Motion not supported by evidence with respect to environmental impacts, the very basis of the need for the change is also unsupported by prefiled testimony. While GRP asserts in its motion that "unscheduled … bearing failure" required a crane for replacing the failed bearings on one turbine, it is not clear why such a singular incident requires a wholesale rollback of the condition. Presumably the unusual nature of the event indicates it should not soon repeat itself. Evidence as to the event, what was done to address the event, and what may actually be required for future issues should be offered in prefiled

testimony. In addition, alternatives to the permanent widening of the road should also be presented in prefiled testimony.

The Decision and Order were final orders of the Committee approved by the Supreme Court, binding on all the parties and supported by the record. When Brookfield petitioned to approve its purchase of the membership interests of GRP in 2011, it assured Counsel for the Public and the Committee that it would abide by all the conditions of the certificate. *See* Brookfield Decision, p. 6 ("Despite the somewhat complicated funding and ownership structure of BGH, Brookfield Renewable Power, Inc., and its affiliates have assured the Committee that they … will collectively ensure that GRP abides by all of the terms and conditions of the Certificate.") GRP essentially admits in its Motion that it did not abide by the Certificate (windrowing the vegetated portions of the road), and claims that it cannot. GRP Motion, p. 2-3. The circumstances that are alleged by GRP in its motion now, however, were foreseeable and are not the result of any new development or other circumstances that might justify relief from the Order. Without some evidence and explanation of why GRP could not reasonably have foreseen the circumstances that precipitated the change, the Committee should not grant relief.

II. GRP Cannot Unscramble The Egg.

Counsel for the Public agreed during the 2009 proceeding not to oppose the approval of the HEMSA. Decision, p. 20. He did so because he believed at the time that the terms were minimally adequate. *See* Decision, p. 54. Each term counted, however, including the Mt. Kelsey road revegetation. In agreeing not to oppose it, Counsel for the Public relinquished a litigation position that the HEMSA would not mitigate the project's adverse effect on high elevation spruce fir habitat. Fish & Game and AMC both changed their

positions on their opinions of unreasonable adverse effects based upon the HEMSA. Decision, p. 52-53. The Committee specifically found "that the Project will not have an unreasonable adverse effect on the natural environment *so long as* the HEMSA is adhered to along with certain other conditions." *Id*., p. 54 (emphasis added). The Committee recognized that the project would "decrease the conservation value" of the project sites and would "disrupt" the lives of the various important species occurring there. *Id*. The Committee found, however, that the HEMSA "reasonably compensates for" the impacts it recognized would occur, and concluded that "with the HEMSA and the other conditions contained herein . . . the proposed project, if constructed and operated in accordance with the Application and the conditions of the Certificate will not have an adverse impact on the natural environment." *Id*., pp. 55-56. Thus, the HEMSA was a key to the approval of the project.

Additionally, GRP obtained the Brookfield Decision upon assurances to the Committee that it would abide by the terms and conditions of the Certificate. *See* Brookfield Decision, p. 6.

It is impossible now to look backward and make a determination of how the evidence might have played out and whether the project would have been approved in 2009 if (a) Counsel for the Public had contested approval of the HEMSA, or (b) the HEMSA included the provisions now being proposed instead of the ones approved.[2] There is no way to know

[2] *See* Robert Frost, *The Road Not Taken* (1916).
("I shall be telling this with a sigh
Somewhere ages and ages hence:
Two roads diverged in a wood, and I—
I took the one less traveled by,
And that has made all the difference.")

whether had they looked at such a proposal in 2009 Fish & Game and AMC would have agreed to the HEMSA or would have sought other consideration or simply litigated the natural environment impact issues. Where the HEMSA –as presented in 2009 with the road revegetation-- was bargained for, and relied upon by Counsel for the Public and the Committee, GRP is estopped from seeking to revisit its terms now. *See Pike v. Mullikin*, 158 N.H. 267, 270 (2009).

Finally, the Committee has broad discretion not to reopen an evidentiary record in a proceeding. Courts have consistently held that agencies are not to be required to reopen except in the most extraordinary circumstances. This rule evidences a strong preference for finality of agency proceedings; otherwise the agency could never consummate any administrative proceeding.[3] Reopening the record in cases is rare and reserved for "exceptional circumstances" and GRP bears a heavy burden.[4] The GRP Motion does not carry that burden or show the exceptional circumstances necessary to change the Committee's final 2009 Order.

III. Expedited Consideration Is Not Warranted.

In the Motion, GRP seeks expedited consideration so that it can implement the revegetation changes it claims that Fish and Game and AMC have assented to. The damage done by GRP in windrowing the revegetated road was in violation of the certificate and New Hampshire law and at a minimum must also be restored. *See* RSA 162-H:5, I ("Such facilities shall be constructed, operated and maintained in accordance with the terms of the

[3] *Northern Ind. Pub. Serv. Co. v. Federal Energy Regulatory Comm*., 782 F.2d 730, 744 (7th Cir. 1985); *see Seacoast Anti-Pollution League v. Nuclear Reg. Comm.*, 598 F.2d 1221, 1230 (1st Cir. 1979) ("The administrative process has to have structured time limits, lest decisions never be reached…")

[4] *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281 (1974) (describing reopening as only in "exceptional circumstances" putting a "heavy burden" on a party seeking it).

certificate.") But there is nothing in the Certificate that prevents GRP from restoring the road revegetation or from revegetating other areas not covered by the original HEMSA. As a result, no change to the Certificate is necessary, expedited or otherwise, to accomplish revegetation in either case. Moreover, GRP has not alleged in its Motion or presented any evidence that it will need to use the larger roadway at anytime in the foreseeable future much less a time in the immediate future. Consequently, there is no factual basis for expedited determination of this Motion.

Respectfully submitted this 27th day of March 2014,

PETER C.L. ROTH
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By his attorneys

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Certificate of Service

I, Peter CL Roth, do hereby certify that on March 27, 2014, I caused a true copy of the foregoing to be served upon the parties in the case by submitting it to the Committee's Clerk for electronic distribution by her to the Service List.

Dated: March 27, 2014 _/s/ Peter CL Roth_____