

August 4, 2014

**VIA FEDEX**

Ms. Jane Murray  
Department of Environmental Services  
29 Hazen Dr., PO Box 95  
Concord, NH 03302-0095

**RE: Objection of Granite to Motion to Strike Testimony of Dr. Kimball  
New Hampshire Site Evaluation Committee Docket No. 2014-03**

Dear Ms. Murray,

Please find attached the Objection of Granite Reliable Power, LLC to Counsel for the Public's Motion to Strike Testimony of Kenneth Kimball. Per your instructions, my office has sent you the attached filing electronically for distribution to the Service List of Docket No. 2014-03, and has sent you the original and one hard copy via Fed-Ex.

Please contact me with any questions or comments.

Sincerely,



Harold C. Pachios

HCP:nec  
Enclosure  
Cc: Michael J. Iacopino, Esq. (by e-mail)  
Matthew Warner, Esq. (by e-mail)  
Joshua Stayn, Esq. (by e-mail)

**THE STATE OF NEW HAMPSHIRE  
SITE EVALUATION COMMITTEE**

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

**OBJECTION OF GRANITE RELIABLE POWER  
TO COUNSEL FOR THE PUBLIC’S MOTION TO STRIKE TESTIMONY OF  
KENNETH KIMBALL**

Granite Reliable Power, LLC (“Granite”) objects to the Motion to Strike Testimony of Kenneth Kimball that Counsel for the Public filed on July 25, 2014. Dr. Kimball, Director of Research for the Appalachian Mountain Club, attended the entire July 24, 2014 technical session telephonically and responded to questions posed both by Counsel for the Public and by Attorney Iacopino (“Committee Counsel”). Despite his participation, Counsel for the Public and Ms. Linowes (for Intervenor WindAction Group) chose not to ask Dr. Kimball any direct questions. Nevertheless, Counsel for the Public, purportedly on behalf of the people of New Hampshire and their government, now asks the Committee to deprive Granite of due process and to deprive the Committee of important input from a Committee-designated signatory to the agreement that Granite seeks to amend, simply because Dr. Kimball did not attend the technical session in the manner that Counsel for the Public prefers. The Motion should be denied for the following reasons:

1. First, contrary to Counsel for the Public’s assertions, Dr. Kimball complied with the Committee’s directives. The Committee’s Procedural Order dated May 14, 2014 directed that, at a technical session on a date that Committee Counsel would determine, Granite’s witnesses “be available for questions.” The Committee’s Notice of Technical Session and

Informal Conference dated July 16, 2014 scheduled a technical session for July 24, 2014 and directed that “[a]ny witness offering testimony on behalf of the Applicant must attend.”

2. Per the Committee’s directives, Dr. Kimball, who pre-filed written testimony with the Committee on May 22, 2014, attended by telephone and was available for questions throughout the entire six-hour technical session on July 24, 2014. He identified himself on the record, answered questions posed directly by Committee Counsel, and responded to a certain question that Counsel for the Public asked the witness panel and could be best answered by AMC’s representative.

3. Nothing in the Committee’s directives or the rules or laws that govern the Committee bars Dr. Kimball’s attendance by phone, and Counsel for the Public cites no authority establishing that proposition.

4. In contrast, contemporary business and legal processes regularly incorporate attendance via telephone and other electronic means. New Hampshire law specifically authorizes public bodies to meet and make substantive decisions “by means of telephone or electronic communication,” R.S.A. 91-A:2;<sup>1</sup> In addition, Committee Site Rules authorize discovery via, among other methods, “depositions and any other discovery method permissible in civil judicial proceedings before a state court,” N.H. Site Eval. Comm. Proc. Rule 202.12, and multiple sources of rules in New Hampshire permit telephonic participation in civil proceedings. *See, e.g.*, N.H. Super. Ct. R. 62 (2008) (expressly authorizing telephonic participation in pre-trial procedure and settlement conferences); N.H. Admin. Rules, He-C 203.13 (2008) (permitting telephonic participation in hearings). Further, the Federal Rules of Civil Procedure explicitly

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<sup>1</sup> New Hampshire law broadly defines “public bodies” to include “[a]ny board or commission of any state agency or authority... and any committee, advisory or otherwise, established by such entities,” as well as the State’s general court, executive council, and “[a]ny legislative body, governing body, board, commission, committee, agency, or authority of any county, town, . . . or other political subdivision...”. R.S.A. 91-A:1-a.

authorize a party to attend a deposition “by telephone or other remote means.” Fed. R. Civ. P 30(b)(4). Accordingly, the Committee plainly has the discretion to allow witnesses to be questioned by telephone in technical sessions.

5. It is therefore unsurprising that the Committee itself has previously allowed witnesses to be questioned telephonically in technical sessions. Indeed, in a Technical Session on August 9, 2010 regarding Groton Wind, LLC’s Application for a Certificate of Site & Facility, Counsel for the Public questioned two witnesses telephonically, without lodging any objection. “Agenda for Technical Session”, App. of Groton Wind, LLC for a Cert. of Site & Facility, Docket No. 2010-01, at 1 (July 30, 2010). As the Committee explained in that proceeding, the Committee is authorized to hear telephonic or videoconference testimony at a full-blown hearing because “the absence of an express statutory authorization . . . to hear [such testimony] does not prohibit such testimony”, and such testimony “can in certain circumstances foster promptness in conducting hearings and increase the likelihood that the Subcommittee hears testimony that address important issues in an integrated fashion.” Order on Pending Motions, App. of Groton Wind, LLC for a Cert. of Site & Facility, Docket No. 2010-01, at 5 (Oct. 27, 2010).

6. Where, as here, the proceeding is merely for fact-gathering purposes, is unlike a deposition or full-blown hearing in that it is not under oath, and presumably will be followed by an opportunity to question each witness in person at a hearing, Dr. Kimball’s participation by telephone should be permitted.

7. Second, striking Dr. Kimball’s testimony would inappropriately penalize Granite, and deprive the Committee of important input from a Committee-designated signatory. As Counsel for the Public acknowledges in his Motion, even before Committee Counsel definitively scheduled the July 24, 2014 technical session, Dr. Kimball informed Committee Counsel that Dr.

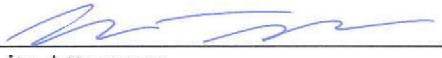
Kimball would need to attend by telephone because of prior commitments and travel distance. When Counsel for the Public objected, Granite replied that it could not compel Dr. Kimball to attend since he is not Granite's employee or consultant, noted that Counsel for the Public might consider subpoenaing and deposing Dr. Kimball, and asked how Counsel for the Public wished to proceed. At that point, Counsel for the Public could have taken affirmative steps to address his preference that Dr. Kimball be questioned in person, by subpoenaing him or filing a motion and ripening the issue *before* the Committee, Dr. Kimball, and Granite all spent time and resources prior to and at the technical session on July 24, 2014. Instead, Counsel for the Public waited for Dr. Kimball to attend by phone and then refused to ask him any direct questions despite having several hours in which to do so, apparently with the intent to ask the Committee to deny Dr. Kimball's participation in this process.

8. Such inaction and punitive motion practice in order to muzzle a longtime, well-respected environmental steward are inconsistent with the open fact-finding purpose of the Committee's technical sessions, and, respectfully, do not seem critical to Counsel for the Public's statutorily defined role of "seeking to protect the quality of the environment and in seeking to assure an adequate supply of energy." R.S.A. 162-H:9. That is particularly the case where Counsel for the Public's apparent rationale is pure speculation that Dr. Kimball "could as easily have attended in person" but "lacked the desire to make the trip", and is premised on the perplexing assertion that having to issue a subpoena would "unfairly and unreasonably" burden Counsel for the Public. By attempting to impede Granite from fully presenting important evidence supporting its application, Counsel for the Public's Motion would deprive Granite of basic due process.

Wherefore, Granite respectfully requests that Counsel for the Public's Motion to Strike Testimony of Kenneth Kimball be denied.

Respectfully submitted,

**BROOKFIELD RENEWABLE POWER INC.**

By   
and its Attorneys,  
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57 North Main Street  
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By: Harold C. Pachios and  
Matthew S. Warner and  
Sigmund D. Schutz (NH Bar No. 17313)  
(207) 791-3000

August 4, 2014

### Certificate of Service

I, Harold C. Pachios, do hereby certify that I caused 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: August 4, 2014

  
Harold C. Pachios