

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

Docket No. 2014-03

**Re: Motion of Granite Reliable Power, LLC to Amend a Certificate of Site and Facility
with Request for Expedited Relief**

August 7, 2014

**ORDER ON MOTION TO STRIKE TESTIMONY
AND EMERGENCY MOTION TO AMEND PROCEDURAL SCHEDULE**

Introduction

This order denies the motion filed by Counsel for the Public seeking to strike the pre-filed direct testimony of Kenneth Kimball, Ph.D. This order also grants in part and denies in part Counsel for the Public's "emergency ex-parte"¹ motion to amend the procedural schedule.

Background

On July 15, 2009, in Docket No. 2008-04, the New Hampshire Site Evaluation Committee (Committee) granted a Certificate of Site and Facility to Granite Reliable Power, LLC (Applicant). The Certificate authorized the Applicant to site, construct and operate a 99 MW wind powered electric generation facility consisting of 33 wind turbines on private lands located in Dixville, Erving's Location, Millsfield, Odell and the Town of Dummer in Coos County (Facility). The Facility is fully constructed and commercially operating. The Certificate included a number of important conditions pertaining to the construction and operation of the Facility. A series of conditions were incorporated into the Certificate through the Committee's approval of a High Elevation Mitigation Settlement Agreement. Included within the High

¹ Although styled as an "ex-parte" motion, the pleading contained a certification that it was served on the other parties in this docket. Assuming the certification to be correct the pleading would not fit within the definition of an ex-parte communication with the Site Evaluation Committee. *See* RSA 541-A: 36; NEW HAMPSHIRE CODE OF ADMINISTRATIVE RULES Site 202.30.

Elevation Mitigation Settlement Agreement, Section A, Paragraph 5, and incorporated in the Certificate was a condition stating:

Within the Retained Land on Mt Kelsey, only those trees necessary for project construction will be cut. Once construction is completed, there shall be no commercial timber harvesting in this area. After project construction the roadway shall be revegetated so that the roadbed is limited to 12 feet in width.

On March 12, 2014, the Applicant filed a Motion to Amend the Certificate of Site and Facility (Motion). The Applicant asserts that it has complied with all conditions contained within the High Elevation Mitigation Settlement Agreement. However, the Applicant asserts that the maintenance requirements of the Facility necessitate the repeated and periodic disturbance of the revegetated areas along the roadbed to accommodate heavy construction equipment. The Applicant seeks to amend the Certificate to replace the road width condition with a Revised High Elevation Restoration Plan that will require that road widths be revised generally to 16 feet. In addition, the Revised High Elevation Restoration Plan includes additional requirements pertaining to: 1) minimization of temporary and permanent disturbances; 2) restricted access; 3) stabilization and revegetation (including requirements pertaining to grading, soil preparation, tree seedlings, and mulch for moisture retention and soil stabilization); 4) monitoring, and; 5) maintenance.

On April 7, 2014, the Windaction Group (“Windaction”) filed a Petition to Intervene *Pro Se*. On April 7, 2014, Coos County Commissioner, District Three, Rick Samson, filed a request to intervene with the Committee. Both motions to intervene were granted on May 1, 2014.

A Procedural Order was issued on May 14, 2014. The Procedural Order set forth a schedule with deadlines to allow the parties to conduct discovery. As part of the Procedural Order, the Applicant was required to pre-file direct testimony supporting its position on or before

May 22, 2014. The Committee also scheduled a technical session for July 24, 2014. The Procedural Order required that the Applicant's witnesses "be available for questions" at the time of the technical session and ordered the parties to satisfy supplemental requests made at the technical session within seven days of the technical session. Procedural Order, May 14, 2014, p. 2.

On May 22, 2014, the Applicant filed the direct testimony of Dr. Kimball, John Cyr and Tyler Phillips.

On July 16, 2014, counsel for the Committee issued a Notice of Technical Session and Informal Conference scheduling the technical session for July 24, 2014. The Notice indicated that, "Any witness offering testimony on behalf of the Applicant must attend." On July 15, 2014, Dr. Kimball advised the parties that he could not physically attend the technical session due to other previously scheduled commitments and travel distance. Dr. Kimball also advised the Committee that he will be available for questioning by phone. In an email to the Applicant and copied to the parties Counsel for the Public objected to Dr. Kimball's appearance via phone and requested his physical attendance at the technical session. The Applicant, by return e-mail, advised Counsel for the Public that it could not compel Dr. Kimball's appearance and invited Counsel for the Public to subpoena and/or depose Dr. Kimball. Counsel for the Public did not seek relief from the Committee prior to the technical session.

The technical session was held on July 24, 2014. Dr. Kimball did not appear in person. However, he was available for questioning telephonically. Counsel for the Public and the intervenors were given the opportunity to question Dr. Kimball via phone. Tr. at 9-12, 229, 238. Counsel for the Public objected to Dr. Kimball's appearance via phone, asserted that Dr. Kimball failed to "attend" the technical session, refused to ask Dr. Kimball any questions and advised

Counsel for the Committee and the parties that he would be filing a Motion to Strike Dr. Kimball's testimony. Tr. at 6-7, 10. The Applicant objected to the Counsel for Public's assertions and asserted that, despite the fact the Dr. Kimball was not physically present, he attended the hearing and was available to answer questions via telephone. Tr. 7.

Counsel for the Committee presided at the technical session. He advised the parties that the technical session was an informal proceeding and that witnesses were not under oath. He advised the parties that the technical session would proceed with Dr. Kimball on the telephone. He recommended that all parties take the opportunity to ask any questions they might have of Dr. Kimball and warned the parties that the failure to do so may result in a loss of the ability to ask Dr. Kimball questions. He also advised the parties that they were all free to petition the Chairman of the Committee for any relief that they believed was appropriate. See Tr. pp. 8-11. The technical session proceeded. During the session Counsel for the Public and the intervenors refrained from asking questions of Dr. Kimball. Nonetheless Dr. Kimball did participate in the session and did provide some information.

On July 24, 2014, at the conclusion of the technical session Counsel for the Committee issued a memorandum identifying the documents and other information that had been the subject of data requests during the technical session. Consistent with the Procedural Order of May 14, 2014, Counsel for the Committee's memorandum required that the data requests be answered within seven days (i.e., by July 31, 2014). Among the data requests submitted at the technical session was a request that the parties and their consultant be permitted to visit the site.

On July 25, 2014, Counsel for the Public filed a Motion to Strike Dr. Kimball's testimony. The motion to strike asserts that Dr. Kimball failed to appear, in person, for

questioning during the technical session. The intervenors assented to the relief sought by Counsel for Public. On August 4, 2014, the Applicant filed an objection to the motion to strike testimony.

On July 31, 2014 the Applicant, by letter to Counsel for the Committee, advised that a site visit would be scheduled at a time convenient for the parties. The letter also indicated that the Applicant would answer the data requests, with one exception relating to a matter on which it would object and seek in camera review². However, the Applicant did not answer the data requests on July 31, 2014. The answers to data requests were not provided until August 4, 2014.

On August 6, 2014, Counsel for the Public filed an Emergency Ex Parte Motion to Amend Procedural Schedule requesting the Committee to issue an emergency order amending its procedural schedule. Counsel for the Public asserted that his expert's ability to prepare a timely report was undermined by Dr. Kimball's telephonic appearance at the technical session; by the Applicant's failure to arrange a site visit; and, by the Applicant's failure to provide timely responses to supplemental requests made at the time of the technical session as required by the Committee's Procedural Order. Counsel for the Public asserted that the Procedural Order should be modified to allow his expert to conduct an investigation and prepare a report. Counsel for the Public further requested the Committee to modify the Procedural Order to allow Counsel for the Public to conduct an in person technical session with Dr. Kimball. Finally, in light of the emergency nature of Counsel for the Public's Motion, Counsel for the Public requested the Committee to waive its rules and issue an emergency order without permitting the Applicant an opportunity to object. Ms. Lewis on behalf of the intervenors assented to the relief sought by Counsel for the Public.

² That objection is not a subject of this order.

On August 6, 2014 the Applicant filed a written objection to the emergency motion. The objection notes that ex-parte communication would be inappropriate under both statutory law and the Committee's rules. The objection also contends that there is no need for "emergency" relief. In its objection the Applicant asserts that the request for a site visit was first made during the technical session and that its response thereto was timely. The Applicant asserts that the proceedings should not be delayed due to an untimely request for a site visit. The Applicant also objects and asserts that Counsel for the Public and his expert had ample opportunity at the technical session to question Dr. Kimball and that a delay in the proceedings on that ground would be inappropriate. Finally the Applicant recognizes that it provided the technical session answers to data requests two business days after the scheduled deadline. However, the Applicant argues that the delay was minor and that any relief should include nothing more than a similar extension of time for the filing of pre-filed direct testimony by Counsel for the Public and the parties.

Analysis

1. Motion to Strike Testimony of Kenneth Kimball Ph.D.

Counsel for the Public seeks to strike the pre-filed direct testimony of Kenneth Kimball, Ph.D. (Dr. Kimball), based on the fact that Dr. Kimball failed to appear, in person, during the technical session scheduled by the Committee. Counsel for the Public asserts that Dr. Kimball's failure to appear was not justifiable and was contrary to the Committee's Procedural Order and Notice of Technical Session and Informal Conference. Intervenors assent to the Counsel for Public's request.

The Applicant objects and asserts that, contrary to Counsel for the Public's argument, Dr. Kimball in fact appeared during the technical session and was available to answer any and all

questions telephonically throughout the entire six-hour technical session. The Applicant further asserts that Dr. Kimball's telephonic appearance is not precluded by any statute or administrative rule and, in fact, reflects contemporary practice recognized by New Hampshire laws. Finally, the Applicant asserts that exclusion of Dr. Kimball's testimony will prejudice the Applicant and will preclude the Committee from conducting a thorough review of the Application.

A technical session is neither a deposition nor a formal hearing. The Committee encourages the parties to participate in technical sessions and make their witnesses available for questioning in order to give the parties an opportunity to conduct thorough discovery in a timely manner. Counsel for the Public could have utilized the technical session for the purposes of his discovery and could have asked any questions he wished. Dr. Kimball was available for questioning via telephone and, in fact, volunteered some answers despite not being specifically questioned. Tr. at 87 – 89, 94, 220 -221. On multiple occasions, Counsel for the Public was invited to ask Dr. Kimball any and all questions he might have had. Tr. at 9-12, 229, 238. Counsel for the Public was further advised that he may not have another opportunity to ask Dr. Kimball his questions. Tr. at 10. Counsel for the Public chose, however, not to “recognize” Dr. Kimball, refused to ask Dr. Kimball any questions, objected to Dr. Kimball “providing any response to questions,” and requested the suspension of the technical session so that he could obtain a protective order from the presiding officer. Tr. at 11-13, 83, 229, 238. If Counsel for the Public, had reasons to believe that it was crucial to ask Dr. Kimball questions in person, Counsel for the Public could have filed a Motion with the Committee identifying the reasons why Dr. Kimball's in person presence was required and requesting the Committee to order Dr. Kimball to appear in person. He did not do this in advance of the technical session nor does his present

motion to strike testimony identify any reasons why Dr. Kimball's physical presence as opposed to his telephonic presence was important or unfair.

Counsel for the Public was given an ample opportunity to examine Dr. Kimball. Counsel for the Public could have posed any question that he had to Dr. Kimball. If the questioning had led to the need to produce additional documents, a technical session data request could have been made as with any other witness. Additionally if there is some aspect of Dr. Kimball's testimony or knowledge that would require an in-person appearance (a fact that has not been pled), Counsel for the Public had ample opportunity seek relief from the Chair of the Committee in advance of the technical session. On July 15, 2014, Dr. Kimball advised the parties that he would need to appear by telephone at the technical session scheduled for July 24, 2014. This notice was provided 9 days prior to the technical session. While Counsel for the Public requested that the Applicant compel Dr. Kimball's physical appearance, Counsel for the Public did not seek any relief from the Chair of the Committee and subsequently failed to ask questions of Dr. Kimball at the July 24, 2014 technical session.

It would be neither reasonable nor fair to strike the testimony of the witness. The witness is not an employee of the Applicant and the Applicant had no ability to control the witness' actions. The witness was available for examination by the parties during the technical session. Counsel for the Public fails to assert any prejudice stemming from a telephonic examination as opposed to physical appearance of the witness. Moreover, after reviewing the transcript and the pre-filed direct testimony of Dr. Kimball, I cannot find that Counsel for the Public or the intervenor would suffer any prejudice by participating in a telephonic examination of the witness during an informal technical session.

Counsel for the Public's request to strike Dr. Kimball's testimony is denied.

2. Motion to Amend Procedural Schedule.

The Procedural Order currently in effect requires Counsel for the Public and intervenors to pre-file direct testimony on or before August 8, 2014. In light of the time constraints set forth by the Procedural Order, it is reasonable and necessary to address Counsel for the Public's concerns in an expedited manner.

Counsel for the Public's request to modify the Procedural Order so that it schedules a technical session for the in person examination of Dr. Kimball is denied. Counsel for the Public was given ample opportunity to conduct his discovery and ask any questions he might have had on July 24, 2014. Counsel for the Public was further advised that he may have no other opportunity to do so. Counsel for the Public chose not to question Dr. Kimball. It is unfair and unreasonable to require the Applicant to make Dr. Kimball available for another examination after Counsel for the Public's refusal to conduct such examination when he had the opportunity to do it.

The Applicant has agreed to accommodate Counsel for the Public's request for a site visit. While the request for a site visit should have been made long ago, I recognize that Counsel for the Public's consultant will benefit from a first-hand view of the Facility and that such a view will assist the Committee in ultimately deciding the issues to be determined in this docket. Additionally the Committee prefers that pre-filed testimony be as complete as possible, thereby limiting the need for supplemental filings. Therefore, the procedural schedule will be amended to accommodate a site visit by the parties and allow testimony to be pre-filed thereafter.

Finally I recognize that the Applicant's responses to the technical session data requests were not timely filed. In defense, the Applicant asserts that they were only late by two business days. It is important for all parties in this docket to adhere to the deadlines set in procedural

orders. As presently structured, this is a large Committee that meets only when required to do so. At present there is no permanent staff for the Committee and it is unreasonable to expect the Committee to amend procedural orders as disputes arise or for the convenience of the parties. The procedural schedule will be amended to accommodate the site visit and from this point forward all of the parties will be expected to adhere to the new procedural order.

Modified Procedural Schedule

1. The current procedural schedule is hereby vacated.
2. A site visit will be scheduled for the parties to occur within the next thirty days. It is suggested that alternate dates be reserved to accommodate inclement weather. Once the site visited has been conducted the Applicant shall advise Counsel to the Committee in writing.
3. Within ten business days after the date of the site visit, Counsel for the Public and the intervenors will file the direct testimony of all witnesses.
4. A further procedural order will issue upon notification that the site visit has been accomplished.

Order

It is therefore:

Ordered: The motion of Counsel for the Public to strike the testimony of Kenneth Kimball, Ph.D is **denied**;

Further Ordered that Counsel for the Public's Emergency Ex Parte Motion is **granted in part and denied in part**;

Further Ordered that Counsel for the Public's request to issue an immediate order on the Counsel for the Public's Emergency Ex Parte Motion is **granted**;

Further Ordered that Counsel for the Public's request to modify the Procedural Order so that it requires a further technical session for the "in person" testimony of Kenneth Kimball, Ph.D is **denied**;

Further Ordered that Counsel for the Public's request to modify Procedural Order so to accommodate a site visit is granted;

Further Ordered that the parties shall arrange for a site visit to occur within the next thirty days;

Further Ordered that Counsel for the Public and the intervenors shall pre-file direct testimony within ten business days after the date of the site visit. The Applicant shall notify the Committee, through counsel, in writing when the site visit has been completed;

Further Ordered that a further Procedural Order shall issue upon receipt of notification that the site visit has been completed.

By Order of the Site Evaluation Committee, this 7th day of August, 2014.



Thomas S. Burack
Chairman and Presiding Officer
NH Site Evaluation Committee

