

**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**

**November 4, 2014**

**ORDER GRANTING MOTION FOR *IN CAMERA* REVIEW  
TO DETERMINE DISCOVERABILITY OF SAFETY PLAN**

**Introduction**

A discovery dispute has arisen in this docket. This order addresses the motion filed by the Applicant seeking *in camera* review of the Facility safety plan and a determination as to whether or not the document is discoverable. In its motion the Applicant does not assert that the safety plan is confidential and does not affirmatively seek a protective order or other confidential treatment. For the reasons stated herein, the relief requested in the motion for *in camera* review is granted. Additionally, the safety plan will remain a sealed document in this docket and will not be available for inspection or public dissemination.

**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 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.

This discovery dispute arises from a data request made at the Technical Session that was held on July 24, 2014. Counsel for the Public and Windaction.org requested a copy of the Facility's safety plan. In response the Applicant has filed a motion seeking *in camera* review of a document entitled, "Granite Reliable Power, LLC, Brookfield, Public Safety Plan, Granite Reliable Windpark" (Safety Plan). The Applicant filed the Safety Plan with the Chairman of the Committee and with counsel to the Committee but did not provide copies to the parties. The Safety Plan consists of twenty-three (23) pages and is labeled: "Contains Confidential Information – Do Not Release."

## Positions of the Parties

### Applicant

The Applicant asserts that nothing within the Safety Plan is discoverable. Citing the Committee's administrative rule regarding discovery, NEW HAMPSHIRE CODE OF ADMINISTRATIVE RULES Site 202.12, the Applicant states: "This safety plan has absolutely no relationship to the road widening and re-vegetation at issue in this proceeding, and is not necessary or even likely to lead to discovery or acquisition of evidence admissible in this proceeding." See Motion for *In Camera* Review to Determine Discoverability of its Safety Plan, page 1. The Applicant has provided a copy of the Safety Plan to the Chairman and counsel to the Committee, presumably to assist the requested *in camera* review.

### Counsel for the Public

Counsel for the Public objects to the relief sought in the motion for *in camera* review. Counsel for the Public asserts that *in camera* review is not an appropriate remedy because the filing was not accompanied by a claim of confidentiality or request for a protective order. Counsel for the Public also claims that the Public Safety Plan could be relevant or could lead to the discovery of admissible evidence in that "it may contain terms which require certain grades, curve radii, travel path width and maintenance requirements necessary for access to the facility by emergency personnel and vehicles." Finally, Counsel for the Public claims that the Applicant's relevance objection was waived because at the time of the request during the technical session the Applicant's counsel indicated that he would "look into it" and "add it to the list of data requests."

### WindAction.org

WindAction.org objected to the motion for *in camera* review. WindAction.org notes that it seeks discovery of the Safety Plan to "determine if there were any prohibitions on certain kinds of

vegetation and the placement of the vegetation.” WindAction.org notes that it is willing to adhere to a protective order should the Safety Plan be deemed to be confidential.

### **Standard of Review**

Discovery issues before the Committee are governed by the Administrative Procedures Act, RSA 541-A: 33, II, and the Committee’s procedural rule, NEW HAMPSHIRE CODE OF ADMINISTRATIVE RULES Site 202.12. The Administrative Procedure Act does not address discovery directly but does provide that irrelevant, immaterial or unduly repetitious evidence may be excluded. *See* RSA 541-A: 33, II.

The Committee’s procedural rules address discovery issues more directly and provides that:

The presiding officer shall authorize data requests in the nature of interrogatories, requests for production of documents, requests for admission of material facts, depositions and any other discovery method permissible in civil judicial proceedings before a state court when such discovery is necessary to enable a party to acquire evidence admissible in a proceeding and when such method will not unduly delay the prompt and orderly conduct of the proceeding.

*See* NEW HAMPSHIRE CODE OF ADMINISTRATIVE RULES Site 202.12 (a).

*In camera* review of material claimed to be confidential is a discovery method that is permissible in civil judicial proceedings. *See e.g. Union Leader v. City of Nashua*, 141 NH 473, 478 (1996) (ex parte *in camera* review of records whose release may cause an invasion of privacy is plainly appropriate); *see also State v. Gagne*, 136 NH 101, 105 (1992) (An *in camera* review of such records provides a "useful intermediate step between full disclosure and total nondisclosure.") The Public Safety Plan submitted for *in camera* review by the Applicant is marked “Contains Confidential Information – Do Not Release.” The document details features of electric generation and transmission facilities. These types of facilities are generally considered to be critical infrastructure. Dissemination of such information raises public safety and security concerns. *In camera* review is appropriate under such circumstances.

In reviewing a request for discovery the relevant consideration is whether the requested discovery is “necessary to enable the requesting party to acquire admissible evidence.” NEW HAMPSHIRE CODE OF ADMINISTRATIVE RULES Site 202.12 (a). In an administrative proceeding before this Committee that means evidence that is relevant, material and not unduly repetitious. In this case the discovery request does not meet that standard.

### **Discussion**

I have conducted an *in camera* review of the Public Safety Plan.

The issues in this docket center on the request of the Applicant to amend its Certificate. 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.

The Public Safety Plan submitted for *in camera* review does not contain any information that is relevant to or likely to lead to the discovery of evidence relevant to the issues in this docket. In general the Public Safety Plan inventories recreational resources and safety features on the site. It also provides policies for safety inspections, maintenance of safety features, incident investigation and reporting and interactions between staff and the public. Nothing within the Public Safety Plan even remotely addresses road widths, vegetation or any of the environmental issues raised by the motion to amend the Certificate.

*In camera* review additionally reveals that the Public Safety Plan is a document that is exempt from the provisions of the state's Right to Know law, RSA 91-A. The information contained within the Public Safety Plan is both confidential and commercial information that is exempt from the Right to Know law. *See* RSA 91-A: 5. Additionally, the Applicant was required by the Certificate to adopt its safety plan in cooperation with Coos County. *See* Certificate at p. 57. As such it may qualify as a "matter relating to the preparation for and carrying out of emergency functions, including training to carry out such functions, developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life." Such matters are exempt from the disclosure requirements of the Right to Know law. *See*, RSA 91-A: VI. In addition, exemption of the Public Safety Plan from the Right to Know law is supported by the three part test set forth by the New Hampshire Supreme Court. *See Lambert v. Belknap County Convention*, 157 NH 375, 382 (2008).

The security of the Facility is an important factor in its operation and ensuring the safety of the community and the environment. The contents of the Public Safety Plan set forth procedures and actions to be taken by the employees of the Applicant in order to ensure safe continued operation of the Facility. As such the Applicant has a clear a privacy interest in the Public Safety Plan. Disclosure of the plan will not assist in determination of the issues in this docket. Disclosure of the Public Safety Plan will do little if anything at all to inform the public about the conduct or activities of government and may actually disclose important safety information to persons who may intend to cause damage to the facility or otherwise wish to jeopardize the safety of the public or the environment in the area of the Facility. The security and public safety interests in maintaining confidentiality of the Public Safety Plan clearly outweigh any public interest in the public dissemination of the document. *See Union Leader Corp. v. New Hampshire Housing Finance Authority*, 142 NH 540, 553 (1997). To the extent

that Counsel for the Public's objection seeks public dissemination of the Public Safety Plan that request is denied.

Counsel for the Public also asserts that the Applicant waived its right to object based on relevance because it did not raise that objection at the time of the technical session. Counsel for the Public does not support this claim with legal authority. Moreover, the response of the Applicant at the technical session that it would "look into it" and add the request for the Public Safety Plan to "your data requests" did not prohibit the Applicant from subsequently objecting to the request or seeking relief from the Committee.

**Order**

It is therefore:

**Ordered:** that the Public Safety Plan submitted for *in camera* review is irrelevant and not likely to lead to the discovery of relevant evidence and, therefore, Granite Reliable Power's Motion for *In Camera* Review to Determine Discoverability of its Safety Plan is GRANTED;

**Further Ordered:** that the Public Safety Plan submitted for *in camera* review is exempt from the disclosure provisions of RSA 91-A and shall be maintained as a sealed document in this docket and not available for public inspection or dissemination.

By Order of the Site Evaluation Committee, this 4<sup>th</sup> day of November, 2014.



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