



CITY OF PORTSMOUTH

LEGAL DEPARTMENT

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November 2, 2015

EMAILED to pamela.monroe@sec.nh.gov

Martin P. Honigberg, Chairman
Alex Speidel, Acting Chairman
NH Site Evaluation Committee
NH Public Utilities Commission
21 S. Fruit Street, Suite 10
Concord, NH 03301

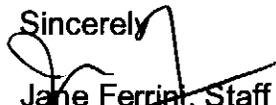
**RE: SEC Docket Number 2015 – 01
Request of SEA-3, Inc. for Exemption from the Approval and Certificate
Provisions of RSA Chapter 162-H**

Dear Chairman Honigberg and Acting Chairman Speidel:

Enclosed for filing please find the original and two (2) copies of the City of Portsmouth's Objection to the Applicant's Motion to Strike Testimony Concerning Railroad Issues.

I certify that copies of the within filing have been provided to those named in the Service List.

Thank you for your assistance.

Sincerely

Jane Ferrin, Staff Attorney
City of Portsmouth

enclosure

cc: Pamela G. Monroe, Administrator - SEC (emailed and mailed)
Service List (emailed)
John P. Bohenko, City Manager
Robert P. Sullivan, City Attorney

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**Site Evaluation Committee
Of the New Hampshire Public Utilities Commission**

In the Matter of the Application of Sea-3, Inc.

SEC DOCKET NO. 2015-01

(Request for Exemption)

**THE CITY OF PORTSMOUTH'S OBJECTION TO THE APPLICANT'S MOTION
TO STRIKE TESTIMONY CONCERNING RAILROAD ISSUES**

NOW COMES the City of Portsmouth, by its counsel, and respectfully objects to Applicant's Motion to Strike Testimony Concerning Railroad Issues ("Objection"). In support of this Objection, the City states as follows:

1. The prefiled testimony of Fire Chief Steven Achilles and Peter Britz was filed with the SEC on August 17, 2015.
2. The Applicant filed a Motion to Strike Testimony Concerning Railroad Issues on October 23, 2015, some eight (8) weeks after the testimony was filed.
3. The Applicant's analysis of Chief Achilles and Peter Britz's testimony was not dependent upon the filing of its Memorandum on the Federal Preemption issue due October 23, 2015.
4. N.H. Code R. Site 202.24 (c) provides that all "objections to the admissibility of evidence shall be stated as early as possible in the hearing, but not later than the time when the evidence is offered."
5. The Applicant failed to object to the admissibility of Chief Achilles and Peter Britz's testimony when the evidence was offered and should be barred from seeking its exclusion at this late date.

6. N.H. Code R. Site 202.24 (b) provides that all “documents, materials and objects offered as exhibits shall be admitted into evidence unless excluded by the presiding officer as irrelevant, immaterial, unduly repetitious or legally privileged.”

7. “An administrative agency is given “broad discretion in determining the admissibility of evidence.” Rhuel v. New Hampshire Real Estate Appraiser Bd., 163 N.H. 34, 45 (2011) quoting McLaughlin v. Fisher Eng’g., 150 N.H. 195, 199 (2003).

8. Further, it is within this Committee’s “discretion to admit hearsay evidence because the rules of evidence do not apply in adjudicative proceedings. RSA 541-A:33, II.” In re Brooks, 161 NH 457, 463 (2011).

9. Any reference in the testimony of Chief Achilles and Peter Britz’s to the railroad is confined to permissible health and safety considerations. Neither Chief Achilles or Peter Britz are making any type of recommendation that directly or indirectly regulates Interstate Commerce or unreasonably burdens, discriminate against railroads or regulates the railroad in any way.

10. This Committee is able to exercise its police power over certain sites if the State and local regulation pass a two-part test: “1) it is not unreasonably burdensome, and (2) it does not discriminate against railroads” New York Susquehanna and Western Railway Corporation v. Jackson, 500 F3d 238 (3rd Cir. 2007). “[T]he touchstone is whether the state regulation imposes an unreasonably burden on railroading.” Id. at 253. In certain cases, the exercise of local police power will not be allowed if the provisions are typically allowable but are subject to exclusive discretion or may cause unlimited delay to rail operations. This is best expressed in Green Mountain R.R. Corporation v. Vermont, 404 F.3d 638, 643 (2^d Cir. 2005), which states:

[N]ot all state and local regulations are preempted [by the Termination Act]; local bodies retain certain police powers which protect public health and safety. It therefore appears that states and towns may exercise traditional police powers over the development of railroad property, at least to the extent that the regulations protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, can be approved (or rejected) without the exercises of discretion on subjective questions. Electrical, plumbing and fire code, direct environmental regulations enacted for the protection of the public health and safety, and other generally applicable, non-discriminatory regulations and permit requirements would seem to withstand preemption.

11. Fire safety considerations and local regulations protecting public health and not preempted and are relevant and material in this Committee's review of Applicant's request for an exemption; this Committee is guided in its review by the broad statement of purpose set forth in RSA 162-H:1:

The legislature recognizes that the selection of sites for energy facilities may have significant impacts on and benefits to the following: the welfare of the population, private property, the location and growth of industry, the overall economic growth of the state, the environment of the state, historic sites, aesthetics, air and water quality, the use of natural resources, and public health and safety. Accordingly, the legislature finds that it is in the public interest to maintain a balance among those potential significant impacts and benefits in decisions about the siting, construction, and operation of energy facilities in New Hampshire; that undue delay in the construction of new energy facilities be avoided; that full and timely consideration of environmental consequences be provided; that all entities planning to construct facilities in the state be required to provide full and complete disclosure to the public of such plans; and that the state ensure that the construction and operation of energy facilities is treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion. In furtherance of these objectives, the legislature hereby establishes a procedure for the review, approval, monitoring, and enforcement of compliance in the planning, siting, construction, and operation of energy facilities.

12. The Applicant needs to set forth specific reasons why it seeks the testimony struck. These reasons may not be conclusory or speculative assertions. See Bohan v. Ritzo, 141 NH 210 (1996). Applicant's assertion that the above referenced testimony, and its

consideration by this Committee, amounts to regulating railroads in not only a gross misrepresents the scope and nature of the testimony, but is impermissibly conclusory and speculative at best and should be not be considered by this Committee.

WHEREFORE, the City of Portsmouth respectfully requests that the Committee:

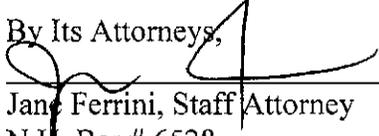
- A. Deny the Applicant's Motion to Strike Testimony Concerning Railroad Issues, specifically as it relates to the testimony of Chief Achilles and Peter Britz;
- B. Consider Chief Achilles and Peter Britz's testimony in its entirety; and
- C. For such other and further relief as may be just.

Respectfully submitted,

DATE: November 2, 2015

THE CITY OF PORTSMOUTH

By Its Attorneys,


Jane Ferrini, Staff Attorney
N.H. Bar # 6528

1 Junkins Avenue

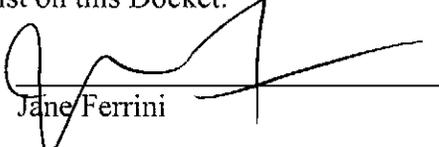
Portsmouth, NH 03801

Phone: (603) 436-3110

Email: jferrini@cityofportsmouth.com

Certification

I hereby certify that on this 2ND day of November, 2015, I caused a copy of the foregoing Objection to Applicant's Motion to Strike Testimony Concerning Railroad Issues to be sent via email to the persons on the Service List on this Docket.


Jane Ferrini