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BY E-MAIL AND FIRST CLASS MAIL

Pamela.Monroe@sec.nh.gov

Pamela G. Monroe
Administrator
State of New Hampshire
Site Evaluation Committee
21 S. Fruit St., Suite 10
Concord, NH 03301-2429

RE: *Application of Tennessee Gas Pipeline Company, L.L.C. for a Certificate of Site and Facility for the Construction of a New Natural Gas Transmission Line in New Hampshire*

SEC Docket No. 2015-08

Dear Ms. Monroe:

Enclosed please find Tennessee Gas Pipeline Company, L.L.C.'s *Objection to the Motion of the Towns of Fitzwilliam, Rindge, and Pelham for an Order Directing Tennessee Gas Pipeline Company, L.L.C. to Bear the Cost of an Expert Consultant.*

Thank you for your attention to this matter.

Best regards,



W. Scott O'Connell

WSO/cln

Enclosure

cc: Tennessee Gas Pipeline Company, L.L.C.
Service List

STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

Application of Tennessee Gas Pipeline Company, L.L.C. for a Certificate of Site and Facility for
the Construction of a New Natural Gas Transmission Line in New Hampshire

SEC DOCKET NO. 2015-08

**OBJECTION TO THE MOTION OF THE TOWNS OF FITZWILLIAM,
RINDGE, AND PELHAM FOR AN ORDER DIRECTING TENNESSEE GAS
PIPELINE COMPANY, L.L.C. TO BEAR THE COST OF AN EXPERT CONSULTANT**

NOW COMES Tennessee Gas Pipeline Company, L.L.C. (“TGP”), by and through its Attorneys, Nixon Peabody, LLP, and respectfully objects to the Motion filed by the Towns of Fitzwilliam, Rindge and Pelham (collectively, the “Towns”) which seeks an order compelling TGP to bear the costs, fees and expenses¹ for certain services rendered solely to the Towns by Rick Van de Poll, Ph.D. related to: (i) wetlands mapping and impact assessment, (ii) verification and assessment of TGP’s application for a Certificate of Site and Facility (the “Application”), and (iii) certain other unidentified services in connection with serving as the Towns’ expert witness on matters relating to the Application (the “Towns’ Motion”). In support of this objection, TGP states as follows:

1. The Site Evaluation Committee (the “SEC”) lacks the authority to grant the relief requested by the Towns. The SEC has only those powers which are expressly granted or fairly implied by statute. See Appeal of Public Service Co. of New Hampshire, 122 N.H. 1062, 1066 (1982). Actions beyond that authority are improper. Id. The Towns claim RSA 162-H:10, IV authorizes the SEC to award expenses incurred by the Towns to retain an expert witness. However, the Towns’ reliance on that statute is misplaced. That statute permits the SEC to require *information* from TGP related to the hearings and any investigation or study which the

¹ The Town’s Motion lacks sufficient cost specificity. It merely provides Dr. Van de Poll’s hourly rate, not a budget, which is normally demanded by the clients of consultants engaged in such work.

SEC might undertake. See id. The statute does not state, or even imply, that the SEC may award any costs independently and unilaterally incurred by the Towns or any other intervenor. See id. In the absence of such authority, the SEC simply lacks the ability to provide the relief requested by the Town.

2. In December of 2010, the SEC previously addressed a similar request in Groton Wind, LLC's ("Groton") application for a Certificate of Site and Facility (Docket No. 2010-01). In that matter, a group of interveners filed a motion seeking reimbursement from Groton for expenses in producing an expert witness, pursuant to RSA 162-H:10, V. Unlike the subsection of RSA 162-H:10 cited in the Towns' Motion, RSA 162-H:10, V does specifically reference certain costs of consultant(s) retained by the SEC or the Counsel for the Public borne by an applicant. The SEC's denied that request providing that: "The statute clearly does not authorize the Subcommittee to order reimbursement for a witness retained by a party other than Counsel for the Public." See Exhibit A (Order on Pending Motions and Further Procedural Order, Application of Groton Wind, LLC, NH SEC, Docket No. 2010-01, at 3 (Dec. 14, 2010)). For the same reasons the SEC denied the intervener's motion for an order directing Groton to bear the costs for an expert consultant, the SEC must now deny the Towns' Motion here.

3. In addition to the absence of legal authority to grant the relief requested by the Towns, public policy compels that the Motion be denied. An order requiring an applicant to pay costs incurred (or to be incurred) by a group of intervenors would improperly incentivize those in opposition to an energy project to incur substantial and unregulated costs with the intention of shifting them to the applicant. Such conduct could chill applications to the SEC and have the potential to make otherwise viable energy projects uneconomical.

4. Assuming, *arguendo*, that the SEC has the authority to grant the relief requested, the Towns' Motion is not ripe for adjudication for the following reasons:

- A. The Towns have not yet sought intervener status from the SEC. Until such status is obtained, the Towns do not have standing to request the relief included within their Motion. At present, there is no Application for this project pending before the SEC. Until an Application has been filed and accepted, and the SEC has issued a procedural order governing, among other things, the intervention process, any requests for intervention are untimely and procedurally improper. See e.g., Order Determining Application to be Incomplete, Application of Atlantic Wind, LLC, NH SEC, Docket No. 2013- 02, at 17 (Jan. 13, 2014) (“All motions to intervene in this docket shall be held in abeyance until such time as a complete Application has been accepted.”); see also Site 202.11(a) (requiring that persons seeking to intervene shall file their petitions with the SEC and with parties identified in the notice of hearing).
- B. Given that the Application has not been filed with the SEC (or accepted as complete, thereby commencing the adjudicative proceeding), neither the Towns, the SEC nor Counsel for the Public has had the opportunity to (i) review the Application or the supporting materials submitted therewith, or (ii) ascertain whether any additional studies or investigations are necessary and appropriate pursuant to RSA 162-H.

Hence, until the Towns have obtained status as interveners and the Application is accepted as completed, the Towns' Motion is not ripe. Subsequent to the Towns obtaining interveners status,

the SEC or Counsel for the Public can then make a determination whether to retain the Towns' consultant pursuant to RSA 162-H:10, V.

WHEREFORE, TGP respectfully requests that the SEC:

- A. Issue an Order denying the Towns' Motion; and
- B. Grant such other and further relief as deemed just and proper.

Respectfully Submitted,

TENNESSEE GAS PIPELINE COMPANY, L.L.C.

By Its Attorneys,
NIXON PEABODY LLP

Dated: March 7, 2016

By:



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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of March, 2016, the foregoing Objection has been emailed to the persons on the Service List of this docket.



W. Scott O'Connell

EXHIBIT A

*Order on Pending Motions and Further Procedural Order, Application of Groton Wind, LLC,
NH SEC, Docket No. 2010-01, at 3 (Dec. 14, 2010)*

<See attached>

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

Docket No. 2010-01

**Application of Groton Wind, LLC for a Certificate of Site and Facility
for a Renewable Energy Facility in Groton, New Hampshire**

Order on Pending Motions and Further Procedural Order

Issued December 14, 2010

Introduction

On March 26, 2010, Groton Wind, LLC (Applicant) filed an Application for a Certificate of Site and Facility. The Applicant petitions the Site Evaluation Committee (Committee) for authority to site, construct and operate a renewable energy facility (Facility) in the Town of Groton, Grafton County. The Application proposes a wind energy facility consisting of 24 wind turbines, each having a nameplate capacity of two (2) MW for a total nameplate capacity of 48 MW. On April 26, 2010, the Vice-Chairman of the Committee accepted the Application as provided in RSA 162-H: 6-a, III. On May 7, 2010, the Chairman of the Committee designated a Subcommittee to review the Application as provided in RSA 162-H: 4, V.

An adjudicatory hearing in this docket commenced on November 1, 2010, and continued through November 5, 2010, at which time, consistent with the Order and Notice of Final Prehearing Conference and Public Adjudicative Proceedings, dated October 12, 2010, the proceeding was recessed to the call of the Chair.

In response to a request from the Chair, the Applicant, Counsel for the Public and some of the intervenors filed memoranda addressing the procedural schedule that should be followed in this docket. The Subcommittee has also received additional supplemental testimony and three motions.

The Applicant, in response to data requests from the Committee at the adjudicatory proceedings filed Exhibit 33, the capacity factor profile and Exhibit 40 B, financial statements of the non-publically held companies, Groton Wind LLC and Iberdrola Renewable Holdings Inc. The Applicant filed a Motion for Protective Order and Confidential Treatment for these two exhibits.

Additionally, the Buttolph/Lewis/Spring intervenor group filed a motion seeking reimbursement for its expenses in producing a witness, Michael McCann.

On December 3, 2010, the Sub-Committee held a public meeting for the purpose of discussion and deliberated on the procedural schedule for the balance of this proceeding. The Subcommittee also considered and deliberated on the outstanding

motions. This Order memorializes the actions taken by the Subcommittee. This Order also addresses the Applicant's recent motion relative to jurisdiction over associated facilities and the procedural schedule.

Motion for Protective Order and Confidential Treatment

The Applicant has filed a motion seeking confidential treatment of Exhibit 30, financial statements of the Applicant and another privately held company that are both subsidiaries of Iberdrola Renewables, Inc, a publicly traded company. The Applicant also seeks confidential treatment and non-disclosure of its capacity factor profile.

In *Lamy v. New Hampshire Public Utilities Commission*, 152 N.H. 106 (2005), the New Hampshire Supreme Court described a three-step analysis to determine whether information is exempt from public disclosure pursuant to the Right-to-Know law, RSA 91-A: 5, IV. The first prong of the analysis is to determine if the Applicant has identified a privacy interest. If a privacy interest is invoked then the agency must assess whether there is a public interest in disclosure. Disclosure should inform the public of the activities and conduct of the government. If disclosure does not serve that purpose then disclosure is not required. Finally, when there is a public interest in disclosure, that interest is balanced against any privacy interests in non disclosure. *See also, Union Leader Corp. v. New Hampshire Housing Finance Authority*, 142 NH 540, 553 (1997). (The agency must perform a balancing test to determine whether the records should be protected or if the public's interest in disclosure is outweighed by the Applicant's interests in protecting its confidential financial and commercial information.)

The Applicant seeks confidential treatment for the financial statements of non-publicly held companies. At the same time, the Applicant has filed and disclosed the financial statements of its parent company which is publicly traded. The information is clearly financial information as contemplated by RSA 91-A: 5, IV. Disclosure of the financial statements will do little to inform the public of the conduct or activities of the government, especially since the parent company's financial records have been disclosed. Under these circumstances the Applicant's interest in maintaining the confidentiality of the financial record of its non-public subsidiaries outweigh the benefits of disclosure to the public. The financial statements may be filed confidentially and need not be disclosed to the public or other parties. However, because of his important statutory role, pursuant to RSA 162-H:9, copies of the financial statements shall be provided to Counsel for the Public. Counsel for the Public shall not further disclose the information without prior approval of the Committee.

The Applicant also seeks confidential treatment of its capacity factor profile. The capacity factor profile includes technical information including the results of various wind study surveys performed by the Applicant. This information is researched and generated at great expense to the Applicant and is in the nature of a trade secret. Disclosure of the information would disadvantage the Applicant by allowing competitors to obtain, at no cost, the Applicant's trade secrets. There is little if any public interest in the disclosure of this type of information and the threat of financial harm to the Applicant

is great. Therefore, the capacity factor profile information may be filed confidentially and shall not be disclosed to the public. However, Counsel for the Public shall be provided with a copy of the information and shall not further disclose the information without further order from the Committee.

Motion for Reimbursement of Fees for Expert Witness

The Buttolph/Lewis/Spring intervenors seek reimbursement from the Applicant for the expense incurred in obtaining the testimony of Michael McCann. Mr. McCann testified generally about his opinions regarding the effect of wind turbine projects on nearby property values. The Intervenor's allege that Mr. McCann is the only witness to credibly address the issue of property values as a component of the orderly development of the region. The Intervenor's rely on RSA 162-H: 10, V. The Applicant objected to the motion asserting that such relief was beyond the authority of the Subcommittee as Mr. McCann was retained by an intervenor and not by the Committee or Counsel for the Public. At the public meeting, Counsel for the Public questioned the intervenor's reliance on RSA 162-H:10, V, but suggested that reimbursement might be statutorily available as a condition of the Certificate at the conclusion of the docket. At the public meeting, the Applicant objected to Counsel for the Public's suggestion.

RSA 162-H:10, V, states:

The site evaluation committee and counsel for the public shall jointly conduct such reasonable studies and investigations as they deem necessary or appropriate to carry out the purposes of this chapter and may employ a consultant or consultants, legal counsel and other staff in furtherance of the duties imposed by this chapter, the cost of which shall be borne by the applicant in such amount as may be approved by the committee. The site evaluation committee and counsel for the public are further authorized to assess the applicant for all travel and related expenses associated with the processing of an application under this chapter.

The statute clearly does not authorize the Subcommittee to order reimbursement for a witness retained by a party other than Counsel for the Public. Neither the Subcommittee nor Counsel for the Public found it necessary or appropriate to employ the Intervenor's consultant. The Intervenor's alone made the decision to employ the consultant. Therefore, the Subcommittee denied the Intervenor's motion for an order directing the Applicant to bear the costs of the expert consultant.

Procedural Schedule

At the public meeting on December 3, 2010, the Subcommittee also considered and deliberated on a further procedural schedule. Shortly before the commencement of the adjudicatory hearings the Subcommittee was advised that the Applicant was considering an alternative route for the transmission line that would deliver power from

the project area in Groton to the Beebe River Substation. The Subcommittee also was advised that, contrary to the original Application, the interconnection with the substation will be required to be at 115 kV. This will necessitate the construction of a step-up transformer station that was not contemplated in the original Application. Additionally, the Subcommittee was informed that the New Hampshire Division of Historical Resources had rejected the project area form submitted by the Applicant as part of its federal Section 106 review. These developments affect the statutory concerns of the Subcommittee and it will be necessary to extend the adjudicatory hearings and obtain additional information. It is in the public interest to ensure that these matters are appropriately addressed in the course of the proceedings in the docket. Therefore, the Subcommittee unanimously found it to be in the public interest to extend deliberations in this docket until April 26, 2011.

In order to ensure that appropriate discovery and technical sessions are completed before further adjudicatory proceedings, a pre-hearing conference shall be held on December 17, 2010 at 10 a.m. Counsel for the Committee shall preside at the pre-hearing conference. The parties will discuss a discovery schedule, the need for additional technical sessions and possible dates to conclude the adjudicatory portions of this proceeding. Counsel for the Committee shall issue a notice to the parties advising of the time and place for the pre-hearing conference. That notice shall be displayed in the office of the Department of Environmental Services and at the offices of the Public Utilities Commission. In addition, the notice shall be published on the Committee's website and served upon the service list in this docket.

On December 8, 2010, the Applicant filed its Unassented-to Motion for Ruling on Jurisdiction/Scope by December 17, 2010. The Applicant reprises the question of the Committee's jurisdiction over: "1) the power line that will run within the New Hampshire Electric Co-operative's distribution corridor; and/or 2) the facilities that will interconnect the line to the regional transmission grid." Among other things, the Applicant asserts that a ruling on the jurisdictional issue is a "necessary prerequisite for determining an appropriate schedule for the duration of this proceeding." The Applicant reports that the Buttolph/Spring/Lewis group objects to the motion and that Counsel for the Public takes no position.

Resolution of the jurisdictional issue posed by the Applicant is not a necessary prerequisite for determining an appropriate procedural schedule. Arguably, resolution of the jurisdictional issue relating to what constitutes "associated facilities" could simplify the undertaking, if that were the only unresolved issue. However, there are other unresolved issues, notably concerning historic sites, which must be contemplated in determining an appropriate schedule. While it might be preferable to set a schedule that moved along a single path of procedural deadlines, the conditions that confront us are more complex and may require moving along more than one path to ensure a full and timely review. In any event, there is insufficient time to rule on the jurisdictional issue prior to the December 17, 2010 technical session. The Applicant's motion is denied.

Conclusion and Order

Based upon the foregoing, it is hereby:

ORDERED, that the Applicant's Motion for Protective Order and Confidential treatment is **GRANTED**; and it is


FURTHER ORDERED, that the Motion of Intervenor Group Buttolph/Lewis/Spring for Order Directing Groton Wind LLC and Iberdrola Renovables to Bear the Costs of Expert Consultant is **DENIED**; and it is,

FURTHER ORDERED, that the Applicant's Unassented-to Motion for Ruling on Jurisdiction/ Scope by December 17, 2010 is **DENIED**; and it is

FURTHER ORDERED, that it is in the public interest to extend deliberations in this docket until April 26, 2011; and it is

FURTHER ORDERED, that a pre-hearing conference shall be held on December 17, 2010, at a time and place to be determined by Counsel for the Committee. The parties shall discuss a further procedural schedule, appropriate discovery and scheduling for the balance of this docket.

December 14, 2010


Thomas B. Getz, Vice Chairman
Presiding Officer