

**STATE OF NEW HAMPSHIRE  
SITE EVALUATION COMMITTEE**

**Docket No. 2022-01**

**Petition for Declaratory Ruling  
Regarding Avangrid Renewables, LLC and Lempster Wind, LLC**

**Prehearing Order**

**April 28, 2022**

On February 16, 2022, the Town of Lempster (“Town”) filed a petition with the Site Evaluation Committee for a declaratory ruling regarding Avangrid Renewables, LLC (“Avangrid”) and Lempster Wind, LLC (“Lempster Wind”).<sup>1</sup> The Committee chair appointed a three-person subcommittee to hear the petition by order dated February 28. Avangrid and Lempster Wind filed a petition to intervene on March 8. Kevin and Debra Onnela filed a petition to intervene on March 14. The chair of the subcommittee granted both motions on March 31 and issued a notice of prehearing conference designating me as presiding officer for the conference on April 4.

On April 11, I presided over a prehearing conference pursuant to RSA 541-A:31, V(b) and Site 202.10. Attorney Michael Courtney appeared on behalf of the Town, Attorney Susan Geiger appeared on behalf of Avangrid and Lempster Wind, and Attorney Thomas Quarles appeared on behalf of the Onnelas. At the prehearing conference, the following matters were discussed and/or decided.

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<sup>1</sup> As discussed at the prehearing conference, the Town submitted with its petition a \$3,000 filing fee under RSA 162-H:8-a, II(d)(2), rather than the \$3,600 filing fee implemented by the Committee pursuant to RSA 162-H:8-a, III. See Site Evaluation Committee Revised Fee schedule, available at <https://www.nhsec.nh.gov/sites/g/files/ehbemt531/files/inline-documents/sonh/revised-fee-schedule.pdf> (October 19, 2018). The Town since supplemented its filing fee with an additional \$600, received by the Committee on April 19. The Town’s petition is deemed filed as of the receipt of its full filing fee, and the 90-day deadline for a subcommittee response begins to run as of that date. Site 203.02(b). This timeline is subject to the subcommittee’s authority to waive procedural rules as provided for in Site 202.15.

**1. Offers of settlement**

The parties had no offers of settlement to discuss.

**2. Simplification of the issues**

The Town, Avangrid, Lempster Wind, and the Onnelas are currently engaged in litigation in the Sullivan County Superior Court. Their dispute surrounds the installation of locked gates on Bean Mountain Road in the town of Lempster. In their superior court suit, Avangrid, Lempster Wind, and the Onnelas defend the current location of the gates on the basis that they believe the gates to be required by Lempster Wind's Certificate of Site and Facility, issued by the Site Evaluation Committee in Docket No. 2006-01 on June 28, 2007 (the 2007 Certificate). The superior court judge determined that it was appropriate for the Committee to interpret its own order and stayed the parties' superior court action to allow them to seek a declaratory ruling. Order on Mot. for Summ. J., Town of Lempster v. Kevin Onnela, et al., Docket No. 220-2020-CV-00112, at 6 (N.H. Super. Oct. 25, 2021).

The Town's petition and Avangrid and Lempster Wind's objection raise numerous issues.<sup>2</sup> At the prehearing conference, however, the parties agreed that the scope of a declaratory ruling petition limits the available relief in the proceeding. Specifically, a declaratory ruling is "an agency ruling as to the specific applicability of any statutory provision or of any rule or order of the agency." RSA 541-A:1, V. For the purpose of this petition, the agency order at issue is the 2007 Certificate. As narrowed at the prehearing conference, the parties seek a declaratory ruling from the subcommittee as to whether the

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<sup>2</sup> The Onnelas have not yet briefed their position on the petition, nor was there a requirement that they do so at this stage in the proceeding.

2007 Certificate requires the installation of locked gates at their current locations on Bean Mountain Road.

It is worth providing a brief, non-exhaustive list of the issues the parties agreed would not be properly before the subcommittee for consideration in the context of a declaratory ruling. The subcommittee's declaratory ruling will be a ruling as to the specific applicability of the 2007 Certificate. The subcommittee is not a forum for the vindication of private rights. Thus, the injunctions sought by the Town in its petition are not available as a remedy. Moreover, although the Committee or a duly appointed subcommittee thereof might take an enforcement action against a certificate holder on behalf of the state, a declaratory ruling brought by a third party would not be an appropriate forum to "declare" that a certificate holder is in violation of its certificate.<sup>3</sup>

Additionally, because a declaratory ruling is limited in its scope to an agency's interpretation of its own statutes, rules, and orders, see RSA 541-A:1, V, the subcommittee's inquiry is statutorily restricted to RSA Chapter 162-H, the Site administrative rules, and any orders issued by the Committee. It would not be appropriate for the subcommittee to opine as to the applicability of RSA 231:21-a, a statute outside of its jurisdiction. The related questions of preemption doctrine raised in the petition, while properly before the superior court as a court of general jurisdiction, are also not subject to analysis by the subcommittee in a declaratory ruling proceeding.

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<sup>3</sup> In this particular instance, even if the subcommittee concludes that the gates are not *required* by the 2007 Certificate, the Town does not advance any argument that the gates are *prohibited* by the 2007 Certificate.

Furthermore, a declaratory ruling is not an opportunity for the subcommittee to reconsider<sup>4</sup> or modify<sup>5</sup> the order issued by the Committee in 2007. The subcommittee will issue its declaratory ruling as to what the Committee meant by what it wrote in 2007, not what it might do differently now with the benefit of hindsight.

Finally, with regard to the affirmative defenses raised by Avangrid and Lempster Wind, I expressed skepticism as to the applicability of defenses in a proceeding without defendants. As presiding officer of a prehearing conference, I have no authority to rule on the merits of the parties' arguments. I expect, however, that, if Avangrid and Lempster Wind intend to continue to assert affirmative defenses in this docket, it will likely assist the subcommittee in their analysis if Avangrid and Lempster Wind are able to identify some authority explaining whether and to what extent those defenses are available here.

- 3. In light of the significant narrowing of issues in this docket, supplemental focused briefing would no doubt assist the subcommittee to correctly interpret the 2007 Certificate. The subcommittee's decision on the content and volume of that supplemental briefing will be informed by their review of the joint statement of material facts and the ruling on the motion for site visit addressed later in this prehearing order. This requirement that the parties file a joint statement of material facts should not be interpreted as prohibiting the parties from filing any other pleading or information that they may choose to file consistent with the Committee's statute and rules. However, no such supplemental filing is required at this time. Stipulations or admissions as to issues of fact or proof, by consent of the parties.**

Because declaratory rulings are strictly limited to their facts, it is imperative that the subcommittee have a full understanding of the facts upon which the parties seek the declaratory ruling. A declaratory ruling is binding only upon the petitioners. See Appeal of Nationwide Ins. Co., 120 N.H. 90, 93 (1980). In a typical petition for a declaratory ruling, a

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<sup>4</sup> Rehearing and reconsideration of Committee orders are available under RSA 541 and Site 202.29 and subject to the limitations laid out therein.

<sup>5</sup> Requests to modify existing certificates are provided for in RSA 162-H:8-a, II(d)(5).

single petitioner supplies the administrative body with applicable facts and the specific ruling sought. Site 203.01(b)(2). In this docket, however, two petitioner-intervenors have joined. It is apparent from their filings that there are significant factual disagreements among these parties. To be binding on the petitioners here, the subcommittee's declaratory ruling must be based upon facts to which all parties agree. As discussed at the prehearing conference, the parties shall submit a joint statement of material facts upon which the declaratory ruling is to be based within 14 days of the issuance of this prehearing order. The joint statement of material facts is expected to focus narrowly on the issues to be decided and to include information to help the subcommittee understand the relevant project site and neighboring property boundaries, property interests, and roads through actual photographs, maps, and surveys. The parties are encouraged to use this opportunity to consider potential areas of agreement with respect to project site boundaries and alternative signage options.

**4. Limitations on the number of witnesses.**

Consistent with typical process in declaratory ruling petitions, no party at the prehearing conference expressed an intent to call witnesses.

**5. Changes to standard procedures desired during the hearing, by consent of the parties.**

Avangrid and Lempster Wind filed an assented-to motion for a site visit under Site 202.13 (a). As explained at the prehearing conference, the presiding officer lacks authority to rule on a request for site visit. Site 202.13 (a) requires the subcommittee to conduct a requested site visit if it "determines that the site visit will assist the . . . subcommittee in reaching a determination in the proceeding." At the prehearing conference, Avangrid and Lempster Wind explained that a site visit would assist the subcommittee by demonstrating

that the gates in their current locations are necessary to effectuate the Committee's intent in the Certificate to restrict public access to the facility.

As discussed at the prehearing conference, the subcommittee consists of two state employees with full-time jobs at other agencies and a member of the public who participates on the subcommittee as a volunteer. In the interest of utilizing the subcommittee members' time efficiently, I believe it is prudent to allow them to review the parties' joint statement of material facts prior to determining whether a site visit would assist them. If any party wishes to provide any supplemental filing in support of the site visit request, they may do so within 14 days of the issuance of this order.

**6. Consolidation of examination of witnesses by the parties.**

As noted in section 4 above, no party at the prehearing conference expressed an intent to call witnesses.

**7. Any other matters which aid in the disposition of the proceeding.**

Declaratory rulings do not typically require hearings. See Appeal of Toczko, 136 N.H. 480, 485 (1992); accord New Hampshire Drafting and Procedure Manual for Administrative Rules, Office of Legislative Services, Ch. 2 § 4.2 p 17 (May 1, 2016). At the prehearing conference, the parties expressed a willingness to provide oral argument on the petition if the subcommittee determined that oral argument would be helpful in reaching a decision. The subcommittee will best be able to make this determination after reviewing the parties' joint statement of material facts, conducting a site visit if necessary, and reviewing any supplemental briefing it may request based upon the narrowed scope of the declaratory ruling petition as outlined above. Any decision on the parties' request for oral argument is, therefore, deferred until that time.

**Based on the foregoing, it is hereby**

**ORDERED**, that the issues presented in this docket are limited to a declaratory ruling as to **whether the 2007 Certificate requires the installation of locked gates at their current locations on Bean Mountain Road**; and it is

**FURTHER ORDERED**, that the parties shall, within 14 days of the issuance of this order, submit a joint statement of material facts upon which the declaratory ruling is to be based; and it is

**FURTHER ORDERED**, that ruling on the parties' assented-to request for a site visit is deferred for decision by the subcommittee, after the subcommittee has had the opportunity to review the joint statement of material facts and any supplement to the request filed by any party as laid out in section 5 above; and it is

**FURTHER ORDERED**, that the content and volume of any supplemental briefing on the now narrowed issue presented in this docket shall be specified by the subcommittee, after the subcommittee has ruled on the assented-to request for a site visit and, if the request is granted, after the site visit occurs; and it is

**FURTHER ORDERED**, that the subcommittee's determination on the necessity of any oral argument in this matter is deferred until the subcommittee has had the opportunity to review any supplemental briefing it requests as laid out above.

So ordered, this 28<sup>th</sup> day April, 2022.

/s/Michael R. Haley  
Michael R. Haley  
Presiding Officer