

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

Docket No. 2022-01

**Town of Lempster
Petition for Declaratory Ruling**

**INTERVENORS' UNASSENTED-TO MOTION FOR CLARIFICATION
AND/OR REHEARING**

NOW COME Avangrid Renewables, LLC (“Avangrid Renewables”), Lempster Wind, LLC (“Lempster Wind”), Kevin and Debra Onnela (“the Onnelas”) (collectively, “the Intervenor”) by and through their undersigned attorneys, and pursuant to RSA 541:3 and N.H. Admin. Rule Site 202.29, respectfully move for clarification and/or rehearing of the Prehearing Order issued April 28, 2022 in the above-captioned docket (“the Prehearing Order”). In support of this Motion, the Intervenor state as follows:

I. Rehearing Standard

Decisions of the New Hampshire Site Evaluation Committee (“SEC” or “Committee”) are reviewable in accordance with the provisions of RSA 541. *See* RSA 162-H:11. Any SEC order or decision may be the subject of a motion for rehearing filed by a party to the proceeding or any person directly affected thereby. RSAs 541:2 and :3. A motion for rehearing must “set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable.” RSA 541:4. The SEC’s rehearing rules supplement the provisions of RSA 541, and require that a rehearing motion identify errors of fact, reasoning or law which the moving party

wishes to have reconsidered, and describe how each error causes the order or decision to be unlawful, unjust or unreasonable. N.H. Admin. Rule Site 202.29.

“The purpose of rehearing is to direct attention to matters said to have been overlooked or mistakenly conceived in the original decision, and thus invite reconsideration upon the record to which that decision rested.” *Dumais v. State of New Hampshire Pers. Comm.*, 118 N.H. 309, 311 (1978) (internal quotations omitted). A rehearing may be granted upon a finding of “good reason”. RSA 541:3.

II. Argument

A. The Prehearing Order is Internally Inconsistent

The Prehearing Order states that the subcommittee’s declaratory ruling in this proceeding “must be based upon facts to which all parties agree” and directs the parties to “submit a joint statement of material facts upon which the declaratory ruling is to be based...”. Prehearing Order, p. 5. The Prehearing Order also states that the requirement to file the Joint Statement “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.” Prehearing Order, p. 4. To the extent that the Prehearing Order appears to limit the factual record in this case to the facts contained in the Joint Petition, but at the same time permits the parties to file additional information, it is internally inconsistent and should be clarified. For the reasons discussed below, such clarification should indicate that the parties may submit facts into the record of this proceeding in addition to those contained in the parties’ Joint Statement of Material Facts filed on May 12, 2022 (“the Joint Statement”).

B. The Prehearing Order's Inconsistency Can Create an Unjust, Unreasonable and Unlawful Result

To the extent that the Prehearing Order purports to limit the factual record in this proceeding to those facts contained in the Joint Statement, the Prehearing Order, it is unlawful, unjust, and unreasonable.

First, nothing in the Committee's rules or statutes restrict the subcommittee to deciding a petition for declaratory simply upon the facts contained in a joint statement of material facts. To the contrary, the rules expressly contemplate that the Committee will review all facts presented by the petitioner and any other parties that file objections or replies with respect to the petition. *See* N.H. Admin. Rule Site 203.02(a). The rules also require a written ruling that includes an explanation of the factual and legal basis for granting or denying the petition. *See* N.H. Admin. Rule Site 203.02 (b); *see also* RSA 541-A:35 (an agency's final decision shall include findings of fact and rulings of law) and RSA 541-A:31, VIII (findings of fact shall be based exclusively on the evidence and on matters officially noticed). Accordingly, in deciding the instant petition for declaratory ruling, the subcommittee must engage in fact finding, and must consider not only the facts presented in the Town of Lempster's petition and the Joint Statement, it must also consider the facts and other information presented in the Intervenors' Objections, as well as any other relevant information submitted by the parties.

Second, all parties to this contested proceeding must be afforded the opportunity to present evidence and argument on all issues involved. RSA 541-A:32, IV. This opportunity includes the ability to submit information and statements of fact upon which all parties do not agree. *See* RSA 541-A:31, VI (e)(the record in a contested case includes proposed findings); *see*

also N.H. Admin. R. Jus 812.05(a)(any party may submit proposed findings of fact and conclusions of law to the presiding officer prior to or at the hearing).¹

Third, the Prehearing Order overlooks the fact that the SEC has engaged in adjudicating contested facts in prior declaratory ruling proceedings. *See, e.g., Re: Petition for Declaratory Ruling of the Antrim Wind Opponents*, SEC Docket No. 2018-01, Order on Pending Motions (July 26, 2018), and *Re. Motion of Campaign for Ratepayers Rights, et al, for a Declaratory Ruling Regarding Modifications to Merrimack Station Electric Generating Facility*, SEC Docket No. 2009-01, Order Denying Motion for Declaratory Ruling (Aug. 10, 2009).

Lastly, while the parties made a good faith effort to reach agreement on a set of facts that the subcommittee could solely rely upon in making its decision, the parties were unable to do so. Therefore, the parties agreed that they intended to submit additional facts separately to the SEC's attention and include them in the record of this proceeding. *See* Joint Statement, p. 1. In these circumstances, to the extent that the Prehearing Order restricts the parties and the subcommittee to the limited set of facts contained in the Joint Statement, the Prehearing Order is unjust and unreasonable.

C. The Prehearing Order Should Be Clarified to Correctly State the Issue in this Proceeding and to Recognize that the Petitioner Bears the Burden of Proof

The Prehearing Order states that “the parties seek a declaratory ruling from the subcommittee as to whether the 2007 Certificate requires the installation of locked gates at their Current locations on Bean Mountain Road.” Prehearing Order, pp. 2-3. This statement overlooks the fact that neither the Town of Lempster's Petition for Declaratory Ruling, nor the requests for

¹ The Notice of Prehearing Conference issued April 4, 2022 in this docket states “[t]o the extent the Committee's statutes and rules do not address an issue of policy or procedures, the Subcommittee shall rely upon RSA 541-A and Jus Part 800 *et seq.*” Because the Committee's statutes and rules do not contain provisions for the submission of proposed findings of fact and conclusions of law, Jus 812.05 applies in this case.

relief stated in the Objections filed by the Intervenors use such language. The Town's Petition requests that SEC "[f]ind and rule the Respondents are interfering with the use of Bean Mountain Road in a manner violative of RSA 231-21-a, II and in a manner inconsistent with the terms of the Agreement"² (which was made a part of the SEC's Decision and Order in SEC Docket No. 2006-01), and the requests for relief in the Intervenors' Objections are that the SEC issue a declaratory ruling that the Intervenors "may maintain the gates located on Bean Mountain Road in Lempster, New Hampshire in their present locations in order to prevent the public from accessing the site of the Lempster Wind Facility."³ In view of the foregoing, the determination on page 7 of the Prehearing Order 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**" (emphasis in original) should be restated as follows: "whether the Town of Lempster has met its burden of proof to show that the 2007 Certificate does not allow the installation of locked gates at their current locations on Bean Mountain Road." Such clarification is both consistent with the parties' pleadings, and reflects that the Town of Lempster bears the burden of proof with respect to its Petition. *See* N.H. Admin. Rule Site 202.19 (a).

III. Conclusion

For the above-stated reasons, the Prehearing Order must be clarified and reconsidered so as to allow the parties to present to the subcommittee facts in addition to those contained in the Joint Statement, and to allow the subcommittee to base its decision on all relevant facts, not simply

² Town of Lempster's Petition for Declaratory Ruling, p. 6.

³ Avangrid Renewables, LLC's and Lempster Wind, LLC's Objection to Town of Lempster's Petition for Declaratory Ruling, p. 25; Kevin and Debra Onnela's Objection to Town of Lempster's Petition for Declaratory Ruling, p. 19.

the limited set of facts in the Joint Statement upon which the parties were able to agree. The Prehearing Order must also be clarified to correctly state the issue presented in this docket.

IV. Assent

Counsel for Avangrid and Lempster Wind has made a good faith effort to obtain the Town of Lempster's assent to the relief sought herein, but as of the time of filing this motion, counsel for the Town of Lempster has not provided the Town's position.

WHEREFORE, the Intervenor respectfully request that the Presiding Officer that issued the Prehearing Order:

- A. Issue an order clarifying the Prehearing Order to permit the parties individually to submit additional facts into the record of this proceeding beyond those contained in the parties' Joint Statement of Material Facts;
- B. Issue an order clarifying the Prehearing Order to correctly state the issue in this proceeding as set forth above; and
- C. Grant such further relief as it deems appropriate.

Respectfully submitted
Avangrid Renewables, LLC and
Lempster Wind, LLC
By their Attorneys:
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Dated: May 26, 2022

By:



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CERTIFICATE OF SERVICE

I hereby certify that on the above date a copy of this Motion was sent via electronic mail to the Distribution List.



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