STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

Docket No. 2022–01

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

Order on Intervenors' Motion for Clarification and/or Rehearing

June 6, 2022

On April 11, 2022, I presided over a prehearing conference in the above-captioned matter pursuant to RSA 541-A:31, V(b) and Site 202.10. Attorney Michael Courtney appeared on behalf of the petitioner, the Town of Lempster ("Town"), Attorney Susan Geiger appeared on behalf of intervenor Avangrid Renewables, LLC and Lempster Wind, LLC ("Avangrid") and Attorney Thomas Quarles appeared on behalf of intervenors Kevin and Debra Onnela. On April 28, I issued a prehearing order memorializing the consensus reached by the parties at the prehearing conference.[1]

On May 26, the intervenors filed a motion for clarification and/or rehearing of the prehearing order. On June 3, the Town objected to the intervenors' motion. For the reasons that follow, the intervenors' motion is denied.

I. The Intervenors' Motion

The intervenors' motion essentially raises two issues. First, the intervenors argue that the prehearing order incorrectly states the question upon which the Town seeks its declaratory ruling. Second, the intervenors argue that the prehearing order improperly

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[1] The prehearing conference was recorded and is available for viewing online at https://nhgov.webex.com/recordingservice/sites/nhgov/recording/d4baf4859bf9103ab8f60050568195cf/playback. As explained at the prehearing conference, parties may request that a transcript be prepared at their own expense. As of the issuance of this order, no party has requested production of a transcript. The Webex software provides a speech-to-text "transcript" adjacent to the video viewer, but the computer-generated text is of questionable accuracy and does not constitute an official transcript of this proceeding.

restricts the scope of the subcommittee's review by limiting the factual record to the parties' joint statement of material facts. Neither of the intervenors' arguments forms a basis for rehearing or clarification of the prehearing order.

II. The Town's Objection

The Town filed a concise objection agreeing with the terms of the prehearing order and asking that the intervenors' motion be denied.

III. Standard of Review

Decisions of the Site Evaluation Committee are reviewable in accordance with RSA 541. RSA 162-H:11. Under RSA 541, a party may request rehearing of an agency's order within 30 days, and the agency "may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion." RSA 541:3.

IV. Analysis

A. The scope of the petitioner's declaratory ruling request

I spent considerable time at the prehearing conference discussing with the parties the nature of a declaratory ruling petition and the features that distinguish it from a Superior Court declaratory judgment action. 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. Although the New Hampshire Supreme Court has taken appeals and writs of certiorari from agency declaratory rulings, I am unaware of any case that provides additional interpretation of this definition. Nor has any party to this proceeding directed me toward any.

The New Hampshire Office of Legislative Services publishes the New Hampshire Drafting and Procedure Manual for Administrative Rules ("Manual"), the most recent

version of which was amended and effective as of August 1, 2019.[2] This manual provides limited additional explanation of the nature of a declaratory ruling in that it states, "A declaratory ruling is not a rule. Both are written and made effective by an agency, but by definition a declaratory ruling can apply only to the petitioner because it is a ruling 'as to the specific applicability of any statutory provision or of any rule or order of the agency.'" Manual at 17.

As discussed at the prehearing conference, a typical petition for a declaratory ruling presents an administrative agency with a factual scenario and asks the agency whether or how the agency's statute, rule, or order applies in that factual scenario. Thus, unlike declaratory judgments, these proceedings do not have plaintiffs and defendants. They are not a forum for the vindication of private rights. Nor should they be an opportunity for a petitioner to obtain a ruling "declaring" that some third party is in violation of a rule, statute, or order.[3] Nor are they an appropriate vehicle to seek injunctive relief.

After highlighting these limitations to the Town at the prehearing conference, I suggested to the Town that an appropriate framing of the question could be whether Bean Mountain Road is an "access road" and therefore required to be gated under the facility's certificate. Recording at 9:38–10:00. I specifically discussed the likely complications with framing the question as to whether the certificate *prohibited* gating. Recording at 10:06–10:20. The Town agreed that the question of whether Bean Mountain Road is an access

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[2] Available online at: http://gencourt.state.nh.us/rules/manual/amendedmanualeffective5-1-16amended8-1-19.pdf

[3] Of course, as a regulatory body, the SEC retains the authority to find a certificate holder in violation of an SEC statute, rule, or certificate. But the SEC would make such a finding in the context of an enforcement action on behalf of the State.

road that required gating would be an appropriate question for the SEC to answer through a declaratory ruling. Recording at 10:56–11:12.[4]

I then turned to the facility to seek its input on the appropriate scope of the declaratory ruling. Recording at 12:59. The facility and Onnelas disagreed with this initial framing and countered that the question was not whether Bean Mountain Road is an access road, but whether the certificate required the facility to gate Bean Mountain Road at the gates' current locations to restrict the public's access to the facility. Recording at 15:46–16:53. Having heard from all parties, I said the following:

> So, when I do the prehearing order—because it's supposed to be a simplification of the issues, I'm going to put in a statement of what I think the question is that's before the SEC. And what I think the issue that everybody can agree on is, "Does the Avangrid certificate of site and facility require gating of Bean Mountain Road at the current locations." … Does that seem like the question that they're supposed to be answering?

Recording at 19:23–19:55. All parties agreed with this framing. Recording at 19:55–19:58.

I later returned to the question of the issue to be decided and said:

> So, it seems to me like the best outcome [the Town] could expect to hope [sic] from this is that the order says the certificate does not require installation of gates at the current location, and the best outcome for [the intervenors] is, the certificate does require it at the current location . . . Those seem like those are your best outcomes here. Is that—does that ring true to everyone in the room?

Recording at 21:13–21:46. All parties agreed with this framing. Recording at 21:46–21:54.

After discussing some other matters, I once again returned to the question of the issue before the SEC and stated:

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[4] Although the intervenors do not address this aspect of the prehearing conference in their motion, I also discussed that declaratory rulings are limited to an agency's interpretation of its *own* statutes, rules, and orders. This would preclude the SEC from opining on the road classification statute, which is under the jurisdiction of the Department of Transportation. Recording at 12:06–12:36.

> It seems like we're all sort of in agreement that, "Does the 2007 Lempster Wind certificate of site and facility require the facility to install locked gates on Bean Mountain Road at their current locations?" is the question.

Recording at 31:05–31:13. The purpose of this third restatement of the question was to ensure the parties were on the same page with respect to their joint statement of material facts. I also suggested to the parties that, at some future date, the SEC might direct them to brief this limited issue because the briefing to that point dealt with numerous issues beyond the newly narrowed scope. No party objected to this framing, or to the task of compiling a joint statement of facts material to this limited question.

On April 28, I issued a prehearing order identifying the issue presented to the SEC. The order reproduced, almost verbatim, the question that I outlined three times at the prehearing conference, and that all parties agreed to.[5] Nearly a month later, the intervenors filed their Motion demanding that the issue presented be restated as, "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." Motion at 5.

The intervenors' motion must be denied for multiple reasons. First, as reflected in the recording of the prehearing conference, the narrowed issue presented in this docket reflects exactly the issue that all parties agreed was the appropriate question before the SEC. It is entirely immaterial that the parties submitted different questions in their briefing. A central purpose of a prehearing conference under RSA 541-A:31, V(c)(2)—and of this prehearing conference in particular—is to simplify the issues before the agency. The

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[5] It is worth noting that this framing of the issue is precisely the issue that the Superior Court directed the parties to request from the SEC. See Order on Motion for Summary Judgment, Town of Lempster v. Kevin Onnela, et al., No. 220-2020-CV-00112 (Oct 25, 2021) (the "Superior Court Order")

prehearing conference would be meaningless if it simplified issues only to return them to their earlier complexity based on the parties' earlier pleadings.

Moreover, the intervenors in this instance not only agreed to the question, but actively participated in revising it. Indeed, it is because of the intervenors' input that the question does not reference "access roads." Recording at 15:46–16:53. The intervenors' motion lacks any explanation why they helped construct a question for the SEC that they now seek to cast aside.

In addition, the parties, the SEC, and its staff have already expended over a month of time and effort proceeding with the understanding that the question presented in this docket is the question to which all parties agreed at the prehearing conference. The parties have agreed upon a joint statement of material facts—facts that they presumably believe are material to the prehearing conference question. Adopting an entirely new question at this stage renders those efforts wasted. The intervenors' motion is devoid of any rationale that would justify scrapping those efforts.

Most fundamentally, however, the intervenors' assent to the simplified question is immaterial. Although it substantially streamlined this docket to simplify the issue presented, the petition in this docket belongs to the Town. The Town filed this petition. The Town paid the $3600 filing fee. It is ultimately the Town's prerogative to determine what question it seeks to pose to the SEC. Intervenor status does not grant a party the right to capture the petitioner's petition for declaratory ruling and force the petitioner to ask a question it does not want answered.[6]

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[6] Nothing prevents the intervenors from filing their own petition with the SEC, paying their own filing fee, and seeking their own declaratory ruling on whatever question they may choose, regardless of whether that question is the one that the Superior Court directed the parties to ask.

Any of these four reasons provides adequate grounds to deny the intervenors' motion. It is worth noting, however, that there are at least two significant problems with their proposed question. First, it does not appear that any party to this proceeding believes that the 2007 Certificate *does not allow* the installation of locked gates at their current locations on Bean Mountain Road. The Town's argument, as outlined in the Superior Court Order is twofold. Essentially, the Town argues that certificate does not require locked gates at their current locations on Bean Mountain Road and, in the alternative, if the certificate did require the gates, the SEC exceeded its authority. Superior Court Order at 4–5. An answer to the question of whether the certificate *does not allow* the installation of the gates would contribute nothing to the Town's arguments, nor to the Superior Court's analyses thereof. Of course, the intervenors would be free to ask such a question of the SEC, regardless of whether the answer to such a question would serve any purpose in their Superior Court litigation. But the intervenors may not compel the Town to seek a declaratory ruling from the SEC on a question in which it has no interest.

More troublingly, however, the intervenors' invocation of a "burden of proof" in their question betrays an enduring misapprehension about the nature of declaratory rulings. It is worth clearing up this misapprehension because of its potential effect on the remainder of this proceeding. As discussed at the prehearing conference and as laid out in this order, a declaratory *ruling* is not a declaratory *judgment*. There are no plaintiffs and defendants who bear a burden of proof to persuade a neutral adjudicator to reach one conclusion or another. The parties to this docket are already involved in such a proceeding—namely, their Superior Court action. This petition is not a complete mini-litigation stacked matryoshka-style within the parties' Superior Court case. It is a forum to ask the SEC what it meant by its 2007 Certificate—nothing more.

The intervenors' citation to administrative rules invoking a burden of proof are not persuasive. These rules are all-purpose and must be read to establish a burden of proof in the type of proceedings where such a burden exists. The specific rule cited, Site 202.19(a), states "[t]he party asserting a proposition shall bear the burden of proving the proposition by a preponderance of the evidence." The Town is not "asserting a proposition" here. It is asking the SEC how its order applies to the present set of circumstances. It is nonsensical to refer to a "burden of proof" in this context.

Thus, the intervenors have not stated good reason to rehear the prehearing order's framing of the question presented to the subcommittee.

B. The record to be considered in a petition for declaratory ruling

The intervenors argue that the prehearing order must be reheard or clarified because it is "internally inconsistent" and limits the factual record to the facts contained in the joint petition. Neither argument is correct.

There is nothing inconsistent with having parties supply a joint statement of material facts but also allowing them to file additional information later. In addition, in determining what the SEC meant by its 2007 certificate, the Subcommittee will no doubt find it useful to consider relevant documents, agreements, and transcripts of proceedings that were compiled at the time the certificate was issued. Such documents would not ordinarily be contained within a joint statement of material facts, and the prehearing order expressly permits the parties to submit such documents.[7]

[7] Although it is within the purview of the presiding officer to "[a]dmit relevant evidence and exclude irrelevant, immaterial[,] or unduly repetitious evidence," Site 202.02(c)(4), no party has yet sought to introduce any contested evidence, nor have I excluded any evidence. I decline to rule prospectively on the admissibility of as-yet unspecified evidence that is alleged to be contested but is not currently before the Subcommittee in any form.

The remainder of the intervenors' arguments in this section of their motion suggests a similar misapprehension about the nature of declaratory rulings to that addressed in the previous section of this order. At the risk of belaboring the point, a declaratory ruling asks an agency to apply its statute, rule, or order to a specific factual scenario. As already discussed at the prehearing conference, the question properly before the Subcommittee is not whether, in retrospect, the 2007 Certificate should have imposed a requirement that the facility gate Bean Mountain Road.[8] Nor is it whether a such gating requirement, if it exists, violates a statute outside the jurisdiction of the SEC.[9] In this instance, the question is whether the 2007 Certificate requires the facility to gate Bean Mountain Road at the current gate locations. The parties disagree on the proper interpretation and application of numerous facts that are relevant to the interpretation of the 2007 Certificate. They are free to express those differing interpretations and applications as legal argument. But the relevant facts—such as the location of the gates and the numerous documents that speak for themselves—are largely, if not entirely, uncontested. In any event, no discrete question on the admissibility of a particular fact is presently before me. The intervenors' arguments on this point are, therefore, unripe.

Finally, it is worth addressing the prior SEC dockets referenced by the intervenors on page 4 of their Motion. In this order, I make no finding as to whether the intervenors' characterization of these proceedings is accurate, nor need I do so. As already noted, a declaratory ruling petition is not a declaratory judgment action. To the extent that prior

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[8] Assuming, *arguendo*, that the 2007 Certificate included no gating requirement but the facility believes such a requirement should have been included, it could always request that the certificate be modified. RSA 162-H:8-a, II(c)(5).

[9] As noted at the prehearing conference, such an argument is entirely appropriate for the parties' Superior Court action, but would only need to be argued if the 2007 Certificate, in fact, includes such a requirement.

SEC proceedings permitted parties to improperly transform a declaratory ruling proceeding into something more akin to a declaratory judgment action, that would not be a reason to repeat such a mistake here.

The intervenors have, therefore, not stated good reason for rehearing or clarification of the prehearing order on this point.

Based on the foregoing, it is hereby

ORDERED, that the intervenors' Motion for Rehearing and/or Clarification is DENIED. The terms of the prehearing order remain in full force and effect.

So ordered, this sixth day of June, 2022.

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