

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

Docket No. 2022-01

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

Final Order

12/01/2022

On February 16, 2022, the Town of Lempster (“Town”) filed a petition with the Site Evaluation Committee (“SEC”) for a declaratory ruling regarding Avangrid Renewables, LLC (“Avangrid”) and Lempster Wind, LLC (“Lempster Wind”). The SEC chair appointed a three-member subcommittee to hear the petition. Avangrid and Lempster Wind, as well as Kevin and Debra Onnela (the landowners on whose land the Lempster Wind facility is constructed) filed petitions to intervene, which the subcommittee chair granted.

After clarification at an April 11, 2022, prehearing conference, the Town’s petition sought the Subcommittee’s ruling as to whether Lempster Wind’s 2007 Certificate of Site and Facility (the “2007 Certificate”) requires the facility to install locked gates at their current locations on Bean Mountain Road. The Subcommittee reviewed various documents and pleadings submitted by the petitioner and intervenors, conducted a site visit on July 25, 2022, and heard comments from the petitioner and intervenors at a meeting convened for deliberations on October 11, 2022. All documents are available on the Site Evaluation Committee’s website at the following link:

<https://www.nhsec.nh.gov/projects/2022-01/2022-01.htm>

Based upon its review, the Subcommittee issues the following order with respect to the petition.

A. Standard of Review

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. It 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, such as the 2007 Certificate.

A declaratory ruling is not an opportunity for the subcommittee to reconsider¹ or modify² the order issued by the Committee in 2007. This Order is, therefore limited to a 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.

B. Findings of Fact³

For the purposes of this order, the Subcommittee adopts as true the parties’ joint statement of material facts. The petition pertains to the Lempster Wind facility, a wind energy facility in Lempster, New Hampshire. Lempster Wind, LLC filed an application in 2006 to construct the facility, and the Site Evaluation Committee granted the petition and issued a Certificate of Site and Facility in 2007. Most of the project is constructed on the

¹ Rehearing and reconsideration of Committee orders are available under RSA 541 and Site 202.29 and subject to the limitations laid out therein.

² Requests to modify existing certificates are provided for in RSA 162-H:8-a, II(d)(5).

³ Intervenors submitted “Proposed Findings of Fact and Conclusions of Law” in a pleading on June 21, 2022. The provision of the Administrative Procedure Act dealing with proposed findings of fact and conclusions of law deals specifically with orders that are “adverse to a party in a contested case.” RSA 541-A:35. As has been frequently explained to the parties in this proceeding, a declaratory ruling petition is not an adversarial proceeding. It is not to be confused with a declaratory *judgment* action filed in court. Notwithstanding the intervenors’ citation to Jus 812.05, the requirement that an agency rule on proposed findings of fact and conclusions of law is—by statute—not applicable to this type of proceeding. The Subcommittee here provides the factual and legal basis for its decision in accordance with Site 203.02(b).

property of intervenors Kevin and Debra Onnela. The site includes several roads running among the windmills. The facility site can be accessed via Bean Mountain Road, which connects the project to Nichols Road to the north and to Mountain Road to the Southeast.

In 2008, Lempster Wind installed a gate at the intersection of Nichols Road and Bean Mountain Road to the northwest. In 2010, Lempster Wind installed an additional gate on Bean Mountain Road to the southeast of the facility.

Subcommittee members visited the site at the parties' request on July 25, 2022. The members accessed the site via a gated entrance on Ridge Road near the intersection between Ridge Road and Mountain Road. Ridge Road passes several turbines before it arrives at a central complex of buildings making up the Lempster Wind facility. Just past this complex, Bean Mountain Road intersects with Ridge Road. Beyond this intersection, Ridge Road continues past the Onnelas' home to the left, past several more turbines, and then dead-ends without connecting to any other roads.

The Subcommittee members walked Bean Mountain Road to the east up to the location of the 2008 gate. In between the gate and the Bean Mountain Road / Ridge Road intersection, facility staff pointed out a path by which one of the turbines can be accessed from Bean Mountain Road. Subcommittee members then drove Bean Mountain Road northwest to the location of the 2010 gate. Bean Mountain Road descends relatively steeply for this stretch and does not intersect with any other notable roads or paths between the 2010 gate and the Bean Mountain Road / Ridge Road intersection.

C. The 2007 Certificate

The 2007 Certificate itself does not speak to the gating of access roads. It does, however, incorporate by reference two agreements—one between the facility and Counsel for the Public and another between the facility and the Town of Lempster—and provides

that the conditions contained in those agreements “shall be conditions of this Certificate.”

2007 Certificate at 3.

The agreement with the Counsel for the Public includes the following condition:

Entrance to the Project Site shall be gated[] and locked during nonworking hours. If problems with unauthorized access are identified, the Owner shall work to install additional gated access points.

2007 Certificate, Appx. II at 3 ¶ 4.a. The agreement with the Town of Lempster includes an identically worded condition. 2007 Certificate, Appx. III at 6 ¶ 4.1.3.

D. Conclusions of Law

By incorporating the requirements from the two agreements, the 2007 Certificate required the facility to gate “entrance” to the project site.⁴ Based upon the documents submitted in this docket—including a map of the site provided in the parties’ joint statement of material facts—there can be no doubt that entry to the facility is possible via Bean Mountain Road. The Subcommittee visually confirmed during its site visit that such entry is possible. But for the gates, it would be possible for someone to gain unauthorized entry to the facility by traveling along Bean Mountain Road either from Nichols Road or Mountain Road. (Although not a subject of this petition, the same can be said of the gate on Ridge Road near its intersection with Mountain Road.)

Based upon the foregoing, the Subcommittee concludes that entry to the Facility is possible via Bean Mountain Road. The 2007 Certificate must have contemplated the gating of Bean Mountain Road as part of the requirement to gate entrances to the facility.

⁴ Further support for this conclusion can be found in the Order accompanying the 2007 Certificate. In the “Public Access” portion of that Order, the Committee noted that the Onnelas had previously allowed public access to their property for recreational purposes such as hunting, hiking, snowmobiling, and OHRVs. The Order then notes the Onnelas’ preference that *unaffected* portions of their property remain open to public access. In other words, the Committee contemplated that those portions of the property that were affected—i.e., the portions of the property upon which the facility was to be constructed—would thereafter be closed to public recreational access.

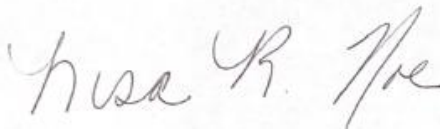
Although the 2007 Certificate does not specify the precise locations along Bean Mountain Road at which gates must be installed, the current locations are consistent with the certificate. The Subcommittee notes, however, that the 2007 Certificate only requires that these gates be locked “during non-working hours.” There is no requirement that the Bean Mountain Road gates be locked during working hours.

In reaching this conclusion, the Subcommittee does not opine as to whether the gates are consistent with statutes pertaining to the classification of roads in New Hampshire. Nor does the Subcommittee make any finding as to the classification of Bean Mountain Road within that classification system. These are questions that are beyond the jurisdiction and expertise of the Site Evaluation Committee. The Subcommittee, furthermore, lacks jurisdiction to rule on any of the questions of preemption raised by the intervenors in their briefing.

SO ORDERED.



Carleton B. Simpson
Chair



Lisa Noe
Member



Michael Servetas
Member