

**THE STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

RE: Application of Granite Reliable)
Power, LLC for Certificate of site and)
facility to construct up to 99 MW of wind)
electric generation in Coos County,)
New Hampshire and operate the same)
.

Docket No. 2008-04

**RESPONSE OF COUNSEL FOR THE PUBLIC TO
APPLICANT’S MOTION FOR REHEARING**

Counsel for the public, Senior Assistant Attorney General Peter C.L. Roth, by his attorneys, the Office of the Attorney General, hereby responds to the “Contested Motion for Rehearing, Reconsideration and/or Clarification” filed by Granite Reliable Power, LLC (the “Applicant”), dated August 14, 2009.

1. The Applicant seeks two forms of relief through its Motion. First, the Applicant asks for clarification that its Certificate would not be in violation if it is used as collateral for loan financing. This request is in direct conflict with the plain language of the statute. RSA 162-H:5, I (“Such a certificate may not be transferred *or assigned* without approval of the committee.”) The granting of liens and security interests is generally considered to be a transfer or assignment. See Fidelity Fin. Serv., Inc. v. Fink, 522 U.S. 211, 212 (1998) (Souter, J.) (discussing voidability of “transfer of a security interest” as a preference in bankruptcy). Nevertheless, it appears that under applicable New Hampshire law, this restriction is overridden by RSA 382-A:9-408(c) at least as far as the creation and perfection of the security interest. Therefore, it appears that the Applicant may use the Certificate as collateral without approval of the Committee and, thus, further clarification is unnecessary. To the extent the Committee decides to clarify

the condition on this basis, however, it should also make clear that the secured party must still seek SEC authorization to effectuate a sale of the Certificate upon exercising its rights against the Applicant and its property.

2. The second request made by the Applicant is to revise the condition providing for a retention of jurisdiction by the SEC should it be later discovered that the operation of the Applicant's project has an unreasonable adverse impact on any species. Counsel for the Public is concerned about this request because granting it would upset a balance reached by the Committee which could result in the loss of the certificate overall. The Applicant's data on the effects of the project on breeding birds, raptors and migratory birds was less than complete. As a result, the Applicant's certificate was conditioned upon it performing additional studies, including post-construction studies. The purpose of the studies presumably is to measure the actual effects of the project on wildlife as opposed to those predicted. It is not for the sake of developing interesting information, but rather, as a condition to assure that "the site and facility" will comply with the certificate, which means that the basic finding of no unreasonable adverse effect on the natural environment remains always true. See RSA 162-H:16, IV(c), and VI. Adopting the Applicant's request to eliminate the condition would result in a loss of the safeguard against the uncertainty of the evidence. Without the safeguards it would be difficult to conclude, as the Committee did, that the project "will not have an unreasonable adverse effect on...the natural environment." See Decision at 54 ("Having considered the evidence and the arguments, the Subcommittee finds that the Project will not have an unreasonable adverse effect on the natural environment so long as the High

Elevation Mitigation Settlement Agreement is adhered to along with certain other conditions . . . In addition, some additional conditions, described below, are necessary in order to ensure that any impacts on the natural environment are not unreasonably adverse.”) In the following paragraphs of the Decision, the Committee discussed the uncertainties of preconstruction evidence and required the Applicant to conduct post-construction studies. Decision at 54-55. It wraps up this essential part of the discussion with the condition that the Applicant now challenges. Decision at 56. As a result, the Committee’s finding that the project will not have an unreasonable adverse impact on the natural environment is entirely dependent upon the conditions, including the condition wherein the Committee retains jurisdiction.

The Applicant also suggests that the condition be modified in significant ways if it cannot be eliminated altogether. The first change is that it be limited to avian species. Secondly, the Applicant asks that the condition only require the Applicant to “work with New Hampshire Fish & Game” to come up with a commercially reasonable response if Fish & Game “has significant concern.” The standard for certification and conditioning projects is not commercial reasonableness. Moreover, it is not clear whether Fish & Game has any expertise with respect to what is commercially reasonable for a wind generation power plant.

Nevertheless, Counsel for the Public acknowledges the difficulty the uncertainty might bring to the Applicant’s ability to obtain financing. Ordinarily, such uncertainties are worked out between the parties to the loan on commercially reasonable terms. Moreover, SEC jurisdiction to enforce the terms of the Certificate should not be withheld

lightly. Counsel for the Public suggests that perhaps the condition proposed by the Applicant in its Motion could be reworded as follows:

Further Ordered that, if NHF&G has significant concern about the Project's impact on any species, GRP shall work with NHF&G and GRP shall take appropriate actions to address such impacts, and further, if after such actions, the Project's impacts have not been mitigated, a party may petition the Site Evaluation Subcommittee for relief;

Further Ordered that, if, after notice and an opportunity to be heard, the Subcommittee grants the petition, it may (1) determine that the Project continues to have an unreasonable adverse impact on any species that could not be resolved by commercially reasonable methods, and (2) as a result of such finding, take appropriate action within its jurisdiction to address such impact.

This proposed condition will enable the Sub-Committee to maintain the balance it struck in granting the certificate and yet still provide the Applicant some of the relief it seeks, thereby eliminating the need for further evidentiary hearings on the premises of the Motion. If further hearings are required, Counsel for the Public would seek to again retain financial expertise to test the new post-record closing evidence that the Applicant seeks to introduce.

Respectfully submitted this 25th day of August, 2009.

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By his attorneys

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Certificate of Service

I, Peter C.L. Roth, do hereby certify that I caused the foregoing to be served by electronic mail upon each of the parties on the Service List.

Dated: August 25, 2009

s/ Peter C.L. Roth
Peter C.L. Roth