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October 8, 2010

Via Electronic Mail and Hand Delivery

NH Site Evaluation Committee
c/o Jane Murray, Secretary
29 Hazen Drive, P.O. Box 95
Concord, NH 03302-0095

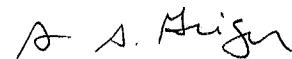
***Re: Application of Groton Wind, LLC –
SEC Docket No. 2010-10***

Dear Ms. Murray:

Enclosed for filing with the Site Evaluation Committee in the above-captioned matter, please find an original and 3 copies of the following pleadings: Applicant's Objection to Buttolph/Lewis/Spring Group of Intervenors' Motion to Allow for Participation of Expert Witness Via Teleconference or Videoconference; Applicant's Partially Contested Motion *in Limine* to Exclude the Testimony of Michael Nissenbaum; and Applicant's Contested Motion *in Limine* to Exclude the Testimony of Michael McCann.

Please contact me if you have any questions about the enclosed pleadings.
Thank you.

Very truly yours,



Susan S. Geiger

Maureen D. Smith
(Of Counsel)

STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

Docket No. 2010-01

RE: APPLICATION OF GROTON WIND, LLC
FOR A CERTIFICATE OF SITE AND FACILITY
FOR A RENEWABLE ENERGY FACILITY IN GROTON, NH

APPLICANT'S OBJECTION TO BUTTOLPH/LEWIS/SPRING GROUP OF
INTERVENORS' MOTION TO ALLOW FOR PARTICIPATION OF EXPERT
WITNESS VIA TELECONFERENCE OR VIDEOCONFERENCE

NOW COMES Groton Wind, LLC ("the Applicant") by and through its undersigned attorneys and respectfully objects to "Buttolph/Lewis/Spring Group of Intervenors' Motion to Allow for Participation of Expert Witness via Teleconference or Videoconference During the Adjudicatory Proceeding for the Above Referenced Matter" ("Motion"). In support of this objection, the Applicant states as follows:

1. On September 30, 2010, the Buttolph/Lewis/Spring Group of Intervenors ("Intervenors") forwarded the above-referenced undated Motion to the undersigned via electronic mail. The Motion states that the Intervenors have "enlisted" Michael McCann as an expert witness, and they have entered Mr. McCann's prefiled testimony into the record¹. The Motion further states that Mr. McCann is expected to be in Florida during the adjudicative phase of this proceeding and that the Intervenors seek to have Mr. McCann provide his testimony via telephone, or alternatively by videoconference, during the adjudicative hearing.

¹ The Applicant disputes that the filing made by Mr. McCann in this docket constitutes prefiled testimony; it merely consists of a letter to the Committee, an exhibit describing the contingencies and limitations on his assignment, and a letter and accompanying documents addressed to a County Board in Quincy, Illinois. It contains no information specific to the Groton Wind Project site or even to New Hampshire. For reasons discussed in the accompanying Motion *in Limine* filed herewith, Mr. McCann's documents should be excluded from the record of this proceeding. The accompanying Motion seeks to have all testimony by Mr. McCann barred in its entirety. The within Objection is asserted without prejudice to that Motion and with the intent that should the Committee permit Mr. McCann to testify at all, it must not be via teleconference or videoconference.

2. The Motion cites no New Hampshire case law or statutes in support of the Intervenor's request. The Intervenor's argue that their request should be granted because "there is no reason to believe that allowing this particular witness to participate telephonically or via videoconference would cause undue prejudice to any party." The Intervenor's are mistaken on this point. The Committee should deny the Intervenor's Motion because permitting Mr. McCann to testify telephonically, or by videoconference, would violate the Applicant's due process rights.

3. In resolving issues of fact, an administrative agency like the Site Evaluation Committee must comply with due process requirements. Appeal of Londonderry Neighborhood Coalition, 145 N.H. 201, 205 (2000). Due process generally requires live witness testimony at administrative hearings where credibility is at issue. See Petition of Smith, 139 N.H. 299 (1994); Petition of Grimm, 138 N.H. 42 (1993); Ainsworth v. Astrue, Civil No. 09-cv-286-SM, 2010 WL 2521432, *2 (D.N.H. June 17, 2010).

4. In Ainsworth v. Astrue, Civil No. 09-cv-286-SM, 2010 WL 2521432, *2 (D.N.H. June 17, 2010), the plaintiff challenged the denial of social security disability benefits on the ground that the Administrative Law Judge improperly received expert medical testimony via teleconference. After noting that the Social Security regulations were silent on whether such testimony may be received telephonically, the court remanded, cautioning that "the practice of accepting critical testimony via telephone is not universally applauded." Id.

A telephone hearing does not provide for the due process required for a constitutional hearing, the hearing required by the Social Security Act, or the procedure provided by the Administrative Procedure Act. A telephone hearing adversely affects the ability of the administrative law judge to ascertain the identity of participants and to determine the credibility of either the claimant or the witness because their demeanor cannot be observed by the judge.

Id. (quoting Comments of the Ass'n of Admin. Law Judges Regarding Social Security Admin. Notice of Proposed Rulemaking, available at <http://www.aalj.org/pdf/08d003/pdf> (Oct. 29, 2007)); see also Aqua Marine Prods. v. Pathe Computer Control Sys. Corp., 229 N.J. Super. 264, 274 (App. Div. 1988) (telephonic testimony allows “no basis at all on which the indefinable and elusive indicia of credibility, denominated demeanor, can be evaluated by the fact-finder.”) (internal quotations and brackets omitted).

5. In an analogous situation, the New Hampshire Supreme Court has held that *hearing panel members* must be physically present for witness testimony to properly evaluate credibility. See Petition of Smith, 139 N.H. 299 (1994); Petition of Grimm, 138 N.H. 42 (1993). In Petition of Grimm, the Board of Examiners of Psychologists revoked a psychologist’s certificate following an administrative hearing. Petition of Grimm, 138 N.H. at 45. The psychologist argued that the hearing violated his right to due process because some of the panel members had been absent from the hearings during the testimony. Id. at 46. The complainant argued that the panel members’ absence from the hearings was inconsequential because they subsequently heard audio recordings of the testimony at issue. Id. at 47. The court rejected that argument, holding that “all the members acting in a fact-finding capacity [must be] physically present to hear the testimony of the parties.” Id. at 48; see also Petition of Smith, 139 N.H. at 304.

6. Here, as in Ainsworth, allowing Mr. McCann to testify via telephone or videoconference would infringe upon the Committee’s ability to thoroughly evaluate his testimony in accordance with due process requirements. In addition, Mr. McCann’s absence cannot be distinguished from the panel members’ absences in Petition of Grimm and Petition of Smith. Ultimately, absences of hearing panel members are no different than absences of the witnesses themselves. Both situations prevent the Committee from fully observing the witness’s

characteristics that bear on the weight of his testimony. It would be entirely inconsistent and unsupportable to require hearing panel members to be physically present to receive live testimony, while permitting those testifying to be absent from the hearing room.

7. Another critical concern with permitting Mr. McCann to testify telephonically or by videoconference is that it would be impossible for the Committee to have proper oversight and control of the testimony. There would be no way to ensure, for example, that Mr. McCann did not have access to unknown written material, other persons, or even the internet while testifying. And, to the extent that the Applicant or other parties wish to reference a particular document or exhibit during their questioning of Mr. McCann, it would be a logistical nightmare to coordinate such references and know with certainty that he was reviewing the same material as the examining party. Thus, the typically straightforward task of cross examining a witness would become unnecessarily complicated.

8. Moreover, although the Intervenors claim that advances in technology have made the use of telephone and video conferences widespread in business settings, the fact remains that technology is unreliable. Despite best efforts to coordinate such conferences, the audio and/or video feeds are rarely flawless. See, e.g., Ainsworth, Civil No. 09-cv-286-SM, 2010 WL 2521432, *4 (telephonic expert testimony contained numerous gaps, appearing merely as “[INAUDIBLE]” in the record).

9. The procedural schedule in this docket was established in an order issued by the Committee on June 25, 2010. All of the parties, including the Intervenors, have been aware of the hearing dates since that time and no one has moved to reschedule them. The Intervenors have offered no exigencies that could possibly justify allowing Mr. McCann to testify via telephone or video. They have not asserted any explanation for their request other than cost of

attendance and his inability to come up from Florida. The Intervenors consciously elected to retain an expert based in Illinois for this matter, knowing full and well that the adjudicative hearings would be held in New Hampshire and the dates thereof. The Intervenors have simply provided no reason sufficiently compelling to sacrifice the fairness and thoroughness of this hearing. Their request, therefore, should be denied.

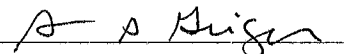
10. Neither New Hampshire's administrative procedures act, RSA 541-A, nor the statute governing the Committee's processes, RSA 162-H, authorize the Committee to grant the relief requested by the Intervenors. For that reason alone the Motion should be denied. Moreover, the Committee has a long-standing practice of requiring witnesses to physically attend the adjudicative hearings, testify in the presence of the Committee members and be subject to cross-examination by the parties and questioning by the Committee members. Departing from this procedure would create a dangerous precedent which ultimately will undermine the efficiency and integrity of the Committee's processes.

WHEREFORE, for all of the foregoing reasons, the Applicant respectfully requests that the Committee grant the following relief:

- A. Deny the Intervenors' Motion for Participation of Expert via Teleconference or Videoconference; and
- B. Grant such other and further relief as deemed just and proper.

Respectfully submitted,
Groton Wind, LLC
By Its Attorneys

Dated: October 8, 2010


Susan S. Geiger

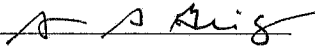
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Certificate of Service

I hereby certify that, on the date written below, I caused the foregoing pleading to be sent by electronic mail or U.S. mail, postage prepaid, to the persons on the service list (exclusive of Committee members).

10/8/10

Date



Susan S. Geiger

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