

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

Docket No. 2010-01

**Application of Groton Wind, LLC for a Certificate of Site and Facility
for a Renewable Energy Facility in Groton, New Hampshire**

ORDER ON PENDING MOTIONS

Issued October 27, 2010

I. Background

On March 26, 2010, Groton Wind, LLC (Applicant) filed an Application for a Certificate of Site and Facility for authority to construct and operate a renewable energy facility (Facility) in the Town of Groton, Grafton County, consisting of 24 wind turbines, each having a nameplate capacity of two (2) MW, for a total nameplate capacity of 48 MW. On April 26, 2010, the Vice-Chairman of the Committee accepted the Application as provided in RSA 162-H: 6-a, III. On May 7, 2010, the Chairman of the Committee designated a Subcommittee to review the Application as provided in RSA 162-H: 4, V. Adjudicatory hearings are scheduled to commence on November 1, 2010.

There are currently three procedural motions pending.

1. Applicant's Partially Contested Motion *In Limine* to Exclude the Testimony of Michael Nissenbaum.
2. Applicant's Contested Motion *In Limine* to Exclude the Testimony of Michael McCann.
3. Buttolph/Lewis/Spring Group of Intervenor's Motion to Allow for Participation of Expert Witness Via Teleconference or Videoconference During the Adjudicatory Proceeding Matter.

Testimony of Michael Nissenbaum

II. Motion to Exclude

On August 31, 2010, the Buttolph/Lewis/Spring group of intervenors (Buttolph Group or Intervenor) filed the testimony of Mr. James Buttolph. Mr. Buttolph's testimony states that his group enlisted Dr. Michael Nissenbaum as an expert to testify on the issue of the impact of the turbine sound emissions on human health. See, Pre-

filed Testimony of James Buttolph, p. 10. Supporting Mr. Buttolph's testimony was an affidavit, dated August 11, 2010, from Dr. Nissenbaum. However, Dr. Nissenbaum's affidavit did not reference the Application before the Subcommittee. Dr. Nissenbaum's affidavit appears to have been filed in a civil court proceeding in the Court of Queen's Bench for the province of Saskatchewan, Canada.¹ The Buttolph Group did not file testimony from Dr. Nissenbaum specific to this docket. Nonetheless, the Applicant propounded data requests to be answered by Dr. Nissenbaum, but he did not answer the data requests. Dr. Nissenbaum did not attend the technical sessions held on September 27, 2000, or September 28, 2000².

On October 8, 2010, the Applicant moved to exclude the Nissenbaum affidavit from the record and to bar Dr. Nissenbaum's testimony as irrelevant and immaterial. In addition, the Applicant argues that Dr. Nissenbaum's testimony should be prohibited because the Intervenor did not file testimony from Dr. Nissenbaum, did not respond to the Applicant's data requests, and did not present Dr. Nissenbaum at the technical sessions.

The Buttolph Group objected to the Applicant's motion. The intervenors acknowledge that they did not provide responses to data requests directed to Dr. Nissenbaum and did not present Dr. Nissenbaum at the technical sessions. The Intervenor explained that Dr. Nissenbaum has been otherwise engaged in a study regarding the effects of wind turbines on human health and that they could not afford to hire Dr. Nissenbaum as an expert witness. The Intervenor concedes that it would be inappropriate for Dr. Nissenbaum to testify at the adjudicative hearing because other parties have not had the opportunity for appropriate discovery of Dr. Nissenbaum's opinions and the bases therefore. The Intervenor claim that they do not have current plans to present Dr. Nissenbaum as a witness. Nonetheless, the Intervenor urged the subcommittee to allow them the flexibility of seeking to call Dr. Nissenbaum as a witness "should conditions change."

It would be fundamentally unfair to permit the testimony of Dr. Nissenbaum in the absence of an opportunity for the Applicant to conduct appropriate discovery and to understand the opinions and the bases for the opinions expressed by Dr. Nissenbaum. Therefore, he will not be permitted to testify as a witness in the adjudicatory hearings.

The Applicant also seeks exclusion of the Nissenbaum affidavit from the record. The affidavit does not pertain specifically to the proposed facility but it is nonetheless somewhat relevant to the concerns of the subcommittee. Thus, to the extent that the intervenors rely on Dr. Nissenbaum's affidavit in their testimony the affidavit will be

¹ The affidavit identifies the matter as between David McKinnon and Red Lilly Power Limited Partnership Et Al. The affidavit does not contain a docket number.

² It has been the practice of the Site Evaluation Committee to facilitate technical sessions for the purpose of ensuring that all parties can conduct discovery and have access to witnesses prior to the commencement of the adjudicatory proceedings. See, New Hampshire Code of Administrative Rules, Site 202.12(a).

allowed and given such weight as the Subcommittee deems appropriate during deliberations consistent with RSA 162-H:10, III.

Testimony of Michael McCann

III. Motion to Exclude

On October 8, 2010, the Applicant filed a Contested Motion *In Limine* to Exclude the Testimony of Michael McCann requesting that the Subcommittee exclude Mr. McCann's testimony as irrelevant and immaterial. The Applicant argues that Mr. McCann's testimony about the potential effect of the Facility on the real estate market is irrelevant because Mr. McCann, in part, based his conclusions on the effect of another wind Facility on the real estate market in Adams County, Illinois.

According to Mr. McCann's pre-filed testimony, he will testify about the effect of the turbine facilities on the real estate market. The Applicant asserts that this testimony is irrelevant because Mr. McCann has never seen the Facility and is not familiar with the local real estate market. Mr. McCann's pre-filed testimony also includes references to a report from the Lawrence Berkeley National Laboratory (LBNL) entitled: "The Impact of Wind Power Projects on Residual Property Values in the United States: a Multisite Hedonic Analysis" (LBNL Report). The LBNL Report was contained in the Application as Appendix 37. Within the Application this report is referred to as "the most recent and exhaustive study done" regarding the effects of wind farm visibility on property transaction values. In its application, the Applicant cites the report for the proposition that "there was an absence of measurable effects of wind farm visibility on property transaction values." The intervenor group notes that Mr. McCann reviewed drafts of the LBNL Report and is referenced in the acknowledgments of the report for helping to "shape the early thinking on this project." In addition to this pre-filed testimony, Mr. McCann also answered data requests from the Applicant and was available for questioning by telephone at the technical session this docket.

The rules of evidence do not apply in adjudicative proceedings. RSA 541-A: 33, II. However, the presiding officer may exclude irrelevant, immaterial or unduly repetitious evidence. RSA 541-A: 33, II; N.H. Code of Administrative Rules, Site 202.24 (b); see also, Appeal of Town of Newmarket, 140 N.H. 279, 285 (1995). The effect of wind farm visibility on property values generally is relevant to the orderly development of the region which is a statutory concern of the subcommittee. See, RSA 162-H: 16, IV (b). The Applicant recognizes this fact in addressing real property values in the Application and attaching the LBNL report as an appendix to its Application. One of the purposes of RSA 162-H is to ensure that all environmental, economic, and technical issues in connection with the construction and operation of the Facility are resolved in an integrated fashion. RSA 162-H: 1. The Facility's impact on the local real estate market is one of the economic issues that may be considered by the Subcommittee in this proceeding. Thus, Mr. McCann will be allowed to testify. However, inasmuch as Mr. McCann has no specialized knowledge of the specific project that is the subject of this docket and claims no specific knowledge of the real estate market in the area of the

proposed facility, the Subcommittee may consider these factors in determining the weight to be given to Mr. McCann's testimony.

IV. Motion to Allow Telephonic or Videoconference Testimony

In addition to sponsoring Mr. McCann's testimony, the Buttolph intervenors seek to present Mr. McCann as a witness via telephone or video-conference. They argue that it is economically unfeasible for Mr. McCann to be brought to New Hampshire to testify in person. Additionally, the intervenor group advises that Mr. McCann is scheduled to be in Florida during the time of the adjudicatory hearings in this docket. The Intervenor group asserts that Mr. McCann is the only real estate expert listed as a witness in this matter and that permitting his testimony by videoconference or telephonically would permit the greatest public participation in this docket. The Intervenor group relies on administrative rules from Arizona and the practices of the United States Bankruptcy Court for the District of New Hampshire as illustrative of an appropriate use of telephonic and/or videoconference testimony.

The Applicant objects to the motion and asserts that New Hampshire law and due process generally require live witness testimony so that the Subcommittee can properly evaluate credibility. See, Petition of Smith, 139 NH 299 (1994); Petition of Grimm, 138 NH 42 (1993). The Applicant also argues that there is no statutory authority or administrative rule permitting the subcommittee to allow either telephonic or videoconference testimony and therefore such testimony is prohibited.

A. Authority to Hear Telephonic or Videoconference Testimony

Neither RSA 541-A nor RSA 162-H expressly authorizes or prohibits telephonic or videoconference testimony. The Applicant relies on a recently decided unpublished federal case, Ainsworth v. Astrue, 09-cv-286-SM, 2010 WL 2521432 (D.N.H. June 17, 2010) to support its argument that the lack of express statutory authority prohibits such testimony. In Ainsworth, the Court remanded the social security eligibility decision of an Administrative Law Judge (ALJ) that was based, in part, on the telephonic testimony of an expert witness. *Id.* However, the Applicant's reliance on Ainsworth for the proposition that express statutory authority is necessary to take telephonic testimony is misplaced. In Ainsworth the Court remanded the case because the circumstances of the testimony in dispute warranted the remand and not because "the practice of accepting expert testimony by telephone is or is not authorized by the governing regulations." 2010 WL 2521432 *4. In fact the court held that remand would be required whether the telephonic testimony was authorized by statute or not. *Id.* It should also be noted that Ainsworth dealt solely with telephonic testimony.

Under RSA 162-H: 6-a, VII, the Subcommittee "shall hear testimony . . . submitted on behalf of . . . any intervenors." RSA 162-H: 6-a. In addition, RSA 541-A: 33 requires that "[a]ll testimony of parties and witnesses shall be made under oath or affirmation administered by the presiding officer." However, the statutes do not define

the term “testimony” or expressly indicate that it shall be limited to in-person testimony. Under the laws of statutory construction, where the statutory language is not specifically defined, we look at the “intent of the legislation, which is determined by examining the construction of the statute as a whole, and not simply by examining isolated words and phrases found therein.” Rix v. Kinderworks, 136 N.H. 548, 550 (1992) (citations and quotations omitted). While interpreting the meaning of the statute, we must pay particular attention to “the evil or mischief” the statute was designed to remedy. *Id.*

The legislature enacted RSA 162-H partially in order to avoid “undue delay in construction of needed facilities” and to ensure “that the construction and operation of energy facilities is treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion.” RSA 162-H: 1. The use of telephonic or video conference testimony can in certain circumstances foster promptness in conducting hearings and increase the likelihood that the Subcommittee hears testimony that addresses important issues in an integrated fashion. In light of the intent of RSA 162-H, we find that the absence of an express statutory authorization to the Subcommittee to hear telephonic or videoconference testimony does not prohibit such testimony.

B. Due Process

Due process requirements binding administrative procedure are quite different from those binding judicial procedure. See, Roy v. Water Supply Commission, 112 New Hampshire 87, 92 (1972). Generally, an administrative officer may act on the written record of testimony by witnesses whom he has not personally seen or heard. However, if disposition of the matter turns on the credibility of the witness’s testimony all finders of fact must be in attendance for all testimony that bears on credibility. See, Petition of Smith, 139 N.H. 299 (1994), Petition of Grimm, 138 N.H. 42 (1993). Both Smith and Grimm addressed circumstances where disputed facts in an administrative hearing rested, in some material part, on the fact finder’s assessment of credibility as demonstrated by the demeanor and conduct of the witnesses at the hearing. See, Smith at p. 303. While the testimony of a real estate appraiser in this docket presents a different circumstance than the percipient fact witness testimony in Grimm and Smith, we will accept for our purposes today that the credibility of Mr. McCann is in dispute and that observation of his demeanor and conduct is necessary to resolve issues of credibility. In such circumstances, the Subcommittee must be able to assess the demeanor and conduct of the witness during his testimony. We recognize that this cannot be accomplished telephonically and therefore will not allow telephonic testimony. However, the use of videoconferencing testimony provides the Subcommittee with the opportunity to observe the demeanor and conduct of Mr. McCann as he testifies and will permit the Subcommittee to make appropriate credibility determinations. Thus, we find that the use of videoconferencing testimony will preserve the Applicant’s due process rights.

It should also be noted that since the Supreme Court rulings in Grimm and Smith, state administrative agencies have begun to take advantage of the benefits of technology in the conduct of adjudicative proceedings. For example, the Department of Employment Security is now authorized to hear the testimony in interstate appeals by video so long as parties can view and hear the witnesses as testimony is being presented and can cross-examine them. N.H. Code Admin. R. Emp. 202.01; *but see*, N.H. Code Admin. R. Emp. 202.01 (x) (allowing the testimony by telephone only if all parties assent to such testimony and the witness's presence in person or video conference is difficult due to illness, disability, prohibitive distance, and lack of transportation, and etc.). In addition, the Department of Labor may consider a witness's telephonic or video testimony under the following circumstances: (1) adequate equipment and facilities are available to allow all parties to participate fully in the examination; and (2) allowing testimony in this form is necessary due to the distance to travel to the hearing from outside of New Hampshire. N.H. Code Admin. R. Lab 203.07 (a), (b), *but see*, N.H. Code Admin. R. Lab 203.07 (c) (prohibiting telephonic testimony if the assessment of credibility of the witness is required). The Department of Health and Human Services is allowed to conduct a hearing by telephone or video conference where the witness cannot travel due to economic hardship and such participation will not compromise the hearing process and will not infringe the party's rights. N.H. Code Admin. R. He-C 203.13 (a)-(c). If such a hearing is scheduled, the presiding officer is required to ensure the ability of all parties to hear and question all witnesses, to confer with their counsel, and to be heard by presiding officer and each other. N.H. Code Admin. R. He-C 203.07(d).

The judicial branch also, in certain cases, can take testimony via videoconference. In criminal cases, the testimony of expert witnesses from the state police forensic laboratory is allowed by video if it is limited to expert testimony and cross-examination of the witness may proceed in the same manner as permitted by the trial. *See*, RSA 516:37. Likewise, under the Uniform Child Custody Jurisdiction and Enforcement Act, a witness residing in another state may testify by telephone or audiovisual means. *See*, RSA 458-A: 10, II. Recently, the New Hampshire Supreme Court considered whether an incarcerated plaintiff in a civil action should be permitted the opportunity to appear by telephone to prosecute his claim. *See*, Buzzard v. F.F. Enterprises, ___N.H.___, (Decided October 19, 2010). In recognizing the plaintiff prisoner's right to appear at the hearing the Court also recognized that such appearances may cause additional concerns regarding expense, security and logistics. The plaintiff had sought to appear telephonically but his motion was denied by the lower court and he was defaulted. The Supreme Court remanded the matter because the lower court had failed to determine whether the countervailing considerations of expense, security and logistics justified denial of the motion.

This matter does not involve an incarcerated party but similar countervailing considerations apply. Videoconference testimony appears to be less expensive for the parties than the normal costs associated with witness travel for hearings. While security is not an issue, logistically, it appears that videoconferencing will allow the Subcommittee to observe the conduct and demeanor of the witness.

While administrative procedural rules may be trending toward allowing video testimony, this Committee does not presently own the physical facilities necessary to conduct videoconferencing testimony. Therefore, the responsibility to provide such equipment must fall to the party proffering the testimony. In this case, the Buttolph intervenor group seeks to present the testimony of Mr. McCann by videoconference. Therefore, the Buttolph intervenor group must be responsible for making the arrangements to present the videoconference testimony at the adjudicative hearings in a manner that allows the Subcommittee to view Mr. McCann under circumstances substantially similar to the view that the Subcommittee would have if he were in the hearing room. While Mr. McCann may be seated he must be visible to the Subcommittee from at least his chest up. In addition, the Subcommittee must be able to view all papers, computers and other materials that he refers to during the course of his testimony.

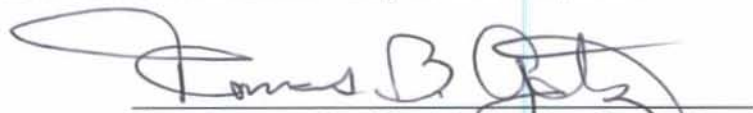
Based upon the foregoing, it is hereby:

ORDERED, that the Applicant's Partially Contested Motion *In Limine* to Exclude the Testimony of Michael Nissenbaum is hereby GRANTED; and it is

FURTHER ORDERED, that the Applicant's Contested Motion *In Limine* to Exclude the Testimony of Michael McCann is hereby DENIED.

FURTHER ORDERED, that the Buttolph/Lewis/Spring Group of Intervenor's Motion to Allow for Participation of Expert Witness Via Teleconference or Videoconference During the Adjudicatory Proceeding for the Above Referenced Matter is hereby GRANTED IN PART as to videoconference testimony and DENIED IN PART, as to telephonic testimony; and it is

By Order of the Site Evaluation Committee this 27th day of October, 2010.


New Hampshire Site Evaluation Committee
Thomas B. Getz, Subcommittee Chair