

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, N.H.

May 8, 2014

ORDER ON PENDING MOTIONS
PERTAINING TO ISSUES RAISED BY THE FIRE MARSHAL

I. Background

On May 6, 2011, a Subcommittee of the Site Evaluation Committee (Subcommittee) issued its Decision granting a Certificate of Site and Facility (Certificate) with conditions (Decision) to Groton Wind, LLC (Applicant), authorizing the construction and operation of a renewable energy facility (Facility or Project) consisting of 24 Gamesa G82 turbines each having a nameplate capacity of 2 megawatts (MW), for a total nameplate capacity of 48 MW to be located in the Town of Groton, Grafton County, New Hampshire (Site). On October 14, 2011, the New Hampshire Supreme Court issued an order declining to review the Decision on appeal.

The Applicant subsequently constructed the Facility. The Facility has commenced commercial operations.

On August 14, 2013, the Committee received a letter from Investigator Ron Anstey of the State Fire Marshal Office (Fire Marshal). In his letter, Investigator Anstey alleges that statements made in testimony by the Applicant's representatives at the time of the adjudicative hearing were not true. In addition, Investigator Anstey alleges that the Applicant has failed to comply with applicable fire and building codes in violation of the conditions of the Certificate. Investigator Anstey recommended that all operation on the site cease until all safety concerns,

plans, reviews, and required inspections have been completed and approved. Inspector Anstey's request, if granted, would result in a suspension of the Certificate.

On October 18, 2013, the Fire Marshal filed a letter setting forth the sections of the State Building Code (International Building Code, 2009 Edition), the New Hampshire State Fire Code (NFPA 1, 2009 Edition; NFPA 101, 2009 Edition; NFPA 10, NFPA 12, NFPA 72) and the Recommended Practice for Fire Protection for Electric Generating Plants and High Voltage Direct Current Converter Stations, NFPA 85, that he claims form the basis for his authority and for the appropriate operation of the Facility in accordance with the Certificate. The Fire Marshal's letter also sets forth additional relevant codes and provisions.

A pre-hearing conference was held on October 2, 2013. At the pre-hearing conference the parties agreed in principle to the terms of a pre-hearing process. A procedural order was issued on November 4, 2013. In accordance with the procedural order the parties filed briefs addressing certain legal questions.

A further pre-hearing conference was held on January 30, 2014. A report of pre-hearing conference advising of the fire safety issues as well as other pending issues in this docket was submitted by counsel to the Committee on January 31, 2014. The report contained a proposed schedule agreed upon by the parties attending the pre-hearing conference. The proposed schedule bifurcated and expedited the safety issues raised by the Fire Marshal.

On February 20, 2014, the Chairman issued a Procedural Order and Notice of Possible Suspension of Certificate of Site and Facility. The procedural order noted that the resolution of the fire issues was important and committed to making every effort to address those issues as soon as is practicable while recognizing the due process rights and discovery needs of all parties

into the docket. Consequently, the Chairman ordered a bifurcated procedural schedule addressing the safety issues raised by the Fire Marshal on an expedited basis. As a part of its Order, the Committee required the Applicant and the Fire Marshal to file an exhibit “containing all of the correspondence between the Office of the Fire Marshal and the Applicant by February 28, 2014.” The Committee also required (i) the Office of Fire Marshal to submit its pre-filed testimony by March 3, 2014 and (ii) the Applicant to file a statement identifying the building codes, life safety codes, and fire codes that it asserts are applicable to the Project, along with copies thereof by March 14, 2014. An adjudicative hearing limited to the safety issues raised by the Fire Marshal was scheduled to commence on June 12, 2014¹.

II. The Pending Motions Pertaining to the Fire Marshal

A. Applicant’s Contested Motion to Modify Procedural Order (Applicant’s Statement Identifying the Building Codes, Life Safety Codes, and Fire Codes)

On February 26, 2014, the Fire Marshal filed a Motion to Modify the Procedural Order requesting the Committee to modify its procedural order by eliminating the bifurcation of issues and combining the issues raised by the Fire Marshal with other outstanding issues in this docket. The Fire Marshal’s request to modify the procedural order was denied and the Fire Marshal was ordered to pre-file testimony by March 21, 2014. The Chairman also extended the time frame for the submission of the Applicant’s pre-filed testimony to May 5, 2014. The order did not address the Applicant’s obligation to file a statement identifying the building codes, life safety codes, and fire codes by March 14, 2014.

On March 14, 2014, the Applicant filed a Contested Motion to Modify Procedural Order requesting the Committee to modify its procedural order and to allow the Applicant to file a

¹ Committee members were requested to set aside two full days for the adjudicative hearing.

statement identifying the building codes, life safety codes, and fire codes after the Fire Marshal's submission of pre-filed testimony and, at earliest, at the time of the filing of the Applicant's pre-filed testimony regarding State Fire Marshal issues.

On March 21, 2014, the Fire Marshal pre-filed testimony with the Committee. On March 24, 2014, the Fire Marshal filed its Response to the Applicant's Motion to Modify Procedural Order stating that a new time frame for the submission of the Applicant's statements of codes should be established and requesting the Committee to schedule the filing in a manner that is consistent with the procedural order.

The Buttolph/Lewis/Spring group of intervenors (Intervenors) filed an objection to the Applicant's request on March 24, 2014. The Intervenors' objection noted the Applicant's request to delay the filing of life safety, building and fire codes that the Applicant deems to be applicable. However, the Intervenors did not specify any reason why the request should be denied.

As set out below, this motion is deemed to be moot as a result of the Compliance Agreement reached between the Applicant and the Fire Marshal and the stay issued below.

B. Applicant's Contested Motion for Rehearing/Reconsideration of Procedural Order Regarding Filing Certain Correspondence between the Office of State Fire Marshal and Groton Wind, LLC.

On February 27, 2014, the Applicant filed a letter with the Committee seeking the extension of the deadline for the submission of the correspondence between the Applicant and the Office of the Fire Marshal until March 28, 2018. Counsel for the Public objected to the Applicant's request on March 7, 2014. On March 13, 2014, the Chairman issued an order

granting the Applicant's request and allowing the Applicant to file correspondence with the Fire Marshal by March 28, 2018.

On March 14, 2014, the Applicant filed a Contested Motion for Rehearing or Reconsideration of Procedural Order Regarding Filing Certain Correspondence Between the Office of State Fire Marshal and Groton Wind, LLC. The Applicant asserts that the Fire Marshal and the Applicant have already submitted to the Committee documents consisting of correspondence between the Applicant and the Fire Marshal on October 18, 2013. As to correspondence after October 18, 2013, the Applicant asserts that such correspondence contains settlement discussions between the Applicant and the Office of Fire Marshal and requests the Committee to reconsider and clarify its procedural order and affirmatively rule that the Applicant and the Fire Marshal are not required to file correspondence containing settlement discussions.

On March 24, 2014, the Fire Marshal filed his response to the Applicant's Motion for Rehearing/Reconsideration. The Fire Marshal did not agree with the legal arguments espoused by the Applicant in its motion. Despite the disagreement about the law, the Fire Marshal did not object to the Applicant's request to eliminate the joint filing requirement. The Fire Marshal did, however, reserve his right to use any correspondence with the Applicant during the course of the adjudicative proceedings.

On March 24, 2014, the Intervenors filed an objection to the Applicant's motion. The Intervenors assert that disclosure of all correspondence including settlement negotiations is required by the Right to Know Law, RSA 91-A. They claim that the Right to Know law applies more strictly because the Applicant's settlement correspondence occurred with a state agency, the Office of the Fire Marshal.

C. Fire Marshal's Partially Assented-To Motion to Stay

On April 10, 2014, the Fire Marshal and the Applicant reached an agreement addressing code compliance and other issues. A compliance agreement was filed with the Committee on April 16, 2014. The compliance agreement addressed the outstanding code violation allegations and the issue of the installation of fire suppression systems within the nacelle of each turbine at the Facility. In addition, the compliance Agreement addressed sanctions and procedures to be employed in the event of non-compliance.

On April 21, 2014, the Fire Marshal filed a Partially Assented-To Motion to Stay. The Fire Marshal advised the Committee that it has reached a compliance agreement with the Applicant. Pursuant to the agreement the Applicant is required install a fire suppression system in each turbine. The Applicant agreed to shut down the operation and maintenance building and any turbine without fire suppression if compliance is not achieved as agreed by the parties. The Agreement also addresses the code violations alleged by the Fire Marshal. In light of the agreement with the Applicant, the Fire Marshal requested the Committee to stay the proceedings in this docket as they relate to the fire, safety and code compliance issues. The Applicant, Counsel for the Public and the Town of Rumney assented to the stay of proceedings.

No party has filed an objection to the motion to stay.

III. Analysis

A. The Motion to Stay

The Fire Marshal and the Applicant have reached an agreement to bring the Facility into compliance with the Fire Marshal's requirements. In order to facilitate the compliance agreement

the Fire Marshal has filed a motion to stay the proceedings. No party has filed an objection. Therefore, the request contained in the Office of Fire Marshal's Partially Assented-To Motion to Stay, is hereby **GRANTED**. The proceedings in this docket, as they relate to the issues raised by the Fire Marshal, shall be stayed pending the Applicant's compliance with the agreement. The Office of Fire Marshal shall notify the Committee of the Applicant's compliance with the compliance agreement within 30 days of the date of this order. Until then, the proceedings relating to the issues raised by the Fire Marshal in this docket shall be stayed. The adjudicative hearing scheduled for June 12, 2014, is postponed. Instead, the parties shall appear before the Committee on June 12, 2014, for a status conference.

B. The Settlement Correspondence

At the outset it should be noted that the request from the Committee that the Applicant and the Fire Marshal disclose correspondence was not contemplated to include settlement negotiations. The requirement for the filing of correspondence between the Applicant and the Fire Marshal was first raised in a memorandum and agenda for the prehearing conference held on October 2, 2013. The agenda contained a notice that the issues to be discussed at the prehearing conference would include a deadline as follows:

Applicant and Investigator Anstey shall file copies of all correspondence of any nature between the Applicant, Applicant's representative or agents pertaining to the fire code, life safety code, building code and whether "on-board" fire suppression equipment is required.

On or about October 17, 2013 the Applicant filed a package of correspondence between its employees and agents and the Fire Marshal². On October 18, 2013 the Fire Marshal filed a similar package of correspondence.

On January 30, 2014, a further prehearing conference was held. The report from that prehearing conference dated January 31, 2014 and a subsequent procedural order dated February 20, 2014 contained the following requirement:

The Applicant and the Fire Marshal shall file an exhibit containing all of the correspondence between the Office of the Fire Marshal and the Applicant by February 28, 2014.

On February 18, 2014 the Fire Marshal filed a pleading entitled Confirmation of Filing of Correspondence. That pleading referenced the previous filing of correspondence made by the Applicant and the filing of the correspondence by the Fire Marshal on October 18, 2013. The Fire Marshal's pleading confirmed that all correspondence between the Fire Marshal and the Applicant until October 18, 2013 had been filed with the Committee.

The purpose of requiring the Fire Marshal and the Applicant to file their correspondence was to determine what violations were alleged to be outstanding and what response was provided to the Fire Marshal about the alleged violations. The intent of the request was not to learn the nature of settlement discussions. Indeed, the Committee has no interest in understanding the details of settlement negotiations. Such negotiations would normally be inadmissible as a matter of policy.

Settlement negotiations are generally not admissible in litigated proceedings because they are not considered to be relevant and because of public policy encouraging the settlement of

² This filing was mistakenly posted to the Committee's website as if it had been filed on March 17, 2013.

disputed issues. While the formal rules of evidence are not strictly applicable in administrative hearings, evidence may be excluded if it is irrelevant, immaterial or unduly repetitious. *See* RSA 541-A: 33, II. While not binding on the Committee, New Hampshire Rule of Evidence 408 is instructive. NHRE 408 prohibits the introduction of settlement negotiations as evidence:

The Rule “states the basic proposition that evidence of compromise offers [,] compromise agreements, and conduct or statements made in compromise negotiations is inadmissible on questions of liability and damages.” N.H. R. Ev. 408 Reporter's Notes. “The Rule ... reflects both doubt as to the probative value of the fact of settlement and a policy to encourage settlements.” *Id.*

Axenics, Inc. v. Turner Constr. Co., 164 N.H. 659, 674 (N.H. 2013). The policy provisions underlying NHRE 408 are equally important in the context of this administrative proceeding. Settlement negotiations in an administrative proceeding may and very often are based upon concerns that have nothing to do with the strength of a party’s position. Correspondence that contains settlement negotiations or discussion would not be relevant evidence in this proceeding and would not likely lead to the discovery of relevant and admissible evidence.

The Intervenors in this case argue that the Right to Know law, RSA 91-A, requires disclosure of the correspondence containing settlement negotiations. However this argument is misplaced. The settlement correspondence has never been filed with the Committee. The settlement correspondence is not a governmental record. A governmental record is defined as:

any information created, accepted, or obtained by, or on behalf of, any public body, or a quorum or majority thereof, or any public agency in furtherance of its official function. Without limiting the foregoing, the term "governmental records" includes any written communication or other information, whether in paper, electronic, or other physical form, received by a quorum or majority of a public body in furtherance of its official function, whether at a meeting or outside a meeting of the body. The term "governmental records" shall also include the term "public records."

RSA 91-A: 1-a, III. In this case the settlement correspondence has never been filed with or received by the Committee. Therefore, RSA 91-A does not apply. To the extent that such records may exist within the records of the office of the Fire Marshal, the determination as to whether such records should be disclosed rests with the Fire Marshal and not the Site Evaluation Committee.

Because the settlement correspondence is not relevant, not likely to lead to the discovery of relevant evidence and not a governmental record received by the Committee, the Applicant's Motion for Rehearing or Reconsideration as it pertains to settlement correspondence is GRANTED. Nevertheless the Applicant and the Fire Marshal remain obligated to provide any additional correspondence that is not in the nature of settlement discussions to the other parties in this docket. Such further disclosure shall occur within ten days of the date of this order.

C. Motion to Modify Procedural Order

As indicated above, the motion to stay proceedings pending compliance with the recently filed compliance agreement has been granted. Therefore, the Fire Marshal's motion to modify the procedural order is MOOT and requires no ruling.

Order

For the reasons set forth herein it is hereby:

Ordered that the Office of Fire Marshal's request to stay proceedings on the issues raised by the Office of Fire Marshal in this docket is hereby granted;

Further Ordered that the proceedings on the issues raised by the Office of Fire Marshal in this docket are hereby stayed pending further order;

Further Ordered that the Office of Fire Marshal shall report to the Committee on the Applicant's compliance with the Compliance Agreement within 30 days of this order;

Further Ordered that all parties in this docket shall appear for a status conference before the Committee on June 12, 2014, at 9 AM at the office of the Public Utilities Commission, 21 South Fruit Street, Suite 10, Concord, N.H.;

Further Ordered that the Applicant's Contested Motion for Rehearing/Reconsideration is granted as it applies to correspondence containing settlement negotiations or discussion;

Further Ordered that the Fire Marshal's Motion to Modify the Procedural Schedule is moot and requires no further ruling.

Further Ordered that Groton Wind, LLC is hereby notified that the Site Evaluation Committee has received correspondence alleging that Groton Wind LLC is operating the Facility in the above referenced docket in violation of the terms and conditions of the Certificate of Site and Facility. The proceedings described herein may result in a determination that Groton Wind, LLC is in violation of the terms and conditions of the Certificate of Site and Facility issued in this docket (and the Decision underlying such Certificate). If found to be in violation of the Certificate or Decision, the Certificate may be suspended and/or revoked pursuant to the provisions of RSA 162-H: 120 RSA 541-A: 30 and RSA 541-A: 31.

So ordered this 8th day of May, 2014 by the Site Evaluation Committee.



Thomas S. Burack
Chairman and Presiding Officer
NH Site Evaluation Committee