

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

Docket No. 2015-02

**Re: Application of Antrim Wind Energy, LLC
For a Certificate of Site and Facility**

December 2, 2016

**ORDER DENYING MOTION TO RECONSIDER AND
RE-OPEN THE RECORD**

I. BACKGROUND

On October 2, 2015, Antrim Wind Energy, LLC (Antrim Wind or Applicant), filed an Application for a Certificate of Site and Facility (Application) with the Site Evaluation Committee (Committee). Antrim Wind proposes to site, construct, and operate 9 Siemens SWT-3.2-113 direct drive wind turbines capable of generating 3.2 MW for a total nameplate capacity of 28.8 MW and associated civil and electrical infrastructure (Project). *See* Application, at 19, 27. The Project is proposed to be located in the Town of Antrim on the Tuttle Hill ridgeline spanning southwestward to the northeastern slope of Willard Mountain (Site). *Id.* at 5. The Project will be constructed primarily on the ridgeline that starts approximately 0.75 miles south of NH Route 9 and runs south-west, for approximately 2 miles. *Id.* The Project will be located in the rural conservation zoning district on private lands owned by six landowners and leased by Antrim Wind. *Id.* at 5-6. Antrim Wind seeks the issuance of a Certificate of Site and Facility approving the siting, construction, and operation of the Project.

In accordance with the Committee's procedural rules, the Applicant filed the direct testimony and a visual impact assessment from David Raphael of LandWorks with the Application. Exhibit App. 33, Att. 9A.

On March 25, 2016, a Procedural Schedule was issued, requiring Counsel for the Public and the intervenors to disclose expert witnesses and submit pre-filed testimony on or before May 23, 2016, and supplemental pre-filed testimony on or before August 15, 2016. In accordance with the procedural schedule, Counsel for the Public filed the direct pre-filed testimony and a visual impact assessment from Kellie Connelly of Terraink, Incorporated. On August 16, 2016, the Presiding Officer modified the Procedural Schedule and extended the timeframe for the parties to file supplemental pre-filed testimony to August 18, 2016. The Applicant filed supplemental testimony from David Raphael on August 18, 2016. Mr. Raphael's supplemental testimony in large part is critical of Ms. Connelly's pre-filed direct testimony and visual impact assessment. Neither Counsel for the Public nor any party sought leave to file any further testimony.

On August 26, 2016, the Applicant filed a Motion to Strike the supplemental pre-filed testimony of certain intervenors. On August 31, 2016, the Allen/Levesque Group of Intervenors filed a request to strike the supplemental pre-filed testimony of the Town of Antrim.¹ On September 13, 2016, the Presiding Officer issued an order that for the most part denied the motions to strike². That order, in pertinent part, stated:

“The practice before the Site Evaluation Committee has been to allow the filing of supplemental testimony after the discovery process has terminated. Supplemental testimony usually addresses matters that were not known before the filing of direct testimony or to address evidence, issues and arguments that arise during the discovery phase of the matter. However, there is no statute or rule

¹ The Allen/Levesque Group of Intervenors titled its pleading as “Intervenor’s Objection to Applicant’s Motion to Strike Certain Supplemental Pre-Filed Testimony.” The Objection, however, contains a request to strike the Town of Antrim’s supplemental pre-filed testimony. Therefore, the Objection is treated, and is addressed, as an independent Motion to Strike in this docket.

² A portion of the Supplemental Pre-filed Testimony of Annie Law and Robert Cleland was stricken because it was irrelevant.

that specifically defines or specifies the requirements for supplemental testimony.”

A final pre-hearing structuring conference was held on September 7, 2016. At that time, Counsel for the Public advised that she required six hours for the cross-examination of Mr. Raphael. Transcript, September 7, 2016, p. 48. In total, Counsel for the Public and the intervenors indicated that they would cross-examine Mr. Raphael for more than thirteen hours. *See* Transcript, September 7, 2016, p. 48-50. The Applicant indicated that it would need approximately three hours to cross-examine Ms. Connelly. Transcript, September 7, 2016, p. 97.

The adjudicative hearings commenced on September 13, 2016. Mr. Raphael adopted his pre-filed direct testimony and his pre-filed supplemental testimony and cross-examination began on the afternoon of September 22, 2016. On September 23, 2016, he was cross-examined for the entire day. *See* Transcript, September 23, 2016. He returned to the witness stand and was cross-examined for the entire morning on September 28, 2016. Counsel for the Public cross-examined Mr. Raphael on both September 23, 2016 (Transcript, September 23, 2016, Afternoon, pp. 66 – 147), and at the next hearing date which was on September 28, 2016 (Transcript, September 28, 2016, Morning, pp. 8 – 82.).

Counsel for the Public’s visual impact expert, Kellie Connelly, took the witness stand on November 1, 2016. At the outset of her testimony, Counsel for the Public had Ms. Connelly correct some errata in her testimony and asked her to adopt the corrected testimony. Transcript, November 1, 2016, p. 6-9. Counsel for the Public did not ask further questions of Ms. Connelly nor seek permission from the Presiding Officer to offer any additional testimony. The cross-examination of Ms. Connelly continued to the next day of hearings on November 7, 2016. Cross-examination of Ms. Connelly concluded on November 7, 2016, and was followed by questions from the Subcommittee. Thereafter, Counsel for the Public began her re-direct

examination. Shortly into her re-direct examination, Counsel for the Public asked Ms. Connelly: “In terms of identifying sensitive sites, have you ever seen a methodology that Mr. Raphael used, used by anybody else?” Counsel for the Applicant objected on the grounds that the question was beyond the scope of cross-examination and was improper re-direct examination. The Applicant also made a claim that allowing new testimony after the conclusion of cross-examination would be a due process violation. *See*, Transcript, Afternoon, November 7, 2016, p. 7-9. After a brief legal argument where both parties claimed a due process violation, the Presiding Officer sustained the Applicant’s objection to the testimony. Because Counsel for the Public told the Presiding Officer that making an offer of proof to preserve her record would take over an hour, the Presiding Officer ordered Counsel for the Public to file a written offer of proof. Counsel for the Public then continued with her re-direct examination.

On November 14, 2016, Counsel for the Public filed a written Offer of Proof and a Motion to Reconsider the Evidentiary Ruling and Re-Open the Record. The Applicant filed an objection to the motion on November 21, 2016.

This order denies Counsel for the Public’s Motion for Reconsideration Evidentiary Ruling and Request to Re-Open the Record.

II. Position of the Parties

Counsel for the Public seeks reconsideration of the evidentiary ruling sustaining the objection to questions on re-direct examination that were beyond the scope of the cross-examination. Counsel for the Public claims that the failure of the Subcommittee to include an opportunity for “sur-rebuttal” pre-filed testimony, combined with the limitation of her re-direct examination, violated fundamental fairness and due process. Counsel for the Public argues that the Subcommittee should allow rebuttal and sur-rebuttal testimony in a manner akin to that

provided for in RSA 516:29-b, governing expert disclosure in civil cases. Citing to the N.H. Rules of Evidence (NHRE) 611, Counsel for the Public also claims that the rules of evidence used in court do not limit re-direct examination to matters raised on cross-examination. Counsel for the Public argues that there is no support in statute, rule or case law for the proposition that the party with the burden of proof should be permitted final rebuttal. Counsel for the Public argues that the Administrative Procedure Act, RSA 541-A: 31, IV, requires that she be provided with the opportunity to present sur-rebuttal testimony. Finally Counsel for the Public claims that a similar issue arose with testimony presented by the Audubon Society and that the Presiding Officer allowed sur-rebuttal in that instance.

The Applicant objects to the Motion for Reconsideration and Request to Re-open the Record. The Applicant asserts that Counsel for the Public is attempting to introduce new testimony after Ms. Connelly has already been subject to cross-examination. The Applicant argues that this attempt violates RSA 541-A: 31, IV, because it deprives the Applicant of the opportunity to cross-examine or to respond to new testimony that was never before submitted to the Subcommittee or the parties. The Applicant also argues that Counsel for the Public had the opportunity to pursue rebuttal testimony by seeking leave from the Subcommittee to pre-file that testimony or by asking questions regarding the rebuttal testimony on direct examination.

III. Analysis

In her motion, Counsel for the Public frames the issue as one where the Committee's administrative rules and procedural orders did not provide an opportunity for her to respond to the supplemental pre-filed testimony of Mr. Raphael. As a result, Counsel for the Public claims that the evidentiary ruling divested her of the opportunity to present relevant sur-rebuttal testimony. Counsel for the Public's framing of the issues is incorrect.

The supplemental testimony of David Raphael was filed with the Subcommittee and served on Counsel for the Public on August 18, 2016. Counsel for the Public had ample opportunity to review that supplemental testimony before the commencement of the adjudicative hearings on September 13, 2016. If Counsel for the Public felt that a response was necessary, she should have filed a motion seeking leave to respond, but she did not do so. Likewise, Counsel for the Public had the opportunity to conduct a direct examination of Ms. Connelly after the adoption of her pre-filed testimony. However, Counsel for the Public chose not to conduct such a direct examination, nor did she seek leave from the Presiding Officer to do so.

In her motion, Counsel for the Public recognizes that the Committee has discretion to set discovery and procedural schedules pursuant to RSA 162-H:4 and N.H. CODE ADMIN. RULES, Site 202.22. However, she argues that the Subcommittee misused that discretion by setting a procedural schedule that did not allow her to file sur-rebuttal testimony. She buttresses that argument with references to RSA 516:29-b and NHRE 611. Those analogies are misplaced.

In civil trials, RSA 516:29-b, in pertinent part provides that expert disclosures:

shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party, within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required in accordance with the court's rules.

RSA 516:29-b (emphasis added).

As in civil cases, the Subcommittee, through its Presiding Officer, has the authority to set forth the timing and sequencing of discovery and testimony. *See* N.H. CODE ADMIN. RULES, Site 202.22. In this case, Counsel for the Public had more than adequate time to file a motion

requesting leave to file additional testimony. Counsel for the Public had 25 days before the adjudicative hearings and 35 days before beginning the cross-examination of Mr. Raphael to seek relief.

NHRE 611 does not support the claims made by Counsel for the Public. The rule provides that the court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence. NHRE 611 (b) also indicates that the court may “limit cross-examination with respect to matters not testified to on direct examination.” The Site Evaluation Committee has similar discretion and authority under N.H. CODE ADMIN. RULES, Site 202.22. While Counsel for the Public suggests that there is no requirement that re-direct examination be limited to the testimony heard on direct examination, NHRE 611 (b) does imply that such a limitation is appropriate and within the discretion of the court. If limiting cross-examination is permissible, then limiting re-direct is similarly permissible.

Counsel for the Public claims that there is a “practice” before the Site Evaluation Committee of not asking rebuttal questions at the time of direct examination. While it is true that direct examination before the Subcommittee usually consists of the adoption and correction of pre-filed testimony, it is not true that there is a practice of not allowing rebuttal during direct testimony. In fact, in this docket, additional testimony was allowed to be provided by intervenor Henninger. *See* Transcript, October 18, 2016, Afternoon, p. 66 - 68. Mr. Henninger appropriately advised the Committee that he had additional testimony to offer at the time when he was asked to adopt his pre-filed testimony. Similarly, Fred Ward, Ph.D. was asked if he had any changes to his testimony and indicated that he had a “response” to information that was received during the course of the hearing. In that case, Dr. Ward had arranged for another intervenor to ask him questions about that information. *See* Transcript, October 20, 2016,

Afternoon, p. 170. The mere fact that rebuttal questions are not always asked on direct examination does not constitute a “practice” of the Committee. Rather, it is an indication that rebuttal is rarely sought. Counsel for the Public could have chosen to notify the Subcommittee that she had sur-rebuttal testimony to present during the direct examination of Ms. Connelly. In that case, all parties and the Committee would have had the opportunity to cross-examine Ms. Connelly with respect to her rebuttal. Counsel for the Public did not do this.

Counsel for the Public also claims that the Presiding Officer ruled differently when a similar issue arose during the course of the presentation of evidence by the Audubon Society. In that case, the Applicants objection was overruled. That analogy is misplaced. The Audubon Society was permitted to show a video animation to the Subcommittee. That video animation had been marked as an exhibit in the case and had been filed as an attachment to the pre-filed testimony of the witness, Michael Buscher. It was not new testimony. The only additional information that was received was an explanation of the difference between a still-frame animation and a live video animation. This information was necessary for the Subcommittee to understand the video exhibit. There was no extensive rebuttal testimony offered as part of the re-direct testimony. The Audubon Society’s video had been previously provided to all the parties. Unlike the tact taken by Counsel for the Public with respect to Ms. Connelly, each party had the prior opportunity to cross-examine Mr. Buscher with respect to the video because it was in the record.

It is important to recognize that Counsel for the Public had considerable opportunity to cross-examine the Applicant’s witness, Mr. Raphael, about the contents and nature of his supplemental testimony. Her cross-examination of Mr. Raphael was not, in any way, limited or diminished. However, the same cannot be said with respect to the testimony proffered from Ms.

Connelly by Counsel for the Public. Counsel for the Public waited until the end of the proceedings and after the Applicant had cross-examined the witness in an attempt to insert new evidence and testimony into the record. Had that been allowed, the Applicant would have been denied the opportunity to cross-examine Ms. Connelly. “The type of new issues needed to allow rebuttal are those issues relevant to the case at trial and that the party could not reasonably have presented or opposed during its case-in-chief.” *State v. Hopkins*, 136 N.H. 272, 276 (1992). In this case, Counsel for the Public had ample opportunity to present Ms. Connelly’s responses to Mr. Raphael’s supplemental testimony during Counsel for the Public’s case in chief. Counsel for the Public chose not to do so.

RSA 541-A: 33, II and N.H. CODE ADMIN. RULES, Site 202.24(b) permit the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A close review of the Offer of Proof filed by Counsel for the Public reveals that much of the offer consists of testimony about information that is already in the record in this docket and is, therefore, cumulative and unduly repetitious.

For example, it appears that Counsel for the Public uses parts of the Offer of Proof to provide information that is not responsive to Mr. Raphael’s supplemental testimony. A good deal of the Offer of Proof attacks the methodology and conclusions of Mr. Raphael as expressed in his original testimony. Counsel for the Public could have provided testimony that was responsive to (or a rebuttal of) that original testimony in her first round of testimony or by filing supplemental testimony.

Counsel for the Public admits that much of the information provided in the Offer of Proof was already testified to by Ms. Connelly³. Offer of Proof, p.1, Fn. 1. Repetition of that

³ In her Offer of Proof, Counsel for the Public identifies statements that may already be in the record by using an asterisk. Counsel for the Public uses the asterisk 24 times in a 13 page Offer of Proof. Of the 35 offers contained within the document, 15 include facts with an asterisk. Another six offers admit that Ms. Connelly already testified to the information contained in the offer of proof.

information was cumulative and unnecessary.

Counsel for the Public originally drew an objection to the following question:

“In terms of identifying sensitive sites, have you ever seen a methodology that Mr. Raphael used, used by anybody else?” Transcript, November 7, 2016, Evening, p. 7. The question was beyond the scope of the cross-examination and was not responsive to, or a rebuttal of, the supplemental testimony of Mr. Raphael. The question asked Ms. Connelly to comment on Mr. Raphael’s methodology, a question that could easily have been posited as part of Ms. Connelly’s original pre-filed testimony.

Similarly, the Offer of Proof states:

She (Ms. Connelly) disagrees with the approach used by Raphael that mathematically calculates what percentage of a resource affected by the project using a field of view and angle of view that do not reflect the normal human perception because used in that manner will have the effect of almost always deflate (sic) the effect of the project on the visual study area.

Ms. Connelly could have addressed this concern in her original pre-filed testimony rather than on re-direct testimony. Similarly, the Offer of Proof includes much information that is already in the record. For instance, the Offer of Proof states:

Raphael did not include most of the sites that she identified as sensitive sites. Ms. Connelly would have testified that Raphael was wrong to exclude these sites in his analysis. That means none of them were subject to further analysis in his VIA.

Offer of Proof p. 3.

This criticism is already in the record and contained within Ms. Connelly’s visual impact assessment: “In addition, the LandWorks rating of the (4) remaining sensitive resources that were found to be visually impacted within the Terraink VIA were eliminated from impact assessment during the LandWorks rating process.” Exhibit CFP 1, Attachment 1, p. 60. The

Offer of Proof contains a number of similar instances. In each case, the information was cumulative and unduly repetitious.

Based on the foregoing, neither reconsideration nor re-opening the record is required for a full consideration of the relevant issues in this proceeding. The Motion for Reconsideration and to Re-open the Record is denied.

SO ORDERED this second day of December, 2016.



Robert R. Scott, Presiding Officer
NH Site Evaluation Committee