

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7156

Petition of UPC Vermont Wind, LLC, for a Certificate of)
Public Good, pursuant to 30 V.S.A. § 248, authorizing the)
construction and operation of a 52 MW wind electric)
generation facility, consisting of 26 wind turbines, and)
associated transmission and interconnection facilities, in)
Sheffield and Sutton, Vermont)

Order entered: 9/27/2006

ORDER RE OBJECTION TO TESTIMONY

On August 28, 2006, UPC Vermont Wind, LLC ("UPC") filed objections to the prefiled testimony of the Town of Sutton ("Sutton"), the Department of Public Service ("Department"), Donald Gregory, the Town of Westmore ("Westmore"), and John and Marilyn Pastore. In this Order we deny in part, and grant in part, UPC's objection to portions of the testimony submitted by certain parties to this Docket.

Testimony of the Town of Sutton

Position of Parties

UPC objects to the testimony of three witnesses for Sutton. UPC contends that two of the lay witnesses¹ "do not own property in Sutton, are not residents of Sutton, and do not pay taxes to, or receive services from the Town of Sutton." UPC argues that the testimony by these witnesses is beyond the scope of Sutton's permissive intervention as Sutton did not seek to intervene to address the potential impact of the proposed project on landowners outside of Sutton.

1. UPC's August 28 filing objected to the testimony of Herbert DiGioia, Philip Grant, and Kenneth James. In its September 15 filing, UPC states that, based upon discovery responses, it appears that Mr. DiGioia lives in Sutton and, if that is the case, UPC has no objection to Mr. DiGioia's testimony.

Sutton filed a response to UPC's motion on September 8, 2006. Sutton contends that the testimony in question is relevant to the proposed project's aesthetic impact and "[a]s a general rule, all relevant evidence is admissible."

On September 12, 2006, UPC filed a reply to the comments on its motion. In the September 12 filing, UPC contends that the issue to be decided is not whether the testimony is relevant but whether Sutton has standing to present the evidence, given the Board's limitations on Sutton's participation in this Docket.

Discussion

UPC is correct that the issue at hand is whether Sutton has standing to present testimony from residents that do not reside within Sutton. In our Order of May 18, 2006, we granted Sutton's request to expand the scope of its permissive intervention to include the following issues: "aesthetics and scenic and natural beauty; the ability of the local government to provide municipal or governmental services; and development affecting public investments." The Board did not limit Sutton's permissive intervention to include only those factors that affect the town itself.¹ The testimony in dispute addresses issues of aesthetics and scenic and natural beauty. There is nothing in the Board's Order of May 18 that would limit Sutton to providing testimony only on the potential impact of the proposed project on the aesthetics, scenic, and natural beauty as seen from Sutton. Accordingly, we deny UPC's motion to strike the testimony of the non-Sutton residents.

Testimony of the Department of Public Service and Donald Gregory

Position of Parties

UPC objects to those portions of Robert Ide's testimony that address the potential impact of the proposed project on the King George School. UPC contends that Mr. Ide's comments regarding the potential impact on the King George School rely "exclusively on the public comment of the School's principal, a comment which itself was entirely speculatively [sic] as to the Project's potential impacts." UPC notes that there is no evidence in the record from an employee of the school regarding the potential impact on the school. UPC states that any

1. The Board will consider whether, in future dockets, such limitations should be placed on intervenors.

comments made by King George School employees constitutes "unsupported hearsay." UPC further contends that "[a]llowing a party in a 248 proceeding to avoid the contested case process by raising its concerns via only public comments rather than testimony subject to cross examination raises serious fairness and due process concerns to the petitioner."

UPC makes a similar argument regarding portions of Donald Gregory's testimony that UPC contends relies on "hearsay and speculation regarding the operations of the King George School."

The Department contends, through a filing made August 31, 2006, that it would be premature to grant UPC's motion at this time "as Mr. Ide's testimony is subject to connection to other evidence that may be submitted at a later point in this proceeding." The Department notes that the evidentiary record remains open until the close of the technical hearings. The Department further states that the closure of the King George School "was utilized in the assumption in the testimony of UHS witnesses Copp and Carr and is currently subject to detailed discovery requests served by UPC on Universal Health Services, Inc. and UHS of Sutton." The Department requests that the Board "treat the objection as preserved for consideration at a future date in the event Mr. Ide's testimony is not connected to additional record evidence."

In its September 12 filing UPC contends that all parties, including the Department, have "an obligation to present evidence which is admissible at the time it is offered." UPC further states that the fact that additional rounds of testimony are required under the schedule is irrelevant because "rebuttal and surrebuttal must address issues *already raised* by the parties, not new issues, such as whether the school will close."

The Department filed additional comments on September 12, 2006.

Mr. Gregory did not file any comments on UPC's motion.

Discussion

The Department does not dispute that portions of Mr. Ide's testimony are based on hearsay. The Department instead argues that additional evidence to "connect" Mr. Ide's testimony may be filed in the future and requests that the Board wait to rule on UPC's objection until the evidentiary record is closed.

To take such action as the Department requests would be to create a process which ignores the rules of evidence and places an unfair burden on opposing parties to respond to inadmissible testimony. Additionally, such a process would invite parties to disregard the rules regarding rebuttal testimony — that rebuttal testimony should not raise new issues, but is instead limited to addressing issues that have already been raised.² The testimony is clearly hearsay and as such is inadmissible.

UHS, the owner of the King George School, is a party to this Docket and has not submitted testimony from an employee of the school stating under oath that construction of the proposed project would result in the closure of the school. Although a school employee has stated during a public hearing that the school would likely close down if the proposed project was constructed,³ this individual has not provided sworn testimony and is not subject to cross-examination by parties. Consequently, there is a fundamental issue of fairness.

For these reasons the Board will not allow into evidence the following portions of Mr. Ide's testimony which rely on hearsay evidence: Page 11, lines 15 -19 and page 12, lines 1-5. For the same reasons, the Board will not allow the following portions of Mr. Gregory's testimony: page 8, lines 1-15.

Testimony of the Town of Westmore and the Pastores

Position of Parties

UPC contends that Westmore and the Pastores have not presented evidence that conforms to the requirements of the Board's rules. UPC states that it "does not object to the Board considering the issues and concerns raised by the Town of Westmore and the Pastores, but the letters and attachments offered by both parties should be treated as general public comments, and not as prefiled evidence."

Neither Westmore nor the Pastores responded to UPC's motion.

Discussion

2. See, e.g., Docket 6860 Order of 10/8/04 at 3; discussing the standard for surrebuttal.

3. Tr. 4/25/06 at 66-68 (Fitzhugh).

Although Westmore and the Pastores did not conform to the Board's rules regarding proper format, the filings by these parties provides the same substantive content as would testimony that conforms to the Board's procedural requirements. The purpose of Board Rule 2.213 is to provide a common format for prefiled testimony. Given the limited nature of Westmore's and the Pastores' testimony, departure from the rule should not cause unfair prejudice to other parties. Further, it is common for the Board to receive filings from lay people in a similar format as to that received from Westmore and the Pastores. Typically, other parties do not object to such testimony in the interest of facilitating participation by pro se parties. In this case, UPC has not demonstrated that the procedural deficiency prejudices UPC. Therefore, we will allow Westmore's and the Pastores' testimony.

However, we do remind both Westmore and the Pastores that they must strive to comply with Board rules and procedures. Under a more strict interpretation of the Board's rules, both parties could have had their testimony — an integral component of any party's case — not admitted into evidence. Westmore and the Pastores must make greater efforts in the future if they intend to participate in an effective manner.

Conclusion

For the reasons stated above, we deny UPC's motion to strike as it relates to the testimony of the Town of Sutton, the Town of Westmore and the Pastores. We grant UPC's motion to strike as it relates to portions of the testimony of the Department of Public Service and Donald Gregory.

SO ORDERED.

Dated at Montpelier, Vermont, this 27th day of September, 2006.

<u>s/James Volz</u>	)	
	)	PUBLIC SERVICE
	)	
<u>s/David C. Coen</u>	)	BOARD
	)	
	)	OF VERMONT
<u>s/John D. Burke</u>	)	

OFFICE OF THE CLERK

FILED: September 27, 2006

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)