STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7508

Petition of Georgia Mountain Community Wind, LLC,	)
for a certificate of public good, pursuant to 30 V.S.A.	)
Section 248, authorizing the construction and operation	)
of a 5-wind turbine electric generation facility, with	)
associated electric and interconnection facilities, on	)
Georgia Mountain in the Towns of Milton and Georgia,	)
Vermont, to be known as the "Georgia Mountain	)
Community Wind Project"	)

Order entered: 1/13/2011

ORDER RE: OBJECTION TO PREFILED TESTIMONY

On November 22, 2010, Georgia Mountain Community Wind, LLC ("GMCW") submitted prefiled testimony regarding the issue of the appropriate distance that the proposed wind turbines should be set back from adjoining property. On December 23, 2010, the Landowner Intervenors[1] filed objections to certain portions of the prefiled testimony submitted by GMCW.

In this Order, the Public Service Board ("Board") denies the Landowner Intervenors' objections as the Landowner Intervenors have not demonstrated that the expert testimony provided by GMCW's witnesses should be excluded from the evidentiary record. This ruling does not, however, prevent the Landowner Intervenors from conducting cross-examination on the testimony and utilizing the opportunity to prepare a brief that challenges the weight that should be accorded the testimony.

Motion of the Landowner Intervenors

The Landowner Intervenors object to eleven portions of the prefiled testimony of John Zimmerman and five portions of the prefiled testimony of Marc LeBlanc. Each of the objections

1. The Landowner Intervenors consist of Scott and Melodie McLane, Daniel and Tina FitzGerald, Jane and Heidi FitzGerald, George and Kenneth Wimble, Matt and Kim Parisi, Kevin and Cindy Cook, and Kenneth and Virginia Mongeon.

cites relevancy as one basis for the objection. The bases for the remaining objections include hearsay, lack of foundation, leading question, and the Landowner Intervenors' assertion that the testimony calls for a legal conclusion.

Response to the Motion

On January 3, 2011, GMCW filed a response to the objections to testimony, stating that the motion is defective on procedural grounds and is also unsupported as a matter of law. GMCW states that the Landowner Intervenors' motion should be rejected as untimely because the motion was filed with the Board outside the thirty-day deadline for objections to testimony imposed by Board Rule 2.216(C).[2] GMCW asserts that there:

> appears almost no question that the Landowners' Motion to Strike was either authored by a lawyer or written at the direction of an attorney. . . . Petitioner reminds the Board that it has already cautioned the Landowners in this proceeding that *pro se* parties that make filings prepared by an attorney will not be provided with any leeway with respect to procedural matters.

In addition, GMCW contends that the motion is defective because it does not include a brief or memorandum of law. GMCW cites to Board Rule 2.206, which states in pertinent part, "[m]otions not made during the hearing shall be in writing and, if they raise a substantial issue of law, shall be accompanied by a brief or memorandum of law." GMCW asserts that the Landowner Intervenors failed to provide the necessary legal argument "setting forth the basis and support for any of the evidentiary objections stated" and therefore the motion should be rejected.

Finally, GMCW contends that the objections are unsupported by law or fact. GMCW states:

> As an administrative tribunal, this Board has broad discretion as to the admissibility of all evidence, including expert testimony. The definition of "expert," *i.e.,* a person who can contribute expert testimony, is broad. Under the Vermont Rules of Evidence ("V.R.E."), moreover, an expert may be qualified on the basis of her skill, knowledge, or experience. Where a witness' experience or

2. Board Rule 2.216(C) states that "[o]bjections to the admissibility of prefiled testimony or exhibits shall be filed in writing not more than thirty days after such evidence has been prefiled or five days before the date on which such evidence is to be offered, whichever is earlier."

> training is sufficient to provide assistance to the Board, that witness' testimony is admissible as expert testimony, whether it be in the form of opinion or otherwise.[3]

GMCW further cites to 3 V.S.A. § 810(1), which provides that administrative tribunals such as the Board may allow evidence, even if it were not admissible under the rules of evidence, if the Board deems the evidence "necessary to ascertain facts not reasonably susceptible of proof" under the rules of evidence and if the evidence is "of a type commonly relied upon by reasonably prudent men in the conduct of their affairs."

No other party filed comments on the motion.

On January 10, 2011, the Landowner Intervenors filed a response to GMCW's letter. The Landowner Intervenors state that GMCW is incorrect in its statement that the objections to prefiled testimony were not timely filed. The Landowner Intervenors assert that the objections to testimony were e-mailed to the Board and parties on December 22, 2010, thirty days from the date of GMCW's prefiled testimony. Further, the Landowner Intervenors state that, although GMCW hand-delivered its prefiled testimony on November 22, 2010, the filing was not hand-delivered to parties, and parties did not receive the testimony until after November 22. The Landowner Intervenors contend that, "[u]nder these circumstances, the Vermont Rules of Civil Procedure provide that three (3) calendar days shall be added to the prescribed period of time, and therefore, the thirty-day period in which the Landowner Intervenors had to respond should not have begun to run until November 25."

The Landowner Intervenors also state that GMCW is incorrect in its assertion that the objections to the testimony must be accompanied by a memorandum of law. The Landowner Intervenors state that Board Rule 2.216(c) only requires that any objection be made in writing, and does not require that objections be in the form of a motion or supported by a brief. The Landowner Intervenors request that the Board consider and rule on the objections on the merits.

Discussion

The Landowner Intervenors are correct that, under the Board's rules, as well as the rules of civil procedure, the objections were timely because, pursuant to Vermont Rule of Civil

3. Citations omitted.

Procedure 6(e), three days are added to the thirty-day deadline for written objections to testimony when the testimony is served on parties by mail. In addition, the Landowner Intervenors correctly note that a written objection to prefiled testimony is not a motion and, under Board Rule 2.216(C), does not require that a memorandum of law or brief accompany the objection.[4] Accordingly, we address the Landowner Intervenors' objections on the merits.

In ruling on an objection to testimony, the Board does not decide whether particular testimony is compelling. Instead, the Board decides the more narrow question of whether that testimony should be allowed into the evidentiary record pursuant to the rules of evidence and the discretion accorded the Board in 3 V.S.A. § 810(1).

In contrast to a superior or district court, the Board's review of a project under 30 V.S.A. § 248 is as an expert body that is engaged in a "legislative, policy-making process."[5] In administrative proceedings such as these, the Board is the trier of fact and there is no jury to protect from unreliable evidence.

Board proceedings typically involve testimony filed by expert witnesses. A witness may be qualified as an expert "by knowledge, skill, experience, training, or education."[6] Given the experience of Mr. Zimmerman in siting wind generation facilities, including testifying before this Board in at least three proceedings involving the siting of such facilities, it is clear that Mr. Zimmerman qualifies as an expert, at least through experience. In addition, the resume of Mr. LeBlanc indicates that he has extensive experience and training involving wind generation facilities. Accordingly, Messrs. Zimmerman and LeBlanc can both be categorized as expert witnesses.

This distinction between an expert and lay witness, and the categorization of witnesses, is important because the Vermont Rules of Evidence include specific standards for determining the information on which an expert witness can rely to provide the basis for that witness' testimony:

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4. We note, however, that the greater the detail included in the objection, the greater the opportunity for the objecting party to make its case for excluding testimony.

5. *In re Amended Petition of UPC Vermont Wind*, 2009 Vt. 19, ¶ 2 (citing *In re Vt. Elec. Power Co.*, 2006 Vt. 69, ¶ 6).

6. Vermont Rule of Evidence 702.

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.[7]

It is under these standards that the Landowner Intervenors' objections to expert prefiled testimony must be reviewed.

The primary bases that the Landowner Intervenors set forth for objecting to the prefiled testimony are relevancy, hearsay, and lack of foundation. In addition, some objections are on the basis that the testimony offers a legal conclusion.[8]

With respect to the issue of relevancy, GMCW's prefiled testimony addresses issues related to siting wind turbines, including operational issues associated with public health and safety. It is therefore unclear why the prefiled testimony should be excluded based on relevancy, and the Landowner Intervenors have not provided a sufficient rationale to support this objection.

As noted above, the rules of evidence allow expert witnesses to utilize, as a basis for testimony, information that may not itself be admissible. Accordingly, a witness may rely on a document which itself may be hearsay in testimony. Since the Landowner Intervenors have objected only to the prefiled testimony of the expert witnesses, and the rules of evidence allow such witnesses to rely on facts and data that may otherwise be considered hearsay, we find no basis for excluding the prefiled testimony based on an objection of hearsay. Similarly, an expert witness does not have to lay a foundation for observations that are based on experience or training, and accordingly we reject the objections to the extent that they are based on the grounds of failure to provide a foundation.

Finally, we address the Landowner Intervenors' contention that the witnesses are making legal conclusions in their testimony. The Board relies on statutes that often set forth the

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7. Vermont Rule of Evidence 703.

8. In addition, the Landowner Intervenors object to one portion of testimony on the basis of "leading question." However, Board rules require prefiled testimony to be filed in question and answer format and it is common practice for the question portion of the testimony to be guiding in nature to facilitate the presentation of relevant information and the rationale for the prohibition on leading questions doesn't exist when the testimony is prefiled. Therefore we overrule the leading question objection.

objective standards for Board review.[9] We expect that expert witnesses are familiar with these standards and the Board's rulings on these standards so that they can provide informed testimony. This is distinct from a witness setting forth an argument as to the appropriate application of a legal standard to a set of facts.

By way of specific examples of the application of these principles to the objections, we review the objections that the Landowner Intervenors raise to the following testimony of Mr. Zimmerman:

> In evaluating the public safety criterion under Section 248(b)(5), this Board has grounded its determinations based upon acceptability of risk from evidence founded upon science-based risk assessment. In its order regarding public safety risk posed by the East Haven Wind Project, for example, this Board stated that it "does not need to find that the proposed Project would present no risks. It would be impossible to make such a finding for any project." In that case, however, based upon the science-based risk analysis by Mr. LeBlanc, the Board concluded that the "minuscule risk presented by shed ice from the proposed Project is an acceptable one." Petition of EMDC, LLC, Order of July 17, 2006, at 32 (acknowledging that the probability that the shed ice would strike a person is "exceedingly small").

The Landowner Intervenors raise the following objections to the above testimony:

> Objection on the basis of relevancy, hearsay, lack of foundation, and on the basis that the question calls for a legal conclusion. The matters testified to concern other, unrelated proceedings. There is no indication that the witness has any personal knowledge of, or expertise to testify as to, the Board's resolution of legal questions raised in other proceedings.

With respect to the objection as to the relevancy of the testimony, Mr. Zimmerman appears to be setting forth his understanding of the Board's standards related to possible risks to public health and safety. This provides a context for Mr. Zimmerman's testimony as to the appropriate set-back distance of the proposed wind turbines from the project property line and is therefore relevant.

With respect to the objection that the testimony is hearsay, as noted above, even if Mr. Zimmerman's summary of the Board's relevant decisions is hearsay, VRE 703 clearly states that

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9. For example, the substantive criteria of Section 248(b).

an expert witness such as Mr. Zimmerman may rely on evidence that may not otherwise be admissible, such as hearsay, in his testimony.

With respect to the objection that Mr. Zimmerman has not provided a foundation for his testimony, it is unclear whether the Landowner Interevenors are contending that there is a lack of familiarity with the subject matter or whether there is a lack of expertise. Either way, the Landowner Intervenors have not provided a sufficient basis for excluding the testimony.

Finally, with respect to the contention that the testimony calls for a legal conclusion, Mr. Zimmerman is stating his understanding of the Board's rulings related to public health and safety. This explanation of his understanding of the Board's relevant precedent does not mean that the witness is providing a legal argument, but instead is setting the context for the testimony.

The remaining objections submitted by the Landowner Intervenors are substantially similar to the objections raised above. Given the status of Messrs. Zimmerman and LeBlanc as expert witnesses, and the greater latitude the rules of evidence provide to such witnesses, the Landowner Intervenors have not provided sufficient rationales to demonstrate that any of the evidence objected to should be excluded from the record. Instead the appropriate course of action for the Landowner Intervenors is to utilize their opportunity to cross-examine Messrs. Zimmerman and LeBlanc during the upcoming hearings on the set-back issue, as well as to submit briefs of their arguments subsequent to the evidentiary hearings, to attempt to demonstrate that the Board should not accord the testimony much weight.

SO ORDERED.

Dated at Montpelier, Vermont, this 13th day of January, 2011.

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

OFFICE OF THE CLERK

FILED: January 13, 2011

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)