STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7628

Joint Petition of Green Mountain Power Corporation, Vermont Electric Cooperative, Inc., and Vermont Electric Power Company, Inc. for a certificate of public good, pursuant to 30 V.S.A. Section 248, to construct up to a 63 MW wind electric generation facility and associated facilities on Lowell Mountain in Lowell, Vermont, and the installation or upgrade of approximately 16.9 miles of transmission line and associated substations in Lowell, Westfield and Jay, Vermont	)

Order entered: 1/10/2011

ORDER RE: TOWN OF CRAFTSBURY OBJECTION TO ADMISSIBILITY OF PREFILED TESTIMONY

I. Introduction

On December 6, 2010, the Town of Craftsbury ("Craftsbury") filed with the Public Service Board ("Board") a document styled Motion to Strike Testimony and for Sanctions[1] in response to certain prefiled rebuttal testimony submitted by Green Mountain Power Corporation, Vermont Electric Cooperative, Inc., and Vermont Electric Power Company, Inc.'s ("Petitioners") witness David Raphael on November 22, 2010. Under Board Rule 2.216(C), this filing is actually an objection to the admissibility of prefiled testimony. In this Order we overrule Craftsbury's objection and deny its request for sanctions. Our ruling today does not in any

1. We are treating Craftsbury's motion to strike as an objection to the admissibility of evidence pursuant to PSB Rule 2.216(C). Because Mr. Raphael's prefiled rebuttal testimony will not actually become part of the evidentiary record until it is admitted into that record in the course of the technical hearings, there is nothing to strike from the record at this time. The language of Board Rule 2.216(C) does not contain the phrase "motion to strike," nor does it provide a standard for deciding such motions. Rather, that rule prescribes a process for objecting in Board proceedings to the admissibility of prefiled testimony. Generally, a "motion to strike" is filed pursuant to Rule 12(f) of the Vermont Rules of Civil Procedure, which permits such motions in order to seek removal "from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter," or is made to strike evidence after it has come into the evidentiary record.

manner limit the proper use of surrebuttal testimony or cross-examination by Craftsbury to impeach Mr. Raphael by challenging the accuracy of the testimony at issue.

II. Procedural History

On November 22, 2010, Petitioners filed their rebuttal testimony in this Docket, including the rebuttal testimony of their aesthetics expert, David Raphael.

On December 6, 2010, Craftsbury filed its objection, asking the Board to strike a portion of Mr. Raphael's prefiled rebuttal testimony and to require Green Mountain Power Corporation ("GMP") to pay the expenses incurred by Craftsbury in preparing the objection.

On December 8, 2010, GMP filed its opposition to Craftsbury's objection.

On December 10, 2010, Craftsbury filed a reply to GMP's opposition.

On December 15, 2010, the Department of Public Service filed a response to the Craftsbury objection.[2]

III. Positions of the Parties

Craftsbury asserts that Mr. Raphael's rebuttal testimony contains a statement that is "false and misleading, and must be stricken from the record."[3] The statement at issue relates to a discovery response from Craftsbury's aesthetics witness, Ms. Gail Henderson-King. At page 14 of his prefiled rebuttal testimony, Mr. Raphael states that Ms. Henderson-King "admits that the only view [of the proposed project] from Craftsbury Common is at the end of a parking lot in front of the library, which is actually off of the Common." However, Craftsbury, quoting the relevant information request from Petitioners and the response from Ms. Henderson-King, contends that Ms. Henderson-King expressly denied that the only possible view of the project in the vicinity of Craftsbury Common was the one from the parking lot mentioned in Mr. Raphael's

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2. The Department's filing stated that it was responding to "motions filed by the Towns of Albany and Craftsbury ("Towns") and Dyer-Dunn, Inc. ("Dyer-Dunn") seeking to strike portions of the rebuttal testimony proffered by the Petitioners, and/or to modify the existing schedule." However, the Department's response appears to focus on the filings made by the Town of Albany and Dyer-Dunn, Inc., and does not appear to address Craftsbury's filing. Accordingly, this Order will not include any discussion of the Department's response.

3. Craftsbury objection at 2.

testimony.[4] Craftsbury further states that it contacted GMP prior to filing its objection and requested that Mr. Raphael's testimony be corrected, and that GMP refused to change the testimony. Craftsbury argues that GMP's refusal to correct what it contends is "an obvious and egregiously false statement" in Mr. Raphael's testimony warrants the imposition of a sanction against GMP in the amount of $900, representing the attorney's fees and costs incurred in preparing its objection.[5]

GMP argues that Craftsbury's motion should be denied[6] because: (1) Mr. Raphael's conclusion that Ms. Henderson-King's discovery response was tantamount to an admission that there were no other views from the Common is a fair inference to be made when her response is taken in its entirety; (2) Craftsbury has failed to provide a legal basis for striking the statement, and that the proper method for addressing factual disputes is through the hearing process, including cross-examination of witnesses; and (3) Craftsbury has failed to demonstrate the type of exceptional circumstances that warrant an award of attorney's fees because there has been no breach of discovery obligations, there is nothing unusual about a factual or expert opinion dispute, and any inefficiency was caused by Craftsbury's decision to pursue the matter through its objection rather than surrebuttal testimony or cross-examination.[7]

IV. Discussion

We overrule Craftsbury's objection and deny its request for sanctions because, when read in its entirety, Ms. Henderson-King's discovery response cannot fairly be characterized as an unequivocal denial, because Craftsbury has not provided a legal basis for excluding the contested statement from admission into the record, and because there are no grounds warranting the award of attorney's fees.

The information request and response that gave rise to the current dispute read as follows:

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4. Craftsbury objection at 2.

5. Craftsbury objection at 4-6.

6. As noted above, Craftsbury's filing is properly characterized as an objection to the admissibility of prefiled testimony under PSB Rule 2.216(C) which we overrule with this Order.

7. GMP opposition at 2-3.

> Request: Admit that the only location in the vicinity of the Craftsbury Common where a clear view of the Project will be possible is beyond the end of the parking lot in front of the library. If your answer is anything other than an unequivocal admission, please identify other locations and describe the clear view of the Project from that location.
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> Response: Denied that this is the only possible location. There is a clear view of the Lowell Mountain Range from the parking lot in front of the library, which is in the vicinity of the Craftsbury Common. I did not perform an analysis of the views of the proposed wind project taking into account the late fall to early spring seasons when no leaves exist on the deciduous trees. Therefore, I can't state there will or will not be any clear views of the proposed wind project from this or other areas. However, according to Mr. Raphael's report, Appendix 3 - Potential Visibility from Open Areas, there may be areas of visibility of the proposed Lowell Wind Project in the vicinity of the Craftsbury Common.

Craftsbury contends that the response does not constitute an admission because of the express denial in the first sentence of the response. However, we believe that when read in its entirety, the response can reasonably be construed as a qualified admission, rather than a denial, notwithstanding the initial sentence. In substance, the response states that Ms. Henderson-King agrees that the one view exists and is not aware of any other views, but that if she performed additional analysis, she might at some point identify other viewpoints from the vicinity of Craftsbury Common. While Mr. Raphael might have chosen his words more carefully in his characterization of the discovery response, we conclude that his description of it is based on a plausible inference when the response is read in its entirety.

We see as problematic Craftsbury's argument that the request itself should be viewed as two separate requests, the first a request to admit, and the second an interrogatory, each with its own corresponding response.[8] While Craftsbury may believe this strengthens its position by isolating the first sentence of the response from the qualifying language that follows, we believe this argument actually weakens Craftsbury's position. If the request and response were to be read the way Craftsbury urges, the result would be two contradictory discovery responses; the first being an outright denial, and the second being a statement regarding lack of knowledge that would fail to support the earlier outright denial. If the outright denial stood on its own as a

8. Craftsbury response at 2.

separate response, its necessary implication would be that Ms. Henderson-King actually performed a complete analysis and had concluded that other views did in fact exist. This is clearly not the case.

Additionally, Craftsbury has not provided a legal basis on which to exclude Mr. Raphael's statement, other than to assert that it is factually incorrect and therefore must not be part of the record. Generally, the Board applies the Vermont Rules of Evidence as applied in civil proceedings by Vermont's Superior Courts.[9] Under those rules, evidence that is relevant is admissible, and evidence that is irrelevant is inadmissible.[10] However, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[11] Craftsbury has not presented any argument on the relevancy of Mr. Raphael's statement, nor has it demonstrated that its probative value is substantially outweighed by any of the risks described in the rule. Indeed, such a showing would be difficult given the prefiled nature of the testimony, Craftsbury's ability to address it in its surrebuttal testimony due to be filed on January 10, 2011, and its ability to attempt to impeach Mr. Raphael regarding the statement during cross-examination in the upcoming technical hearings.[12] On this point we agree with GMP. The most efficient use of the parties' and the Board's time and resources for dealing with this issue is surrebuttal testimony and cross-examination. Craftsbury is represented by counsel and we are confident that the evidentiary record, once fully developed, will not contain any inaccuracies with respect to this dispute.

Lastly, we decline to award attorneys fees to Craftsbury because GMP's actions in this dispute do not constitute the type of exceptional circumstances that have supported such awards

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9. 3 V.S.A. § 810(1); *Investigation into Energy Efficiency Utility Structure*, Docket 7466, Order of 9/3/09 at 4.

10. V.R.E. 402.

11. V.R.E. 403.

12. While not precisely on point, in one case the Vermont Supreme Court recognized that courts prefer the use of cross-examination to ferret out untruthful testimony over the use of an exclusionary rule. *State v. Simpson*, 156 Vt. 349, 351-52 (1991) (quoting *United States v. Cresta*, 825 F.2d 538, 546 (1st Cir. 1987)).

in the past. Consistent with the American Rule, attorneys fees are generally not awarded in Board proceedings absent statutory authority or an enforceable contractual agreement. However, the Board has on occasion departed from application of the rule, but only "in exceptional circumstances, such as when a discovery sanction is warranted, or when it is appropriate to off-set the additional litigation costs incurred by one party in responding to another party's untimely or inefficient actions in presenting its case."[13] Craftsbury does not allege grounds for a discovery sanction, and as we discussed above, we find Mr. Raphael's interpretation of Ms. Henderson-King's discovery response to be plausible, so that while Craftsbury may disagree with it, it does not amount to the "affront to the truth-seeking function of adversary proceedings" that Craftsbury claims.[14] Nor do we find anything untimely or inefficient in Petitioners' actions. They prefiled Mr. Raphael's testimony in accordance with the schedule and Craftsbury retains its ability to challenge the accuracy of that testimony in surrebuttal and through cross-examination. These are clearly more appropriate and less expensive responses to the type of testimony being challenged by Craftsbury, which as of the date of this Order, has not yet been admitted into the record. Parties are advised that the Board doesn't look kindly on this type of unnecessary motion practice. There is a significant difference between the current dispute and the situation in Docket 7440, where other parties relied on inaccurate information provided by the petitioner in preparing and conducting their cases. No such situation exists in the present case, as evidenced by the disagreement between Craftsbury and GMP, and Craftsbury has not suffered any prejudice to its rights or incurred any inappropriate and unnecessary expenses as a result of Mr. Raphael's prefiled rebuttal testimony.

For the foregoing reasons, we overrule Craftsbury's Objection to the Admissibility of Prefiled Testimony and deny its request for sanctions.

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13. *Petition of Entergy Nuclear Vermont Yankee, LLC*. Docket 7440, Order of 6/4/10 at 10.

14. Craftsbury objection at 5 and Craftsbury response at 2 (quoting *ABF Freight Systems, Inc. V. NLRB*, 510 U.S. 317 (1994)).

SO ORDERED.

Dated at Montpelier, Vermont, this 10th 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 10, 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)