

MEMORANDUM

To: Parties in PSB Docket No. 7628

From: Susan M. Hudson, Clerk of the Board

Re: Notice of Status Conference, Proposed Order of Witnesses for Technical Hearings,
Electronic Copies of Filings

Date: 1/13/2011

Technical Hearings in this proceeding are scheduled to commence February 2, 2011.¹ The Public Service Board ("Board") routinely asks that parties submit a proposed order of witnesses in advance of scheduled hearings. In this Docket, the Board was prepared to request the parties to submit such a proposal by Friday, January 21, 2011. However, on January 12, 2011, the petitioners filed with the Board a letter indicating that they had requested information from the other parties regarding preliminary cross-examination estimates and witness availability, but that not all parties have provided the requested information. Additionally, based on the cross-examination estimates received so far, the petitioners believe that more than 16 days of hearings would be required. As a result, the petitioners have requested a status conference to discuss witness scheduling.

Given the representations in the petitioners' January 12, 2011, filing, and as indicated in the accompanying notice, the Board will conduct a status conference commencing at 2:00 p.m. on Wednesday, January 19, 2011, at the Public Service Board Hearing Room, Third Floor, People's United Bank Building (f/k/a Chittenden Bank Building), 112 State Street, Montpelier, Vermont. The purpose of the status conference is: (1) to discuss the scheduling of witnesses; and (2) to provide an overview of the procedures involved in a Technical Hearing.

¹ The Prehearing Conference Memorandum and Scheduling Order established the first date of hearings as February 7, 2011. However, it now appears that additional days may be necessary and the Board is therefore starting the hearings on February 2, 2011. A notice indicating all the hearings dates will be sent out shortly.

Cross-Examination Estimates and Availability of Witnesses

The Board hereby instructs the parties to submit their cross-examination estimates for each witness they intend to cross-examine no later than the close of business on Tuesday, January 18, 2011.² No time will be allocated in the hearing schedule for cross-examination by parties that fail to submit their estimates in a timely fashion for each witness they wish to examine. These estimates must be good-faith estimates and reflect the amount of time a party actually believes is necessary to effectively cross-examine each witness. Simply indicating a generic amount of time for a number of witnesses just in case a party thinks it may need to conduct cross-examination is not appropriate. For example, the matrix that accompanied the petitioners' January 12, 2011, filing indicates that the Department of Public Service has reserved 30 minutes each for 14 of the petitioners' witnesses. To the extent that these represent good-faith estimates, they are acceptable. However, to the extent they are "just in case" estimates, they are not acceptable. Additionally, parties should be aware that the scope of cross-examination is limited to questions regarding a witness's prefiled testimony and matters affecting the witness's credibility³. This is particularly true with respect to "friendly cross," in which a party cross-examines a witness of a party with similar interests in an attempt to either bolster that witness's testimony or have the witness introduce new testimony that should have been submitted in prefiled testimony prior to the hearings. If any of the parties anticipate utilizing such "friendly cross" questions, it is likely that such questions, and answers, will not be allowed.⁴ Cross examination estimates should take this fact into account. Lastly, in preparing cross-examination estimates, the intervenors should limit their planned cross-examination only to witnesses and subject matter that is relevant to the scope of their interventions.

Parties must also include with their cross-examination estimates the availability of any of their witnesses that will be sponsoring prefiled testimony and exhibits during the hearings.

Parties are also encouraged to prepare a proposed order of witnesses collaboratively for submission before the January 19th status conference, if possible. In preparing both their cross-examination estimates and any proposed order of witnesses, to the extent

²Parties may submit their estimates electronically on that date with hard copies to follow the next day. In the event a party's cross-examination estimates are accurately represented in the petitioners' January 12, 2011 letter attachment, a party need only file a statement verifying that fact.

³Vermont Rules of Evidence 611(b). However, if the witness himself or herself is a party, cross-examination may also include other matters that are material to the case, provided they are within the scope of intervention of the cross-examining party.

⁴Friendly cross-examination is not allowed because it elicits information that a witness should have prefiled in his or her written testimony. Allowing this type of information into the record through "friendly cross" is fundamentally unfair to other parties who have not had an opportunity to prepare for its introduction. Additionally, it causes scheduling problems because adjustments will need to be made so that the parties have an opportunity to adequately respond to the new information.

possible, parties with similar interests should coordinate to estimate the amount of time needed for their cross-examinations to avoid repetitive questioning of witnesses.

Any proposed witness schedule should:

- Identify the specific day on which each witness will testify;
- Identify specific days during the week that each witness is not available;
- Identify the amount of time that each party anticipates using to cross-examine each witness;
- Identify the order in which the parties will be cross-examining each witness; and
- Allocate no more than 5 hours of total cross-examination time for each full hearing day.

The Board strongly encourages parties to focus their cross-examination, wherever possible, to optimize the use of hearing time. Following receipt of the above-described filings, the Board will establish a schedule for witnesses and, if necessary, set limits on the amount of time for cross-examination.

To facilitate the hearings, the Board also intends to adopt the following procedures:

- At the present time, the Board anticipates that hearings will run from 9:30 A.M. to 5:00 P.M. each day (hearings are expected to be scheduled on February 2-4, February 7-11, and February 22-25).
- Each day, one half hour before the commencement of hearings, a member of the Board's staff will be available to meet with parties' representatives in the hearing room to discuss procedural issues that may arise that day. All parties intending to present evidence or conduct examination that day *must* attend. Issues to be discussed will include the schedule for the day, marking of exhibits, identification of allegedly confidential information that may be presented that day, and other matters.
- For each day, the Board intends to adopt the following schedule:
 - The hearings will recess for lunch from 12:00 P.M. to 1:15 P.M.
 - The Board will schedule a 15-minute morning break around 10:30 A.M. and a 30-minute afternoon break at 3:00 P.M.
- Parties are encouraged to stipulate to the admission of any prefiled testimony and prefiled exhibits to which no party has objected.
- The Board does not wish for witnesses to orally summarize their testimony.
- At the beginning of the day, parties should mark for identification any exhibits that they plan to introduce (including those to be used in cross-examination).

To the extent feasible, parties should plan to mark each document as a separate exhibit, rather than introducing all of a witness's exhibits or a collection of different documents as a single exhibit. Parties should also prepare a written list of all exhibits (an electronic version would also be appreciated). Parties should ensure that, for exhibits that were not prefiled, and for their exhibit lists, they have sufficient copies to distribute to the Board, Board staff, and other parties. Parties must distribute exhibits that have not been prefiled to other parties prior to the commencement of hearings for that day.

- Witnesses should arrive at the hearing at least one-half hour prior to their estimated starting time, unless the witness is the first witness of the day.
- The time used to introduce witnesses, prefiled testimony, and exhibits should be kept to a minimum.

Electronic Copies of Filings

Each party that has not already done so should send the Clerk of the Board (at psb.clerk@state.vt.us) electronic copies of prefiled testimony and exhibits.⁵ Also, parties should file electronic copies of briefs and reply briefs at the same time they file the written copies of those documents. To the extent that parties file this material in .pdf format, the Board requests that parties ensure that the .pdf file is encoded in a manner that allows text to be searched and selectively extracted rather than as an image.

Enclosure

⁵Parties need not file copies, electronically, of confidential testimony and exhibits.