

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7867

Application of Seneca Mountain Wind, LLC, for)
authority, pursuant to 30 V.S.A. §§ 246 and 248, to)
install four temporary meteorological stations, two)
in the Town of Brighton, Vermont, and one each in)
the towns of Ferdinand and Newark, Vermont)

Order entered: 11/8/2012

ORDER RE: NNU RULE 60(b) MOTION

I. INTRODUCTION AND PROCEDURAL HISTORY

On October 15, 2012, Newark Neighbors United ("NNU") filed with the Public Service Board ("Board") a Motion for Relief from Judgment Pursuant to V.R.C.P. 60(b) ("Motion"). In the Motion, NNU asks the Board to reverse the Hearing Officer's determination regarding the scope of issues to be considered at the upcoming technical hearing in this Docket.

On October 17, 2012, the Deputy Clerk of the Board issued a memorandum establishing October 29, 2012, as the deadline for filing responses to the Motion.

On October 29, 2012, responses to the Motion were filed by Seneca Mountain Wind, LLC ("SMW") and the Department of Public Service ("DPS" or "Department").

For the reasons explained below, we deny NNU's Motion.

II. POSITIONS OF THE PARTIES

Newark Neighbors United

NNU asks the Board to relieve NNU from the restrictions of the June 29, 2012, Procedural Order ("June 29 Procedural Order") issued by the Hearing Officer which, among other things, limited the scope of issues to be considered at the upcoming technical hearing in this Docket, as well as subsequent Orders that declined to expand the scope of issues (together with the June 29 Procedural Order the "Scoping Orders"). Specifically, NNU asks that relief be granted pursuant to V.R.C.P. 60(b)(2), (3), and (6).

First, NNU contends that relief is warranted under Rule 60(b)(2) due to new evidence that was not before the Hearing Officer when she issued the June 29 Procedural Order limiting the scope of the upcoming technical hearing. According to NNU, this new evidence consists of: (1) SMW's failure to properly notify all adjoining landowners prior to the passage of a new Newark Town Plan; (2) a public hearing held after the June 29 Procedural Order was issued at which the majority of speakers expressed opposition to the proposed meteorological towers ("MET towers") on the basis of aesthetics; (3) the "overwhelming" support of the Town of Newark voters in approving a new Town Plan that opposes any industrial development at elevations above 1,700 feet or structures greater than 125 feet in height; and (4) the Department's recent statements regarding the applicability of town plans in MET tower proceedings.¹

Second, NNU contends that relief should be granted under Rule 60(b)(3) because SMW's failure to provide notice to all adjoining landowners at the outset of this proceeding deprived some of those landowners of the opportunity to participate in the July 17, 2012, site visit and public hearing, and left those adjoining landowners with an insufficient opportunity to address the issues of aesthetic and natural resource impacts from the proposed MET towers. NNU also asserts that aesthetics and natural resource impacts need to be fully explored in the technical hearing in order to mitigate the fact that participants other than NNU did not receive advance notice of SMW's intent to file its application.²

Lastly, NNU asserts that justice requires that relief be granted under Rule 60(b)(6) due to changes in the Newark Town Plan, which constitute a clear, written, community standard under the aesthetics analysis utilized by the Board, and recent comments made by the Department with respect to the relevance and importance of local opposition to proposed projects.³

1. Motion at 4.

2. Motion at 4-5. V.R.C.P. 60(b)(3) allows a court to grant relief from judgment to a party for fraud, misrepresentation or other misconduct by an adverse party. NNU does not explain in any detail why the deficiencies in notice by SMW amount to fraud, misrepresentation or misconduct, nor does NNU explain why it has standing to assert the interests of other parties to bolster its argument in an attempt to advance its own interests.

3. Motion at 7-8.

Seneca Mountain Wind

SMW asserts that NNU's Motion should be denied because NNU has not provided a valid legal basis under Rule 60(b) in support of the relief NNU seeks.

First, SMW contends that NNU is, in the guise of attempting to vindicate the rights of other parties to this proceeding, improperly seeking a "second bite at the apple" for itself. SMW asserts that NNU's scope of intervention does not permit NNU to raise the interests of other parties to the proceeding, and that it therefore does not have standing to raise the interests of adjoining landowners that were not afforded timely notice of SMW's intent to file a MET tower application. Further, according to SMW, the interests NNU seeks to rely on in support of the Motion were either already addressed by the Hearing Officer by virtue of allowing the newly-identified adjoining landowners an opportunity to comment and seek intervention without the limitations imposed by the Scoping Orders, or are currently being considered by the Hearing Officer with respect to the potential applicability of the new Newark Town Plan to this proceeding.⁴

Second, SMW asserts that relief is unavailable under Rule 60(b)(2) because the evidence that NNU seeks to rely upon was not in existence at the time the June 29 Procedural Order was issued. SMW contends that relief under Rule 60(b)(2) is only available where the evidence relied upon by a movant both existed at the time of trial, and was not discoverable prior to trial by an exercise of due diligence. According to SMW, all of the new evidence relied upon by NNU arose after the issuance of the June 29 Procedural Order and therefore cannot form a basis for the relief sought.⁵ SMW also asserts that relief under the rule is unavailable because the new evidence that NNU seeks to advance is unlikely to change the outcome of the Scoping Orders, and in any event, is being considered in the context of the potential applicability of the new Newark Town Plan.⁶

Third, SMW contends that relief is unavailable under Rule 60(b)(3) because there has been no fraud, misrepresentation nor misconduct on its part, and no party has alleged such

4. SMW Opposition at 6-7.

5. SMW Opposition at 8-10.

6. SMW Opposition at 10-11.

conduct. SMW asserts that NNU has put forth no evidence that would meet the legal test for fraud, misrepresentation or misconduct and has therefore made an improper and unsupported argument under Rule 60(b)(3).⁷

Lastly, SMW maintains that Rule 60(b)(6) is inapplicable because the relief sought by NNU has already been granted. According to SMW, the newly-identified adjoining landowners were relieved from the restrictions of the June 29 Procedural Order by virtue of the Order issued on September 14, 2012, which allowed those landowners to file comments and seek intervention without the limitations imposed by the June 29 Procedural Order. Therefore, SMW concludes, it is impossible for the Board to grant the relief NNU seeks because it has already been granted.⁸

Department of Public Service

The Department asserts that the Motion is not ripe for review by the Board because the legal status of the applicability of the new Newark Town Plan is currently under consideration and believes that any ruling on the Motion would be premature until that issue is resolved.⁹

The Department also maintains that the other new evidence that NNU relies on in seeking relief under Rule 60(b)(2) consists of sources of input that would not become part of the evidentiary record on which the Board must base its decision,¹⁰ and therefore do not rise to the level of new evidence justifying the requested relief.¹¹

Lastly, the Department contends that NNU does not explain how SMW's failure to give proper notice to all adjoining landowners justifies reconsideration under Rule 60(b)(3) in light of the fact that the newly-identified adjoining landowners were relieved from the restrictions of the June 29 Procedural Order and allowed to file comments and seek intervention without the limitations imposed by that Order. The Department also asserts that allegations of fraud under

7. SMW Opposition at 11-12.

8. SMW Opposition at 13-14.

9. DPS Comments at 1.

10. Specifically, comments made at the July 17, 2012, public hearing, the Town of Newark's vote on the new Town Plan and public statements made by the DPS Commissioner.

11. DPS Comments at 1-2.

Rule 60(b)(3) must be proven by clear and convincing evidence, and that no proof has been offered that meets that standard.¹²

III. DISCUSSION

For the reasons discussed below, NNU's Motion is denied because it is not a proper motion under V.R.C.P. Rule 60(b). We further decline to exercise our discretion to grant what essentially amounts to a request from NNU for interlocutory review of the Scoping Orders issued by the Hearing Officer.

Rule 60(b) allows relief from judgment under certain enumerated circumstances. However, motions under Rule 60(b)(3) are proper only when made in relation to a "final judgment, order, or proceeding."¹³ The Vermont Supreme Court has held that

the test of finality "is whether [an order] makes a final disposition of the subject matter before the court." Before it can be a final, appealable order, it must dispose "of all matters that should or could properly be settled at the time and in the proceeding then before the court."¹⁴

The Scoping Orders from which NNU seeks relief do not meet this test of finality. Therefore, no relief is available to NNU at this time under Rule 60(b) as no final Board Order has been issued yet, and the Motion is accordingly denied without reaching the merits of the parties' arguments.

With regard to reviewing NNU's Motion as a request for interlocutory review, the Board retains the inherent authority to conduct such review of determinations made by the Hearing Officer prior to the issuance of a proposal for decision.¹⁵ However, we decline to do so in this instance.

The Board generally looks with disfavor on granting interlocutory review of a procedural order issued by a Hearing Officer, and grants such review only sparingly, such as in instances where the issues are relatively straightforward and conducting interlocutory review will lead to

12. DPS Comments at 2.

13. V.R.C.P. 60(b).

14. *In re Petition No. 152 by Cent. Vt. Ry., Inc.*, 148 Vt. 177, 178 (1987) (citations omitted).

15. *See Dudley v. Snyder*, 140 Vt. 129, 131 (1981) (where a motion is in substance a motion to revise an interlocutory order, it is within the plenary power of a court to afford such relief as justice requires).

an expeditious resolution of the docket,¹⁶ or when the Hearing Officer's decision has the practical effect of a final order.¹⁷ Further, as stated in an earlier Order issued in this Docket:

The instant proceeding is limited to potential impacts from the proposed temporary meteorological towers, and, while the Board has not yet decided whether to approve the proposed towers, if they are eventually approved, it should not be considered an indication of how the Board will decide any potential future application for the construction of a commercial-scale wind generation facility in the area. Any such application would be subject to full scrutiny under 30 V.S.A. § 248.¹⁸

In this case, interlocutory review of the Scoping Orders will not result in the kind of judicial efficiencies that would justify taking this unusual procedural step. In reaching this conclusion, we note that our decision to not grant review in this instance does not eliminate NNU's ability to raise these arguments before the Board at a later date. Accordingly, we decline to grant interlocutory review of the Scoping Orders.

SO ORDERED.

16. *Investigation into the rates charged by Sprint Communications Company*, Docket 6373, Order of 11/8/11 at 3.

17. Docket 7867, Order of 10/5/12 (affirming Hearing Officer's denial of intervention). The denial of an intervention request by a Hearing Officer has the same practical effect as a final order because the entity seeking intervention will be precluded from not only participating in the proceeding before the Hearing Officer, it will also be precluded from later filing comments on a proposal for decision, seeking oral argument before the full Board, or appealing the final Board order.

18. Docket 7867, Order of 10/5/12 at 3.

Dated at Montpelier, Vermont, this 8th day of November, 2012.

<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: November 8, 2012

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 technical errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)