

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: 10/10/2012

ORDER RE: MOTION TO COMPEL AND REQUEST FOR ATTORNEY'S FEES AND SANCTIONS

On September 4, 2012, Newark Neighbors United ("NNU") filed with the Public Service Board ("Board") a Motion to Compel, Motion for Sanctions and Request for Attorney's Fees ("NNU Motion"). On September 17, 2012, Seneca Mountain Wind, LLC ("SMW") filed its Opposition to Newark Neighbors United's Motion to Compel and for Sanctions and Request for Attorney's Fees and Motion for Sanctions ("SMW Opposition"). In this Order I deny both the NNU Motion and SMW's Request for Attorney's Fees and Motion for Sanctions. I will first address the NNU Motion and SMW's Opposition, and will then separately address SMW's request for sanctions and attorney's fees.

1. NNU Motion to Compel

NNU seeks an Order from the Board compelling SMW to immediately respond to a number of requests to admit promulgated on SMW by NNU.¹ In the event SMW fails to immediately respond to the requests to admit, NNU asks that they be deemed admitted by the Board. Lastly, NNU asks that SMW be required to pay NNU's costs and attorney's fees associated with the NNU Motion.²

1. Filed with the Board on 8/6/12.

2. NNU Motion at 1. NNU also states that, due to the compressed nature of the Docket schedule, it is combining the NNU Motion with a motion for sanctions. *See* NNU Motion at 2. The NNU Motion fails to make clear whether this request for sanctions is something apart from, and in addition to, its request for costs and attorney's fees. Assuming it is something apart from that request, it is prematurely filed since it presumes that an order will issue directing SMW to respond as NNU requests, and that such an order would be violated by SMW. Accordingly, the

NNU asserts that it is entitled to the relief it seeks because the requests to admit are "crucial to the issues the Board is compelled to review under 30 V.S.A. Section 246," and that they are not onerous and do not involve burdensome investigation in order for SMW to respond.³ NNU acknowledges that it did not attempt to resolve its discovery dispute with SMW prior to filing the NNU Motion, as required by V.R.C.P. 26(h), and states instead that the highly compressed schedule and SMW's "utter lack of response to the vast majority of NNU's Requests to Admit" made it impractical to confer with SMW prior to filing the NNU Motion.⁴

SMW responds that the NNU Motion should be "summarily dismissed" for NNU's failure to comply with the requirements of V.R.C.P. 37 and 26(h), or in the alternative, contends that it should be denied on the merits.⁵

SMW contends that the NNU Motion is defective in two respects. First, SMW asserts that NNU failed to provide SMW reasonable notice prior to filing the NNU Motion in violation of V.R.C.P. 37(a).⁶ Second, SMW contends that NNU failed to comply with the provisions of V.R.C.P. 26(h), which require that a party confer with opposing counsel in a good faith effort to resolve a discovery dispute prior to filing a motion to compel, and that any subsequent motion be accompanied by an affidavit or certificate attesting to that effort. According to SMW, V.R.C.P. 26(h) makes no exception to the requirement to confer with opposing counsel and the NNU Motion should be denied on that basis alone.⁷ SMW further contends that the primary reason given by NNU for not meeting the requirements of V.R.C.P. 26(h), the compressed nature of the Docket schedule, does not support NNU's position because the schedule was stayed by the *Third Procedural Order*, dated August 15, 2012, and a revised schedule had yet to be established at the time the NNU Motion was filed.⁸ Lastly, SMW disagrees with NNU's contention that it did not

request for sanctions is denied.

3. NNU Motion at 1–2.

4. NNU Motion at 2.

5. SMW Opposition at 1. SMW also responded to the content of a letter filed by NNU on September 6, 2012, which alleged non-compliance by SMW with discovery obligations related to the production of certain documents. Because NNU's letter did not constitute a proper motion, nor did it request any specific relief, it is not necessary to address it in this Order.

6. SMW Opposition at 2.

7. SMW Opposition at 2.

8. SMW Opposition at 2–3.

respond to the requests to admit, representing that SMW "stated its objections to the requests in clear and unambiguous terms."⁹

SMW also contends that the NNU Motion should be denied on the merits, and that the Board should reach the merits of the NNU Motion to guide the conduct of any future discovery in this proceeding.¹⁰ SMW asserts that the requests to admit seek information that is irrelevant to this proceeding because they pertain to topics that I have previously determined will not be considered at the evidentiary hearing. SMW states that NNU did not attempt to allege any relationship between the requests to admit and the four issues identified for consideration at the evidentiary hearing. SMW contends that, if NNU disagrees with my determinations regarding potentially significant issues in this proceeding, NNU must contest those determinations according to established procedures, rather than by propounding unlawful discovery in an attempt to challenge my prior decisions.¹¹

Discussion

In today's Order, I deny the NNU Motion because it fails to meet the requirements of the applicable rules, as explained below.

The NNU Motion was filed "pursuant to V.R.C.P. 26(h) and seeks an Order compelling SMW to respond to certain requests to admit. Motions to compel responses to discovery requests are not filed pursuant to Rule 26(h). Rather, Rule 26(h) sets forth certain process and presentation requirements for the filing of any motion related to discovery matters. Motions to compel responses to discovery requests, with the notable exception of requests to admit, are filed pursuant to V.R.C.P. 37(a)(2). The process governing requests to admit, including the process available to a party that believes it has not received a sufficient response to a request to admit, is set forth in V.R.C.P. 36.

V.R.C.P. 36(a) states in pertinent part that "[t]he party who has requested the admissions may move to determine the sufficiency of the answers or objections" and establishes remedies if

9. SMW Opposition at 3.

10. SMW Opposition at 4.

11. SMW Opposition at 5.

it is determined that a response does not comply with the requirements of the rule.¹² However, prior to filing a motion pursuant to V.R.C.P. 36, NNU must still comply with certain requirements established by Rule 26(h). First and foremost, Rule 26(h) requires that counsel for parties undertake good faith efforts "to resolve or reduce all differences relating to discovery procedures and to avoid filing unnecessary motions."¹³ Pursuant to this requirement, it was incumbent on NNU to confer with SMW in an attempt to resolve their differences so as to avoid filing a potentially unnecessary motion. Not only is this what the rule requires, it is also desirable policy because it serves to conserve the resources of the parties as well as the tribunal. Accordingly, NNU's purported reasons for not complying with this requirement are not acceptable, particularly since the *Third Procedural Order* stayed the schedule in this Docket.

Additionally, the NNU Motion fails with respect to another requirement of Rule 26(h). That rule requires that, "[e]xcept when the motion is based solely upon the failures described in Rule 37(d), memoranda with respect to any discovery motion shall contain a concise statement of the nature of the case and a specific verbatim listing of each of the items of discovery sought or opposed, and immediately following each specification shall set forth the reason why the item should be allowed or disallowed."¹⁴ The rule not only sets forth the requirement for how to present a discovery-related motion, it also requires NNU to set forth separately its reasoning why the response to each request to admit was insufficient. The NNU Motion states only that the requests to admit are "crucial to the issues the Board is compelled to review under 30 V.S.A. Section 246," and that they are not onerous and do not involve burdensome investigation in order for SMW to respond.¹⁵ The NNU Motion falls far short of the requirements of V.R.C.P. 26(h), rendering the NNU Motion not only procedurally deficient, but substantively deficient as well. For example, the NNU Motion fails to address the fact that V.R.C.P. 36 specifically allows for

12. While the NNU Motion was not filed pursuant to V.R.C.P. 36, and therefore does not seek the precise relief afforded by that rule, I will treat the NNU Motion as if it were properly filed under V.R.C.P. 36 given that it concerns requests to admit, which NNU served on SMW.

13. This requirement is more broad ranging than the similar requirement set forth in the second paragraph of Rule 26(h), which applies to motions being filed under Rules 26 or 37, and also requires the filing of an affidavit or certificate attesting to compliance with the requirement to confer. V.R.C.P. 26(h).

14. V.R.C.P. 26(h).

15. NNU Motion at 1–2.

objections in response to requests to admit, and makes no effort to explain why the objections tendered by SMW are unsustainable.

For the foregoing reasons, the NNU Motion is denied in its entirety.¹⁶

2. SMW Request for Attorney's Fees and Motion for Sanctions

In today's Order, for the reasons set forth below, I deny both SMW's request for attorney's fees and motion for sanctions because I conclude that SMW has not made a sufficient showing in support of its requests.

a. Request for Attorney's Fees

SMW correctly points out that, if the NNU Motion is denied, it is entitled to an award of its reasonable expenses incurred in opposing the motion, including reasonable attorney's fees, unless the Board determines that the making of the motion was "substantially justified," or there exist circumstances that "make an award of expenses unjust."¹⁷ With respect to SMW's request for costs and attorney's fees, I find that awarding them would be unjust under the circumstances. As noted above, NNU incorrectly brought its motion under Rule 26(h), when it should have been brought under Rule 36. SMW, on the other hand, responded to the NNU Motion as if it were properly brought under Rule 37. Additionally, SMW, in spite of the obvious deficiencies in the NNU Motion and SMW's awareness of the Board's prior application of the Rule 26(h) requirements in denying discovery motions, elected to expend resources arguing the merits of its position for the purpose of guiding the conduct of future discovery in this proceeding.¹⁸ The proper vehicle for achieving SMW's stated purpose would be for SMW to file a motion under Rule 26 seeking to limit discovery through a protective order.¹⁹ Additionally, SMW unnecessarily expended resources in preparing the SMW Opposition by responding to NNU's letter filed September 6, 2012, even though that letter did not constitute a motion or seek any sort

16. Because I am able to dispose of the NNU Motion due to its failings under V.R.C.P. 26(h), I do not address the merits-based arguments raised by SMW.

17. V.R.C.P. 37(a)(4). The procedures established by V.R.C.P. 36 incorporate the provisions of Rule 37(a)(4) with respect to awarding costs associated with a motion brought under Rule 36.

18. SMW Opposition at 3.

19. See e.g. V.R.C.P. 26(c)(4).

of relief.²⁰ In summary, I conclude that awarding SMW the expenses it incurred in preparing the SMW Opposition would be unjust because of SMW's unnecessary expenditure of resources in responding to the obviously deficient NNU Motion, and SMW's request for attorney's fees is denied.

b. Motion for Rule 26(g) Sanctions

SMW also asks the Board to impose sanctions on NNU pursuant to V.R.C.P. 26(g), contending that NNU's requests to admit concern issues outside the defined scope of the evidentiary hearing and are therefore "patently inconsistent with V.R.C.P. 26(b), and therefore apparently propounded for improper purposes."²¹

The scope of discovery in any proceeding is limited to any matter that is relevant to the subject matter of the pending proceeding. Information that would be inadmissible in a hearing is still discoverable provided it is reasonably calculated to lead to the discovery of admissible evidence.²² Discovery that is interposed for an improper purpose, such as to harass a party, cause unnecessary delay in a proceeding, or needlessly increase the costs of litigation, will result in sanctions.²³ I conclude that SMW has not made a sufficient demonstration that NNU's requests to admit were interposed with such an improper purpose so as to warrant the imposition of sanctions.

SO ORDERED.

20. SMW Opposition at 5–6.

21. SMW Opposition at 7.

22. V.R.C.P. 26(b)(1).

23. V.R.C.P. 26(g).

Dated at Montpelier, Vermont, this 10th day of October, 2012.

s/ Bridgette Remington
Bridgette Remington, Esq.
Hearing Officer

OFFICE OF THE CLERK

FILED: October 10, 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 apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)