

**STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL**

**Petition of BNE Energy Inc. for a
Declaratory Ruling for the Location,
Construction and Operation of a 4.8 MW
Wind Renewable Generating Project on
Winsted-Norfolk Road in Colebrook,
Connecticut (“Wind Colebrook North”)**

Petition No. 984

April 25, 2011

**OBJECTION TO MOTION TO STRIKE
REQUESTS FOR ADMINISTRATIVE NOTICE**

FairwindCT, Inc., Susan Wagner and Stella and Michael Somers (the “Grouped Parties”), hereby object to the Motion to Strike Requests for Administrative Notice, dated April 19, 2011, filed by Petitioner, BNE Energy Inc. (“BNE”). In its motion, BNE asks that the Council strike certain Requests for Administrative Notice filed by the Grouped Parties on March 15, 2011, and others filed pursuant to a supplemental request dated March 28, 2011. BNE argues that the noticed documents are irrelevant and/or not properly subject to administrative notice. Contrary to BNE’s claims, the documents noticed by the Grouped Parties are relevant to the Council’s decision in this proceeding and properly are subject to a request for administrative notice. Accordingly, BNE’s motion should be denied.

At the outset, the Grouped Parties note that many of the documents complained about by BNE already have been accepted as administratively noticed documents in the similar pending proceedings taking place in Petitions 980 and 983. Further, many of the documents subject to BNE’s objections were preliminarily noticed by the Grouped Parties on February 25, 2011, more than two months before the evidentiary hearing on this petition is scheduled to begin. As BNE notes, the Grouped Parties filed a final administrative notice list on March 15, 2011, and a

supplemental list on March 28, 2011. BNE does not indicate why it waited a week before commencement of the evidentiary hearing in this petition to object to the Grouped Parties noticed documents. Accordingly, BNE has waived any right to object to such documents, and the Council should deny BNE's motion on that basis alone.

Regardless of its timing, however, BNE's motion to strike is meritless and should be denied on the merits.

First, BNE claims document #6, the Federal Communication Commission's Nationwide Programmatic Agreement Regarding the Section 106 Review Process ("FCC 1.5-Mile Area of Presumed Effect"), should be stricken as irrelevant. However, a reference to this item was made in Exhibit B to BNE's own petition, a letter from BNE's consultant to the State Historic Preservation Office. Moreover, BNE's previous attempts to get any reference to the FCC 1.5-Mile Area of Presumed Effect have been rejected by the Council. (See Order denying BNE's motions to partially strike the testimony of Stella Somers and Wilson Faude in Petition 983.) That BNE does not like the content of the FCC 1.5-Mile Area of Presumed Effect because it harms BNE's case is obvious; however, evidence that is damaging is not irrelevant. See Chouinard v. Marjani, 21 Conn. App. 572, 575-76 (1990) (reversing trial court decision to exclude evidence that was not prejudicial, merely damaging to the defendant's case). The FCC 1.5-Mile Area of Presumed Effect is relevant because (1) BNE made it relevant by referencing it in its petition and by relying on the area of presumed effect in making its erroneous statements that its project will have no adverse effect on historic or cultural resources; and (2) the Siting Council has a responsibility under state and federal law to take into account in its decisions the potential adverse effects of applications and petitions on natural, historic and cultural resources in the surrounding area.

Accordingly, BNE cannot reasonably claim now that the document referenced in its own exhibit is irrelevant, and BNE's motion should be denied with respect to this item.

Second, BNE claims that three documents noticed by the Grouped Parties – items 13, 17, and 18 – “should be stricken from the record because they do not exist.” Setting aside the existential quandary of whether documents that do not exist can even be stricken from the record, BNE's claim is meritless. Each of these documents is available from the websites provided by the Grouped Parties, and each very much does exist.¹ Nevertheless, to prevent any further confusion on BNE's part and to ensure that the appropriate documents are placed into the record, the Grouped Parties hereby provide copies of these documents to the Council and to all parties as an attachment to this filing.

BNE further argues that document #13, hosted on the New York Public Service Commission's (“PSC”) website, should be stricken because the PSC should not have hosted a purportedly proprietary document. Irrespective of whether the PSC has obtained permission to host the document in question, the document presently is hosted for public use by that Commission, and it is obviously not the Council's responsibility to police the actions of the PSC. The document is in the public domain through no fault of any participant to this proceeding, and it should not now be falsely shielded from disclosure in this proceeding. Accordingly, there is no reason to strike the notice of document #13.

With respect to documents 17 and 18, BNE claims, without citation to authority, that the Council cannot take administrative notice of the cited documents because they do not comprise the

¹ The Grouped Parties do, however, note a scrivener's error in the administrative notice documents in that the docket number for the documents numbered 17 and 18 should be 7508, not 7628.

entirety of the docket in that pending proceeding.² However, BNE does nothing to indicate why its purported rule is accurate, and, accordingly, BNE's motion to strike these documents is unavailing.

Third, BNE claims that item #27, in which the Grouped Parties noted that they would be subsequently noticing documents related to setback rules and regulations, should be stricken as vague. This already has been done on the request of the Grouped Parties. In their supplemental requests for administrative notice dated March 28, 2011, the Grouped Parties identified the rules and regulations referenced in item #27 and noted that such administrative notice request could be deleted by the Council. Accordingly, BNE's motion with respect to this item should be denied as moot.

Fourth, BNE seeks to strike certain legislative testimony noticed by the Grouped Parties. BNE claims that administratively noticing a pending bill is inappropriate given the amount of proposed legislation that does not become law and further claims that the Grouped Parties may not notice specific testimony. Again, BNE identifies no reason why its statements are or should be the case. Additionally, BNE fails to recognize that the Grouped Parties have not simply noticed the pending legislation (which would be proper in any event), but rather have noticed certain testimony of which they think the Council should be informed in assessing the merits of BNE's petition. There is nothing untoward about that process – indeed, BNE could notice additional testimony if it likes – and BNE's motion should be denied with respect to these documents.

Fifth, BNE seeks to strike documents #1-10 of the Grouped Parties supplemental requests, which notice certain testimony from the proceedings in Petition 980. BNE claims that these

²With respect to BNE's contention that these documents do not really exist, document #18, which is linked directly from the Vermont Public Service Board ("PSB") website, denies a motion to strike the testimony administratively noticed in document #17. If such testimony did not exist, what was the PSB considering striking?

documents are irrelevant and again proclaims – without analysis – that noticing select portions of the record in a pending proceeding is inappropriate. Contrary to BNE’s claims, the Grouped Parties appropriately have noticed certain testimony taken in Petition 980 that is relevant to this proceeding, and the Council is entitled to consider that testimony for its due weight. Moreover, the Council and BNE had full opportunity to cross examine all but one of those witnesses during Petition 980.³ It is burdensome to ask a citizens’ group to pay a second time the costs associated with these witness’ travel from out of state and to ask these witness to again take time out of their schedules to appear before the Council again only to be asked no questions. Accordingly, BNE’s motion to strike this testimony should be denied.

Sixth, BNE argues that the Council should strike certain wind turbine ordinances and regulations, noticed by the Grouped Parties as numbers 11-19, because these documents do not comply with “the best evidence rule.” As the Council is aware, “[i]t is fundamental that administrative tribunals are not strictly bound by the rules of evidence and that they may consider exhibits which would normally be incompetent in a judicial proceeding, so long as the evidence is reliable and probative.” Griffin v. Muzio, 10 Conn. App. 90, 93 (1987). BNE cannot seriously claim that the copies of the rules and regulations noticed by the Grouped Parties are somehow unreliable, and considering the pre-filed testimony of BNE’s own witness, Joel Rinebold, which testimony discusses the setback regulations of other jurisdictions, BNE cannot reasonably claim that the noticed documents are irrelevant. Accordingly, BNE’s motion with respect to these items should be denied.

³ The Grouped Parties acknowledge that neither BNE nor the Council had the opportunity to cross examine Mr. Thomas Casella in Petition 980, due to a medical emergency. The Grouped Parties are therefore willing to withdraw their request to administratively notice Mr. Casella’s pre-filed testimony on Petition 980.

Finally, BNE claims that item #20 in the Grouped Parties' supplemental request for administrative notice, which notices a document originally enacted by the Federal Power Commission, is irrelevant. Contrary to BNE's claims, the document demonstrates a federal agency commitment to consideration of historic and cultural resources when making appropriate siting decisions. Further, the document is referenced in the General Statutes regarding the Siting Council's responsibilities. See Conn. Gen. Stat. § 16-50p(a)(3)(D). The Council, therefore, can fairly take notice of the document, and BNE's motion should be denied.

WHEREFORE, for the foregoing reasons, the Grouped Parties object to BNE's motion to strike requests for administrative notice.

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GE Energy

GE Wind

Setback Considerations For Wind Turbine Siting



GE imagination at work

CHANGE LIST

| Document | Rev. | Release Date (y/m/d) | Affected Pages | Change | Author |
|--|------|----------------------|----------------|----------------|---------------|
| Setback Considerations For Wind Turbine Siting | 00 | 09/07/02 | All | Original Issue | Parker Powell |
| Setback Considerations For Wind Turbine Siting | 01 | 09/07/27 | 5 | Clarification | Parker Powell |
| | | | | | |
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GE Energy

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| | |
|------------|--|
| Page | 3 / 6 |
| Document | Setback Considerations For Wind Turbine Siting |
| Originator | Parker Powell |
| Revision | 01 |

INTRODUCTION

This document is intended to provide recommended setback guidelines with respect to the siting of wind turbines. Such guidelines take into consideration possible safety risks introduced by ice throw and other hazards from wind turbines. The guidance is general in nature, and is based on the published advice of recognized industry associations. Local codes and other factors may dictate setbacks greater than the recommendations in this document. It is ultimately the responsibility of the owner and the developer to determine whether wind turbines should be installed in a particular site. A prospective wind developer is encouraged to seek the advice of qualified professionals for siting decisions.

ICE SHEDDING and ICE THROW

As with any man-made structure, wind turbines can accumulate ice under certain atmospheric conditions.

A wind turbine may shed accumulated ice due to both gravity and mechanical forces of the rotating blades.

Recognized industry practices, suggest the following actions be considered when siting turbines in order to mitigate risk resulting from ice shedding and ice throw events:

Physical and visual warnings: Place fences and warning signs as appropriate for the protection of site personnel and the public.

Wind turbine deactivation: Remotely switch off the turbine when site personnel detect ice accumulation. Additionally, GE Wind turbine controllers can shut down or curtail the unit based on certain criteria programmed in the wind turbine controller.

Operator Safety: Restrict site personnel access to wind turbines while ice remains on the turbine structure. If site personnel absolutely must access a turbine with ice accumulation, safety precautions should include but are not limited to remotely shutting down the turbine, yawing the turbine to position the rotor on the side opposite from the tower door, parking vehicles at a safe distance from the tower, and restarting the turbine remotely when work is complete. As always, standard personnel protective gear should be worn.

SET BACK CONSIDERATIONS

Set back considerations depend on many factors such as population density, road usage frequency, land availability, and proximity to other publicly accessed areas and buildings.

Ice shedding/ice throw, and other hazards can create risk in the vicinity of the wind turbine park. To mitigate these hazards GE recommends the following guidelines presented in table 1.

Table 1: Setback Recommendations

| Setback Distance | Objects of concern within the setback distance |
|---|--|
| If icing is likely at the wind turbine site: 1.5 x (Hub Height + Rotor Diameter) | Public use areas Residences Office buildings Public buildings Parking lots Public roads (more than lightly traveled) Railroads |
| All turbine sites: 1.1 x Tip Height ¹ | Public use areas Residences Office Buildings Public Buildings Parking lots Public roads (more than lightly traveled) Railroads Sensitive above ground services ² |
| All turbine sites: 1.1 x Blade Length ³ | Remote boundaries to property not owned by wind farm participants ⁴ No occupied structures allowed. |

¹ The maximum height of any blade tip when the blade is straight up (hub height + ½ rotor diameter).

² Services that if damaged could result in significant hazard to people or the environment or extended loss of services to a significant population.

³ Use ½ rotor diameter to approximate Blade Length for this calculation.

⁴ Property boundaries to vacant areas where there is a remote chance of any future development or inhabitation during the life of the wind farm.

GE recommends using the generally applicable guidelines contained in table 1. Objects of concern within the recommended setback distance may not create significant safety risk, but warrant further analysis. The customer should perform its own safety review of the proposed turbine location(s). In addition, if the location of a particular wind turbine does not meet the guidelines, customers are requested to provide the information listed in Table 2 so that GE can complete a more detailed safety review of the proposed turbine location(s).

Table 2: Data Typically Required for Safety Review

| Condition | Data Required |
|---|--|
| If icing is likely at the wind turbine site | Annual number of icing days |
| For winter season | Annual number of days with snow on the ground |
| Residences | Number of residences within recommended setback distance. |
| For industrial buildings (warehouse / shop) | Plot of bldg vs. turbine(s) Average number of persons in area during shift Number of work shifts per week |
| For open industrial areas (storage / parking lot) | Plot of area vs. turbine(s) Average number of persons in area during shift Number of shifts per week |
| For sports / assembly areas | Plot of area vs. turbine(s) Average number of persons in area per day Average number of hours occupied per day Number of days area occupied per week If area covered, what type of cover |
| For roads / waterways | Plot of road / waterway vs. turbine(s) Average number of vehicles per day Average number of persons per vehicle Type of road (residential, country, # of lanes, etc.) |
| For paths / trails (walk, hike, run, bike, ski) | Plot of paths / trails vs. turbine(s) Average number # of persons per day by type of presence (walk, hike, etc.) Flat or uneven / hilly terrain |

**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. § 248, authorizing the construction)
and operation of a 5 wind turbine electric)
generation facility with associated electric)
collection and interconnection facilities on)
Georgia Mountain, in the Towns of Milton and)
Georgia, Vermont, to be known as the "Georgia)
Mountain Community Wind Project)

**PREFILED TESTIMONY OF
SCOTT MCLANE**

January 12, 2011

Summary: Scott McLane is a non-adjointing landowner intervening party. He has done extensive research to determine what other government agencies have done to determine appropriate property line setback standards for the siting of large scale wind turbines, and he has reviewed numerous municipal and county ordinances from multiple jurisdictions around the country, as well as state laws and administrative regulations, decisions, and guidance documents. He has summarized the content of those documents and his testimony presents that information to the Public Service Board.

EXHIBITS

| State | County/Town | Document Name | Exhibit number |
|----------|-------------------|--|----------------|
| | | Setback Summary Chart | SM1 |
| Alaska | Kenai | Ordinance No. 2455-2009 | SM2 |
| Idaho | Jefferson County | Wind Energy Ordinance | SM3 |
| Illinois | Coles County | Ordinance Governing Wind Energy Conversion Systems in the Unincorporated Areas of Coles County, Illinois | SM4 |
| Illinois | Mason County | Ordinance Regulating the Siting of Wind Energy Conversion Systems in Mason County | SM5 |
| Illinois | Platt County | Platt County Zoning Ordinance, Appendix B, Standards for Wind Energy Conversion Systems 51kW to 500kW | SM6 |
| Illinois | Vermillion County | Vermillion County Wind Energy Structure Ordinance | SM7 |
| Illinois | Winnebago County | Amendments to the Zoning Ordinance for the Purpose of Regulating Wind Power Generating Facilities | SM8 |
| Indiana | Benton County | Ordinance for Regulating Energy Generation Using Wind Power in Benton County, Indiana | SM9 |
| Indiana | Carroll County | Zoning Ordinance | SM10 |
| Indiana | Cass County | Small and Large Wind Ordinance | SM11 |
| Indiana | Clinton County | Clinton County Wind Ordinance | SM12 |
| Indiana | Grant County | Wind Energy Conversion Systems (WECS) Siting Regulations | SM13 |
| Indiana | Jay County | Wind Power Energy Generation Regulations | SM14 |
| Indiana | Logansport County | Proposed addition to the Logansport Zoning Ordinance establishing a Small and Micro Wind Energy Conversion Ordinance | SM15 |
| Indiana | Randolph County | Wind Energy Conversion System Siting Regulations | SM16 |
| Indiana | Rush County | Zoning Ordinance | SM17 |
| Indiana | Steuben County | Zoning Ordinance, Article 9A, Wind Energy Conversion Systems | SM18 |
| Indiana | Tippecanoe County | Ordinance Amending Chapter of Ordinance No. | SM19 |
| Indiana | Tipton County | Tipton County Zoning Ordinance | SM20 |

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|---------------|---------------------|--|------|
| Indiana | White County | White County Zoning Ordinance, WECS Siting Regulations | SM21 |
| Iowa | Boone County | Zoning Ordinance Section 8.04, Commercial/Utility Wind Energy Systems | SM22 |
| Iowa | Mason City | Zoning for Wind Energy Conversion Systems | SM23 |
| Iowa | Plymouth County | Zoning Ordinance for Plymouth County, Iowa | SM24 |
| Iowa | Polk County | Ordinance Regulating Wind Energy Conversion Systems | SM25 |
| Iowa | West Burlington | Wind Energy Systems Ordinance | SM26 |
| Maine | | Maine State Planning Office Model Wind Energy Facility Ordinance | SM27 |
| Maine | Buckfield | Wind Energy Facility Ordinance | SM28 |
| Maine | Dixmont | Wind Energy Facility Ordinance | SM29 |
| Maine | Montville | Town of Montville Wind Turbine Generator Ordinance | SM30 |
| Maine | Phillips | Town of Phillips, Maine, Wind Energy Facility Ordinance | SM31 |
| Massachusetts | | | |
| Massachusetts | Salem | Zoning Ordinance | SM32 |
| Michigan | | Michigan Siting Guidelines for Wind Energy Systems | SM33 |
| Michigan | Centreville | Centreville Township Zoning Ordinance for Commercial Wind Energy Systems | SM34 |
| Michigan | Grand Haven | City of Grand Haven Zoning Ordinance | SM35 |
| Michigan | Gratiot | Wind Energy Facility Ordinance | SM36 |
| Michigan | Ionia | An Ordinance to Amend the Codified Ordinances of the City of Ionia By Adding a New Chapter, Which Chapter Shall be Designated Chapter 1287 Entitled Wind Energy Systems to Title Six -- Zoning of Part 12 -- Planning and Zoning Code of the Codified Ordinances | SM37 |
| Michigan | Manchester Township | Ordinance Number 67, Manchester Township, Washtenaw County, Michigan, Wind Energy Conversion Systems | SM38 |
| Michigan | Otsego County | Wind Turbine Generator Ordinance | SM39 |
| Michigan | Ottawa County | Model Wind Energy Ordinance | SM40 |

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|-----------------------|------------------------|---|-------|
| Michigan | Portland | Wind Energy Conversion Systems Ordinance | SM41 |
| Michigan | Wilson | Zoning Ordinance, Section 10.21, Commercial Wind Generation | SM42 |
| Minnesota | | Order Establishing General Wind Permit Standards | SM43 |
| Minnesota | Chippewa | Zoning Ordinance, Section 12, Windpower Management | SM44 |
| Minnesota | Goodhue County | Zoning Ordinance | SM45 |
| Nebraska | Grand Island | Ordinance No. 9261 | SM46 |
| Nebraska | Madison | Wind Energy Conversion Facilities, Madison County Addition to Current Zoning Regulations | SM47 |
| Nebraska | Saunders County | | SM48 |
| New York | NYSERDA | Wind Energy Model Ordinance Options | SM49 |
| New York | Brandon | Wind Energy Facility Law | SM50 |
| New York | Carroll | Zoning Law of the Town of Carroll | SM51 |
| New York | Fenner | Local Law No. 2000-02 of the Town of Fenner | SM52 |
| New York | Gorham | Zoning Local Law of the Town of Gorham | SM52A |
| New York | Hamlin | Local Law Governing Wind Energy Facilities in the Town of Hamlin | SM53 |
| New York | Harrisburg | Town of Harrisburg Zoning Law | SM54 |
| New York | Holland | Wind Energy Conversion Systems Ordinance | SM55 |
| New York | Mayville | Zoning Law of the Village of Mayville | SM56 |
| New York | Meredith | Wind Energy Law | SM57 |
| New York | Montague | Town of Montague Land Use Law | SM58 |
| New York | Panama | Zoning Law of the Village of Panama | SM59 |
| New York | St. Lawrence County | Model Wind Energy Facility Local Law for St. Lawrence County Municipalities | SM60 |
| New York | Turin | Town of Turin Rural Development Law | SM61 |
| New York | West Turin | Town of West Turin Zoning Law | SM62 |
| North Carolina | | North Carolina Wind Working Group, Model Wind Ordinance for Wind Energy Facilities in North Carolina | SM63 |

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|----------------|----------------------|--|-------|
| North Carolina | Ashe County | An Ordinance to Regulate Wind Energy Systems in Ashe County, North Carolina | SM64 |
| North Carolina | Camden County | Ordinance No. 2007-09-01 | SM65 |
| North Carolina | Carteret County | Carteret County Code of Ordinances, Appendix F: Tall Structures, Article 3. Wind Energy Facilities | SM66 |
| North Carolina | Currituck County | Currituck County Unified Development Ordinance | SM67 |
| North Carolina | Hyde County | Ord2008-10-01, An Ordinance of the Hyde County Board of Commissioners Relating to Wind Energy Facilities | SM68 |
| North Carolina | Kill Devil Hills | Kill Devil Hills Code of Ordinances, Section 153.177(d), Conditional Uses, Wind Turbines | SM69 |
| North Carolina | Tyrrell County | Tyrrell County, North Carolina, Wind Energy Facilities Ordinance | SM70 |
| North Carolina | Watauga County | Watauga County Ordinance to Regulate Wind Energy Systems | SM71 |
| North Dakota | | North Dakota Statute, Chapter 49-22, Energy Conversion and Transmission Facility Siting Act | SM71A |
| North Dakota | Morton County | Wind Energies Facilities Ordinance | SM72 |
| North Dakota | Wells County | Wells County Zoning Ordinance, Article 12-Wind Energy Facilities | SM73 |
| Ohio | | ORC Chapter 4906-17, Application Filing Requirements for Wind-Powered Electric Generation Facilities | SM74 |
| Oregon | Department of Energy | A Model Ordinance for Energy Projects | SM75 |
| Pennsylvania | Millcreek | Ordinance No. 2009-4 | SM76 |
| Pennsylvania | Valley Township | An Ordinance Amending the Valley Township Zoning Ordinance in Order to Provide for the Installation and Use of Wind Energy Facilities Within the Township | SM77 |
| Pennsylvania | Washington | Ordinance Amending Chapter 131 of the Washington Township Code of Ordinances, Zoning Ordinance, By Adopting Article XXIV, Et Seq. Which Shall Provide for Alternative Energy Systems Within the Township | SM78 |
| South Dakota | | SDCL, 49-41B-22 and ARSD 20:10:22:18 and 20:10:22:19 | SM78A |
| South Dakota | | Draft Model Ordinance for Siting of Wind Energy Systems (WES) | SM79 |

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|---------------|---------------------------|---|-------|
| South Dakota | Brown County | Second Revision of Brown County Ordinances | SM80 |
| South Dakota | Harrisburg | Ordinance No. 2008-10 | SM81 |
| South Dakota | Lawrence | Lawrence County Zoning Ordinance | SM82 |
| Texas | Garland | Comprehensive Zoning Ordinance | SM83 |
| Virginia | Amherst | Untitled Ordinance | SM84 |
| Virginia | Nelson County | Small Wind Energy Ordinance | SM85 |
| Virginia | Rockingham County | Ordinance Repealing Chapter 17, Article VII Use Regulations, Division 6B and Re-enacting Chapter 17, Article XII Wind Energy Conversion Systems Divisions 1 and 2 of the Code and Ordinances of Rockingham County, Virginia | SM86 |
| Wisconsin | Public Service Commission | PSC Rule 128, Wind Energy Systems | SM87 |
| Wisconsin | Chilton | Wind Energy Systems Licensing Ordinance | SM88 |
| Wisconsin | New Glarus | Wind Generator Ordinance | SM89 |
| Wisconsin | Polk County | Small Wind Energy Systems Ordinance | SM90 |
| Wisconsin | Ridgeville | Wind Energy Conversion Systems Ordinance | SM91 |
| Wisconsin | Trempealeau County | Wind Generator and Wind Generating Facility Ordinance for Trempealeau County | SM92 |
| Wisconsin | Union Township | Wind Energy Systems Licensing Ordinance | SM93 |
| Wisconsin | Wilton | Wind Energy Conversion Systems Ordinance | SM94 |
| Maine | Oakfield | Evergreen Wind Power II, LLC, Findings of Fact and Order | SM95 |
| Maine | Record Hill | Record Hill Wind, LLC, Findings of Fact and Order | SM96 |
| Maine | Spruce Mountain | Spruce Mountain Wind LLC, Findings of Fact and Order | SM98 |
| Minnesota | Oak Glen | Large Wind Energy Conversion System Site Permit for the Oak Glen Wind Farm | SM99 |
| New Hampshire | Coos County | Decision Granting Certificate of Site and Facility with Conditions | SM100 |

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|---------------|---------------|--|-------|
| New Hampshire | Lempster | Decision Issuing Certificate of Site and Facility with Conditions | SM102 |
| Ohio | Heartland | Heartland Wind, LLC, Opinion Order, and Certificate | SM104 |
| Ohio | Paulding | Paulding Wind Farm, LLC, Opinion, Order, and Certificate | SM105 |
| Ohio | Timber Road | Paulding Wind Farm II, LLC, Opinion, Order, and Certificate | SM106 |
| Oregon | Golden Hills | Site Certificate for the Golden Hills Wind Project | SM108 |
| Oregon | Helix Wind | Helix Wind Power Facility, Final Order | SM109 |
| Oregon | Montague | Site Certificate for the Montague Wind Power Facility | SM112 |
| Oregon | Stateline | Fourth Amended Site Certificate for the Stateline Wind Project | SM113 |
| South Dakota | Buffalo Ridge | Buffalo Ridge II, LLC, Final Decisions and Order | SM114 |
| South Dakota | White Wind | Navitas Energy, Inc., Decision and Order Approving Stipulation and Granting Permit to Construct the White Wind Farm and Associated Collection Substation and Electric Interconnection System | SM115 |

**STATE OF VERMONT
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Docket No. 7508

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

**PREFILED TESTIMONY OF
SCOTT MCLANE**

1 Q1. Please state your name, address, and occupation.

2 A1. My name is Scott McLane. My address is 1179 Georgia Mountain Road, Fairfax,
3 Vermont, and I am employed as a mechanical engineer.

4
5 Q2. Are you a party to this proceeding?

6 A2. Yes. I have been granted status as an intervening party.

7
8 Q3. Have you previously testified in this proceeding?

9 A3. Yes.

10
11 Q4. Are you offering your testimony today on your own behalf?

12 A4. Yes, and on behalf of my wife, Melodie. I have also been authorized to offer, and I am
13 offering, this testimony on behalf of all of the landowner intervening parties, including

1 Jane and Heidi FitzGerald, Daniel and Tina FitzGerald, Kenneth and Virginia Mongeon,
2 Kevin and Cindy Cook, George A. and Kenneth N. Wimble, and Matthew and Kimberly
3 Parisi.

4
5 Q5. What is the purpose of your testimony?

6 A5. The Public Service Board's ("PSB") June 11, 2010, Findings and Order ("Order") in this
7 matter contained a condition that Georgia Mountain Community Wind, LLC
8 ("Petitioner") "incorporate into the proposed Project design an appropriate set-back
9 distance from adjacent property lines." The PSB's Order also contained language
10 providing that the PSB would hold additional proceedings to determine the appropriate
11 setback. The PSB's findings made clear that they wanted to determine an appropriate
12 setback to mitigate safety risks related to ice throw and potential turbine collapse, and
13 noted that other government agencies have established setbacks to address the safety risks
14 associated with wind turbines. I have examined the wind turbine setback standards as
15 established by other government agencies from around the country and I wish to present
16 that information to the PSB.

17
18 Q6. Please describe for the Board the research you performed with respect to wind turbine
19 setback standards and to otherwise determine what other governmental agencies had
20 determined as to property line setbacks?

1 A6. I performed extensive research using the internet, reviewed copies of ordinances, orders,
2 bylaws and related materials and organized those materials to determine if there are any
3 written, definitive or other standards which can be identified.
4

5 Q7. Can you describe for us generally the methods you used to do your research?

6 A7. I started by searching for setback regulations from other states.
7

8 Q8. What did you find?

9 A8. I found that the United States Department of Energy has a web site related specifically to
10 wind energy. That web site contains links to many town and county ordinances, as well
11 as state guidelines and model ordinances that specifically address wind turbine siting,
12 including setbacks. I reviewed all of the linked ordinances available through the
13 Department of Energy's web site as of January 6, 2011. If the linked ordinances indicated
14 that the documents were a draft, I would then try to find the applicable municipality's web
15 site to find the adopted version of the ordinance.
16

17 Q9. Did you do additional searching besides using the Department of Energy's web site?

18 A9. Once I finished reviewing the materials available through the DOE web site links, I
19 expanded my research by using various search engines to find state laws and
20 administrative regulations and decisions that addressed large, commercial wind turbine

1 siting and setbacks.

2

3 Q10. Let me show you what has been marked as Exhibit SM 1 and ask if you can identify this
4 document for me.

5 A10. Exhibit SM 1 is a chart that I prepared that summarizes the setbacks contained in the
6 documents that I reviewed. These include municipal and county ordinances from
7 multiple jurisdictions around the country, as well as state laws and administrative
8 regulations, decisions, and guidance documents. Overall, I reviewed approximately 95
9 ordinances, laws, and regulations and 15 administrative decisions. I also reviewed, but
10 did not include in Exhibit SM 1, ordinances that ban large, commercial wind turbines
11 altogether.

12

13 Q11. Let me also show you what have been marked as Exhibits SM2 through SM115. Can you
14 identify these documents for me?

15 A11. These are copies of the relevant sections of the documents that I reviewed that contain the
16 setback information that is summarized on Exhibit SM1.

17

18 Q12. Are you offering your own opinions as part of your testimony?

19 A12. No, I am only offering a summary of the contents of the documents that I have read and
20 that are included in Exhibits SM2 through SM115.

1

2 Q13. From your review and summary of those materials what conclusions, if any, were you
3 able to determine related to property line setbacks established by other government
4 authorities relative to wind turbines?

5 A13. My conclusions are best shown on Exhibit SM1. Exhibit SM1 demonstrates that most
6 jurisdictions require property line setbacks of between 1.1 and 1.5 times the total height
7 of the turbine. I should clarify that whenever I use the term "total height" or "total height
8 of the turbine" in my testimony I am referring to the height of the tower plus the rotor
9 blades when a blade is extended vertically from the tower at its highest point above the
10 ground.

11 Many jurisdictions require property line setbacks that are multiples of the total
12 height. Some ordinances define the required property line setbacks in terms of total
13 distance measured in feet, but most base the setbacks on a multiple of the total height of
14 the turbine. In only a small sampling of the ordinances that I reviewed were setbacks set
15 at less than the total height for large, commercial wind turbines, and only five, one from
16 Grand Island, Nebraska, and four from Lewis County, New York, would allow for a
17 setback as small as 150 feet for a turbine of the size being proposed by Petitioner for this
18 project.

19

20 Q14. Does every jurisdiction take the same approach in determining property line setbacks?

1 A14. No. Each state which regulates wind turbine development has adopted a slightly different
2 approach to the setback issue. There is no uniform or model statute or ordinance,
3 although a definite minimum setback is almost always mandated.
4

5 Q15. Please describe some of the approaches taken in different jurisdictions.

6 A15. In Ohio, for example, large scale wind farms with greater than 5 megawatts of capacity
7 must receive a permit from the Ohio Power Siting Board. For such projects, Ohio has
8 established property line setbacks by state statute at 1.1 times the total height of the
9 turbine. An exception is allowed if the affected neighbor waives the setback. The Ohio
10 statute, Ohio Revised Code, section 4906.20, is shown on Exhibit SM74.

11 In Minnesota, projects greater than 5 megawatts of capacity must receive a permit
12 from the state Public Utilities Commission. The Minnesota Public Utilities Commission
13 has established property line setbacks by regulation as five times the rotor diameter on the
14 predominant wind axis and three times the rotor diameter on the secondary wind axis.
15 Minnesota's regulations are shown on Exhibit SM43.

16 In Oregon, wind farms with 35 megawatts or more of capacity must receive a
17 permit from the Oregon Energy Facility Siting Council. The Oregon Energy Facility
18 Siting Council has not adopted specific setback regulations, but their decisions indicate
19 that the Council has established a minimum property line setback of 1.1 times the total
20 height in order to protect public health and safety. The Council increases the minimum

1 setback to 3,520 feet from the property line of any property that is zoned for residential
2 use. Copies of four of their recent decisions can be found in Exhibits SM108, SM109,
3 SM112, and SM113. In addition, for projects not subject to the Council's review, the
4 Oregon Department of Energy has published a Model Ordinance to guide local counties
5 in their planning. The Model Ordinance suggest a minimum property line setback of 1.5
6 times the total height to protect public safety. The Oregon Model Ordinance is shown on
7 Exhibit SM75.

8
9 Q16. Are there any other state regulations you believe are instructive?

10 A16. Yes. In Wisconsin, the Public Service Commission has recently adopted rules that
11 preempt local regulation of wind energy system siting. The Wisconsin rules set the
12 property line setback at 1.1 times the total height. The Wisconsin rules are shown on
13 Exhibit SM87.

14 Both North Dakota and South Dakota have adopted a state-level permitting
15 process for large wind turbines, but both sets of regulations generally defer to local
16 zoning or other ordinances for the establishment of property line setbacks. The North
17 Dakota and South Dakota statutes and applicable regulations are shown on Exhibits
18 SM71A and SM78A, respectively. The South Dakota statutes provide that the South
19 Dakota Public Utilities Commission can preempt local ordinances upon a finding that the
20 local ordinances are "unreasonably restrictive". At least one decision from the South

1 Dakota Public Utilities Commission, however, indicates that the Commission will give
2 substantial deference to local land use controls. In the Commission's Buffalo Ridge
3 decision it required the applicant to forego construction of part of the facility if the
4 turbines couldn't be located within local setback requirements. A copy of the Buffalo
5 Ridge Decision is contained in Exhibit SM114. Also, the South Dakota Public Utilities
6 Commission has issued a Model Ordinance for Siting of Wind Energy Systems as a guide
7 for county-level land use polices. The South Dakota Model Ordinance sets property line
8 setbacks at the greater of 500 feet or 1.1 times the total height of the turbine. The South
9 Dakota Model Ordinance is shown on Exhibit SM79.

10
11 Q17. Did you find any relevant property line setback standards that were established by
12 administrative decisions?

13 A17. Yes. In Maine the state-level siting authority is with the Maine Department of
14 Environmental Protection and with the Maine Land Use Regulation Commission,
15 depending upon the specifics of the project. Although there are no statutory or regulatory
16 standards, through its orders in connection with specific siting decisions the Maine
17 Department of Environmental Protection has established a recommended safe property
18 line setback of 1.5 times the total height. In arriving at this setback, the Department noted
19 that it "considered industry standards for wind energy production in climates similar to
20 Maine, as well as the guidelines recommended by certifying agencies such as Det Norske

1 Veritas." To the extent the Department's orders have allowed a lesser setback it has only
2 been in instances where the turbine developer secured an easement on the adjoining
3 property to provide the balance of the safety setback area. The Maine Department of
4 Environmental Protection Decisions are set forth in Exhibits SM95, SM96, and SM98. In
5 addition, the Maine State Planning Office has issued a Model Wind Energy Facility
6 Ordinance as guidance for Maine municipalities. The Model Ordinance calls for
7 minimum property line setbacks of 1.5 times the total height. The Maine Model
8 Ordinance is shown in Exhibit SM27.

9 Finally, similar to Maine, New Hampshire does not have state-wide property line
10 setbacks that are established by statute or regulation. Decisions of the New Hampshire
11 Site Evaluation Committee, however, indicate that the Committee has endorsed property
12 line setbacks of 1.1 times the total height as being consistent with industry standards.
13 Some relevant decisions of the New Hampshire Site Evaluation Committee are contained
14 in Exhibits SM100 and SM102.

15
16 Q18. Are there other states that have state-level property line setbacks?

17 A18. I did not find any evidence of state-level, mandated property line setbacks in other states,
18 but in addition to those mentioned above I found model wind turbine siting ordinances
19 from Michigan, New York, and North Carolina. The Michigan and North Carolina model
20 ordinances call for minimum property line setbacks of 1.5 times the total height. These

1 model ordinances are shown in Exhibits SM33 and SM63, respectively. The New York
2 model ordinance, published by the New York State Energy Research and Development
3 Authority, offers several alternative provisions for property line setbacks ranging from the
4 smallest setback of the total height plus 50 feet, up to two times the total height. The
5 New York Model Ordinance is shown in Exhibit SM49.

6
7 Q19. What did you find for setback standards other than at the state level?

8 A19. As I mentioned above, I found local municipal and county ordinances from across the
9 country that addressed property line setbacks for large, commercial wind turbines. As
10 summarized in Exhibit SM1, the majority of those ordinances set minimum property line
11 setbacks equal to between 1.1 times the total height and 1.5 times the total height.

12
13 Q20. Do any of those ordinances discuss the rationale or basis for their adoption of the property
14 line setbacks?

15 A20. Yes. Most of them discuss that the setbacks are necessary for safety in the event of a
16 tower collapsing or tipping over. For example, the Polk County, Iowa, Ordinance
17 Regulating Wind Energy Conversion Systems, provides for a minimum setback of 1.1
18 times the total height "thus should the structure collapse or topple, it shall come to rest
19 wholly within the property lines on which it is located." The Polk County Ordinance is
20 shown on Exhibit SM25.

1 Q21. Do any of the ordinances you reviewed allow for exceptions to the minimum setback
2 areas?

3 A21. Only in very limited circumstances. Many of the ordinances allowed for exceptions if an
4 easement was obtained from the neighboring property owner to make up the extent of the
5 setback area. Some of the ordinances also allowed the decision-making body to grant a
6 lesser setback if there was a specific engineer certification as to the maximum fall zone
7 under all possible circumstances and, ostensibly, other safeguards are in place.

8
9 Q22. Were you able to determine if different property line setback standards are applied where
10 there are no structures reasonably near the adjoining property line?

11 A22. Yes. As all the exhibits demonstrate, property line setback standards are consistently
12 applied even in remote areas.

13
14 Q23. Are there any examples you can provide?

15 A23. First of all, there are no exceptions that I found that were based on the location of the
16 property, except to the extent that the Oregon Energy Facility Siting Council increases the
17 required property line setback from 1.1 times the total height of the turbine to 3,520 feet
18 if the adjoining property is zoned residential, which is referenced in their decisions in
19 Exhibits SM109, SM112, and SM113, and the Polk County, Iowa, Ordinance Regulating
20 Wind Energy Conversion Systems increases the property line setback from 1.1 times the

1 total height of the turbine to 1,320 feet if the adjoining property is zoned anything other
2 than agricultural, which is referenced in Exhibit SM25. In addition, the New Hampshire
3 Site Evaluation Committee, in its Decision Issuing Certificate of Site and Facility with
4 Conditions to Lempster Wind, LLC, for a 24MW wind facility in Lempster, New
5 Hampshire, endorsed a setback standard of 1.1 times the total height of the turbine even
6 though it specifically noted that the project was in a remote location. That decision is
7 contained in Exhibit SM102.

8
9 Q24. Based on your research have you determined whether there is an industry standard for
10 property line setbacks?

11 A24. I did not find a definitive, written industry standard for property line setbacks. As I noted
12 above, however, the Maine Department of Environmental Protection has stated in several
13 of its decision orders that it considered industry standards in determining a property line
14 setback of 1.5 times the total height. In addition, as I also noted above, the majority of
15 property line setbacks in the ordinances I reviewed have established setbacks of between
16 1.1 and 1.5 times total height.

17
18 Q25. Based on the ordinances that you reviewed, have you determined what the average
19 setback requirement would be for the Petitioner's project?

20 A25. If one applied each property line setback requirement to the project and then averaged the

1 results, the required setback would be approximately 785 feet, or just over 1.75 times the
2 total height of the tower plus the rotor. At the local level, however, there is significant
3 variation. Local property line setbacks range from 100 feet to 5759 feet. I found much
4 more consistency at the state level for those states that have implemented state-level
5 siting permits. If one applied only the state-level mandated property line setbacks, the
6 required setback would be approximately 585 feet, or just over 1.3 times the total height
7 of the tower plus the rotor.

8
9 Q26. So, after reviewing setback requirements from around the country, what does your
10 summary indicate would be an appropriate setback for this project?

11 A26. My research indicates that a property line setback of 1.3 times the total height would be in
12 line with setbacks required by other decision-making authorities that have reviewed the
13 safety issues associated with industrial scale wind turbines and determined appropriate
14 setbacks.

15
16 Q27. Are there any property line setbacks from other jurisdictions that are particularly
17 instructive for Vermont?

18 A27. Yes. In particular I note that Maine and New Hampshire both have topographies and
19 climates similar to Vermont. Those two states have established minimum property line
20 setbacks of 1.5 times the total height and 1.1 times the total height, respectively, both of

1 which minimum setbacks are in line with the 1.3 times average that I determined from my
2 research. In addition, their administrative decisions indicate that those setbacks have been
3 applied to projects similarly located to the Petitioner's project.
4

5 Q28. Is there a minimum standard for a property line setback that your summary indicates
6 should be applicable to this project?

7 A28. Based on my research, any property line setback of less than between 1.1 and 1.5 times
8 the total height of the turbines, without an easement agreement in place to make up the
9 balance of the area, would be a significant departure from the standards established by the
10 overwhelming majority of other jurisdictions that have considered and established
11 property line setbacks for wind turbine siting.
12

13 Q29. Does that conclude your testimony today?

14 A29. Yes.
15

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: 3/3/2011

ORDER RE: MOTION TO EXCLUDE PREFILED TESTIMONY AND EXHIBITS

On January 13, 2011, Jane and Heidi FitzGerald and Scott McLane submitted prefiled testimony and several exhibits in this Docket regarding the issue of the appropriate distance that the proposed wind turbines should be set back from adjoining property. On February 10, 2011, Georgia Mountain Community Wind, LLC ("GMCW") filed a motion to exclude certain portions of the prefiled testimony submitted by the FitzGeralds and Mr. McLane.

In this Order, the Public Service Board ("Board") grants in part and denies in part GMCW's motion to exclude testimony and exhibits.

Motion of GMCW

GMCW contends that certain testimony and exhibits submitted by the FitzGeralds and Mr. McLane:

is objectionable and should be excluded on at least four grounds: (1) it is not based upon the personal knowledge of the witnesses as required by V.R.E. [Vermont Rules of Evidence] 602; (2) it constitutes inadmissible hearsay evidence under V.R.E. 802; (3) it constitutes inadmissible opinion testimony by lay persons based upon inadmissible hearsay evidence, contrary to V.R.E. 701-703; and (4) it is inadmissible under V.R.E. 403 because its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the Board.

GMCW contends that the FitzGeralds and Mr. McLane are not expert witnesses, and therefore their testimony must be limited to the personal knowledge of the witnesses and may not rely upon hearsay.

In particular, GMCW objects to the testimony of the FitzGeralds and Mr. McLane that cites to wind turbine setbacks that have been imposed in other jurisdictions.

Responses to the Motion

On February 22, 2011, the FitzGeralds filed a response to GMCW's motion. The FitzGeralds assert:

it is important for the Board to be presented with examples of guidelines and regulations in other jurisdictions where the issue of a reasonable setback has already been determined. The Petitioner has failed to provide the Board and parties with any examples of setback guidelines in other jurisdictions. . . . Petitioner can address its concerns regarding certain exhibits through cross-examination.

On February 22, 2011, Mr. McLane filed a letter opposing GMCW's motion. Mr. McLane contends that the exhibits accompanying his testimony are admissible through judicial notice, and alternatively through the Vermont Rules of Civil Procedure 44.1 and V.R.E. 803(8). In addition, Mr. McLane maintains that his prefiled testimony, which summarizes the content of the exhibits, is admissible pursuant to V.R.E. 1006.

Reply to the Responses

On March 2, 2011, GMCW filed a reply to Mr. McLane's response. GMCW argues that: (1) Mr. McLane's testimony is not based on his personal knowledge; (2) the ordinances cannot be judicially noticed; (3) the ordinances are not business records; (4) Mr. McLane's testimony summarizing the ordinances is not admissible if the ordinances are not admissible; and (5) Mr. McLane's testimony is not relevant.¹

1. GMCW's motion did not include an objection based on relevance. Because relevance was not raised in the Motion, today's Order ruling on the Motion does not consider GMCW's relevance argument.

Discussion

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 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."² In administrative proceedings such as these, the Board is the trier of fact and there is no jury to protect from unreliable evidence.

The testimony and exhibits submitted by the FitzGerald and Mr. McLane are focused on the imposition of setback requirements for wind turbines in other jurisdictions. Our June 11, 2010, Order approving the project stated that "our approval of this Project is conditioned on our determination of a reasonable setback requirement in further proceedings to be held in this docket"³ In our discussion of whether to impose setbacks in this case, we specifically stated that "other state and local public agencies have addressed potential public health and safety impacts of wind turbines by establishing setbacks based on the size of the turbine, including the blades."⁴ Clearly the decisions that other jurisdictions have made regarding setbacks for wind turbines may help inform our decision in this case. The question is whether the testimony and exhibits at issue are admissible under the Vermont Rules of Evidence and Vermont Administrative Procedures Act.

GMCW objects to testimony submitted by the FitzGerald that cites to and summarizes Mr. McLane's testimony regarding setback requirements in other jurisdictions. The FitzGerald state that "the duplication of the same information and ordinances in their testimony would not be helpful or efficient to the process. Therefore, the FitzGerald in their prefiled testimony referred to the testimony of Scott McLane." Regardless of whether the reference to Mr.

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

3. Docket 7508, Order of 6/11/10 at 34.

4. Docket 7508, Order of 6/11/10 at 33 (citations omitted).

McLane's testimony is hearsay, it is duplicative and, because Mr. McLane has submitted the testimony and will appear for cross-examination, the FitzGeralds' testimony does not assist the Board in assessing Mr. McLane's testimony. Accordingly, we exclude page 3, lines 3-7 of the FitzGeralds' testimony.

In addition, GMCW objects to exhibit J. FitzGerald Supp. JF-1, which consists of a newspaper article that discusses setbacks for wind turbines in New York, as well as the FitzGeralds' testimony summarizing the newspaper article. The FitzGeralds state that "[a] newspaper article is one example of how a reasonable person obtains information in order to form an opinion on a subject" and should therefore be admitted as "it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs." The FitzGeralds further note that they provided GMCW with copies of the municipal ordinances referenced in the newspaper article.

Although a municipal ordinance on setback requirements would be something that would be commonly relied upon by a reasonably prudent person in the conduct of their affairs, the same cannot be said for a newspaper article reporting on a municipal ordinance. Furthermore, a newspaper article does not fall within any of the exceptions to the hearsay rule. It is difficult to determine whether there are inaccuracies in a newspaper article, whereas a government-issued document such as a municipal ordinance can be readily verified. Because the FitzGeralds acknowledge that they are lay witnesses, rather than expert witnesses, they cannot rely on hearsay evidence in their testimony. Accordingly, page 3, lines 14-18 of the FitzGeralds' supplemental testimony, as well as exhibit J. FitzGerald Supp. JF-1, are excluded.

GMCW objects to exhibit J. FitzGerald Supp. JF-2, which consists of a handout prepared by General Electric concerning siting wind turbines, as well as the prefiled testimony by the FitzGeralds that references that exhibit. GMCW not only objects on the basis that the presentation is hearsay evidence, but also contends that the presentation is misleading, and attaches a report from General Electric that GMCW contends provides more accurate information regarding setback distances from property lines. The FitzGeralds assert that the testimony and exhibits are not misleading and confusing because the plain language of the

exhibit appears to be inconsistent with the General Electric report provided by GMCW with its objection to the exhibit.

The report is hearsay evidence, and accordingly, we exclude exhibit J. FitzGerald Supp. JF-2 and page 3, lines 14-18 of the FitzGerald's prefiled testimony. However, we note that the FitzGeralds may seek to use the General Electric documents to cross-examine GMCW's witnesses during the technical hearings.

GMCW contends that the majority of Mr. McLane's testimony, page 3, line 1 to the end of the testimony, as well as all of the exhibits submitted by Mr. McLane (exhibits SM-1 through SM-115) should be excluded as hearsay because Mr. McLane is not an expert witness. GMCW further contends that the testimony and exhibits should be excluded as confusing and prejudicial. In response, Mr. McLane maintains that the exhibits consist of (1) relevant excerpts of other state statutes; (2) county and municipal ordinances; (3) model ordinances published by governmental agencies; and (4) regulations and adjudicative decisions issued by state administrative agencies. In addition, exhibit SM-1 consists of a summary of the setback requirements contained in the remaining exhibits. Further Mr. McLane asserts that, even if the exhibits are hearsay, he should be considered an expert witness and allowed to rely on the information contained in the exhibits in submitting testimony.

A witness can be qualified as an expert through research and study. Mr. McLane has clearly conducted significant research on setback requirements in other jurisdictions,⁵ an issue that was specifically raised by the Board. No other witness has demonstrated this level of knowledge on the issue,⁶ and accordingly, we conclude that Mr. McLane's research has qualified him as an expert on the issue of setback requirements in other jurisdictions, and his prefiled testimony would be allowed even if we were to exclude exhibits SM-1 through SM-115.

With respect to the question of the exhibits included with Mr. McLane's testimony, with the exception of exhibit SM-1, the exhibits consist of municipal and county ordinances, decisions

5. Without judging the merits of a decision on appropriate setback distances, we appreciate Mr. McLane's research on an issue specifically identified by the Board.

6. We note that GMCW's expert witness on siting wind turbines stated, in response to a question on setback standards, "I'm not aware of really any standards in other states regarding property lines per se." Tr. 2/10/10 at 241 (Zimmerman).

by administrative bodies, portions of relevant statutes, and model ordinances published by governmental agencies. The Board specifically cited to setback requirements in other jurisdictions in determining that additional information was required for us to establish appropriate setback distances for this project.⁷ Accordingly, the exhibits filed by Mr. McLane provide the type of information that is helpful in making a determination on this issue. The narrow question is how this information can be used during these proceedings. The Board, in other dockets, has admitted decisions of administrative bodies and documents composed by governmental agencies; however, this information is not admitted for the truth of the matter asserted in such documents. For example, the Board could recognize that a particular agency decided to impose setbacks for wind turbines based upon an analysis of the distance from which ice could be thrown from a turbine. However, if the agency decision found that ice could be thrown 1,000 feet, we would not include that distance as a finding of fact in our order, because the witness that was relied upon to produce that finding is not available in this proceeding, and the parties, and the Board, cannot cross-examine that witness to determine the underlying assumptions and methodology of the calculation that produced that number. For these reasons, we will allow the admission of exhibits SM-2 through SM-115 for the limited purpose of showing the setback recommendations and determinations of other governmental entities; they are not admitted for the truth of any underlying facts set forth in the exhibits.⁸ With respect to exhibit SM-1, the exhibit is a summary of setback requirements established in other jurisdictions. It is not unusual for an expert witness, such as Mr. McLane, to provide summaries of relevant information in the form of an exhibit, and, accordingly, we will not exclude exhibit SM-1.

We are particularly troubled that GMCW has argued that information on wind turbine setbacks contained in ordinances and siting decisions from other jurisdictions is potentially misleading and confusing for an expert tribunal responsible for siting wind turbines. If GMCW believes that the setback requirements established by other jurisdictions are not appropriate in

7. Docket 7508, Order of 6/11/10 at footnote 36.

8. This ruling is consistent with our established practice of the parties and the Board itself relying on regulatory and other legal authority from other jurisdictions. Such authority need not be included in the evidentiary record, and instead may be directly cited in legal briefs and Board discussions. Furthermore, the Board is not taking judicial notice of the exhibits; instead the Board is admitting these documents for the limited purpose described above.

this case, it may present that case during these proceedings. However, it is difficult to conceive of why GMCW would attempt to exclude the type of information that we specifically cited to in our decision to establish setback requirements.

SO ORDERED.

Dated at Montpelier, Vermont, this 3rd day of March, 2011.

| | | |
|------------------------|---|----------------|
| <u>s/ James Volz</u> |) | |
| |) | PUBLIC SERVICE |
| |) | |
| <u>s David C. Coen</u> |) | BOARD |
| |) | |
| |) | OF VERMONT |
| |) | |

OFFICE OF THE CLERK

FILED: March 3, 2011

ATTEST: s/ Judith C. Whitney
Deputy 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)

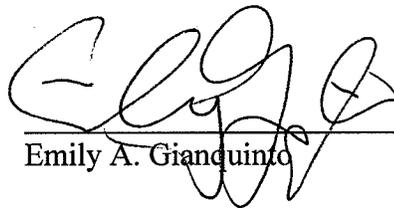
CERTIFICATION

I hereby certify that a copy of the foregoing document was delivered by first-class mail
and e-mail to the following service list on the 25th day of April, 2011:

Carrie L. Larson
Paul Corey
Jeffery and Mary Stauffer
Thomas D. McKeon
David M. Cusick
Richard T. Roznoy
David R. Lawrence and Jeannie Lemelin
Walter Zima and Brandy L. Grant
Eva Villanova

and sent via e-mail only to:

John R. Morissette
Christopher R. Bernard
Joaquina Borges King



Emily A. Gianquinto