



JOHN ELIAS BALDACCI
GOVERNOR

STATE OF MAINE
DEPARTMENT OF CONSERVATION
22 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0022

ELIZA TOWNSEND
ACTING COMMISSIONER

Memorandum and Order

Pre-Hearing Conference
In the Matter of
Development Permit DP 4860
TransCanada Maine Wind Development, Inc.
Kibby Expansion Project
Prehearing Conference held on February 24, 2010
9:00 am to 11:00 am

On February 24, 2010, a pre-hearing conference was held pursuant to Chapter 5.07 of the Commission's Rules, at the Department of Conservation's Williams Pavilion Building in Augusta, Maine. An agenda for the pre-hearing conference was distributed prior to the conference, but several discussion items were added to the agenda at the conference.

In attendance

Commission

Gwen Hilton, Presiding Officer
Catherine Carroll, LURC Director
Amy Mills, Attorney General's Office (AAG)
Marcia Spencer Famous, LURC staff
Samantha Horn-Olsen, LURC staff

Applicant

Juliet Browne, Verrill Dana, counsel for TransCanada
Kelly Boden, Verrill Dana
Nick Didomenico, TransCanada
Tom Patterson, TransCanada
Dana Valleau, TRC, consultant for TransCanada

Intervenors

Jenn Burns, Maine Audubon Society (MAS)
Dylan Voorhees, Natural Resources Council of Maine (NRCM)
David Publicover, Appalachian Mountain Club (AMC) (participated by phone)
Bob Weingarten, Friends of the Boundary Mountains (FBM)
Nancy O'Toole, FBM
Rufus Brown, counsel for FBM

Government agencies

Sarah Demers, Maine Natural Areas Program

The conference proceedings and relevant rulings of the Presiding Officer are summarized as follows:

I. Purpose of the Hearing

The purpose of the public hearing is to provide an opportunity for the Commission to receive testimony relevant to the Commission's legal criteria applicable to TransCanada's request for Development Permit DP 4860 for the proposed Kibby Expansion Project, and to provide the applicant, Intervenor, and members of the public an opportunity to address the Commission on relevant issues relating to the proposal.

II. Public hearing date and location

The public hearing and site visit will be held on **May 11 and 12, 2010, at a location to be determined** (see Section X, below, for hearing agenda and site visit details).

III. Participation by State and Federal Agencies

No State or federal agencies have indicated an interest in testifying at the public hearing at this time. However, the Commission reserves the right to request that any of the reviewing agencies present testimony at the hearing or be present to answer questions by the Commissioners. Government agencies that reviewed the application may participate at the public hearing as provided by the Commission's Chapter 5 rules, Section 5.15.

IV. Consolidation of Intervenor MAS, AMC, and NRCM

Intervenor MAS, AMC, and NRCM are considering consolidation, and requested they be given until March 22, 2010 to make a final decision, this being the date of MAS' next Board of Directors' meeting. After the MAS Board meeting, if all three Intervenor agree, then consolidation of these Parties will be as described in Section V. However, if these Intervenor decide to not be consolidated in the manner described in Section V, then a subsequent Order will revise that section. For the purposes of this Order, these three Intervenor shall be referred to as the "Consolidated Parties".

The applicant and the Intervenor shall be referred to herein as "Party" or "Consolidated Parties" as applicable, or collectively as the "Parties". Members of the general public are not referred to as "Parties" for the purposes of this Order.

V. Spokespersons and Contacts

- A. Designated spokesperson. The designated spokesperson for the applicant, Intervenor FBM, or the Consolidated Parties, is responsible for: submittal of pre-filed testimony, coordination of other pre-hearing matters, presentation of an oral summary of the pre-filed direct testimony at the hearing, producing witnesses for cross-examination, cross-examining other Parties' witnesses, and any post-hearing filings. All filings with the Commission in this proceeding must be copied to the other designated spokespersons. Each designated spokesperson shall be responsible for assuring copies have been provided to the others in his/her group. As a courtesy, all contacts described below in Section B may be copied electronically to assure that all other member of each group have received all submittals.

B. Consolidated Parties - MAS, AMC, and NRCM

Intervenors MAS, AMC, and NRCM did not state a position for or against the proposal, but each Party reserved the right to state a position for or against the proposal during the course of the proceeding. These three Parties must submit to LURC by March 24, 2010 a final decision of whether they agree to being consolidated, including their position regarding the proposal.

1. **Designated spokesperson:** If MAS, AMC, and NRCM agree to consolidation, then as the Consolidated Parties they must confirm the designation of one spokesperson, who is tentatively named below in Section V.E. The responsibilities of the designated spokesperson are described above in Section A.
2. **Contact persons:** Jenn Burns, David Publicover, and Dylan Voorhees, will represent MAS, AMC, and NRCM, respectively, with Jenn Burns tentatively also serving as the designated spokesperson for the Consolidated Parties. If a different contact person for any of these three Parties is desired, the designated spokesperson must notify LURC staff, the applicant, and the other Intervenors in writing, providing the new contact information.

C. Opposing Intervenor - FBM

FBM, as the only Party opposing the proposed project, is not consolidated with any other Intervenor. The designated spokesperson for this Intervenor is its attorney, Rufus Brown. All electronic filings may also be copied to contacts Bob Weingarten and Nancy O'Toole. If changes are made for either contact person, the designated spokesperson must assure that LURC staff and the other Intervenors are notified in writing, and provided the new contact information.

D. Applicant - TransCanada

The designated spokesperson for the applicant is its attorney, Juliet Browne. All filings and correspondence may also be copied to contacts Kelly Boden, Christine Cinnamon, Nick Didomenico, and Dana Valleau. If changes are made for any contact person, the designated spokesperson must assure that LURC staff and the Intervenors are notified in writing, and provided the new contact information.

E. Names, addresses, phone numbers, and email for all spokespersons and contacts are listed below:

1. **Land Use Regulation Commission**, 22 State House Station, Augusta, ME 04333
Catherine Carroll, Director, 207-287-4930; Catherine.M.Carroll@maine.gov
Marcia Spencer Famous, 207-287-4933; Marcia.Spencer-Famous@maine.gov

2. **TransCanada**

Spokesperson - Juliet Browne, Esq., jbrowne@verrilldana.com
Verrill Dana
1 Portland Square
Portland, ME 04114

Contacts -

Kelly Boden, Verrill Dana, kboden@verrilldana.com
Nick Didomenico, TransCanada, nick_didomenico@transcanada.com
Christine Cinnamon, christine_langille@transcanada.com
Dana Valleau, TRC (consultant for TransCanada) 14 Gabriel Drive, Augusta,
ME 04330, dvalleau@trcsolutions.com

3. **Consolidated Parties** - AMC, MAS, and NRCM

Spokesperson – Jenn Burns Gray, Esq.

Contacts -

Jenn Burns Gray, Esq., jgray@maineaudubon.org, Maine Audubon Society, 20 Gilsland Farm Rd., Falmouth, ME 04105

David Publicover, Appalachian Mountain Club, PO Box 298, Gorham, NH 03581
dpublicover@outdoors.org

Dylan Voorhees, Natural Resources Council of Maine, 3 Wade St., Augusta, ME 04330
Dylan@nrcm.org

4. Opposing Party – FBM

Spokesperson – Rufus Brown, Esq., rbrown@brownburkelaw.com
85 Exchange Street, Suite 201
P.O. Box 7530
Portland, ME 04101

Contacts – Bob Weingarten, 29 Davis Road, Vienna, ME 04360, bpw1@midmaine.com
Nancy O'Toole, 204 Hare St., Phillips, ME 04966, npatu@hotmail.com

VI. Relevant Review Criteria

The following are the legal criteria relevant to the Commission's review of this proposal:

- 12 M.R.S., Sections 685-B, 2-C, 4, and 4-B of the Commission's statutes;
- 35-A M.R.S., Ch. 34-A, Sections 3451, 3452, 3454, and 3455
- Other applicable provisions of the Commission's statute, 12 M.R.S., Sections 681 through 689; and Chapter 10, the Land Use Districts and Standards.

VII. Issues Not Subject of the Proceeding

Testimony irrelevant to the above-recited legal criteria will be excluded from the hearing. Issues related exclusively to the Maine Department of Environmental Protection's jurisdiction or laws are not the subject of the hearing, except as subsumed in one of the legal standards applied by the Commission under Section VI, above.

VIII. Issues Discussed at the Pre-Hearing Conference

A. Public hearing schedule and logistics. At the pre-hearing conference, the following scheduling, timing, and logistical issues regarding submittal of testimony and the date of the hearing were discussed:

1. *The date(s) of the hearing*. FBM asserted it is difficult for them to have their volunteers attend both days of a two day hearing, but also stated that it would prefer the hearing be two or more days. FBM also requested that the hearing be arranged to allow sufficient time for cross-examination of witnesses. TransCanada requested that there be a one day hearing with an evening session, and that it would object to any schedule that unnecessarily holds up the processing of the permit. TransCanada questioned whether members of FBM should be allowed to testify at the public portion of the hearing.
2. *Witnesses and issues list*. TransCanada requested that a witness list be submitted well in advance of the hearing, stating that it would not object to testimony on any relevant issue, but needs adequate time to identify their own witnesses to testify in response to the other Parties' testimony.

3. *Site visit.* The Parties discussed whether a site visit should be held at the same time or at a different time than the hearing. Several meeting attendees expressed an interest in holding the site visit the day before to the hearing. FBM requested that the site visit be comprehensive enough to allow the Commission to see the scope of the project, and that the visit not be scheduled back-to-back with the hearing.
4. *Submittal of pre-filed direct testimony.* FBM requested that adequate time be provided to prepare testimony.
5. *Rebuttal to the pre-filed direct testimony.* The meeting attendees discussed whether rebuttal to pre-filed testimony was needed, and if so, the timing of submittal. TransCanada stated it did not anticipate needing to submit rebuttal testimony, and it stated it was neutral on the issue, provided that any pre-filing of rebuttal did not lead to substantial delay. MAS, AMC, and NRCM specifically stated they are neutral on the subject of rebuttal testimony. FBM stated that it would prefer to submit rebuttal to the pre-filed testimony.
6. *Close of the hearing record.* The meeting attendees discussed whether the record can or should be closed at the end of the hearing, and questioned if it must by law be closed sometime after the hearing. FBM stated it would prefer to have more time before the hearing than after. TransCanada stated that a written comment period after the hearing is necessary.

B. Other topics discussed at the meeting. The Presiding Officer reminded the Parties that issues relevant to the proceeding will be identified in Procedural Orders, and that all direct testimony must be pre-filed. The AAG reminded the Parties that the discussion at the meeting was a tentative identification of issues, and each Party will be providing witness lists.

1. *LD 1680, "An Act to Assist in Reviewing Wind Energy Applications".* The meeting attendees discussed the 270 day time limitation for processing of the permit in accordance with the provisions of PL 2007, Ch. 661, the so-called "Wind Energy Act" (see 12 M.R.S., Section 685,B,2-C). FBM asked if the relevant review criteria regarding the time frame for processing the permit will be amended by LD 1680, noting that the bill does not include a retroactive clause. MAS also asked if LD 1680 will be retroactive. The AAG stated that LD1680 will be effective upon enactment, agreed that the bill does not include a retroactive clause, and agreed that as a general principle legislation is not retroactive absent such a clause.
2. *Scenic review criteria.* The meeting attendees discussed the applicable standard with respect to effects on scenic character in view of the Wind Energy Act. FBM asserted that impacts to scenic character and impacts to existing uses are each relevant, and that scenic resources of state or national significance are visible from the proposed Kibby Expansion Project area..

TransCanada asserted that the only review criteria applicable scenic impacts due to a wind energy development in the expedited permitting area are the scenic character provisions of the Wind Energy Act. TransCanada noted that the Wind Energy Act modified the section of the law regarding scenic impact due to wind turbines.

NRCM noted the changes made to the law by the Wind Energy Act regarding the application of the statutory "harmonious fit" language, and stated they will be testifying on the impacts to scenic resources of state or national significance.

MAS indicated that it intends to focus on existing recreational uses dependant on scenic character, in accordance with the provisions of the Wind Energy Act.

As set forth in Section VI above, 12 M.R.S. § 685-B(4), as amended by the Wind Energy Act, provides the applicable criteria for approval. As stated in that section: “In making a determination under this paragraph regarding an expedited wind energy development the commission shall consider the development’s effects on scenic character and existing uses related to scenic character in accordance” with 35-A M.R.S. § 3452. Accordingly, the Commission will consider any effect on scenic character and/or any effect on existing uses related to scenic character in accordance with 35-A M.R.S. § 3452.

3. The Parties tentatively identified issues other than those listed above that they intend to submit testimony on.

(a) *NRCM*. NRCM asserted some portions of the proposed project will be “in compliance with the law” but some portions may not be consistent with applicable environmental criteria.

(b) *AMC*. At the meeting, AMC did not individually identify the issues it tentatively intends to provide testimony on.

(c) *MAS*. At the meeting, MAS identified the following issues:

- (i) Bird and bat data, Bicknell’s Thrush, eagles
- (ii) Impact to the subalpine plant community
- (iii) Technical and financial capacity, and the economic viability of the project

TransCanada objected, stating “economic viability” is not relevant to the applicable review criteria.

(d) *FBM*. FBM asserted the application is deficient, and the applicant has not met the burden of proof of “no undue adverse impact,” and identified the following issues:

- (i) Permitting of roads located outside of the expedited permitting area for wind energy development, and within a P-MA Subdistrict.
- (ii) Impacts from roads, especially to soils; and erosion, specifically on super-elevated roads and road location. FBM asserted that a proposed road would not meet the road standard of 12% slope or less.
- (iii) Impacts to the Roaring Brook Mayfly
- (iv) Impacts to Golden and bald eagle.
- (v) Impacts to Canada lynx
- (vi) Impacts to wetlands, streams vernal pools
- (vii) Acidic rock management plan/geotechnical work
- (viii) Decommissioning plan and funding, however FBM acknowledged that the project will be self-financed.
- (ix) Technical capacity, wind resource data evaluation, and the weather conditions of the project site.

TransCanada objected, stating that the wind resource data are not relevant to the applicable review criteria.

(e) *TransCanada*. TransCanada requested that testimony be specific, not broad and general, to facilitate responding to the Parties’ testimony. TransCanada also requested that testimony on issues outside LURC’s jurisdiction (for example, transmission congestion, capacity factors, etc) be avoided.

IX. Lists of witnesses and issues, and pre-filed direct testimony.

- A. MAS, AMC, and NRCM must submit their final decision on whether they will agree to be consolidated and state their position with respect to the proposed project no later than **Wednesday, March 24, 2010 at 5:00 pm.**
- B. All Parties must provide a tentative list of witnesses and issues they wish to testify on no later than **Wednesday, March 24, 2010 at 5:00 pm.**
- C. All direct testimony must be pre-filed. Pre-filed direct testimony must be sworn, notarized and filed with the Commission by all Parties no later than **Wednesday, April 21, 2010 at 5:00 pm.** A cover letter reciting legal interpretations or arguments the Party wishes to assert may be included with the pre-filed testimony. The pre-filed testimony must clearly indicate any experts who will be presenting testimony at the hearing.
- D. Any exhibit that a party wishes to introduce into the administrative record must be attached and incorporated to pre-filed testimony. The Chair retains the discretion to allow the introduction of an exhibit at hearing that was not pre-filed based on a showing of good cause; however, such requests will be looked upon with extreme disfavor, and the requesting party will bear the heavy burden of demonstrating why it was not feasible to pre-file the exhibit, and that the need to introduce the exhibit outweighs any prejudice to other parties. The use of exhibits that were not pre-filed and are not in the administrative record to impeach witnesses at hearing may be approved by the Chair on a case by case basis if the Chair is satisfied that the use of the exhibit as proposed will assist the Commission in its decision-making. Reduced versions of oversized exhibits may be pre-filed, with the full-size exhibit presented at hearing. It is the responsibility of each party to label their exhibits in a manner that allows them to be easily identified and referenced.
- E. **By April 28, 2010 at 5:00 pm,** each Party shall identify in writing, and make available to the Commission and all other Parties, a final list of witnesses of the other Parties it wishes to have available for cross-examination, and an estimate of the amount of time it expects to need for cross-examination. A Hearing Order will be issued thereafter with the final hearing schedule, including times allocated to each Party for presentation of testimonial summaries and for cross-examination.
- F. Parties shall provide the Commission with three paper copies and 12 CD copies of all pre-filed direct testimony. If possible, submittals must also be provided to the Commission electronically by email. On the filing date, each party shall provide the designated spokesperson of the other Parties with a paper copy and a CD copy, and if possible an emailed version, of the pre-filed testimony and exhibits.

X. Administrative Timeline and Hearing Agenda

A. Summary of dates

- Tentative witness and issues list; decision of consolidation/position – March 24, 2010
- Pre-filed testimony – April 21, 2010
- Final list of witnesses to be cross-examined – April 28, 2010
- Second Order with times allocated – to be distributed approximately 1 week before hearing
- Hearing and site visit
 - May 11th - site visit
 - May 11th, evening – public session
 - May 12th, morning and afternoon – technical session (applicant and Intervenors)

- May 12th, evening - public session
- Post-hearing written comments – May 24th
- Post-hearing rebuttal and record closes – May 31st

B. Site visit

Dates for a site visit to inspect the project area were discussed by the meeting attendees. A site visit for the Commission has been tentatively set for **Tuesday, May 11, 2010**. Any Parties wishing to attend the site visit are welcome to do so, but must make their own travel and meal arrangements and inform Marcia Spencer Famous (207.287.4933) of LURC staff no later than **Friday, May 7th at 5:00 pm**. The itinerary for the site visit will be provided to all site visit attendees. During the Commission's site visit, representatives of the applicant may point out various features and locations of the proposed project, and site-specific questions may be asked by Commission members and other attendees. The Presiding Officer may alter the conduct of the visit in order to make it efficient and effective. During the site visit, no Party may discuss its testimony or otherwise engage in any advocacy or conversations about the project with Commission members.

C. Public hearing

The public hearing is scheduled for **May 11th and 12th, 2010**, and will be held at a location to be determined. The public hearing will begin on Tuesday, May 11th in the evening, at 6:00 pm to hear testimony from the general public, after first hearing the Opening Statement by the Presiding Officer, the Staff Statement and Administrative History, and a brief summary of the proposal by the applicant. The hearing will resume on Wednesday May 12th, the following morning, at 9:00 am to hear summaries of the pre-filed direct testimony from the applicant, government agencies, and Intervenors. The daytime session will adjourn at 5:00 pm, and the hearing will resume again at 6:00 pm to hear any remaining testimony from the public and/or continued examination of witnesses as time permits.

1. All Parties submitting testimony may be subject to questions from the Commission or staff. Government agencies submitting comments or testimony may be examined by the Parties, but Parties wishing to do so must indicate before the hearing that they desire to have a representative of that agency present for this purpose. No Party will be allotted time to summarize testimony at the hearing unless it has pre-filed testimony.
2. Each Party is required to present their summary of testimony and to cross-examine efficiently. Parties supporting the same position must coordinate their testimony to reduce redundancy. The Presiding Officer may limit any Party's time in order to expedite the hearing and eliminate redundant or insignificant testimony. Cross-examination will occur immediately following each witness or group of witnesses for a Party or Consolidated Party, as the Presiding Officer determines.
3. Testimony by the general public will be heard during the evening sessions on May 11th and 12th, 2010. The public may be asked questions by the Commission and staff. The Parties may not cross-examine the public, but may ask for clarification through the Presiding Officer with her permission.
4. Witnesses who pre-file testimony relating to any topic on behalf of a Party in this matter will not be permitted to testify at the public session(s). Individuals who are affiliated with a Party in this matter may testify at the public session(s) only in their personal capacities, and not on behalf of a Party.

5. A general hearing agenda is presented below. A second Hearing Order containing a more detailed hearing schedule with time allocations will be distributed after the list of witnesses to be cross-examined has been received.

MAY 11, 2010

Site visit: Details to be announced.

Evening (6:00): Public Session

Opening Statement by Presiding Officer, Staff Statement and Administrative History
Brief presentation summarizing the proposal by the applicant
Public testimony
Recess and Closing Statement of the Presiding Officer

MAY 12, 2010

Morning (9:00 to 12:00)

Presiding Officer Opening Statement, Staff Statement and Administrative History
Summary of applicant's testimony and cross-examination of its witnesses
Questions by Commission of government agencies; if needed, summary of direct testimony by government agencies, and cross-examination of their witnesses

Lunch (12:00 to 1:00)

Afternoon (1:00 to 5:00)

Summaries of direct testimony by Intervenors, and cross-examination of their witnesses

Evening (6:00): Public Session

Opening Statement by Presiding Officer, Staff Statement and Administrative History
Public testimony (Additional written testimony from the public may be submitted until the end of the post-hearing comment period.)
Additional summaries or cross-examination by the Parties may occur as time permits during this evening session.
Closing Statement of the Presiding Officer

XI. Close of Hearing

Pursuant to this Memorandum and Order and Section 5.18(2) of the Commission's *Rules for the Conduct of a Public Hearing*, the hearing record will remain open at the close of the hearing until May 24, 2010 for the purpose of allowing all interested persons, as well as the applicant and the Intervenors, to file written statements with the Commission. The record will remain open until May 31, 2010 for the filing of statements in rebuttal of the written comments filed at the close of the hearing. In addition, within a time prescribed by the Presiding Officer, the Parties may respond in writing to specific questions asked by the Commission or staff at the public hearing. The hearing record will then close and no additional evidence or argument will be allowed into the record except by leave of the Presiding Officer.

XII. Authority and Reservations

This memorandum and order is issued by the Presiding Officer pursuant to LURC Chapter 5, *Rules for the Conduct of Public Hearings*. All objections to matters contained herein should be timely filed in writing with the Commission but are not to be further argued except by leave of the Presiding Officer. All rulings and objections will be noted in the record. The Presiding Officer may amend this order at any time.

Questions regarding this Memorandum and Order or rulings of the Presiding Officer should be directed to Catherine Carroll, the Commission's Director, or Marcia Spencer Famous at the Commission's office in Augusta. No ex parte communication may occur with the Presiding Officer or any other Commission member.

DATED AT AUGUSTA, MAINE THIS 9th DAY OF MARCH, 2010

By: Catherine M. Carroll
for Gwen Hilton, Presiding Officer