

STATE OF VERMONT  
PUBLIC SERVICE BOARD

Docket No. 6860

Petitions of Vermont Electric Power Company, Inc. )))  
 (VELCO) and Green Mountain Power Corporation )  
 (GMP) for a certificate of public good, pursuant to 30 )  
 V.S.A. Section 248, authorizing VELCO to construct the )  
 so-called Northwest Vermont Reliability Project, said )  
 project to include: (1) upgrades at 12 existing VELCO )  
 and GMP substations located in Charlotte, Essex, )  
 Hartford, New Haven, North Ferrisburgh, Poultney, )  
 Shelburne, South Burlington, Vergennes, West Rutland, )  
 Williamstown, and Williston, Vermont; (2) the )  
 construction of a new 345 kV transmission line from )  
 West Rutland to New Haven; (3) the reconstruction of a )  
 portion of a 34.5 kV and 46 kV transmission line from )  
 New Haven to South Burlington; and (4) the )  
 reconductoring of a 115 kV transmission line from )  
 Williamstown to Barre, Vermont –

Order entered: 10/8/2004

**ORDER RE MOTION TO STRIKE TESTIMONY OF ROBERT BLOHM**

**Background and Positions of the Parties**

On September 14, 2004, Vermont Electric Power Company, Inc. ("VELCO") filed a motion asking that the Public Service Board ("Board") strike the prefiled surrebuttal testimony of Robert Blohm. Mr. Blohm's testimony had been filed on behalf of the Conservation Law Foundation ("CLF"), the Town of New Haven ("New Haven"), Vermont Citizens for Safe Energy ("VCSE"), and the Addison County Regional Planning Commission ("ACRPC") (collectively, the "Blohm Sponsors"). VELCO asserts that: (1) with one exception, the substance of Mr. Blohm's testimony does not constitute surrebuttal; (2) Mr. Blohm's testimony exceeds the scope of allowed surrebuttal in this docket in that the testimony could have been reasonably presented at an earlier stage of the proceeding; (3) any probative value of the testimony is outweighed by unfair prejudice, confusion of issues, and delay; and (4) the Blohm Sponsors have failed to establish Mr. Blohm's expertise to offer the opinions he expresses in his testimony.

On September 23, 2004, VELCO filed a letter asserting that recent discovery responses from Mr. Blohm indicate that he was originally contacted by New Haven as a potential rebuttal witness, not a surrebuttal witness. Thus, contends VELCO, Mr. Blohm's testimony could have been filed earlier, in the rebuttal phase of this proceeding.

On September 24, 2004, the Blohm Sponsors filed a memorandum in opposition to the motion to strike. The Blohm Sponsors contend that Mr. Blohm's testimony "does contradict, counteract, explain, undermine and impeach" the other parties' rebuttal testimony, and thus constitutes appropriate surrebuttal. The Blohm Sponsors assert that Mr. Blohm's testimony was filed at their first opportunity to respond to new evidence that VELCO submitted on July 2, 2004. They further claim that they are entitled to present Mr. Blohm's testimony in response to rebuttal testimony of VELCO and the Department on the issue of reliability standards employed in other parts of the country. The Blohm Sponsors argue that they should be given the same opportunity as VELCO to depart from the surrebuttal schedule, given that VELCO filed on September 1, 2004, a report on a contested reliability-standard issue.<sup>1</sup> The Blohm Sponsors contend that Mr. Blohm's testimony is not unfairly prejudicial or confusing, and that if VELCO claims to be unfairly surprised by the testimony, then VELCO's course should be to ask for an opportunity to respond. Finally, the Blohm Sponsors claim that Mr. Blohm is competent to

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1. The Board has not ruled on the admissibility of that report.

provide expert testimony; they point to Mr. Blohm's web-page résumé (which was referenced in the biography that Mr. Blohm submitted with his testimony) and to Mr. Blohm's discovery responses.

On September 28, 2004, the Vermont Department of Public Service ("Department") filed a letter in response to the Blohm Sponsors' September 24 memorandum. The Department contends that those portions of Mr. Blohm's testimony that are purportedly responding to Department witnesses are beyond the scope of permissible surrebuttal, in that those portions fail to comply with the standard for surrebuttal testimony that the Board established in its Order of August 9, 2004. The Department further asserts that the Blohm Sponsors have not qualified Mr. Blohm as an expert to provide the opinions set forth in his prefiled testimony.

On October 4, 2004, the Blohm Sponsors filed a supplemental memorandum in opposition to the motion to strike. In their supplemental memorandum, the Blohm Sponsors argue that Mr. Blohm's prefiled testimony responds not only to issues addressed in the cross-examination, but also to issues raised in VELCO's and the Department's prefiled rebuttal testimony. The Blohm Sponsors contend that Mr. Blohm does possess the requisite expertise to present the opinions in his testimony. Finally, the Blohm Sponsors assert that Mr. Blohm's testimony is not an "ambush" that could have been filed earlier.

### **Discussion and Conclusions**

In our August 9, 2004, Order, we stated that:

Prefiled surrebuttal testimony must be narrowly focused to address evidence in the record, and should be limited to responding to new matters which could not have been reasonably responded to in an earlier round of prefiled testimony. The prefiled surrebuttal testimony must clearly identify the testimony or exhibits that it is responding to.<sup>2</sup>

We have previously applied this standard in ruling on motions to strike other prefiled surrebuttal testimony.<sup>3</sup> In those rulings, we stated:

The motion to strike Section Three of Mr. Whitley's testimony is granted. Section Three of Mr. Whitley's testimony, although stating that it responds to rebuttal

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2. Order of 8/9/04 at 1.

3. In the similar case of prefiled rebuttal testimony that could have been filed as direct testimony, we struck portions of Scudder Parker's prefiled testimony.

testimony concerning undergrounding the proposed 345 kV line, provides general testimony concerning undergrounding. This testimony could have been filed during the rebuttal phase of these proceedings.

The motions to strike the prefiled testimony of Messrs. LaForest, Bloch, and Emerson are denied. The prefiled testimony in each case appropriately responds to new matters presented in the rebuttal phase that could not have been reasonably responded in earlier testimony.<sup>4</sup>

It is instructive to compare specifically our previous rulings on Mr. Whitley's and Mr. LaForest's prefiled surrebuttal testimony. The objected-to testimony of each witness addressed undergrounding issues. The critical difference between the two witnesses' testimony is that Mr. LaForest focused on, *and narrowly responded to*, an issue that was presented by another party's rebuttal testimony: the proposed undergrounding of parts of the 345 kV line. Although Mr. Whitley's undergrounding testimony indicated that it was responding to that same rebuttal testimony, Mr. Whitley's surrebuttal was not narrowly focused, and instead addressed more general undergrounding issues that could have been reasonably presented in earlier testimony. Thus, under the standard that we announced in our August 9 Order, Mr. LaForest's testimony on undergrounding was within the scope of appropriate surrebuttal, while Mr. Whitley's undergrounding testimony was not.

Applying that same standard (from our August 9 Order) to Mr. Blohm's prefiled surrebuttal testimony, we conclude that substantial portions of the testimony should be struck. Just as we did not permit Mr. Whitley to present broad testimony on undergrounding issues in response to another party's narrower testimony on undergrounding issues, we will not permit Mr. Blohm to present broad surrebuttal testimony on reliability issues as a response to other witnesses' rebuttal testimony on narrower issues. Just because another witness's rebuttal testimony may have touched upon reliability does not open up the scope of surrebuttal to encompass all reliability issues. Most notably, in several places Mr. Blohm testifies generally on "Transmission Reliability Margin" and on the distinction between "emergency reliability" and "economic reliability." This is testimony that is neither "narrowly focused to address evidence in the record" nor "limited to responding to new matters which could not have been reasonably responded to in an earlier round of prefiled testimony," and thus is beyond the scope of surrebuttal testimony as allowed by our August 9 Order.

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4. Memorandum from Susan M. Hudson, Clerk of the Board, 9/20/04.

Accordingly, we strike the following portions of Mr. Blohm's prefiled surrebuttal testimony as beyond the scope of surrebuttal testimony allowable in this Docket:

- Page 1, line 20 through page 4, line 4, inclusive;
- Page 7, line 17 through page 9, line 10, inclusive;
- Page 13, line 22 through page 14, line 18, inclusive;
- Page 15, line 6 through page 17, line 22, inclusive;
- Page 21, line 21, through page 22, line 6, inclusive;
- Page 24, line 12 through page 26, line 20, inclusive;
- Page 30, line 4 through page 31, line 10, inclusive.

Finally, we are not persuaded by VELCO's and the Department's arguments that the Blohm Sponsors have failed to establish Mr. Blohm's expertise, and thus we do not strike the remaining portions of Mr. Blohm's testimony. To be clear, it is incumbent upon a party to include, as part of a witness's prefiled testimony and exhibits, a foundation adequate to establish that the witness is competent to present any expert opinions set forth in the testimony. Thus, we do not rely upon the Blohm Sponsor's attempts to bolster Mr. Blohm's credentials with materials not included with the prefiled testimony. However, we find that Mr. Blohm's prefiled surrebuttal testimony, with the attached biography, establishes a sufficient basis for him to present the opinions in his testimony. The extent of Mr. Blohm's expertise goes to the weight that we should accord his opinions.

SO ORDERED.

Dated at Montpelier, Vermont, this 8th day of October, 2004.

s/ Michael H. Dworkin)

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PUBLIC

SERVICE

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s/ David C. Coen

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BOARD

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OF

VERMONT

s/ John D. Burke \_\_\_\_\_ )

OFFICE OF THE CLERK

FILED: October 8, 2004

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: Clerk@psb.state.vt.us)*