

November 30, 2004

Mrs. Susan M. Hudson, Clerk
Vermont Public Service Board
112 State Street - Drawer 20
Montpelier, VT 05620-2701

Re: Docket No. 6860 - Response to November 24, 2004 Order re Testimony of Robert Blohm

Dear Mrs. Hudson:

The Department of Public Service (“DPS” or the “Department”) responds to the Public Service Board’s order of November 24, 2004 (“the Order”) regarding the testimony of Robert Blohm.

DPS respectfully disagrees with the Board’s denial of the Department’s request, in its letter of November 22, 2004, that the Board provide time and opportunity “*outside of the briefing schedule for this case*” (emphasis added) for resolution of discovery disputes and submission of responsive testimony, in the event the Board reconsiders and admits Mr. Blohm’s testimony.

The effect of the Order is to deny this request because the opportunity provided by the Board is within the briefing schedule of the case. As the Board is aware, reply briefs are due on December 17, 2004, and approximately a dozen briefs were filed on November 24, 2004. In this regard, the Order does not mention that the Department had requested that the opportunity be given outside of the briefing schedule, or expressly rule on that part of the Department’s request, but the result, as discussed above, is a denial. The Department continues to maintain and renews its request that the opportunity be outside of the existing briefing schedule.

The schedule provided by the Order fails to provide adequate time to prepare responsive testimony. Mr. Blohm is now scheduled to testify on December 3, 2004, a mere five business days after the date of the Order¹ and parties are said to have an opportunity to present responsive testimony the same day or the following business day. Mr. Blohm’s lengthy testimony raises complex issues and novel theories relating to reliability. The time provided would not be sufficient to respond to Mr. Blohm’s testimony even in the absence of any other activities in the docket, and the inadequacy is magnified by the concurrent necessity to review and respond to initial briefs and prepare for the design detail hearings on the Ferry Road crossing.

The time provided is similarly inadequate to prepare to cross-examine Mr. Blohm. To do

¹Although the Order indicates that Mr. Blohm may testify on December 3 or 6, 2004. DPS learned yesterday from the Clerk that Mr. Blohm in fact will testify on December 3, 2004.

so, it would be necessary for counsel to review the approximately 13 pages of formerly stricken testimony, as well as the discovery responses, which number several hundred, and the deposition transcript, which is approximately 140 pages. Additional time would be needed to formulate the cross-examination. Five business days simply is not sufficient time to prepare in the context of reviewing and responding to initial briefs. Nor is it sufficient time when the opportunity runs concurrently with an opportunity to develop responsive testimony.

The schedule provided by the Order for resolving the Department's discovery dispute with the sponsors of Mr. Blohm's testimony also is far short of adequate. The Order has the effect of requiring DPS, within two business days of the Order, to review all of the approximately 75 deficient discovery responses noted in its letter of September 29, 2004 to the sponsors of the Blohm testimony (copied to all parties and the Board), and to review again New Haven counsel's responsive letter of October 8, 2004 that includes some supplemental information, and determine exactly which discovery responses remain insufficient.² It also requires DPS to seek responses to

²On September 29, 2004, DPS sent a letter to the sponsors of Mr. Blohm's testimony alleging deficiencies respecting approximately 75 discovery responses. Most of these responses pertained to the testimony that later was struck. DPS then followed up by calling the representatives of those parties seeking a response. On October 8, 2004, DPS received a letter from counsel for the Town of New Haven responding to the Department's allegations of deficiency. This letter addressed many but not all of those allegations and stated that New Haven would address the remaining allegations in the future. For all of those allegations it did address, it claimed that the responses were sufficient, and for several of them offered some supplemental information. In many cases, New Haven's letter for the first time referred to specific responses to VELCO's information requests which it claimed were sufficient responses to DPS requests. Previously, New Haven had in many cases blanketly referred to the 200 plus discovery responses to VELCO without specifics.

As DPS was reviewing the letter from New Haven's counsel, DPS received the Board's order of October 8, 2004, striking large sections of Mr. Blohm's testimony. DPS therefore immediately compared the then-stricken sections to the sections on which it was seeking adequate responses and determined that it was unnecessary to proceed further with the disputed discovery issues. DPS and New Haven agreed that, in light of the Board's order, it was not necessary for New Haven to respond to the remaining allegations of deficiency.

On October 11, 2004, New Haven's counsel sent DPS a revised copy of its letter of October 8, 2004, with a few changes which New Haven represented were based on Mr. Blohm's review. As had been agreed, New Haven did not address the remaining DPS allegations of deficiency.

Based on the review that was performed at that time, DPS had concluded that some of New Haven's supplemental responses remedied deficiencies but that many of the deficiencies remained, including references to VELCO information requests that were not in fact fully responsive to DPS information requests. However, that review was incomplete and, due as well to the passage of time, it would be necessary to review the documents pertaining to the dispute again in order to

(continued...)

the remaining allegations of deficiency to which New Haven did not respond (by agreement after receipt of the Board's ruling striking much of the Blohm testimony on October 8, 2004), and to review those responses if received.³ It further requires DPS to prepare a motion to compel under VRCP 37, potentially pertaining to several dozen information requests, within an exceptionally tight time frame, since Mr. Blohm is scheduled to testify on December 3, 2004. In the context of briefing and preparing for the Ferry Road hearings, the opportunity provided by the Board is seriously insufficient.

Under the circumstances, DPS is deprived of a meaningful opportunity to be heard and perform cross-examination, in contravention of the Vermont Administrative Procedure Act. 3 V.S.A. §§ 809(c), 810(3). As the Board is aware, the Vermont Supreme Court interprets that Act to require a "meaningful" opportunity. In re Petition of Burlington Electric Dept., 151 Vt. 543, 546 (1989). It is the opposite of such an opportunity for the Board suddenly, and in the middle of briefing, to reverse course, admit previously stricken testimony, and then provide an ostensible opportunity to cross-examine on and respond to lengthy testimony addressing complex issues, preceded by only a few business days' notice.

This situation would not be presented had New Haven and the other parties sponsoring Mr. Blohm complied with the Board's prior scheduling orders and filed Mr. Blohm's testimony either as direct or rebuttal. Sufficient time and opportunity would have existed to address discovery, cross-examination, and preparation of responsive testimony. Now, however, at the last minute during briefing, the Board is allowing in the record testimony that, by its own admission, it correctly struck because it was not proper surrebuttal testimony.

In view of the foregoing, the Department's response to the specific notification requirements contained in the Order is as follows:

- In the Department's view, the discovery dispute is not resolved. However, in the time frame provided by the Board and while briefing is ongoing, DPS is unable to prepare a motion to compel and submit it to the Board.
- If allowed sufficient time to prepare cross-examination, DPS likely would have cross-examination for Mr. Blohm. However, DPS does not believe it is able to prepare or give a real time estimate for cross-examination in the time provided by the Board and while briefing is ongoing. As a contingency, DPS will, at this time, reserve 15 minutes.

²(...continued)
prepare and file a motion under VRCP 37.

³On November 24, 2004, immediately on receipt of the Board's ruling to reconsider striking Mr. Blohm's testimony, DPS asked New Haven to respond to the remaining allegations of deficiency. As of this writing, New Haven's counsel has informed DPS it will receive a response this afternoon, which means that DPS is unable to evaluate its sufficiency before today's filing deadline.

- DPS will not present any responsive witnesses to Mr. Blohm's testimony on December 3 or 6, 2004, since it has been afforded insufficient time to develop responsive testimony.

Finally, DPS objects to the Order's granting the sponsors of Mr. Blohm additional opportunity to present testimony from him on NERC planning standards. It was New Haven, not VELCO, which first introduced those standards, doing so on July 27, 2004 in the form of an excerpt marked as Exhibit New Haven Rebuttal-8. 7/27/04 tr. at 8 (vol. 1). Further, since Mr. Blohm's prefiled testimony allegedly addresses those standards, there is no reason why he could not have provided any additional explanation in his prefiled. Parties should not be subjected to this last-minute surprise and prejudice.

Thank you for your attention.

Sincerely,

Aaron Adler
Special Counsel

cc: Attached Service List