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GOVERNOR

STATE OF MAINE
DEPARTMENT OF AGRICULTURE, CONSERVATION & FORESTRY
LAND USE PLANNING COMMISSION
18 ELKINS LANE, 22 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0022

AMANDA E. BEAL
COMMISSIONER

STACIE R. BEYER
EXECUTIVE DIRECTOR

Seventh Procedural Order

In the Matter of

Zoning Petition ZP 779A

Wolfden Mt. Chase, LLC.

Application for Zone Change, Picket Mountain Mine

T6 R6 WELS, Penobscot County, Maine

Commissioner Everett Worcester, Chair and Presiding Officer

This Seventh Procedural Order addresses a motion by the Tribes and Nonprofits Intervenor group (Intervenor 2) to strike from the hearing record the rebuttal comments submitted by Wolfden Mt. Chase, LLC (Wolfden or Applicant) on November 9, 2023.

I. BACKGROUND

- A.** On January 18, 2023, Wolfden Mt. Chase, LLC filed with the Maine Land Use Planning Commission (Commission or LUPC) an application to rezone 374 acres in T6 R6 WELS from a General Management to a Planned Development (D-PD) subdistrict. The proposed D-PD subdistrict would allow for the development and operation of the Pickett Mountain metallic mineral mine. On February 24, 2023, the Commission accepted the application as complete for processing.
- B.** The application is subject to and will be reviewed under the Commission's Chapter 12 rules (Mining and Level C Mineral Exploration Activities). 01-672 C.M.R. Chapter 12, effective May 27, 2013. Chapter 12 requires a public hearing to be held by the Commission prior to a final decision on the application. The public hearing was held on October 16, 17, and 18 in Millinocket and October 23 in Bangor.
- C.** On January 20, 2023, the LUPC provided notice to the public that the application had been received and published a webpage on the project, one purpose of which is to provide the public and the Applicant with materials related to the project. Since its publication,

the webpage has stated that “public comments on this application are welcome until the close of the record after the hearing” and has provided directions for submitting comments. The Commission compiled and posted the public comments it received to the webpage on April 14, July 13, August 21, and September 21, 2023. These postings comprised approximately 70 unique public comments.

- D.** Pursuant to § 5.10(B) of the Commission’s Chapter 5 rules, *Rules for the Conduct of Public Hearings*, the hearing record remained open for public comments by interested persons for 10 days (through November 2, 2023) following the final hearing session, and for a subsequent seven days (through November 9, 2023) for the filing of rebuttal comments.
- E.** After the last posting of public comments on September 21, 2023, the LUPC received over 260 additional unique comments, including approximately 215 from the start of the hearing on October 16, 2023, to the close of the comment period on November 2, 2023. This set of comments contained substantive comments and new evidence, including comments from 15 regional or state-level organizations that had not previously commented and opposed or expressed concerns about, the application. The Commission posted these additional comments to the webpage on November 3, 2023.
- F.** Wolfden Mt. Chase, LLC submitted rebuttal comments to previously filed public comments on November 9, 2023.
- G.** On November 13, 2023, Intervenor 2 filed a motion to strike Wolfden’s rebuttal to public comments on the basis that Wolfden is not an interested person as defined in Chapter 2 of the Commission’s rules. Intervenor 2 further argued that such an interpretation is consistent with the Presiding Officer’s statements near the conclusion of the hearing, as the Presiding Officer stated that, except for several specified items, additional evidence and exhibits related to evidence produced during the technical session would not be accepted. Intervenor 2 asserted that Wolfden’s opportunity for rebuttal is limited to its post-hearing brief.
- H.** On November 14, 2023, Wolfden responded to the motion to strike, arguing that adopting Intervenor 2’s interpretation of Commission rules and the Presiding Officer’s statements would be inaccurate, unfair, and contrary to Commission practice. Wolfden noted that it had no opportunity at the hearing to respond to written public comments submitted after September 21, 2023 (as these were not made available until after the hearing) or to public testimony given on October 23, 2023.

Wolfden also maintained that the Presiding Officer’s statements at the conclusion of the technical sessions related to whether the Applicant could subsequently respond to issues that arose during the technical sessions, including specific exhibits proposed by Intervenor Two during its re-cross examination, rather than to written public comments submitted after the hearing. Wolfden also pointed out that at the end of both the technical and public comment sessions, the Presiding Officer stated that the record would remain open for written public comment until Thursday, November 2, 2023, and for an additional week for rebuttal testimony in response to public comment, with no indication that rebuttal was limited to certain individuals or parties. Wolfden further pointed to Chapter 5 § 2(D)(2)(c), which gives the Presiding Officer the authority to fix the time for

filing of evidence, briefs, and other written submissions. Wolfden maintained that the interpretation that best comports with Commission practice and principles of fairness is that the public had an opportunity to submit additional comments until November 2, after which the parties could file rebuttal that was limited to responding to the additional public comment.

- I. **Criteria and Standards.** Chapter 5, § 5.02(D) of the Commission’s rules gives the Presiding Officer the authority to regulate the course of the hearing, rule on procedure issues, and rule on the admissibility of evidence.

Chapter 5, § 5.10(B) sets the times for written comments and rebuttal after the conclusion of a hearing.

Chapter 2, § 11 defines applicant, § 109 defines interested person, and § 110 defines intervenor.

II. REBUTTAL COMMENTS

Having considered Intervenor 2’s motion to strike Wolfden’s rebuttal comments and Wolfden’s response, the Presiding Officer has determined that the rebuttal comments are allowed, consistent with Chapter 5, § 5.02(D), the intent of statements made at the close of the hearing sessions, and past Commission practice, as well as in the interest of fairness to the Applicant. The rebuttal comments submitted by Wolfden are responsive to public comments that were not available to Wolfden before November 3, 2023. Allowing Wolfden the opportunity to respond to issues raised in these public comments is consistent with the Commission’s intent for the rebuttal period and in making the comments available at that time. Additionally, the term “interested person” in the context of an administrative hearing has a different meaning than in the context of notification requirements during the processing of an application as provided by the Commission’s Chapter 4 rule, *Rules of Practice*, the context to which the Commission’s definition of an interested person is intended to apply. It has not been the Commission’s practice to limit the rebuttal period provided by Chapter 5, § 5.10(B) to interested persons so defined, and the Presiding Officer concludes that doing so here is not warranted. Intervenor 2’s motion to strike is denied.

III. POST-HEARING BRIEFS

The Fourth Procedural Order set a deadline of November 21, 2023, for the parties to submit post-hearing briefs. Post-hearing briefs are intended to take the place of closing statements and, as such, must not introduce new evidence.

IV. AUTHORITY AND RESERVATIONS

This Procedural Order is issued by the Presiding Officer pursuant to the Commission’s Chapter 5, *Rules for the Conduct of Public Hearings*. All objections to matters contained herein should be timely filed in writing with the Commission according to the service list 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.

DONE AND DATED AT AUGUSTA, MAINE THIS 20th DAY OF November 2023

A handwritten signature in cursive script, appearing to read "Everett Worcester", is written in black ink on a light-colored background.

Everett Worcester, Chair and Presiding Officer

**STATE OF MAINE
LAND USE PLANNING COMMISSION**

IN RE: PICKETT MOUNTAIN MINE REZONING APPLICATION

Applicant: Wolfden Mt. Chase LLC

Location: T6R6 WELS

Commission Application Number: ZP 779A

MOTION TO STRIKE WOLFDEN’S REBUTTAL TO PUBLIC COMMENTS

Submitted by

**HOULTON BAND OF MALISEET INDIANS, PENOBSCOT NATION,
NATURAL RESOURCES COUNCIL OF MAINE, CONSERVATION LAW
FOUNDATION**

The Penobscot Nation, Houlton Band of Maliseet Indians, Natural Resources Council of Maine, Conservation Law Foundation (collectively “Intervenor 2”), file this motion to strike the Rebuttal to Public Comments filed by Wolfden Mt. Chase, LLC (“Wolfden”) on November 9, 2023. Wolfden is a party to the proceeding and not an interested person within the LUPC’s definition. Therefore, Wolfden should not be allowed to file rebuttal comments and that filing should be struck from the record.

Wolfden’s rebuttal comments should be struck because Wolfden is not an interested person. Chapter 5 § 5.10(B) provides that:

After the conclusion of a hearing the record will remain open for:

- 1) A period of 10 days for the purpose of allowing interested persons to file written statements with the Commission; and
- 2) A period of seven additional days for the purpose of allowing interested persons to file statements in rebuttal of those filed pursuant to Section 5.10(B)(1) above.

Wolfden is the applicant, not an interested person. Chapter 2 of the LUPC Rules sets out the definitions for applicant, intervenors and interested persons as follows:

Applicant: A person applying for a permit or zone change.... Chapter 2 § 2.02(11)

Intervenor: A person who, in accordance with the Maine Administrative Procedure Act, 5 M.R.S. §§ 9054(1) and (2), and the Commission’s rules governing hearings, has been granted leave to participate as a party in a particular proceeding where a decision has been made to hold a hearing. *Id.* §2.02(110)

Interested Person: A person who submits written comments on an application or who requests, in writing, receipt of materials related to a particular application. *Id.* §2.02(109)

Wolfden is an applicant in this matter, not an interested person, under the LUPC’s definitions. Accordingly, because only interested persons are entitled to file rebuttal comments, Wolfden’s submission should be struck from the record. Wolfden can file a post-hearing brief on November 21, 2023, as agreed by the parties. Any rebuttal that Wolfden wishes to put forth should be reserved for its post-hearing brief.

Chairman Worcester’s own comments near the conclusion of the hearing are consistent with the LUPC Rules and make clear that parties, i.e., the applicant and the intervenors, may not file rebuttal comments. Specifically, at the conclusion of the daytime technical sessions, Chairman Worcester rejected Wolfden’s counsel’s stated understanding that the parties could continue to provide “information responsive just to the issues that came up in the hearing or the public comment session” separately from post-hearing briefing as long as the record was open. Tr. 605, 18–22. Instead, Chairman Worcester emphasized that the parties were limited to post-hearing briefing. Tr. 606, 4–6 (“My understanding was if you haven’t submitted it by now, it’s over.”). Indeed, due to the Chair’s limitation of further submissions, Wolfden objected to certain exhibits, and the parties were offered a chance to submit short briefs addressing these exhibits as the only other post-hearing submission. *See generally* Tr. 610–11. Chairman Worcester’s statement was unambiguous—the parties could not submit any new information after the close of the hearing, nor any new argument outside of the post-hearing briefs. This comports with the LUPC Rules, since parties, including applicants, are not interested persons entitled to rebuttal.

Wolfden's Rebuttal Comments dated November 9, 2023, should be struck from the record.

Dated: November 13, 2023

Respectfully Submitted,



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STATE OF MAINE
DEPARTMENT OF AGRICULTURE, CONSERVATION & FORESTRY
LAND USE PLANNING COMMISSION

IN THE MATTER OF ZONING)	
PETITION ZP 779A)	
WOLFDEN MT. CHASE, LLC)	APPLICANT’S OPPOSITION TO
APPLICATION FOR ZONE CHANGE,)	MOTION TO STRIKE WOLFDEN’S
PICKET MOUNTAIN MINE)	REBUTTAL TO PUBLIC COMMENTS
T6 R6 WELS,)	
PENOBSCOT COUNTY, MAINE)	

Wolfden Mt. Chase, LLC (“Wolfden”) provides the following opposition to Intervenor Two’s Motion to Strike Wolfden’s Rebuttal to Public Comments (the “Motion”).

Intervenor Two argues that the Applicant and parties are prohibited from filing rebuttal testimony in accordance with the November 9 deadline for rebuttal testimony set in the Fourth Procedural Order and discussed at the end of the technical session and last evening session of the public hearing. That interpretation makes no sense here, is contrary to Commission practice, and would be fundamentally unfair to the Applicant.

The final batch of written public comments, constituting nearly 1700 pages, was not released until November 2nd. This occurred not only after the technical and evening sessions of the public hearing, but well after the prior batch of public comments had been released on September 21st. Wolfden had no opportunity to respond to or correct those public comments at the public hearing. It is noteworthy that many members of the public affiliated with Intervenor Two opted to testify at the October 23rd evening session, which was specifically scheduled in response to the efforts of Intervenor Two. Had they testified during the initial scheduled evening sessions of October 16th and 17th, Wolfden could have responded on October 18th, during the last day of the technical sessions. Indeed, many apparently coordinated comments of the public during the October 23rd evening session related to new topics not previously addressed by

Intervenor Two or the public including, for example, blatant misstatements about mines that Mr. Little was associated with in West Africa. It is fundamentally unfair to delay public comments until after conclusion of the technical sessions and then argue that only members of the public (many affiliated with Intervenor Two), but not the Applicant, can respond to those comments.

Moreover, the Applicant disagrees with Intervenor Two's characterization and interpretation of the dialogue that occurred at conclusion of the public hearing. That discussion related to whether the Applicant could respond to issues that came up during the *public hearing*, including specific exhibits proposed by Intervenor Two, in accordance with the deadline for rebuttal comments. Chairman Worcester said they could not – any evidence related to issues raised during the public hearing had to be addressed during the public hearing. Tr. 605:9 to 606:6. Chairman Worcester did not state that the Applicant was excluded from providing rebuttal responses to *public comment*.

To the contrary, at the end of the technical sessions the Chairman stated: “I wish to remind everyone that the record will remain open with written *public comment* until Thursday, November the 5th, 2023 and for an additional week until Thursday, November 9, 2023 for *rebuttal testimony in response to public comment*.” Tr. 610:25-611:5 (emphasis added). Similarly, at the end of the final public comment session on October 23rd, the Chairman stated: “I wish to remind everyone that the record will remain open for written *comments from the public* for 10 days until Thursday, November 2, 2023. And an additional week until Thursday, November 9, 2023, *for rebuttal testimony*.” Day 3 Evening Session, Tr. 115:24-116:3 (emphasis added). Neither time did he suggest, nor would it make sense to conclude, that only the public could file rebuttal testimony. The public had an opportunity to submit additional comments until November 2nd, and thereafter the parties could file rebuttal that was limited to responding to the

additional public comment. Wolfden filed in accordance with the November 9th deadline and limited its rebuttal to responding to public comment, consistent with the Chairman’s direction.

Intervenor Two cites the language of Chapter 5 § 5.10(B) of the Commission’s rules, and claims that rebuttal to public comment was never available to the parties. However, Chapter 5 also states that the “Presiding Officer maintains the authority to: . . . Regulate the course of the hearing, set the time and place of continued hearings, and fix the time for filing of evidence, briefs and *other written submission*.” 01-672 C.M.R. ch. 5, § 2(D)(2)(c) (emphasis added). Our understanding is that Commission practice has allowed the parties to respond to newly submitted public comments in accordance with the deadline set for rebuttal following conclusion of the public hearing, which makes practical sense. It is particularly appropriate, and fairness requires, that the Applicant be allowed to do so here where (i) written public comments were not released until after conclusion of the technical sessions of the hearing, (ii) Intervenor Two succeeded in having an additional public comment session scheduled after conclusion of the technical session, and (iii) the Applicant reasonably understood it was allowed to do so.

Finally, the suggestion that rebuttal should be included in the briefs misapprehends the purpose of rebuttal. Rebuttal is an opportunity to submit evidence. The briefs are typically a summary of, and legal argument related to, record evidence.

Dated: November 14, 2023



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