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September 10, 2012

*Via Hand-Delivery and Electronic Mail*

Ms. Jane Murray, Secretary  
New Hampshire Site Evaluation Committee  
N.H. Department of Environmental Services  
29 Hazen Drive  
Concord, NH 03302-0095

*Re: Antrim Wind Energy, LLC, Docket No. 2012-01*

Dear Ms. Murray:

Enclosed for filing with the New Hampshire Site Evaluation Committee in the above-captioned matter please find an original and 9 copies of Applicant's Objection To Industrial Wind Action Group's Motion For Reconsideration pertaining to Motions to Compel.

Please contact me if there are any questions about this filing. Thank you for your assistance.

Very truly yours,

Rachel A. Goldwasser

Enclosures

cc: Service List (excluding Committee Members)  
Clark A. Craig, Jr. (by first class mail)  
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THE STATE OF NEW HAMPSHIRE  
SITE EVALUATION COMMITTEE

Docket No. 2012-01

Re: Antrim Wind Energy, LLC

**APPLICANT'S OBJECTION TO  
INDUSTRIAL WIND ACTION GROUP'S  
MOTION FOR RECONSIDERATION PERTAINING TO  
MOTIONS TO COMPEL**

NOW COMES Antrim Wind Energy, LLC ("AWE" or "the Applicant"), by and through its undersigned attorneys, and objects to the Motion for Reconsideration Pertaining to Motions to Compel ("Motion for Reconsideration") filed by Industrial Wind Action Group ("IWAG") by stating as follows:

1. In its August 22, 2012 Order on Outstanding Motions, the Site Evaluation Committee ("the Committee") denied IWAG's motion to compel responses to its data requests 1-13 and 1-14, and refused to require that the Applicant provide information regarding power purchase agreement solicitation and negotiation. *Re: Application of Antrim Wind Energy, LLC*, Order on Outstanding Motions (Aug. 22, 2012) at 7-8 ("Order on Outstanding Motions").

2. In its Motion for Reconsideration, IWAG asks the Committee to reverse its decision and require the Applicant to produce these highly confidential materials. IWAG seeks "spreadsheets and quotes containing expected capital expenditures and labor estimates for the project" (Data Request 1-13), "the pro forma schedule for the project," (Data Request 1-13), and "the anticipated price the Applicant believes he needs to sell the project's energy and RECs (per megawatt hour) in order for the project to be financially

viable.” *Motion for Reconsideration* at 1, 2. Failing to cite any error of law or relevant fact, IWAG’s motion must fail.

3. Applying by analogy the New Hampshire Superior Court’s standard for motions for reconsideration, IWAG cannot demonstrate that the Committee overlooked or misapprehended any points of law or fact. N.H. Super. Ct. R. 59-A. In the alternative, applying the RSA 541 standard for motions for rehearing of administrative decisions, IWAG fails to demonstrate that the Committee’s determination was “unlawful or unreasonable.”<sup>1</sup> RSA 541:4. In short, IWAG’s motion fails “to direct ‘attention to matters said to have been overlooked or mistakenly conceived in the original decision...’” *Dumais v. State*, 118 N.H. 309, 311 (1978) (citation omitted).

**I. The Committee Properly Refused to Require Disclosure of the Pro Forma and Capital Cost Estimates to the Parties.**

4. With respect to the pro forma and capital cost estimates, IWAG asserts that the Committee erred because Ms. Linowes can be trusted with confidential information and because she has the “requisite knowledge to contribute to the process in a material way that will benefit the Subcommittee.” *Motion for Reconsideration* at 1. However, the Committee correctly balanced “the government interest in nondisclosure and the individual’s privacy interest in nondisclosure” to determine that disclosure should not be required to any party other than Counsel for the Public. *Lamy v. New Hampshire Public Commission*, 152 N.H. 106, 109 (2005); *Lambert v. Belknap County Convention*, 157 N.H. 375 (2008); RSA 91-A:5, IV. IWAG fails to demonstrate that the Committee’s

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<sup>1</sup> IWAG does not term its motion a “motion for rehearing,” and the Committee’s decision on discovery issues would not present a decision from which appeal can be sought under RSA 541. *See* N.H. Supreme Court R. 4 (differentiating between two types of appeal from administrative decision: “interlocutory transfer without ruling” and an “appeal by petition,” which is governed by RSA 541). An appeal from a discovery decision would certainly be considered an interlocutory appeal. N.H. Supreme Court R. 3.

decision overlooked or misapprehended any points of law or fact with respect to this highly confidential information.

5. The Committee properly found that the Applicant identified a privacy interest in the information requested. Most of the capital cost information was developed by third parties (Acciona and Reed & Reed) and is protected by third party confidentiality agreements. The reasons for these protections are clear – disclosure of, for example, the construction estimates could “harm Reed & Reed and the Applicant’s competitive position when it bids out the project for construction.” *Order on Outstanding Motions* at 3. The pro forma provides a comprehensive financial analysis of the project and is composed of proprietary information modeling the financial inputs and outputs for the project. Competitive generators safeguard this information and do not provide it publicly, and disclosure could provide competitors and suppliers an unfair advantage through the course of negotiation with the Applicant. If the information sought by IWAG were “revealed to the public *or to other parties in this docket*, it could put the Applicant at a significant competitive disadvantage with competitors, vendors and suppliers.” *Order on Outstanding Motions* at 7 (emphasis added).

6. Further, the public interest, if any, in this information is not directly relevant to “the prospects of the Applicant to obtain project financing in the near term.” *Order on Outstanding Motions* at 4; *Re: Application of Antrim Wind Energy, LLC*, Order on Unassented-to Motion for Protective Order and Confidential Treatment (June 4, 2012) at 3-4 (“Order on Unassented-to Motion”). The Committee properly found “it cannot be said that there is a public interest in the disclosure of the information” and that “[d]isclosure of the information to the public is not required at this time, as it would not

inform the public of the activities and conduct of government or this agency.” *Order on Outstanding Motions* at 18. Should the Committee or Counsel for the Public seek to rely on this information, then the public’s interest in disclosure may be weighed more heavily.

7. Finally, even if there is a public interest in disclosure to the parties, that interest is far outweighed by the privacy interest in non-disclosure. *Union Leader Corp. v. New Hampshire Housing Finance Authority*, 142 N.H. 540, 553 (1997). The Applicant’s privacy interest in this information is vital to its business; as stated by the Committee, “it can be argued that disclosure of this information by the company in and of itself would demonstrate insufficient managerial capabilities.” *Order on Outstanding Motions* at 7. Furthermore, the Committee can condition certification of the project on obtaining financing for the project, obviating any need to consider this confidential information at this stage of the proceeding. *Order on Unassented-to Motion* at 3-4 (stating that the issue before the Committee is “the near-term prospect for project financing”).

8. Contrary to IWAG’s assertions, the Committee’s decision is not directed at a particular party; instead the Committee undertook a generalized balancing of the interests at stake to determine that AWE’s privacy interests outweigh the public interest of disclosure. Of course, if the information becomes relevant to the Committee’s decision making process – *e.g.*, if Counsel for the Public or the Applicant seek inclusion of this information on the record for consideration by the Committee, the Lamy/Lambert analysis may indeed shift and require disclosure pursuant to protective order.

9. Disclosure to Counsel for the Public does not change this analysis. The Committee found that this information should be provided under protective order to

Counsel for the Public, recognizing its special statutory role. *See, e.g.*, RSA 162-H:9 (stating that Counsel for the Public “shall represent the public in seeking to protect the quality of the environment and in seeking to assure an adequate supply of energy”); *see also* RSA 162-H:10, V (permitting counsel for the public to conduct “reasonable studies and investigations,” the cost of which is borne by the Applicant); *Application of Groton Wind, LLC*, SEC Docket No. 2010-01, Order on Pending Motions and Further Procedural Order (Dec. 14, 2010) at 2 (finding that information must be disclosed only to Counsel for the Public, due to its special statutory role).

10. IWAG’s assertion that the Committee’s determination “demonstrates a profound disrespect for IWA by assuming IWA cannot be trusted with confidential information” fails to recognize Counsel for the Public’s special statutory role and that an order permitting disclosure would apply to all parties to this action. *Motion for Reconsideration* at 1. The Committee’s decision, which is supported by recent precedent in the Groton Wind matter, merely follows the Lamy/Lambert analysis to its logical conclusion – that highly confidential financial information of non-public corporations should not be disclosed to the parties under these circumstances. *See Application of Groton Wind, LLC*, SEC Docket No. 2010-01, Order on Pending Motions and Further Procedural Order (Dec. 14, 2010) at 2. The Committee’s decision is not directed at IWAG in particular and is not a judgment on IWAG’s ability to maintain confidentiality of particular information.

11. IWAG further misinterprets the Committee’s decision, asserting that it requires parties to obtain consultants to obtain private and confidential information. *Motion for Reconsideration* at 2. A party’s education, knowledge regarding wind project

financials, and their engagement of an expert is irrelevant to the Committee's determination. The Lambert/Lamy balancing test does not incorporate consideration of the requesting party's background or ability to engage experts in consideration of the information requested. The Committee is not being asked to judge, as a factual matter, expertise of individual parties in this matter. The Committee's decision to produce the information to Counsel for the Public and its statutorily provided-for expert is not the product of special treatment of experts; instead it is recognition of the special role of Counsel for the Public in Committee proceedings. As a result, IWAG has failed to demonstrate that the Committee overlooked or misapprehended any points of law or fact. N.H. Super. Ct. R. 59-A. Furthermore, the Committee's decision was not unlawful or unreasonable. RSA 541:4.

## **II. The Committee Properly Refused to Require Disclosure of any Information Regarding Energy Pricing.**

12. In its motion, IWAG attempts to clarify its request for information on power purchase agreement negotiations, asserting that it "is looking for the anticipated price the Applicant believes he needs to sell the project's energy and RECs (per megawatt hour) in order for the project to be financially viable." *Motion for Reconsideration* at 2. IWAG asserts that this information is independent of the actual price which could be approved by the New Hampshire Public Utilities Commission.<sup>2</sup> *Id.* However, this clarification fails to result in any change in the Committee's decision and fails to demonstrate that the Committee overlooked or misapprehended any points of law or fact, or acted unlawfully or unreasonably. N.H. Super. Ct. R. 59-A; RSA 541:4. As such, IWAG's clarification results in a distinction without a difference, and does not

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<sup>2</sup> Please note that this statement assumes that any PPA would be with a New Hampshire utility regulated by the New Hampshire Public Utilities Commission.

affect the conclusion that the information sought is not discoverable because it is irrelevant to the issues presented in this docket and is also privileged negotiation information.

13. IWAG claims that the “data is necessary when evaluating the economic costs of the project relative to claimed benefits.” *Id.* However, the Site Evaluation Committee is not charged with weighing the costs and benefits of the project. *See* RSA 162-H:16, IV. Thus, the price which would result in a viable project is irrelevant to the Committee’s analysis. *Order on Outstanding Motions* at 8 (stating, regarding power purchase solicitation and negotiation, that “such information does not provide useful or relevant information to the Subcommittee with regard to the financial and managerial capabilities of the Applicant”).

14. Furthermore, even if the information IWAG requests were relevant to the Committee’s analysis, IWAG fails to demonstrate that this information should be treated differently from the solicitation and negotiation information which the Committee has found is not discoverable. The information requested is highly confidential, sensitive commercial information, which, if publicly disclosed, would be very damaging to AWE because it would provide the “floor” necessary for pricing a PPA. As such, the analysis is the same as enunciated in *Public Service Company of New Hampshire*, 95 NH PUC 579, 589 (2010). This Committee has already properly refused to require production of information related to the negotiations for power purchase agreements. *See Order on Outstanding Motions* at 3, 8 (“Requiring companies to reveal the state of negotiations for power purchase agreements that have not yet been executed would cause substantial harm . . . .”). IWAG provides no reason that the Committee should change its position.

## CONCLUSION

15. For the reasons set forth above, Industrial Wind Action Group's Motion for Reconsideration Pertaining to Motions to Compel must fail, and the Applicant should not be required to produce the confidential information sought.

WHEREFORE, the Applicant respectfully requests that the Committee:

- A. Deny IWAG's Motion for Reconsideration Pertaining to Motions to Compel; and
- B. Grant such further relief as deemed appropriate.

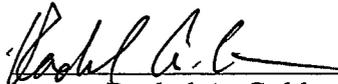
Respectfully submitted,  
**Antrim Wind Energy, LLC**  
By its Attorneys,  
Orr and Reno, P.A.

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Dated: September 10, 2012

### Certificate of Service

I hereby certify that on this 10th day of September 2012, a copy of the foregoing Objection was sent by electronic mail or U.S. Mail, postage prepaid, to persons named on the Service List of this docket, excluding Committee Members.

  
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Rachel A. Goldwasser