



William L. Chapman
George W. Roussos
Howard M. Moffett
James E. Morris
John A. Malmberg
Douglas L. Patch
Steven L. Winer
Peter F. Burger
Lisa Snow Wade
Susan S. Geiger
Jennifer A. Eber
Jeffrey C. Spear
Connie Boyles Lane
Judith A. Fairclough
Maureen D. Smith
Todd C. Fahey
James F. Laboe
Robert S. Carey
John M. Zaremba
Heidi S. Cole
Jeremy D. Eggleton
Rachel A. Goldwasser

October 1, 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: *Docket 2012-01 - Application of Antrim Wind Energy, LLC
for a Certificate of Site and Facility for a Renewable Energy Facility***

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 a Contested Motion for Clarification of Protective Order or, in the alternative, Motion for Protective Order, and Motion for Protective Treatment of Unredacted Deloitte Report. Also enclosed in a separate, sealed envelope is one copy of the pages of the Redacted Deloitte Report that contain the confidential capacity factor information discussed in the enclosed Motion.

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

Very truly yours,

Susan S. Geiger

Enclosures

cc: Service List, excluding Committee Members
Clark A. Craig, Jr. (by first class mail)

923426_1

Lawrence A. Kelly
(Of Counsel)

**THE STATE OF NEW HAMPSHIRE
BEFORE THE
NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

DOCKET NO. 2012-01

**APPLICATION OF ANTRIM WIND ENERGY, LLC
FOR A CERTIFICATE OF SITE AND FACILITY**

**CONTESTED MOTION FOR CLARIFICATION OF 8/22/12 PROTECTIVE
ORDER OR, IN THE ALTERNATIVE, MOTION FOR PROTECTIVE ORDER
AND
MOTION FOR PROTECTIVE TREATMENT OF
UNREDACTED DELOITTE REPORT**

NOW COMES Antrim Wind Energy, LLC (“AWE” or “the Applicant”), by and through its undersigned attorneys, and respectfully moves the Site Evaluation Committee (“SEC” or “Committee”) to clarify that the August 22, 2012 Order on Outstanding Motions (“Order on Outstanding Motions”) protects the confidentiality of capacity factor information described below. In the alternative, AWE moves the Committee to issue a protective order that preserves the confidentiality of that information. AWE further seeks confirmation that confidential information contained in the unredacted version of the Report of Deloitte Financial Advisory Services submitted by Counsel for the Public to the Committee is confidential and is protected under the Committee’s Order on Outstanding Motions. In support of this Motion, AWE states as follows:

1. On September 25, 2012, Counsel for the Public provided both unredacted and redacted versions of the Report of Deloitte Financial Advisory Services, dated September 24, 2012 and entitled “Analysis of the Wind Generation Facility Proposed to be Built in Antrim, New Hampshire” (the “Report”) to Counsel for the Committee and to

the undersigned counsel for the Applicant. *Notice of Intent to Disclose Redacted Report* (Sept. 25, 2012). The instant pleading seeks clarification from the Committee that the detailed capacity factor information contained in the Report is protected under the Committee's prior orders and may not be produced to the parties in the "redacted" version of the Report, and to clarify that the "unredacted" version of the report is protected by the Committee's Order on Outstanding Motions dated August 22, 2012.

I. Detailed Capacity Factor Information is Protected as Confidential by the Committee's August 22, 2012 Order on Outstanding Motions.

2. When Counsel for the Public filed the Report on September 25, 2012, it indicated that unless AWE filed a motion for protective treatment by 5 p.m. on September 26, 2012, it would produce the redacted Report to the parties in the above-captioned matter. *Notice of Intent to Disclose Redacted Report* (Sept. 25, 2012). After conferring at length, the Applicant and Counsel for the Public were unable to come to agreement regarding whether capacity factor information, contained at pages 24-27 of the Report (and heretofore not produced to the parties in this proceeding), may be produced to the parties and the public in the redacted version of the Report.¹ Via electronic mail, Counsel for the Public extended the deadline for filing motions for protective treatment until Monday, October 1, 2012 at noon.

¹ In a telephone conversation on September 27, 2012, Counsel for the Public, counsel for the Committee, and the undersigned counsel for the Applicant discussed disclosure of the confidential capacity factor information to the parties if the Committee granted a joint request for a protective order. The undersigned counsel originally agreed to disclose capacity factor information to the parties even though such information is at issue in Industrial Wind Action Group's July 24, 2012 motion to compel which the Committee has not yet ruled upon. The undersigned counsel agreed to said production in an attempt to avoid additional discovery disputes. However, upon re-review of the August 22, 2012 Order on Outstanding motions, undersigned counsel recognized that the capacity factor information at issue here is already protected under that order because it was produced to Counsel for the Public in support of Antrim Wind's pro forma financial analyses. The undersigned counsel contacted Counsel for the Public as soon as the error was recognized and indicated that given the existence and wording of the Order on Outstanding Motions, there was no need to obtain a further protective order for the capacity factor information, and in light of that, AWE would not provide this confidential information to the parties pending the outcome of IWAG's motion to compel.

3. The only Project capacity factor information which has been produced to all the parties to date is the “range” of between 37.5% and 40.5%. *See Application of Antrim Wind Energy, LLC for a Certificate of Site and Facility* at 25. For the reasons set forth below, AWE has repeatedly and uniformly refused to produce detailed capacity factor information to the parties in this docket. For example, on July 24, 2012, Industrial Wind Action Group (IWAG) filed its *Motion to Compel Antrim Wind LLC to Respond to Technical Session Data Requests*, seeking disclosure of, among other things, AWE’s capacity factor information. AWE objected to IWAG’s request on August 1, 2012. *Applicant’s Objection to Industrial Wind Action Group’s Motion to Compel Antrim Wind LLC to Respond to Technical Session Data Requests* (Aug. 1, 2012) (“AWE Objection to IWAG Motion to Compel”). The Committee has not yet ruled on IWAG’s motion to compel.

4. On August 22, 2012, the Committee issued an order regarding, *inter alia*, confidential materials to be produced to Counsel for the Public. *Order on Outstanding Motions* (Aug. 22, 2012). The Order concluded that confidential financial information should be produced to Counsel for the Public under protective order, but such information must not be produced to any other parties. *Id.* at 3-4, 17-18. The Order identified several types of financial information to be produced to Counsel for the Public and its experts, Deloitte Financial Advisory Services. Specifically, it ordered that the “Applicant provide to Counsel for the Public a copy of any document outlining its business plan for the project; all financial pro-formas that have been considered by the company and *any document which is necessary to understand the estimates contained*

in the pro-forma.” *Id.* at 4 (emphasis supplied). Under the Order, all such information is confidential and must be treated as such by Counsel for the Public. *Id.* at 18.

5. In accordance with the Order on Outstanding Motions, AWE provided to Deloitte its pro formas. The pro formas included assumptions regarding the capacity factor for the Project. The Applicant also provided Deloitte with a detailed report by V-Bar, LLC regarding capacity factors at the site because this report supports the assumptions contained in the pro formas. The V-Bar report contains the capacity factor for the Project under a variety of probability analyses, including the capacity factors assumed for purposes of the pro formas. The capacity factor information was produced to aid in Deloitte’s understanding the pro formas, and as such, is protected by the Order on Outstanding Motions.

6. Notwithstanding the Order on Outstanding Motions, Counsel for the Public has determined that the capacity factor information should be disclosed to the parties to this matter. In these circumstances, before Counsel for the Public discloses to the parties the “redacted” Report, which includes confidential capacity factor information, the Applicant seeks clarification from the Committee enunciating that this information is preserved as confidential by the protective order contained in the August 22, 2012 Order on Outstanding Motions and may not be disclosed further without additional action from the Committee.

II. In the Alternative, a Protective Order Should Issue Protecting the Capacity Factor Information from Disclosure to the Parties.

7. If the Committee agrees with Counsel for the Public’s reading of the August 22, 2012 Order on Outstanding Motions, and the capacity factor information is

not currently protected, then the Applicant now seeks a new order providing protective treatment of that information.

8. RSA 91-A:5, IV. provides, *inter alia*, that records pertaining to confidential, commercial or financial information, and other files whose disclosure would constitute an invasion of privacy, are exempt from the public disclosure requirements of RSA 91-A. The New Hampshire Supreme Court has determined that “overhead and operating costs” as well as “financial condition” information constitute “commercial or financial” information within the meaning of RSA 91-A:5, IV. *Union Leader Corp. v. New Hampshire Housing Finance Authority*, 142 N.H. 540, 553 (1997). This Committee has determined that financial information of a non-publicly held applicant for a certificate of site and facility (such as AWE) need not be disclosed to the public or to other parties, except for Counsel for the Public, due to his important statutory role pursuant to RSA 162-H:9. *See, e.g., Order on Outstanding Motions* at 18.

9. As stated in AWE’s Objection to IWAG’s Motion to Compel, in general, capacity factor information is highly confidential, sensitive commercial and technical information which constitutes trade secrets of AWE. *See* RSA 350-B:1, IV. In fact, this information is indistinguishable from the other information which the Committee ordered produced only to Counsel for the Public. Capacity factor information goes to the core of AWE’s ability to negotiate for power purchase agreements; if the capacity factor information is disclosed, the Applicant would be placed at a significant competitive disadvantage. This is particularly true because capacity factor information can be used to determine AWE’s position on energy prices in the context of negotiations for power purchase agreements. As such, if this proprietary information is made public or made

available to AWE's competitors, AWE would suffer serious injury; the possibility also exists that other participants in the competitive New England electricity market could utilize this sensitive information to their advantage and to the disadvantage of the Applicant (*e.g.* in bidding against AWE for power agreements) and other market participants. Furthermore, the Applicant has expended significant resources to develop this information and does not publicly disclose it.

10. Applying the three-pronged analysis established in *Lambert v. Belknap County Convention*, 157 N.H. 375 (2008) and *Lamy v. New Hampshire Public Utilities Commission*, 152 N.H. 106 (2005) the instant motion compels the same result as the August 22, 2012 Order on Outstanding Motions: 1) The Applicant has identified a privacy interest in the information as demonstrated above. 2) There is limited public interest in disclosure of this information, as it has yet to be determined whether this information will be relied upon by the Committee. 3) Assuming, *arguendo*, that there is a public interest in disclosure of this information, that interest is greatly outweighed by AWE's privacy interests in non-disclosure as described above. *Order on Outstanding Motions* at 18.

11. In view of the foregoing, the Committee should issue an order protecting from disclosure the capacity factor information noted on the attached pages of the redacted report and authorizing only Counsel for the Public to have access to this information.

III. The Committee Should Issue a Protective Order Protecting the Unredacted Report.

12. The unredacted Report submitted by Counsel for the Public to the Committee contains commercially sensitive and proprietary information which is not

disclosed publicly. More specifically, the unredacted Report includes confidential information (including, but not limited to, information relative to: fixed charge coverage ratios, assumptions regarding Power Purchase Agreement prices, assumptions regarding energy prices, operating expenses, financing needs, and capital structure) that has already been accorded protective treatment by the SEC's Order on Outstanding Motions dated August 22, 2012 at pages 4 and 18. In view of the foregoing, the unredacted Report should be accorded confidential treatment and should not be disclosed to anyone except Counsel for the Public.

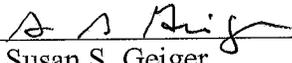
WHEREFORE, AWE respectfully requests that the Committee:

- A. Issue an order clarifying that the capacity factor information disclosed to Deloitte is protected from disclosure under the protective order issued in the Committee's August 22, 2012 Order on Outstanding Motions;
- B. Issue a protective order protecting the capacity factor information identified herein (and in the attached pages of the Report that are marked "confidential") such that Counsel for the Public may not release such information to the parties by way of the redacted Report;
- C. Issue a protective order safeguarding the unredacted Report (which contains information that is protected by the Committee's August 22, 2012 order) from disclosure to anyone other than Counsel for the Public; and
- D. Grant such further relief as it deems appropriate.

Respectfully submitted,

Antrim Wind Energy, LLC
By its attorneys,
ORR & RENO, P.A.

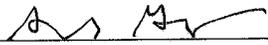
One Eagle Square
P.O. Box 3550
Concord, NH 03302-3550

By: 
Susan S. Geiger
Telephone: (603) 223-9154
Email: sgeiger@orr-reno.com

October 1, 2012

Certificate of Service

I hereby certify that on this 1st day of October, 2012, a copy of the foregoing Motion was sent by electronic or U.S. mail, postage prepaid, to persons named on the Service List of this docket, excluding Committee Members.


Susan S. Geiger

923232_1