



June 3, 2013

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**Via Hand-Delivery and Electronic Mail**  
New Hampshire Site Evaluation Committee  
c/o Ms. Jane Murray, Secretary  
29 Hazen Drive  
P.O. Box 95  
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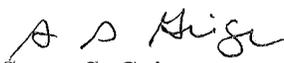
***Re: Docket 2012-01, Application of Antrim Wind Energy, LLC***

Dear Ms. Murray:

Enclosed for filing in the above-referenced docket, please find an original and 9 copies of Applicant's Motion for Rehearing and Motion to Reopen the Record. Please note that the enclosed order is timely filed. The Presiding Officer in this docket issued an order on May 7, 2013 stating that the correct date of the Subcommittee's Decision is May 2, 2013. RSA 541:3 provides that a motion for rehearing must be filed within 30 days of a decision or order. Because the thirtieth day after May 2, 2013 fell on a Saturday (*i.e.*, June 1, 2013), the deadline for filing the enclosed motion for rehearing is extended to the following business day, *i.e.*, Monday, June 3, 2013. *See Application of Groton Wind, LLC, SEC Docket No. 2010-01, Order on Motions for Clarification, Rehearing and Reconsideration (Aug. 8, 2011) at 3; see also, Radziewicz v. Town of Hudson, 159 N.H. 313, 317 (2009); HIK Corp. v. Manchester, 103 N.H. 378, 381 (1961); RSA 21:35, II; and N.H. Code Admin. R. Site 202.08 (c).*

Antrim Wind Energy, LLC respectfully requests that the Subcommittee rule on the enclosed motions as expeditiously as possible. Please let me know if there are any questions about this filing. Thank you.

Very truly yours,

  
Susan S. Geiger

cc: Service List (electronic mail only)  
1016341

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

**Docket No. 2012-01**

**Re: Antrim Wind Energy, LLC**

**APPLICANT'S MOTION FOR REHEARING  
AND  
MOTION TO REOPEN THE RECORD**

NOW COMES Antrim Wind Energy, LLC ("AWE" or "the Applicant"), by and through its undersigned attorneys, and, pursuant to RSA 162-H:11; RSA 541:3; RSA 541:4 and N.H. Admin. R. Site 202.29, respectfully moves the Subcommittee of the New Hampshire Site Evaluation Committee ("the Subcommittee")<sup>1</sup> that heard the above-captioned matter for a rehearing to consider the issues discussed below. In addition, pursuant to Rule Site 202.27, AWE moves the Subcommittee to reopen the record to consider new relevant material and non-duplicative information that is necessary for a full consideration of the issues in this docket. In support of these motions, the Applicant hereby incorporates by reference the arguments presented in its Post-Hearing Brief and also states as follows:

**I. MOTION FOR REHEARING**

**A. Summary of the Argument**

The Presiding Officer correctly acknowledged that these proceedings before the Subcommittee must provide predictability and fairness to applicants and parties. Tr. 2/6/13 (Deliberations) Day 2, PM at 70:9-19. The May 7, 2013 Decision Denying

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<sup>1</sup> The Subcommittee has all of the associated powers and duties of the New Hampshire Site Evaluation Committee, which necessarily include the authority to grant motions for rehearing and to reopen the record. See RSA 162-H:4, IV.

Application for Certificate of Site and Facility (“Decision”) fails to meet this standard because it was neither predictable nor fair, justifying reconsideration by the Subcommittee.

The Subcommittee has been charged by the legislature with the important duty of making decisions that “assure the state has an adequate and reliable supply of energy in conformance with sound environmental principles.” RSA 162-H:1. This important duty demands fairness in the process; similarly situated applicants must be treated consistently. The Subcommittee’s role also demands procedural predictability in accordance with well established principles of administrative law. Predictability means that applicants and parties should be able to rely on the SEC’s past decisions, and that new rules should not be developed without prior notice, or applied unfairly or retroactively. *Cf.* RSA 541-A:3, *et seq.* Moreover, the SEC possesses authority under RSA 162-H:10, VI to adopt new standards prospectively in accordance with RSA 541-A. Thus, it need not engage in *ad hoc* adjudication to formulate new standards. *See Retail, Wholesale & Dept. Store Union, AFL-CIO v. National Labor Relations Board, et al.*, 466 F.2d 380, 388-89 (D.C. Cir. 1972).

The Presiding Officer’s recognition that there must be “a sound basis” for deviating from prior decisions, Tr. 2/6/13 (Deliberations) Day 2, PM at 70:7-8, and that there must “be a sense that we have a reasoned approach,” and a “reason why we head off in different directions and that it isn’t just the whims of whoever happened to be sitting on any particular case,” *id.* at 70:11-17, only underscores why rehearing must be granted in this case. Here, the Subcommittee “headed off in different directions” in its analysis of aesthetic impacts, in its failure to make a ruling on AWE’s financial capability, and in its

failure to correctly apply the 2009 World Health Organization's Guidelines for night sound levels without a reasonable basis for doing so.

Prior to this Decision, this Subcommittee created predictability by consistently evaluating three prior wind projects using a regional impact analysis; these projects presented aesthetic concerns virtually indistinguishable from those in this case. The record evidence in this docket establishes that AWE's application met all the aesthetic impact standards followed by the SEC in prior wind project application reviews. Despite this, the Decision deviated from that precedent, without explanation, and instead applied a new standard which focused locally on purported "viewsheds of significant value within the State of New Hampshire." *Decision* at 55. It further arbitrarily focused on the difference in height between prior-permitted turbines and the proposed Project turbines. In establishing these new standards, the Subcommittee failed to take into account prior cases, including the Merrimack Station decision which determined (in the context of a coal fired power plant) that extending a chimney from 317 feet to 445 feet did not constitute a "sizable addition" to the facility. *Re: Merrimack Station*, SEC Docket No. 2009-01, Order Denying Motion for Declaratory Ruling (Aug. 10, 2009) at 15 and *Dissent of Vice-Chairman Getz* at 1. It was unreasonable and unfair for the Subcommittee to apply these new standards retroactively after AWE had invested substantial time and resources<sup>2</sup> developing a project that would meet the standards previously used by the SEC in evaluating wind projects.

The Decision also has the unfair effect of granting veto power over the Project to a small group of citizens opposed to any wind project in Antrim despite the

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<sup>2</sup> As of January 2012, AWE had spent \$1.85 million in development costs simply to be able to file its SEC application. Ex. AWE 3, Appendix 14B (Economic Impact Analysis) at 15.

overwhelming support for the Project in the general population of Antrim. It also has the detrimental effect of preventing an additional source of much-needed clean, renewable energy from being added to the state's generation portfolio, despite the Project's significant and unprecedented commitment to land conservation and other mitigation which would broadly benefit citizens and visitors to the region, in conformance with sound environmental principles. *See* RSA 162-H:1.

In addition, the Subcommittee acted unlawfully, unreasonably, and arbitrarily in failing to issue a ruling on the Applicant's financial capability in accordance with RSA 162-H:16, IV(a). The Deloitte Report and all expert testimony support a finding that AWE meets the statutory standard. Further, the Applicant simply seeks application of the same financial capability standard and condition as was applied to the Granite Reliable Project, and the Subcommittee acted unlawfully in failing to apply that standard and condition in this case.

Similarly, the Subcommittee should reconsider its sound conditions, which are not based on record evidence and are unlawful, unreasonable, and arbitrary. While the Subcommittee indicated that it was applying the 2009 World Health Organization's Guidelines for night sound levels, it failed to follow those guidelines and applied an absolute standard instead of a yearly average. The Subcommittee also unlawfully, unreasonably, and arbitrarily departed from longstanding New Hampshire precedent regarding wind project sound conditions without expressing any reason for this departure, and without recognizing that only two sound complaints have been made about the Lempster Project (one of which related to a faulty hearing aid). As a result, rehearing of the sound issue is necessary and appropriate.

Finally, the Subcommittee should reopen the record to consider new, additional mitigation and financial information. In response to the Subcommittee's statements during deliberations, AWE proposes additions to its mitigation package which include removing turbine #10, thereby dramatically reducing perceived visual impacts to Willard Pond, providing additional conservation of 100 acres on Tuttle Hill, reaching agreement with the Town of Antrim on a one-time payment for enhancements to the Gregg Lake Beach area as full an adequate compensation for perceived visual impacts there, and offering a one-time payment to NH Audubon. The record should also be reopened to include new and additional financial capability information in the form of letters of interest in the Project from two financial institutions. Reopening the record will allow the Subcommittee to consider new, important and relevant information which responds to its concerns regarding the Project.

#### **B. Rehearing Standard**

Any SEC order or decision may be the subject of a Motion for Rehearing filed by a party to the proceeding or any person directly affected thereby. RSA 162-H:11; RSAs 541:2 and :3; N.H. Admin. R. Site 202.29(a). The purpose of rehearing "is to direct attention to matters that have been overlooked or mistakenly conceived in the original decision...." *Dumais v. State*, 118 N.H. 309, 311 (1978) (internal quotations omitted). Reconsideration is justified when the moving party identifies errors of fact, reasoning or law and describes how each error causes the Committee's decision to be "unlawful, unjust or unreasonable, or illegal in respect to jurisdiction, authority or observance of the law, an abuse of discretion or arbitrary[,] unreasonable or capricious." N.H. Admin. R. Site 202.29 (d) (1) and (2). The Subcommittee is authorized to grant a rehearing request

for “good reason.” RSA 541:3. Good reason for rehearing exists here because the Majority Decision of the Subcommittee has erred in the manner in which it considered the aesthetic impact of the proposed AWE facility. Additionally, the Subcommittee’s Majority Decision fails to address AWE’s financial capability and mistakenly applies an unreasonable sound standard. These oversights and mistakes render the Decision “unlawful, unjust, or unreasonable...an abuse of discretion or arbitrary[,] unreasonable or capricious.” *Id.*

### AESTHETICS

#### **C. The Majority’s Finding that the AWE Facility Will Have an Unreasonable Adverse Effect on Aesthetics is Unlawful, Unreasonable, and Arbitrary**

The Majority’s Decision in this case found that the AWE wind energy facility (“the Facility”) would have an unreasonable adverse effect upon aesthetics. *Decision and Order Denying Application for Certificate of Site and Facility* (April 25, 2013)<sup>3</sup> (“*Decision*”) at 48. In reaching its decision, the Majority states that it considered three issues: “the impact of the Facility’s size and scope on the aesthetics of the overall community; the impact of the Facility on the area referred to as Willard Pond and the dePierrefeu Wildlife Sanctuary; and, the lack of satisfactory mitigation for the aesthetic impacts of the Facility.” *Decision* at 49. Rather than follow its precedent in examining these issues, the reason articulated by the Majority for its denial of AWE’s Application for a Certificate of Site and Facility is that, “the Facility will have an unreasonable adverse effect on viewsheds of significant value within the State of New Hampshire.” *Id.* at 55. The Decision must be reheard and reconsidered because it flies in the face of the

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<sup>3</sup> Although the Decision is dated April 25, 2013, the Presiding Officer has issued an order indicating that the correct date of the Decision is May 2, 2013. *Order Correcting Date of Decision Denying Application for Certificate of Site and Facility* (May 7, 2013).

SEC's prior rulings on the siting of wind facilities, unfairly imposes new standards of review on AWE that were not imposed on other applicants, and ignores the weight of evidence in the record on the aesthetics issue under consideration, giving undue weight to the views of a small minority of stakeholders.

**1. The Majority Decision Is Unlawful, Unreasonable, and Arbitrary For Failing To Follow Precedent Without Explanation**

It is a well-recognized precept of administrative law that “[t]he law demands ascertain orderliness. If an administrative agency decides to depart significantly from its own precedent, it must confront the issues squarely and explain why the departure is reasonable.” *Davila-Bardales v. Immigration and Naturalization Service*, 27 F.3d 1, 5 (1<sup>st</sup> Cir. 1994). The Decision is unlawful, unreasonable, and arbitrary, justifying reconsideration because the Majority failed to follow established SEC precedent regarding analysis of aesthetic impacts of wind turbines or distinguish this case from prior decisions that granted certificates of site and facility to other ridgeline wind projects that, like AWE's project, “have very tall wind turbines located on ridge lines that are visible from many different locations.” *Dissent of Johanna Lyons, Craig Green and Harry Stewart* at 1 (“Dissent”).

In this case, the Subcommittee concedes that it has an obligation to follow precedent or explain its deviation from prior decisions. For example, as the Presiding Officer stated during deliberations:

[I]n the notion of predictability and fairness to applicants and parties in the future on any other cases, there has to be a sense that we have a reasoned approach to what we're doing and that we are not locked into the decisions made by people in the past, but we have reason why we head off in different directions and that it isn't just the whims of whoever happened to be sitting on any particular case that the answers are bouncing all over the place.

Tr. 2/6/13 (Deliberations) Day 2, PM at 70:9-19.

The SEC has also specifically recognized that as an adjudicatory body, it should properly consider precedent for guidance. *See Application of Groton Wind*, SEC Docket No. 2010-01, Order on Motion for Clarification, Rehearing and Reconsideration (Aug. 8, 2011) at 13. Following precedent is appropriate and reasonable especially in a situation such as this one where there are no objective statutory or regulatory evaluation criteria for assessing aesthetic impacts. As the Dissenters in this case noted, the absence of such criteria produces a subjective decision. *Dissent* at 1. In order to avoid an unreasonable and unjust result, the Subcommittee should have examined and followed the SEC's prior decisions analyzing the aesthetic impacts of wind projects.

The Subcommittee's failure to follow prior precedent or explain why it has changed the standards it will apply constitutes reversible error. *See Federal Communications Commission v. Fox Television Stations*, 556 U.S. 502, 515 (2009) ("Fox Television Stations") ("To be sure, the requirement that an agency provide a reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.") (emphasis in original); *Davila-Bardales*, 27 F.3d at 5; *Alliance to Protect Nantucket Sound v. Department of Public Utilities*, 959 N.E.2d 413, 423 (Mass. 2001) (valid explanation must be provided for departure from precedent); *Matter of Charles A. Field Delivery Service, Inc.*, 488 N.E.2d 1223, 1227 (Mass. 1985) (absent an explanation regarding departure from

precedent, failure to follow precedent is an arbitrary act requiring reversal, even if there is substantial record evidence to support the agency's determination).<sup>4</sup>

Unlike the Majority, the Dissenters in this case correctly "considered the precedent set by previous decisions...as well as the range of possible mitigation measures discussed by experts during the hearings on the Antrim Wind LLC Application."

*Dissent*, at 1. The Dissenters noted that the three other certificated New Hampshire wind projects were discussed to various degrees during the hearings in this docket and "could have served as precedent" for the Decision. *Id.* The Dissenters correctly observed that "[n]o 'bright lines' are evident that can be used to objectively distinguish the actual aesthetic effects of these approved projects" from the AWE Project. *Id.* The specific "approved projects" to which the Dissenters referred are those that were the subject of the Lempster Wind, Granite Reliable Power and Groton Wind dockets.

In the case of the Granite Reliable Power Project (which consists of 33 turbines<sup>5</sup> having a height of 411 feet<sup>6</sup>), the SEC granted a certificate and noted that "the turbines are tall structures that will extend well beyond tree top level, but at the same time, the evidence does not support a finding that the turbines themselves are aesthetically displeasing." *Application of Granite Reliable Power, LLC*, SEC Docket No. 2008-04,

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<sup>4</sup> While the New Hampshire Supreme Court has stated that an agency is not precluded from changing its position, the Court supported its conclusion by relying on *Good Samaritan Hospital v. Shalala*. *Appeal of Public Service Company of New Hampshire*, 141 N.H. 13, 22 (1996). *Good Samaritan Hospital* is a United States Supreme Court decision which goes on to state that "[o]n the other hand, the consistency of an agency's position is a factor in assessing the weight that position is due. As we have stated: 'An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference' than a consistently held agency view.'" *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 417 (1993) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446, n. 30 (1987)). Since the *Good Samaritan* case, the Supreme Court issued the decision in *Fox Television Stations*, described above, which indicates that an agency certainly may not shift its position without explaining that shift. *Fox Television Studios*, 556 U.S. at 515.

<sup>5</sup> See *Application of Granite Reliable Power, LLC*, SEC Docket No. 2008-04, Decision Granting Certificate of Site and Facility (July 15, 2009) at 2.

<sup>6</sup> See *Decision* at 50, n. 3.

Decision Granting Certificate of Site and Facility With Conditions (July 15, 2009) at 43 (“Granite Reliable Power Decision”). The Granite Reliable Power Project is located approximately 2 miles from the 39,000-acre Nash Stream State Forest (New Hampshire’s largest State Forest),<sup>7</sup> which is “west of the project site and provides undeveloped recreational opportunities, such as hunting and fishing as well as hiking and backcountry skiing and snowshoeing. Numerous mountains are within the Forest including Baldhead, Muise, Whitcomb, Long, North and South Percy, Stratford, Sugarloaf, and other minor peaks southeast of Blue Mountain. There are hiking trails to Percy Peak and to Sugarloaf Mountain.” *Application of Granite Reliable Power*, SEC Docket No. 2008-04, Visual Impact Assessment, Appx. 11 at 14. The Groton Wind Project was certificated even though views of the project site are visible from several locations on Route 3A (the River Heritage Scenic Byway) and despite the fact that 19 to 24 wind turbines are visible from Loon Lake. *See Application of Groton Wind, LLC*, SEC Docket No. 2010-01, Decision Granting Certificate of Site and Facility With Conditions (May 6, 2011) (“*Groton Decision*”) at 48; *Application of Groton Wind, LLC*, SEC Docket No. 2010-01, Application at 61. And, in the case of the nearby Lempster Wind Project, the SEC granted it a certificate even though the twelve turbine project is close to (within a mile from) Pillsbury State Park – a public resource that includes several completely undeveloped ponds all within between approximately one and three miles of the Lempster Project.<sup>8</sup> Several turbines are visible from at least one of these ponds. *See* New Hampshire Parks and Recreation Website, Pillsbury State Park, available at

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<sup>7</sup> Cohos Trail, available at <http://www.cohostrail.org/nashupdate.html> (last visited May 31, 2013).

<sup>8</sup> *See* Attachment A, Map of Lempster Wind Project and Pillsbury State Park ponds. This map is contained in *Application of Lempster Wind, LLC*, NH SEC Docket 2006-01, Appendix 6 (Aug. 28, 2006). As such, the Subcommittee may take official notice of it. *See* RSA 541-A: 33, V (b).

<http://www.nhstateparks.org/explore/state-parks/pillsbury-state-park.aspx> (last visited May 31, 2013); *Application of Lempster Wind, LLC*, SEC Docket No. 2006-01, Decision Issuing Certificate of Site and Facility With Conditions (June 28, 2007) (“*Lempster Decision*”) at 27-28; see Section I. C.1.a., *infra*. There are no aesthetic impact issues here that distinguish the Antrim Project from these three prior approved projects. The Subcommittee therefore should reconsider its deviation from precedent, and grant a certificate to AWE.

**a. In its analysis of impacts on Willard Pond, the Majority failed to take into account SEC precedent regarding Pillsbury State Park**

Applicants and members of the public justifiably rely on prior SEC decisions for guidance on the issue of how aesthetic impacts of a wind project are evaluated. Although RSA 162-H:16, IV requires that the SEC determine whether a proposed energy facility will have “an unreasonable adverse effect on aesthetics,” the term “aesthetics” is not defined in RSA 162-H or in the SEC’s rules, nor are there any statutory guidance or rules governing the manner in which aesthetic impacts are to be determined. In the absence of such guidance, reliance on previous SEC orders and decisions is reasonable and just. *Cf. Application of Groton Wind, LLC*, SEC Docket No. 2010-01, Order on Motion for Clarification, Rehearing and Reconsideration (Aug. 8, 2011) at 13 (consideration of previous orders and decisions does not render SEC’s decision unreasonable or unjust).

If the SEC is free to abandon its precedent, developers and members of the public will be left with no guidance on the aesthetics standards that the SEC will apply to any given project. See *Letter from Kate Epsen, Executive Director of the New Hampshire Sustainable Energy Association* (May 31, 2013). This is patently unfair and

unreasonable. It is also unjust and unreasonable for the Subcommittee to have denied AWE's application based solely on aesthetic impacts when, in the past, certificates have been granted to other facilities that have more wind turbines visible from nearby lakes and ponds (including completely undeveloped ponds within a state park ) than the Antrim Project does. Finally, it is unjust and unreasonable to have denied the AWE application given that other wind facilities that have been granted certificates did not have the extensive mitigation measures already proposed by AWE, namely, the unprecedented commitment by AWE to use radar activated lighting and to conserve over 800 acres of ridgeline in perpetuity even after the turbines have been decommissioned.

The Majority attached an unwarranted and improper significance to the viewshed of Willard Pond in justifying denial of a certificate to AWE. In doing so, it unlawfully failed to take into account the precedent established in the Lempster case, i.e. approval of a wind facility within the viewshed of undeveloped ponds in a nearby state park. *Fox Television Stations*, 556 U.S. at 515 (“To be sure, the requirement that an agency provided reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position.”) (emphasis in original). As stated above, Pillsbury State Park contains several undeveloped ponds and is a state-designated public resource which is close to the Lempster Project. Counsel for the Public's aesthetics witness, Jean Vissering, characterized Pillsbury State Park as a “visually sensitive resource,” Tr. 11/28/12 Day 7, PM at 97:24-98:6, which had “**no difference in value**” than the Willard Pond Wildlife Sanctuary in terms of their “**sensitivity to viewing.**” Tr. 11/28/12 Day 7, AM at 78:1-10 (emphasis added). Ms. Vissering testified that “there's probably not a whole lot of difference between a state park, like Pillsbury and the

Audubon Nature Center, in terms of they both probably tend to be served more by kind of a regional group of people;" *see* Tr. 11/28/12 Day 7, PM at 40:1-5, and that the Lempster Project is visible from Pillsbury State Park - a "kind of highly---what I would call a 'visually sensitive resource.'" Tr. 11/28/12 Day 7, PM at 98:1-6. Given the similarities between Pillsbury State Park and the NH Audubon Wildlife Sanctuary noted by Ms. Vissering, as well as their respective proximities to the Lempster Wind facility and the AWE Project, there is simply no rational basis for the SEC to have granted Lempster Wind a certificate and denied AWE's application. This point is further underscored by the information about Pillsbury State Park<sup>9</sup> found on the website maintained by the New Hampshire Division of Parks and Recreation set forth below.

It is indisputable that Pillsbury State Park is a public resource designated and funded by the State of New Hampshire. The State of New Hampshire's website regarding Pillsbury State Park describes the park as "one of the more primitive and lesser known gems of the New Hampshire State Park system." New Hampshire Parks and Recreation Website, Pillsbury State Park, available at <http://www.nhstateparks.org/explore/state-parks/pillsbury-state-park.aspx> (last visited May 31, 2013). The website displays a color photograph showing 8 wind turbines on a ridgeline in full view from an undeveloped pond. A copy of that photograph is submitted herewith as Attachment B. It demonstrates that the view of the Lempster turbines from one of the Pillsbury State Park ponds is very similar to the photo simulation of the Antrim

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<sup>9</sup> The Subcommittee may take official notice of all of the information set forth herein concerning Pillsbury State Park. Information derived from the SEC's Lempster Wind Docket may be noticed under RSA 541-A:33, V (b). Information taken from the state-sponsored website of the New Hampshire Division of Parks and Recreation may be noticed under RSA 541-A:33, V (a) (agency may take official notice of any fact which could be noticed by the New Hampshire courts); *see also* N.H. Rules of Evidence, Article II, Rule 201(a) ("A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction... or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.").

Project view from Willard Pond. *See* Ex. AWE 9, Guariglia Supplemental Prefiled Testimony, Figure JWG-8B. Although Ms. Vissering suggested that the height of the Lempster turbines (396')<sup>10</sup> would be more appropriate for the Antrim Project (which proposes using 492' turbines)<sup>11</sup>, she did not know the actual height of the Lempster turbines. Tr. 11/28/12 Day 7, AM at 53:13-20. More importantly, she has conceded that when people look at turbines that differ in height by 200 feet (which is over double the difference between the heights of the Lempster and AWE turbines), they would not be able to discern this height differential. *See* Ex. AWE 34, Clean Energy States Alliance, State Clean Energy Program Guide at 19 (“[I]t is difficult for most people to distinguish between a 200-foot turbine and a 400-foot turbine unless they are side by side.”). Thus, the suggestion that the height of the Lempster turbines is somehow more appropriate than the height of the proposed AWE turbines is totally undermined and negated by Ms. Vissering’s own opinion which supports a finding that most viewers would not be able to discern the difference between the AWE turbines and the Lempster turbines.

The Subcommittee’s departure from this significant precedent without explanation evidences the arbitrariness and unreasonableness of the Majority’s Decision. *See Fox Television Stations*, 556 U.S. at 515; *Davila-Bardales*, 27 F.3d at 5; *Alliance to Protect Nantucket Sound*, 959 N.E.2d at 423 and *Matter of Charles A. Field Delivery Service, Inc.*, 488 N.E. 2d at 1227. Based on this, the Subcommittee should grant a rehearing and apply the same aesthetics standards that applied to the other New Hampshire wind projects.

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<sup>10</sup> *Decision* at 50, fn.3.

<sup>11</sup> *See* Ex. AWE 1 (Application) at 16.

**b. The Majority's articulation of new standards concerning aesthetics was unlawful, unreasonable, and arbitrary**

In addition to failing to justify or explain its departure from the Lempster decision, the Subcommittee unlawfully altered the aesthetics standard that has applied in prior cases, changing the focus from visual impacts on an entire region to simply examining isolated impacts on just a few locations. This decision gives undue import to the opinions of only a few stakeholders, and discounts the views of the broader population, including the vast majority of Antrim residents. In past cases, the SEC has interpreted the aesthetics criterion as requiring a consideration of a project's "effects on the viewshed of the region" and "whether the effect is unreasonably adverse." *E.g.*, *Lempster Decision* at 27-28. An assessment of regional impacts is very different from, and does not include focusing on isolated impacts to a limited number of privately owned locations within the region. *See Groton Decision* at 37-38. Moreover, an assessment of aesthetic impacts within the entire region – rather than upon a few locations- is compatible with the statutory mandate that the Subcommittee balance the general public's need for reliable sources of electricity. In its limited focus upon a few locations, the Subcommittee disregarded the overall benefits of the Project and allowed the views of a vocal minority to dominate the aesthetic impact determination. This result is simply unfair.

To appreciate the significance of the shift in standard applied by the Subcommittee here, it is appropriate to review how the Subcommittee analyzed the Lempster Project. In granting a certificate of site and facility to the Lempster Project (which consists of "twelve towers on two miles of scenic ridgeline"), *Lempster Decision* at 27, the SEC assessed the project's impacts on the region's viewshed by examining the

degree of the project's visibility throughout the region – not the impacts on a few select locations. More specifically, the SEC found that “[d]espite their height, the turbines will not be visible in many areas, especially to the north and east of the Project.” *Id.* at 28. Similarly, in the case of the Groton Wind Project (a twenty-four turbine ridgeline facility), *Groton Decision* at 47, the SEC applied a regional impacts analysis and noted that “the Project will be visible from a small portion of the area within a 10-mile radius of the proposed turbines.” *Id.* When vegetated screening is considered, the Groton Project would be visible from 4% of the 10-mile region. *Id.* at 48. This degree of visibility throughout the region is very comparable to the Antrim Project, which is expected to be visible in only 5% of study area because much of the 10-mile area has intervening topography and is highly vegetated. Ex. AWE 3, App. 9A, VIA Report at 6-7; Ex. AWE 9, Guariglia Supp. Testimony at 4:4-9. The vegetated viewshed map (which Counsel for the Public’s Witness found reliable, *see* Tr. 11/28/12 Day 7, AM at 114:8-21), indicates that the Antrim Project’s potential visibility throughout the study area will be “low.” Ex. AWE 9, Guariglia Supp. Testimony at 4:4-9. Thus, because the Antrim Decision focused on the Project’s impacts on just a few locations instead of considering the AWE Project’s aesthetic impacts on the region as a whole, the Subcommittee applied a new standard without explaining why it was abandoning the analysis established in prior wind cases. This is unlawful and unreasonable. *Fox Television Stations*, 556 U.S. at 515; *Davila-Bardales*, 27 F.3d at 5; *Alliance to Protect Nantucket Sound*, 959 N.E.2d at 423; *Matter of Charles A. Field Delivery Service, Inc.*, 488 N.E. 2d at 1227.

The Majority’s application of a new test, via its consideration of impacts on “viewsheds of significant value in the State of New Hampshire” is also an erroneous

standard upon which to deny an application for a certificate of site and facility. The standard is not contained in RSA 162-H or Committee rules. Furthermore, the Subcommittee provided no explanation about what a “viewshed of significant value” is, or how an applicant might meet that standard. This is arbitrary and unreasonable.

The Majority Decision also articulated a new subjective aesthetics standard, *i.e.*, that the Project exceeded some unwritten threshold with respect to the ratio of turbine height to site elevation. *Decision* at 49-50. Applying this standard is unlawful and unreasonable because it is not prescribed by statute or regulation. Moreover, such a standard is inherently flawed: limiting a turbine’s height to some fraction of the landform’s elevation means that no turbines could ever be sited on flat ground or at sea level, and requiring turbines to be sited only on the tallest hills would likely mean that they would have greater visibility within the region. There is simply no basis in the law or precedent for such an arbitrary and illogical standard.

Further, the Majority Decision’s assertion that the proposed turbines are the “tallest ever sought to be certificated in this state” and its conclusion (without record citation) that “if constructed they may be the tallest free-standing structures in the state” create an arbitrary, unlawful and unreasonable standard for wind projects. *Decision* at 50. The Decision inappropriately compares the AWE turbine height (492 feet) to the height of a commercial building in Manchester (approximately 275 feet). *Id.* The Decision also completely ignores that another New Hampshire electricity generator - the coal-fired Merrimack Station plant in Bow, New Hampshire (which was the subject of another SEC Docket) – has a chimney that is 445 feet tall. *Re: Merrimack Station*, SEC Docket No. 2009-01, Order Denying Motion for Declaratory Ruling (Dissent of Vice-

Chairman Getz) (Aug. 10, 2009) at 1. Moreover, in light of the fact that the SEC determined that extending the Merrimack Station chimney from 317 feet to 445 feet did not constitute a “sizeable addition” to the Merrimack facility, *Re: Merrimack Station*, SEC Docket No. 2009-01, Order Denying Motion for Declaratory Ruling (Aug. 10, 2009) (Dissent of Vice-Chairman Getz), the Subcommittee’s focus on the height of AWE’s turbines is patently unreasonable and capricious. This point is underscored by Counsel for the Public’s own visual expert, Jean Vissering, who indicated that most people cannot distinguish turbines that have height differentials of 200 feet unless the turbines are side by side. Ex. AWE 34, Clean Energy States Alliance, State Clean Energy Program Guide at 19. The Subcommittee’s concern over the height of AWE’s turbines overlooks that modern wind turbines are taller than older models. Testimony from GL Garrad-Hassan, a globally recognized consulting firm, confirms that larger rotor, taller turbines like the ones AWE proposes are becoming the industry norm. Tr. 10/30/12 Day 2, PM at 225:8-24; 226:1-24 and 240:4-20.

Moreover, the Majority fails to recognize that a larger turbine size permits a project to produce more renewable energy using fewer turbines, thereby lessening a project’s overall environmental and visual impact. For example, the AWE Project (as proposed in its Application) requires only 10 turbines to produce 30 megawatts of electricity, whereas the Lempster Project produces only 24 megawatts with 12 turbines – thus the larger turbines allow for a 25% increase in installed capacity (and significant increases in capacity factor) with 20% fewer turbines. *Lempster Decision* at 2; *Antrim Decision* at 4; Ex. AWE 9, Kenworthy Supp. Testimony at 20:17-22. As renewable energy resources play an increasing role in replacing fossil fuel generation, the height

difference between the older Lempster turbine model (396 feet) and current turbine models like those proposed here (492 feet) must also be considered within the context of significant improvements in clean energy yield and the associated reduction in facility footprint. Thus, although the newer turbines are taller than older models, fewer of them are needed to produce the same amount of renewable energy as the older turbines.

Fewer turbines result in fewer environmental and other impacts (e.g. those created by associated infrastructure such as turbine foundations, roads, transmission lines, etc.) Ex. AWE 9, Kenworthy Supp. Testimony at 20:17-22. Thus, the Majority's unfounded concern that the turbines "may be the tallest free-standing structures in the state"

*Decision* at 50, must be measured against the fact that if smaller turbines were installed, they would produce substantially less renewable energy, a result that is inconsistent with the legislature's goals of promoting the production of renewable energy. See RSA 362-F:1 ("[i]t is ...in the public interest to stimulate investment in low emission renewable energy generation technologies in New England and, in particular, in New Hampshire."); see also *Groton Decision* at 30 ("[T]he state has recognized a need for low emission renewable electric power.") This point underscores the unreasonableness of the Subcommittee's undue focus on the height of AWE's turbines.

Because the Subcommittee failed to follow precedent without explanation and instead relied on new subjective criteria about the Project's aesthetic impacts, its decision to deny AWE's application, is unreasonable and arbitrary, and a rehearing of this matter is necessary.

## **2. The Majority's Retroactive application of new standards was unlawful**

In this case, the Subcommittee's retroactive replacement of the standards set forth in prior precedent and its application to this case of new, heretofore unexplained standards was unlawful and requires rehearing. *Verizon Telephone Companies v. Federal Communications Commission*, 269 F.3d 1098, 1109 (D.C. Cir. 2001). "[W]hen there is a 'substitution of new law for old law that was reasonably clear,' the new rule may justifiably be given prospectively-only effect in order to 'protect the settled expectations of those who had relied on the preexisting rule.'" *Id.* (quoting *Pub. Serv. Co. of Colo. v. FERC*, 91 F.3d 1478, 1488 (D.C. Cir. 1996)). "As a general matter, when an adjudicating agency retroactively applies a new legal standard that significantly alters the rules of the game, the agency is obliged to give litigants proper notice and a meaningful opportunity to adjust." *Puerto Rico Aqueduct and Sewer Authority v. U.S. Environmental Protection Agency*, 35 F.3d 600, 607 (1<sup>st</sup> Cir. 1994). Failure to provide that opportunity results in unjust and inequitable application of the new law. *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (citing *Thorpe v. Housing Auth. of the City of Durham*, 393 U.S. 268, 282 (1969)).

Here, as described above, the Subcommittee has unlawfully changed the rules of the game regarding the aesthetics standard and failed to give parties proper notice and a meaningful opportunity to adjust. The Applicant relied on the clear standard set forth in the Lempster, Groton and Granite Reliable decisions, which were devoid of any mention of the standards applied in the instant Project. *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544 (D.C. Cir. 1993). In light of the significant investment that the Applicant made in reliance of the SEC's prior decisions, *see supra*, footnote 2, application of the new

standard in this case is unjustified and unlawful. *Verizon Tel. Co.*, 269 F.3d at 1109.

Given the importance of the issues being addressed here - whether a clean, renewable energy facility can be built - the outcome in this case is plainly unfair and unreasonable.

As a result, rehearing is required.

### **3. The Majority Erred in Determining that Willard Pond, Bald Mountain, Goodhue Hill and Gregg Lake are Viewsheds of Significant Value Within the State of New Hampshire**

In addition to articulating a new standard of aesthetic impact review, the Majority went on to misapply that newly-announced standard. Rehearing is thus warranted. The Majority opined that the Project would impact viewsheds of “significant value,” but the evidence before the Subcommittee does not support that conclusion. *Decision* at 55.

There is no state statute or rule that identifies locations of viewsheds of significant value. In addition, neither Antrim’s Master Plan nor Antrim’s open space conservation plan nor any other local, regional or state document identifies any of the areas listed in the *Decision* as “viewsheds of significant value” despite the ample opportunity that these various managing authorities have had to designate appropriate areas as such. *See* Tr. 11/2/12 Day 5, PM at 164:17-165:1. The Subcommittee’s determination also ignores that the Town of Antrim has never designated any of these resources as aesthetically important and has steadfastly supported the Antrim Project, having full knowledge of the Project’s visual impacts. *See* Ex. AWE 36, Letter of Support; Ex. AWE 3, Appendix 17A, paragraph 2.5 (specific reference to 500 foot limit on turbine height) and paragraph 16 (Town of Antrim’s explicit agreement to support the Project).

Moreover, testimony from the Appalachian Mountain Club (“AMC”), which has a long history of involvement in wind siting issues and has engaged in efforts “at guiding

wind power development away from areas where they will have a significant negative impact on important . . . scenic resources of state, regional or national importance,” supports the conclusion that rehearing is warranted. Ex. AMC 4 at 2:8-11 (Prefiled testimony of Dr. Kenneth Kimball). Dr. Kimball testified that Willard Pond is not an area of “state, regional or national significance.” Tr. 11/28/12 Day 7, AM at 10:22-24. In fact, the viewsheds impacted by the Antrim Project,<sup>12</sup> including Willard Pond, are “more local or regional to this part of the state.” Ex. AMC 4 at 5:23-25 (Prefiled testimony of Dr. Kenneth Kimball). In view of the foregoing, the application of the “viewshed of significant value” standard by the Subcommittee in this case to Willard Pond, Bald Mountain, Goodhue Hill and Gregg Lake is an error of law.

Application of the “viewshed of significant value” standard to a site which was deliberately altered by the Audubon Society resulting in greater visibility of the AWE Project is also unreasonable and unjust. In particular, with respect to Goodhue Hill, Ms. Vissering testified that the view of AWE’s Project from Goodhue Hill was the result of intentional logging/clearing within the Audubon property that occurred very recently, i.e. “within a year.” Tr. 11/28/12 Day 7, PM at 101:3-22. Ms. Vissering conceded that had this recent clearing not occurred, the view of the Project from that location would have been significantly different. *Id.* at 102:1-5. In these circumstances, it is unreasonable for the Subcommittee to have conferred a status of scenic significance to an area that was clearcut within the past year, especially when that clearcut created new views to locations

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<sup>12</sup> Dr. Kimball provides one exception—the Monadnock-Sunapee Greenway Trail.

in an area that NH Audubon knew or should have known<sup>13</sup> was proposed for the AWE Project.

In making its determination that Willard Pond is a scenic resource of significant value, the Subcommittee apparently accorded weight to the fact that Willard Pond is a “state designated Great Pond.” *Decision* at 51. However, such weight is misplaced. The *Decision* fails to recognize that a New Hampshire “great pond” is simply a classification based upon the size of a water body, not its scenic value or any other quality. *See* RSA 4:40-a; RSA 271:20; N.H. Admin. R. Env-Wr 101.21. As some of the Subcommittee members noted during deliberations, a New Hampshire water body’s designation as a great pond has nothing to do with its significance, the amount of development or any other criteria except size. *Tr. 2/5/13 (Deliberations) Day 1, PM at 57:16-58:11*. As the foregoing clearly establishes, the “great pond” label does not confer the status of a significant scenic resource and distorts the fact that Willard Pond is actually an artificial impoundment with a dam (and a busy parking lot) which allows electric motorized boat access. *Id.* at 44:4-24.

Despite the fact that Willard Pond’s designation as a great pond means nothing in terms of its aesthetic value, one Subcommittee member nonetheless stated that “Willard Pond does **seem** like a significant area” (emphasis added) and suggested that the Subcommittee “should consider whether this project would have an unreasonable adverse effect on its aesthetics despite the fact that” Mr. Guariglia testified (as did Dr. Kimball) that the area is not “of statewide significance.” *Id.* at 58:19-59:1. This deliberative

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<sup>13</sup> The Project has been in the public domain and well covered in the press for over four years, in part because AWE made a concerted effort to engage all conservation entities in the region, including NH Audubon. *See* Ex. AWE 1, Prefiled Testimony of Jack Kenworthy at 12:7-23.

statement – which invited the Subcommittee to ignore record evidence and to focus on impacts to Willard Pond because it “seems” like a significant area - illustrates that the Majority’s decision was subjective and arbitrary. As such, the Decision is unreasonable.

Another Subcommittee member stated that Willard Pond should be afforded special consideration because visitors “went there with a specific expectation.” Tr. 2/7/13 (Deliberations) Day 3, PM at 45:2-6. Yet, there is no evidence in the record to suggest that current visitors to Willard Pond would not return there if the Project were built, or that their experience would be unreasonably diminished if they had views of the turbines. There is also no justification for why the visitors to Willard Pond are any different than visitors to Pillsbury State Park, which continues to attract visitors and “is always open for recreation” even though there are clear, close-range views of the Lempster wind turbines from undeveloped ponds at that location. *See* New Hampshire Parks and Recreation Website, Pillsbury State Park, available at <http://www.nhstateparks.org/explore/state-parks/pillsbury-state-park.aspx> (last visited May 31, 2013).

And while this same Subcommittee member admonishes AWE for choosing to locate the Project near Willard Pond because its existence as a wildlife sanctuary predates the Application, Tr. 2/7/13 (Deliberations) Day 3, PM at 9:6-23, he neglects to recognize that Pillsbury State Park, with all of its undeveloped ponds, obviously existed prior to the selection and approval of the Lempster Wind Project. Such disparate treatment is arbitrary, unfair and improper.

Finally, the Subcommittee noted that public funds have been expended to help conserve areas in and around the Willard Pond/NH Audubon Wildlife Sanctuary area.

*Decision* at 52. To the extent that the Subcommittee relied upon this fact in determining that Willard Pond was an area of statewide scenic significance, the Subcommittee erred. The fact that some of the lands surrounding Willard Pond have been placed into conservation with some use of public funds does not mean that the views from those areas are entitled to any special status by the SEC or anyone else absent designation by an official governing body. New Hampshire Audubon Society holds no viewshed easement and has no right to control the development of land on Tuttle Hill and surrounding areas.

The Decision fails to recognize that the Project's significant and long-term land conservation components (which will ensure permanent conservation of the ridgeline overlooking Willard Pond even after the Project is decommissioned) will complement and enhance the above-referenced conservation efforts. In view of the foregoing, it was unreasonable for the Subcommittee to designate the Willard Pond viewshed as one of significant value within the State of New Hampshire, and to deny AWE a certificate because of the Project's visual impacts at that location.

#### **4. The Majority Decision Erroneously Relied Upon Irrelevant Decisions From Other Jurisdictions**

The Majority's decision regarding aesthetics noted cases from other jurisdictions that "denied authority for the construction of energy facilities that would cause adverse impacts on the viewshed or aesthetics of the region." *Decision* at 54. Although the Majority recognized that "its authority and jurisdiction has a scope that is somewhat different from the out-of-state agencies relied on by Counsel for the Public" *id.*, it nonetheless referenced the decisions from other jurisdictions in support of its ultimate conclusion that the AWE facility "will have an unreasonable adverse effect on viewsheds of significant value within the State of New Hampshire," *id.* at 55, a standard that does

not appear in RSA 162-H or elsewhere. This constitutes legal error. Decisions made by other jurisdictions that are not governed by RSA 162-H or New Hampshire precedent are totally irrelevant to the instant docket. As such, those decisions should have been disregarded and excluded from the record of this proceeding. *See* RSA 541-A:33, II. (Presiding Officer may exclude irrelevant information). Even if those other state decisions are somehow considered relevant, the Subcommittee erred in relying on them because:

- (1) The Passadumkeag decision was reversed and the project was approved. *See Maine Board of Environmental Protection* (March 21, 2013), available at <http://www.maine.gov/tools/whatsnew/attach.php?id=501962&an=2> (last visited May 31, 2013);
- (2) The Redington site is dissimilar from AWE's because it is a high elevation site with turbines located in close proximity to the Appalachian National Scenic Trail, a resource of statewide and national significance (established under the National Trails System Act and managed by the National Park Service). *See Maine LURC Commission Decision* (March 5, 2008), available at [http://www.maine.gov/doc/lupc/projects/windpower/redington/zp702\\_MP\\_Black%20Nubble\\_Denial\\_FINAL.doc](http://www.maine.gov/doc/lupc/projects/windpower/redington/zp702_MP_Black%20Nubble_Denial_FINAL.doc) (last visited May 31, 2013);<sup>14</sup> and

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<sup>14</sup> The National Park Service testified against the Redington project, indicating that it had not opposed other wind power projects, but that the project would unduly impact the Congressionally-designated National Scenic trail, and would frequently be visible from many miles of the Appalachian Trail. *Id.*

- (3) The Champlain Wind, LLC – Bowers Wind Project would have impacted *nine* lakes which were identified, in accordance with state statutory requirements, to be “Scenic Resources of State or National Significance.” *See Maine LURC Commission Decision* (April 20, 2012), available at [http://www.maine.gov/doc/lupc/projects/windpower/firstwind/champlain\\_bowers/Development/Decision/CW4889\\_Denial\\_April\\_2012\\_FINAL.pdf](http://www.maine.gov/doc/lupc/projects/windpower/firstwind/champlain_bowers/Development/Decision/CW4889_Denial_April_2012_FINAL.pdf) (last visited May 31, 2013).

Instead of noting irrelevant cases from other states, the Subcommittee, as explained above, should have considered and acted in accordance with prior New Hampshire SEC cases that granted certificates of site and facility to wind farms that are larger in scope and visual impact than the Antrim Project.

**5. The Decision is Unreasonable For its Failure to Consider the Project’s Significant Mitigation Efforts and For Its Failure to Adopt Conditions Addressing Mitigation of the Project’s Aesthetics Effects; Good Cause Exists for Rehearing To Consider AWE’s New Mitigation Proposal**

The Decision is unreasonable because it fails to recognize as acceptable the Applicant’s unprecedented and significant mitigation package, a plan that will be more than adequate to address the Project’s anticipated effects upon aesthetics in the region. Significantly, intervenor AMC was satisfied by the Project’s land conservation efforts and its commitment to install a radar activated lighting system after approval by the FAA. Tr. 11/27/12 Day 6, PM at 172:13-18. Yet, the Subcommittee fails to demonstrate in its Decision why these mitigation efforts are unsatisfactory. On one hand, the Subcommittee ascribed scenic value to lands (i.e. the dePierrefeu Wildlife Sanctuary) that have been conserved for reasons other than aesthetics (i.e. to preserve them in their

natural state), while at the same time it failed to consider the significant value associated with the permanent conservation of hundreds of acres of ridgeline and supporting landscapes. The Subcommittee has overlooked that the Project's permanent conservation of the ridgeline results in a long-term aesthetic and land preservation benefit: the ridgeline will be protected in perpetuity after the Project is decommissioned and limits the length of time that the Project can remain standing. Ex. AWE 37 (redacted conservation easements). In addition, the Subcommittee has apparently ignored the fact that without the Project, this area could be subdivided into three acre house lots under current Antrim zoning regulations. Tr. 10/29/12 Day 1, AM at 79:17-19.

In deeming the Applicant's mitigation efforts insufficient to adequately mitigate the Project's aesthetic impacts, the Subcommittee described the mitigation efforts as "comparable to what is the standard design of any wind facility in the region." *Decision* at 53. This statement is incorrect because it ignores that none of the other wind projects certificated by the SEC have made a commitment to use a radar activated lighting system. AWE's commitment to this is unprecedented in New Hampshire, is in direct response to community input over years of project development, and is at a significant cost to the Applicant. In addition, burying the ridgeline collector lines is a deliberate step by AWE to address aesthetic concerns associated with overhead lines, and is a more expensive, less expedient option than building them above ground.

The Decision states that the Majority "simply could not structure appropriate mitigation measures for adverse visual effects...." *Decision* at 54. The Majority's refusal to consider mitigation options and its consequent denial of a certificate is unreasonable and inexcusable in light of the abundant record evidence concerning

suggested mitigation. As the Dissenters aptly noted, the visual experts in this docket provided a “range of mitigation measures for aesthetic effects that could have been deemed acceptable to the Subcommittee without project denial.” *Dissent* at 2. Imposition of reasonable mitigation conditions is far more appropriate than an outright denial of a certificate, especially given that “the residents of Antrim voted not to prohibit the Project,” *Decision* at 44, and want the Project to go forward. Tr. 11/2/12 Day 5, AM at 73:6-9.

Finally, a rehearing of the aesthetics issues is also warranted because, since the time of the Subcommittee’s deliberations, AWE has developed new plans to even further address the Project’s visual impacts. These plans are described more fully in the Motion to Reopen the Record, *infra*, and they include:

- **Eliminating turbine 10**, the southernmost turbine which is the closest to Willard Pond and most visible from that location; and eliminating all of the road and electrical infrastructure beyond turbine 9 to the southwest. These changes reduce the overall scale of the Project by more than 10%. *See infra*, Part II.B.1.a (regarding mitigation and reduction by more than 10%, including the removal of roads).

- **Permanent conservation of approximately 100 more acres on Tuttle Hill** (i.e., in addition to the conservation package submitted to the Subcommittee), for a total of approximately 908 acres of conservation land. This new conservation land is along the ridgeline and surrounds the location of turbines 3, 4, 5 and 6 such that **100% of the ridgeline would be conserved permanently** (i.e. in perpetuity even after the Project is decommissioned). Of these 908 acres, the Project will directly impact only 50 acres.

- **An agreement with the Town of Antrim regarding a compensation plan for addressing perceived visual impacts to Gregg Lake**, an agreement that the Town has indicated is “full and acceptable compensation for any perceived visual impacts to the Gregg Lake Area.” *See* Attachment C.

- **A one-time payment of \$40,000 to NH Audubon or other appropriate recipient** designated by the Subcommittee. This payment is equal to the one specified in the Gregg Lake Agreement described above.

### **Conclusion Regarding Aesthetics and Mitigation**

For all of the reasons set forth above, the Subcommittee must grant a rehearing of this matter. This Committee should not have abandoned its precedent or arbitrarily applied a new standard to the AWE Project. AWE had a legitimate expectation that the Subcommittee would apply to it the same aesthetic impact standard that the SEC applied to all of the other wind project applications that the SEC has reviewed thus far. Even if the Subcommittee were able to articulate a reason justifying a change in this standard, the Applicant had a right to receive notice of this change in advance of the filing of its application. The siting of clean, renewable energy projects is very important to this state, *see* RSA 362-F:1, and the investment of time and money in developing them is simply too great to justify a change in the standard at the hearing stage.

Upon rehearing, the Subcommittee should not substitute its subjective assessment of the Project’s aesthetic impacts or its mitigation proposal for the wishes of the majority of Antrim residents who are in favor the Project.<sup>15</sup> Nor should the Subcommittee accede

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<sup>15</sup> The Committee has received letters from a myriad of Antrim residents who support the project. One example letter, from Christopher Condon indicates, respectfully, that “[a] small but vocal minority in our town have sought to delay or derail this wind farm. Their emotional appeals are based on myths and do not stand up to scrutiny. While their passion is admirable, they have held Antrim hostage to their ‘not in my

to the wishes of the vocal minority. At the hearing, a member of the public commented that Counsel for the Public “has taken the position of the vocal minority of those opposed to the project in town, and has brought their case before you.” Tr. 11/2/12 Day 5, AM at 73:12-15. The Subcommittee should not lose sight of the fact that “the Antrim Board of Selectmen, as the locally elected governing body which has the authority to speak and act on behalf of the town as a whole (see RSA 41:8),” *Petition for Jurisdiction Over Renewable Energy Facility Proposed by Antrim Wind Energy, LLC*, SEC Docket No. 2011-02, Jurisdictional Order (August 10, 2011) at 27, “supports the issuance of a Certificate” and “urges the Subcommittee to issue the Certificate.” *Decision* at 16. The Subcommittee should also consider that several Antrim landowners – i.e. those who have leased their property to AWE – want their property to be used as a wind farm and have agreed to place their property into permanent conservation as part of this Project. See *Antrim Landowners’ Motion for Rehearing* (May 23, 2013).

The weight of the evidence in this case demonstrates that the Project will not have an *unreasonable* adverse effect on aesthetics. RSA 162-H:16, IV (emphasis added). Although many energy facilities, including wind turbines, that are erected in formerly undeveloped areas will likely have some effect on aesthetics, those effects are not automatically deemed “unreasonably adverse” simply because they are caused by wind turbines. As the SEC has noted “turbines are tall structures ...but, at the same time, the evidence does not support a finding that the turbines themselves are aesthetically displeasing.” *Granite Reliable Power Decision* at 43. Notwithstanding that express

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back yard’ mentality for far too long.” Letter from Christopher Condon (Feb. 4, 2013); Letter from Steven MacDonald (Feb. 7, 2013); Letter from Steve Sawyer (Feb. 5, 2013); Letter from Gordon Webber (Feb. 5, 2013); Letter from Karen and Albert Weisswange (Feb. 4, 2013); Letter from Scott Burnside (Feb. 1, 2013); Letter from Wesley Enman (Feb. 1, 2013).

finding, during deliberations in the instant docket, one Subcommittee member opined, without substantiation, that in comparison to other energy facilities like a gas pipeline or biomass plant (“or whatever”), wind turbines “probably have the biggest aesthetic impacts.” Tr. 2/7/13 (Deliberations) Day 3, PM at 34:17-35:1. Whether or not wind turbines have bigger aesthetic impacts than any other energy facilities (such as the Seabrook nuclear power plant, the Merrimack Station chimney or high voltage transmission lines) is debatable. However, what is not debatable is that the applicable standard under New Hampshire siting law is whether the effect is unreasonably adverse. It is critical that the Subcommittee focus on the legal standard (and precedent) - not subjective impressions or opinions. It is also critical to recognize the overall important public benefits of the Project.

In addition to the significant economic, employment and tax benefits of the Project cited in the “Economic Impact Analysis,” Ex. AWE 3, App. 14B, the Project will help meet the “need for low emission renewable electric power,” and is a source of electricity that does not emit air pollutants, reducing the amount of carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), nitrogen oxides (NO<sub>x</sub>), sulfur dioxide (SO<sub>2</sub>) and particulate matter emitted in New Hampshire. *Groton Decision* at 30; Ex. AWE 3, App. 10 (Avoided Emissions Report) at 5-7. The American Lung Association has concluded that the emissions reductions associated with projects such as the Antrim Project can have clear health benefits for the people of New Hampshire. *See Letter from Edward F. Fuller, Senior Vice President of Public Policy, American Lung Association* (May 31, 2013). Taking into account all of these significant benefits, as well as the facts set forth above regarding visual impacts, the Project’s effect upon aesthetics cannot be deemed

unreasonably adverse. The Subcommittee's failure to find that the Project will not have an unreasonable adverse effect on aesthetics, as well as its failure to fashion conditions to address the Project's visual impacts, is unreasonable and constitutes good cause for rehearing this matter so that appropriate findings can be made, mitigation for visual impacts can be accepted, and a certificate of site and facility can be granted to Antrim Wind Energy, LLC for this Project.

### **FINANCIAL CAPABILITY**

#### **D. The Subcommittee Acted Unlawfully, Unreasonably, and Arbitrarily By Failing To Make A Finding Regarding AWE's Financial Capability**

In evaluating an application for a certificate of site and facility, the Subcommittee must make a finding on whether an "[a]pplicant has adequate financial, technical and managerial capability to assure construction and operation of the facility in continuing compliance with the terms and conditions of the certificate." RSA 162-H:16, IV (a). Although the Subcommittee found that AWE had adequate technical and managerial capability, it made no finding regarding financial capability even though its legal counsel specifically advised the Subcommittee that it was "required to make findings with respect to financial capability of the Applicant under RSA 162-H:16." Tr. 2/5/13 (Deliberations) Day 1, AM at 100:2-3. Given the above-referenced statutory requirement and the clear instruction provided by the Subcommittee's attorney, the Subcommittee's failure to make a finding regarding the Applicant's financial capability is unlawful and unreasonable. It is also arbitrary considering that the Subcommittee's Decision contains findings on every other criterion expressed in RSA 162-H:16, IV. During deliberations, the Presiding Officer stated at least three times that that the Subcommittee would "come back" to the issue of financial capability. *See e.g.* Tr. 2/5/13 (Deliberations) Day 1, AM at 110:9-11,

112:15-17; Tr. 2/5/13 (Deliberations) Day 1, PM at 12:18-20. Yet, the Subcommittee never did that. Its failure to do so constitutes good reason for rehearing this matter.

**E. The Weight of the Evidence Supports a Finding that AWE Possesses Adequate Financial Capability to Assure Construction and Operation of the Facility**

The weight of the evidence supports a determination that AWE possesses adequate financial capability to assure construction and operation of the proposed facility. The Subcommittee's deliberations note that the report provided by Counsel for the Public's expert, Deloitte, "found that there was financial capability on the part of the principals coming together here." Tr. 2/5/13 (Deliberations) Day1, AM at 82:20-23. Deloitte found "nothing negative regarding the financial background or experience of any of the participants," *id.* at 83:23-24, and "there was no negative conclusion, and certainly a positive about the capabilities of the individuals." *Id.* at 84:9-11. In addition, Messrs. Cofelice and Pasqualini provided uncontroverted testimony, which is supported by the Deloitte report, that the Applicant possesses adequate financial capability to assure construction and operation of the facility. *See* Ex. AWE 1, Cofelice & Pasqualini Prefiled Direct Testimony; Ex. AWE 9, Cofelice & Pasqualini Supp. Testimony; Tr. 10/31/12 Day 3, AM and PM.

Mr. Cofelice, an Executive Officer of Antrim Wind Energy, LLC testified that he has been in the energy industry since 1981, and that he and the Project's management team have been directly responsible for project development and financing of over 4,000 MW of independent power assets, including 700 MW of wind power projects, representing over \$3 billion in aggregate project financings. Tr. 10/31/12 Day 3, AM at 11:13-12:2; Ex. AWE 1, Cofelice & Pasqualini Prefiled Direct Testimony at 6:4-13. Mr.

Cofelice's testimony was corroborated by Mr. Pasqualini, a founding principal of CP Global Partners, LLC, a recognized expert in renewable energy finance that has "represented the sponsor or participating financing institutions in connection with the financing of 46 separate wind projects in 16 states totaling over \$9 billion in asset value, and more than 5 gigawatts ("GW") of capacity." Ex. AWE 1, Cofelice & Pasqualini Prefiled Direct Testimony at at 3:3-7.

In addition to the testimony provided by Messrs. Cofelice and Pasqualini, the Deloitte Report concluded that:

Based on the information provided to us by the Applicant and through our independent research we note that the majority of the development team has direct experience in wind and other power project development and financing. Based on additional research, which included searches of a number of proprietary databases that we subscribe to, **we did not find any information that would negatively impact** our conclusion that the team appears to be qualified to develop the Project.

Ex. PC 7, Deloitte Report at 40 (emphasis added). Thus, the weight of the evidence in this docket clearly supports a finding that the Applicant has satisfied its burden of demonstrating that it possesses the requisite financial capability required by RSA 162-H:16, IV (a).

It is important to note that RSA 162-H:16, IV (a) speaks to an **applicant's financial capability** (to assure construction and operation of the facility in continuing compliance with the terms and conditions of the certificate). The statute does not require an applicant to prove **the financial capability of the Project**. The Subcommittee's deliberations indicate that it misconstrued the statute by focusing on the financial components of the Project instead of the Applicant's financial capabilities. For example, the Presiding Officer stated: "So I personally don't think I can find that they have made

the demonstration of financial capability. And, by that, **I don't mean the individuals don't have capability, as people of quality and some experience, but that the package overall of the project doesn't meet a financial capability test in my mind.**"

Tr. 2/5/13 (Deliberations) Day 1, AM at 97:21-98:2 (emphasis added).

Even assuming, *arguendo*, that the financial capability criterion did encompass an evaluation of the **Project's** financial capabilities (as distinguished from the **Applicant's** financial capability to assure construction and operation of the Project), the evidence supports a finding that AWE has met that test as well. The Deloitte Report contains a comprehensive analysis of several issues including the market for financing development-stage wind projects and the Project's business and funding plans. The Deloitte Report found that, in general, the Applicant "had a reasonable basis for its estimates of the capital cost, revenue expectations, operating costs, and economic useful life of the Project." Ex. PC 7, Deloitte Report at 2. The Deloitte Report also explicitly found that "it appears likely that the Antrim Pproject can be financed if the Project can attract a PPA with pricing that allows for adequate return to its investors" and that the proposed terms of the Applicant's non-production tax credit case scenario "should give the project enough room to absorb potential higher interest rates and larger equity capital requirements and still meet the fixed charge requirements of lenders." *Id.* at 40.

In view of the foregoing, and in the absence of any testimony rebutting the Applicant's financial experts and the Deloitte Report, the Subcommittee must determine that the Applicant possesses adequate financial capability under RSA 162-H:16, IV (a). In failing to make this finding, the Subcommittee improperly ignored the expert evidence and apparently was influenced by Counsel for the Public's arguments concerning the lack

of certainty regarding various financial components of the Project. *Compare* Tr. 2/5/13 (Deliberations) Day 1, AM at 84:14- 85:5 (A summary of Counsel for the Public's argument concerning Applicant's financial capability - no PPA, no O&M agreement, no turbine supply agreement, no interested lenders,<sup>16</sup> no identification of equity investors) with *id.* at 96:16-97:11 (Presiding Officer's statement about the "financial side of it" – there's no lender, no big equity investor, no PPA, no letter of interest). To the extent that the Subcommittee did not make a finding concerning the Applicant's financial capabilities because it was influenced by Counsel for the Public's arguments instead of the uncontroverted expert testimony and Deloitte Report, it acted unreasonably.

Public Counsel's arguments are merely opinions (not testimony) and therefore should be given less weight than the opinions expressed by actual financial experts who provided direct testimony or who authored the Deloitte Report. Moreover, because Counsel for the Public's statutory authority in this matter is limited to representing "the public in seeking to protect the quality of the environment and in seeking to assure an adequate supply of energy," *see* RSA 162-H:9, his opinions about the Applicant's financial capability exceeded his statutory authority and therefore must be disregarded. Rather than giving improper weight to arguments raised by Counsel for the Public - arguments that contradict the conclusions of his own financial expert and that are beyond the scope of his authority - the Subcommittee must instead accord proper weight to the testimony and evidence provided by the financial experts in this case. In so doing, the Subcommittee must find that the Applicant has met its burden of proof regarding its financial capability.

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<sup>16</sup> The argument that there are no interested lenders in the Project is untrue. Letters of interest are submitted herewith in support of the Motion to Reopen the Record, *infra*. *See* Attachments H-1 and H-2.

**F. The Subcommittee Acted Unlawfully, Unreasonably, and Arbitrarily In Failing to Follow Precedent that Conditioned Certificates of Site and Facility Upon Demonstration That Project Financing Was In Place Prior to Commencement of Construction**

There are no statutes or rules that specify the standards by which the SEC is to assess an applicant's financial capabilities. The lack of such criteria allows the determination of financial capability to be susceptible to subjective impressions. *See, e.g.,* Tr. 2/5/13 (Deliberations) Day 1, AM at 97:21-98:2 (“the package overall of the project doesn't meet a financial capability test **in my mind**”) (emphasis added). In the absence of statutory criteria for determining financial capability, and in a case such as this one where the Subcommittee has expressed concerns about the Applicant's financial capability, a reasonable approach is to rely upon precedent and apply the same or similar financial conditions that the SEC has included in prior decisions. If the Subcommittee fails to do so, it must explain why. *Fox Television Stations*, 556 U.S. at 515; *Davila-Bardales*, 27 F.3d at 5; *Alliance to Protect Nantucket Sound*, 959 N.E.2d at 423; *Matter of Charles A. Field Delivery Service, Inc.*, 488 N.E. 2d at 1227.

In this case, AWE specifically requested that the Subcommittee impose a financial condition similar to that imposed in the Granite Reliable case. *See Applicant's Post-Hearing Brief* (Jan. 14, 2013) at 98. In the Granite Reliable case, the Subcommittee noted that “financing of large scale renewable energy facilities is a complicated endeavor” and that “[s]uch facilities are rarely financed from the existing balance sheet assets of the developer.” *Granite Reliable Power Decision* at 31. In the face of a “challenging” market for wind project financing, *id.* at 32, the Subcommittee in the Granite Reliable case imposed a condition that prohibited the Applicant from

commencing construction until such time as construction financing is completely in place, required the Applicant to notify the Subcommittee when construction financing is in place and to generally advise the Subcommittee of the name and address of the equity and debt entities providing such financing. *Id.* As AWE argued in its Post-Hearing Brief, these requirements assure that the public's interests are protected while establishing adequate final verification that the Applicant has satisfied the requirements for financial capability under RSA 162-H:16, IV (a). *Applicant's Post Hearing Brief* at 18-19.

Although the Decision states that the Subcommittee recognizes and accepts the Applicant's position that obtaining a certificate would enhance the Applicant's ability to obtain financing, equity partners and a power purchase agreement ("PPA"), *Decision* at 39, the Subcommittee refused to grant a certificate with the Applicant's requested financial condition. The Subcommittee's legal counsel expressly noted during deliberations that the Subcommittee has the authority to condition the certificate, *see* RSA 162-H:16, VI, and he discussed prior cases where financial conditions had been imposed. Tr. 2/3/13 (Deliberations) Day1, AM at 100:4-6 and PM at 6:14-9:24. Instead of following precedent and issuing a certificate with a financial condition, the Subcommittee did not make a finding on the financial criterion. Rather, it "expressed concern" based on its impression that "the Applicant essentially comes to the table without any substantial progress towards establishing any of the key conditions necessary to render the Applicant to be financially capable to construct and operate the Facility." *Decision* at 39. The Subcommittee's concern in this case is misplaced.

The Subcommittee ignored the commercial realities of prudent energy facility development – namely, that a certificate is a critical prerequisite for many of the “key conditions” identified as demonstrating financial capability. While certain Subcommittee Members and Public Counsel lament the absence of an executed turbine supply agreement, offtake agreement/PPA, or balance of plant contract, the Applicant has provided ample evidence to demonstrate that securing a certificate prior to entering into these binding contracts is prudent and customary, and that it possesses the experience to obtain and execute these commercial agreements successfully. *See* Ex. AWE 1, Application at 55-56; *see also* Ex. AWE 9, Cofelice & Pasqualini Supp. Testimony at 4:8-5:3 and 8:15-21 (“[I]t is common industry practice to secure a PPA or financial swap after receipt of permits...[t]his is in fact how it worked with one of the other wind power projects currently operating in New Hampshire that was previously approved by the SEC.”).

In circumstances where a Subcommittee has concerns about an applicant’s financial capability the reasonable approach that has been followed in prior SEC cases has been to issue a certificate of site and facility subject to a condition such as the Granite Reliable condition described above. *See* Tr. 2/5/13 (Deliberations) Day 1, PM at 6:14-9:24.

However, in this Docket, the Subcommittee has not articulated any reason why conditioning a certificate requiring that construction financing be in place prior to construction would be unreasonable or inadequate, nor did it express concerns that the AWE management team was not capable of meeting such a condition. The Subcommittee’s failure to follow precedent and its failure to impose a financial condition

similar to the one imposed in the Granite Reliable docket or explain its departure from prior cases is unreasonable and improper. *Fox Television Stations*, 556 U.S. at 515; *Davila-Bardales*, 27 F.3d at 5; *Alliance to Protect Nantucket Sound*, 959 N.E.2d at 423 and *Matter of Charles A. Field Delivery Service, Inc.*, 488 N.E.2d at 1227. Further, the Subcommittee's failure to explain why such a condition would not completely satisfy its concerns, and ultimately its failure to make a finding that the Applicant possesses the requisite financial capability is unreasonable and arbitrary conduct that warrants a rehearing of this matter. *Id.*

## **SOUND**

### **G. The Subcommittee's Sound Conditions are Unlawful, Unreasonable, and Arbitrary and Unsupported by Record Evidence**

#### **1. The Decision Is Unlawfully Inconsistent With the 2009 World Health Organization Guidelines**

The Subcommittee determined that AWE's proposed facility would not have an unreasonable adverse effect on public health and safety as it relates to noise, provided certain conditions were met. *Decision* at 68. The Subcommittee also found "that there was insufficient data to determine that the turbines will emit low frequency inaudible or infrasound that would cause harm to human health." *Id.* While AWE agrees with the latter determination, and that it was supported by the record in this proceeding, AWE respectfully requests that the Subcommittee reconsider the noise conditions articulated in the Decision. For the reasons discussed below, good cause for rehearing or reconsideration exist because the conditions are unlawful, unreasonable, arbitrary and unsupported by and inconsistent with record evidence.

The Decision states that the Subcommittee relied upon the newer 2009 World Health Organization (“WHO”) Guidelines in establishing a sound level condition. *Id.* The Subcommittee then went on to impose the following conditions: “daytime[] sound levels generated by the Facility at the outside facades of residences shall not exceed 45 dBA or 5 dBA above ambient, whichever is greater” and “nighttime[] sound levels ... shall not exceed 40 dBA or 5 dBA above ambient, whichever is greater.” *Decision* at 68. Because these sound restrictions are not consistent with the 2009 WHO Guidelines cited by the Subcommittee, the conditions are unreasonable. As such, they violate RSA 162-H:16, VI which requires that conditions imposed by the SEC be “reasonable.”

The Decision overlooks the fact that the 2009 WHO Guidelines refer to an *annual average*, not an absolute number. More specifically, the 2009 WHO Guidelines recommend an annual average nighttime sound level limit of 40 dBA, which is “a long-term annual average for nighttime sound.” Tr. 11/2/12 Day 5, AM at 28:16-17; *see also* Supplemental Prefiled Testimony of Robert O’Neil (Oct. 11, 2012), Attachment RDO-G, “Wind Turbine Health Impact Study: Review of Independent Expert Panel,” *Executive Summary* at ES 10 (“The time period over which these noise limits are measured or calculated also makes a difference. For instance, the often-cited World Health Organization recommended nighttime noise cap of 40 dB(A) is averaged over one year (and does not refer specifically to wind turbine noise).”).

On the second day of its deliberations, the Subcommittee referenced testimony from Counsel for the Public’s sound witness, Gregory Tocci, and noted that Mr. Tocci testified that the 2009 WHO Guidelines recommend night time noise levels be limited to 40 dB. Tr. 2/6/13 (Deliberations) Day 2, PM at 20:10-14. The Subcommittee’s

deliberations also reflect that the 2009 WHO Guidelines for nighttime outdoor sound levels are those which are “A-weighted, long-term average sound level[s] as defined in the ISO 1996-2, 1987, determined over all the night periods of the year’ -- ‘**over all the night periods of a year.**” *Id.* at 20:16-23 (Emphasis added.). Further deliberations indicated that the Subcommittee was uncertain about the difference between the 1999 and 2009 WHO guidelines, *id.* at 41:4-12, and was unsure whether the 40 dbA nighttime sound limit contained in the 2009 WHO Guidelines is an annual average. Tr. 2/7/13 (Deliberations) Day 3, AM at 11:4-8, 14:20-15:4 and 24:3-24.

Although the deliberations demonstrate some confusion regarding the 2009 WHO standards, early on the third day of deliberations a member of the Subcommittee recited information from the record that clearly indicated that the 2009 WHO Night Noise Guideline of 40 decibels is “a long-term annual average.” Tr. 2/7/13 (Deliberations) Day 3, AM at 9:17- 10:2. Later that same day, a Subcommittee member stated that if the Subcommittee were “subscribing to the WHO guidelines...” they “most likely” are an annual standard. *Id.* at 24:18-22, Yet, despite this knowledge, and without any clear reasoning or explanation, the Subcommittee Chair suggested “not get[ting] into the average over time.” *Id.* at 25:4-6. Immediately thereafter, the Subcommittee voted to impose an absolute nighttime limit of 40 dBA. In so doing, the Subcommittee has imposed a new, unprecedented nighttime sound limit that is arbitrary and unsupported by the record or the guidelines the Subcommittee purportedly relied upon.

If, in fact, the Subcommittee relied on the 2009 WHO Guidelines (as the Decision specifically states), and adopted them in this case, the Decision is flawed because it fails to identify the dBA limit conditions in terms of an annual average. As currently worded,

the Decision prefaces the noise limits by stating: “The Subcommittee relied upon the newer 2009 WHO Guidelines in establishing a sound level condition.” *Decision* at 68. Clearly, based on the deliberations and the wording of the 2009 WHO Guidelines, the Subcommittee knew or should have known that the recommended noise limits in the Guidelines consisted of annual averages. If it were truly relying on those Guidelines, the Subcommittee would not have imposed an absolute 40 dBA limit for nighttime. In these circumstances, the condition must be rewritten to reflect that it is based on an annual average, rather than the arbitrary standard conjured up during deliberations. In the alternative, the condition should be changed to an absolute standard of 45 dBA, to be consistent with the 1999 WHO Community Noise Guidelines (which are still considered valid and relevant for the purpose of achieving the values of the 2009 WHO Night Noise Guidelines for Europe),<sup>17</sup> prior SEC decisions (discussed below) and record evidence (e.g. the Town of Antrim Agreement).

## **2. The Decision Unlawfully, Unreasonably, and Arbitrarily Departs From SEC Precedent Without Any Explanation**

The Decision’s noise conditions are unlawful, unreasonable, and arbitrary because they depart from precedent without clearly articulating the reasons for doing so. *Fox Television Stations*, 556 U.S. at 515; *Davila-Bardales*, 27 F.3d at 5; *Alliance to Protect Nantucket Sound*, 959 N.E.2d at 423; *Matter of Charles A. Field Delivery Service, Inc.*, 488 N.E. 2d at 1227. In the Groton case, the Committee expressly followed precedent and required the Applicant “to comply with the same standard regarding noise that was

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<sup>17</sup> See World Health Organization Night Noise Guidelines for Europe 2009, Executive Summary, p. XVIII, available at [www.euro.who.int/document/e92845.pdf](http://www.euro.who.int/document/e92845.pdf) (last visited June 1, 2013) (“the *night noise guidelines for Europe* are complementary to the 1999 guidelines. This means that the recommendations on government policy framework on noise management elaborated in the 1999 guidelines should be considered valid and relevant for the Member States to achieve the guidelines of this document.”)

imposed on the Lempster facility,” *i.e.* a daytime standard of 55 dbA or 5 dbA above ambient, whichever is greater, and a nighttime standard of 45 dbA or 5 dbA above ambient, whichever is greater. *Groton Decision* at 86.

The Lempster/Groton noise standards are reasonable because, as was noted a number of times in this docket, there have only been two complaints about noise from the Lempster facility, and one was the result of a faulty hearing aid. *See, e.g.*, Tr. 11/2/12 Day 5, AM at 93:8-10. Further underscoring the reasonableness of applying the Lempster/Groton sound conditions to the Antrim Project is the fact that the nearest non-participating residence to a Lempster wind turbine is 1,500 feet, compared with a 2,800 foot setback at the Antrim Project. *Id.* at 93:11-16. Given the lack of noise complaints in Lempster (where the wind facility has been operating for several years), there is no good reason for the Subcommittee to have deviated from these standards in the instant docket.

The Subcommittee’s failure to articulate any reasons for its departure from the noise level conditions contained in prior SEC orders is unlawful and constitutes reversible error. When an agency sets new policy, “[i]t would be arbitrary or capricious to ignore [the prior policy]. In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.” *Fox Television Stations*, 556 U.S. at 515-16. Absent such an explanation, failure to conform to agency precedent is an arbitrary act requiring reversal, even if there is substantial record evidence to support the determination made. *Id.* It is unreasonable and unfair to the Applicant for the Subcommittee to impose new, more stringent noise conditions without distinguishing the Antrim case from the other projects approved by

the Committee. It is also unlawful. *See* RSA 541-A:35 (agency decisions must contain “a concise and explicit statement of the underlying facts supporting the findings”).

Precedent must carry some weight in the Committee’s deliberations; applicants and intervenors deserve some level of certainty in the standards that the Committee is to impose – especially in light of the fact that there are no New Hampshire statutes or rules governing sound restrictions for wind facilities. As the Presiding Officer noted during deliberations, there must be “a sound basis” for deviating from prior decisions. Tr. 2/6/13 (Deliberations) Day 2, PM at 70:7-8. The Presiding Officer also noted that there must “be a sense that we have a reasoned approach,” and a “reason why we head off in different directions and that it isn’t just the whims of whoever happened to be sitting on any particular case.” *Id.* at 70:11-17. Despite the Presiding Officer’s admonitions, the Subcommittee did exactly what the Presiding Officer cautioned against: the Decision provides no reasons for the deviation from prior SEC noise conditions. This is unlawful and unreasonable because any change from an agency’s prior pattern of conduct must be explained.

The arbitrariness of the noise conditions is further highlighted by the following comment made by a Subcommittee member: “it seems like we’re kind of just picking numbers out of the air here for the daytime. I haven’t heard a whole lot that would convince me the 55 needs to be changed. Do we have a good rationale on why it was set that way from the past two projects, and have we had any complaints that we know of from the public?” Tr. 2/6/13 (Deliberations) Day 2, PM, at 102:12-19.

When the Decision is read in conjunction with the deliberations and the record in this case, as well as the noise conditions imposed in prior SEC dockets, there can be no

other conclusion except that the Subcommittee acted unlawfully, unreasonably and arbitrarily in imposing the specified noise conditions. For all of the foregoing reasons, the Subcommittee must reconsider these conditions.

### **3. The Decision Unlawfully, Unreasonably, and Arbitrarily Fails To Consider the Noise Restrictions Agreed To By The Town of Antrim**

In addition to the Decision's inconsistency with the 2009 and 1999 WHO Guidelines, and its failure to follow precedent, the Decision is unreasonable in its failure to recognize the noise conditions that the Applicant and Town of Antrim agreed upon. The Town of Antrim Agreement, Ex. AWE 4, App. 17-A, section 11, establishes sound limits that are similar to those established for other wind facilities in prior SEC dockets. The Town Agreement establishes sound limits of 50 dBA or 5 dBA above ambient, whichever is greater, during daytime and 45 dBA or 5 dBA above ambient, whichever is greater, at night. AWE submits that it was unreasonable for the Subcommittee to ignore the Town Agreement and to substitute its judgment for that of the Town, especially since the Subcommittee never mentioned the Agreement's noise provisions in its deliberations or in its Decision. The Subcommittee's failure to address in any way the noise provisions in the Town Agreement suggests that it was either unaware of the Agreement's noise provisions or chose to totally ignore them, either of which warrants reconsideration of the Decision's noise restrictions.

### **CONCLUSION REGARDING SOUND**

For all of the reasons set forth above, the Subcommittee's establishment of an absolute nighttime sound standard (when it was purportedly relying on the 2009 WHO annual average nighttime sound level limits), its departure from prior SEC decisions, and its failure to consider the agreement with the Town of Antrim demonstrate that its

conditions with respect to sound were unlawful, unreasonable, and arbitrary, and must be revised.

## **II. MOTION TO REOPEN THE RECORD**

### **A. Standard for Reopening the Record**

A party may request that the record be re-opened to receive relevant, material and non-duplicative evidence or argument, and if the presiding officer determines that additional testimony, evidence or arguments are necessary for a full consideration of the issues presented at the hearing, the record shall be opened to accept the offered items.

N.H. Admin. R. Site 202.27 (a) and (b).

### **B. The Record Should Be Reopened to Consider New Mitigation Information and New Financial Information**

#### **1. New Mitigation Information**

AWE has taken significant, comprehensive steps to address concerns expressed by the Subcommittee related to the perceived visual impacts created by the Project. AWE has proposed modifications to the Project, as described below, and proposed new mitigation measures **in addition to** the substantial mitigation already in place. The original mitigation plan builds off AWE's commitment to careful siting and design, and includes permanently conserving over 808 acres of adjacent land, utilizing radar activated lighting technology, and burying ridgeline collector lines. AWE's proposed Project revisions and additional mitigation include the following components:

**Removal of Turbine #10 ("T10") from the Project.** Turbine #10 is the highest elevation turbine in the Project, is closest to the NH Audubon conservation lands, and is the most visible turbine from Willard Pond. The removal of T10 reduces the overall scale of the Project by more than 10% when the additional infrastructure associated with

T10 is considered, i.e. by removing T10, over 2,500 feet of road will not need to be constructed. The closest turbine to the boat launch at Willard Pond will now be T9, at a distance of 1.7 miles. From this distance, only the top of the nacelle and blades will be visible. A visual simulation of the view from Willard Pond without T10 is attached. *See Attachment D.* The specific Project changes due to this mitigation component are described below and shown on the attached revised project layout map. *See Attachment E.*

**Additional conservation of approximately 100 more acres of high visibility ridgeline.** AWE has entered into a Letter of Intent with Antrim Limited Partnership (owned by the Bean family, no relationship to AWE) to permanently conserve approximately 100 acres of ridgeline in the areas of Turbines #3-6. *See Attachment F* (letter of intent). The Letter of Intent reflects the parties' expectation that the conservation easement will be held by the Town of Antrim, and AWE is awaiting the Town's formal approval of that proposal. The location of this additional conservation land is shown on the map submitted herewith as Attachment G. This new conservation easement assures that 100% of the ridgeline area surrounding the turbine locations will be permanently conserved (i.e. there will be no future development on the ridgeline even after the Project ceases operations and is decommissioned). The new easement ties together all of the Project's existing Project conservation easements, such that the total conservation package now includes over 900 acres of contiguous land, the vast majority of which will not be impacted at all by the Project. No homes or other structures will be allowed to be built within the new easement. AWE believes this mitigation component significantly enhances the original conservation package and responds specifically to NH

Audubon's and others' preference for ridgeline conservation with minimal reserved rights.

**Gregg Lake Agreement with the Town of Antrim.** AWE and the Town of Antrim have entered into an Agreement, whereby AWE has agreed to pay, and the Town has agreed to accept, a one-time payment of \$40,000 as full and adequate compensation for any perceived visual impacts to the Gregg Lake area. *See Attachment C.* The Town will ultimately have discretion as to how the funds are used, and the letter suggests various concepts that center around enhancing the recreational and aesthetic experience around the Gregg Lake area.

**One-time payment of \$40,000 to NH Audubon.** AWE is willing to offer a payment to NH Audubon equal to the amount to be paid to the Town of Antrim under the Gregg Lake Agreement. The payment to NH Audubon is intended to support their management priorities for the dePierrefeu Wildlife Sanctuary. If NH Audubon is unwilling to accept such a payment, AWE requests that the Subcommittee designate an appropriate recipient (e.g. Antrim Conservation Commission) for the funds.

The Project reconfiguration and additional mitigation measures proposed herein are intended to directly address the Subcommittee's concerns about aesthetics. As such, the information set forth is relevant, material and non-duplicative evidence which should be made part of the record in this docket. These measures are significant and quite substantial. Physically scaling back the Project by more than 10% will reduce the overall aesthetic impact of the Project on the entire region, and will more directly reduce the visual impacts on the Willard Pond area. In addition, substantial new mitigation in the form of additional permanent conservation, which now includes 100% of the

ridgeline, and cash payments greatly enhances AWE's original and substantial mitigation package.

**Description of the Facility Changes:**

AWE's proposal to remove T10 necessitates a revision to the original Project plans to eliminate certain facilities from the Project. Specifically, the plan revisions include removal of T10 itself, its foundation and all electrical, road and stormwater management infrastructure leading from T9 to T10. Furthermore, two Project elements that were previously located at or near the T10 location will need to be relocated. More specifically:

1. The radar tower that is used for the radar activated lighting control system will be removed from the T10 location and relocated nearby to T2, where it will continue to be installed on a 90-foot monopole tower. There is only a minor foundation for the radar tower and ground based equipment and locating these facilities near T2 will not increase the Project's impacts on any sensitive resources such as rare, threatened, or endangered species of plants or animals, wetlands, vernal pools, etc.
2. The crane assembly area that was to be located near T10 will be moved to T9. As with the radar tower, this constitutes moving a Project element from one location to another rather than the addition of a new Project element. This move will also not create new impacts on sensitive resources.

Turbines 1-9 will remain in their original locations and no further design changes are required to accommodate the removal of T10. The footprints of the newly located crane assembly area and radar tower and pad will occur within the original limits of

disturbance for the facility and, as such, are well within the areas surveyed by AWE during its environmental reviews of the site.

Due to the fact that these Project changes consist of the removal and not the addition of facilities, and no new sensitive resources will be impacted by these changes, AWE requests that should the Committee issue a certificate for the Project, that it delegate the authority to NH Department of Environmental Services (“NH DES”) to review the Project modifications described above and issue any necessary revisions to the permits that NH DES has already recommended for approval.

In addition to all of the reasons set forth in AWE’s motion for rehearing related to the Project’s perceived aesthetic impacts, the new mitigation components introduced here clearly establish that the Project will not have an unreasonable adverse effect upon aesthetics, a conclusion that enables the Subcommittee to issue a certificate of site and facility. Accordingly, the record of this matter should be reopened to include all of the above-stated information so that the Subcommittee may properly consider it, accept it as appropriate mitigation for visual impacts, and make a finding that the AWE Project will not have an unreasonable adverse effect upon aesthetics and therefore should be granted a certificate of site and facility.

## **2. New Financial Information**

Since the filing of the Applicant’s Post-Hearing Brief, there have been new developments that are relevant to the issue of the Applicant’s financial capability and that warrant reconsideration of the Decision insofar as it lacks a finding with respect to the Applicant’s financial capability. First, Mr. Steve Schauer was appointed as Executive Officer of Antrim Wind Energy, LLC and President of Westerly Antrim, LLC. *See*

*Letter to Jane Murray* (April 25, 2013). The Applicant submitted this information to the Subcommittee as required by RSA 162-H:7, IX. *Id.* Mr. Schauer has over 23 years of energy finance experience, serving most recently as Senior Vice President of Finance and Treasurer for First Wind Holdings. *Id.* Mr. Schauer has raised over \$7 billion of capital for wind energy projects. *Id.* In addition, the Applicant has received letters from financial institutions (i.e., Bayern LB and KeyBank, N.A.) expressing an interest in investing in the AWE Project. *See Letters of Interest* (Attachments H-1 and H-2).

All of this new information warrants that this case be reheard so that the Subcommittee can consider this new evidence and, after doing so, make the required finding that the Applicant possesses adequate financial capability in accordance with RSA 162-H:16, IV (a).

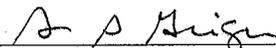
**Statement of Compliance With Site 202.14(d)**

In accordance with N.H. Admin. R. Site 202.14 (d), the undersigned has notified the parties of the relief sought herein in a good faith effort to obtain their concurrence. At the time these motions were finalized, the following parties provided the responses indicated below: New Hampshire Audubon does not assent; Harris Center for Conservation Education neither supports nor opposes; the North Branch Intervenors do not concur; the Edwards-Allen Joint Intervenors do not concur; and Ms. Longgood stated on behalf of “the abutters” that they do not concur.

WHEREFORE, in view of the foregoing, the Applicant respectfully requests that the Committee:

- A. Grant a rehearing of the issues discussed herein;
- B. Reopen the record in this docket to accept and consider the new information set forth above and submitted herewith;
- C. In accordance with N.H. Admin. R. Site 202.27 (c), specify a deadline within 30 days from the date of this motion by which other parties must respond to or rebut the new information;
- D. After rehearing and considering the new information submitted herewith, grant a Certificate of Site and Facility to Antrim Wind Energy, LLC; and
- E. Grant such further relief as it deems appropriate.

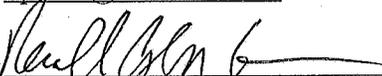
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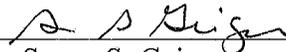


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Dated: June 3, 2013

Certificate of Service

I hereby certify that on this 3rd day of June, 2013, 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.

  
\_\_\_\_\_  
Susan S. Geiger

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