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June 7, 2013

Via Hand-Delivery and Electronic Mail
New Hampshire Site Evaluation Committee
c/o Ms. Jane Murray, Secretary
29 Hazen Drive
P.O. Box 95
Concord, NH 03302-0095

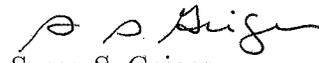
Re: Docket 2012-01, Application of Antrim Wind Energy, LLC

Dear Ms. Murray:

Enclosed for filing in the above-referenced docket, please find an original and 9 copies of Applicant's Objection to Counsel For The Public's Motions For Rehearing.

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)

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THE STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

Docket No. 2012-01

Re: Antrim Wind Energy, LLC

**APPLICANT'S OBJECTION TO
COUNSEL FOR THE PUBLIC'S MOTIONS FOR REHEARING**

NOW COMES Antrim Wind Energy, LLC ("AWE" or "the Applicant"), by and through its undersigned attorneys, and objects to Counsel for the Public's Motions for Rehearing filed on May 28, 2013 and June 3, 2013 by stating as follows:

1. On May 28, 2013, Counsel for the Public distributed a Motion for Rehearing to the service list for Docket No. 2012-01. *Motion for Rehearing* (May 28, 2013) ("May 28 Motion"). The May 28, 2013 Motion was not publicly withdrawn, but it also has not been posted on the Site Evaluation Committee's website. On June 3, 2013, Counsel for the Public distributed a second Motion for Rehearing in this docket. *Motion for Rehearing* (June 3, 2013) ("Motion"). For the reasons set forth below, both motions must fail.

2. As a preliminary matter, Counsel for the Public's May 28 and June 3 motions are indistinguishable except that paragraph (3)(c) of the May 28 Motion indicates incorrectly that a May 20, 2013 Hillsborough County Superior Court decision voided the Applicant's Agreement with the Town of Antrim. *See Order on Petition for Declaratory Judgment* (May 20, 2013), attached hereto as Attachment A. The Order voided the Payment in Lieu of Taxes ("PILOT") agreement, as referenced in Counsel for the Public's June 3 Motion. The Applicant's counsel asked Counsel for the Public via

electronic mail whether one of the motions had been withdrawn, and to date Counsel for the Public has not responded to the inquiry, even though the May 28 motion states significant and misleading factual error. All references herein to the June 3 Motion should be considered responsive to the nearly-identical May 28 Motion, unless otherwise indicated.

3. Counsel for the Public's Motion fails 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), and does not meet the standards for rehearing set forth in RSAs 541:3 and :4, or N.H. Admin. R. Site 202.29(d). The Motion fails to explain how the Subcommittee's decision was "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" and it further does not "[s]tate concisely the factual findings, reasoning or legal conclusion proposed by the moving party." N.H. Admin. R. Site 202.29(d). Instead, the Motion draws blanket conclusions without record citations or legal support. Counsel for the Public's Motion further fails to meet the standards set forth under the SEC's rules by neglecting to seek concurrence as required under N.H. Admin R. Site 202.14(d), and omitting any statement regarding his obligation to do the same.

4. In substance, Counsel for the Public first asserts that the Subcommittee should not have made findings on the Applicant's technical and managerial capability. *Motion* at ¶ 3(a). Counsel for the Public's claim is erroneous as a matter of law. Under RSA 162-H:16, IV(a), 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). *See Applicant’s Motion for Rehearing and Motion to Reopen the Record* (June 3, 2013) at 33-34 (asserting that the Subcommittee had an obligation to make a finding regarding all of the elements in RSA 162-H:16, IV(a)).

5. Counsel for the Public’s second argument is a vague, unsubstantiated assertion that the Subcommittee’s finding that the Applicant has technical and managerial capacity is unsupported by the Record. *Motion* at ¶ 3(b). This argument must fail because the Subcommittee based its findings concerning the Applicant’s technical and managerial capabilities upon record evidence, a summary of which is set forth in the Applicant’s Post-Hearing Brief (Jan. 14, 2013) at 19-24. More specifically, the Subcommittee properly found, based on the evidence before it, that “the Applicant’s team does bring considerable experience to this Project,” and that Acciona, the manufacturer responsible for installation and operation for five years, “is a world-wide leader in the field of wind power generation.” *Decision Denying Application for Certificate of Site and Facility* (May 2, 2013) at 35 (“Decision”). The Subcommittee found that the relationship between Acciona and the Applicant is “routine in the industry” and the combination of the Applicant’s experience and the relationship with Acciona provides “sufficient evidence that [the Applicant] possesses the technical and managerial capability to construct and operate the facility.” *Id.*; *see also* 2/5/13 (Deliberations), AM at 95:22-96:1 (statement by Subcommittee Chair during deliberations).

6. Counsel for the Public has provided no record evidence demonstrating that the Subcommittee’s finding of technical and managerial capability under RSA 162-H:16,

IV(a) was “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). In these circumstances, Counsel for the Public’s argument must fail.

7. Counsel for the Public’s third argument in the June 3 Motion is that the Hillsborough County Superior Court’s recent order regarding the Payment in Lieu of Taxes (“PILOT”) agreement requires the Subcommittee to reconsider its decision regarding the Applicant’s technical and managerial capability. *Motion* at ¶ 3(c). Counsel for the Public does not explain how the PILOT is related to the Applicant’s ability to construct and operate the facility under RSA 162-16, IV(a). Further, Counsel for the Public’s assertion that the Subcommittee “should have, but did not” consider the Superior Court’s decision fails to recognize that the Superior Court’s May 20, 2013 order issued long after the Subcommittee’s May 2, 2013 decision.

8. The PILOT is not relevant to the Applicant’s ability 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). The Subcommittee did not rely on the PILOT to draw *any* of its conclusions – the PILOT is not referenced in a single section of the Decision describing the Subcommittee’s deliberations or conclusions. The only references in the Decision to the PILOT are in the Subcommittee’s enunciation of party positions. *Decision* at 16, 19-20, 40. Further, the Town of Antrim is currently in the process of considering a new PILOT. *See* Meghan Pierce, *Antrim Wind Project: Developer Offers to Eliminate 1 Turbine*, New Hampshire Union Leader (June 4, 2013)

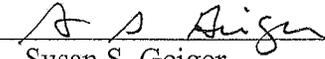
available at <http://www.unionleader.com/article/20130605/NEWS05/130609684> (last visited June 5, 2013). As a result, Counsel for the Public's arguments are inapposite.

9. Finally, as indicated above, Counsel for the Public falsely asserts in the May 28 Motion that the agreement with the Town of Antrim has been voided, which is factually incorrect. *See Order*, Attachment A. As a result, Counsel for the Public's arguments in paragraph (3)(c) of the May 28 Motion regarding the impact of the Court's order are erroneous and therefore should be disregarded.

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

- A. Deny Counsel for the Public's May 28, 2013 Motion for Rehearing;
- B. Deny Counsel for the Public's June 3, 2013 Motion for Rehearing; and
- C. Grant such further relief as it deems appropriate.

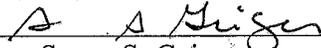
Respectfully submitted,
Antrim Wind Energy, LLC
By its Attorneys,
Orr and Reno, P.A.
One Eagle Square
P.O. Box 3550
Concord, NH 03302-3550
603-224-2381

By: 
Susan S. Geiger
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Rachel Aslin Goldwasser
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Dated: June 7, 2013

Certificate of Service

I hereby certify that on this 7th 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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**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

Hillsborough Superior Court Northern District
300 Chestnut Street
Manchester NH 03101

Telephone: (603) 669-7410
TTY/TDD Relay: (800) 735-2964
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May 21, 2013

ROBERT WILLIAM UPTON, II
UPTON & HATFIELD LLP
23 SEAVEY STREET
PO BOX 2242
NORTH CONWAY NH 03860

Case Name: **Gordon Allen, et al v Town of Antrim Board of Selectmen**
Case Number: **216-2012-CV-00655**

You are hereby notified that on May 20, 2013, the following order was entered:

RE: PETITION FOR DECLARATORY JUDGMENT:

See copy of order attached - Garfunkel, J.

John M. Safford
Clerk of Court

(539)

C: John J. Ratigan, ESQ



RECEIVED
5-22-13

HILLSBOROUGH, SS.
NORTHERN DISTRICT

STATE OF NEW HAMPSHIRE

SUPERIOR COURT

Gordon Allen, Mary Allen, Charles Levesque,

Jancie Longgood and Matha Pinello

v.

Town of Antrim Board of Selectmen

Docket No. 2012-CV 00655

ORDER ON PETITION FOR DECLARATORY JUDGEMENT

The petitioners, Gordon Allen, Mary Allen, Charles Levesque, Janice Longgood and Martha Pinello, seek to void a Payment in Lieu of Tax ("PILOT") Agreement entered into between the respondent, Town of Antrim Board of Selectmen (the "Board"), and Antrim Wind Energy LLC ("Antrim Wind"), under the Right-to-Know law, RSA 91-A. The respondent objects, contending that the Right-to-Know law does not apply to negotiations and meetings concerning the Board and PILOT Agreements. The court held a hearing on April 10, 2013, during which former Antrim Selectman Eric Tenney ("Tenney"), Antrim Administrative Assistant Galen Stearns ("Stearns") and petitioner Mary Allen testified. After consideration of the pleadings, arguments, testimony, exhibits and applicable law, the court finds and rules as follows.

Background

The Right-to-Know violations for which the petitioners complain arise out of negotiations between the Board and Antrim Wind regarding the construction of a wind facility in Antrim, New Hampshire. Specifically, Antrim Wind and the Board entered into

non-public, noticed and unnoticed meetings during which a PILOT Agreement was discussed. On June 20, 2012, the Board held a public hearing and approved the PILOT Agreement. The Board does not dispute that numerous noticed and unnoticed, nonpublic meetings were held with Antrim Wind concerning the PILOT Agreement.

For example, Galen Stearns, Antrim's Town Administrator during the PILOT Agreement, testified that based on the advice of town counsel, he believed the PILOT Agreement meetings were not subject to the requirements of the Right-to-Know law. Stearns believed that, under the aegis of the attorney-client privilege, unnoticed, nonpublic meetings were permissible as long as town counsel was present. Stearns also believed that he was only required to issue notice of non-public PILOT Agreement meetings when town counsel was not present.

As a result, Stearns testified that he posted notice of a non-public March 7, 2011, Board meeting with Antrim Wind under exemption RSA 91-A:3 II, a & d.¹ However,

¹ RSA 91-A:3, II states in pertinent part:

Only the following matters shall be considered or acted upon in nonpublic session:

- (a) The dismissal, promotion, or compensation of any public employee or the disciplining of such employee, or the investigation of any charges against him or her, unless the employee affected (1) has a right to a meeting, and (2) requests that the meeting be open, in which case the request shall be granted.
- (c) Matters which, if discussed in public, would likely affect adversely the reputation of any person, other than a member of the public body itself, unless such person requests an open meeting. This exemption shall extend to any application for assistance or tax abatement or waiver of a fee, fine, or other levy, if based on inability to pay or poverty of the applicant.
- (d) Consideration of the acquisition, sale, or lease of real or personal property which, if discussed in public, would likely benefit a party or parties whose interests are adverse to those of the general community.

Tenney, a Selectman during the PILOT Agreement negotiations, testified that the March 7, 2011 meeting did not fall under exemption RSA 91-A:3, II, a & d. Rather, this exemption applied to an unrelated issue at the meeting, in which the town was considering purchasing an easement.

Stearns further testified that the non-public August 24, 2011, meeting concerning Antrim Wind was posted because town counsel was not present. Stearns testified that this August 24, 2011, meeting with Antrim Wind was posted as a non-public meeting under exemption RSA 91-A:3, II, c because he believed this provision was applicable as it involved taxation. However, Stearns agreed with the petitioners' counsel that the PILOT Agreement did not involve Antrim Wind's inability to pay taxes under RSA 91-A:3, II, c.

Tenney testified that the August 24, 2011, probably did not meet RSA 91-A:3, II, c's requirements but based on town counsel's advice the Board believed the PILOT Agreement negotiations could be conducted in non-public meetings. Generally at these non-public meetings, Tenney testified, the Board received a "broad outline" of what Antrim Wind thought the value of the project would be, including general terms, but not including balance sheets or profit and loss statements. Tenney further testified that the information received at the non-public meetings was used in formulating the final PILOT Agreement.

According to Stearns, in addition to the March 7, 2011, and August 24, 2011, meetings, the Board held four other unnoticed, non-public meetings concerning the PILOT Agreement on June 21, 2011; October 25, 2011; February 15, 2012 and May 9, 2012 because town counsel was present. At these meetings Antrim Wind was also

present. Stearns also testified that there were meetings attended by him, Selectmen Webber and Antrim Wind concerning the decommissioning of the project and cost of construction.

At the hearing, town counsel represented to the court that it was his advice upon which the town relied in holding the PILOT Agreement meetings with Antrim Wind in nonpublic sessions.

Analysis

The petitioners allege that the noticed and unnoticed, nonpublic meetings between the Board and Antrim Wind constitute a violation of RSA 91-A, New Hampshire's Right-to-Know law. As a result of this purported violation, the petitioners seek an order from this court invalidating the PILOT Agreement, assessing attorney's fees and costs and requiring the Board to receive remedial training on the Right-to-Know law. The respondent objects and contends that RSA 72:74 allows for non-public meetings when the Board is considering a PILOT Agreement.

1. Right-to-Know Violation

The Board must comply with the requirements of the Right-to-Know law. See RSA 91-A:1-a; Carter v. City of Nashua, 113 N.H. 407, 414 (2001). Accordingly, all Board meetings must be open to the public and recorded unless an exemption applies. RSA 72:74 provides in pertinent part that "[t]he owner of a renewable generation facility and the governing body of the municipality in which the facility is located may, after a duly noticed public hearing, enter into a voluntary agreement to make a payment in lieu of taxes."

The interpretation of a statute is a matter of law. Goodreault v. Kleeman, 158 N.H. 236, 252 (2009). The court will consider the statute as a whole and construe the language in accordance with its plain and ordinary meaning. Id. If the statute's

language is plain and unambiguous, the court need not look beyond it for further indication of legislative intent, and will not consider what the legislature might have said or add language that the legislature did not see fit to include. Id. at 253. By contrast, if the statute is ambiguous, the court will look to the legislative history to aid its analysis. Id.

"Our goal is to apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme." Id. (quotation omitted). In light of the statutory purpose of "ensur[ing] the greatest possible public access to . . . records of public bodies, and their accountability to the people," RSA 91-A:1 (2001), the provisions in the Right-to-Know law favoring disclosure will be construed broadly while the provisions citing exemptions will be construed narrowly. Lamy v. N.H. Pub. Utils. Comm'n, 152 N.H. 106, 108 (2005).

Nothing in RSA 91-A:3, II or RSA 72:74 exempts PILOT Agreements from the Right-to-know law. Contrary to the respondent's contention, the plain language of RSA 72:74 supports this conclusion. Furthermore, as the respondent concedes, none of the exemptions in RSA 91-A:3, apply to the respondents. Thus, the court finds the respondent violated the Right-to-Know law by entering into non-public meetings with Antrim Wind for the PILOT Agreement on the numerous occasions detailed above.

2. Remedies

The Right-to-Know law, if violated, provides for three possible remedies: (1) an award of reasonable costs and attorney's fees, RSA 91-A:8, I; (2) an order voiding action taken by a public body or agency, if the circumstances justify such invalidation, RSA 91-A:8, II; and (3) an injunction, RSA 91-A:8, III. The petitioners seek to have the

PILOT Agreement invalidated, request attorney's fees and costs and for the court to order the respondent to seek remedial training on the Right-to-Know Law.

The court GRANTS the petitioners' request to void the PILOT Agreement. As discussed above, the Board conducted numerous noticed and unnoticed, non-public meetings while negotiating the PILOT Agreement. These meetings contravened the fundamental purpose of the Right-to-Know law's goal of transparent and open government. Accordingly, the court finds voiding the Agreement is warranted to redress the Right-to-Know violations. See Lambert v. Belknap County Convention, 157 N.H. 375, 382 (2008).

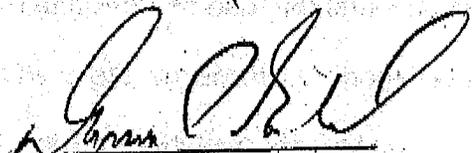
However, the court DENIES the petitioners' request to assess attorney's fees and costs against the respondent. RSA 91-A:8, I expressly states that in order to assess attorney's fees and costs, the court must first find that "the public body, public agency, or person knew or should have known that the conduct engaged in was in violation of this chapter" Here, Stearns and Tenney testified that they believed the hearings did not have to be public based on the advice of town counsel. Moreover, at the hearing, town counsel agreed that it was his advice regarding RSA 72:74 upon which the town relied. See Voelbel v. Town of Bridgewater, 140 N.H. 446, 448 (1995) (overturning award of attorney's fees when selectmen acted in good faith, relied on town counsel's advice and the Right-to-Know violation was not obvious, deliberate or willful). Accordingly, the court finds the Board did not knowingly engage in the Right-to-Know violation and therefore DENIES the petitioners' request for attorney's fees and costs.

The court also DENIES the petitioners' request to order the respondent to receive remedial training on the Right-to-Know law. As explained above, the selectmen

relied on town counsel's advice regarding application of the Right-to-Know law. Tenney and Stearns both demonstrated an awareness of the Right-to-Know law's requirements and exemptions during their testimony. Thus, the court finds that remedial training is unnecessary because the town's error resulted from its reliance on town counsel's incorrect advice.

SO ORDERED.

May 20, 2013


David A. Garfunkel
Presiding Justice