

**STATE OF NEW HAMPSHIRE  
SITE EVALUATION COMMITTEE**

RE: Petition by Antrim Wind Energy, LLC )  
for jurisdiction over renewable energy facility )  
SEC Docket Number 2014-05 )

**THE WIND ACTION GROUP RESPONSE TO TOWM OF ANTRIM  
MEMORANDUM OF LAW IN SUPPORT OF JURISDICTION**

NOW COMES the Wind Action Group (“Windaction”), through its representative, Lisa Linowes, and offers these responsive comments to the Town of Antrim's memorandum of law filed on June 26, 2015.

The Town of Antrim ("Town") and Antrim Wind Energy LLC ("AWE") have petitioned the SEC ("Committee")<sup>1</sup> to exercise its jurisdiction over AWE's plan to construct a wind energy facility in Antrim. The proposed project is substantially identical to the application previously considered, and ultimately denied in Docket 2012-01.<sup>2</sup> The revised project, at 28.8 MW, is below the 30 MW threshold required to prompt automatic review by the SEC.

Following the Committee's decision to deny AWE's original application<sup>3</sup>, AWE and the Town moved to re-open the record to allow consideration of several project amendments to cure defects they believed led to the initial denial. The amendments included *inter alia* an expanded mitigation package and removal of turbine #10. The Committee dismissed the motion after finding that the revisions "materially changed the original Application and would require an extensive de novo review."<sup>4</sup>

The Town suggests the Committee's reference to a *de novo review* amounts to a directive for AWE to resubmit an amended application under a new docket. The Town goes to great pains to articulate

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<sup>1</sup> "Committee" in this filing may refer to the full SEC or the Subcommittee that reviewed the AWE project.

<sup>2</sup> Antrim Wind Energy LLC Petition for Jurisdiction at para 17.

<sup>3</sup> Committee decision, April 25, 2013.

<sup>4</sup> Order on Pending Motions, September 10, 2013 at 11.

how the revised application differs from the original and how those differences are material. It cites removal of turbine #10, the slight height reduction of turbine #9, minor technical differences between Siemens- and Acciona-made turbines<sup>5</sup> and then recites from Mr. Raphael's testimony. The Town ignores that the turbines are situated in the same location as in the original application and how the linear layout of the roads and project infrastructure remain unchanged. AWE concedes in its own petition that it intends to rely on previously completed impact studies since "this is in most key aspects the same project that the Committee considered in Docket 2012-01." (*Petition For Jurisdiction Over a Renewable Energy Facility Proposed By Antrim Wind Energy, LLC at 6 and 11*)

The Town refers to *Morgenstern v. Rye*, 147 N.H. 558, 566 (2002) wherein it cites "the plaintiff did not merely resubmit the same application... but, *at the town's invitation, submitted a new proposal in an effort to meet the town's concerns.*" [emphasis added] Similarly, the Town cites *Appeal of Town of Nottingham*, 153 N.H. 539, 566 (2006), where the Court ruled the applicant (USA Springs) amended its plan "*in response to comments made by DES in denying the prior application.*" [emphasis added]

In applying *Morgenstern*, the question of materiality is still relevant, but two other questions are raised. The first is whether the Committee *invited* AWE to resubmit a revised application for its review? The second is whether the Committee is the only agency authorized to review AWE's new application?

During the February 7, 2013 deliberative session, a wide range of statements were proffered by the Committee members in discussing whether the project would pose an unreasonable adverse effect on aesthetics. The majority generally found that the scale of the project did not fit the surroundings. Some members expressed a concern for Willard Pond while others were not specific. The idea of smaller, fewer

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<sup>5</sup> There is nothing in the record that supports the Town's claim that the Siemens turbines have a reduced sound impact. The maximum sound power rating for the Siemens turbine is 107.5 dB(A). The Acciona is rated less than 1 dB(A) above at 108.4 dB(A). The Town also claims the Siemens turbine tower is 13% narrower at 13 feet. If this is accurate, the Acciona towers would likely exceed the maximum diameter (4.1-4.3 meters) permitted to allow for road transport logistics.

wind turbines was raised, but again nothing specific. A sampling of quotes from the February 7, 2013 deliberation follows:

*I look at this project as having a very large, not footprint, but position on the landscape. I have wondered how it could be mitigated. I'm not coming up with any solutions. ...And I look at it not just from Willard Pond, but from the other directions, literally. It's going to be seen from a lot of places. ...And I'm not quite sure I'm ready to say one view or one area is more important than another, or is the only one maybe is a better way to put it, than the others. - Dr. Boisvert Transcript 2/7/2013 at 19-21*

*[T]hey [the towers], unlike Granite Reliable, placed in very remote places in the White Mountains, they're being placed right in the center of a very small community, I find it just overwhelming as to scale and too much for a small community. - Chairman Ignatius Transcript 2/7/2013 at 23*

*I often drive down Route 9 because I go to Monadnock State Park all the time and Greenfield. So I go through the town a lot, of Antrim. And I think it will change the flavor of the community and its surrounding communities. - Ms. Lyons Transcript 2/7/2013 at 36*

*I think it is a very large impact. And I'd like to find mitigation, but I just don't -- I guess I'm stuck there on what would be appropriate mitigative measure for that. - Mr. Simpkins Transcript 2/7/2013 at 26*

*And I agree with the Chair, that the scale here with the wind farm is out of sync with the area. I think it's just too large. I think it's going to overwhelm the quality and experience that folks might have for going to Willard Pond for a lot of reasons. And I don't know how you mitigate that. ... So I think you either accept the project or you don't. - Mr. Robinson Transcript 2/7/2013 at 26*

Unlike *Morgenstern* where the ZBA offered suggestions to the applicant, the Committee's 2013 deliberations were entirely limited to the members. AWE and the Town may have inferred ideas for revising the project based on what they heard, but it would be wrong to construe the Committee's discussions as purposeful direction regarding AWE's next steps.

Even if we were to accept an intent by the Committee to counsel AWE, that does not mean the Committee is the only agency to review an amended proposal. In *Morgenstern*, statute required the plaintiff to appear before the ZBA for a variance. In *Appeal of Town of Nottingham*, DES was the only permitting authority, and therefore the only agency before which the applicant could appear. In contrast, RSA 162H *does not* mandate all applications be heard by the Committee. Projects that are under the 30

MW threshold, as well as projects that exceed the threshold can be reviewed by other entities. Further, had the Committee seated in 2013 intended for AWE to return with a revised plan, RSA 162-H:10 III assures that future Committees would not be bound by such an intent.<sup>6</sup>

The Town also argues that it lacks the legal authority to regulate a large-scale wind project relative to noise, wildlife, and aesthetics. This is simply not true. First, RSA 31:39 I (n) grants towns the authority to adopt bylaws that regulate noise. But more to the point, Antrim has the institutions in place that are designed to assess complex projects of this type including its Selectboard, a Planning Board, a Zoning Board of Adjustment and a master plan. RSA 676:4-b permits planning boards to obtain third party review and consultation, as necessary, on land use applications that may exceed the experience level of its members or time constraints the board is under. Antrim's local governing boards are not the only parties responsible for reviewing an application. Any proposed wind facility would still be subject to various state permits that affect the environment including a wetlands permit and alteration of terrain permit, each issued by the Department of Environmental Services. There may be other state and federal agencies with permitting jurisdiction that would be engaged. Had the legislature agreed with the Town's claim, it would have mandated every energy facility be reviewed by the Committee. This is clearly not the case.

AWE is at liberty to proceed with a revised, or entirely different application at any time. There are no rules or regulations at the state or local level that prohibit this action. While the original project may not have been appropriate for the site, AWE is not precluded from proposing a wind energy facility with different dimensions. However, the presumption of Committee jurisdiction is not assured.

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<sup>6</sup> RSA 162-H:10 III - "The committee shall consider, as appropriate, prior committee findings and rulings on the same or similar subject matters, but shall not be bound thereby."

Date at Lyman, New Hampshire, this 4th day of July, 2015.

INDUSTRIAL WIND ACTION GROUP, INC.



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Lisa Linowes  
286 Parker Hill Road  
Lyman, NH 03535  
603-838-6588

cc: Service List for Docket 2014-05