THE STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

RE: Petition of Antrim Wind Energy, LLC for Jurisdiction	)	**Docket No. 2014-05**

MEMORANDUM IN SUPPORT OF OBJECTION TO PETITION FOR JURISDICTION

Counsel for the Public hereby submits this Memorandum in Support of its Objection to the Petition for Jurisdiction over the Renewable Energy Facility Proposed by Antrim Wind Energy, LLC (the "Petition"). This also serves as a response to the Town of Antrim's Memorandum in Support of Jurisdiction. Counsel for the Public requests that the Petition for Jurisdiction be denied.

The Petitioner, Antrim Wind Energy, LLC ("Petitioner") seeks jurisdiction by the Site Evaluation Committee over a project of approximately 28.8 MW of wind generation to be constructed in the Town of Antrim (the "Project"). As noted in Counsel for the Public's Objection to the Petition for Jurisdiction the Petitioner first applied for a certificate of site and facility for a project in Antrim in January 2012 ("2012 Project"). The 2012 Project was designed to have 10 turbines each rising to a level of 492 feet above ground level. As proposed, each turbine would have been between 25% and 35% of the elevation of the ridgeline where it was proposed to be located.

Petitioner's 2012 application was denied on May 2, 2013 by the Site Evaluation Committee ("Committee"), finding that the project would have an unreasonable adverse impact

on aesthetics. 5/2/13 Decision and Order Denying Application for Certificate of Site and Facility, p. 50-51. *Petition of Antrim Wind Energy, LLC*, N.H. Site Eval. Comm., no. 2012-01).[1]

In so doing, the Committee reached the following factual findings:

a) The ridgeline designated for the location of the turbines has a site elevation fluctuating between 1,042 feet and 1,904 feet.

b) As proposed, the height of each turbine would be between 25% and 35% of the elevation of the ridgeline where it will be located.

c) The Tuttle Hill ridgeline is a prominent topographical feature in the Town of Antrim.

d) The ridgeline extends along the northwest border of the Town of Antrim and along with Willard Mountain, Robb Mountain, Bald Mountain and Goodhue Hill, and creates a cradle that encompasses Willard Pond, Gregg Lake, Meadow Marsh and a number of areas containing sensitive viewpoints.

e) At least one of these visually sensitive areas, Pitcher Mountain, already has an existing view of the Lempster wind project located in Lempster, New Hampshire.

f) The size of the proposed wind turbine generators, when imposed upon the Tuttle Hill/Willard Mountain ridgeline would appear out of scale and out of context with the region. This is particularly so when considering the viewshed impacts on a combination of visually sensitive areas.

g) There are significant qualitative impacts upon Willard Pond, Bald Mountain, Goodhue Hill and Gregg Lake.

h) There are moderate impacts on additional locations including, but not limited to, Robb Reservoir, Island Pond, Highland Lake, Nubanusit Pond, Black Pond, Franklin Pierce Lake, Meadow Marsh and Pitcher Mountain.

i) The Subcommittee found Mr. Guariglia's limitation of qualitative considerations only to areas meeting his definition of "statewide significance" to be an overly restrictive approach.

j) The Audubon's wildlife sanctuary is an area to which state and federal funds have been designated. Regardless of the definition used to identify an area as being of

[1] The Committee deferred making a final determination as to Antrim Wind Energy LLC's financial capacity to construct and operate the 2012 Project, and ultimately voted to deny the application on other grounds. *Id.* p. 39-40.

"statewide significance", it is clear that the Facility would have a significant impact on areas that are of significant value for their viewshed in the Town of Antrim and the surrounding region.

k) A majority of the Subcommittee agreed with the assessment of Ms. Vissering that the Facility is not appropriately scaled and designed to work within the geographic setting. Ex. PC 1 at 18. In short, the turbines are too tall and too imposing in the context of the setting. They would overwhelm the landscape and would have an unreasonable adverse impact upon valuable viewsheds.

Id. at pp. 49 - 51

In addition the Committee made additional findings specific to Willard Pond and the dePierrefeu Wildlife Sanctuary as follows:

a) The Facility would have a particularly profound impact on Willard Pond and the dePierrefeu Wildlife Sanctuary which is owned in fee and managed by Audubon.

b) The Wildlife Sanctuary comprises 1,700 acres. The Facility is proposed to be constructed within one mile of the property boundary of the Wildlife Sanctuary. In addition, Audubon holds conservation easements on approximately 1,300 acres of land adjacent to the Wildlife Sanctuary. Willard Pond is located in the interior of the Wildlife Sanctuary. Willard Pond is a state designated Great Pond.

c) Willard Pond is approximately 100 acres and boasts an undeveloped shoreline and pristine water quality. Motorized vessels are prohibited from the Pond. Willard Pond is surrounded by forested peaks, including Bald Mountain and Goodhue Hill.

d) Willard Pond and the Wildlife Sanctuary are popular locations that are enjoyed by numerous visitors. Environmental education programs, fishing, birding, wildlife viewing, and solitude all appear to generate visitors to the Pond and Wildlife Sanctuary.

e) The Pond and the Wildlife Sanctuary are part of a larger tract of conserved lands consisting of approximately 30,000 acres and known as the "super sanctuary."

f) Public funds have been dedicated to the dePierrefeu Wildlife Sanctuary and the surrounding conservation lands through a conservation program known as the Forest Legacy Program, the federal government has invested

> approximately $3.5 million to conserve the lands within and directly adjacent to the Wildlife Sanctuary. Transcript Day 8 Morning at 63, 68-69. The State has invested approximately $400,000.00 for similar purposes. Id. In addition, Willard Pond and the dePierrefeu Wildlife Sanctuary sit within the "Quabbin to Cardigan Initiative," an interstate regional effort to conserve the Monadnock Highlands of north central Massachusetts and western New Hampshire.

Ultimately the Subcommittee determined that Facility would impose an unreasonable adverse effect on the viewshed from Willard Pond, as well as in other areas throughout the dePierrefeu Wildlife Sanctuary. *Id.* at pp. 51-52

In considering the mitigation measures, particularly the proposal for off-site mitigation consisting of the dedication in excess of 800 acres of conservation land in the surrounding area, the Committee found that the dedication of lands to a conservation easement would not suitably mitigate the impact explaining that additional conserved lands would be of value to wildlife and habitat but they would not mitigate the "imposing visual impact that the Facility would have on valuable viewsheds. *Id.* at p. 53.

The Committee relied upon the testimony of Jean Vissering, a landscape architect hired by Counsel for the Public in reaching its decision on aesthetic impacts. *Id.* at 47-48. It also addressed the changes and mitigation measures suggested by Ms. Vissering that may mitigate the unreasonable adverse effect on aesthetics, in particular the elimination of two turbines and a reduction in size of the balance of turbines in the facility. *Id.* at p. 53-54. The Committee found that the reduction in scale suggested by Ms. Vissering may substantially mitigate the unreasonable adverse impact on aesthetics but would likely change other dynamics of the project to such a degree that it would not be able to confidently assess the consequences of issuing a Certificate. *Id.* at 53-54.

Petitioner has modified its current proposed Project but those modifications do not represent the reduction in scale suggested by Ms. Vissering and the Committee such that they would materially change the unreasonable adverse impacts that this project will have on the aesthetics of the region. Petitioner is proposing the elimination of turbine 10 and a 45 foot reduction in turbine 9. The remaining turbines 1- 8 will be virtually the same height and remain in the same location. See, Petition at p. 6. The proposal to use of a radar activated lighting that was proffered in the 2012 docket by the Petitioner and considered by the Committee in its decision is still pending approval by the Federal Aviation Agency. Decision and Order Denying Application at p. 55. The Petitioner also agreed to provide additional conservation lands but the Committee has previously determined that offsite mitigation does not mitigate "the imposing visual impact the Facility would have on valuable viewsheds." *Id.* at p. 53.

It is the modifications to the turbines themselves that will have the greatest material impact on the aesthetics in the region, and Ms. Vissering addressed these changes in her testimony. As noted by Ms. Vissering:

> The primary difference is that Turbine #10 would be removed. Turbine #9 would be slightly less visible due to its lower height, but its height would still be 50 feet taller than the Lempster turbines. While the lower height obscures the nacelle from some vantage points, it will still be quite intrusive when observed from others. Turbines #9 and #10 were particularly egregious due to their proximity, and #10's location on a prominent peak, but the impacts to the Sanctuary were also due to the impacts resulting from very large turbines visible from all three of the Sanctuary's primary destinations – the two summits and the pond… Views of roads and clearings would be visible along the project ridge and visible from off-site viewpoints including those within the Sanctuary. These exacerbate aesthetic impacts by interrupting the continuous forest cover. The removal of turbine #10 would not change the resulting aesthetic impacts. [2]

[2] Vissering Testimony at p.8.

Further Ms. Vissering indicated that the reduction in height in turbine 9 may reduce its visibility but it does not eliminate its visibility from sensitive resources like Willard Pond, Goodhue Hill, Gregg Lake, Pitcher Hill and other locations. [3]

These are the resources that were identified as among the most sensitive in the Committee's opinion, and they are also the resources that will be most significantly impacted. The Petitioner suggests that the changes will result in the elimination of visibility from Center Pond, Spoonwood Pond, Nubanusit Lake and Beech Hill but Ms. Vissering did not consider any of these locations to have severe aesthetic impacts, although she noted the impact on Nubanusit Lake as having moderate. [4]

Thus, Petitioner's proposed current project doesn't sufficiently address the most important Committee findings. Removal of turbine 10 and the 10% reduction in height of turbine 9 does not materially change the significant qualitative adverse impacts of the project upon the dePierrefeu Wildlife Sanctuary, Willard Pond. The proposed changes do not address the further findings by the Committee that Willard Pond and the Wildlife Sanctuary are popular locations that are enjoyed by numerous visitors; that environmental education programs, fishing, birding, wildlife viewing, and solitude all appear to generate visitors to the Pond and Wildlife Sanctuary. It does not address the Committee's findings that the project would have significant qualitative adverse impacts of the project upon Bald Mountain, Goodhue Hill and Gregg Lake. It does not address the Committee's finding that the project would appear out of scale and out of context with the region when considering the viewshed impacts on a combination of visually sensitive areas. It does not address the Committee's finding that the project would have moderate qualitative impacts upon other locations including, but not limited to, Robb Reservoir,

[3] Vissering Testimony at p. 12.
[4] Vissering Testimony at p. 13.

Island Pond, Highland Lake, Black Pond, Franklin Pierce Lake, Meadow Marsh and Pitcher Mountain.

Petitioner is relying on a new expert, David Raphael, to invite the Committee to re-litigate the findings that the Committee made in the 2012 project. Mr. Raphael testified that he conducted a visual impact assessment and concluded that based upon the changes from the 2012 project, the proposed will not have an unreasonably adverse impact on the surrounding area.

Mr. Raphael has made clear that his opinion is based upon the visual assessment he conducted. As part of his visual assessment, Mr. Raphael re-visited the findings the Committee made regarding the visual effect that project would have on public resources and public vantage points and rated the potential sensitivity on each resource. He testified that his analysis as to the identification and rating of the potentially sensitivity of these resources was based upon his methodology on evaluating the resources: creating an inventory of sensitive scenic resources; determining if there was visibility from those resources; the identification of sensitive scenic resources; the determination of visual effect from those sensitive scenic resources; and finally the effect on the viewer from those resources. Each of these stages was a winnowing process that resulted in Mr. Raphael identifying one sensitive resource Willard Pond, and then determining there would be a moderate effect on the viewer from Willard Pond. Mr. Raphael testified that this analysis was essential and integral to his conclusion.

The remaining part of Mr. Raphael's report where he determines that there is no unreasonable adverse impact does not employ any of the foregoing methodology. Even so, he concluded that the project would not have an unreasonable adverse impact on Willard Pond.

ARGUMENT

Where a project falls below the 30 MW threshold for mandatory jurisdiction, upon an appropriate petition, the Committee may treat a renewable project as an "energy facility," subject to its jurisdiction, if the Committee determines it "requires a certificate, consistent with the findings and purposes set forth in RSA 162-H:1." RSA 162-H:2, XII.

In other cases when the Committee has addressed the question of jurisdiction over renewable energy projects it has considered the factors or findings that relate to the public interests expressed in RSA 162-H:1. *Petition for Jurisdiction of Timbertop Wind I, LLC*, N.H. Site Eval. Comm., no 2012-04; *Petitions of Laflamme and Jones (In re Clean Power Development, LLC)*, N.H. Site Eval. Comm., no. 2009-03.

At the outset, the legislature recognized that that the selection of sites for energy facilities may have significant impacts on and benefits to the following: "the welfare of the population, private property, the location and growth of industry, the overall economic growth of the state, the environment of the state, historic sites, aesthetics, air and water quality, the use of natural resources, and public health and safety."(emphasis added). RSA 162-H:1. The factors that have been utilized by the Committee in deciding whether to assert jurisdiction over a project are set forth below:

(1) Maintain a balance between those impacts (referenced *supra*.,) and the need for new energy facilities in New Hampshire;

(2) Avoid undue delay in the construction of needed facilities and provide full and timely consideration of environmental consequences;

(3) Ensure that all entities planning to construct facilities in the state be required to provide full and complete disclosure to the public of such plans; and,

(4) Ensure that the construction and operation of energy facilities are treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion.

RSA 162-H:1.

The Committee considered these factors when it approved jurisdiction for the 2012 project. But it need not exercise its discretionary jurisdiction for a project that is substantially or materially the same project it denied in 2013. Counsel for the Town of Antrim alleges that the same factors relied upon by the Committee to exercise jurisdiction in 2012 exist today. Counsel for the Public disputes this contention. While it is true that Antrim has tried multiple times to enact a zoning ordinance that does not mean that there is methodology in place to review this project. Antrim has bodies in place to assess a complex project as the one being proposed by the Petitioner, including a Board of Selectmen, a Planning Board Zoning Board of Adjustment, and a master plan. See, *Id.*, *Dissent from Jurisdictional Order*, 8/23/1. There is no basis to conclude that there are any issues with bias, undue delay, and no basis to conclude that either the Zoning Board of Adjustment or the Planning Board will not act on the proposal fairly or in a timely fashion. Unlike the situation in 2012, currently both the Town's Board of Selectmen and Planning Board support the project. The fact that site plan review waivers and variances from the terms of the Antrim zoning ordinance may be necessary may make the project more laborious but it is still possible. A representative of the Planning Board testified that even though there currently is no ordinance it is possible for the Town to consider the project, and like the Committee, the Town can thoroughly review the project with the help of experts and consultants.

In its Memorandum in Support of Jurisdiction, the Town alleges that the Committee invited the Petitioner to file a new petitioner based upon the changes that the Petitioner submitted in its motion for rehearing and to re-open the record after the Committee denied Petitioner's Application. As such, the Town argues, the *Fisher v. Dover* rule applies and the application cannot be considered substantially the same application. 120 N.H. 187 (1980).

Assuming for arguments sake that is the appropriate standard, a review of the Order and the Deliberations on the Petitioner's Motion for rehearing does not support the Town's interpretation of that Order. Rather the Committee held that the changes proposed would materially change the entire application. Order on Pending Motions, p. 11(emphasis added). The application consisted of numerous studies that could be impacted by the change. As noted in the deliberations on Petitioner's motion, the Subcommittee discussed that there had been no precedent for re-opening a record after a decision had been made. *Id.* Transcript on Deliberations, 7/10/2013, p. 91. Committee members also expressed concern that it may set a precedent for applicants to try a case under one set of facts and substitute the facts after they didn't prevail, (*Id.* p. 93-95); and there was further concern that the loss of one turbine might affect the financial capability of the Petitioner. (*Id.* p. 95). It is clear that the Committee was concerned about how the changes would affect other aspects of the application, like the financial condition of the Petitioner. But that cannot be construed to mean that the Committee found that proposed changes would materially change the Committee's determination on aesthetics.

Further, in its Decision Denying the Application for Certification the Committee contemplated recommending the changes proposed by Ms. Vissering that would call for removal of turbines 9 and 10 and a reduction in height of the remaining 8 turbines, however the

Committee refrained from that recommendation, noting that "the reduction in scale suggested by Ms. Vissering may substantially mitigate the unreasonable adverse effect on aesthetics but would likely change other dynamics of the Project to such a degree that the Subcommittee would be unable to confidently assess the consequences of issuing a Certificate." Decision and Order Denying Application for Certificate of Site and Facility. 4/25/2013, p. 54.

The Town also alleges that Counsel for the Public should be estopped from arguing that changes are not material based upon the position Counsel for the Public took in his Objection to Motion for Rehearing and the Re-open the Record . The Town alleges that Counsel for the Public argued that the changes proposed by the Petitioner were material; therefore they should be considered *de novo* in a new application. See, Town's Memorandum, p. 4. The Town has misread the Objection filed by Counsel for the Public.

Counsel for the Public filed a 21 page objection in which he raised several grounds why the motion for rehearing be denied. Regarding the proposed changes Counsel for the Public argued, "[T]he information that the Applicant seeks to introduce on aesthetics mitigation was already considered by the Subcommittee in the abstract over an entire afternoon and rejected as an approach because the complexity of the case, including the financial issues, made such a retrofit unworkable." See *Petition of Antrim Wind Energy, LLC*, N.H. Site Eval. Comm., no. 2012-01), Objection of Counsel for the Public to Motion for Rehearing and to Reopen the Record, 6/13/13, p. 16. Counsel for the Public also argued:

> The Applicant "strenuously object[ed] for financial reasons" to the same kind of mitigation it is suggesting now because it would "materially increase the Project's construction costs per MW of installed capacity. The resulting loss of economies of scale in the construction of the Project would make the Project far less competitive and thus unlikely to secure a PPA and obtain

> financing."50 Surprisingly, the Applicant now proposes changes that it denounced as unreasonable and impossible.
>
> There is also no evidence in the record that the proposed changes would sufficiently soften the impact that the project would have on aesthetics. Mr. Guariglia, obviously, made no mitigation recommendations and did not comment on those recommended by Ms. Vissering.
>
> On the other hand, Ms. Vissering's testimony and report made clear that the only way to mitigate the visual impacts was with *all* of her recommendations, which included removing two turbines and making all the rest significantly smaller.51 Thus, introducing some new and uncertain conservation land easements, cash offers, and removing one turbine does not provide anywhere near the kind of mitigation that the undisputed record shows would be necessary.
>
> In sum, with these new submittals and redesign the Applicant is trying to do that which its witnesses and counsel stated in no uncertain terms could not be done and which is unsupported by any evidence as being effective for its intended purpose.

Id. at 17.

This can hardly be construed as inviting to submit the same plan for de novo review in a new application. As such the Committee should reject the Town's estoppel argument.

It is the Petitioner's burden to establish that the current proposed project is materially different from the project proposed in 2012. See generally, *Fisher*, 120 N.H. at 189. Petitioner has not met that burden. The evidence demonstrated that the reconfiguration of the 2012 project does not reflect the changes recommended by Ms. Vissering. Given the Committee's reliance on Ms. Vissering's testimony as the basis of its decision in denying the application, it is important to emphasize in full Ms. Vissering's opinion and recommendations regarding the aesthetic impacts of this Project.

Ms. Vissering's concluded the mitigation measures discussed by Petitioner's expert, Saratoga Visual Report were generic measures used in nearly all recently proposed wind energy projects and they did not address the particular characteristics, resources and impacts that would

result from the project. See, Report of Jean Vissering, p. 18, *Petition of Antrim Wind Energy, LLC*, N.H. Site Eval. Comm., no. 2012-01). She believed that substantial modification would be required for this project to meet the requirements of RSA 162-H:16, IV, (c). *Id.* Ms. Vissering recommended the following combined mitigation measures as *the minimum necessary* to adequately reduce the significant and unreasonable impacts of the project:

(1) Eliminate turbines #9 and #10. These two turbines are the most prominent as viewed from Willard Pond, Bald Mountain and Goodhue Hill and will result in unreasonable adverse aesthetic impacts. Visibility of clearing around turbine #9 will also result in significant visual impacts.

(2) Use an OCAS or similar motion activated collision avoidance system. This will be essential as night lighting will result in significant and unreasonable adverse aesthetic impacts to the area given the high visibility of the project from numerous lakes and ponds and especially from within wildlife sanctuaries and conservation areas.

(3) Use smaller turbines. The scale of the landscape in this part of New Hampshire is small with relatively low hills and mountains. The proposed turbines will overwhelm the ridgeline especially from a vantage point like Gregg Lake.

(4) Specific plans for land conservation as part of an off-site mitigation program must be identified and provide a meaningful counterbalance to the impacts to the natural and scenic resources of the area. Audubon's dePierrefeu-Willard Pond Sanctuary will be heavily impacted as a result of the project. The developer should work with Audubon to find a reasonable conservation off-set in conjunction with other measures identified here to reduce the visual impacts of the project.

(5) Identify and address all areas from which portions of roads, ridgeline clearing, cut and fill slopes and or turbine/pads may be visible. Of particular concern is the visibility of the road between turbines #5 and #6 from Goodhue Hill, any other areas where project infrastructure other than turbines are visible will be a significant concern. The applicant should conduct line-of-sight studies from portions of roadway and turbine clearings to all sensitive vantage points. Specific plans need to be provided showing how these areas of project infrastructure visibility will be mitigated. Among the measures that must be considered would be reducing the size of clearings, reducing the size of cut and fill slopes, eliminating turbines in areas where visibility could be high, re-vegetating cut and fill slopes using indigenous species.

(6) General re-vegetation of cut and fill slopes and all non-permanent surfaces must occur immediately following construction. Revegetation must be with native plants and seed sources preferably using stock-piled soil. Introduction of exotic species should be avoided. Planting of indigenous species may be required in some areas as discussed above. A specific plan should be developed and approved by the NH Department of Forestry and Lands including on-going monitoring to ensure re-vegetation is successful.

(7) Any significant visibility of the substation and O&M facility may need to be mitigated with screening plantings.

Id. at 18-19.

Ms. Vissering testified that the recommendations related to the turbines were the most important to the reduction of adverse impacts. However, Petitioner modified its project only by eliminating turbine 10, and reducing the height of turbine 9 approximately 40 – 45 feet. Further with regard to turbines 1 through 8, the Mr. Kenworthy and Mr. Raphael testified before the Committee that the 3 foot reduction in height and change to Seimans turbines will not affect the impact of the project on aesthetics.

The remaining changes proposed by Petitioner involve use of OCAS radar[5], an additional 100 acres of conservation land, payment to the New England Forestry Foundation of $100,000 to be used for conservation land in somewhere in Southern New Hampshire, and a $40,000 payment to the Town of Antrim to be used at its discretion to address aesthetic impacts at Gregg Lake. Since the Committee already rejected the mitigation involving conservation lands off-site as sufficient mitigation for adverse aesthetic impacts in it s Decision and Order Denying the Application, (pp.52-54) it is difficult to imagine that the Committee would now determine more of the same to be effective mitigation. Similarly the

[5] The Committee indicated that it would approve the use of radar activated night lighting if the certificate were to be approved noting that the FAA had not yet approved this system. *Id.* at 55.

Petitioner failed to establish how a one-time payment of $40,000 for the Town to use at its discretion to mitigate the aesthetic impacts at Gregg Lake would be meaningful mitigation.

The Petitioner has not established that project as proposed represents a material change from the 2012 project. Rather, the evidence presented demonstrated that the biggest change in Petitioner's proposal involved that opinion of a new aesthetics expert who reviewed the proposed project and determined that the current proposal would not have unreasonable adverse impacts to aesthetics. Citing his superior methodology, he testified that the Committee came to the wrong conclusion with the 10 turbine project because they did not have the benefit of his opinion. His opinion that the current project constituted a substantial change from the 2012 project was informed by his visual assessment. Concerning that visual assessment, he indicated that the steps he took in his methodology was integral and essential to his conclusion.

As the evidence demonstrated Mr. Raphael re-analyzed the visual impacts and concluded that only one property, Willard Pond, had potential overall visual impacts and he deemed them moderate impacts. This is in contrast to the decision by the Committee that found high or significant impacts to Willard Pond, and the dePierrefeu Wildlife Sanctuary, Goodhue Hill, Bald Mountain, and Gregg Lake, and moderate impacts to Robb Reservoir, Island Pond, Highland Lake, Nubanusit Pond, Black Pond, Franklin Pierce Lake, Meadow Marsh and Pitcher Mountain.

The Committee should resist re-litigating its prior finding on aesthetics on the grounds of *res judicata* and *collateral estoppel*. The doctrine of *res judicata* provides that a final judgment by a court of competent jurisdiction is conclusive upon the parties in a subsequent litigation involving the same cause of action. *Eastern Marine Const. Corp. v. First Southern Leasing*, 129 N.H. 270, 273 (1987) (quotation omitted). *Res judicata* attempts to avoid repetitive litigation in order to promote judicial economy and a policy of certainty and finality in our legal system so

that at some point litigation over a particular matter comes to an end. *Brzica v. Trustees of Dartmouth College*, 147 N.H. 443, 454 (2002); Eastern Marine, 129 N.H. at 273. Thus, "[a] valid judgment finally negatives every defense that was or might have been raised" *Boucher v. Bailey*, 117 N.H. 590, 591 (1977) (quotation omitted)(emphasis added).

Three conditions must be met for res judicata to apply: (1) the parties must be the same or in privity with one another; (2) the same cause of action must be before the court in both instances; and (3) a final judgment on the merits must have been rendered on the first action. *Brzica*, 147 N.H. at 454. Those three conditions have been met in this case. The parties in the instant docket are the same as in the prior docket. The Petitioner did not appeal the decision of the Committee to the New Hampshire Supreme Court. Therefore the decision of the Committee is a final decision on the merits. Finally, the same cause of action is before the Committee because the Petitioner has not established that the proposed project represents a material (or substantial) change to the 2012 project as it effects the determination of this Committee that the 2012 project would have an unreasonable adverse impact on aesthetics.

The reasoning underlying the doctrine of *res judicata* are fully applicable to administrative proceedings. *Meserve v. State*, 119 N.H. 149, 154 (1979). *Res judicata* has been applied to a decision of an administrative agency, such as the labor commissioner or his deputy, when it was rendered in a judicial capacity, resolved disputed issues properly before it and which the parties had an opportunity to litigate. *Morin v. J.H. Valliere Co.*, 113 N.H. 431, 434 (1973). In order for *res judicata* to apply to an administrative decision the officer or board must have been acting in a judicial capacity. See 46 Am. Jur. 2d Judgments § 580 (1994); see also Restatement (Second) of Judgments § 83 (1982) (decision of administrative tribunal is conclusive under *res judicata* so long as proceeding resulting in determination entailed essential

elements of adjudication). Mr. Raphael agreed that his methodology and the steps that he took within that methodology were essential to the conclusion of his visual assessment. Further, the Committee was clearly acting in a judicial capacity when it ruled on Petitioner's application for certification in 2013.

Moreover, the doctrine of collateral estoppel bars re-litigation of facts determined in a prior proceeding. For collateral estoppel to apply, "the issue subject to estoppel must be identical in each action, the first action must have resolved the issue finally on the merits, and the party to be estopped must have appeared as a party in the first action, or have been in privity with someone who did so." *Daigle v. City of Portsmouth*, 129 N.H. 561, 570 (1987). "These conditions must be understood, in turn, as particular elements of the more general requirement, that a party against whom estoppel is pleaded must have had a full and fair prior opportunity to litigate the issue or fact in question." *Id.* As with *res judicata*, the New Hampshire Supreme Court has held that findings of an administrative body collateral estoppel has been recognized as applying to cases based upon administrative proceedings. *In re Breau*, 132 N.H. 351 (1989).

Here the Petitioner is the same party or is in privity with the same party in the first action. *Daigle*, 129 N.H. at 570. The issues that the Petitioner is attempting to re-litigate, to wit, the findings by the Committee as to visually sensitive areas impacted by the project, and the level of that impact - are identical to both actions. *Id.* In this regard, as noted above, Mr. Raphael testified that the turbines themselves do not enter into this analysis. Further the Committee's denial of the application for certification on the basis of finding that the facility would create an unreasonable adverse impact to aesthetics is a final decision on the merits. *Id.* Finally Mr. Kenworthy agreed that AWE had a full and fair opportunity to litigate these issues in the first action.

The Committee found that high or significant impacts to Willard Pond, and the dePierrefeu Wildlife Sanctuary, Goodhue Hill, Bald Mountain, and Gregg Lake, and moderate impacts to Robb Reservoir, Island Pond, Highland Lake, Nubanusit Pond, Black Pond, Franklin Pierce Lake, Meadow Marsh and Pitcher Mountain. The Committee also found that size of the wind turbines when imposed on the Tuttle Hill/Willard Mountain ridgeline would appear out of scale and out of context with the region. As well it determined that off-site conservation lands were insufficient to mitigate unreasonable adverse impacts on the regional setting and the Willard-Pond - dePierrefeu Sanctuary. The Petitioner should not be afforded another opportunity to re-litigate these and the other factual findings the Committee made concerning its holding on the impact of the project on aesthetics. These issues remain the same as they did in the first project. And with the impact on these areas is virtually the same. [6] Again these issues were fully resolved in the first action and the Petitioner had a full and fair opportunity to litigate these issues in the first action. As such collateral estoppel should prohibit Petitioner from re-litigating these issues in the instant docket.

As noted in Counsel for the Public's Objection to the Petition for Jurisdiction, the Committee decision denying the 2012 application was issued after holding eleven days of evidentiary hearings and three days of public deliberations. The Committee appointed by the Committee heard from 39 witnesses and considered more than 260 exhibits, along with oral and written statements from interested members of the public. See, 9/10/13 Order on Pending Motions, *Petition of Antrim Wind Energy, LLC*, N.H. Site Eval. Comm., no. 2012-01). The Committee also held a public hearing in Antrim, several technical sessions and visited the proposed site. *Id.* The entire process took well over a year.

[6] One property Nubanusit Lake is impacted positively by the proposed changes but as noted that property was identified by Ms. Vissering as having moderate impacts.

The Petitioner has not established that the proposed project is substantially or materially different that the former project such that it would result in a change in the Committee's decision that it would pose unreasonable adverse impacts to the aesthetics of the community. As such the Committee should not exercise its discretion to grant the Petition for jurisdiction based upon the doctrines of res judicata and collateral estoppels for the reasons stated herein.

WHEREFORE, for the reasons cited herein, Counsel for the Public respectfully requests:

A. That the Committee deny the Petition for Jurisdiction; and

B. And for such other relief as is just and reasonable.

Respectfully submitted,

COUNSEL FOR THE PUBLIC
By her attorneys

Joseph A. Foster
ATTORNEY GENERAL

Dated: July 7, 2015

Mary E. Maloney, Bar No. 1603
Senior Assistant Attorney General
Environmental Protection Bureau
33 Capitol Street
Concord, New Hampshire 03301-6397
Tel. (603) 271-3679

Certificate of Service

I, Mary E. Maloney, do hereby certify that I caused the foregoing to be served upon each of the parties named in the Service List of this Docket.

Dated: July 7, 2015

Mary E. Maloney