



**Upton
& Hatfield**^{LLP}
ATTORNEYS AT LAW

Please respond to the Portsmouth office

July 23, 2015

Via Electronic Mail

Jane Murray
Site Evaluation Committee
NH Department of Environmental Services
29 Hazen Drive
PO Box 95
Concord, NH 03302-0095

Re: Docket No. 2014-05
Petition of Antrim Wind Energy

Dear Ms. Murray:

Enclosed please find *Objection to Motion of Counsel for the Public*.

If you have any questions, please contact me.

Very truly yours,

Justin C. Richardson
jrichardson@uptonhatfield.com

JCR/sem
Enclosure(s)
cc: Service List (w/ enclosure)(via Electronic Mail)

Concord Office

10 Centre Street
PO Box 1090
Concord, NH
03302-1090
603-224-7791
1-800-640-7790
Fax 603-224-0320

Attorneys At Law

James F. Raymond
Barton L. Mayer
Charles W. Grau
Heather M. Burns
Lauren Simon Irwin
Michael S. McGrath*
Marilyn Billings McNamara
Jeanne S. Saffan*
Lisa M. Hall
Kimberly A.W. Peaslee***
Sandra H. Kenney**
Michael P. Courtney*

Of Counsel

Robert Upton, II
Gary B. Richardson
John F. Teague
Bridget C. Ferns

Hillsborough Office

8 School Street
PO Box 13
Hillsborough, NH
03244-0013
603-464-5578
1-800-672-1326
Fax 603-464-3269

Attorneys At Law
Steven J. Venezia*

Of Counsel

Douglas S. Hatfield

Portsmouth Office

159 Middle Street
Portsmouth, NH 03801
603-436-7046
1-877-436-6206
Fax 603-369-4645

Attorneys At Law

Russell F. Hilliard
Justin C. Richardson

www.uptonhatfield.com
law@uptonhatfield.com

*Also admitted in MA

**Also admitted in MA & NY

***Admitted in DC, ME

1A, NH, US Patent/Trademark

BEFORE THE STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

Petitions of Antrim Wind, LLC and the Town of Antrim

NHSEC No. 2014-05

OBJECTION TO MOTION OF COUNSEL FOR THE PUBLIC

NOW COMES the Town of Antrim, by and through Upton & Hatfield, LLP, and objects to Counsel for the Public's recent motion as follows:

I. SUMMARY OF OBJECTION

1. This Committee *ordered* that memoranda be submitted by July 17, 2015. Counsel for the Public simply chose not to do so. A very high threshold should be met before the Committee allows a party to ignore its procedural order, file no argument by the date required, and then untimely present additional argument citing to facts not contained in evidence or the record immediately prior to deliberations.

2. As explained in this objection: (a) no credible explanation has been offered to justify Counsel for the Public's disregard of the Committee's order to submit memoranda by July 17, 2015; (b) Counsel for the Public uses the pretext of a response to offer garden-variety argument that was required and could have been presented by July 17, 2015; and (c) the Committee's rules prohibit submission of untimely argument and new evidence after the close of the record.

3. Reasonable time to review and respond to Counsel for the Public's argument has not been afforded. However, a cursory review of Counsel for the Public's argument reveals both factual and legal errors. The Committee has a sufficient record to decide this case without the need for untimely additional arguments submitted.

II. THE REQUIREMENTS FOR UNTIMELY SUBMISSION OF LATE ARGUMENT AND NEW EVIDENCE HAVE NOT BEEN MET.

4. The sole grounds for Counsel for the Public's motion is stated in Paragraph 2 which argues that: "Counsel for the Public could not address these same issues raised on the second day of hearings because Ms. Vissering had not testified when the memorandum was drafted."

5. Counsel for the Public presents no explanation why "issues raised on the second day of hearings" could not be addressed 10 days later on July 17, 2015. Counsel for the Public simply ignored the Committee's order.

6. The Committee's rules provide as follows:

Site 202.26 Closing the Record.

(a) At the conclusion of a hearing, *the record shall be closed and no other evidence, testimony, exhibits, or arguments shall be allowed into the record, except as allowed by paragraph (b) below.*

(b) Prior to the conclusion of the hearing, a party may request that the record be left open to accommodate the filing of evidence, exhibits, or arguments not available at the hearing.

(c) If the other parties to the hearings have no objections or if the presiding officer determines that such evidence, exhibits, or arguments are necessary to a full consideration of the issues raised at the hearing, the presiding officer shall specify a date no later than 30 days after the hearing for the record to remain open to receive the evidence, exhibits or arguments.

(emphasis added).

7. Site 202.26 is clear that the record closed on July 17, 2015 "and no other evidence, testimony, exhibits, or arguments shall be allowed". Counsel for the Public had 10 days to offer argument and simply ignored the Committee's Order and its rules.

8. Because the record closed on July 17, 2015, Counsel for the Public's motion is subject to Site 202.27 which provides:

Site 202.27 Reopening the Record.

(a) A party may request that the record be re-opened to receive relevant, **material and non-duplicative evidence or argument** by written motion.

(b) 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 reopened to accept the offered items.

(c) The presiding officer shall specify a date no later than 30 days from the date of receiving the additional testimony, evidence or argument by which **other parties shall respond to or rebut the newly received materials**.

(emphasis added).

9. Counsel for the Public's Motion fails under all three criteria in Site 202.27 (a), (b) and (c). First, Counsel for the Public's additional argument duplicates the arguments made during closing statements on July 7, 2015 and by other project opponents on July 15, 2015. The requirement in Site 202.27 (a) to re-open the record for "material and non-duplicative evidence or argument" has not been met.

10. Second, Counsel for the Public has failed to demonstrate that additional argument is "necessary for a full consideration of the issues presented at the hearing" under Site 202.27 (b). The Committee allowed 10 days to respond to the evidence provided. No reason has been presented as to why these 10 days were insufficient. All of the arguments raised are based on testimony of Donald Raphael and Jean Vissering on July 6 and 7, 2015. It is not necessary to re-open the record to allow argument that Counsel for the Public could have made on July 17, 2015.

11. Finally, the motion also fails to meet the requirements of Site 202.27 (c) which requires that the Committee provide other parties the opportunity to "respond to or rebut the newly received materials." No such opportunity exists here as deliberations are scheduled to begin on July 24, 2015. If the Committee grants the motion, it cannot deliberate because its rules require an opportunity to "respond to or rebut the newly received materials."

12. An opportunity to respond is critical because Counsel for the Public improperly makes argument based on allegations of facts and transcripts of prior proceedings that are not contained in evidence or in the record of this proceeding. For example, Counsel for the Public makes allegations as to statements during deliberations and in memoranda that are not reflected in the Committee’s decision. Under RSA 541-A:33, VI, “Parties shall be notified either before or during the hearing or by reference in preliminary reports or otherwise of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed.” Counsel for the Public’s untimely argument affords Antrim no opportunity to respond to or rebut her allegations and argument, as required by RSA 541-A:33, VI and Site 202.27 (c).

IV. COUNSEL FOR THE PUBLIC’S UNTIMELY REQUEST IS LEGALLY AND FACTUALLY ERRONEOUS

Without waiving the foregoing objection, Antrim offers the following response to Counsel for the Public’s Motion:

13. Counsel for the Public attacks David Raphael’s visual impact assessment under the mistaken view that the purpose of this proceeding is to evaluate the project on its merits. It is not. The question before the Committee is whether Antrim Wind has made material changes to its project so as to create a “reasonable possibility — not absolute certainty — of a different outcome”. *Brandt Dev. Co. v. City of Somersworth*, 162 N.H. 553, 560 (2011).

14. The problem that Counsel for the Public faces is that Ms. Vissering’s entire opinion rests on her seven recommendations that the Committee specifically did not require. She performed no analysis of the specific changes to the project, yet agreed that factors such as dominance, proximity and angle of view had changed. This is fatal to Counsel for the Public’s position because the law only requires a “reasonable possibility – not an absolute certainty of a

different outcome”. *Id.* Counsel for the Public and Ms. Vissering mistakenly assumed that the law required substantial proof that a different outcome would result.

15. Tellingly, when Committee Member Scott asked Ms. Vissering what changes she would consider to be material, she was unable to provide a clear explanation. Her difficulty is understandable because she did no analysis of the specific changes proposed, or others that the Committee might require.

16. David Raphael conducted a complete analysis and concluded that the changes were both substantial and material. He provided credible testimony that the Committee could reach a different outcome based on these changes. As a result, Antrim Wind has met its burden of proof to show material changes that create “a reasonable possibility – not an absolute certainty – of a different outcome.”

WHEREFORE Antrim respectfully requests that the Committee:

- A. Deny Counsel for the Public’s Motion;
- B. Grant the Petitions for Jurisdiction; and
- C. Grant such other relief as justice may require.

Respectfully submitted,

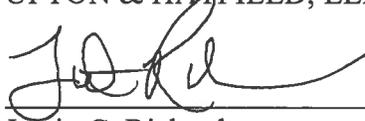
Town of Antrim

By Its Counsel,

UPTON & HATFIELD, LLP

Date: July 23, 2015

By:



Justin C. Richardson

NHBA #12148

159 Middle Street

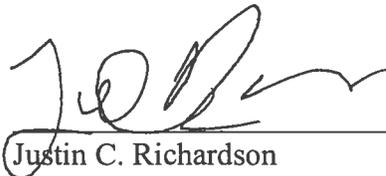
Portsmouth, New Hampshire 03801

(603) 436-7046

jrichardson@uptonhatfield.com

CERTIFICATION

I hereby certify that a copy of the foregoing was this day forwarded to all parties in this proceeding by electronic mail.



Justin C. Richardson