

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

**Docket No. 2015-02**

**APPLICATION OF ANTRIM WIND ENERGY, LLC  
FOR A CERTIFICATE OF SITE AND FACILITY**

**APPLICANT'S MOTION FOR PROTECTIVE ORDER  
AND CONFIDENTIAL TREATMENT**

Antrim Wind Energy, LLC (“AWE” or the “Applicant”) by and through its attorneys, McLane Middleton, Professional Association, respectfully requests that the Site Evaluation Committee (“SEC” or “Committee”) issue a protective order to preserve the confidentiality of information described below that the Applicant has agreed to provide in response to certain data requests propounded in the above-captioned matter. In support of its Motion, the Applicant states as follows:

1. Counsel for the Public has propounded the following written data requests on the Applicant: PC 1-5 – requesting detailed information on other projects in which Mr. Weitzner, Mr. Manahilov, Ms. Valdovinos, Mr. Shaw, Walden Green Energy, LLC, Walden Renewables, LLC, and RWE Supply & Trading have been involved including the amount invested and the total project cost; PC 1-7 requesting Applicant’s pro forma; PC 1-8 – requesting Balance of Plant (“BOP”) Contract with Reed & Reed and preconstruction service agreements; PC 1-9 – requesting Reed & Reed’s cost estimates; PC 1-10 – requesting Turbine Supply Agreement (“TSA”) and Service and Maintenance Agreement (“SMA”) with Siemens; PC 1-13 requesting letters of intent, MOU’s or other agreements or contracts with financing institutions; and PC 1-15 – requesting information about Power Purchase Agreements (“PPAs”).

2. The information requested, currently in AWE's possession, has been marked confidential and placed in a sealed envelope and provided to the Committee as well as Counsel for the Public. This information is commercially sensitive and proprietary. The disclosure of this information would place AWE and its contracting third parties at a competitive disadvantage and would not serve the public interest. In fact, it would harm the public interest by establishing adverse precedent that may impede the development of necessary energy infrastructure projects. Disclosure of such information would dissuade third-party vendors from becoming involved in such endeavors if they did not have confidence that their commercially sensitive information would be protected.

3. Governmental records, as defined by RSA 91-A:1-a, are generally made available for public inspection pursuant to the Access to Governmental Records and Meetings Statute (a.k.a. the Right-to-Know Law). *See* RSA 91-A:4; *see also* N.H. Admin Rule Site 104.01. There are certain exemptions, however, from the requirement that public agencies or public bodies produce government records. One such exemption applies to "confidential, commercial, or financial information . . . and other files whose disclosure would constitute invasion of privacy." RSA 91-A:5. The Applicants respectfully request that the Committee issue a protective order and that the Committee treat the above-described information as confidential pursuant to RSA 91-A:5. *See also* Site 104.01(b) (presiding officer or chairman may protect documents that are exempt from disclosure pursuant to RSA 91-A:5).

4. "The terms 'commercial or financial' encompass information such as business sales statistics, research data, technical designs, overhead and operating costs, and information on financial condition." *See Union Leader Corp. v. New Hampshire Housing Finance Authority*, 142 N.H. 540, 553 (1997). The Committee has determined that financial information of a non-

publicly held applicant for a certificate of site and facility, such as AWE, does not need to be disclosed to the public or to other parties in the proceeding, except for Counsel for the Public. *See Order on Pending Motions and Further Procedural Order*, SEC Docket No. 2010-01, p. 2 (Dec, 14, 2010).

5. The SEC has routinely recognized that confidential treatment should be granted to competitively sensitive or proprietary information under the 91-A:5 exemption for “confidential, commercial, or financial information.” See, e.g., *Order on Pending Motions and Further Procedural Order*, NH SEC Docket 2010-01 (Dec. 14, 2010) (granting confidential treatment for financial statements and the applicant’s capacity factor profile); *Order on Partially Assented-to Motion for Protective Order and Confidential Treatment for Certain Confidential, Commercial, and Financial Documents*, NH SEC Docket 2009-02 (June 9, 2010) (granting confidential treatment for business plans and financial models); *Order Granting Applicant’s Motion for Protective Order and Approving Procedure for Treatment of Confidential, Commercial, or Financial Information*, NH SEC, Docket 2008-04 (Nov. 4, 2008) (granting confidential treatment for commercially sensitive and proprietary financial information to avoid an adverse effect upon the applicant’s ability to successfully negotiate commercial transactions).

6. Requests for confidential treatment and protective orders in an SEC proceeding must meet the requirements set forth by the Supreme Court in *Lambert v. Belknap County Convention*, 157 N.H. 375, 382 (2008) and *Lamy v. New Hampshire Public Utilities Commission*, 152 N.H. 106 (2005), which requires a three-step analysis to determine whether information should be exempt from public disclosure pursuant to the Right-to-Know law, RSA 91-A: 5, IV. *Order on Unassented-To Motion for Protective Order and Confidential Treatment*, NH SEC Docket 2012-01 (June. 4, 2012). When engaging in the three-step analysis, the SEC

must consider whether: (1) the Applicants have identified a privacy interest; (2) whether there is a public interest in disclosure; and (3) finally, if there is a public interest in disclosure, that interest is balanced against any privacy interests in non-disclosure. *Id.*

7. In applying the three-step analysis to the data request responses at issue here, even in instances in which the public may have an interest in the information, that interest is dramatically outweighed by the privacy interests of the Applicant.

I. Bank Term Sheets and Investment Information

8. The Applicant expects to receive letters of interest from debt and tax equity providers over the coming months. AWE has agreed to provide Counsel for the Public with these financial documents when they are received. These term sheets and letters of interest typically contain competitively sensitive information regarding project finance. The exemption from RSA 91-A disclosure specifically refers to financial information, which directly relates to the information sought by Counsel for the Public.

9. Counsel for the Public has also requested information regarding other projects in which members of the AWE team have been involved. Among other requested information, Counsel for the Public seeks information regarding the total amount invested and the total estimated project cost. In response, AWE has produced a document to all Parties which describes the AWE team's involvement in other projects, provides a description of those projects, as well as the status. AWE has provided Counsel for the Public with additional information regarding total project cost and the amount invested subject to this request for protective order and confidential treatment. This information is commercially sensitive as it is subject to third party confidentiality agreements. Making this cost information public would

significantly disadvantage the Walden team in future potential financial transactions. As such, the Applicant requests it be treated as confidential.

## II. Agreements with Siemens and Reed & Reed

10. AWE has executed a Preconstruction Services Agreement (“PSA”) with Reed & Reed and has received confidential BOP cost estimates from Reed & Reed. The Applicant expects to finalize the BOP Contract with Reed & Reed at the same time it finalizes construction loan agreements for the Project. The disclosure of the PSA, BOP Contract, and BOP cost estimates would substantially harm the Applicant and Reed & Reed’s competitive position in the market. The BOP Contract and BOP cost estimates directly relate to the Applicants construction costs and therefore fall within the RSA 91-A exemption for confidential commercial information. The BOP contract and PSA also contain confidential business practice information that would give Reed & Reed and AWE’s competitors an advantage if disclosed. AWE has an obligation to protect this competitively sensitive information on behalf of Reed & Reed, its third party contractor.

11. AWE is in the process of completing negotiations with Siemens on the Turbine Supply Agreement (“TSA”) and Siemens Service and Maintenance Agreement (“SMA”). The disclosure of the TSA and SMA would substantially harm the Applicant and Siemens competitive position in the market. The TSA and SMA directly relate to the Applicant’s construction and operating costs and therefore, fall within the RSA 91-A exemption for confidential commercial information. These terms have been carefully negotiated by AWE with Siemens for the past 18 months and the disclosure of these terms would give AWE’s competitors a competitive advantage. Additionally, the Siemens TSA and SMA contain confidential pricing information which would provide Siemens competitors with a competitive advantage if

disclosed. They also contain confidential business practice information that would give Siemens' competitors an advantage if disclosed. AWE has an obligation to protect this competitively sensitive information on behalf of Siemens, its third party contractor.

12. AWE has agreed to provide Counsel for the Public with copies of the Preconstruction Services Agreement with Reed & Reed, the BOP Contract with Reed & Reed once it is finalized, the cost estimate from Reed & Reed, the Siemens Turbine Supply Agreement ("TSA"), and the Siemens Service and Maintenance Agreement ("SMA") once they are finalized.<sup>1</sup>

### III. Pro Forma

13. In addition to providing Counsel for the Public with copies of AWE's agreements with its third party vendors, AWE has also provided Counsel for the Public with a pro forma. However, due to the competitive nature of this information, AWE has requested that Counsel for the Public treat this material as confidential. The pro forma contains information that is protected under confidentiality agreements with third parties, such as cost information, energy and REC price information and OPEX information, which AWE is legally obligated to protect.

Additionally, the release of this information to the public would harm AWE's position as it

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<sup>1</sup> The Applicant is not seeking a determination now about whether any party other than Counsel for the Public is entitled to all of confidential information at issue in this motion. However, if any other party sought such information, the Applicant would object. The SEC previously ruled with respect to business information, such as a pro forma, that the applicant only had to provide this confidential information "solely to Counsel for the Public pursuant to the terms of a protective order." *See Order on Outstanding Motions*, Docket No. 2012-01, p. 4 (August 22, 2012); *See also, See Order on Pending Motions and Further Procedural Order*, SEC Docket No. 2010-01, p. 2 (Dec, 14, 2010). The Committee previously held that disclosure of construction cost estimates to parties, other than Counsel for the Public, may harm the "competitive position" of the Applicant and contracting third parties. Similarly, the information underlying the Preconstruction Services Agreement, BOP Contract, TSA and SMA agreement reflect certain costs of doing business. The disclosure of this information would place AWE and its third party contractors at a competitive disadvantage in the market. Additionally, the public interest in the disclosure of this information, if any, is substantially outweighed by the harm to the Applicant. This Committee has recognized that Counsel for the Public has a unique statutory role in this proceeding and that the execution of this role is critical to insure the goals of RSA 162-H are met. *See Order on Unassented to Motion for Protective Order and Confidential Treatment*, Docket No. 2012-01, p. 4 (June 4, 2012). Given Counsel for the Public's unique role in insuring statutory compliance, it is unnecessary for other parties to have access to this competitively sensitive confidential information.

continues to seek PPAs with various parties. Additionally, the release of this information would be harmful to Walden on other projects that it is developing. As determined by the Committee in the prior Antrim Wind Energy Docket, a pro forma “is highly confidential and could negatively affect the competitive interests of the Applicant.” *See, Order on Outstanding Motions*, Docket 2012-01, 4 (August 22, 2012).

14. The Applicant acknowledges that the information which may be contained in a pro forma does have some bearing on the prospects of the Applicant to obtain project financing. *See, Order on Outstanding Motions*, Docket 2012-01, 3 (August 22, 2012). Consequently, in order to balance the interests of both the Applicant and the public, the Applicant has provided other parties to the proceeding with a document outlining a 20 year projection of revenues; a 20 year projection of operating expenses including categories; a description of the capital that will go into the financing for the Project; and a projection for how the tax credits will be monetized by the Project. This information should sufficiently balance the interests of the public while protecting competitively sensitive information. In addition, AWE has already agreed to a condition, in any issued Certificate of Site and Facility, that would require AWE to demonstrate that construction financing is in place prior to commencing construction.

#### IV. Power Purchase Agreements

15. As determined by the Committee in the prior Antrim Wind Energy Docket, providing the names of entities with whom the Applicant may be negotiating a PPA and the details of those negotiations is highly confidential. As the Committee noted, “one cannot think of a situation that could cause more harm to the Applicant and any other party to such a power purchase agreement than requiring the Applicant to reveal the terms under negotiation.” *See, Order on Outstanding Motions*, Docket 2012-01, 8 (August 22, 2012)(Holding “[o]nly a

confirmed and executed power purchase agreement is relevant in these proceedings” and that “[r]equiring companies to reveal the state of negotiations for power purchase agreements that have not yet been executed would cause substantial harm to those companies.”)

16. Similarly, AWE requests that any PPA information provided to Counsel for the Public be protected. The negotiations of a PPA, as the Committee has held, “does not provide useful or relevant information to the Subcommittee with regard to the financial and managerial capabilities of the Applicant.” *Order on Outstanding Motions*, Docket 2012-01, 8 (August 22, 2012).

17. Pursuant to N.H. Admin. Rule Site 202.14(d), the undersigned has contacted the parties to this docket in an effort to determine their positions on the motion. The following parties have responded with their positions noted below: Counsel for the Public assents to the relief requested.

WHEREFORE, Antrim Wind Energy, LLC respectfully request that this Committee:

- A. Issue a protective order that preserves the confidentiality of the documents that are the subject of this Motion; and
- B. Grant such further relief as it deems appropriate.

Respectfully Submitted,

Antrim Wind Energy, LLC

By its attorneys,

McLANE MIDDLETON,  
PROFESSIONAL ASSOCIATION

Dated: April 15, 2016

By: \_\_\_\_\_  
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Certificate of Service

I hereby certify that on the 15<sup>th</sup> day of April 2016, an original and 1 copy of the foregoing Motion was hand-delivered to the New Hampshire Site Evaluation Committee.

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Barry Needleman