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Please respond to our Meredith office

March 7, 2018

VIA REGULAR MAIL and
EMAIL TO Pamela.monroe@sec.nh.gov
New Hampshire Site Evaluation Committee
Pamela G. Monroe, Administrator
21 South Fruit Street, Suite 10
Concord, NH 03301

Re: Application of Antrim Wind Energy, LLC for a Certificate of Site and Facility
SEC Docket No. 2015-02

Good Afternoon Ms. Monroe:

Enclosed please find for filing an original Joint Motion to Reconsider of Decision of Administrator, for Adjudicative Hearing to Determine Satisfaction of Condition of Certificate of Site and Facility, and to Suspend Certificate of Site and Facility on behalf of the Abutting Landowners Group, the Non-Abutting Landowners Group, the Levesque-Allen Group, the Stoddard Conservation Commission, and the Windaction Group.

Please let me know if you have any questions. Many thanks for the collective time and attention to this detail.

Very truly yours,
DONAHUE, TUCKER & CIANDELLA, PLLC

Eric E. Maher by CB with permission

Eric E. Maher, Esq.
emaher@dtclawyers.com

Enclosures
cc: Client (via email)
Distribution List, Docket No. 2015-02 (via email)

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

JOINT MOTION TO RECONSIDER OF DECISION OF ADMINISTRATOR, FOR ADJUDICATIVE HEARING TO DETERMINE SATISFACTION OF CONDITION OF CERTIFICATE OF SITE AND FACILITY, AND TO SUSPEND CERTIFICATE OF SITE AND FACILITY

NOW COME, Janice Longgood, Bruce and Barbara Berwick, and Mark and Brenda Schaefer on behalf of the Abutting Landowners Group, Richard Block, Annie Law, Robert Cleland, Jill Fish, and Kenneth Henninger on behalf of the Non-Abutting Landowners Group, Mary Allen on behalf of the Levesque-Allen Group, Geoffrey Jones on behalf of the Stoddard Conservation Commission, and Lisa Linowes on behalf of the Windaction Group, (collectively "the Opposing Intervenors") and hereby file this Motion to Reconsider the Decision of Administrator, for Adjudicative Hearing to Determine Satisfaction of Condition of Certificate of Site and Facility, and to Suspend Certificate of Site and Facility (hereinafter "Intervenors' Motion"). In support thereof the Opposing Intervenors state as follows:

I. FACTUAL AND PROCEDURAL BACKGROUND

1. Antrim Wind Energy, LLC ("AWE") filed an Application for a Certificate of Site and Facility to construct a nine turbine wind farm ("the Project") on Tuttle Hill in the Town of Antrim on October 2, 2015 ("the Application").

2. In support of the Application, AWE, both through pre-filed testimony and at the adjudicative hearings, stated that AWE intended to finance the Project's $63 to $65 million cost

through a mixture of debt and equity — approximately $11 million in equity from RWE, the parent of AWE's parent entity Walden Green Energy, LLC ("WGE"), and $52 to $54 million through a construction loan. AWE asserted throughout this Docket that numerous lenders exhibited interest in providing the construction loan for the Project. See e.g. Appendix 18A through 18C of Application. This mixture of debt and equity was considered by AWE's witnesses to be a "very reasonable number" and that the amount of the equity from RWE could be "a little more" or a "little less." September 13, 2016 PM Transcript at 32.

3. In this Subcommittee's March 17, 2017 Decision and Order Granting Application for Certificate of Site and Facility ("the Decision"), the Subcommittee noted AWE's plans to finance the project, stating that AWE "testified that it plans to finance the construction phase through combination of a construction loan that eventually will convert into a permanent term loan and equity investment." Decision at 75-76. The Subcommittee further stated that AWE "agreed to provide loan documentation demonstrating sufficient funds were raised for construction of the Project prior to the commencement of construction of the Project." Decision at 76 (emphasis added). The SEC's findings and determinations are considered incorporated into the Subcommittee's Certificate of Site and Facility for the Project ("the Certificate"). Certificate at 2.

4. The Certificate contains two conditions meant to address the financial capability criteria set forth in RSA 162-H:16. Specifically, (1) AWE "shall immediately notify the Committee of any change in ownership or ownership structure of [AWE] or its affiliated entities and shall seek approve of the Committee for such a change"; and (2) "prior to construction of the Project, [AWE] shall provide documentation demonstrating that debt and/or equity financing

required for the construction of the Project is in place to the Committee's Administrator." Certificate at 5.

5. The Opposing Intervenors timely filed a motion for rehearing of the Subcommittee's decision issuing a Certificate, and, following this Subcommittee's denial of that motion for rehearing, timely appealed that denial to the New Hampshire Supreme Court.

6. The appeal presently before the New Hampshire Supreme does not challenge this Subcommittee's decision with regard to the above-referenced conditions, nor does it challenge this Subcommittee's findings with regard to AWE's financial capability.

7. On December 21, 2017, WGE submitted a letter to Pamela Monroe, the SEC's Administrator, stating:

> Construction equity for the Project will be provided by [WGE], AWE's parent, by RWE Supply and Trading GmbH . . . Walden Green Energy's majority investor. RWEST is funded by RWE, AG. The ownership, control and flow of equity capital to construct the Project remain entirely consistent with the capitalization program represented during hearings in Docket 2015-02.

See Letter from Henry Weitzner to Pamela Monroe dated December 21, 2017.

8. That same day, RWE PI Walden Holding, LLC submitted a letter to Ms. Monroe, echoing WGE's statements that the Project could be funded by 100% equity and that RWE was willing and able to finance the entirety of the Project through equity. See Letter from Stephen O'Reilly to RWE PI Walden Holding, LLC to Pamela Monroe dated December 21, 2017.

9. The Opposing Intervenors were not notified of these letters until January 8, 2017, eighteen days after the letters' submission.

10. On January 24, 2018, the Opposing Intervenors filed a response to the above-referenced letters, arguing that AWE's letters were inconsistent with AWE's prior

representations to this Subcommittee and were inconsistent with the conditions contained in the Certificate. See Opposing Intervenors' Response to Antrim Wind, LLC December 21, 2017 Compliance Filing at 1-5 ("Response of Opposing Intervenors"). The Opposing Intervenors argued that "the Committee should find the Project is out of compliance with the Certificate," or, in the alternative, "if the only method of financing the Project today is through a 100% equity strategy with the German parent, AWE should seek an amendment to the Certificate at which time it would provide formal confirmation of RWE's irrevocable commitment to fully fund the construction." Response of Opposing Intervenors at 5.

11. On January 29, 2018, Counsel for the Public ("CFP") filed a Response to Walden Green Energy, LLC's Notice of Financial Documentation ("CFP's Response"), arguing similar issues. See CFP's Response at 1-7. CFP also requested that this Subcommittee suspend the Certificate until such time as AWE/WGE has complied with the requirements of the Certificate, and the Supreme Court has issued a decision on the appeal. See CFP's Response at 7.

12. AWE filed a response to the responses of the Opposing Intervenors and Counsel for the Public on January 31, 2018.

13. On February 8, 2018, Ms. Monroe sent a letter to the Opposing Intervenors and Counsel for the Public in which she, and not the Subcommittee, determined that the letters from Mr. Weitzer and O'Reilly satisfied the conditions in the Certificate. Ms. Monroe concluded, "[a]ccordingly, the Site Evaluation Committee will not hold a hearing on either the Weitzner and O'Reilly correspondence or your responses." See Letter from Pamela Monroe to Opposing Intervenors and Counsel for the Public dated February 8, 2018.

14. On February 20, 2018, TransAlta Renewables, Inc. announced that it had entered into an arrangement to purchase a "29 MW [wind development] projected [sic] located in New Hampshire with two 20-year PPAs." See "TransAlta Renewables Announces Acquisition of Two U.S. Wind Projects," TRANSALTA (February 20, 2018), attached hereto as Exhibit A. The Project is the only wind project in New Hampshire that meets these characterizations.

15. It has come to the Opposing Intervenors' attention that AWE has informed the SEC, through its administrator, of the proposed sale; however, such information has not been disseminated to the public, nor have any further hearings been scheduled to determine whether the proposed buyer, TransAlta, meets the qualifications set forth in RSA 162-H:16.

II. DISCUSSION

16. The Opposing Intervenors respectfully request that this Subcommittee (a) reconsider and reverse the SEC administrator's finding that AWE satisfied the financing condition set forth in the Certificate; (b) find that AWE has not satisfied the condition of approval contained in the Certificate related to financing; (c) schedule this matter for a hearing to determine whether the financial arrangements that AWE alluded to in AWE's letters allow for this Subcommittee to continue to find that AWE has the financial capability to construct and operate the Project per RSA 162-H:16, IV, particularly in light of the announced sale of the Project; and (c) suspend the Certificate until such time as this Subcommittee determines that the financing arrangement presented by AWE satisfies the condition set forth in the Certificate.

17. At the outset, the Opposing Intervenors are troubled by the lack of transparency and public involvement associated with ensuring that AWE satisfies the conditions set forth in the Certificate. In this instance, AWE provided the above-referenced letters associated with

financing to the SEC's administrator on December 21, 2017. The SEC did not inform the Opposing Intervenors or CFP of these developments until January 8, 2017. Despite the Opposing Intervenors and CFP raising concerns associated with the satisfaction of the financing conditions, the SEC's administrator unilaterally determined that the condition had been met, without a hearing or public deliberation. To compound matters, it has come to the Opposing Intervenors' attention that AWE has, and continues to have, ex parte communications with the SEC, through its administrator, as to the proposed sale of the Project to TransAlta and that AWE has provided documentation to the SEC administrator related to the proposed sale. The substance of these ex parte communications and the materials provided to the SEC have not been made available for public consideration, even though such communications and materials pertain to a substantial change in the Certificate, namely the entity that will construct and operate the Project. In short, the Opposing Intervenors are concerned that determinations as to the satisfaction of conditions of the Certificate will be made without an opportunity for public involvement and without the public process mandated by RSA chapter 162-H and RSA 541-A.

18. Turning to the Opposing Intervenor's requests for relief, this Subcommittee should reconsider and reverse the determination of the SEC's administrator and should adjudicate the issue of whether the letters submitted to the SEC satisfy the financing conditions of approval because the determination of whether a condition has been satisfied is a determination to be made by this Subcommittee, not the administrator of the SEC. The administrator has asserted that the administrator is authorized to determine the letter's sufficiency per the conditions of approval. See Letter from Pamela Monroe to CFP and Opposing Intervenors dated February 8, 2018. However, the condition in the Certificate only

states that AWE is to "provide documentation demonstrating that debt and/or equity financing required for the construction of the Project is in place to the Committee's Administrator." Certificate at 5 (emphasis added). The Administrator, therefore, is to act as the recipient of financing documentation; the Administrator has not been delegated the role of determining the sufficiency of the documentation provided or the satisfaction of any condition of approval, particularly when the sufficiency of those letters is in dispute based on representations made and relied upon at the adjudicatory hearings. See id.

19. Even if the condition could be interpreted to grant the administrator that authority, RSA 162-H:4 and the SEC's administrative rules clearly prohibit such a delegation of authority. RSA 162-H:4 provides, in pertinent part, that: "[t]he committee may delegate the authority to monitor the construction or operation of any energy facility granted a certificate under this chapter to the administrator or such state agency or official as it deems appropriate, but shall ensure that the terms and conditions of the certificate are met." RSA 162-H:4 (Supp. 2015) (emphases added). Similarly, nothing in the SEC's administrative rules permits the SEC to delegate determining the satisfaction of a condition to the SEC's administrator. By the clear terms of the statute and the SEC's administrative rules, it is the SEC/Subcommittee that is solely responsible for determining that a condition of approval associated with the Certificate is met, and that responsibility cannot be delegated. RSA 162-H:4. The Subcommittee has yet to make that determination with regard to the financing contingency, and the Opposing Intervenors respectfully request that the Subcommittee do so through an adjudicatory hearing.

20. The Subcommittee should further address the sufficiency of AWE's proposed financing arrangement because the financing arrangement is significantly different from AWE's

representations to this Subcommittee. In the context of land use, the scope of a condition of approval is dependent upon the representations of the applicant and the intent of the condition at the time it is issued. Cf. 1808 Corp. v. Town of New Ipswich, 161 N.H. 772, 775 (2011) (stating that "the scope of a variance is dependent upon the representations of the applicant and the intent of the language in the variance at the time it is issued"); Rye v. Ciborowski, 111 N.H. 77, 81 (1971).

21. Here, the financing contingency set forth in the Certificate must be interpreted and informed by AWE's representations at the adjudicative hearings. Cf. 1808 Corp., 161 N.H. at 775. In AWE's application, AWE stated that construction financing will consist of "a construction loan and construction equity to complete the turnkey construction process." See Pre-Filed Direct Testimony of Henry D. Weitzner and Eric Shaw, dated March 3, 2016, at 7. AWE also stated that "the Project will be funded with a $10-$13 million construction loan converting to a term loan, and $50-55 million of equity." Id. at 9. In support of that testimony, AWE provided a series of letters from various lending institutions that reflected those institutions interest in providing construction loan financing for the Project. See Appendices 18A to 18C of the Application. During the adjudicative hearings, AWE's witnesses did not testify as to any circumstances in which AWE envisioned having to provide 100% of the equity for the Project. Although AWE's witnesses testified that the equity for the Project could increase depending on the amount of debt available to AWE to finance the Project, the responses from AWE's witnesses clearly envisioned that the Project would be financed through a mixture of debt and equity. See September 13, 2016 PM Transcript at 22-23, 29-33, 41, 88-89.

22. The Subcommittee relied upon these statements in both its deliberations and the Decision. The Subcommittee made express reference to AWE's representations that financing will "use what seems to be the standard in the United States for wind industry development . . . with the construction financing [being] a combination of a construction loan and then the construction equity." December 7, 2016 AM Transcript at 66, 71. The Subcommittee further referenced AWE's testimony in its decision, stating that "AWE agreed to provide loan documentation demonstrating sufficient funds were raised for construction of the Project prior to the commencement of construction of the Project." Decision at 76.

23. In short, the Applicant's current financial proposal differs substantially from that proposed both in the Application and the adjudicative hearings. The Subcommittee relied on these representations in finding that AWE had the financial capability to construct the Project, and this Subcommittee must make a determination as to whether AWE's current construction financing proposal reflects the required financial capability to move forward with construction. Until this decision is made and rendered, the Subcommittee should suspend the Certificate. See N.H. CODE OF ADMIN. R. Site 302.01 (allowing for Subcommittee, upon receipt of a complaint, to determine if condition of approval is being violated); N.H. CODE OF ADMIN. R. Site 302.02 (allowing for suspension of certificate in light of material misrepresentation in the application or additional statements of fact or studies required of the applicant).[1]

24. The subsequent materials provided by AWE are insufficient to demonstrate the requisite financial capability for AWE to undertake construction. While AWE has provided a

[1] AWE is likely to argue that the language of the Certificate, namely the use of the phrase "debt and/or equity" permits a 100% equity structure. However, as argued above, the condition must be read and interpreted in light of the testimony offered and the Subcommittee's findings in its decision, all of which clearly envision a significant component of debt financing. Cf. 1808 Corp., 161 N.H. at 775.

corporate resolution from WGE as to a protocol for requesting equity infusions from RWE to fund the Project's construction, there have been no documents, agreements, resolutions, or any other commitments from RWE Supply and Trading GmbH which would compel the providing of these funds. Absent this commitment, the Project's construction could be cancelled midway due to RWE's refusal to provide further funding, and the public may be without recourse as to the partially constructed Project.[2] Indeed, such a situation is occurring currently in South Carolina where the construction of the V.C. Summer Nuclear Stations in Jenkinsville was cancelled midway, leaving the State of South Carolina and the Town of Jenkinsville to deal with what is to happen with the empty hulk. See Stelloh, Tim, "Construction Halted at South Carolina Nuclear Power Plant," NBC NEWS (July 31, 2017). Considering that these wind turbines are being located in an ecologically and environmentally sensitive area and will have adverse aesthetic impacts on scenic resources, see Decision at 121, the Subcommittee should consider whether additional conditions should be imposed on Certificate in light of AWE's all-equity proposal.

25. Additionally, and perhaps most importantly, the recent announcement of the acquisition of the Project by TransAlta merits an adjudicatory hearing as to how the potential sale of the Project impacts AWE's proposed financing arrangement. AWE has stated that AWE intends on funding the Project using the financial strength of AWE's parent, RWE. However, based on the press release issued by TransAlta, AWE is not going to remain associated with the Project through construction, TransAlta is. See Exhibit A. The time for considering the introduction of TransAlta is now, prior to the commencement of construction, and prior to any further alteration of the landscape. The vetting and consideration of TransAlta as a viable

[2] At this time, it is unclear whether any decommissioning letter of credit would apply to reclamation activities that occur prior to the Project becoming operational.

successor to AWE under RSA 162-H:16 must be done in a public hearing and is a matter that needs to be determined by the full Subcommittee, as the SEC has required in prior instances where a new entity sought to operate an energy facility subject to the SEC's jurisdiction. See Decision and Order Approving Transfer of Ownership Interest in Granite Reliable Power, LLC, SEC Docket No. 2010-03, at 3-5 (Issued February 8, 2011).

26. For the reasons stated above, this Subcommittee should reconsider the decision of the SEC's Administrator and should conduct a limited adjudicatory hearing to determine the impact of AWE's proposed all-equity financing arrangement and the announced sale of the Project to TransAlta on the continuing validity of the Certificate. This adjudicatory hearing should consider whether the criteria set forth in RSA 162-H:14 are still satisfied and whether these developments require revisiting conditions of approval contained in the Certificate.

WHEREFORE, the Opposing Intervenors respectfully request that the Subcommittee:

A. Grant the Intervenors' Motion;

B. Reconsider and reverse the decision of the SEC's Administrator;

C. Schedule an adjudicatory hearing, at which time (1) AWE will be required to prove that AWE and the Project continue to satisfy the criteria set forth in RSA 162-H:14, and (2) AWE will be required to prove that the transfer of the Project to TransAlta does not impact the validity of the Certificate;

D. Suspend the Certificate pending such an adjudicatory hearing; and

E. Grant such further relief as is just and equitable.

Dated this 7th day of March, 2018

Respectfully submitted,

The Abutting Landowners Group, the Non-Abutting Landowners Group, the Levesque-Allen Group, the Stoddard Conservation Commission, and the Windaction Group,

By and through their attorneys,

DONAHUE, TUCKER & CIANDELLA, PLLC

/s/ **Eric A. Maher**

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Certificate of Service

I hereby certify that I served a copy of this Pleading pursuant to Site 202.07 to the current service list in this Docket this 7th day of March, 2018.

/s/ Eric A. Maher
Eric A. Maher, Esq.