



Decommissioning Assurance in the form of an Irrevocable Letter of Credit (“ILOC”) issued by a major financial institution with a credit rating of “BBB” from Standard and Poor’s or a “Baa2” rating from Moody’s, each as defined on the Effective Date. Upon information and belief AWE/WGE intends to comply with this condition, however, as of this filing it has not provided the Assurance to the Town and the SEC Administrator.

In its December 21, 2017, post-certificate filings, AWE/WGE stated an intention to commence construction of the Wind Farm on February 1, 2018. In addition to the forgoing issues with AWE/WGE’s compliance with the Certificate, the issuance of the Certificate has been appealed to the New Hampshire Supreme Court by several intervenors. Oral argument on this appeal took place on January 25, 2016, but it is unknown as to when the Supreme Court will issue a decision on that appeal. Because AWE/WGE has not submitted sufficient documentation demonstrating the debt/ equity financing for the project, or the Decommissioning Assurance is in place, and because the New Hampshire Supreme Court has not issued a decision on the intervenors’ appeal, Counsel for the Public requests that Certificate be suspended 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.

As grounds, the following is set forth:

As part of AWE/WGE’s pre-filed testimony, Mr. Weitzner stated that the Project Sponsors would use a traditional financing approach, consisting of two phases, a construction financing phase comprised of a construction loan and construction equity, and a permanent financing phase during which the construction loan would be converted to a term loan after the project becomes operational. See Pre-filed Testimony of Eric Shaw and Henry Weitzner, 9/10/15, p. 6-7. Weitzner further stated that AWE received Letters of Interest from several

large commercial banks experienced in providing project construction loans to wind project in the U.S. *Id.* at p. 9. At the time the Application was filed AWE did not anticipate that it would be eligible for the Production Tax Credit; thus, it anticipated that \$20-25 million in equity would be required. Later in the process AWE submitted supplemental pre-filed testimony wherein Weitzner reiterated that the Project Sponsors would use a traditional financing approach consistent with market standards in the United States Wind Industry. See Supplemental Pre-filed Testimony of Eric Shaw and Henry Weitzner, 3/3/2016, p. 6. In the supplemental pre-filed testimony Weitzner stated that that the Project's construction would be financed with a \$50-55 million construction loan converting to a term loan, and \$10 -13 million of equity. *Id.* at p. 8.<sup>1</sup> In that regard, Weitzner noted that “[m]arket standard criteria for the debt and tax equity, which require that the Project demonstrate sufficient contracted cash flow net of all project expenses to service tax equity payments and debt principal and interest payments ensure the Project will have sufficiently strong revenues for its continued operation in compliance with all conditions contained in a Certificate and industry practices once financing is closed.” *Id.* at p. 9. Weitzner relied on the letters of interest from “some of the most reputable and active funding providers of the U.S. wind sector” to bolster the “competitive economics of the project” relative to other U.S. wind projects.” *Id.* at p. 2.

As it relates to the change in equity, Weitzner stated that Walden's equity contribution and resulting overall financing structure would be adjusted to the extent that assumption or actual conditions changed with respect to PPA price or other factors. *Id.* at pp. 8-9. However, when pressed on whether there was a limit to the equity that RWE was going

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<sup>1</sup> At this point, it was determined that the project would be eligible for the Production Tax Credit (“PTC”) or Investment Tax Credit (“ITC”). SEC transcript, Day 1 p.m. pp 5 -7.

to contribute to the Project during the construction phase Mr. Weitzner was reluctant to say that RWE was ready to contribute as much equity as necessary to stay operational. See SEC Hearings Transcript, Testimony of Henry Weitzner, Day 1, pm, p. 24. When specifically asked about RWE contributing \$65 million in equity, Weitzner testified that he didn't know and that decision was not dependent the financial viability of the project but on "what made financial sense to us." *Id.* at 30. Further, Mr. Shaw testified that while RWE is not constrained as to the amount of equity it would contribute to the project, the amount would be determined by the contracts for the output of the project that AWE/WGE is able to secure, and the equity will be "back calculated" based upon the contracts that the projects sponsors are able to secure. *Id.* Testimony of Eric Shaw, p. 32. Ultimately when pressed again on whether the \$11 million was all that RWE was going to have to contribute, Mr. Weitzner stated that \$11 million is a "very reasonable number," but it could be a little more or less. *Id.* Testimony of Henry Weitzner at p. 32.

In its Decision, the SEC noted that AWE proposed a two-phased financing plan that it described as standard in the United States for renewable wind energy facilities: (i) the construction financing phase; and (ii) the operation phase. Decision, p. 75. The SEC further noted that, as of the date of deliberations, the AWE had already obtained and provided to the Subcommittee a number of letters of interests from commercial institutions demonstrating their interest in providing funds for a construction loan. While this was not a guarantee that AWE would obtain the financing, the SEC stated, "[n]otably, to ensure that the Applicant has raised sufficient capital for construction and operation of the Project, the Applicant agreed to provide loan documentation demonstrating sufficient funds were raised for construction of the Project prior to the commencement of construction of the Project." *Id.* at 76. Based upon

these representations and findings, the SEC conditioned the Certificate on the requirement that AWE provide documentation demonstrating that debt and /or equity financing required for the construction of the Project is in place to the Committee's Administrator. *Id.*

Counsel for the Public submits that AWE/WGE's filing on December 21, 2017 represents a substantial change from AWE/WGE's proposed financing plan submitted to the SEC during the course of the proceedings into this matter. It also represents a substantial change from the financial plan that was approved by the SEC in its Decision. As such, AWE/WGE should have filed a Motion to Amend the Certificate so that the SEC, Counsel for the Public and Intervenors could consider an altogether different financing proposal. It is noteworthy that AWE/WGE has offered no rationale why there has been such a substantial change in the financing of the Project. Where several independent financial institutions have submitted letters of interest after reviewing AWE/WGE's financial information and *pro formas*, the SEC and the parties to the litigation have a right to ask if the financial institutions have withdrawn their interest in the project, and if so, why they are no longer interested in the project.

With that said, even if the SEC were to accept this substantially different financing arrangement, the SEC conditioned the Certificate upon receipt of "documentation demonstrating that debt and/or equity financing required for the construction is in place prior to commencing construction." Decision, pp. 75-76. The financial information submitted to the SEC's Administrator consisting of two letters, one from Henry Weitzner, Co-Founder of Walden Green Energy and the Second Letter from Stephen O'Reilly, CEO of RWE PI do not amount to sufficient documentation that the debt and/or equity financing is in place prior to the commencement of construction. They constitute unbinding representations by

subsidiaries of RWE of an undocumented promise that the RWE will be fully funding the project with a 100% equity contribution and no construction loans.

Counsel for the Public contacted counsel for AWE/WGE to request additional documentation supporting the new financing scheme in the way of bank statements from AWE/WGE and counsel for AWE/WGE advised Counsel for the Public that information is confidential. Counsel for the Public asked counsel for AWE/WGE for alternative documentation in the way of a written pledge or guarantee, loan documents between RWE Supply/RWE AG, and AWE/WGE or corporate resolution from RWE AG. Counsel for AWE/WGE advised Counsel for the Public that WGE could provide a corporate resolution from WGE that it was going to receive the equity from the parent company. But Counsel for the Public was advised that a corporate resolution from RWE AG or RWEST indicating it would be fully funding the project with 100% equity could not be produced.

Mr. Weitzner testified that the way in which it receives funds from RWE to request it up the chain from its parent companies. Transcript, Day 1 pm. P. 77. At any given time, however, WGE's books may look fairly weak. For example in RWE's 2016 annual report, published in March of 2017, WGE is listed in a line item with a year ending loss of € - 818,000.<sup>2</sup> Thus a corporate resolution from WGE is not sufficient documentation that the \$65 million project construction costs will be in place.

Counsel for the Public does not contest that RWE AG has sufficient funds to finance the project, so one has to question why additional documentation is not forthcoming. AWE/WGE submitted a financial plan that looks very different than that which is currently

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<sup>2</sup> See <http://www.rwe.com/web/cms/mediablob/en/3688522/data/2957158/7/rwe/investor-relations/reports/2016/RWE-annual-report-2016.pdf>

being proposed. Counsel for the Public, the intervenors and the SEC relied on that plan, the evidence submitted and testimony presented by the Project Sponsors throughout the course of the SEC hearings into this matter. In particular, Counsel for the Public relied on AWE/WGE's commitment to produce documentation demonstrating that debt and/or equity financing required for the construction would be in place prior to commencing construction. The SEC conditioned its approval of the Certificate on that commitment, a condition to which the Project Sponsors remains obligated. Given the substantial change in project financing, what is needed to satisfy the condition of the SEC Certificate amounts to documentation that RWE is legally bound to fund the project with 100% equity. The two letters submitted by AWE/WGE or RWE PI do not evidence such a commitment.

WHEREFORE, Counsel for the Public requests that the SEC issue an Order that:

- a. The Certificate be suspended 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
- b. AWE/WGE submit testimony and/or documentation explaining why the project financing has changed;
- c. AWE/WGE produce documentation demonstrating that RWE is legally bound to fund the project with a 100% equity investment prior to commencing construction;
- d. AWE/WGE not commence construction on the project until it has met all of the conditions of the Certificate including producing documentation demonstrating that debt and/or equity financing required for the construction is in place;
- e. AWE/WGE not commence construction on the project until it has met all of the conditions of the Certificate including the procurement of Decommissioning Assurance; and
- f. Grant such other relief as may be just.

A hearing is requested.

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Respectfully submitted this 29<sup>th</sup> day of January, 2018.

COUNSEL TO THE PUBLIC

By his attorneys

ANN RICE  
DEPUTY ATTORNEY GENERAL



Mary E. Maloney, Bar # 1603  
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: January 29, 2018



Mary E. Maloney