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MCLANE MIDDLETON

March 14, 2018

VIA ELECTRONIC MAIL & HAND DELIVERY

New Hampshire Site Evaluation Committee
Pamela G. Monroe, Administrator
21 South Fruit Street, Suite 10
Concord, NH 03301

Re: NH Site Evaluation Committee: Certificate of Antrim Wind Energy, LLC – Objection to Motion to Reconsider Decision of the Administrator

Dear Ms. Monroe:

Please find enclosed for filing with the Site Evaluation Committee, Antrim Wind Energy's Objection to the Joint Motion to Reconsider Decision of the Administrator.

A copy of the Objection has been provided by e-mail to Counsel for the Joint Intervenors and Attorney Maloney. Please contact me directly should you have any questions.

Sincerely,

Rebecca Walkley for

Barry Needleman

BN:rs3

Enclosure

THE STATE OF NEW HAMPSHIRE

SITE EVALUATION COMMITTEE

In Re: ANTRIM WIND ENERGY, LLC
CERTIFICATE OF SITE AND FACILITY

ANTRIM WIND ENERGY'S OBJECTION TO JOINT MOTION TO RECONSIDER

Antrim Wind Energy, LLC ("AWE") by and through its attorneys, McLane Middleton, Professional Association, submits this Objection to Richard Block, Annie Law, Wind Action Group, and Mary Allen's (collectively referred to as the "Complainants") Motion to Reconsider Decision of Administrator for Adjudicative Hearings to Determine Satisfaction of Condition of Certificate of Site and Facility (the "Motion").

I. INTRODUCTION

1. On March 17, 2017 the Site Evaluation Committee (the "SEC" or the "Committee) granted a certificate with conditions to Antrim Wind Energy to construct and operate a wind facility on Tuttle Ridge in Antrim, New Hampshire (the "Certificate").

2. On June 21, 2017 the Committee issued a final order denying all motions for rehearing. The Committee's final order on motions for rehearing constituted the conclusion of the administrative process before the SEC for docket number 2015-02.

3. On June 2, 2017, the Complainants filed an appeal with the New Hampshire Supreme Court. They asked the Court to suspend the Certificate. The Court denied that request. *Order on Motion for Summary Affirmance*, Docket No. 2017-0313 (July 31, 2017). The Certificate thus remains in force and effect during the pendency of the appeal. *Id.*; *see also* RSA

541:18 (stating, "[n]o appeal or other proceedings taken from an order of the commission shall suspend the operation of such order.")

4. The Certificate requires that AWE, prior to commencing construction of the Project, "provide documentation demonstrating that debt ***and/or*** equity financing required for the construction of the Project is in place to the Committee's administrator." *Order and Certificate of Site and Facility with Conditions*, Docket No. 2015-02, p. 5 (March 17, 2017) (emphasis added).

5. On December 21, 2017, for the purpose of satisfying this condition, AWE filed a letter from Henry Weitzner (on behalf of Walden Green Energy) and a letter from Stephen O'Reilly (on behalf of RWE) demonstrating that construction financing was in place and that, consistent with the testimony provided by AWE and RWE, the financing would be in the form of equity provided by RWE.

6. The Complainants filed a letter on January 24, 2018 asserting that AWE failed to satisfy the Certificate condition relating to construction financing. On January 30, 2018 Counsel for the Public also submitted a filing regarding the construction financing. AWE submitted a Response on January 31, 2018.

7. On February 8, 2018 Administrator Monroe issued a letter concluding that AWE had satisfied the construction financing condition in the Certificate.

II. ARGUMENT

A. The Complainants' Motion is Procedurally Improper.

8. Complainants are confused about the procedural posture of these proceedings. They cite to RSA 162-H and RSA 541-A to support their right to challenge determinations of compliance with the Certificate. *Motion*, p. 6 (March 7, 2018). Their analysis, however, is

misplaced. RSA 541-A addresses procedures in adjudicative proceedings (as well rulemaking procedures). RSA 162-H lays out the public process during the adjudicative proceedings regarding an application for a certificate of site and facility. Here, the adjudicative proceedings are over. There is no statutory mandate that the SEC address certificate compliance as part of a publicly adjudicated process. Moreover, the Certificate contains over 80 conditions, and together with individual requirements in underlying permits and agreements that are incorporated into the Certificate there are over 200 conditions. The Complainants are in effect asserting that they have a right to challenge every one of these conditions as they are implemented by the Committee. There is no basis for such a claim.

9. The Complainants have no procedural right to seek reconsideration of the Administrator's February 8, 2017 compliance determination. Pursuant to Site 202.29 and RSA 541:3 rehearing may be sought regarding an order or decision of the commission (in this case, the SEC). The February 8, 2018 letter constitutes a routine compliance determination made by the Administrator pertaining to a condition in a validly issued Certificate. Such determinations are not "orders or decisions" of the commission within the meaning of the statute and the rule. If the statute and rules were construed so as to allow such motions, it would render the administrative process unworkable.

10. While the Complainants were granted intervenor status in the underlying adjudicative process, that administrative process is now complete. Those intervenors do not have any unique ongoing rights to participate in all matters of compliance under the Certificate.[1]

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[1] The Complainants raise a concern about the "lack of transparency" associated with AWE's filing. *Motion*, p. 5 (March 7, 2018). That assertion mistakenly assumes the Complainants have ongoing rights here, which they do not. As noted, the adversarial process concluded when the SEC rendered it's final decision denying motions for rehearing resulting in a validly issued final Certificate. At that point, the rights that the interveners had as parties to that adjudicative proceeding ended. The implication that their rights exist in perpetuity and that all compliance filings and determinations for the life of this project must involve them is simply wrong.

At this point, complainants hold the same status as any other member of the public. As such, their filing should be treated as nothing more than public comment.

11. The SEC unquestionably has ongoing jurisdiction over the Certificate and is required to ensure continued compliance. RSA 162-H:4, I(c) and (d). However, those routine compliance determinations are not made in the context of an adjudicative proceeding and so the statutes and rules governing such proceedings are not applicable. Requiring adjudication of each and every compliance determination by the Committee or a delegated entity is unnecessary given the underlying findings already made. Additionally, requiring such a process opens the door for unreasonable delay for certificate holders as well as limiting the ability of the Committee to function in an efficient manner.

12. In addition, the Complainants are seeking to challenge an administrative determination that does not require any actual finding or decision by the Administrator or the SEC. The Certificate requires that "the Applicant 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." *Order and Certificate of Site and Facility*, p. 5 (March 17, 2017). This is an administrative matter subject to a simple inquiry: has AWE provided the requisite documentation, yes or no? AWE provided the documentation as required and the Administrator acknowledged that fact. If the Committee wanted this process to be more detailed or elaborate, as the Complainants argue it is, the Committee would have written the condition in a different manner.

13. The Complainants also misconstrue this condition as an invitation to re-litigate the issue of AWE's financial viability. *See Motion,* p. 9 (March 7, 2018)(Noting "[t]he subsequent materials provided by AWE are insufficient to demonstrate the requisite financial

capability for AWE to undertake construction."). It is readily apparent from the plain language of the condition that it does not contemplate the sort of new and expansive process the Complainants argue for here.

B. Communications with the SEC Administrator are Not Ex Parte Communications.

14. Complainants assert that AWE, by speaking with the SEC Administrator, engaged in improper an ex parte communication. In support of their assertion the Complainants refer to a conversation AWE's counsel had with the SEC Administrator regarding the potential sale of the project. *Motion*, p. 6 (March 7, 2018). The assertion that such a communication is improper is both factually and legally wrong.

15. The SEC rules require that Committee members not communicate directly or indirectly with parties. Site 202.30. The Administrator is not a Committee member and so this rule does not pertain to her.

16. Moreover, the ex parte rules are designed to ensure that improper communications are not made with Committee members, or alternatively with employees of an agency assigned to render a decision, regarding the substance of matters before them. *See* RSA 541-A:36. The communication in question did not involve a substantive matter before the Committee. It was purely a courtesy call to inform the Administrator that a press release was about to be issued indicating that a sale of the project may occur at some point in the future.[2] If such a sale occurred, it would require SEC approval prior to closing and would not be a decision made by the Administrator. AWE acknowledged that point with the Administrator. Thus, the notion that there was anything legally or factually improper about this communication is nonsensical.

[2] Contrary to the unfounded assertions raised by the Complainants (*Motion*, p. 6 (March 8, 2018)), AWE has not provided the SEC or the SEC Administrator with any documentation relating to a sale of the proposed project.

C. The Complainants Argument That The Committee Improperly Delegated Authority to Administrator Is Wrong and Has Been Waived

17. The Complainants assert that the Administrator cannot make the determination regarding the financing condition and that for her to do so is an improper delegation of authority. *Motion*, p. 7 (March 7, 2018). The Complainants fail to fully consider the language provided by the SEC rules relating to the delegation of authority. Site 301.17 permits the SEC to "Delegat[e] to the administrator or another state agency or official of the authority to monitor the construction or operation of the energy facility subject to the certificate and to ensure that related terms and conditions of the certificate are met." Based on this authority, the SEC may delegate to the administrator the authority to monitor construction and to ensure that related terms are met. The condition at issue relates directly to construction activity and therefore is within the SEC's authority to delegate.

18. Notwithstanding that point, if the Complainants wished to raise this argument, regarding the underlying authority to delegate and not the substance of any determination rendered, they were required to do so in their original motion for rehearing filed on April 14, 2017, within 30 days of the issuance of the Certificate. They failed to do so and therefore failed to adequately preserve such issues for appeal to the New Hampshire Supreme Court. As such, they cannot now make claims that there are procedural defects in the Certificate. They waived such arguments. RSA 541:3.

19. Regardless of whether the authority was properly delegated, the Complaints untimely and incorrect argument is moot because, as discussed below, other than a determination that documentation was or was not provided, the condition does not require any finding either by the Administrator or the SEC. Findings regarding financial capability were already made in the adjudicative proceeding below.

D. The Decision to Finance the Project with Full Equity is Not a Material Change.

20. As already articulated in AWE's January 31, 2018 filing, the decision to finance the Project with all equity is not a substantial change from the representations made during the adjudicative proceedings and does not create any greater risks.

21. While the Complainants argue that the "Subcommittee relied upon these statements in both its deliberations and the Decision" that they expected AWE to proceed with third-party financing (*Motion*, p. 9 (March 7, 2018)), this is clearly not the only option contemplated by the Committee and is not reflected in the Certificate or any condition. The Committee expressly noted that AWE has "a commitment from RWE to provide 100 percent of the construction equity to construct the Project...And there was testimony that basically said 'If it's more, they'll kick in more. It's not an issue.'" *Tr. Deliberations Day 1/Morning Session*, p. 71.

22. Complainants further point to language in the Decision and Order noting that "the Applicant agreed to provide loan documentation demonstrating sufficient funds were raised." *Motion*, p. 9 (March 7, 2018). While this language is included in the Decision, it was not included as a condition of the Certificate. To the extent that such loan documentation was applicable, AWE would provide it to the SEC. The use of full equity to finance the construction phase of the Project means that no such documentation exists and therefore, there is nothing to provide. The documentation "demonstrating sufficient funds were raised," has been provided.

23. As a practical matter, Complainants fail to understand that using additional equity, as opposed to financing with debt, is a widely employed method of financing wind project construction, particularly for well-capitalized utility companies such as RWE.[3] Contrary

[3] Michael Drunsic from DNV GL, the owner's engineer in this case, has provided AWE with additional information supporting AWE's assertion that balance sheet construction financing is routine. In DNV GL's experience, in 2017,

to the implicit argument raised by the Complainants that constructing wind energy projects using all equity is somehow a risk,[4] such construction financing presents no greater risk.[5] *Response to Antrim Wind's Compliance Filing*, p. 4 (January 24, 2018). The choice is a business decision made by project owners given the conditions at the time. As stated in the December 21 letter from Mr. O'Reilly, RWE fully supports moving the project construction forward using all equity at this time.

24. Complainants argue that "the Applicant's current financial proposal differs substantially from that proposed both in the Application and the adjudicative hearings." *Motion*, p. 9 (March 7, 2018). The premise underlying this assertion is fatally flawed: there is no change, substantial or otherwise. The testimony and the record in this proceeding demonstrate that financing construction with all equity was always a contemplated and available option, as discussed above. Additionally, RWE testified that the "equity check here, whether it's $11 million *or whether it grows from there*, as was referred to earlier, is largely immaterial to that size of a company." *Tr. Day 1/Afternoon Session*, p. 61 (emphasis added). The financing approach documented by AWE is consistent with the testimony presented to and relied on by the Committee.

25. Additionally, it should be noted that there are two phases of project finance: construction financing and permanent financing. At this time, given the pending New

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70% of the 5,000 megawatts of new wind construction in which DNV GL was engaged to conduct due diligence, was built on balance sheet, or with full equity, and without a construction loan.

[4] The Complainants reference an example of a construction project in South Carolina where the financial backer has pulled out of the project to further support their speculative concerns regarding full equity financing. The Complainants seek to draw a theoretical analogy between this case and a concern that AWE could somehow lose financing and leave a partially constructed project as an eyesore or a danger to local residents. The Complainants fail to take into account the $3.15 million decommissioning letter of credit that is currently in place. This money is available to AWE or to the Town at any time in the event that that Project has been abandoned and needs to be decommissioned. Therefore there is no scenario where the loss of financial support could result in a partially constructed, abandoned project. There is no basis to support Complainants theoretical concern.

[5] While Mr. Weitzner did testify that putting more equity in "makes it a slightly less attractive project from a return basis," *Tr. Day 1/Afternoon Session*, p. 89, there was no testimony given and it would be contrary to the industry perspective to suggest that financing a project on balance sheet somehow creates a greater risk.

Hampshire Supreme Court appeal, third-party debt financing for the construction phase is an unattractive option. However, it is almost certain that permanent financing will involve some combination of equity, tax-equity and/or debt financing. The permanent financing phase has not commenced and will follow the completion of the construction financing phase.

26. The rationale for this business decision is further supported by the letters submitted by Mr. Weitzner and Mr. O'Reilly which clearly outline that the decision to finance with all equity at this time was made to ensure compliance with various environmental, construction and commercial timelines and obligations. Given these circumstances, Walden Green Energy and RWE determined that financing construction using equity was the best business decision to move the project forward at this time.

27. The Complainants also assert that the TransAlta announcement somehow merits an adjudicatory hearing. That assertion is not supported by the actual circumstances and facts involved in this case. The Antrim Project has not been sold and cannot be sold without prior SEC authorization. Such authorization can only come after a proper adjudicative proceeding. *See e.g. Granite Ridge Energy, LLC and Calpine Granite, LLC*, Docket No. 2015-07, *Berlin Station, LLC*, Docket No. 2011-01. Therefore, holding a hearing or adjudicative process relating to a potential future sale of the Project is plainly premature. Walden Green Energy backed by RWE continues to fully fund construction of the Project.

III. CONCLUSION

Based on the foregoing, the Motion filed by the Complainants is procedurally defective and should be dismissed as improper. Substantively, the Complainants have failed to raise a legitimate issue relating to a justiciable matter. The Committee has jurisdiction over AWE's compliance with its Certificate. This ongoing jurisdiction is not consistent with an ongoing

adjudicative proceeding or ongoing public process. At this time, the Committee has determined that AWE has complied with all certificate conditions and no further action is required. The Complainants simply ask the Committee to reach a different conclusion and seek to create further unreasonable delay.

WHEREFORE, Antrim Wind Energy, LLC respectfully requests that the Committee:

A. Dismiss Complainant's Motion as procedurally improper;

B. Alternatively, deny Complainant's Motion to Reconsider; and

C. Grant such other and further relief as is deemed just and appropriate.

Respectfully Submitted,

Antrim Wind Energy, LLC

By its attorneys,

McLANE MIDDLETON,
PROFESSIONAL ASSOCIATION

Dated: March 14, 2018

By: Rebecca Walkley

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Certificate of Service

I hereby certify that on the 14th day of March, 2018, an original and one copy of the foregoing Objection to Motion for Rehearing were hand-delivered to the New Hampshire Site Evaluation Subcommittee

Rebecca Walkley for
Barry Needleman