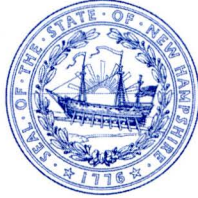


**ATTORNEY GENERAL
DEPARTMENT OF JUSTICE**

33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

GORDON J. MACDONALD
ATTORNEY GENERAL



ANN M. RICE
DEPUTY ATTORNEY GENERAL

March 27, 2018

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

Re: SEC Docket No. 2015-02
In the matter of the Application for Certification Pursuant to RSA 162-H of
Antrim Wind Energy, LLC

Dear Ms. Monroe:

Enclosed you will find an original and one copy of Counsel for the Public's Reply to Objection to Joint Motion to Reconsider for filing in above-referenced matter.

Thank you for your attention to this matter. Please feel free to call with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Mary E. Maloney".

Mary E. Maloney
Assistant Attorney General
Environmental Protection Bureau
(603) 271-3679

/llm
Enclosures
cc: Distribution List

had in the original docket.

In its Objection, AWE maintains that that new financing arrangement does not really represent a change in their financial plans and Administrator's February 8, 2018 letter was a routine compliance determination. AWE suggests that any opinion to the contrary reflects a lack of understand of how these projects are financed.¹ To the contrary, AWE presented evidence during the proceedings that it 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; See also Supplemental Pre-filed Testimony of Eric Shaw and Henry Weitzner, 3/3/2016, p. 6. As indicated by the Opposing Intervenors in their Joint Motion for Reconsideration the Certificate's financing contingency should be interpreted and informed by AWE's representations made during the adjudicatory process. See Joint Motion to Reconsider, ¶ 20-22.

Counsel for the Public relied on public and private representations made by AWE that it had 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." Supplemental Pre-filed Testimony of Eric Shaw and Henry Weitzner, 3/3/2016, p. 2. Counsel for the Public relied on the fact that these potential lenders, being active funding providers of wind projects, would have all the necessary expertise to conduct appropriate due diligence on the project before providing loans to AWE. Thus, the importance that AWE would provide documentation demonstrating that the loan documents were in place *prior to*

¹ Counsel for the Public submits the parties' understanding of how this project was to be financed was based upon AWE's application, exhibits and testimony during the proceedings. There was no testimony that the project would be financed using 100% equity and no construction loans and there was no testimony that such financing was the traditional approach to financing these types of projects.

construction cannot be understated.

There is a qualitative difference between what was presented by AWE during the hearing process, that being, debt/equity financing and that which is being proposed currently – which is simply equity financing. As noted, an independent financial lender providing a construction or long-term loan must conduct due diligence and must abide by the terms of the loan. But as indicated by Opposing Intervenors in their Motion to Reconsider, a single equity provider can walk away from a project at any time. See Opposing Intervenors’ Joint Motion to Reconsider at ¶ 24.

AWE also states that the decision to finance with all equity at this time was based upon what made financial sense to the company. See Antrim Wind Energy’s Joint Response to Filings Relating to Construction Financing, ¶13. AWE acknowledges its potential lenders were not willing to finance the project while the Supreme Court Appeal was pending. *Id.* at ¶ 14. AWE also argues that its compliance obligations with various other agencies and entities necessitated the change from debt/equity financing to all equity financing. Antrim Wind Energy’s Objection to Joint Motion to Reconsider ¶ 26.

But neither the SEC’s Decision or Certificate included a provision that allowed the financing structure to change based upon what made financial sense to AWE. And no agencies or entities are requiring AWE to commence construction at the present time. The desire to commence construction prior to the resolution of the Supreme Court appeal appears to be the only reason why AWE’s financing plans have changed. That decision is simply a business decision by AWE that reflects its willingness to take the risk regardless of whether the promised construction loan is in place and regardless of the outcome of the Supreme Court appeal.

The Certificate required that AWE provide the SEC with documentation demonstrating that it had obtained the debt and /or equity financing necessary for the Project prior to

commencing construction of the project. Instead, AWE has decided to commence construction and proceed without banks loans with only equity financing because the banks will not lend AWE the money while this matter is on appeal. Antrim Wind Energy's Joint Response to Filings Relating to Construction Financing. ¶ 14. This represents a substantial and qualitative change from the financial requirements approved by the SEC, and thus it requires an alteration or modification of the certificate.

Under RSA 541:16 if the SEC Certificate is altered, modified or amended, the altered, modified, or amended order shall take the place of the original order complained of, and the Supreme Court then renders judgment on the changed order, *after allowing any amendments of the pleadings or other incidental proceedings desired by the parties which the changed situation may require*. RSA 541:16. (emphasis added.) The Opposing Intervenors and Counsel for the Public have a statutory right to participate in the process to address the changes to the Certificate. *Id.* RSA 541:16.

Counsel for the Public is mindful that Site 301.17(d) states that the Administrator has the authority to both monitor the construction and operations of the energy and also *to ensure that related terms and conditions are met*. Site 301.17(d). (emphasis added.) However, a review of the plain language of RSA 162-H:4, III demonstrates that the authority to ensure that related terms and conditions are met rests with the SEC and is a non-delegable duty. RSA 162-H:4, III; see also RSA 162-H:4, III-b (“[t]he committee may not delegate its authority or duties except as provided under this chapter”). To the extent the Site rules indicate otherwise, they exceed the authority provided under the statute and they cannot be read to authorize such a delegation. *Appeal of Cover*, 168 N.H. 614, 623 (2016); *Appeal of Mays*, 161 N.H. 470, 473 (2011).

Support for this interpretation is evidenced in the instant case wherein the Certificate holder is submitting plans that are different than those contained in the Certificate, because the

decision by the Administrator to accept AWE's changed financing plans represents a determination by the Administrator that the Certificate is not modified or altered by those changes under RSA 541:16. There is nothing in RSA 162-H or the SEC's rules that contemplate delegating of that kind of decision-making authority to the Administrator, particularly as this type of decision also could have the effect of depriving the Intervenors and Counsel for the Public of their statutory right to have meaningful input in the modification of the Certificate under RSA 541:16.

Finally, Counsel for the Public submits that given that the Administrator has been acting in a decision-making capacity, substantive communications with any of the parties may qualify as *ex parte* communications that the SEC should guard against. Thus as it concerns the communication related to the proposed purchase of Antrim Wind by Trans Alta, Site 301.17 (a) requires that the certificate holder promptly notify the committee of any *proposed* or actual change in ownership of the holder. (emphasis added). Certainly the press release issued by Trans Alta indicating that it has entered into an agreement to purchase Antrim Wind and finance the construction of the project, qualifies as a proposed change in ownership. Thus, AWE's assertion, that the call was a simple courtesy call to the Administrator understates its obligations under Site 301.17 (a). See Objection to Motion to Reconsider, ¶ 16.

Further, as side from issues related to possible *ex parte* communications, this remains an open docket and the SEC should be providing notice of these proposed changes to all of the parties.

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

- a. Granting the Opposing Intervenors' Motion to Reconsider:

- b. Suspending the Certificate be until such time as AWE/AWE has complied with the requirements of the Certificate; and
- c. Granting such other relief as may be right and just.

A hearing is requested.

Respectfully submitted this 27th day of March, 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: March 27, 2018



Mary E. Maloney