

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

**No. 2015-02
ANTRIM WIND ENERGY LLC**

**ORDER DENYING MOTION FOR REHEARING FILED BY LISA LINOWES,
BARBARA BERWICK AND JANICE LONGGOOD**

May 14, 2021

Lisa Linowes, Barbara Berwick and Janice Longgood (Movants) filed a document entitled “Motion for Rehearing, January 5, 2021 Order” (Motion) in the above referenced docket¹. This order denies the Motion.

I. Procedural History

On March 17, 2017, the Site Evaluation Committee (Committee) approved the application filed by Antrim Wind Energy LLC (Antrim Wind) to site, construct, and operate nine Siemens SWT-3.2-113 direct drive wind powered turbines each with a nameplate generating capacity of 3.2 MW and a total nameplate capacity of 28.8 MW (Project). The Committee issued an Order and Certificate of Site and Facility with Conditions (Certificate). On February 15, 2019, the Committee approved a transfer of ownership of Antrim Wind to Antrim Level, LLC (Level) a subsidiary of TransAlta Holdings U.S. Inc. (TransAlta.) On December 24, 2019, the Project began commercial operation.

N.H. Admin. R. Site 301.18(e)(7) requires the filing of post-construction sound reports within three months of commercial operation and once during each season thereafter. TransAlta filed a Winter 2020 Sound Monitoring Report on May 13, 2020. The report was prepared by Acentech, Incorporated (Acentech.) The Acentech report concluded that the Project complies with N.H. Admin. R. Site 301.14(f)(2)(a) at all testing locations. The Committee’s Administrator retained a third-party expert

¹ As referenced infra, Docket No. 2015-02 is not an open docket. All matters to be finally adjudged in the docket were resolved in 2017.

Gregory Tocci of Cavanaugh Tocci to conduct a peer review of the Acentech Winter 2020 Sound Monitoring Report. Mr. Tocci filed his review with the Committee on September 4, 2020 concluding that the methods used in the Acentech report were generally consistent with those of ANSI S12.9 Part 3 and meet the requirements of the N.H. Admin. R. Site 301.18 for seasonal sound monitoring.

Between January and July 2020, the Committee received several noise complaints from residents along Reed Carr Road in Antrim. The Administrator of the Committee commissioned Mr. Tocci to take sound measurements to validate the complaints. Mr. Tocci filed a revised report of his measurements on September 4, 2020. Mr. Tocci's revised report concluded that sound from the turbines likely conforms to limits of N.H. Admin. R. Site 301.14(f)(2)(a).

On July 24, 2020 TransAlta filed correspondence requesting the Committee to waive N.H. Admin. R. 301.18(e)(5) and to allow seasonal sound monitoring measurements to be obtained from less than all the locations set out in the pre-construction sound analysis. TransAlta asserted that a landowner has refused entry on premises to conduct the monitoring. TransAlta also asked the Committee to waive its rule and modify the schedule for the Spring Sound Study, allowing the study to be provided for Spring 2021.

On November 23, 2020, the Committee held a public meeting. The notice of the meeting and the agenda for the meeting were published on the Committee's website and on the public notice board at the Public Utilities Commission. At the public meeting, the Committee took the following action:

1. The Committee reviewed and accepted the Winter 2020 Sound Monitoring Program Report prepared by Acentech and the peer review report by Cavanaugh Tocci;²
2. Under N.H. Admin. R. Site 302.05, the Committee granted a waiver from the location requirement of N.H. Admin. Rule 301.18 (e)(5) regarding Location 4 in future sound monitoring studies so long as the landowner at Location 4 prohibits access to Antrim Wind or its agents; and

² Acceptance of sound monitoring reports is not an action the Committee is required to undertake. The Certificate requires only that the reports be filed with the Committee. The use of the word "acceptance" was not meant to be interpreted as an approval of the methodology employed.

3. Under N.H. Admin. R. Site 301.18 (e)(7), the Committee granted a waiver and permitted a schedule adjustment to defer the Spring 2020 Sound Monitoring Report until Spring 2021.³

On January 5, 2021, the Committee published its order memorializing the actions taken by the Committee.

On February 4, 2021, the Movants filed the Motion. On March 25, 2021, the Committee held a public meeting. At that public meeting, the Committee voted to deny the Motion. This order memorializes the reasons for denial.

II. Positions of the Parties

A. Movants

The Motion is based on three claims. First the Movants claim that the Committee did not provide proper notice of the November 23, 2020 hearing. They claim entitlement to individualized notice through the service list instituted in Docket 2015-02. The Movants assert that the acceptance of the Acentech report required an adjudicative hearing with individualized notice and a right to be heard.

Second, the Movants argue the Committee improperly accepted the Acentech report. They allege the report violates N.H. Admin. R. Site 301.18 (e)(6) pertaining to sound monitoring measurements.

The Movants third claim alleges the Committee should not have waived the location or scheduling requirements of Site 301(e)(5) or 301.18 (e)(7) as requested by Antrim Wind. They claim the requested waivers do not serve the public interest and will disrupt the orderly and efficient resolution of matters before the Committee.

³ While the Order of January 5, 2021, states the Committee's action was a grant of a waiver of Site 301.18(e)(7), the Committee can allow an adjustment without a waiver. Site 301.18(e)(7) b., by its text, permits scheduling adjustments subject to review by the Committee or administrator. The Committee's action effectively permitted a scheduling adjustment that is consistent with the administrative rules.

B. Antrim Wind

Antrim Wind objects to the Motion and argues that an adjudicative proceeding is not necessary whenever there has been a complaint. Antrim Wind argues there is not a basis for a contested case and therefore no reason for an adjudicative proceeding. Antrim Wind does note that should the Committee commence an enforcement proceeding, after determining there has been a violation of a term or condition of the certificate, an adjudicative hearing would be appropriate.

Antrim Wind also argues that the Movants have confused separate rules governing waiver. Antrim Wind points out that site 302.05 permits the Committee to grant a waiver from its rules without the requirement of an adjudicative hearing.

III. Standard of Review

RSA 541:2 provides that any order or decision of the Committee may be the subject of a motion for rehearing or of an appeal in the manner prescribed by the statute. A request for rehearing may be made by “any party to the action or proceeding before the commission, or any person directly affected thereby.” RSA 541:3. The motion for rehearing must specify “all grounds for rehearing, and the commission may grant such rehearing if, in its opinion, good reason for the rehearing is stated in the motion.” *Id.* Any such motion for rehearing “shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable.” RSA 541:4.

“The purpose of a rehearing is to direct attention to matters said to have been overlooked or mistakenly conceived in the original decision, and thus invite reconsideration upon the record to which that decision rested.” *Dumais v. State of New Hampshire Pers. Comm.*, 118 N.H. 309, 311 (1978) (internal quotations omitted). A rehearing may be granted if the Committee finds “good reason.” *See* RSA 541:3. A motion for rehearing must be denied where no “good reason” or “good cause” has been demonstrated. *See O’Loughlin v. NH Pers. Comm.*, 117 N.H. 999, 1004 (1977); *see also In re Gas Service, Inc.*, 121 N.H. 797, 801 (1981). A motion for rehearing may also be denied where the movants have not suffered an injury

in fact and do not have standing before the agency. *See Appeal of NH Right to Life*, 166 N.H. 308, 314 (2014).

IV. Discussion

A. The November 25, 2021 Public Meeting Was Properly Noticed.

The Movants complain that notice of the November 25, 2020 public meeting was improper. They claim they should have received email notice as members of the service list used in Docket No. 2015-02. Their argument misunderstands the nature of the November 25, 2020 public meeting and the prior proceedings before the Committee.

The adjudicative portion of Docket No. 2015-02 has been long closed. On June 21, 2017, the Subcommittee issued its final order in 2015-02, denying various motions for rehearing. The matter was appealed to the New Hampshire Supreme Court and affirmed on May 11, 2018. All matters to be adjudicated in Docket 2015-02 were at that time resolved. The docket was closed.

The closure of Docket 2015-02 was communicated to the Movants and the public. On March 7, 2018, the Movants, along with others, filed a joint motion seeking reconsideration of the action of the administrator and requesting an adjudicative hearing. On March 27, 2018, the then-chair of the Committee issued an order stating “the Site Evaluation Committee has completed its exercise of authority in Docket No. 2015-02. [. . .] This is not an open docket.” See March 27, 2018 Order on Joint Motion Filed in Docket No. 2015-02, Application of Antrim Wind Energy, LLC for a Certificate of Site and Facility at 2. Notably each of the Movants was a party to the March 2018 motion and was informed that Docket 2015-02 was no longer open⁴.

Notice of a public meeting is governed by the New Hampshire Right to Know Law, R.S.A. 91-A. The Right-to-Know law requires notice of the time and place of a public meeting to be posted in two places, one of which may be the Committee’s website. RSA 91-A:2, II. By law, notice of non-

⁴ Since Docket 2015-02 was closed in 2017 the Committee has opened and adjudicated four separate dockets pertaining to the Antrim Wind Facility, each with its own service list. *See* Docket Nos. 2018-01, 2018-03, 2019-01, and 2019-03.

emergency meetings need be provided 24-hours in advance, excluding Sundays and holidays. *Id.* The Committee fully complied with these requirements before the November 23, 2020 meeting.

A notice of the meeting, containing an agenda describing the matters to be considered was published on a conspicuous portion of the Committee's web site entitled: Meeting Notices, Agendas and Minutes. Consistent with RSA 91- A the notice was published on the website and posted at the Office of the Public Utilities Commission more than 24 hours before the scheduled meeting. *See* RSA 91-A: 2, II. The notice also complied with the emergency provisions of RSA 91-A and Emergency Order 2020-04 issued by the Governor because of the Coronavirus pandemic. The Movants request for rehearing based on claims of improper notice are denied.

B. The Site Evaluation Committee Did Not Approve A Sound Study methodology at its November 25, 202 meeting.

The Movants mistakenly interpret the Committee's action on November 25, 2020 in accepting the Acentech 2020 Winter Sound Monitoring Study as a ruling that the study was conducted under a methodology that properly interpreted N.H. Admin. R. Site 301.18. Neither the order issued after the public meeting nor the transcript of the meeting supports that interpretation of the Committee's action. The order that issued did not approve the methodology used by either Acentech or Cavanaugh Tocci. In the order the Committee recognized that Tocci's report confirmed the Acentech approach. However, the Committee did not adopt or approve the methodology used by either Acentech or Tocci. Moreover, the Committee recognized distinctions between the Seasonal Sound Study Report and the complaints received about noise. *See*, Transcript. November 23, 2020 p. 73-77, 80-81 and 84-85.

Since the January 5, 2021 Order, the Committee, at a public meeting held on March 25, 2021, recommended the Chairperson establish a Subcommittee to investigate individual noise complaints. *See* Docket No. 2021-02. That subcommittee is charged with investigating noise complaints received through December 31, 2020. The subcommittee must prepare a written recommendation regarding the appropriate methodologies for measurement and analysis of sound, and procedure for validating noise

complaints to the full Committee. The determination of the appropriate methodology for measurement and analysis of noise complaints will then be determined by the Committee.

There is not good cause for rehearing of the Committee's prior action which simply received and accepted the Acentech report and Mr. Tocci's peer review without approval of any particular methodology. The complaints received and not reached at the November 23, 2020 public meeting will be investigated as part of Docket 2021-02.

C. The Actions Taken on November 23, 2021 Were Not in the Context of a Contested Case and an Adjudicative Hearing Was Unnecessary.

Under RSA 541:3, a motion for rehearing can only be filed by a party to the proceeding before the Committee or a person directly affected by the Committee's actions. The Movants are not parties to a contested case before the Committee nor are they directly affected by the Committee's decision and order of January 5, 2021..

A matter becomes a contested case when the "legal rights, duties, or privileges of a party are required by law to be determined by an agency after notice and an opportunity for hearing," RSA 541-A:1, IV, or if one is a "named party or properly seeking and entitled as a right to be admitted as a party." RSA 541-A:1, XII. Nothing done by the Committee on November 23, 2021 required an adjudicative hearing. The Movants were not, nor required to be, parties to the Committee's actions.

Likewise, the Movants are not "persons directly affected" by the Committee's actions. To have standing in an administrative matter under RSA 541:3, an individual must either be a party or show he or she has or will suffer an "injury in fact" because of the challenged action. *See Appeal of New Hampshire Right to Life*, 166 N.H. at 314 (citations and quotations omitted). Regarding each complaint the Movant's have failed to demonstrate a non-speculative, particularized harm they suffer (or will suffer) that is not generally applicable to the public at large.

1. Seasonal Sound Study

As discussed above the Committee did not approve a methodology for sound monitoring at its November 23, 2020 public meeting. Therefore, there is no particularized harm or injury in fact to the Movants. Even had the Committee adopted or approved a methodology for seasonal sound studies there would be no individualized harm to the Movants. The seasonal sound study surveys required by N.H. Admin. R. Site 301.18 are not designed to validate individual noise complaints nor to measure the impact at one particular property. They are used to provide the Committee with the overall level of sound generated by the facility and whether that level is consistent with the levels estimated in the pre-construction predictive studies. The rule was not promulgated to enforce the rights of any one individual but to provide a basis for the Committee to appropriately site and set conditions for wind energy facility certificates.

2. Waiver of Location

The Committee granted a waiver from the location requirement of N.H. Admin. R. Site 301.18 (e)(5) regarding Location 4 in future sound monitoring studies so long as the landowner at Location 4 prohibits access to Antrim Wind or its agents. The Committee's administrative rule governing the waiver of administrative requirements mandated by Chapter Site 300 rules does not require an adjudicative hearing in this circumstance.

Like the sound monitoring reports, the Movants again fail to establish an individualized harm or "injury in fact" regarding the waiver of N.H. Admin. R. Site 301.18 (e) regarding location 4 if the landowner does not permit access. The Movants do not show how the Committee's action to grant a waiver regarding the location or number of sound monitoring stations creates a specific individualized harm. As noted above, the seasonal sound studies are not designed to investigate, determine, or validate individual noise complaints. Therefore, the Movants fail to specify a particularized harm. Absent such harm there is no requirement of an adjudicative hearing.

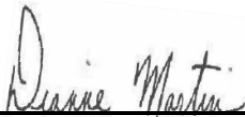
3. Adjustment to Schedule of Sound Monitoring.

While the Order of January 5, 2021, states the Committee's action was a grant of a waiver of N.H. Admin. R. Site 301.18(e)(7), the Committee can allow such adjustments without a waiver. N.H. Admin. R. Site 301.18(e)(7), by its text, permits scheduling adjustments subject to review by the Committee or administrator. The Committee's action simply permitted a scheduling adjustment consistent with the administrative rules. Even if the action is considered a waiver of the rule, as noted above, the adjustment to the scheduling of the sound monitoring reports does not create an individualized harm to the Movants.

V. Conclusion

Docket 2015-02 was closed in March of 2018. The November 23, 2020 public meeting of the Committee was lawfully noticed. The Committee did not adopt, approve, or interpret a proper sound methodology at its public meeting. The actions taken by the Committee at that meeting did not rise to the level of a contested case requiring the opening of an adjudicative hearing. The Movants were not parties to any matter before the Committee on November 23, 2021. The actions taken by the Committee, including granting waivers concerning the location and scheduling of sound studies, did not directly affect the Movants and were undertaken in accordance with the Committee's administrative rules. The Motion for Rehearing is denied.


So ordered this fourteenth day of May, 2021.



Dianne Martin, Chairwoman



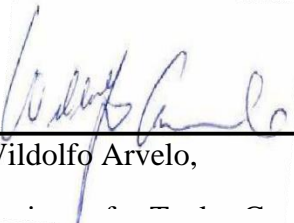
Robert R. Scott, Vice Chairman



Victoria Sheehan



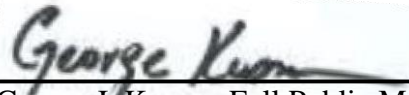
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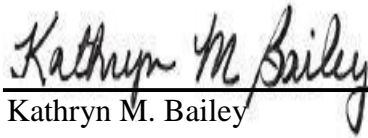
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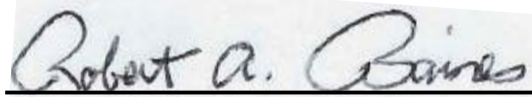
George I. Kassas, Full Public Member



Kathryn M. Bailey



Thomas R. Eaton, Full Public Member



Robert A. Baines, Public Member



Lisa R. Noe, Public Member