To: The NH SEC, re Antrim Wind Energy LLC, Docket No. 2015-02
From: Gordon Allen (private citizen comments speaking for himself), 21 Summer Street, Antrim, NH 03440 wgordonallen@gmail.com 603-588-2742 11/21/16

I raise these red flags as a person – like my fellow townspeople – who firmly believes in renewable energy and who is not a NIMBY, but at the same time takes very seriously that when the State of NH grants a valuable franchise like this to a for-profit developer, that there must be a clear, rock-solid, and compelling case that public benefits far exceed public costs, and that the public interest is clearly served while doing no irreparable harm.

After looking favorably at the idea of the project when the possibility was first raised, the more I analyzed the details as I was able to get them, the more it became very clear that this project was not in the public interest for Antrim, the region and the State – and that while it had some potential, it was fundamentally and structurally flawed as sited and proposed – a classic case of trying to fit a square peg into a round hole.

The red flags raised below illustrate some of the basic flaws at the policy level where I have considerable experience (and hopefully some expertise from five years of graduate training), having spent the better part of the last 40 years actively engaged in passing and implementing good public policy, programs, and projects at the state and local level and projects in one way or another (with some success, like chairing the building committee for our middle schools building program) – and also analyzing and working to stop or fix proposed laws, policies, and projects not in the public interest.

In this role, at the local level, I have served on the Antrim Planning Board, Conservation Commission, as a Trustee of Trust Funds, and on the Contoocook Valley Regional School District (ConVal). I also served three terms in the NH House (four on the Finance Committee and for better or worse author and sponsor of the Statewide Property tax), seven years as the director of a State agency and two years in the DHHS Commissioners' Office as a policy analyst and 25 years analyzing the State budget in detail as founder if the NH CARES Coalition for Responsible Budgeting. I have also served on the boards of a number of statewide nonprofit advocacy organizations, and continue to spend time at the State House and in the policy advocacy arena. Finally, over the past six years I served as the co-chair of the Coalition for Open Democracy and the NH Rebellion and founding chair of WNHN.

These red flags alone provide the basis for not permitting the AWE Project, and permitting the project without resolving the issues they raise – perhaps as suggested by the recommendations for each provided in the following – is not in the public interest and carries the risk of a disaster in the success of the project and in public confidence and public relations if many of these red flag concerns come to pass.

RED FLAG REASONS
for the SEC NOT PERMITTING the AWE PROJECT

Red Flag #1 – *The immeasurable public cost of the AWE Project taking the "sanctuary" out of the dePierre-Willard Pond Sanctuary and the "SuperSanctuary" by itself far exceeds the public benefit of the energy that might be generated.*

(A) There is no question that the AWE Project – given its proposed scale and siting – will immediately destroy the "sanctuary" these two iconic places provide to the overwhelming majority of the public. These two places were named "sanctuaries" – and not "parks," "areas," or "forests," for a reason – and they are special places that provide the people of NH, and the country, a very rare and unspoiled refuge.

These two sanctuaries are as iconic as the White Mountains and Mt. Monadnock in their own way, just smaller with a lower profile. And while the physical wind resource for the White Mountains and Mt. Monadnock far exceeds that of the AWE's, there is no question that wind energy projects in the White Mountains or on Mt. Monadnock would generate such huge public costs (and so disastrously destroy invaluable and irreplaceable public benefits) that they are totally unacceptable on this basis alone.

Recommendation: In assessing net public benefits of the AWE Project, the SEC should recognize and explicitly factor in that the same clear level of unacceptable public costs from eliminating the sanctuaries applies here as it does with other iconic NH places like the White Mountains, even as such costs are in many ways unquantifiable.

(B) As NH and our nation become more developed year-after-year and as the urban landscape continues its relentless spread, so it is certain that the public benefit of these sanctuaries will increase year-after-year, whereas the only thing we know for certain about the AWE Project (and similar ones) is that it will become increasingly technologically obsolete and likely less cost-effective year-after-year.

Recommendation: In assessing net public benefits, the SEC should add value to the greater certainty in the current and future public benefits generated by the sanctuaries and discount the current and future public benefits of AWE's power generation because of their greater uncertainty especially from the threat of technological obsolescence even in the short run.

(C) The Willard Pond and SuperSanctuary are very difficult or even impossible to replace once gone (notwithstanding claims to the contrary, AWE is a major project requiring much blasting that will permanently alter the landscape, even if the towers are eventually torn down) compared to the many options now for replacing the power generated by the AWE Project – and the many more in the future as renewable energy technology continues its rapid advance.

And while preservation of iconic natural places is not the primary focus of the SEC, land preservation is a longstanding, important, and strongly-supported public policy in NH State Law that should not be countermanded and damaged unless there is a compelling project that is on solid ground that generates clear, certain, and significant net public benefits.

Recommendation: In assessing net public benefits, the SEC take into consideration that the public benefits generated now from the sanctuaries are not easily replaced – and future replacement options will become ever more limited – compared to the public benefits of the renewable power generated where there are many other potential options now, with more options likely opening up in the future.

(D) The sanctuaries that the AWE Project eliminates are a significant part of NH's portfolio of special protected places (and NH's "brand" and ethic) whereas the power generated by the AWE project makes an insignificant contribution to the grid and to the portion that is renewable.

Recommendation: In its assessing net public benefits, the SEC explicitly (in recognition of competing state policy objectives here in land protection and preservation and tourism versus encouraging renewable energy) give greater weight to the public benefits that are significant from a statewide perspective than public benefits that are not.

(E) As economists tell us, the value and public benefit of rare places like Willard Pond and our national parks goes far beyond those who visit. The fact that such special places are protected and open to the public is a perceived benefit that people value from afar (and are willing to pay for) even if they never plan to visit those assets. An added advantage of the public benefits from the sanctuary is that unlike the production benefits from the project that require substantial public and private expenditures in the form

of incentives, subsidies, and mandates (and including a required upgrade to the Eversource distribution line paid by ratepayers), the benefits from the sanctuaries require no significant state, federal, or ratepayer spending.

Recommendation: In assessing net public benefits, the SEC add in as a significant benefit – regardless in the difficulty quantifying it (although economists have made estimates) – this substantial public demand from around the country and NH for maintaining the sanctuaries from those who do not plan to visit, and consider the benefits of the sanctuaries in requiring no public expenditures to operate.

Summary of Recommendations on the Sanctuaries

Perhaps the most important consideration for the SEC in deciding whether to permit the AWE Project – given its siting, scale, and corresponding visual impacts – is whether keeping the existing and longstanding public benefits of these sanctuaries for now and in the future (indefinitely) by again denying the permit exceeds the estimated public benefits for now and in the future (20 years) of the renewable power generated.

More lyrically, perhaps the refrain from Joni Mitchell's classic 1970 song "Big Yellow Taxi" best sums up the core benefit-cost calculation facing the SEC in this case: *"You don't know what you've got till it's gone. Pave paradise and put up a parking lot."*

It's up to the SEC to recognize and assess the immense public benefit of maintaining the paradise that is the Willard Pond Sanctuary (however difficult it is to quantify these benefits compared to kilowatts generated) – and to not "pave it over" in the form of the AWE Project that in truth, makes a miniscule contribution to NH's public policy objective of increasing renewable wind production.

Red Flag #2 – *The AWE project is out of scale with the area generating significant potential short and long-term diseconomies.*

(A) The extraordinary height of the turbines with eight at 488 feet (would be tallest in New England) plus their siting on a prominent ridgeline are clearly out of scale with the surrounding landscape, topography, towns, residences, businesses, lakes, and any other man-made structures in the Monadnock Region, and this incongruous scale risks the "Currier & Ives" regional brand that is not only a source of cultural pride and identification but is one of the region's most important economic assets and drivers. And while AWE's siting on top of the ridgeline alone would create diseconomies, there is no question that shorter windmills (such as those in Lempster that are about 100' lower) would create a lower level of negative impacts, especially outside the sanctuaries. It is indeed unfortunate that apparently to make the project work from a production standpoint, AWE has little choice on this site but to build these extraordinarily tall facilities that are so clearly incongruous that they unavoidably spawn a wide array of diseconomies.

Losing the special economic advantage of being a slice of old-fashioned, small-town, and relatively unspoiled Americana means the region risks losing a portion of its attractiveness to the small-scale businesses, entrepreneurs, artists, retirees, and summer-home residents who have migrated in and prevented the area (which does not even have an Interstate highway) from being a stagnant economic backwater – that on paper, it should be – thereby avoiding all the manifold public, social, and private costs that come with a stagnating economy.

Notes: (a) This violation of scale from the AWE Project is the visual and aesthetic equivalent of putting the old John Hancock Building in Boston (at 496 feet including the famous weather tower, Boston's first skyscraper) on top of Tuttle Mountain, or putting it on Main Street in Hancock, Antrim, or in any town

in the area. (b) By way of comparison, the proposed AWE wind turbine towers dwarf the 85 to 145-foot towers that are so controversial in the Northern Pass Project and are seen by many from all over to have such a negative effect on the North Country's brand and economic advantage – although, unlike the AWE project, the Northern Pass towers are not all located on the top of the highest ridgelines.

Recommendation: In assessing net public benefits, the SEC should add in estimates of the public costs from the risk the project poses to the area's "Currier & Ives" economic advantage.

(B) Recognition of the economic advantage of the region's rural small town character is why towns throughout the region – including Antrim – have in their master plans and zoning taken care to protect it by establishing zoning districts that prohibit large scale commercial development (such as the Rural Conservation Zone in which the proposed AWE project would be located) and, further, most regional towns have limited strip development along their highways. And this is why Antrim voters have repeatedly voted not to change the restrictions on large-scale commercial developments (like the AWE project) in this zone, despite a number of attempts to do so.

Recommendation: In assessing net public benefits, the SEC take into consideration the value of local zoning, why it was established to protect and advance public benefits, and why projects that violate it like the AWE project will likely decrease and damage this economic advantage and public benefits.

(C) The overwhelming majority of lake property owners who will see the AWE project from their property, or when out in a boat on the lake, come to the region to escape looking at man-made commercial structures like the AWE project – and in fact, they pay a high premium on their properties and taxes for this, the so-called controversial "view tax."

And while many lakefront owners – such as those with property on Franklin Pierce Lake, who will be visually impacted – but who have so far not been provided with an accurate picture of these impacts (the site selection process does not seem to include a requirement for individual notification or property owners such as these, especially those in another municipality) – might have not weighed in yet, those who have become informed, such as White Birch Point homeowners on Gregg Lake, are overwhelmingly opposed for legitimate reasons.

In fact, as a measure of the likely strong opposition based on the private and public costs of the AWE Project once impacted lake and other area property owners become informed, is the fierce opposition of the Franklin Pierce Lake area residents over the 150' cell tower on Gibson Mountain – a case now in court. (And unlike the AWE Project, this proposed cell tower provides real benefits to the area residents and if removed, does not leave permanent changes to the mountain ridges.)

Recommendation: In assessing net benefits, the SEC add the public and private costs – and especially of lake area property owners (based on responses received from White Birch Point) who have not been informed and are not yet fully aware of the visual impacts of the AWE project on them. They should have a voice even if they have not been notified and this can avoid strings of later lawsuits based on lack of information or misinformation about the AWE Project.

(D) The many recreational boaters from outside and within the area increasingly using the many of the State's "great ponds" will experience greater negative visual impacts than even lakefront property owners because they are out in large open areas with longer sight lies. In fact, for many of the lakes and ponds in the area where the visual impact from the shoreline is not great, the visual impact from the middle of the lake is indeed significant. As with the sanctuaries, and notwithstanding anecdotal arguments by promoters to the contrary, the reality is that the overwhelming majority of these boaters who come to the lakes in the area, including the many smaller ones where the visual impacts have not

been presented, seek an unspoiled experience without wind towers (especially the growing number of kayakers). It appears the costs to these boaters as an important stakeholder group has been largely overlooked.

Recommendation: In assessing net benefits, the SEC should be sure to include the direct and secondary public and private costs from the negative visual impacts of the AWE Project to the many boaters who use NH's great ponds, including those within 15 miles of the facility.

(E) At the Oct. 21 and Oct. 22, 2016, concluding charette of the "Antrim 2020: Build Your Community" – a Community Profile Planning Project facilitated by the UNH Cooperative Extension Service – Antrim residents identified the most important community assets that attracted and kept them in Antrim and were the greatest sources of community pride. At the top of the list was the ready access Antrim provides to unspoiled areas – especially Willard Pond and Gregg and Franklin Pierce Lake – and participants also pointed out that using the lakes was a prime draw for higher-income second-home owners and retirees locating in town outside of lakefront. There was not a single mention in the two days of the AWE Project being an asset to the community, even by the one selectman attending who is a strong supporter. Note: This is not inconsistent with the results of the 2016 municipal election where incumbent selectman Gordon Webber, long the strongest proponent of the AWE Project, was defeated by Robert Edwards who was an intervener opposing the AWE Project in the first permitting process, NHSEC Docket 2012-01.

Recommendation: In assessing net benefits, the SEC add the value of the public benefits (and their loss from the project) of Antrim's unspoiled areas that the majority of the 70 or so residents of Antrim participating in "Antrim 2020" planning clearly identified as a top community asset and was a major draw for the retirees and second home owners so important to the tax base and economy.

Red Flag #3 – *AWE's second application to the SEC is essentially identical to its first application in all major characteristics, raising many questions.*

Antrim Wind Energy's second application for a permit is essentially the same project as the SEC denied with no discernable change in net public benefit, and it appears given the parameters of the site, that AWE feels they have little flexibility to make changes to mitigate visual, noise, and other identified impacts that are inherent in any wind project of this scale and height in a populated and recreational area.

One example of how little the project changed is the reduction of the height of eight turbines from 492 feet to 488. This is a token 1% reduction in height with no significant lessening of the visual impact. The only significant physical change between this application and the first is the elimination of the tenth turbine near Willard Pond and the shortening of the ninth turbine. This only reduces the project size by a tenth ... and does not eliminate the visual impact of the other turbines (including the shortened one) from visitors to Willard Pond.

In addition, the proposed project area is still on top of a prominent ridgeline (part of the watershed between the Connecticut and Merrimack rivers) and that location amplifies and intensifies its visual impact.

Those minor changes do not make this project significantly different than NHSEC Docket 2012-01 based on the two key public benefit and cost areas of visual impacts and power production. And while there may be some legal, administrative, or political case that might be made to justify going through the costly, often painful, and time-consuming permitting process for essentially the same project over again (the law did change from the time of the first AWE decision), one would be hard pressed to come up

with a reasonable-person and objective analysis that would find that the fundamentals of the AWE Projects 1 and 2 in their generation of benefits and costs were significantly different.

Recommendations:
(a) Make the same decision to not permit the AWE Project 2 using the same basis used on essentially the same project.
(b) If the SEC decides to permit the AWE Project 2, in order to protect its integrity and process (see note below), the committee should provide extraordinary and detailed documentation of its compelling case for why the project generates such clear, solid, and substantial net public benefits that it is in the public interest – and why this has changed from the first application.
(c) Because of the similarity of the AWE projects and their applications, all the AWE statements and behavior in their first permitting process should be applicable in the second.

Note: Notwithstanding the change in law between AWE 1 and AWE 2, it sets a dangerous precedent for the SEC to both grant a hearing, and especially to make a different decision, on essentially the same project where there appears to be little or no compelling basis in the new application for a change in the assessment of net public benefit, and particularly in the assessment of the harm the project causes.

To some developers and others this may give the appearance – however false – that the SEC rewards persistence by granting a permit the second time around even when the project fundamentals do not change. There is little question that such a perception alone would damage the integrity of the SEC and its process and invite litigation.

Red Flag #4 – *Possible marginal power production and corresponding marginal public benefits generated from AWE's facility and the risks these weak fundamentals pose to its viability and ability to deliver power, especially in light of the Trump Administration's position to eliminate federal support, incentives and mandates for renewable power.*

(A) Because AWE's is not willing to publically release its wind data (which would quickly answer questions about the likely performance of the proposed AWE facility), we do not know the actual generation potential of AWE's proposed facility.

Lacking that data – and also not being able to assess the accuracy of the data from AWE's Met tower – there are nonetheless reasons to believe this is a very high-cost facility (verified by the high cost in AWE's power in the PPA with NH Electric Cooperative even with the underlying subsidies) could be a marginal site at best (see enclosed wind map) and that there is little reason to believe based on the actual performance of other similar NH wind facilities that the AWE site might be a pocket of high wind resource. Further, AWE's extraordinarily tall wind turbines might indicate it literally has to go to great heights just to get marginal power production.

If it is true that the production generation and corresponding economic fundamentals of the AWE Project are marginal, then this raises red flags about how much actual electricity will be generated – the primary source of the project's public benefit – and at what cost. NH is already at a competitive disadvantage for businesses and jobs because of its existing high electricity rates, and to the extent that power is sold to customers within the state at this cost, it makes NH even less competitive.

Recommendations: (a) In assessing net public benefits, the SEC rely on conservative and experience-based estimates from other NH facilities of the actual generating performance as a percent of capacity of the AWE project and not on AWE's estimates that appear to be optimistic. (b) In assessing net benefits, the SEC discount the public benefit of the energy generated from the AWE project because of its high cost (even with current subsidies and incentives that are now at risk), recognizing that it would be more

in the public interest to permit other wind and renewable projects with stronger economic fundamentals that would not force such a severe tradeoff between increasing renewable energy at the cost of making NH's electric rates even higher and less competitive.

(B) To the extent the production and financial fundamentals of the project are marginal to begin with (even with subsidies) – if this wind project gets permitted and built – given the new and unanticipated future financial stresses, there is an increased chance that the project will cease to operate; and if history is any guide in cases where profits are squeezed, will likely be preceded by a period of cutting corners in maintenance that will likely generate unexpected public costs.

This threat to the post-permit viability of the AWE project has likely significantly increased by the recent election of a President who does not support renewable energy – and there remains the underlying financial weakness of the project because AWE is so highly leveraged and has yet to secured purchase agreements for all its power, in spite of all its efforts to find since its first application.

Shutting down not only immediately eliminates the primary public benefit of the project but, if history is any guide (and to be expected from a private, for-profit venture), will generate a whole range of unexpected public costs as the owners do all within their power (including exploiting every loophole in agreements, conditions, and warrantees as well as lawsuits) to protect their private investment, even if it is at the expense if the public good (see Red Flag #6).

Recommendation: In assessing net public benefits, the SEC reduce the estimate of the public benefits of the AWE project going forward from power generation to account for the real risk to the project's future viability and to add a factor for the project's public costs likely from the case where the project has to curtail or cease production. (Nothing is certain here, but it would be prudent to add in a factor for the predicted change major change in our national policy and support for renewable energy production.)

Red Flags #5 – The applicants have no track record in successfully completing a wind project of this scale, the financing of the project remains highly leveraged, and a key AWE partner faces the possibility of bankruptcy.

These are clearly less than ideal or reassuring conditions for an applicant, especially when added to the other red flags and the new uncertainty and lack of support for renewable energy from the federal and perhaps the NH State government. (The NH situation is less well known, although it is fairly certain there will be no new funding for renewables in the 2018-2019 SFY Budget and likely cuts and the possible repeal of mandates for requiring renewables.) It would be prudent – especially in this newly unfavorable environment for building renewable energy – if the applicant had a track record of success for projects like this, could rely more on solid internal financing, and had a partner with strong financials that was not facing the possibility of bankruptcy.

Recommendations: In assessing net benefits, that the SEC take into account these red flags and the risk they represent to the applicant (and unknown subsequent operators) being able to successfully execute the project and in particular to consider: (a) Raising the requirement for internal and solid outside financing and (b) Not issuing a permit if there is an AWE partner with unresolved bankruptcy threats or proceedings.

Red Flag #6 – *AWE's approach to the project development process, especially in its private dealings with the Antrim Selectmen, and its rigorous promotion to the public focusing on an often very optimistic depiction of benefits has generated a large number of questions about the possibility of conflicts of interest and the lack transparency and whether the public interest was properly represented – all of which raise red flags about the suitability of AWE to carry out a project in a way that complies with the*

spirit and intent of the permit and rules and will serve the broader public interest as well as AWE's private financial interest. The suitability of AWE beyond its technical and managerial capacity is not normally a consideration, but given the number of questions raised on possible conflicts of interest that have been raised in the process, it is an important factor that could make or break the project.

While technically it was the Antrim selectmen who Hillsborough Superior Court Judge David A. Garfunkel ruled had violated the RSA 91-A right-to-know law (see attached, with ruling on page 6), the fact is it was AWE that was the party that was involved in these illegal meetings that not only negotiated the PILOT so favorable to AWE but may very well have planned a coordinated campaign to promote and sell the AWE project.

In particular, the process by which the PILOT was negotiated from the beginning raised red flags about the appearance of conflicts of interest and whether AWE in negotiating it had sufficient understanding, regard, and consideration for the greater public good in their rigorous entrepreneurial push for the project. This included not only that the negotiations were done in private – denying the public its basic right to have public business done in public -- but because the PILOT was actually drafted by AWE. AWE has demonstrated remarkable salesmanship skills in negotiating the PILOT with the selectmen and promoting the project by tapping the strong public support for renewable energy, but the strong ability to sell does not necessarily a successful project make.

This appearance and possibility of conflicts of interest was greatly amplified by the actual language of the approved PILOT because in so many of its provisions it seemed to favor the private interest of AWE at the expense of the public interest and the taxpayers. In particular, the current and original PILOT provides a tax break of over $1m per year to AWE over full market valuation taxes that all the other for-profit businesses in Antrim pay. For example, once fully operational, the first year PILOT payment to the Town of Antrim per page 5 of the agreement would be an estimated $337,500. This compares to an estimated tax payment of $1,827,150 based on full market valuation using the cost basis of $65m project cost at the 2014 Antrim equalized value tax rate of $28.11 for 2014, a tax break to AWE of $1,489,650 per year.

Unfortunately, the public has no idea what compelling arguments and data AWE may have provided to the selectmen to sell them on this PILOT, because it was developed in private in violation of RSA 91-A and because of this, questions about conflicts of interest and lack of transparency for the largest project of any kind proposed for the Town of Antrim continue to go unanswered and hang over the project. It also does not build confidence that AWE's payments to the Town and other third parties were not for mitigation but at best were possible payments to compensate for negative effects.

Recommendations: (a) In assessing net benefits, the SEC consider the track record of AWE in determining its suitability to be granted a permit in light of AWE's being a party to and conducting a process that violated the law – and the manner it chose to sell and promote the project that produced an ongoing stream of questions over possible conflicts of interest and lack of full disclosure that remain largely unanswered and persist, and continue to hang over the project. (b) In particular, in recognizing the realities of the underfunding of monitoring and enforcement functions throughout state agencies in the state budget (and these lines items being the among the first to be cut or frozen with a biennial shortfall) that by default necessitates the reliance on self-policing by permit holders for projects like this to avoid harm to the public interest and costly "enforcement by lawsuits", that the SEC take this track record of AWE outside the formal permitting process into consideration in assessing confidence in AWE's ability to self-police in complying with all the applicable rules and conditions in construction and operation of the project.

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
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May 21, 2013

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Case Name: **Gordon Allen, et al v Town of Antrim Board of Selectmen**
Case Number: **216-2012-CV-00655**

You are hereby notified that on May 20, 2013, the following order was entered:

RE: PETITION FOR DECLARATORY JUDGMENT:

See copy of order attached - Garfunkel, J.

John M. Safford
Clerk of Court

(539)

C: Robert William Upton, II

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. SUPERIOR COURT
NORTHERN DISTRICT

Gordon Allen, Mary Allen, Charles Levesque,

Jancie Longgood and Matha Pinello

v.

Town of Antrim Board of Selectmen

Docket No. 2012-CV 00655

ORDER ON PETITION FOR DECLARATORY JUDGEMENT

The petitioners, Gordon Allen, Mary Allen, Charles Levesque, Janice Longgood and Martha Pinello, seek to void a Payment in Lieu of Tax ("PILOT") Agreement entered into between the respondent, Town of Antrim Board of Selectmen (the "Board"), and Antrim Wind Energy LLC ("Antrim Wind"), under the Right-to-Know law, RSA 91-A. The respondent objects, contending that the Right-to-Know law does not apply to negotiations and meetings concerning the Board and PILOT Agreements. The court held a hearing on April 10, 2013, during which former Antrim Selectman Eric Tenney ("Tenney"), Antrim Administrative Assistant Galen Stearns ("Stearns") and petitioner Mary Allen testified. After consideration of the pleadings, arguments, testimony, exhibits and applicable law, the court finds and rules as follows.

Background

The Right-to-Know violations for which the petitioners complain arise out of negotiations between the Board and Antrim Wind regarding the construction of a wind facility in Antrim, New Hampshire. Specifically, Antrim Wind and the Board entered into

non-public, noticed and unnoticed meetings during which a PILOT Agreement was discussed. On June 20, 2012, the Board held a public hearing and approved the PILOT Agreement. The Board does not dispute that numerous noticed and unnoticed, nonpublic meetings were held with Antrim Wind concerning the PILOT Agreement.

For example, Galen Stearns, Antrim's Town Administrator during the PILOT Agreement, testified that based on the advice of town counsel, he believed the PILOT Agreement meetings were not subject to the requirements of the Right-to-Know law. Stearns believed that, under the aegis of the attorney-client privilege, unnoticed, nonpublic meetings were permissible as long as town counsel was present. Stearns also believed that he was only required to issue notice of non-public PILOT Agreement meetings when town counsel was not present.

As a result, Stearns testified that he posted notice of a non-public March 7, 2011, Board meeting with Antrim Wind under exemption RSA 91-A:3 II, a & d.[1] However,

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[1] RSA 91-A:3, II states in pertinent part:

> Only the following matters shall be considered or acted upon in nonpublic session:
>
> (a) The dismissal, promotion, or compensation of any public employee or the disciplining of such employee, or the investigation of any charges against him or her, unless the employee affected (1) has a right to a meeting and (2) requests that the meeting be open, in which case the request shall be granted.
>
> . . .
>
> (c) Matters which, if discussed in public, would likely affect adversely the reputation of any person, other than a member of the public body itself, unless such person requests an open meeting. This exemption shall extend to any application for assistance or tax abatement or waiver of a fee, fine, or other levy, if based on inability to pay or poverty of the applicant.
>
> . . .
>
> (d) Consideration of the acquisition, sale, or lease of real or personal property which, if discussed in public, would likely benefit a party or parties whose interests are adverse to those of the general community.

Tenney, a Selectman during the PILOT Agreement negotiations, testified that the March 7, 2011 meeting did not fall under exemption RSA 91-A:3, II, a & d. Rather, this exemption applied to an unrelated issue at the meeting, in which the town was considering purchasing an easement.

Stearns further testified that the non-public August 24, 2011, meeting concerning Antrim Wind was posted because town counsel was not present. Stearns testified that this August 24, 2011, meeting with Antrim Wind was posted as a non-public meeting under exemption RSA 91-A:3, II, c because he believed this provision was applicable as it involved taxation. However, Stearns agreed with the petitioners' counsel that the PILOT Agreement did not involve Antrim Wind's inability to pay taxes under RSA 91-A:3, II, c.

Tenney testified that the August 24, 2011, probably did not meet RSA 91-A:3, II, c's requirements but based on town counsel's advice the Board believed the PILOT Agreement negotiations could be conducted in non-public meetings. Generally at these non-public meetings, Tenney testified, the Board received a "broad outline" of what Antrim Wind thought the value of the project would be, including general terms, but not including balance sheets or profit and loss statements. Tenney further testified that the information received at the non-public meetings was used in formulating the final PILOT Agreement.

According to Stearns, in addition to the March 7, 2011, and August 24, 2011, meetings, the Board held four other unnoticed, non-public meetings concerning the PILOT Agreement on June 21, 2011; October 25, 2011; February 15, 2012 and May 9, 2012 because town counsel was present. At these meetings Antrim Wind was also

present. Stearns also testified that there were meetings attended by him, Selectmen Webber and Antrim Wind concerning the decommissioning of the project and cost of construction.

At the hearing, town counsel represented to the court that it was his advice upon which the town relied in holding the PILOT Agreement meetings with Antrim Wind in nonpublic sessions.

Analysis

The petitioners allege that the noticed and unnoticed, nonpublic meetings between the Board and Antrim Wind constitute a violation of RSA 91-A, New Hampshire's Right-to-Know law. As a result of this purported violation, the petitioners seek an order from this court invalidating the PILOT Agreement, assessing attorney's fees and costs and requiring the Board to receive remedial training on the Right-to-Know law. The respondent objects and contends that RSA 72:74 allows for non-public meetings when the Board is considering a PILOT Agreement.

1. **Right-to-Know Violation**

The Board must comply with the requirements of the Right-to-Know law. See RSA 91-A:1-a; Carter v. City of Nashua, 113 N.H. 407, 414 (2001). Accordingly, all Board meetings must be open to the public and recorded unless an exemption applies. RSA 72:74 provides in pertinent part that "[t]he owner of a renewable generation facility and the governing body of the municipality in which the facility is located may, after a duly noticed public hearing, enter into a voluntary agreement to make a payment in lieu of taxes."

The interpretation of a statute is a matter of law. Goodreault v. Kleeman, 158 N.H. 236, 252 (2009). The court will consider the statute as a whole and construe the language in accordance with its plain and ordinary meaning. Id. If the statute's

language is plain and unambiguous, the court need not look beyond it for further indication of legislative intent, and will not consider what the legislature might have said or add language that the legislature did not see fit to include. Id. at 253. By contrast, if the statute is ambiguous, the court will look to the legislative history to aid its analysis. Id.

"Our goal is to apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme." Id. (quotation omitted). In light of the statutory purpose of "ensur[ing] the greatest possible public access to . . . records of public bodies, and their accountability to the people," RSA 91-A:1 (2001), the provisions in the Right-to-Know law favoring disclosure will be construed broadly while the provisions citing exemptions will be construed narrowly. Lamy v. N.H. Pub. Utils. Comm'n, 152 N.H. 106, 108 (2005).

Nothing in RSA 91-A:3, II or RSA 72:74 exempts PILOT Agreements from the Right-to-know law. Contrary to the respondent's contention, the plain language of RSA 72:74 supports this conclusion. Furthermore, as the respondent concedes, none of the exemptions in RSA 91-A:3, apply to the respondents. Thus, the court finds the respondent violated the Right-to-Know law by entering into non-public meetings with Antrim Wind for the PILOT Agreement on the numerous occasions detailed above.

2. Remedies

The Right-to-Know law, if violated, provides for three possible remedies: (1) an award of reasonable costs and attorney's fees, RSA 91-A:8, I; (2) an order voiding action taken by a public body or agency, if the circumstances justify such invalidation, RSA 91-A:8, II; and (3) an injunction, RSA 91-A:8, III. The petitioners seek to have the

PILOT Agreement invalidated, request attorney's fees and costs and for the court to order the respondent to seek remedial training on the Right-to-Know Law.

The court GRANTS the petitioners' request to void the PILOT Agreement. As discussed above, the Board conducted numerous noticed and unnoticed, non-public meetings while negotiating the PILOT Agreement. These meetings contravened the fundamental purpose of the Right-to-Know law's goal of transparent and open government. Accordingly, the court finds voiding the Agreement is warranted to redress the Right-to-Know violations. See Lambert v. Belknap County Convention, 157 N.H. 375, 382 (2008).

However, the court DENIES the petitioners' request to assess attorney's fees and costs against the respondent. RSA 91-A:8, I expressly states that in order to asses attorney's fees and costs, the court must first find that "the public body, public agency, or person knew or should have known that the conduct engaged in was in violation of this chapter . . . ." Here, Stearns and Tenney testified that they believed the hearings did not have to be public based on the advice of town counsel. Moreover, at the hearing, town counsel agreed that it was his advice regarding RSA 72:74 upon which the town relied. See Voelbel v. Town of Bridgewater, 140 N.H. 446, 448 (1995) (overturning award of attorney's fees when selectmen acted in good faith, relied on town counsel's advice and the Right-to-Know violation was not obvious, deliberate or willful). Accordingly, the court finds the Board did not knowingly engage in the Right-to-Know violation and therefore DENIES the petitioners' request for attorney's fees and costs.

The court also DENIES the petitioners' request to order the respondent to receive remedial training on the Right-to-Know law. As explained above, the selectmen

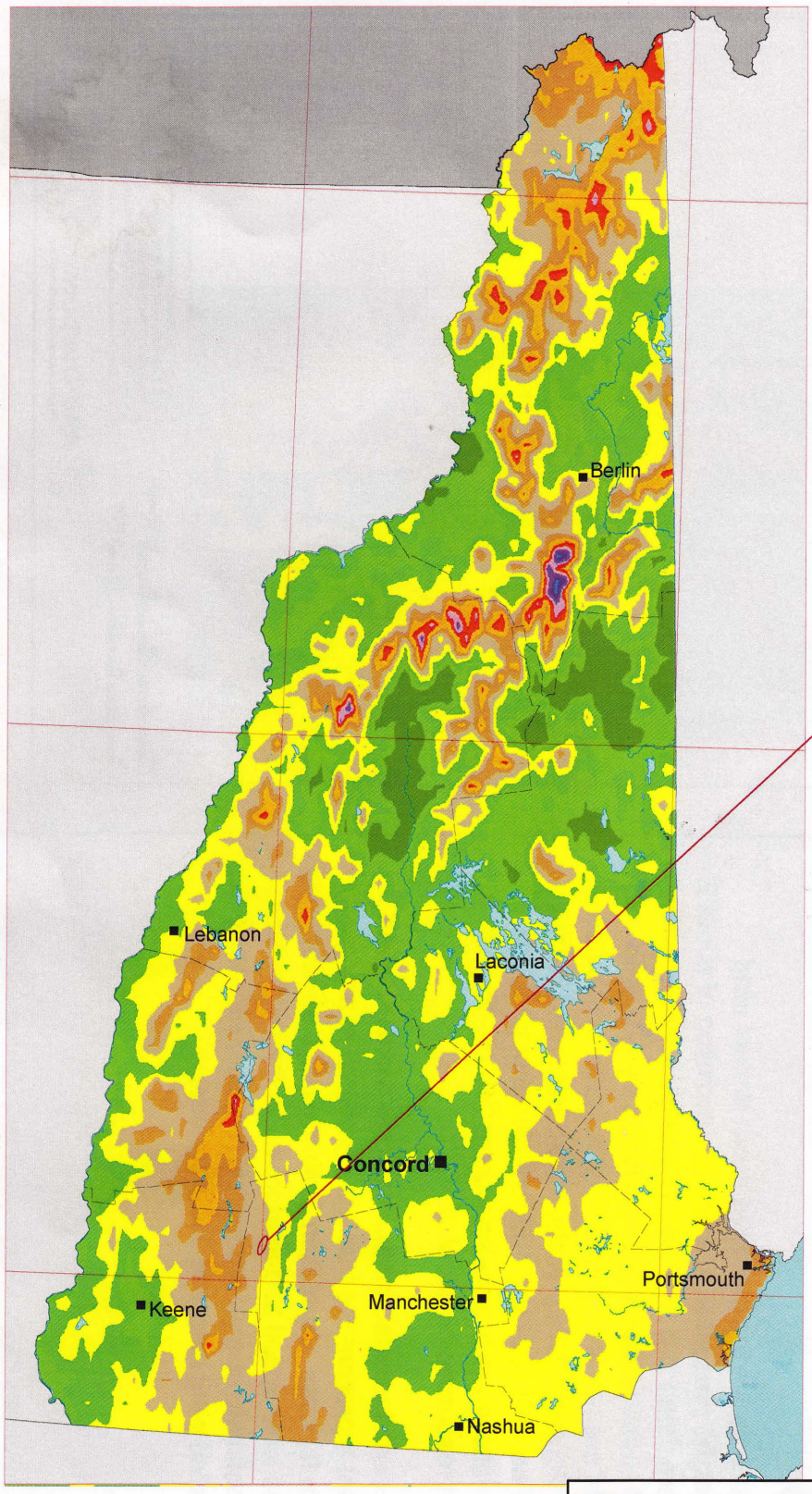
relied on town counsel's advice regarding application of the Right-to-Know law. Tenney and Stearns both demonstrated an awareness of the Right-to-Know law's requirements and exemptions during their testimony. Thus, the court finds that remedial training is unnecessary because the town's error resulted from its reliance on town counsel's incorrect advice.

SO ORDERED.

May 20, 2013

David A. Garfunkel
Presiding Justice

New Hampshire Annual Average Wind Speed at 80 m



Source: Wind resource estimates developed by AWS Truepower, LLC for windNavigator®. Web: http://www.windnavigator.com | http://www.awstruepower.com. Spatial resolution of wind resource data: 2.5 km. Projection: UTM Zone 19 WGS84.

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