

STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

Docket No. 2022-01

**Petition for Declaratory Ruling Regarding
Avangrid Renewables, LLC and Lempster Wind, LLC**

**THE TOWN OF LEMPSTER’S MOTION
FOR REHEARING AND/OR CLARIFICATION**

NOW COMES, the Town of Lempster (the “Town”), by and through its attorneys, Upton & Hatfield, LLP, moving for rehearing, pursuant to RSA 541:3 and Site 202.29, of the December 1, 2022 decision (the “Decision”) of the Site Evaluation Committee Subcommittee (the “SEC”), and as grounds therefor states as follows:

ARGUMENT

I. THE SUBCOMMITTEE’S DECISION IS UNCLEAR

The Decision states: “Although the 2007 Certificate does not specify the precise locations along Bean Mountain Road at which gates must be installed, the current locations are consistent with the certificate.” *Order* at 5. But that is not the question to be answered by the SEC. In the Decision, the SEC noted the question before them: “whether Lempster Wind’s 2007 Certificate of Site and Facility . . . requires the facility to install locked gates at their *current* locations on Bean Mountain Road.” *SEC December 1, 2022 Order at 1* (emphasis added).

The 2007 SEC Certificate “required the facility to gate ‘entrance’ to the project site.” As the Town argued, the Intervenor could accomplish the same goal – restricting access to the wind farm via gates – by placing the gates on such access roads and not on Bean Mountain Road. The Town has recommended that the gates could be installed parallel with Bean Mountain Road at the access road and that would be consistent with the 2007 Certificate. Thus, the SEC should

have specified in their Order that, while the 2007 SEC Certificate required the Intervenors to gate the entrance to the facility, it did not require the Intervenors to place such gates on Bean Mountain Road in their current locations. Such would also avoid violating New Hampshire law by not restricting the public's access of Bean Mountain Road.

The question before the SEC was not whether the location of the gates is consistent with the 2007 SEC Certificate, but rather if the 2007 SEC Certificate *requires* the gates to be on Bean Mountain Road in their current location. It appears the SEC Order answered the question in the negative; however, it is not clear. The Town thus requests that the SEC clarify its decision.

II. THE TOWN AGREEMENT REGULATES THE RELATIONSHIP BETWEEN THE PARTIES AND DISTINGUISHES THE RIGHTS OF THE PARTIES RELATIVE TO “TOWN ROADS” AND “ACCESS ROADS.”

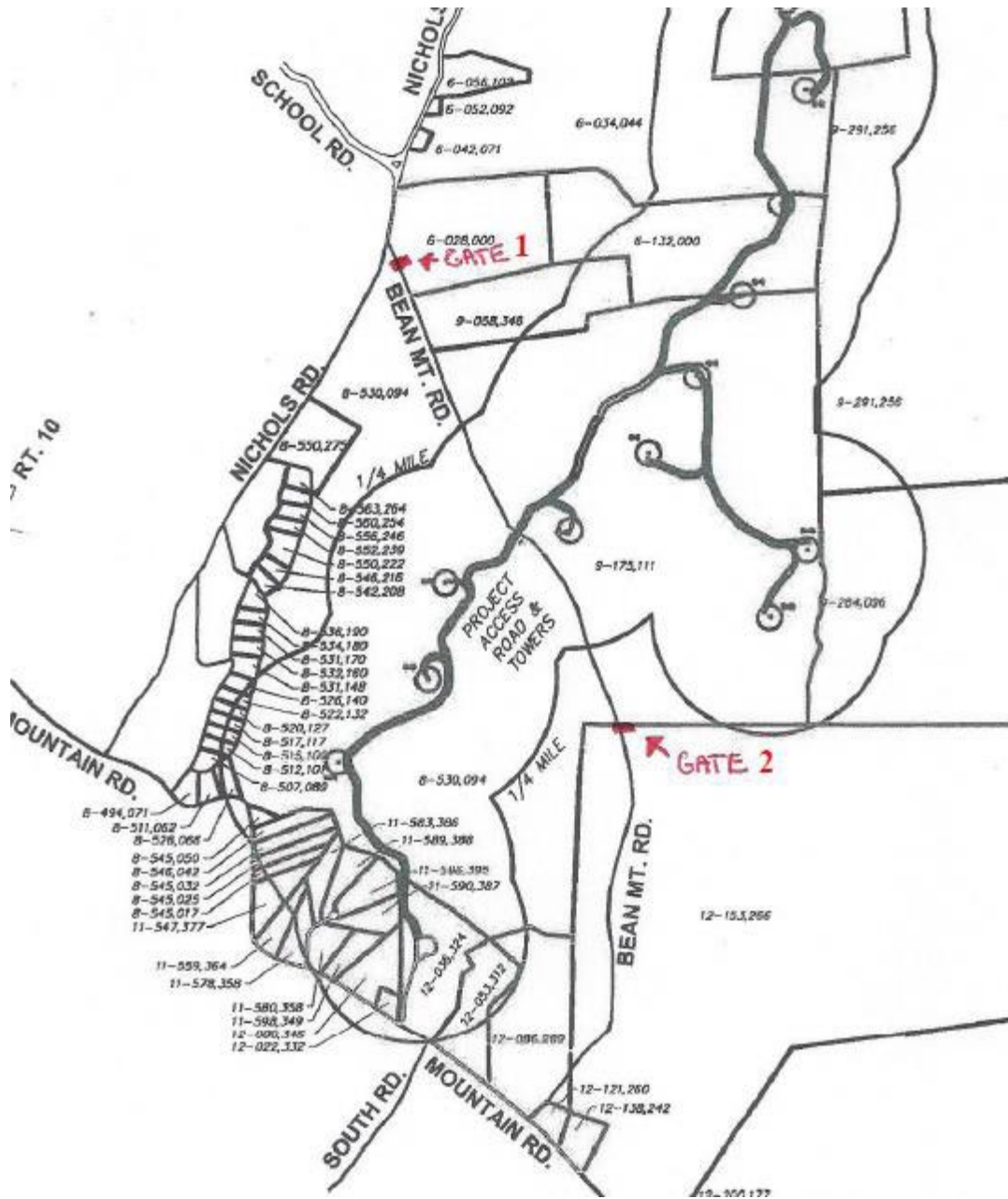
The SEC adopted the terms of two agreements to implement the requirement that Lempster Wind “[g]ate and lock entrances to the project site”. Both agreements refer to the use of locked gates to bar entrance to the project site. Section 4.a of the Public Agreement specifies that “[e]ntrances to the Project site shall be gated and locked during non-working hours. If problems with unauthorized access are identified, the Project shall work to install additional gated access points.” *See Joint Statement of Material Facts ¶4.* Section 4.1.3 of the Town Agreement uses identical language. Additionally, the Town Agreement defined “project site” as:

Property with rights as conveyed to Owner by lease, easement or other agreement with a Participating Landowner that includes all Wind Turbines, access roads, and other facilities required for construction and operation of the Wind Park.

Joint Statement of Material Facts ¶5.

- By the Terms of the Agreement, the “Access Road” “To the Project Site” is gated, and Bean Mountain Road is not an Access Road.

“Access Road” is not a defined term in the Agreement. However, “Project Access Road” is identified as such on a plan created by the Intervenor, running north and south from Bean Mountain Road:



Joint Statement of Material Facts at page 3.

Similarly, Intervenor's survey plan indicates the "access road" is subject to a "Wind Farm Project Easement," whereas Bean Mountain Road is noted as "Not Town Maintained."¹ *Exhibit 11*. Warning signs are to be "placed no less than 300 feet from each Wind Turbine tower base on access roads." *Exhibit 20 at §2.7.3*. Under §2.8, the Town is to have a keyed access "to all gated entrances to the Project Site for the purpose of emergency response." *Id.* at 3. The definition of "Project Site" includes access roads.

As pointed out by the Court, the term "Project Site" is specifically defined by the parties in the Town Agreement to include "access roads":

property with rights as conveyed to Owner by lease, easement or other agreement with a Participating Landowner that includes all Wind Turbines, access roads, and other facilities required for construction and operation of the Wind Park.

Exhibit 20 at §1.9. Intervenor Onnela contend the wind farm operator leases the Intervenor's portion of Bean Mountain Road from the Intervenor. The Onnelas do not and cannot own a public highway, and therefore, cannot convey a lease of Bean Mountain Road to anyone. Nor is the Town a "Participating Landowner," as that term is defined in §1.8.

- **Access Roads Were to be Constructed.**

As Lempster Wind, LLC observed in its SEC Application, it would be seeking "permits for access to public roads and access road construction." *Exhibit 21, pp. 69-70*. In the summer of 2007, "access road construction" would begin. *Id.* A site survey would be "performed to mark the location of the wind turbines [and] access roads." *Id.* "Construction of Project access roads on private, leased site areas will, wherever possible, use existing logging roads and

¹ Class VI roads are town roads open to the public, but they are roads that the Town has no duty to maintain. *See Gill v. Gerrato*, 154 N.H. 36, 42 (2006) ("If the lane is a class VI highway, pursuant to RSA 229:5, the town would have no duty to maintain it.").

trails...” *Id at 71*. By the terms of Lempster Wind’s Application access roads were to be constructed. Bean Mountain Road is not an “access road” to be constructed, it has existed since 1819.

- **Sections 8 and 9 of the Agreement Clearly Distinguish “Public Roads” from “Access Roads.”**

Section 8.1 is entitled “**Public Roads**” (emphasis in original). “Any road damage caused by the Owner or its contractors at any time shall be promptly repaired at the Owner’s expense.” *Id at* §8.1.3. In contrast, §8.2 is entitled and addresses “**Wind Park Access Roads**” (emphasis in original). “The Owner shall construct and maintain roads at the Wind Park.” *Id. at* §8.2.1. “Any use of the access roads that is beyond what is necessary to service the Wind Park” must conform to land use regulations. *Id. at* §8.2.2.

This understanding of the parties continues in §9.7, where staging or idling of vehicles is prohibited on “public roads.” Weight limits are imposed with respect to “a Town road.” §9.7.1. Hours of operation are limited on “Town roads,” §9.7.2. Waivers for over-sized vehicles can be secured with respect to “Town roads.” Similarly, §12.3 provides for “**Setbacks from Public Roads**” (emphasis in original), not “access roads.” *See also id. at* §13.2 (“Town may waive the setback requirement for public roads”).

Clearly, the parties understood the distinction between “public roads” and “Wind Park Access Roads,” and incorporated that understanding in the Agreement by using very clear language.

- **The SEC Order distinguished between Access Roads and Bean Mountain Road.**

The SEC Order states:

Whereas, the proposed facility includes access roads, a metering station and interconnection point with the Public Service Company

of New Hampshire 34.5 kV distribution line at the intersection of Bean Mountain Road and Nichols Road in Lempster.

Note the access road is an integral part of the Project Site, whereas reference to Bean Mountain Road is for locational purposes only. This is the only reference to Bean Mountain Road in the entire Agreement and hardly represents a SEC mandate to gate the road.

Had the parties (or the SEC) intended to identify Bean Mountain Road as an “access road,” they knew how to do so by using those words. That the parties did not identify Bean Mountain Road as an “access road” is a strong indication that the parties did not intend this same result.

- **The Motive for Erecting Gate 2 Was Intervenors’ Onnela Desire to Exclude Public Access to Bean Mountain Road, Not Public Safety.**

In a letter from Wesley Ash, President of the Lempster Trailblazers ATV Club, he advised the Board of Selectmen:

One trail, Bean Mountain Road, now has been gated off with not one, but two gates.

The first gate we ran across was on the side of Coach Road. This gate requires a code to open. When one of our members talked to Ryan Haley from Advanced Renewables about working around this, he explained that Kevin Onnela had requested that it be installed.

We then approached Mr. Onnela about the gate. He informed us that Bean Mountain Road was never a Town road and therefore not a Class 6 road, and that he has the right to gate it. Since then, he has also locked the gate that he has on the Mountain Road side. By doing this, he has cut off our access to a long stretch of our trails plus our access to Coach Road.

Exhibit 12. This letter is confirmed, in part, by *Exhibit 9*, at ¶ 13, Affidavit of Ryan Haley:

In June, 2010, defendant Kevin Onnela, with Lempster Wind’s permission and approval, installed a gate (gate 2 shown on Exhibit A-1) at the border of the Lempster Wind facility site at the east end

of Bean Mountain Road which restricts the public from using Bean Mountain Road to access the Lempster Wind facility.

As the sign (see, *Exhibits 5 and 8, paragraph 13*) erected on Bean Mountain Road makes clear, Intervenor Onnela seek to exclude the public from their property by barring a Town Highway for their own purposes:



The Onnelas make clear their interest in the locked gate, complaining its removal would allow “unrestricted access to Bean Mountain Road and thus access to Onnela’s private residence.” *Exhibit 23*, at p. 2. This argument is not an expedient for violating the law. The motive for erecting gate 2 was Intervenor Onnela’s desire to bar public access to Bean Mountain Road; not to prevent access to the Wind Park. And gate 1 was locked at the behest of Intervenor Onnela to exclude the public from the road.

Kevin and Debra Onnela know that Bean Mountain Road is a Class VI public highway. On January 28, 1981, Building Inspector Rudolf Adler informed Mr. Onnela that a building

permit could not be issued for the Onnela Property because “Bean Mountain Road is a Class VI road and is officially discontinued.” *Exhibit 4*. On March 14, 1981, a Building Permit was issued with the condition that Mr. Onnela be responsible for maintaining Bean Mountain Road as a Class VI road and that “the Town of Lempster reserves all rights to subject road and connectors as a Class VI roadway.” *Id.* The Onellas understood the Town has a right to use Bean Mountain Road when they were seeking a building permit.

III. BEAN MOUNTAIN ROAD IS A PUBLIC, CLASS VI HIGHWAY, SUBJECT TO THE EXCLUSIVE OWNERSHIP, REGULATION AND CONTROL OF THE TOWN OF LEMPSTER AND ITS BOARD OF SELECTMEN.

According to the Intervenor Onnela, the status of Bean Mountain Road is dispositive in this case.

“If [Bean Mountain Road] was a public road, neither the SEC nor the Plaintiff Town would have the authority or jurisdiction to order it gated and the public kept out.”

Exhibit 22, Answer at ¶3 of Intervenor Onnela Statement of Affirmative Defenses.

The Intervenor “bear [] the burden of rebutting the ‘strong presumption against discontinuance, and, in order to prevail, [they] must prove by ‘clear and satisfactory evidence’ that [Bean Mountain] Road has been discontinued.” *Town of Goshen v Casagrande*, 170 N.H. at 551. If the SEC decision is, in fact, that the current gates are required by the 2007 Certificate, then such a position is in violation of RSA 229:5,VI and RSA 231:21-a.

- **Bean Mountain Road is a Public Highway, Laid Out by The Board of Selectmen of the Town of Lempster in 1819.**

Bean Mountain Road is a public, Class VI highway. *See* RSA 229:5,V. The 1819 layout (*see*, RSA 229:1 and RSA 231:8) of the road is contained in the Town records. *Exhibits 3 and 4; Exhibit 7, Second Affidavit of Mary Grenier* at ¶4 and the Department of State, Division of

Archives & Records Management. *Exhibit 2*. Former Selectman and Fire Chief Phillip Tirrell confirmed the layout. *Exhibit 6* at ¶5.

Intervenors' claim that the Board of Selectmen authorized them to terminate public access to Bean Mountain Road must fail as the Board's power under RSA 41:8 "does not include the power to discontinue a public highway." *Marrone v Town of Hampton*, 123 N.H. 729, 734(1983). In *Marrone*, the selectmen permitted an abutter to construct a sea wall, stairs and landscaping on an unpaved extension of a public street, "the effect of the improvements was the discontinuance of the highway." *Id.* at 734. "[S]uch an abrogation of vehicular use could have been accomplished only by vote of the Town." *Id.*

CONCLUSION

The Intervenors may limit access to the Project Site in a manner consistent with the language of the Town Agreement, by installing locked gates on the "access roads," running north and south from Bean Mountain Road. However, the 2007 Certificate and Agreements did not, and cannot, limit the public's access to Bean Mountain Road, a Class VI Town road. To do so would be a violation of the Town's right to have Bean Mountain Road passable by the public. *See* RSA 231:21-a (grants to the Board of Selectmen express authority to "regulate such structures to assure such public use, and may cause to be removed any gates or bars which fall into disrepair *or otherwise interfere with public use of the highway.*"). Accordingly, the Town respectfully requests that the SEC clarify its decision as described above.²

² The Town herein incorporates by reference the Town's Petition for Declaratory Relief, Memorandum of Law in Support of its Petition for Declaratory Relief and Supplemental Brief.

Respectfully submitted,
TOWN OF LEMPSTER
By Its Attorneys
UPTON & HATFIELD, LLP

Dated: December 28, 2022

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Rehearing was this day forwarded to Susan Geiger, Esquire (sgeiger@orr-reno.com), Roberts S. Carey, Esquire (rcarey@orr-reno.com), Meredith R. Farrell, Esquire (mfarrell@orr-reno.com), Thomas Quarles, Jr., Esquire (tquarles@devinemillimet.com), counsel of record, via electronic mail.

/s/ Michael P. Courtney
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