

**STATE OF NEW HAMPSHIRE**  
**SITE EVALUATION COMMITTEE**

**Docket No. 2022-01**

**Town of Lempster**  
**Petition for Declaratory Ruling**

**AVANGRID RENEWABLES, LLC'S AND LEMPSTER WIND, LLC'S**  
**OBJECTION TO TOWN OF LEMPSTER'S**  
**PETITION FOR DECLARATORY RULING**

NOW COME Avangrid Renewables, LLC (“Avangrid Renewables”) and Lempster Wind, LLC (“Lempster Wind”), by and through their attorneys, Orr & Reno, P.A., and object to the Petition for Declaratory Ruling filed by the Town of Lempster, stating as follows:

**I. INTRODUCTION AND PROCEDURAL BACKGROUND**

In this case, the Town of Lempster (“Town”) is challenging the regulatory authority of the New Hampshire Site Evaluation Committee (“SEC” or “Committee”), while also seeking to renege on the Town’s prior agreements with Lempster Wind and Counsel for the Public. The Town seeks a ruling that Avangrid Renewables, Lempster Wind, Kevin Onnela and Debra Onnela are interfering with the use of Bean Mountain Road in Lempster, New Hampshire in manner that violates RSA 231:21-a, III, and that is inconsistent with an agreement between the Town and Lempster Wind. *Petition for Declaratory Ruling (“Petition”)*, p. 6. The Town also seeks an SEC Order requiring Avangrid Renewables, Lempster Wind and the Onnelas to remove all locked gates and signs on Bean Mountain Road that restrict public travel on Bean Mountain Road, and that the SEC’s gating requirements be changed to include a new requirement that gates be installed on access roads belonging to Lempster Wind. *Id.*

In 2007, the SEC issued a Decision and Order granting Lempster Wind a Certificate of Site and Facility with Conditions (“Certificate”) to own and operate a wind-powered electric generating facility. The Town was a party to the SEC process and signed an agreement with Lempster Wind for the installation of gates and signs at the entrances to the Lempster Wind Facility site. In 2008 and 2010, two gates at entrances to the Facility site located on Bean Mountain Road were installed pursuant to the SEC’s Decision and Order.

In 2020, in response to pressure from a local all-terrain vehicle (“ATV”) riding club that demanded to ride their ATVs on Bean Mountain Road, the Town filed a lawsuit in Sullivan County Superior Court against Kevin and Debra Onnela, Avangrid Renewables and Lempster Wind, seeking to remove the gates and signs. *See Attachment 1, Town of Lempster v. Kevin Onnela, et al.*, Sullivan County Superior Court Docket No. 220-2020-CV-00112, Order on Motion for Summary Judgment (Oct. 25, 2021). Applying the doctrine of primary jurisdiction, the Court stayed the action pending SEC review of the Town’s claims under the SEC’s authority to interpret the terms and conditions of its certificates. *Id.*, p. 6. The Court also found that both it “and the SEC have jurisdiction over the dispute and the SEC’s decision will likely materially aid judicial resolution of the case.” *Id.* The instant proceeding ensued.

The Town’s claims must fail because the gates and signs on Bean Mountain Road about which the Town complains were required by the SEC’s 2007 Decision and Order granting the Certificate, and because the SEC’s authority under RSA 162-H to order the installation of gates and signs at entrances to an energy facility site under its jurisdiction preempts any conflicting regulatory authority that the Town allegedly has over Bean Mountain Road. In addition, the doctrines of res judicata, collateral estoppel, municipal estoppel, waiver and laches bar the Town from seeking to challenge the SEC’s Decision and Order nearly 15 years later.

## II. FACTS

### A. Parties

1. Lempster Wind owns and operates a 24-megawatt wind-powered electricity generating facility located on Lempster Mountain in Lempster, New Hampshire (“the Lempster Wind Facility”). *See Attachment 2, Affidavit of Ryan Haley (8/4/21), ¶ 4.*

2. Avangrid Renewables holds a 100% ownership interest in Lempster Wind and is the member-manager of Lempster Wind. *Id.*, ¶ 2.

3. Kevin and Debra Onnela own much of the land upon which the Lempster Wind Facility is located, and they lease that land to Lempster Wind. *Id.*, ¶¶ 7 and 8.

4. The Town of Lempster is a municipal corporation located in Sullivan County, New Hampshire. *Petition*, ¶ 1.

### B. SEC Docket 2006-01 – Application of Lempster Wind, LLC and SEC Process

5. On August 28, 2006, Lempster Wind filed an application with the SEC for a Certificate to construct and operate a 24 megawatt wind energy facility in Lempster, New Hampshire. *See Attachment 3, Application of Lempster Wind, LLC for Certificate of Site and Facility (Aug. 28, 2006)* (“the Application”).

6. The Application states that the Lempster Wind Facility will be located on private property. *Id.*, pp. 7, 12, 14, 23, 46, 63, 64, 67 and 71.

7. The Application also identifies potential safety risks associated with the operation of the wind turbines (e.g., ice shedding, lightning strikes, tower collapse, blade throw, stray voltage, and fire) and states that “the predominant mitigating factor in all these potential safety

risks is the siting of the Project's turbines away from roads [and] public places ...to discourage unauthorized access to wind turbine areas." *Id.*, p. 11.

8. Appendix 5 to the Application contains a list of the Lempster Tax Map/Parcel numbers of the properties comprising the Facility site, and a map depicting those properties. *See Attachment 4, Appendix 5 to Application.* The map also shows that Bean Mountain Road falls within the boundaries of the Facility's site. *Id.*, p. 2.

9. The Application refers to Bean Mountain Road as "private" and describes travel directions to the Facility site as follows: "Access to the Project site is available via the current access entrance to the property of landowners Kevin & Debra Onnela, 107 Bean Mountain Road in Lempster .... At the sign 'Private road – town maintenance ends' bear to the left and continue straight up Bean Mountain Road (private.)" *Attachment 3*, p. 24.

10. The SEC "conducted an open and inclusive process" on the Application, "held four days of evidentiary hearings, heard testimony from 14 witnesses, entertained briefs from the parties and conducted two days of deliberations." *Attachment 5, Decision Issuing Certificate of Site and Facility with Conditions*, NH SEC Docket No. 2006-01 (June 28, 2007), Bates pp. 001-062 ("SEC Decision") at Bates p. 059.

11. The Town was a party to the SEC proceedings regarding the Application, was represented by counsel, and participated throughout the SEC proceedings. *See Attachment 5, SEC Decision*, Bates p. 009.

12. The Town of Lempster presented two witnesses at the SEC proceedings, "Selectmen Everett Thurber and William Murgatroy, Jr., who testified in favor of the Application, subject to an agreement between the Town of Lempster and the Applicant." *Attachment 5, SEC Decision*, Bates p. 012.

13. On June 28, 2007, the SEC issued a Decision and an Order granting a Certificate of Site and Facility to Lempster Wind. *See Attachment 5, SEC Decision, and Order and Certificate of Site and Facility*, Bates p. 063 et. seq. (“SEC Order”).

14. The SEC Decision states: “[i]n order to restrict public access to the turbines, structures and supporting equipment, the Applicant, Public Counsel and the Town of Lempster have entered into agreements which, in part, contain conditions governing access and warning signs...**The conditions set forth in the agreements require the Applicant to...[g]ate and lock entrances to the project site...The Committee finds that the aforementioned conditions will assist in avoiding unauthorized access to the proposed Facility and will adopt them.** The Committee finds that the proposed facility, subject to the conditions set forth herein, does not present an unreasonable adverse effect on the public health and safety from the standpoint of public access to the facility.” *Attachment 5, SEC Decision*, Bates pp. 051-052 (emphasis added).

15. The SEC Order states that the SEC Decision and conditions contained therein are made part of the Order, and authorizes Lempster Wind to “site, construct and operate” the Facility “as outlined in the Application subject to the terms and conditions of the Decision and this Order.” *Attachment 5, SEC Order*, Bates p. 064.

16. The SEC Order states that the Facility will “be located on private property” in Lempster, New Hampshire, and that the “proposed site includes land identified by the Town of Lempster Tax Map as Map/Parcel: 6-132,000; 9-175,111; 8-530-094; 6-218,115; [and] 6-034,044”. *Attachment 5, SEC Order*, Bates p. 063.

17. An agreement between Counsel for the Public and Lempster Wind (“Public Counsel Agreement”), attached to the SEC Order as Appendix II, is part of the Order, and the

conditions contained in said agreement are conditions of the Certificate. *Attachment 5, SEC Order*, Bates p. 065; Bates pp.078-082.

18. Section 4.a. of the Public Counsel Agreement states “Entrances 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.” *Attachment 5, SEC Order*, Bates p. 081.

19. An agreement between Lempster Wind and the Town, attached to the SEC Order as Appendix III and labelled “Draft Subject to Final Approval by Legal Counsel” (“Draft Town Agreement”), is part of the SEC Order, and the conditions contained in said agreement are conditions of the Certificate. *Attachment 5, SEC Order*, Bates p. 065; Bates pp. 083-098.

20. Section 4.1.3 of the Draft Town Agreement states “Entrance to the Project Site shall be gated, and locked during non-working hours. If problems with unauthorized access are identified, the Owner shall work to install additional gated access points.” *Attachment 5, SEC Order*, Bates p. 089.

21. Section 2.8 of the Draft Town Agreement specifies two limited purposes for which the Town shall have access to the Project Site and Facility: the Town shall have access to the Project Site for emergency response purposes, and shall have access to the Project Site, Wind Turbines or other facilities for the purpose of building or safety inspections under Town ordinances. *Attachment 5, SEC Order*, Bates p. 087. Nothing in the Draft Town Agreement authorizes the Town or the public to access the Project Site or Facility for recreational purposes such as ATV riding.

22. Section 5.4 of the Draft Town Agreement states in part: “Signs shall be reasonably sized and limited to those necessary to identify the Project Site and provide warnings

or liability information, construction information, or identification of private property. There will be no signs placed in the public right of way.” *Attachment 5, SEC Order*, Bates p. 089.

23. Neither the SEC Decision nor the SEC Order reveals any indication that the Town disputed the Application’s description of Bean Mountain Road as “private” or raised any concerns about restricting the public’s ability to use Bean Mountain Road after the Lempster Wind Facility was constructed. To the contrary, the Town and Lempster Wind finalized their Draft Agreement subsequent to the issuance of the SEC’s Decision and Order. *See Petitioner’s Exhibit 20, Final Agreement Between Town of Lempster and Lempster Wind, LLC* (July 27, 2007) (“Final Town Agreement”). The Final Town Agreement requires entrances to the Project Site to be gated and locked during non-working hours, and states that if problems with unauthorized access are identified, the Project must work to implement additional security measures. *Id.*, ¶ 4.3.

### **C. Bean Mountain Road, Gates and Signs**

24. Entrances to the Lempster Wind Facility are located on Bean Mountain Road (an unpaved road), and that road provides access points to the Lempster Wind Facility site. *Attachment 7, Affidavit of Ryan Haley* (9/21/21), ¶ 3; *Attachment 2, Affidavit of Ryan Haley* (8/4/21), ¶ 10.

25. As shown on the map below (which is similar to a map submitted with the Application, *see Attachment 4*), a portion of Bean Mountain Road is located within the boundaries of the property comprising the site of the Lempster Wind Facility. Also shown on the map below are the locations of the two gates on Bean Mountain Road about which the Town complains.





26. Gate 1 shown on the map above and in the photo below was installed by Lempster Wind in November 2008 to prevent the public from using Bean Mountain Road to access the Lempster Wind Facility. *Attachment 2*, Haley Affidavit (8/4/21), ¶ 12.



27. Gate 2 shown on the map above was installed by Kevin Onnela in June 2010, with Lempster Wind's permission and approval, to restrict the public from using Bean Mountain Road to access the Lempster Wind Facility. *Attachment 2, Haley Affidavit (8/4/21), ¶ 13.*

28. The gates on Bean Mountain Road are strategically located to prevent the public from entering the Lempster Wind Facility site. Trees and topography on either side/ends of the gates provide natural barriers to entry. *Attachment 6, Haley Affidavit (9/21/21), ¶ 7.*

29. The Town's present request to remove the gates on Bean Mountain Road and relocate them to Ridge Road (where it intersects with Bean Mountain Road) will not be effective in preventing the public from accessing the Lempster Wind Facility site. *Attachment 6, Haley Affidavit (9/21/21), ¶ 8.* Unlike the location of the existing gates, the area where Bean Mountain Road intersects with Ridge Road is very open. *Attachment 6, Haley Affidavit (9/21/21), ¶ 9,* and photos attached thereto. This means that even if the existing gates on Bean Mountain Road were relocated to Ridge Road (as suggested by the Town), the open areas at each end of the gates would render them useless in preventing public access, as users of Bean Mountain Road would be able to circumvent the gates and enter the Lempster Wind Facility site. *Attachment 6, Haley Affidavit (9/21/21), ¶¶ 8 and 9,* and photos attached thereto.

30. During the decade following the installation of the gates on Bean Mountain Road, the Town never disputed the location of the gates or otherwise complained about them. It was only after the Lempster ATV Club submitted a letter to the Lempster Board of Selectmen on April 26, 2020 complaining that the gates on Bean Mountain Road were interfering with recreational ATV use of Bean Mountain Road that the Town took legal action. *See Petitioner's*



*Exhibit 12, Letter from Wesley Ash, President of Lempster Trailblazers ATV Club (Apr. 26, 2020) and Attachment 1.*

31. As shown on the photograph below taken March 3, 2022, the signs on the utility pole in the photograph shown on page 3 of the Town’s Memorandum of Law in Support of its Petition for Declaratory Ruling are no longer there.



### **III. ARGUMENT**

#### **A. The gates on Bean Mountain Road comply with the SEC’s Decision and Order that all entrances to the site of the Lempster Wind Facility must be gated and locked to prevent public access to the site.**

The existing gates on Bean Mountain Road fully comply with the SEC’s Decision and Order that all entrances to the Lempster Wind Facility site must be gated and locked. However, the Town misconstrues the order, arguing that Bean Mountain Road is not an “access road” within the meaning of the Draft Town Agreement adopted by the SEC and the Final Town Agreement, and therefore it is not subject to the SEC’s requirement that Lempster Wind must “[g]ate and lock entrances to the project site”. *Attachment 5, SEC Decision*, Bates p. 051. The flaw in the Town’s argument is readily apparent, and stems directly from the unambiguous language in the SEC Decision that directs Lempster Wind to gate and lock “**entrances to the project site**”. *Id.* (emphasis added). The SEC did not order that locked gates must be installed on project access roads (as the Town asserts) or on any particular entrance(s) to the project site. Therefore, irrespective of whether Bean Mountain Road is a private “access road” or a Class VI public road, the fact that it contains entrances to the Lempster Wind Facility site means that those entrances must be locked and gated in accordance with the safety conditions imposed by the SEC to restrict the public from accessing the Facility.

As indicated in paragraph 29, above, relocating the existing gates on Bean Mountain Road to Ridge Road (as the Town suggests) would be ineffective in restricting public access to the Lempster Wind Facility, and would therefore be inconsistent with the SEC’s Order. Accordingly, the Town’s request for relief cannot be granted because it would be

contrary to the SEC's Order. The existing gates, therefore, must remain in their current locations on Bean Mountain Road, *i.e.*, at the entrances to the site of the Lempster Wind Facility – locations that are effective in protecting the public's safety by restricting public access to the Facility.

**B. The SEC's authority to order the installation of locked gates on Bean Mountain Road as a safety measure to prevent public access to the Lempster Wind Facility preempts any authority the Town claims to have over the road.**

The SEC was established by RSA 162-H and is vested with broad authority over issues relating to the siting, construction and operation of energy facilities, including issues related to public health and safety measures such as site access restrictions and warning signs. *See* RSAs 162-H:4, and 162-H:16, IV (c). By creating the SEC, the legislature preempted municipal authority relative to energy facility siting, construction and operational issues. *Public Service Company of New Hampshire v. Town of Hampton*, 120 N.H. 68, 71 (1980). The New Hampshire Supreme Court has recognized that by requiring the SEC to consider the views of municipal planning commissions and legislative bodies, *see* RSA 162-H:16, IV (b), “the legislature has assured that their concerns would be considered in the comprehensive site evaluation. Thus, the committee protects the ‘public health and safety’ of the residents of the various towns with respect to the siting of power plants and transmission lines falling under the statute.” *Id.*

After a comprehensive review process in which the Town fully participated, the SEC determined that gating and locking entrances to the Lempster Wind Facility site is a condition that “will assist in avoiding unauthorized access to the proposed Facility”, and will assure that the Lempster Wind Facility “does not present an unreasonable adverse effect on the public health and safety from the standpoint of public access to the facility.”

*Attachment 5, SEC Decision*, Bates pp. 051-052. This safety requirement is entirely reasonable, as it is designed to prevent the public from coming within close proximity to an electric generating facility comprised of twelve massive wind turbine generating units, each having an approximate height of 255.9 feet, a gross weight of 303 tons, and rotating blades that are 139 feet long. *Attachment 5, SEC Order*, Bates p. 063.

Notwithstanding the SEC's broad authority under RSA 162-H, the Town asserts that it has the right under RSA 231:21-a to open Bean Mountain Road to the public because the road is a Class VI public highway. At the outset it should be noted that the Town's claims regarding Bean Mountain Road's status as a public road are undermined by the facts in this case. For example, Lempster Wind's 2006 Application states that Bean Mountain Road is a private road. *See Attachment 3*, p. 24. The Town participated in the SEC's comprehensive review process of Lempster Wind's Application, but at no time during that process did the Town dispute that Bean Mountain Road was a private road, or assert that the Town retained any rights to control that road after construction of the Lempster Wind Facility. Moreover, for nearly a decade after the gates were installed on Bean Mountain Road, the Town never complained about them or asserted any rights to regulate them. It was only after ATV riders expressed an interest in accessing Bean Mountain Road for recreational purposes that the Town began asserting that it had the right to control Bean Mountain Road.

But even assuming, *arguendo*, that Bean Mountain Road is a Class VI public road, it is undisputed that a section of Bean Mountain Road is located within the boundaries of the property comprising the site of Lempster Wind Facility, and contains entrances to the site of the Lempster Wind Facility. *See ¶¶ 24 and 25*, above. Because the SEC has valid

and exclusive regulatory authority over public safety issues relating to the siting of and access to the Lempster Wind Facility, any authority that the Town may arguably have with respect to Bean Mountain Road under RSA 231:21-a is preempted by the SEC's 2007 Decision and Order. *See Public Service Company of New Hampshire v. Town of Hampton*, 120 N.H. 68 (1980). And even assuming, *arguendo*, that the Town has authority under RSA 231:21-a to regulate gates and signs on Bean Mountain Road, that authority cannot be exercised in a way that inconsistent with the SEC's public safety authority under RSA 162-H. *Id.* (local regulation is repugnant to State law when it expressly contradicts a statute or is contrary to the legislative intent that underlies a statutory scheme).

Here, the Town's position that it has the authority under RSA 231:21-a to open Bean Mountain Road to recreational ATV riders is repugnant to and inconsistent with the SEC's properly exercised authority under RSA 162-H:16, VI to require that entrances to the Lempster Wind Facility site on Bean Mountain Road be gated and locked to protect the public's safety. As demonstrated in Section III. A. above, the locked gates on Bean Mountain Road comply with the SEC's 2007 Decision and Order. Inasmuch as the Town seeks to exercise its alleged authority over those gates in a manner that is inconsistent with the SEC's Decision and Order, the Town is preempted by the SEC's statutory authority to impose reasonable public safety conditions to prevent public access to the Lempster Wind Facility. *Public Service Company of New Hampshire v. Town of Hampton*, 120 N.H. at 71; *see also Wasserman v. City of Lebanon*, 124 N.H. 538, 542-43 (1984) (City had exceeded its authority by implementing ordinances regulating

maintenance of dams and hydroelectric facilities that were contrary to state law). The Town's Petition, therefore, must be denied.

**C. The Town's requests for relief are barred by the doctrines of res judicata, collateral estoppel, municipal estoppel, waiver and laches.**

In addition to being preempted by the SEC's authority to order locked gates at entrances to the Lempster Wind Facility site that are located on Bean Mountain Road, the Town's Petition is barred by several legal doctrines. Simply put, the Town's own prior conduct prevents it from obtaining the relief it seeks in its Petition. The Town's claims are barred by its: (1) participation in the SEC proceeding on Lempster Wind's Application; (2) failure to appeal the SEC's Decision and Order; (3) execution of the Final Town Agreement; and (4) its unreasonably long delay in presenting its claims alleging Bean Mountain Road's status as a Class VI public road. For the reasons discussed below, the Town's Petition must be denied.

**1. The Town's Petition is barred by res judicata and collateral estoppel, as the Town's claims have been previously litigated by the parties and a final judgment was issued.**

Res judicata bars a party's claims if: "(1) the parties are the same or in privity with one another; (2) the same cause of action was before the court in both instances; and (3) the first action ended with a final judgment on the merits." *Gray v. Kelly*, 161 N.H. 160, 164-65 (2010). Res Judicata applies to the SEC's Decision because the SEC was acting in a judicial capacity. *See Cook v. Sullivan*, 149 N.H. 774, 778 (2003). Similarly, collateral estoppel bars a party from relitigating any issue or fact actually litigated and determined in a prior action in which the party participated and had a full and fair opportunity to litigate the issue or fact. *Id.*



All elements of res judicata and collateral estoppel are present.

First, Lempster Wind and the Town participated as parties in the prior SEC proceeding. Although Avangrid Renewables was not a party to that SEC proceeding, it is in privity with Lempster Wind by virtue of its ownership of 100% of the membership interests in Lempster Wind. *See Daigle v. City of Portsmouth*, 129 N.H. 561, 571 (1987).

Second, the case before the SEC in Docket 2006-01 and the instant docket both involve the same issue, *i.e.*, the extent to which public access to the Lempster Wind Facility should be restricted in order to protect the public's safety. The prior SEC proceedings extensively evaluated public health and safety concerns associated with access to the Facility site, including the issues of the installation of the gates and signs which the Town now claims are in violation of RSA 231:21-a. Further, the SEC's Decision and Order, which adopted and included the Town's agreements with Lempster Wind and Counsel for the Public, explicitly address site access and gating.

Third and lastly, the relief sought by the Town in this proceeding could have been sought from the SEC in the 2007 proceeding. Here, the Town seeks an order: requiring Lempster Wind and Avangrid Renewables to remove all gates and signs on Bean Mountain Road that restrict public travel; prohibiting further installation of locked gates and signs that restrict the public's right to travel on Bean Mountain Road; and requiring that gates be installed on access roads. *Petition*, p. 6. The Town could have requested this relief in 2007, but instead it did the opposite – the Town executed a Final Agreement with Lempster Wind regarding the installation of gates and signage at Facility access points, similar to the Draft Town Agreement which the SEC incorporated into its Order. Because the relief that the Town is seeking now could have been granted by the SEC in

2007, the Town cannot pursue the claims it could have and should have litigated previously. *See Gray v. Kelly*, 161 N.H. at 165 (if the same type of relief is available in both cases, res judicata precludes the claim from being relitigated).

The SEC “conducted an open and inclusive process”. *Attachment 5, SEC Decision*, Bates p. 059. The Town was a party to the SEC proceedings, was represented by counsel, and participated throughout the proceedings. *Attachment 5, SEC Decision*, Bates p. 009. The SEC held four days of evidentiary hearings, heard from 14 witnesses, entertained briefs from all parties, and held two days of deliberations. *Attachment 5, SEC Decision*, Bates p. 059. Following its adjudicative proceedings, the SEC issued a final judgment on the merits of Lempster Wind’s application on June 28, 2007, granting Lempster Wind’s Certificate subject to terms and conditions. These terms and conditions included the Draft Town Agreement and Lempster Wind’s agreement with Counsel for the Public. *See Attachment 5, SEC Order*, Bates p. 065. Counsel for the Public’s agreement with Lempster Wind provides that “[e]ntrances to the Project Site shall be gated, and locked during non-working hours.” *Attachment 5, SEC Order*, Bates p. 081. The Draft Town Agreement contains a nearly identical provision, and also states that signs must be reasonably sized and limited to those necessary to identify the Project Site and provide warnings or liability information, construction information, or identification of private property. *Attachment 5, SEC Order*, Bates p. 089.

The SEC’s Decision notes that “[i]n order to restrict public access to the turbines, structures and supporting equipment, the Applicant, Public Counsel and the Town of Lempster have entered into agreements which, in turn, contain conditions governing access and warning signs.” *Attachment 5, SEC Decision*, Bates p. 051. The SEC

expressly found that adopting these conditions will assist in avoiding unauthorized access to the proposed Facility, and relied upon those conditions determining that the Facility “does not present an unreasonable adverse effect on the public health and safety from the standpoint of public access to the facility.” *Attachment 5, SEC Decision*, Bates p. 052.

The Town had a fair and full opportunity to litigate its gates and sign claims and issues against Lempster Wind before the SEC. The SEC adjudicated those claims and issues and rendered a comprehensive Decision and Order in 2007 which the Town never appealed. The Town cannot now relitigate those claims and issues.

**2. The Town is estopped from pursuing relief that is contrary to its agreement with Lempster Wind.**

Because the Town’s claims contradict the Final Town Agreement which was signed by members of the Lempster Board of Selectmen *see Petitioner’s Exhibit 20*, p. 12, the doctrine of municipal estoppel prevents the Town from pursuing its claims. *See Thomas v. Town of Hooksett*, 153 N.H. 717, 721 (2006) (doctrine of municipal estoppel has been applied to municipalities to accord fairness to those who bargain with agents of municipalities for the promises of the municipalities); *see also Turco v. Town of Barnstead*, 136 N.H. 256, 261-263 (1992) (town was estopped from failing to maintain a road because plaintiffs had reasonably relied on a building permit the town issued).

Municipal estoppel bars municipal action if the party asserting estoppel demonstrates that (1) the municipality, through an authorized representative, made a false representation or concealed material facts; (2) the representation was made with knowledge of the facts; (3) the party relying on the representation was ignorant of the truth of the matter; (4) the municipal representation was made with the intention that the

other party should act on it; and (5) the other party was induced to act on the representation to its injury. *Id.*

All of the elements of municipal estopped are met in this case.

First, the Town's Board of Selectmen signed the Final Town Agreement over 14 years ago. The Town had authority to enter into the agreement, and its Board of Selectmen were authorized to sign it on behalf of the Town. *See* RSA 31:3 (a town "may make any contracts which may be necessary and convenient for the transaction of the public business of the town"), and RSA 41:8 ("selectmen shall manage the prudential affairs of the town and perform duties by law prescribed.")

Second, nothing in the Final Town Agreement indicates that the Town considered Bean Mountain Road a Class VI public road, or that the Town was reserving the right to regulate the Facility's gates and signage other than in the manner described in the Final Town Agreement. By signing the Final Town Agreement, the Town, therefore, made a false representation and also concealed material facts (*i.e.* that the Town considered Bean Mountain Road to be a Class VI public road). That 2007 representation was made by the Town with the "full knowledge of the facts" that the Town considered Bean Mountain Road to be a Class VI public road, as the Town now points to documents dated 1981 to support its position on this issue. *See Petition*, ¶¶ 10 and 11.

Third, Lempster Wind was not only unaware of the Town's position, it believed the opposite to be true, *i.e.*, that Bean Mountain Road was a private road. *See Attachment 3, Application*, p. 24.

Fourth, the Town clearly intended that Lempster Wind and Avangrid Renewables rely on the Executed Agreement; it is illogical to assume that the Town signed the

agreement and somehow did not expect the parties to abide by the agreement's gates and sign provisions. Moreover, the gates and signs were installed many years ago and remained undisputed by the Town until ATV riders insisted on using Bean Mountain Road.

Fifth and lastly, Lempster Wind reasonably relied on the Final Town Agreement to its prejudice. Lempster Wind constructed its Facility, including gates and signage, in conformity with the Final Town Agreement and the SEC's Decision and Order which contain the same requirements. The gates provide an important security measure to protect the Lempster Wind Facility site from public access, and Lempster Wind would be greatly prejudiced if these security measures were removed.

**3. The Town waived its claims by signing the Final Town Agreement which explicitly addresses the issues raised in the Town's Petition for Declaratory Ruling.**

Shortly after the SEC issued its Decision and Order on June 28, 2007, adopting the provisions of the Draft Town Agreement, the Town and Lempster Wind signed a similar agreement dated July 27, 2007 (*i.e.*, the Final Town Agreement) that contains specific provisions regarding the installation of gates at entrances to the Facility site and the installation of signs. *See Petitioner's Exhibit 20*, pp. 4-5. The Town now claims that Avangrid Renewables and Lempster Wind "are currently violating RSA 231:21-a, by installing locked gates on Bean Mountain Road, a Town of Lempster Class VI Road." *Petition*, ¶ 26. However, the Town's claim ignores the fact that the gates and sign are authorized by and consistent with the Final Town Agreement, which has been in place for 14 years. If the Town had any claim under RSA 231:21-a, it was waived when the Town

voluntarily entered into the Final Town Agreement giving Lempster Wind the authority to install gates and signage at Facility entrances.

A valid waiver exists when it is “expressed in explicit language to forego a right” or based on “conduct under the circumstances justifying an inference of a relinquishment of [a right]”. *Town of Atkinson v. Malborn Realty Tr.*, 164 N.H. 62, 66 (2012). Both the explicit language of the Final Town Agreement (authorizing the installation of gates at Facility site entrance points, and signs such as those currently existing on Bean Mountain Road), as well as the Town’s failure to assert its regulatory claims until many years after the date of its agreement, clearly support the reasonable inference that the Town willingly and knowingly relinquished any rights it may have had under RSA 231:21-a to control gates and signs on Bean Mountain Road.

Inasmuch as Bean Mountain Road provides entrances to the site of the Lempster Wind Facility, it is clear from the plain language of the Final Town Agreement that the Town intended to waive any right that it may have had to prevent the installation of the gates and signs about which it now complains. Because the Town waived its claims in 2007 when it signed the Final Town Agreement, the Town’s attempt to bring such claims against Avangrid Renewables and Lempster Wind for acts that comply with that agreement is totally improper and arguably constitutes bad faith on the Town’s part.

**4. Because the Town unreasonably delayed in raising its claims about Bean Mountain Road, the doctrine of laches bars the Town’s requests for relief.**

Laches is an equitable doctrine that bars the claims of a plaintiff that has slept on its rights. *Appeal of Professional Fire Fighters Hudson, IAFF Loc. 3154*, 167 N.H. 46, 57 (2014). If a party’s delay in bringing its claims is unreasonable and prejudice has

resulted, the claims may not proceed. *Pennichuck Corp. v. City of Nashua*, 152 N.H. 729, 740 (2005). For laches to bar a municipality's claim, extraordinary and compelling circumstances must exist. *See Town of Seabrook v. Vachon Management*, 144 N.H. 660, 668 (2000) (doctrine of laches is applied against a municipality only in extraordinary and compelling circumstances).

Extraordinary and compelling circumstances are present in this case. The Town is advancing claims that directly contradict an agreement it executed over 14 years ago, as well as the public safety requirements ordered by the SEC in 2007. In constructing the Lempster Wind Facility, including gates and signs, Lempster Wind and Avangrid Renewables have reasonably relied upon the SEC's Decision and Order, as well as the Final Town Agreement, all of which authorize the gates and signs about which the Town now complains. The gates and signs – which are security measures that protect Lempster Wind's property, including its operations and maintenance building, and protect the public from coming into close proximity with wind energy generating units and associated facilities - were installed long ago, without question or challenge from the Town until recently. In these circumstances, the Town's long delay in bringing its claims is unreasonable and therefore bars it from pursuing those claims.

The Town's lengthy delay in asserting its claims have prejudiced Lempster Wind and Avangrid Renewables by forcing them to expend time and resources to revisit an issue that was decided long ago by the SEC, and that was agreed to by the Town. Further prejudice will result from removing the gates and signs on Bean Mountain Road, as such action would necessitate additional expenditures for new security measures in order to protect the wind turbines, the operations and maintenance building, the overhead lines,

and other property at the Lempster Wind Facility site from public access. Moreover, as noted above, the public's ability to access the site of massive wind energy generators with long rotating blades presents a public safety risk – a risk that the SEC validly and prudently addressed by conditioning Lempster Wind's Certificate on the installation of gates and signs at entrances to the Facility site.

In view of the foregoing, it would be illogical, unreasonable, and inequitable to allow the Town's claims to proceed. Moreover, the safety and security issues implicated by the Town's requested relief create extraordinary and compelling circumstances that warrant barring the Town's claims. The SEC, therefore, should apply the laches doctrine against the Town and deny the Petition. *See Town of Seabrook v. Vachon Management, 144 N.H. 660, 668 (2000).*

#### **IV. CONCLUSION**

The gates and signs on Bean Mountain Road comply with the SEC's Decision and Order issued pursuant to the SEC's broad regulatory authority to protect the public's safety with respect to the operation of electric generating facilities certificated by the SEC. This authority preempts any conflicting regulatory authority asserted by the Town that would allow the public to ride ATVs through the Lempster Wind Facility, or otherwise access the site. The gates and signs in question must remain in place as a reasonable safety measure to protect the public from entering the site of an electric generating facility comprised of massive towers with rotating blades.

The Town participated in the adjudicative process that culminated in the issuance of the SEC's Decision and Order, and did not appeal the Order. The Town, therefore, must honor the SEC's Decision and Order, as well as the agreement it made with Lempster Wind regarding the



gates at entrances to the Lempster Wind Facility site. For the reasons set forth above, the Town's Petition must be denied.

WHEREFORE, Avangrid Renewables, LLC and Lempster Wind, LLC respectfully request that the Committee:

- A. Deny the Town's Petition for Declaratory Ruling;
- B. Issue a Declaratory Ruling that Defendants Avangrid Renewables, LLC and Lempster Wind, LLC may maintain the gates located on Bean Mountain Road in Lempster, New Hampshire in their present locations in order to prevent the public from accessing the site of the Lempster Wind Facility; and
- C. Grant such additional relief as is equitable and just.

Respectfully submitted,

**Avangrid Renewables, LLC and  
Lempster Wind, LLC**

By their attorneys:  
Orr & Reno, P.A.

Dated: April 8, 2022

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**CERTIFICATE OF SERVICE**

I hereby certify that on the above date, a copy of the foregoing Objection was provided via electronic mail to the Distribution List for this Docket.

/s/ Susan S. Geiger  
Susan S. Geiger

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