

STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

Docket No. 2022-01

Town of Lempster
Petition for Declaratory Ruling

KEVIN AND DEBRA ONNELA'S OBJECTION TO
TOWN OF LEMPSTER'S PETITION FOR DECLARATORY RULING

NOW COME Kevin and Debra Onnela, by and through their attorneys, Devine, Millimet & Branch, P.A., and respectfully object to the Petition for Declaratory Ruling filed by the Town of Lempster and in support thereof state:

The Onnelas have moved to intervene in this matter without objection. Their Motion was granted by the Site Evaluation Committee ("SEC") on March 31, 2022.

Introduction and Statement of Facts¹

Kevin and Debra Onnela own land in Lempster, N.H. on which their residence is located. Some of that land includes the ridgeline of Lempster Mountain, which was suitable for development of a wind-powered electric generating facility. Such a facility was planned and developed by Lempster Wind, LLC ("Lempster Wind") starting in 2006. It consists of a dozen wind turbines. Each turbine stands approximately 256 feet high. The wind facility is located on property Lempster Wind leases from Defendants Kevin and Debra Onnela, and the Onnelas' house is the only permanent residence located on the facility site. Bean Mountain Road, which is a private, unpaved road, provides access to the wind facility site. There are two locations on Bean Mountain Road where locked gates prevent public access to the wind facility. In February 2020, on the initiative of the Lempster Trailblazers ATV Club (of which Town of Lempster

¹ The Onnelas also rely on and incorporate by reference as though set forth herein, the Introduction and Procedural Background and Facts sections (p. 1-11) of Avangrid, et al's Objection to Town of Lempster's Petition for Declaratory Ruling.

Selectman (at that time) Philip Tirrell is a member), the Town of Lempster's Selectmen abrogated their 2007 agreement with Lempster Wind (to which the Onnelas are a party) requiring these locked gates to prevent public access.

Instead, the Town now claims that Bean Mountain Road is a public road that they could vote to open to All-Terrain Vehicle ("ATV") access and general public use. On that claim, the Town of Lempster sued the Onnelas in the Sullivan County Superior Court to have the subject gates removed so that ATVs could have unrestricted access to Bean Mountain Road, and thus access to the Onnela's private residence and the wind facility's infrastructure.

In 2007, the State of New Hampshire Site Evaluation Committee ("SEC"), which had exclusive jurisdiction over the siting and approval of the wind facility, approved the entire wind facility project. Prohibiting the public's access to the site was addressed in the SEC's adjudicative Decision and Order. The Town was a party to and participated throughout the SEC's process. Not only did the Town accept the SEC's Decision and Order, the Town also signed an agreement with Lempster Wind, to which the Onnelas were a party and beneficiaries, requiring gates at all entrances to the facility site, and authorizing warning signs. Then 13 years later, the Town to accommodate the ATV Club and its member Selectman, changed its mind and decided the gates need to be gone and a warning sign removed.

In the Superior Court action, the Onnelas filed a Counterclaim against the Town and put it on notice that it considered the wind facility owners and operators, Lempster Wind and Avangrid Renewables, necessary parties in the action. The Town then brought these two entities into the case as defendants with the Onnelas. All defendants then moved for Summary Judgment. The Superior Court ruled that "primary jurisdiction" over the Town's challenge to the Lempster Wind Project's gates and signage lay with the SEC. That Order is found at Attachment 1 to Avangrid's Objection to Lempster's Petition in this matter. The Order stays the Superior

Court case until there is a final decision from the SEC in this current matter whether the gates and signs now challenged by the Town are required by the SEC's Decision, Order and Certificate, which is found at Attachment 5 of Avangrid's Objection referenced above.

As will be discussed further in this Objection, the Town's claims are defeated by many different legal and equitable principles. Underlying each is the fundamental principle that any party, like the Town, must be bound by the Order in the administrative case it litigated, and the agreement it signed.

I. The gates on Bean Mountain Road comply with the SEC's Order that all entrances to the Lempster Wind project site must be gated, and as a party to the SEC's proceeding, the Town is bound by that Order.

The SEC's Order includes the Agreement between Lempster Wind, LLC and Counsel for the Public ("Public Counsel Agreement"). The Public Counsel Agreement plainly states that "Entrances" (emphasis supplied) (i.e., plural) to the project site shall be gated and locked during non-working hours.. That Agreement further states that "[i]f problems with unauthorized access are identified, the Project shall work to install additional gated access points." Thus, the plain language of the SEC's Order indicates that all "entrances" and "access points" to the project site must be gated. Given the safety issues presented by massive, rotating wind turbines, this language is both reasonable and necessary. Given that Bean Mountain Road runs directly through the project site and provides entrances and access points to it, the gates on Bean Mountain Road are required by the SEC's Order.

The existing gates on Bean Mountain Road are essential in blocking public access to the Lempster Wind site first because they block the west and east boundaries to the project site. In addition, these gates are also essential because trees and topography on that road at both ends of the gates provide natural barriers to entry. In contrast, gates at the locations proposed by the Town (on Ridge Road where it intersects Bean Mountain Road) would allow general public

access to the Lempster Wind site because of the openness of that area. ATVs and others using Bean Mountain Road (as the Town desires) could easily drive their ATVs around gates on Ridge Road and gain access to the wind turbines and the facility's buildings and infrastructure. Because the Town's new-found interpretation of the SEC's Order is inconsistent with the reasonable public safety measures ordered by the SEC, it must be rejected.

The SEC's Certificate is "conclusive on all questions of siting, land use, air and water quality." RSA 162-H:16, II. It is "final and subject only to judicial review" RSA 162-H:16, VI, which review must be in accordance with RSA 541. *See* RSA 162-H:11. As a party to the SEC's proceeding, and one that never appealed the SEC's Order, the Town must abide by the plain language of the SEC's Order. It cannot come forward thirteen years later to contest the SEC's Order by asserting a conflicting position that it could have raised at the SEC proceeding in 2007 or in a motion for rehearing as required by RSA 541:3.

II. The Town is bound by the plain meaning of its Agreement stating that all entrances to the Lempster Wind facility must be gated and locked.

The Town has conceded in its pleadings in the Superior Court action that the Onnelas are parties to the Town's 2007 Agreement with Lempster Wind. See Attachment 6 to Avangrid's Objection to Town's Petition. For ease of reference, a copy of the final signed version of that Agreement is attached hereto as Exhibit A. It is referred to below as the "Final Town Agreement", "Town Agreement" or "Agreement".

The Onnelas have the status of a "Participating Landowner" under that Agreement, p. 1, Sec. 1.8.

The Town's Agreement with Lempster Wind at p. 4, Sec. 4.3 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 implement additional security measures.

(emphasis added).

The definition of “Project Site” under that Agreement, p. 1, Sec. 1.9, is “property with rights as conveyed to [Lempster Wind] by lease, easement or other agreement with a Participating Landowner [e.g. the Onnelas] that includes all Wind Turbines, access roads, and other facilities required for construction and operation of the Wind Park.”

The SEC also consistently defined the Project Site as the limits of the land leased by Lempster Wind for the Project. See attached Exhibit B, p. 1-2, the SEC’s Order and Notice of Public Informational Hearing dated October 23, 2006. Lempster Wind’s Application to the SEC calls Bean Mountain Road a private road. See Avangrid’s Objection, Attachment 3, p. 24. An Appendix to that Application to the SEC gave directions to the Project Site that called for people to access the site from Bean Mountain Road’s intersection with Nichols Road (the west entrance to the site). See attached Ex. C, Appendix 6 to Lempster Wind’s Application to SEC.

It is noteworthy that attached Exhibits B and C state that the project is on “private property” and that Bean Mountain Road is a “private road” and “(private)”.

Bean Mountain Road is an integral part of the Project Site. The Project Site consists of five parcels of leased land. Ex. B, p. 2. Three of those parcels are leased by Lempster Wind from the Onnelas. Those parcels comprise about two-thirds of the Project Site and contain the entire section of Bean Mountain Road that is within the Project Site. See attached Exhibit D, the Project Site and Onnelas’ leased parcels highlighted in yellow on the current Town of Lempster Tax map.

Bean Mountain Road provides access to the west side of the Project and contains the electrical transmission line that brings the windpower-generated electricity off the ridge of Lempster Mountain and down Bean Mountain Road, which then connects to the local electrical

distribution system at the junction of Bean Mountain Road with Nichols Road. See attached Exhibit E, aerial map of part of project site.

See also Avangrid's Objection, Attachment 3, Application of Lempster Wind to SEC, "Project Interconnection", p. 29. This electrical transmission line on Bean Mountain Road is shown on a number of the maps submitted by Lempster Wind in its SEC Application. See Attached Exhibit F, found at Appendix 9.01 to that Application and titled "NH DES Site Specific Application Package". See also attached Exhibit G, found at Appendix 14 to that Application and titled "Project Turbine Layout Map and Coordinates" which both show the electrical transmission line going down Bean Mountain Road to the interconnection area.

Note that Lempster Wind's Application, at p. 49 goes on to state that:

The electrical facilities will be located on private land, and will be adequately noticed by signs, warnings and public education efforts to limit unauthorized access to these areas.

(emphasis supplied)

So Lempster Wind's Application to the SEC made it clear multiple times that the Electrical Interconnection line was part of the Project. The Project's "facilities" include that interconnection and Lempster Wind's transmission line down Bean Mountain Road to get to that interconnection. This transmission line on Bean Mountain Road and interconnection is one of the Project's facilities on the Project site that needs to be protected from public access.

Note also that the "Damage to Public Roads" section of Lempster Wind's Application to the SEC makes no mention of Bean Mountain Road. *Id.* at p. 76. That section states that Lempster Wind will work with the Town on a specific plan and agreement:

"for the prevention of damage to public roads and the restoration and repair of any damaged areas post-construction" . . . Prior to construction the Project will work with the Town to video or photo document the existing roadways to verify the pre-construction roadway conditions . . ."

There is no evidence that any such photo documentation or post-construction damage restoration was done for Bean Mountain Road as part of this Project.

Entrances to the Project Site which the SEC has defined as all of the Project's leased land, see attached Ex. B, are on Bean Mountain Road and on Ridge Road. The only reasonable, logical and necessary interpretation of the Agreement's language is that *all* entrances to the Lempster wind project site must be gated, including those entrances on Bean Mountain Road.

From a public safety perspective, it is imperative that all entrances to the project site should be gated and locked to prevent members of the public from gaining access to property where massive wind turbines with long, rotating blades, are producing dangerous electrical energy. Because Bean Mountain Road provides entrances to the Lempster Wind project site, those entrances must be gated, consistent with the language in the parties' Agreement. However, now the Town disagrees, and offers a restrictive and illogical interpretation of the plain language of its Agreement with Lempster Wind and the Onnelas, *i.e.* that the only place where gates can be installed is on Ridge Road. Such an interpretation should be rejected as it is inconsistent with the reasonable meaning of the language used in the contract, *i.e.* entrances (i.e. plural) to the project site must be gated. *See Birch Broadcasting, Inc. v. Capitol Broadcasting Corporation, Inc.*, 161 N.H. 192, 196 (2010).

The language requiring entrances to be gated is unambiguous. Ambiguity exists only if there is a *reasonable* disagreement as to the meaning of the contract language. *Id.* Because the Town's disagreement with the plain meaning of the contract language it agreed to in 2007 is unreasonable, there is no ambiguity.

The parties' post-agreement conduct also demonstrates that the Town believes the entrances to Bean Mountain Road at the project boundaries needed to be gated. It is undisputed that the west gate on Bean Mountain Road with its signage was installed in 2008, and the east

gate was installed in 2010. The Town took no action to dispute the location or installation of either gate until 2020, a decade after the latter gate was installed, and only because the Town wanted to designate Bean Mountain Road for use as an ATV trail. For twelve (12) and ten (10) years, respectively, the gates and signage on Bean Mountain Road existed without incident or comment from the Town. It can therefore only be reasonably inferred that for all of those years, the gates' existence was consistent with the parties' intent that all entrances to the Lempster Wind facility be gated, irrespective of location.

Finally, it is significant that the Town and Lempster Wind expressly agreed that the terms of the Agreement are "final, enforceable and no longer subject to change as of July 27, 2007, regardless of the date of execution by either party." See Ex. A, p. 12. That is consistent with this Agreement being made part of the SEC's Decision and Order and prevents the Town from changing its agreement to the Bean Mountain Road gates as it is now seeking to do.

Legal Argument

A. 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 such as access points and signage. 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.” See *Avangrid’s Objection, Attachment 5, SEC Decision*, Bates pp. 051-052. This safety requirement is entirely reasonable, as it is designed to prevent the public from coming on site and accessing 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. *Id. 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 town road. 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. See p. 5-6 above and attached Exhibits B and C. 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 as stated in the Application, or assert that the Town retained any rights to control that road after construction of the Lempster Wind Facility. Moreover, for 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 the local ATV Club with a member who was a Selectman expressed an interest in accessing Bean Mountain

Road for recreational purposes that the Town first asserted that Bean Mountain Road was a town road and the Selectmen had authority to allow ATV use on it.

Even assuming, for the sake of argument, that Bean Mountain Road is a town road, it is undisputed that a large section of Bean Mountain Road is located within the boundaries of the property comprising the site of Lempster Wind Facility, and it contains the electric transmission line taking electricity from the wind turbines going into the regional grid. Because the SEC has valid and exclusive regulatory authority over public safety issues relating to the siting, construction and operations, including of 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). Even assuming, again, 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 is 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 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 at pages 3-4 above, the locked gates on Bean Mountain Road comply with the SEC's 2007 Decision and Order. Because 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.

B. 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 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 now presenting its claims alleging Bean Mountain Road is a town 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 the Onnelas were not a party to that SEC proceeding, they are in privity with Lempster Wind by virtue of their ownership of and lease of most of the project lands to Lempster Wind. The Onnelas are also in privity with the Town and Lempster Wind due to the Onnelas' party status as "Participating Landowners" in the Town Agreement. *See Daigle v. City of Portsmouth*, 129 N.H. 561, 571 (1987).

Second, the case before the SEC in Docket 2006-01 and the current SEC case 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 public access to the Facility, 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 addresses site access and gating at the entrances to the project site. See p. 3-4 above.

Third, the relief the Town seeks is an order: requiring the Onnelas, 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 sought this relief from the SEC 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 entrances, 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”. *See Avangrid’s Objection, 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. *Id.* at 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 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 Id.* at 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.” *Id.* at 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. *Id.* at 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.” *Id.* at 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 in 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.” *Id.* at 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 and the Onnelas.

Because the Town's claims contradict the Final Town Agreement which was signed by all the members of the Lempster Board of Selectmen, *see attached Exhibit A*, p. 12, the doctrine of municipal estoppel prevents the Town from pursuing its present 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 these elements of municipal estoppel are met in this case.

First, the Town's Board of Selectmen signed the Final Town Agreement thirteen years before they decided to change their position that Bean Mountain Road is a private road. The Town had authority to enter into the 2007 Town 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 town 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 according to its current position, therefore, made a false representation and also concealed material facts (*i.e.* that the Town considered Bean Mountain Road to be a town 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 town public road, since the Town now points to documents dated 1981 to support its position on this issue. *See Petition*, ¶¶ 10 and 11.

Third, the Onnelas and Lempster Wind were not only unaware of the Town’s position, they more than reasonably, based on the Town’s consistent conduct from 2006 to 2019, believed the opposite to be true, *i.e.*, that Bean Mountain Road was a private road. *See Avangrid’s Objection, Attachment 3, Application*, p. 24.

Fourth, the Town clearly intended that the Onnelas, 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.

Fifth and lastly, the Onnelas and Lempster Wind reasonably relied on the Final Town Agreement to their prejudice. The Onnelas starting in 2008 have relied on the subject gates to keep the general public from accessing their private property which includes their residence and

vehicles. Lempster Wind constructed its Facility, including gates and signage, in conformity with and reliance on, the Final Town Agreement and the SEC's Decision and Order which contain the same requirements.

3. The Town waived its current 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 and the installation of signs. *See attached Exhibit A*, pp. 4-5. The Town now claims that the Onnelas, 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. The Town's claim ignores the fact that the gates and sign are authorized by and consistent with the Final Town Agreement, which had been in place for 13 years before the Town decided to challenge them in 2020. 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.

Because Bean Mountain Road provides west and east 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 now bring such claims against the Onnelas, 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 the status of Bean Mountain Road, the doctrine of laches also 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 designed to protect the Project's property and the public from coming into close proximity with massive wind turbines with long, rotating blades producing inherently dangerous electricity - 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 would work a great hardship on the Onnelas, Lempster Wind and Avangrid Renewables. The doctrine of laches therefore bars it from pursuing its new claims.

The Town's lengthy delay in asserting its claims has prejudiced the Onnelas, Lempster Wind and Avangrid Renewables by forcing them to expend time, resources and legal fees to revisit an issue that was decided long ago by the SEC, and that was agreed to by the Town. In addition, the safe and secure operation of the Lempster Wind Facility will be threatened if the Town is allowed to remove the gates and signs on Bean Mountain Road, thereby enabling the public to access the Site. Moreover, the public's ability to access the site of massive wind energy generators with rotating blades generating electricity presents a 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 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).*

I. 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 allegedly allows the public to ride ATVs through the Lempster Wind Facility 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 and power lines generating 24 MW of inherently dangerous electricity.

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 the Onnelas and Lempster Wind regarding the need for gates at all entrances to the Lempster Wind Facility site. For the reasons set forth above, the Town's Petition must be denied.

WHEREFORE, Kevin and Debra Onnela respectfully request that the SEC:

- A. Deny the Town's Petition for Declaratory Ruling;
- B. Issue a Declaratory Ruling that Kevin and Debra Onnela, 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,

KEVIN AND DEBRA ONNELA

By their attorneys,

DEVINE, MILLIMET & BRANCH, P.A.

Dated: April 26, 2022

By: /s/ Thomas Quarles, Jr.
Thomas Quarles, Jr., Esq. (NH Bar #2077)
111 Amherst Street
Manchester, NH 03101
(603) 669-1000
tquarles@devinemillimet.com

CERTIFICATE OF SERVICE

I hereby certify that on the above date, a copy of the foregoing Objection to Town of Lempster's Petition for Declaratory Judgment was provided via electronic mail to Petitioner's counsel, Attorney Michael Courtney, and counsel for Avangrid Renewables and Lempster Wind, Attorney Susan S. Geiger.

Dated: April 26, 2022

/s/ Thomas Quarles, Jr.

Thomas Quarles, Jr.