STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

Docket No. 2010-01

Application of Groton Wind, LLC, for a Certificate of Site and Facility For a 48 MW Wind Turbine Facility in Groton, Grafton County, New Hampshire

ORDER ON MOTIONS FOR CLARIFICATION, REHEARING AND RECONSIDERATION

Issued August 8, 2011

I. PROCEDURAL HISTORY

On May 6, 2011, a duly appointed Subcommittee of the Site Evaluation Committee ("Subcommittee") issued its Decision granting a Certificate of Site and Facility ("Certificate") with conditions ("Decision") to Groton Wind, LLC, ("Applicant"), authorizing the construction and operation of a renewable energy facility ("Facility" or "Project") consisting of 24 Gamesa G82 turbines each having a nameplate capacity of 2 megawatts ("MW"), for a total nameplate capacity of 48 MW to be located in the Town of Groton, Grafton County, New Hampshire ("Site"). The Decision was issued after the Subcommittee held adjudicatory proceedings on November 1-5, 2010 and April 22-23, 2011. The Subcommittee heard from 21 witnesses, and considered over 162 exhibits, along with oral and written statements from interested members of the public. In addition, the Subcommittee held a public hearing in Grafton County, conducted a number of technical sessions, and visited the proposed Site. The Subcommittee's final Decision was the result of a rigorous review of the Application, the testimony, the exhibits, public comments and various pleadings filed by the parties.

On May 13, 2011, the Applicant filed a Contested Motion for Clarification. Thereafter, on June 5, 2011, the Buttolph/Lewis/Spring Group of Intervenors ("Intervenors") filed a Motion for Rehearing. The Applicant objected to Intervenors' Motion on June 15, 2011. On June 6, 2011, the Applicant filed a Contested Motion for Reconsideration and/or Rehearing. The Intervenors' Objected to Applicant's Motion for Reconsideration and/or Rehearing on June 11, 2011 and Counsel for Public Objected to the Applicant's Motion for Rehearing on June 16, 2011. On July 8, 2011, the Subcommittee held a public meeting for the purpose of deliberations.

II. STANDARD OF REVIEW

Under R.S.A. 541:2, any order or decision of the Committee may be the subject of a Motion for Rehearing or of an appeal in the manner prescribed by the statute. A request for a rehearing may be made by "any party to the action or proceeding before the commission, or any person directly affected thereby." R.S.A. 541:3. The motion for rehearing must specify "all grounds for rehearing, and the commission may grant such rehearing if in its opinion good

reason for the rehearing is stated in the motion." Id. Any such motion for rehearing "shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." R.S.A. 541:4.

"The purpose of a rehearing is to direct attention to matters said to have been overlooked or mistakenly conceived in the original decision, and thus invites reconsideration upon the record to which that decision rested." Dumais v. State of New Hampshire Pers. Comm., 118 N.H. 309, 311 (1978) (internal quotations omitted). A rehearing may be granted when the Commission finds "good reason". See, R.S.A. 541:3. A motion for rehearing must be denied where no "good reason" or "good cause" has been demonstrated. See, O'Loughlin v. NH Pers. Comm., 117 N.H. 999, 1004 (1977); Appeal of Gas Service, Inc., 121 N.H. 797, 801 (1981).

III. DISCUSSION

A. Applicant's Contested Motion for Clarification and Contested Motion for Reconsideration and/or Rehearing.[1]

The Applicant filed both a Contested Motion for Clarification and a Contested Motion for Reconsideration and/or Rehearing. The Motion for Reconsideration and/or Rehearing incorporates the Motion for Clarification. In the Motion for Clarification, the Applicant seeks clarification of a condition contained in the Certificate of Site and Facility (Certificate) requiring the Applicant to file an interconnection agreement with the Committee prior to the commencement of construction. The Applicant's Motion for Reconsideration and/or Rehearing addresses the conditions pertaining to post-construction bird and bat population and mortality studies. In addressing the post-construction bird and bat population and mortality studies, the Applicant alleges that the Decision and Order are unreasonable, arbitrary, unlawful and an abuse of discretion. Specifically, the Applicant asserts the following arguments in support of its Motion: (1) the Subcommittee allegedly failed to consider and overlooked the 2009 Lempster post-construction fatality survey report and the Stantec bird and bat risk assessment; (2) the bird and bat population and mortality studies condition is not supported by scientific evidence, record evidence or agency recommendations; (3) the conditions imposed by the Subcommittee are excessive; (4) the conditions imposed by the Subcommittee are unprecedented; and, (5) the conditions are overly burdensome and unreasonably expensive.

On June 11, 2011, the Intervenors objected to the Applicant's Motion for Reconsideration and/or Rehearing, asserting that the motion was not filed in a timely manner. On June 16, 2011, Counsel for the Public filed an Objection to the Applicant's Contested Motion for Reconsideration and/or Rehearing. In his Objection, Counsel for the Public asserts that the

[1] On May 13, 2011, the Applicant filed a Contested Motion for Clarification asking the Subcommittee to issue an order stating that its Order dated May 6, 2011 does not require the Applicant to file an interconnection agreement prior to commencement of the construction of the Project. See, Contested Motion for Clarification. However, on June 16, 2011, the Applicant filed with the Subcommittee its Contested Motion for Reconsideration and/or Rehearing asking the Subcommittee to reconsider and/or rehear the portion of the Order that requires the Applicant to file an interconnection agreement prior to the commencement of the construction of the Facility as addressed in its Motion for Clarification. See, Applicant's Contested Motion for Reconsideration and/or Rehearing. Therefore, the Subcommittee has determined to treat the Motion for Clarification as a Motion for Rehearing and addresses Applicant's Motion for Clarification as incorporated in its Motion for Reconsideration and/or Rehearing.

conditions are supported by the evidence in the record and are necessary for the approval of the Application. Counsel for the Public further alleges that the Subcommittee is not required to base its conditions exclusively on the record, but is authorized to include any conditions the Subcommittee deems necessary. Counsel for the Public notes that the financial burden associated with the post-construction bird and bat studies does not render the Applicant financially incapable to construct and operate the Facility. Therefore, according to Counsel for the Public, rehearing and/or reconsideration of the Subcommittee's Decision is inappropriate.

1. Timing of the Applicant's Contested Motion for Rehearing and/or Reconsideration.

The Intervenors allege that the Applicant filed its motion 31 days after the Subcommittee's Decision and, therefore, such Motion should be denied as untimely.

Under R.S.A. 541:3, a Motion for Rehearing must be filed within 30 days of the Decision. The Decision in this docket was issued on May 6, 2011. The thirtieth day following the date of the Decision was June 5, 2011, a Sunday. The Motion was filed on Monday, June 6, 2011.

Under NEW HAMPSHIRE CODE OF ADMINISTRATIVE RULES, Site 202.08 (c), if the last day of the period allowed for filing falls on a Saturday, Sunday or legal holiday, then the time period should be extended to include the first business day following the Saturday, Sunday or legal holiday. In addition, in HIK Corp. v. Manchester, 103 N.H. 378, 381 (1961), the New Hampshire Supreme Court held that "when the terminal day of a time limit falls upon Sunday that day is to be excluded from the [time] computation." See also, Radziewicz v. Town of Hudson, 159 N.H. 313, 317 (2009). In addition, RSA 21:35, II provides: If a statute specifies a date for filing documents or paying fees and the specified date falls on a Saturday, Sunday or legal holiday, the document or fee shall be deemed timely filed if it is received by the next business day.

The Applicant filed its Motion for Reconsideration and/or Rehearing on June 6, which was the first business day following Sunday, June 5, 2011. Such filing was in compliance with the time limits set forth by RSA 541:3 (as interpreted per RSA 21:35, II) and in our administrative rules. Therefore, we find that the Applicant timely filed its Contested Motion for Reconsideration and/or Rehearing and deny the Intervenors' request to dismiss the Motion as untimely filed.

2. Condition Requiring the Submission of the Interconnection Agreement Prior to the Commencement of the Construction of the Project.

The Applicant asserts that the condition contained in the Subcommittee's Order and Certificate requiring the Applicant to file its interconnection agreement with the Subcommittee prior to the commencement of construction was not discussed in the Decision, or during deliberations by the members of the Subcommittee. The Applicant further alleges that the Subcommittee, in fact, unanimously rejected a condition "regarding the feasibility study," and erroneously included it in its Order. Motion for Clarification, ¶1. Therefore, the Applicant requests that the Subcommittee

reconsider its Order and find that the Applicant is not required to submit its interconnection agreement to the Subcommittee prior to the commencement of construction.

The Order and Certificate dated May 6, 2011, contains the following condition:

> Further Ordered that the Applicant shall continue to cooperate with the requirements of ISO New England and obtain all ISO approvals necessary to a final interconnection agreement for a gross unit rating up to 48 MW. Said interconnection agreement shall be filed with the Subcommittee prior to the commencement of construction.

A review of the record demonstrates that the Subcommittee discussed and considered the conditions requiring the Applicant to cooperate with the requirements of ISO New England and obtain all ISO approvals necessary to a final interconnection agreement. See, Tr., 4/11/2011, at 80-85. The Applicant does not assert that the condition requiring the Applicant to continue to cooperate with the requirements of ISO New England and obtain all ISO approvals was erroneously included by the Subcommittee in its Order. The Subcommittee finds that that condition requiring the Applicant to continue to cooperate with the requirements of ISO New England and obtain all ISO approvals is based on the record and was properly included in the Subcommittee's Order dated May 6, 2011.

The Decision does not contain a specific reference to the condition requiring the submission of the interconnection agreement to the Subcommittee prior to the commencement of the construction of the Project, nor did the Subcommittee discuss the pre-construction submission of the interconnection agreement to the Subcommittee during its deliberation. The inclusion of the condition in the Certificate appears to be a ministerial error. Therefore, the Subcommittee finds that good cause exists to grant the Applicant's request to clarify its Order and holds that the condition articulated in its order should have read as follows:

> Further Ordered that the Applicant shall continue to cooperate with the requirements of ISO New England and obtain all ISO approvals necessary to a final interconnection agreement for a gross unit rating up to 48 MW.

3. Conditions Requiring the Post-Construction Bird and Bat Mortality and Population Status.

The Applicant asserts that the Subcommittee should reconsider the conditions of the Decision and Order requiring the Applicant to conduct the post-construction bird and bat mortality and population studies. In support, the Applicant states the following reasons: (1) the Subcommittee failed to consider and overlooked the 2009 Lempster Post-Construction Fatality Survey Report and Stantec Bird and Bat Risk Assessment; (2) the conditions are not supported by scientific evidence, record evidence or agency recommendations; (3) the conditions are excessive; (4) the conditions are unprecedented; and (5) the conditions are unreasonably expensive.

a. 2009 Lempster Post-Construction Fatality Survey Report and Stantec Bird and Bat Risk Assessment.

The Applicant asserts that the Subcommittee's Decision to require the Applicant to conduct the post-construction bird and bat mortality and population studies should be reconsidered and/or reheard because the Subcommittee allegedly overlooked the 2009 Lempster Post-Construction Fatality Survey Report ("2009 Lempster Report") and the Stantec Bird and Bat Risk Assessment ("Stantec Risk Assessment").

i. 2009 Lempster Report

The Applicant asserts that due to the alleged failure to consider the 2009 Lempster Report, the Subcommittee "made erroneous assumptions regarding the usefulness and purposes of mortality surveys, i.e. it failed to acknowledge that those surveys can and do provide information regarding population level impacts." Applicant's Contested Motion for Reconsideration and/or Rehearing, ¶5. Furthermore, according to the Applicant, the examination of the 2009 Lempster Report would clearly demonstrate to the Subcommittee that "there is very little reason to suspect that impacts at the Groton project would be any different than at Lempster." Id. at ¶6.

A review of the record reveals that the 2009 Lempster Report and its results were discussed and considered by the Subcommittee on numerous occasions. For example, during the deliberations, Dr. Kent explicitly stated that "[p]ost-construction monitoring studies conducted at the Lempster Wind project in 2009 showed very low mortality for nocturnally migrating birds". Tr., 04/07/2011, Afternoon Session, at 27. Furthermore, the Subcommittee addressed the results of this Report as applied to raptor fatalities by specifically stating "[d]uring the first year of post-construction monitoring status at Lempster in 2009, no raptor fatalities were documented". Tr., 04/07/2001, Afternoon Session, at 29. Finally, as applied to the bat fatalities, the Subcommittee specifically acknowledged that the "[p]ost-construction studies conducted in 2009 at Lempster documented only one little brown bat fatality". Tr., 04-07-2011, Afternoon Session, at 30. The 2009 Lempster Report does not constitute new or previously overlooked evidence by the Subcommittee.

ii. Stantec Risk Assessment

The Applicant asserts that the Stantec Risk Assessment demonstrates that post-construction data from different sites can be used to form the basis of expert opinions regarding the degree and nature of the Project's anticipated impacts on birds and bats. Applicant's Contested Motion for Reconsideration and/or Rehearing, at ¶9. According to the Applicant, had the Subcommittee appropriately considered the Stantec Risk Assessment, it would have determined that data from different sites could be used to determine the impact of the Project on the environment and would not require the Applicant to conduct three years of post-construction bird and bat mortality and population studies.

The Subcommittee finds the Applicant's allegations that the Subcommittee failed to consider the Stantec Risk Assessment is without merit. A review of the record demonstrates that the Subcommittee specifically considered, addressed and discussed the Stantec Bird and Bat Risk Assessment. Following are examples of the instances where the Subcommittee addressed the Assessment and its results during its deliberation:

> [b]ird and bat risk assessment was prepared using the results of on-field surveys - - on-site surveys to . . . and a risk assessment sought to characterize the use of the project area and assess potential risks presented by the project to raptors, nocturnally migrating passerines, breeding birds and bats . . .

Tr., 04/07/2011, Afternoon Session at 27.

> The results of the bird and bat risk assessment prepared by the Applicant's consultants followed standardized weight-of-evidence approach . . . The results of the on-field surveys produced a low magnitude of potential impact to nocturnal migrants.

Tr., 04/07/2011, Afternoon Session at 28.

> The results of the bird and bat risk assessment predicted a low magnitude of potential impact to breeding birds.

Tr., 04/07/2011, Afternoon Session at 28.

> The results of the bird and bat risk assessment predict a low magnitude of potential impact to raptors.

Tr., 04/07/2011, Afternoon Session at 29.

> There's been a low documented peregrine falcon mortality at wind projects.

Tr., 04/07/2011, Afternoon Session at 29.

> The bird and bat risk assessment predicted a low magnitude of potential impact to raptors, including peregrine falcons.

Tr., 04/07/2011, Afternoon Session, at 30.

Furthermore, during examination of the Applicant's witness, Adam Gravel, the Subcommittee addressed the conclusions and recommendations contained in the Assessment by inquiring into the applicability of the post-construction mortality data from different wind sites to the Project. Tr., 11/04/2010, Morning Session, at 43-44. The Subcommittee explicitly asked Mr. Gravel whether he would recommend that the Subcommittee decide the issue of the

Project's effect on the environment by comparing it to the data received from the other wind projects. Tr., 11/04/2010, Morning Session, at 44. The Applicant's expert responded that the Subcommittee could determine this effect only by relying on the data contained in the Assessment. Tr., 11/04/2010, Morning Session, at 44. The Subcommittee also heard the testimony of Mr. Lloyd Evans concerning the Risk Assessment who stated that it contained insufficient data to conclude that the Project presents a low collision risk to birds and bats. Tr., 11/04/2010, Afternoon Session, at 65. Therefore, the Subcommittee finds that the record clearly demonstrates that the Subcommittee considered the Stantec Bird and Bat Risk Assessment, and scrutinized its conclusions and recommendations as applied to the Project.

The 2009 Lempster Report and Stantec Risk Assessment do not constitute "new" or different evidence warranting the rehearing or reconsideration of the Subcommittee's Order. Both exhibits were carefully considered by the Subcommittee, as was the competing testimony of Mr. Lloyd Evans. As a result, the Subcommittee denies the Motion for Rehearing based upon the fact that no new or different evidence that would change the Subcommittee's previous determination has been presented. O'Loughlin, 117 N.H. at 1004. The fact that the Applicant disagrees with the Subcommittee's conclusions does not constitute good reason for reconsideration or rehearing.

b. Record Evidence, Scientific Evidence, or Agency Recommendations

The Applicant argues that the Subcommittee's post-construction avian and bat conditions, as articulated in its Order and Decision, are unlawful, unreasonable, arbitrary, and an abuse of discretion because they allegedly are not based on the record, scientific evidence and/or agency recommendations. Specifically, the Applicant asserts that the conditions requiring the post-construction avian and bat mortality and population studies should be reconsidered and/or reheard for the following reasons: (1) there is no record evidence to support the type and extent of post-construction bird and bat studies required by the Subcommittee; (2) the conditions were developed, in part, in reliance on information that was not introduced in the record; specifically, the 2010 Lempster Post-Construction Fatality Survey; (3) the Subcommittee relied on draft federal guidelines documents which were not intended for public use; and (4) the conditions were based on assumptions that are not supported by scientific evidence, record evidence, or agency recommendations. We address each of the issues in turn.

The testimony and evidence in the record clearly demonstrated the need for the type and extent of post-construction studies required by the Subcommittee. The Subcommittee received the testimony of Dr. Trevor Lloyd-Evans, and testimony of the Applicant's expert, Adam Gravel, who agreed that pre-construction bird and bat studies are not indicative of the post-construction effect of the Project on local species and cannot be used to determine or estimate such effect. Tr., 11/03/2010, Morning Session, at 20; Tr., 11/04/2010, Morning Session, at 12; Ex. Buttolph 3, at 34. In addition, Mr. Lloyd-Evans, in his prefiled testimony, stated that he was "greatly concerned by the methods by which the Applicant will determine the importance of significance of mortality counts". Ex. PC 3. During the adjudicatory hearing, the Applicant's expert, Adam Gravel, was asked whether it is possible to determine the impact of the Project on the local population of birds and bats. Tr., 11/04/2010, Morning Session, at 46-47. In response, Mr. Gravel acknowledged that the bird and bat post-construction population surveys, if conducted,

would demonstrate the shift in species composition surrounding the Project and the mortality studies would show how many species are killed by the Project. Tr., 11/04/2010, Morning Session, at 46-48.

Accordingly, based on the testimony regarding the need for extensive post-construction studies and the Applicant's expert's assertion that mortality studies will demonstrate the number of species killed by the Project, while population studies will show the shift in their composition, the Subcommittee's conclusion that a combination of such studies represents a "very well thought out study design" and will demonstrate the actual impact of the Project on local birds and bats was reasonable and based on the record.

The fact that the Subcommittee relied on its members' understanding and knowledge of intricacies of statistical analyses does not warrant the reconsideration of its Decision. It is well settled that members of an adjudicatory body may base their conclusion upon their own knowledge, experience and observations in addition to expert testimony. See, Continental Paving, Inc. v. Town of Litchfield, 158 N.H. 570, 576 (2009) (determining the authority of the members of the Zoning Board of Adjustment). Subcommittee members are not barred from using their knowledge and common understanding of the issues, and are not obligated to disregard their knowledge and skills. The fact that the Subcommittee members use their knowledge and understanding of the issues in dispute, and the underlying science and data, does not render the Decision of the Subcommittee unreasonable, arbitrary, unlawful and an abuse of discretion.

The Subcommittee's decision to subject the Applicant to the post-construction survey conditions articulated in the Order and Decision was not based on facts contained in the 2010 Lempster Report. As discussed in Section 3 a, above, the Subcommittee's decision was based on testimony indicating that there is no correlation between pre-construction studies and post-construction mortality results. Therefore, the combination of mortality and population studies may demonstrate the actual effect of the Project on the environment.

The Applicant also asserts that the Subcommittee's Decision should be reconsidered because the Subcommittee considered draft federal guidance documents. It is the agency's province to weigh the evidence in the first instance. See, In Re Woodmansee, 150 N.H. 63, 68 (2003). The Subcommittee was aware that the policy guidance manuals from the United States Fish & Wildlife were not in their final form. Ex. PC 21, 22, 23, 24. These documents were identified as drafts and were referenced as such by the Subcommittee in its Decision. Decision, at 67. The fact that these drafts were not intended for the public use does not preclude reliance upon them by the Subcommittee, especially when the Subcommittee applies its independent scientific knowledge of the issues.

The Subcommittee denies the Applicant's request to rehear or reconsider the post-construction bird and bat mortality and population conditions. The Subcommittee finds that the record provides ample support for the Subcommittee's Decision and the Applicant has failed to provide new or different evidence that would change the Subcommittee's previous determination. The Applicant's request for reconsideration and/or rehearing regarding post-construction studies is denied.

c. Excessiveness, expensiveness, and uniqueness.

The Applicant asserts that the Subcommittee has never imposed such stringent post-construction bird and bat conditions on any other energy project it has certified and, therefore, such conditions are unreasonable and arbitrary. It further alleges that to comply with these conditions, it would have to spend between $1 million and $1.5 million. According to the Applicant, the implementation of this "burdensome" condition makes the Subcommittee's decision unjust and unreasonable.

Whether the Subcommittee has not required other energy facilities to conduct similar post-construction bird and bat studies does not, in itself, render the Subcommittee's decision unreasonable or arbitrary. In Appeal of Pub. Serv. Co. of N.H., 141 N.H. 13, 22 (1993) (citing and quoting Good Samaritan Hospital v. Shalala, 508 U.S. 402, 417 (1993)), the Court specifically stated that the agency's historic interpretation of public good "does not preclude it from adopting a new paradigm based on the change in concepts of what the public good requires." Id. During the deliberation, the Subcommittee acknowledged that in order to foster the declaration of purpose articulated in R.S.A. 162-H, it should learn from what had been done in the Lempster Project. Tr., 04/07/2011, Afternoon Session at 66. Specifically, the Subcommittee acknowledged that the statute and public policy require the Subcommittee to determine the actual effect of the Project on the natural environment and it would require the analysis of mortality surveys conducted in conjunction with other surveys. Tr., 04/07/2011, Afternoon Session at 66. This decision was not arbitrary or unreasonable, but, instead, was deeply rooted in the Subcommittee's determination that the protection of the natural environment requires analysis of the actual effect of the Project on birds and bats in the area and accurate estimation of the significance of such effect. Therefore, whether the Subcommittee previously applied the same conditions to any other renewable energy facility does not render the Subcommittee's decision unreasonable and/or arbitrary.

The Applicant's estimates of the cost of compliance do not constitute new facts, not previously considered by the Subcommittee, and do not warrant rehearing and/or reconsideration of the Subcommittee's Decision. The Subcommittee thoroughly considered the Applicant's financial capacity to construct and operate the Project in compliance with the Certificate. Decision at 34. While the studies required by the Certificate may be costly, the Subcommittee had sufficient reasons, as set forth in the record, to require them.

The Subcommittee denies the Applicant's request to rehear and/or reconsider the condition of the Subcommittee's Order and Decision and finds that the Applicant did not present any new or previously unconsidered evidence to demonstrate that the condition requiring post-construction bird and bat mortality and population studies is unreasonable or arbitrary.

B. Buttolph/Lewis/Spring Group of Intervenors Motion for Rehearing.

The Intervenors filed their Motion for Rehearing with the Subcommittee on June 5, 2011. The Intervenors ask the Subcommittee to reconsider its Decision, stating that the rehearing is warranted for the following reasons: (1) the Subcommittee failed to "strike a balance" between

the environment and the need for new energy facilities in New Hampshire; (2) the Subcommittee erroneously interpreted R.S.A. 162-H; (3) the Subcommittee violated due process by allowing the Applicant to submit its response to the Intervenors' Final Brief without giving the Intervenors an opportunity to be heard; (4) the Subcommittee made its Decision while it was "unclear of its own powers"; (5) the Subcommittee allegedly failed to properly weigh evidence and misstated facts; and (6) the Subcommittee allegedly inappropriately compared the Project to other wind energy facilities. The Applicant objected to the Intervenors' Motion for Rehearing on June 15, 2011. The Applicant urges the Subcommittee to deny the Intervenors' Motion for Rehearing, stating that the motion failed to specify or reference challenged provisions of the Decision or Order as required by R.S.A. 541:4. In addition, the Applicant asserts that due process was not violated where its response to the Intervenors' final brief did not contain new testimony, but simply provided an explanation of the Applicant's position.

1. Balance Requirements and Consideration of the Impact of the Facility Pursuant to RSA 162-H:16

The Intervenors argue that the Subcommittee improperly balanced the need for new energy facilities against the negative impacts to the environment in this case. This argument was articulated by the Intervenors in their Final Brief and rejected by the Subcommittee in the Decision. See, Decision, p. 37. In its Decision, the Subcommittee found that the Intervenors' balancing argument mistakenly conflates the general language of the declaration of purpose, R.S.A. 162-H:1, with the specific findings required under R.S.A. 162-H:16. In essence, the Intervenors argued, in their brief, and again in their Motion for Rehearing, that the Subcommittee should superimpose a generic balancing test in addition to considering the requirements of R.S.A. 162-H:16, IV. The Intervenor's Motion for Rehearing does not contain, in this regard, any new fact or evidence, nor does it indicate any overlooked facts or evidence in the record which would demonstrate that the Decision was unjust or unreasonable.

2. Due Process

The Intervenors assert that they were denied due process by the Subcommittee when the Subcommittee allowed the Applicant to submit a response to the Intervenors' Final Brief without giving the opportunity to the Intervenors to address the facts contained in that response.

Under the law, "where issues of fact are presented for resolution by an administrative agency, due process requires a meaningful opportunity to be heard". Appeal of Londonderry Neighborhood Coalition, 145 N.H. 201, 205 (2000). A review of the record demonstrates that the Applicant's response to the Intervenor's Brief does not contain any new facts upon which the Intervenors were denied a meaningful opportunity to be heard.

Fundamentally, the Intervenors mistake argument for testimony. Nevertheless, we address each of the Applicant's responses, in turn, as disputed in the Intervenors' Motion.

In response to the Intervenors' request number one, the Applicant stated the following:

> There is not credible support in the record for the proposition that this Project will effect property values within a two mile radius, or even at all. Such condition is unprecedented – neither of the other two wind energy facilities that have been certified by the Site Evaluation Committee is subject to this type of condition – and is arguably beyond the Committee's authority to order. Lastly, the condition is unworkable as it raises more questions than it answers, and creates significant enforcement/implementation responsibilities for the Subcommittee.

Applicant's Response to Conditions Proposed by Counsel for the Public and Intervenors, at 1-2. This response contains a conclusion that the Property Value Guarantee is unprecedented and has not been required in any other case before the Committee. The statement does not involve any new facts. It simply characterizes the record. By stating that the condition is "unworkable" the Applicant simply reiterated its position, which was already contested by the Intervenors' and other parties. The Applicant's response did not admit any more than an argument as to why the proposed condition should be rejected. The response did not trigger the need for further process.

Request 12D:

> It is unnecessary for the SEC to review or approve the Project's plans for dealing with issues related to oversized vehicles. Oversized vehicles are strictly governed by the New Hampshire Department of Transportation ("NH DOT") permits, and are accompanied by police escort vehicles. *See* Exhibit App. 46. Police at the scene need discretion to address any issues that arise. The Applicant will adhere to the detailed requirements of NH DOT oversized vehicle permits. *Id.*

Applicant's Response to Conditions Proposed by Counsel for the Public and Intervenors, at 7.

This response does not contain any new facts that were not available to the Intervenors during the course of the adjudicatory proceeding. In fact, Exhibit 46 was received on November 10, 2010 pursuant to a record request from the Committee. The Intervenors also referenced the exhibit in their post-hearing brief. See, Intervenors Brief at 16. There was no denial of due process.

Request 12E:

> The proposed condition is unwarranted, unjustified, and unsupported by any evidence, and there is no precedent for such a condition.

Applicant's Response to Conditions Proposed by Counsel for the Public and Intervenors, at 7. The Applicant's response to this request merely contains legal conclusions and does not contain any new statements of fact that require additional process.

Request 12F:

> . . . The Rumney Board of Selectmen requested and obtained provisions in its Agreement with the Applicant regarding public roads, including specific provisions regarding Groton Hollow Road. *See* Exhibit App. 7, Section 7. . . . The Rumney Agreement . . . was the result of extensive public consultations with the Town of Rumney Board of Selectmen . . . ."

Applicant's Response to Conditions Proposed by Counsel for the Public and Intervenors, at 7.

The fact that the Agreement with the Town of Rumney was reached as a result of extensive public consultations with the Town of Rumney Board of Selectmen does not contain a new or previously unaddressed statement of fact. The Subcommittee and all parties to this proceeding were privy to the fact that the Agreement with the Town of Rumney was developed as a result of negotiations with the Rumney Board of Selectmen and were given the opportunity to cross-examine about the extent of such negotiations. The Applicant's characterization of such negotiations as "extensive" does not introduce new statements of fact requiring additional process.

The Intervenors' claim that the Subcommittee permitted "new testimony" from the Applicant without providing an opportunity for cross-examination or dispute is meritless. In each of the instances cited by the Intervenors, the facts were part of the record, had been subjected to cross-examination by the other parties and by the Subcommittee, and were available for the Intervenors to dispute before the Subcommittee engaged in deliberation. The Applicant's responses to the proposed conditions of the Intervenors did not include new facts or evidence and were clearly nothing more than responsive arguments. Therefore, that portion of the Intervenors' Motion for Rehearing alleging a failure of due process is denied.

3. Awareness of the Powers of the Subcommittee by the Subcommittees' Members

The Intervenors argue that their Motion for Rehearing should be granted because the Subcommittee demonstrated that it was unclear of its powers. Throughout the proceeding in this docket, the Subcommittee had the assistance of Counsel for the Subcommittee. It is appropriate for Counsel to address legal concerns and questions that members of the Subcommittee might have. A question by a single member of the Subcommittee regarding a legal issue is not grounds for rehearing or reconsideration. Moreover, the denial of the intervenors request for a property value guarantee condition was not based upon legal concerns. The Subcommittee rejected the condition on the basis that it would be impractical to implement; see, Decision, p. 42; and that the evidence did not establish that any effect on property values would unduly interfere with the orderly development of the region. See, generally, Decision, pp. 37-42.

4. Weight of the Evidence and Misstatements of Fact

The Applicant further asserts that the Subcommittee gave improper weight to the evidence and made misstatements of fact. As previously articulated in this Order, the weight to be given to the testimony and evidence is solely within the Subcommittee's province. See, In Re Woodmansee, 150 N.H. at 68. During deliberation, the Subcommittee considered the weight it would give to the LBNL Study and to testimony of Mr. McCann. The fact that the Subcommittee attributed greater weight to the comprehensive analysis contained in the LBNL Study is not a basis for reconsideration or rehearing.

Additionally, the Applicant's assertion that the Subcommittee misstated facts is without merit. According to the Applicant, the Subcommittee mistakenly indicated that the Applicant had received the support of the Grafton County Commissioners from District 3, Martha P. Richards. The Intervenors point out that Ms. Richards was no longer the District 3 Grafton County Commissioner and that she had been replaced by Omer Ahern, Jr. At the time that the Subcommittee received Ms. Richards' letter, she was in office and the letter was written in her official capacity. While it is true that the Subcommittee received a letter from Mr. Ahern, after he became County Commissioner opposing the Project, that letter did not, in any way, identify Mr. Ahern as a County Commissioner nor does it appear to be written in his official capacity as a County Commissioner.

5. Consideration of Prior Decisions

The Applicant's final assertion is that the Decision should be reheard because the Subcommittee "inappropriately" considered its previous decisions. The Subcommittee is obligated to fully consider evidence and testimony introduced in the record and base its decision on the record. The conditions previously articulated by the Subcommittee for other renewable energy facilities in New Hampshire were submitted by the parties for the Subcommittee's consideration as a part of the record in these proceedings. The Subcommittee was obligated to give due consideration to these decision and conditions. In addition, the Subcommittee, as an adjudicatory body, has a right to consider precedent for guidance. Therefore, the consideration of the previous orders and decisions by the Subcommittee does not render its Decision unreasonable or unjust. For the reasons articulated above, the Intervenors' Motion for Rehearing is denied.

IV. CONCLUSION

Based upon the foregoing, it is hereby ordered that the Applicant's Motion for Clarification is **GRANTED** and the Order and Certificate in this docket shall be amended to delete the requirement that an interconnection agreement be filed prior to the commencement of construction. Instead, that ordering paragraph shall be amended to: "Further Ordered that the Applicant shall continue to cooperate with the requirements of ISO New England and obtain all ISO approvals necessary to a final interconnection agreement for a gross unit rating up to 48 MW.

Further Ordered that the Applicant's Motion for Reconsideration and/or Rehearing is **DENIED** in all respects except for the clarification set forth above; and it is,

Further Ordered that, the Intervenors' Motion for Rehearing is **DENIED**.

By Order of the Site Evaluation Committee this 8th day of August, 2011.

Thomas B. Getz, Chairman
Public Utilities Commission

Stephen Perry, Inland Fisheries Division Chief
Fish and Game Department

Robert Scott, Director
Department of Environmental Services

Eric Steltzer, Energy Policy Analyst
Office of Energy and Planning

Brook Dupee, Senior Health Policy Analyst
Department of Health and Human Services

Donald Kent, Designee
Dept. of Resources & Economic Dev.
Development

Richard Boisvert, State Archeologist
NH Division of Historical Resources

Charles Hood, Administrator
Department of Transportation

Michael Harrington, State Engineer
Public Utilities Commission