

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

**Docket Number 2011-02
Petition for Jurisdiction Over Renewable Energy Facility
Proposed by Antrim Wind Energy LLC**

May 6, 2011

**ORDER ON MOTIONS TO INTERVENE AND
FURTHER PROCEDURAL ORDER**

I. Background

On February 10, 2011, the Site Evaluation Committee (Committee) received a letter from Gordon Webber, Chairman of the Board of Selectmen of the Town of Antrim, Hillsborough County, New Hampshire, requesting, on behalf of the Selectmen, that the Committee take jurisdiction of “the review, approval, monitoring, and enforcement of compliance in the planning, siting, construction, and operation of a renewable energy facility proposed to be developed by Antrim Wind Energy, LLC and located in the Town of Antrim.” On March 11, 2011, Antrim Wind Energy, LLC (AWE), filed a Petition for Jurisdiction Over Renewable Energy Facility Proposed by Antrim Wind Energy LLC (Petition).

AWE proposes to site, construct, and operate wind turbine facilities (Facility or Project) to be located in the northwest portion of the Town of Antrim from the east summit of Tuttle Hill to the flank of Willard Mountain to the west. AWE asserts that the Project will be located on a mostly contiguous ridgeline running east northeast to west southwest, and nearly parallel to New Hampshire Route 9, which is approximately 3/4 of a mile to the north. AWE also asserts that the Facility may consist of 10 turbines in the 2 MW size class. The Facility is expected to have an installed nameplate capacity of greater than 5 MW but less than 30 MW. The Petition also asserts that AWE expects to file a full application for a Certificate of Site and Facility prior to the end of 2011.

On March 21, 2011, an Order and Notice of Public Meeting was issued scheduling a public meeting of the Site Evaluation Committee on April 22, 2011, in order to consider the requests that the Committee take jurisdiction over the Project. On April 15, 2011, the Committee received additional correspondence from Gordon Webber along with a Petition signed by more than 100 registered voters from Antrim (Webber Petition) requesting that the Committee assert jurisdiction over the Project.

On April 20, 2011, the Attorney General appointed Senior Assistant Attorney General Peter C.L. Roth as Counsel for the Public. On that same date Counsel for the Public filed a reply to the Petition urging the Committee to deny the Petition. Counsel for the Public asserted that the matter was not yet ripe for adjudication because an application for a Certificate of Site and Facility had not been filed and that additional process may occur before the various town Committees in Antrim.

On April 22, 2011, AWE filed a response to Counsel for the Public's reply. AWE objected to the position taken by Counsel for the Public and further complained that the appointment of Counsel for the Public was premature. The Applicant also alleged that Counsel for the Public had overstepped the bounds of his permitted representation of the public. AWE requested that Counsel for the Public's reply be stricken from the record and by implication suggested that Counsel for the Public should not be permitted to participate in the pending proceedings. Counsel for the Public, with the consent of the Committee, was allowed additional time to respond. Counsel for the Public responded on May 2, 2011, objecting to AWE's request to strike.

On April 22, 2011, the Petition was considered at a public meeting of the Committee. Before commencement of the public meeting, the Committee received nineteen motions to intervene. In addition the Committee received several letters in support of and opposed to the Petition. Further, the Committee received a separate petition signed by more than 100 registered voters sponsored by Mary Allen, opposing the Petition for Jurisdiction (Allen Petition)¹. At the public meeting, AWE provided an overview of the Petition and the Project as well its efforts before various committees in the Town of Antrim. The Committee also heard from the Town of Antrim through its present Chairman of the Board of Selectman, Michael Genest². The Committee also heard from Gordon Webber, a former selectman and sponsor of the Webber Petition. At the public meeting, the Committee heard as well from each person seeking to intervene and took all of the intervention motions under advisement.

¹ The Webber Petition asks the Committee to assert jurisdiction and is statutorily recognized under RSA 162-H: 2, XII. However, the statute makes no provision for recognition of a petition against jurisdiction. Therefore, the Allen petition is considered as public comment on the matter before the Committee.

² Michael Genest apparently assumed the role of chairman of the board of selectmen in March 2011. The Committee understands that Mr. Webber no longer serves on the board of selectmen.

II. Motions to Intervene

A. Standard for Intervention

The New Hampshire Administrative Procedure Act provides when an administrative agency must allow intervention. See, RSA 541-A: 32, I. The statute also sets forth circumstances under which an administrative agency may allow intervention, but is not required to do so. See, RSA 541-A:32, II.

RSA 541-A:32, I, requires that a petition for intervention be granted if:

- (a) The petition is submitted in writing to the presiding officer, with copies mailed to all parties named in the presiding officer's notice of the hearing, at least 3 days before the hearing;
- (b) The petition states facts demonstrating that the petitioner's rights, duties, immunities or other substantial interests may be affected by the proceeding or that the AWE qualifies as an intervener under any provision of the law; and
- (c) The presiding officer determines that the interests of justice and the orderly and prompt conduct of the proceedings would not be impaired by allowing the intervention.

RSA 541-A:32, II permits the presiding officer to allow intervention "at any time upon determining that such intervention would be in the interests of justice and would not impair the orderly and prompt conduct of the proceedings."

Similarly, New Hampshire Code of Administrative Rules, Site 202.11, requires that a petition to intervene be granted if:

- (1) The petition is submitted in writing to the presiding officer, with copies mailed to all parties named in the presiding officer's order of notice of the hearing, at least 3 days before the hearing;
- (2) The petition states facts demonstrating that the AWE's rights, duties, privileges, immunities or other substantial interests might be affected by the proceeding or that the AWE qualifies as an intervenor under any provision of law; and,
- (3) The presiding officer determines that the interests of justice and the orderly and prompt conduct of the proceedings would not be impaired by allowing the intervention.

The rules further provide that the presiding officer shall grant one or more late-filed petitions to intervene upon determining that such intervention would be in the interests of justice and would not impair the orderly and prompt conduct of the hearings.

The Administrative Procedure Act and the Committee's procedural rules thus provide that intervention is mandatory in those cases where the party can establish that it has a right, duty, privilege, immunity or other substantial interest that may be affected by the determination of the issues in the proceeding. The statute and the rule also provide for permissive intervention in those cases where the presiding officer determines that intervention is in the interests of justice and does not interfere with the prompt and orderly conduct of the proceeding.

Importantly, the Administrative Procedure Act and our procedural rules also allow the presiding officer to place limits on an intervenor's participation. See, RSA 541-A:32, III and N.H. Code of Administrative Rules, Site 202.11(d). The presiding officer may limit the issues pertaining to a particular intervenor, limit the procedures in which a particular intervenor may participate, or combine intervenors and other parties for the purposes of the proceeding so long as the limitations placed on intervenors do not prevent the intervenor from protecting an interest that formed the basis of intervention.

B. Analysis of Motions to Intervene

The Committee has received 19 motions to intervene. The motions to intervene are addressed by grouping potential intervenors by the similarity of their claims.

1. Persons Owning Abutting Property

The Committee received motions to intervene from Spencer Garrett, Mark and Brenda Schaefer, and Janice D. Longgood. Each of these individuals asserts that they own property that abuts the proposed project. Ownership of abutting property is a type of direct interest that qualifies a person to be an intervenor under RSA 541-A: 32 and NEW HAMPSHIRE CODE OF ADMINISTRATIVE REGULATIONS, Site 202.11. Therefore, Mr. Garrett, Mr. and Mrs. Schaeffer and Ms. Longgood shall be permitted to intervene. Based on their motions to intervene, it appears that Mr. Garrett, Mr. and Mrs. Schaeffer, and Ms. Longgood all oppose the petition for jurisdiction. RSA 541-A: 32, III specifically permits the presiding officer to impose conditions on an intervenor's participation in the proceedings. Among the ways in which the presiding officer may limit intervention is by requiring two or more intervenors to combine their presentation of evidence and argument, cross-examination and other participation in the proceedings. See, RSA 541-A:32, III (c), NEW HAMPSHIRE CODE OF ADMINISTRATIVE REGULATIONS, Site 202.11(d)(3). In this case it appears that Mr. Garrett, Mr. and Mrs. Schaeffer, and Ms. Longgood, all share a common interest and viewpoint regarding the project, therefore, in order to

advance the orderly prompt and disposition of these proceedings, Mr. Garrett, Mr. and Mrs. Schaeffer and Ms. Longgood shall be required to combine their presentation of evidence, argument, cross-examination and other participation in the proceedings. Therefore, each is granted intervenor status but they are hereby directed to combine their presentation of witnesses, argument, cross-examination, and other participation in the proceedings. A spokesperson should be designated for this group.

2. Non-Abutting Property Owners

The Committee also received motions to intervene from the following individuals: Robert L. Edwards, Brian Biehl and Jeanmarie White, Barbara Gard, Mary Allen, James Hankard, Samuel and Michelle Apkarian, Keith and Julie Klinger, Elsa Voelker, Robert Cleland, Annie Law, and Richard and Loranne Carey Block. Each of these individuals represents that they own property that does not abut the project area but is in close proximity. Many of these individuals assert that they live within 1 to 2 miles of the project area or that they live in the "North Branch" neighborhood of Antrim. Some of these individuals are intervenors in litigation in Superior Court concerning the construction of meteorological towers on the project property. AWE takes no position with respect to whether these non-abutting property owners should be granted intervention status.

It is clear that the Project has generated substantial interest in the town of Antrim. It is also clear that merely residing in Antrim does not create a sufficient interest to justify participation as an intervenor in these proceedings. Nonetheless, each of the non-abutting property owners who have filed a motion to intervene has established that they live sufficiently close to the Project to establish an interest in the outcome of this proceeding. They will, therefore, be granted intervention status. However, pursuant to RSA 541-a :32, III, and NEW HAMPSHIRE CODE OF ADMINISTRATIVE REGULATIONS, Site 202.11(d)(3) their participation will be combined for the purpose of the presentation of witnesses, argument, cross-examination and other participation in this proceeding. The group shall designate a spokesperson that will coordinate presentation of witnesses, argument, cross-examination and other participation in the proceeding.

3. The Audubon Society of New Hampshire and The Harris Center for Conservation Education

The Audubon Society of New Hampshire (ASNH) and Harris Center for Conservation Education (HCCEE) are both conservation organizations that assert a substantial interest in the outcome of this matter because each of the organizations owns property that either abuts the project or is in close proximity to the project. AWE takes no position with respect to the motions to intervene filed by ASNH and HCCEE.

ASNH owns abutting property that consists of a 1650 acre wildlife sanctuary. In addition, ASNH controls conservation easements that protect an additional 1000 acres of land abutting wildlife sanctuary.

HCCEE is an organization that, among other things, operates a conservation land trust. Although not a direct abutter of the project, HCCEE owns more than 1950 acres of land within a 3 mile radius of the proposed project. HCCEE points out that all of its land is managed, primarily, for wildlife habitat and is open to the public for low-impact recreation and educational purposes. HCCEE also points out that it owns additional lands throughout Antrim and in eight surrounding towns, which are held for the same purposes.

Both ASNH and HCCEE assert that they have not reached a conclusion as to whether they will support or oppose the petition for jurisdiction. Each of these conservation organizations satisfied the requirements of RSA 541-A: 32 and New Hampshire Code of Administrative Regulations, Site 202.11, and have demonstrated that they maintain a substantial interest in the outcome of this proceeding, justifying their participation as intervenors.

4. The Antrim Planning Board

The Antrim Planning Board (APB) has moved to intervene. Its motion to intervene is opposed by the Board of Selectmen for the Town of Antrim (ABOS). APB asserts that it is the statutory body having principal responsibility for creation and implementation of land-use planning regulations in Antrim. As such, APB claims that it has direct interest in the outcome of this matter. Relying on Hooksett Conservation Commission v. Hooksett Zoning Board of Adjustment, 149 NH 63 (2003) ABOS asserts that APB is not lawfully authorized to appear as an intervenor in this matter because “the board of selectmen is the body tasked with managing the prudential affairs of the town and is the local governing body having the authority to act on behalf of the town.” AWE takes no position on APB's motion to intervene.

In Hooksett, the Supreme Court had the occasion to interpret whether a town conservation commission had standing to appeal a decision of the zoning board to the superior court. The Supreme Court first looked to the plain meaning of the zoning appeal statute, RSA 677:4, and determined that the statute did not adequately define who was permitted to appeal and thereupon undertook an analysis of the legislative history. Finding the legislative history itself to be ambiguous, the Court examined the “policy sought to be advanced by the statutory scheme.” Ultimately, the Court held that

the Conservation Committee did not have standing to bring the appeal because appeals by multiple local boards would interfere with “the prompt and orderly review of land use applications,” “cause considerable delays,” and require public funds to support both sides of an issue thereby causing “political wrangling” among governmental units. See, Hooksett at p. 953. However, the Supreme Court’s analysis in the Hooksett case did not deal with the relationship between town boards as a general matter. The Hooksett case concerned relationships between town boards under a specific statute that governed appeals from a zoning board decision. Consideration of RSA 162-H does not require the same result.

RSA 162-H: 16 identifies the core issues that the Committee must resolve when an application for a certificate of site and facility has been filed. The core issues include whether a proposed project will unduly interfere “with the orderly development of the region with due consideration having been given to the views of municipal and regional planning commissions and municipal governing bodies.” See RSA 162-H: 16, IV (b). The statute specifically requires the Committee to give due consideration to both municipal planning commissions and municipal governing bodies. Nothing in RSA 162-H: 16, IV (b) or any other portion of the statute indicates a preference between municipal planning commissions and municipal governing bodies. In this respect, RSA 162-H, is considerably different from RSA 677. The holding in Hooksett Conservation Commission v. Hooksett Zoning Board of Adjustment is tied to the requirements of RSA 677. The plain language of our enabling statute, RSA 162-H: 16, IV (b), envisions the Committee considering the views of both local planning boards and municipal governing bodies. Since APB is the municipal planning commission, it has a substantial interest in the outcome of this matter and therefore its petition to intervene shall be granted.

5. Gordon Webber and Marie Harriman

Gordon Webber is a former selectman for the Town of Antrim. He was the Chairman of the Board of Selectmen, who signed the original letter requesting that the Committee assert jurisdiction over the Project. While Mr. Webber is no longer on the Board of Selectmen, he coordinated and sponsored a petition signed by more than 100 registered voters from the Town of Antrim requesting that the Committee assert jurisdiction. The filing of such a petition is one of the predicate acts that may warrant consideration of jurisdiction by the Committee. See, RSA 162-H: 2, XII. Therefore, the Webber petitioners are akin to a party to the proceeding because it is their petition that, in part, leads to consideration of the issue by the Committee. Therefore, it is not necessary for Mr. Webber to file a motion to intervene because he is already a representative of a party by virtue of the petition. Moreover, even in the absence of the Webber Petition, Mr. Webber has demonstrated a substantial interest in the outcome of

the proceedings by virtue of his former service on the Board of Selectmen and the fact that he is also a signatory to the original letter from the Board of Selectmen.

Marie Harriman shares a similar view with Mr. Webber and specifically indicated to the Committee that she does not object to being considered part of Mr. Webber's petition group. Therefore, to the extent that Ms. Harriman's motion to intervene seeks individual intervention it is denied. Nonetheless, she is free to affix her name to the Webber Petition and thereby express her interest in these proceedings. It should be noted that Mr. Webber will be the sole spokesperson for the statutory petition signed by more than 100 registered voters from the Town of Antrim.³

III. Counsel for the Public

On April 19, 2011, the Chairman of the Committee advised the Attorney General of the pending petition for jurisdiction and, subject to his discretion, invited the participation of Counsel for the Public in these proceedings. On April 20, 2011, the Attorney General appointed Senior Assistant Attorney General Peter Roth as Counsel for the Public. On April 20, 2011, Counsel for the Public filed a response to AWE's Petition, asserting that the matter was not yet ripe for determination and therefore urging the Committee to deny petition for jurisdiction.

On April 22, 2011, AWE filed a response to Counsel for the Public and requested the Committee to strike Counsel for the Public's response. AWE claims that Counsel for the Public was prematurely appointed and therefore his response to the Petition should be stricken from the record. AWE suggests that the appointment of Counsel for the Public is not ripe until such time as the Attorney General has received notification that an application for a certificate has been filed with the Committee in accordance with RSA 162-H: 7. AWE also asserts that even if Counsel for the Public is properly appointed he is not statutorily authorized to provide opinions or take a position on the question of jurisdiction. AWE suggests that the role of Counsel for Public pursuant to RSA 162-H:9 is limited to representing "the public in seeking to protect the quality of the environment and seeking to ensure an adequate supply of energy." Counsel for the Public has replied to AWE's response, asserting that AWE's response is inconsistent with SEC rules because it is not in proper form and has not been filed as a formal motion. Counsel for the Public also asserts that RSA 162-H does not prohibit the

³ The Committee notes that it has also received a petition signed by more than 100 registered voters of the town of interim urging the committee not to assert jurisdiction. RSA 162-H makes no provision for the filing of such a petition. The petition against jurisdiction will be included in the Committee's docket as public comment but does not share the statutory standing granted to a petition to assert jurisdiction.

participation of Counsel for the Public in the absence of an application for a certificate of site and facility.

While RSA 162-H indicates that Counsel for the Public shall be appointed upon notification that an application for a certificate of site and facility has been filed, there is nothing in the statute that prohibits the participation of Counsel for the Public in the absence of an application. Indeed, it is important that Counsel for the Public be involved in proceedings before the Committee as early as possible so that the public's interest can be represented at every stage of the proceedings. Therefore, AWE's request to strike the response of Counsel for the Public is denied. Counsel for the Public shall participate in this docket with all the rights, privileges and obligations of a party to the proceeding.

IV. Procedural Schedule

At the conclusion of the meeting on April 22, 2011, Counsel for the Committee conducted an informal technical session/scheduling conference with all of the aforementioned intervenors who were present at the time of the meeting. Counsel's Report of Prehearing Conference is attached hereto and is hereby adopted. The procedural schedule contained within the Report of Prehearing Conference is hereby approved and shall be the Procedural Order for this docket. The May 27, 2011 Technical Session and the June 1, 2011 Hearing will be held at the offices of the New Hampshire Public Utilities Commission, 21 South Fruit Street, Suite 10, Concord, New Hampshire beginning at 10:00 a.m.

Based on the foregoing, it is hereby

Ordered, that the procedural schedule contained in the attached Report of Prehearing Conference is approved and shall be the procedural schedule in this docket; and it is

Further ordered, that the motion to intervene filed by the Antrim Planning Board is granted; and it is

Further ordered, that the motions to intervene filed by the Audubon Society of New Hampshire and Harris Center for Conservation Education are granted; and it is

Further ordered, that the motions to intervene filed by Spencer Garrett, Mark and Brenda Schaefer, and Janice D Longgood are granted and that these intervenors shall be consolidated for the purpose of presentation of evidence, argument, cross-

examination, and all other participation in this docket. They shall designate a spokesperson who shall communicate with the Committee and other parties; and it is

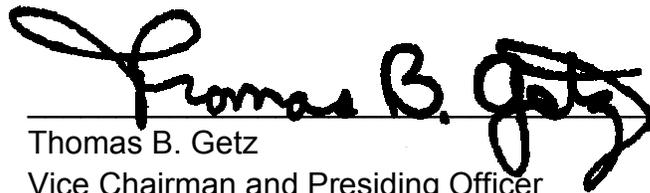
Further ordered, that the motions to intervene filed by Robert L. Edwards, Brian Biehl and Jeanmarie White, Barbara Gard, Mary Allen, James Hankard, Samuel and Michelle Apkarian, Keith and Julie Klinger, Elsa Voelker, Robert Cleland, Annie Law and Richard and Loranne Carey Block are all granted. These intervenors shall be combined for the purposes of presentation of evidence, argument, cross-examination and for all other participation in this docket. These intervenors shall designate a spokesperson who shall communicate with the Committee and other parties; and it is

Further ordered, that the motion to intervene filed by Gordon Webber is moot as Mr. Webber will participate as a party in this matter by virtue of his statutorily filed petition containing the signatures of more than 100 registered voters from the Town of Antrim. Mr. Webber shall be the spokesperson for the petitioning group. Marie J. Harriman shall be treated as a signatory to the Webber Petition; and it is

Further ordered, that the Town of Antrim shall participate as a party in this docket by virtue of its petition filed by its Board of Selectmen seeking jurisdiction of the Committee; and it is

Further ordered, that AWE's request to strike the response of Counsel for the Public is denied and Counsel for the Public may continue to participate in this docket in order to protect the interests of public.

So Ordered this sixth day of May, 2011 by the Site Evaluation Committee.

A handwritten signature in black ink that reads "Thomas B. Getz". The signature is written in a cursive, flowing style with a large initial 'T' and 'G'.

Thomas B. Getz
Vice Chairman and Presiding Officer
New Hampshire Site Evaluation Committee