

**STATE OF NEW HAMPSHIRE  
SITE EVALUATION COMMITTEE**

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

**August 10, 2011**

**JURISDICTIONAL ORDER**

**I. THE PETITION FOR JURISDICTION**

On February 7, 2011, Gordon Webber, then Chairman of the Board of Selectmen of the Town of Antrim, New Hampshire, filed a letter with the Site Evaluation Committee (“Committee”) requesting 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.” See, Letter from Gordon Webber dated February 7, 2011 (Board of Selectmen’s Petition). By letter dated April 20, 2011, the Board of Selectmen reaffirmed its position and, once again, requested the Committee to assume jurisdiction over the proposed development. See, Letter from Michael Genest dated April 20, 2011.<sup>1</sup>

On March 11, 2011, Antrim Wind Energy, LLC (“AWE”) filed a Petition for Jurisdiction Over Renewable Energy Facility Proposed by Antrim Wind Energy LLC (“AWE’s Petition”), requesting the Committee to assert jurisdiction over a proposed wind energy project proposed to be located in Antrim, New Hampshire (“Project” or “Facility”). See, Ex. AWE 1, ¶6.

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<sup>1</sup> Mr. Webber no longer serves on the Board of Selectmen of the Town of Antrim. Mr. Michael Genest assumed the role of Chairman of the Board of Selectmen in March, 2011.

On April 15, 2011, the Committee received a petition signed by more than one hundred registered Antrim voters requesting the Committee to assert jurisdiction over the Project. The petition was presented to the Committee and sponsored by Gordon Webber (“Webber Petition”.)

AWE is a Delaware limited liability company that was formed to develop, build, own and operate the Project. See, Ex. App. 1, ¶1. AWE has two members: (i) Eolian Antrim, Inc. (“Eolian”) and (ii) Westerly Antrim, Inc. (“Westerly Antrim”). Eolian, in turn, is owned by Eolian Energy, LLC, and Westerly Antrim is owned by Westerly Wind, LLC. See, Ex. App. 1, ¶1. In its Petition, AWE asserts that between the two entities, Eolian Energy, LLC and Westerly Wind, LLC and their principals, have significant experience in developing, building and operating wind energy facilities and other types of energy and real estate development of the same magnitude as the Project. See, Ex. AWE 1, ¶1.

The Facility is proposed to be located in the northwest portion of the Town of Antrim and oriented from the east summit of Tuttle Hill to the flank of Willard Mountain to the west. See, Ex. AWE 1, ¶4. 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. See, Ex. AWE 1, ¶4. AWE has already leased 2,000 acres from landowners in order to construct the Facility. See, Ex. AWE 1, ¶4. As proposed, the Project will be accessible from Route 9 coming up the north slope of Tuttle Hill ridge. See, Ex. AWE 1, ¶4. The Project will require construction of approximately 1.5 miles of new road to access the ridge from Route 9 and construction of approximately 2 miles of additional road along the ridge to access each turbine location. Ex. AWE 2, at 8.

AWE reports that the Facility is anticipated to consist of 10 turbines in the 2 MW size class. See, Ex. AWE 1, ¶6. The Facility is expected to have an installed nameplate capacity of

greater than 5 MW but less than 30 MW. See, Ex. AWE 1, ¶6. It is expected that the total turbine heights from foundation to blade tips will be no more than 475 feet. See, Ex. AWE 1, ¶6. As proposed, the electrical output generated by the Facility will be transmitted to the PSNH 34.5 kV distribution circuit running through the right-of-way along the north base of Tuttle Hill and interconnected via a direct tap to the existing 3140 X1 line that continues to Jackman substation in Hillsborough. See, Ex. AWE 1, ¶6. AWE expects to file a full application for a Certificate of Site and Facility prior to the end of 2011. See, Ex. AWE 1, ¶14.

## **II. PROCEDURAL BACKGROUND**

On March 21, 2011, an Order and Notice of Public Meeting was issued scheduling a public meeting of the Committee on April 22, 2011. See, Order and Notice of Public Meeting (issued March 21, 2011). The purpose of the meeting was to consider the requests that the Committee take jurisdiction over the Project. See, Order and Notice of Public Meeting (issued March 21, 2011).

On April 20, 2011, the New Hampshire Attorney General's Office appointed Senior Assistant Attorney General Peter C.L. Roth as Counsel for the Public pursuant to RSA 162-H:9. Counsel for the Public also filed a reply to the Petitions. See, Response of Counsel for the Public to Petition for Jurisdiction dated April 20, 2011. Counsel for the Public urged the Committee to deny the Petitions. See, Response of Counsel for the Public to Petition for Jurisdiction dated April 20, 2011. Specifically, Counsel for the Public noted that AWE has not yet filed its Application for a Certificate of Site and Facility with the Committee and did not fully develop and describe its Project. Id. Therefore, Counsel for the Public argues that the assertion of jurisdiction at this stage of the Project's development is premature. Id.

On April 22, 2011, AWE filed a response to Counsel for the Public's reply objecting to the position taken by Counsel for the Public and further complaining that the appointment of Counsel for the Public was premature. See, Petitioner's Reply to Response of Counsel for the Public dated April 22, 2011. 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. See, Petitioner's Reply to Response of Counsel for the Public dated April 22, 2011. On May 2, 2011, Counsel for the Public objected to AWE's request to strike. See, Reply Memorandum of Counsel for the Public dated May 2, 2011. On May 6, 2011, the Committee acknowledged Counsel for the Public's statutory role under RSA 162-H:10, denied AWE's request to strike the response of Counsel for the Public, and ruled that the participation of Counsel for the Public is helpful to the Committee. See, Order on Motions to Intervene and Further Procedural Order (issued May 6, 2011). Counsel for the Public was permitted to participate with all the rights, privileges and obligations of a party to the proceeding. See, Order on Motions to Intervene and Further Procedural Order (issued May 6, 2011).

On April 22, 2011, at the public meeting, the Committee heard comments from AWE, the Town of Antrim through its present Chairman of the Board of Selectman, Michael Genest, a former Selectman, Gordon Webber, and Martha Pinello representing the Antrim Planning Board. The Committee also allowed each party seeking to intervene an opportunity to address the Committee.

A scheduling conference was held at the conclusion of the public meeting on April 22, 2011. As a result of the scheduling conference, a procedural schedule was issued. See, Order on Motions to Intervene and Further Procedural Order (issued May 6, 2011). Thereafter, on May

27, 2011, the Committee conducted a technical session designed to allow the parties to conduct discovery.

The Committee received letters in support of and opposed to the Petitions. These letters were received as public comment. The letters opposing the Committee's jurisdiction generally asserted that the Antrim Planning Board was capable of providing a full review of the Project. The letters in support of the Committee's jurisdiction generally stated that the Antrim Planning Board does not have a regulatory scheme nor the experience to provide proper review and oversight of the Project in accordance with the purposes of RSA 162-H:1. The Committee also received a separate Petition, sponsored by Mary Allen and signed by more than 100 registered voters, opposing the Petitions for Jurisdiction. Ex. Allen B.

The Committee has considered the views and comments of the public, as expressed at public hearings and in writing in this docket. The transcripts of public comments can be reviewed on the Committee's website or at the Office of the Chairman of the Committee. Written public comments are also available for public review at the office of the Chairman of the Committee (NH Department of Environmental Services).

The Committee received nineteen motions to intervene in this docket. The Committee ruled on each of the motions in its Order of May 6, 2011. See, Order on Motions to Intervene and Further Procedural Order. The participation of intervenors was consolidated for the purpose of the presentation of witnesses, argument, cross-examination and other participation in these proceedings. Id. See, RSA 541-A:31, V(c), N.H. CODE OF ADMINISTRATIVE RULES, SITE 202.11(D).

On May 24, 2011, Richard Block and Lorraine Block filed a Motion to Reconfigure Intervenor Groups with the Committee. See, Motion to Reconfigure Intervenor Group, dated

May 24, 2011. The Blocks requested the Committee to combine the intervenors in the following groups of intervenors: (1) “Block Group of Intervenors” consisting of Richard Block, Lorraine Carey Block, Spencer Garrett, Mark and Brenda Schaefer, Janice D. Longgood, Annie Law, Robert Cleland, Samuel and Michelle Apkarian, Keith and Julie Klinger, Elsa Voelcker, and James Hankard; and (2) “Allen Group of Intervenors” consisting of Robert Edwards, Brian Beihl, Barbara Gard, and Mary Allen. See, Motion to Reconfigure Intervenor Groups dated May 24, 2011. There was no objection to this request. On June 1, 2011, the Committee granted the Intervenors’ Motion to Reconfigure Intervenor Groups.

On June 1, 2011 and June 27, 2011, the Committee held adjudicatory and deliberative proceedings. During the deliberative proceedings, the Committee first considered whether or not the Petitions, as filed, were statutorily sufficient. The Committee unanimously determined that the Petitioners were statutorily sufficient. See, Tr., 06/27/2011, p. 67; Section V, A, set forth below. The Committee also deliberated on the question raised by Counsel for the Public as to whether or not this matter was ripe for review in the absence of a formal Application for a Certificate of Site and Facility. The Committee unanimously determined that the matter was, in fact, ripe for review. See, Tr., 06/27/2011, pp. 69-70; Section V, B, below. The Committee next deliberated on a motion made by Vice Chairman Getz (seconded by Mr. Harrington) to delay deliberations until a time when the Town of Antrim had voted on a proposed amendment to the zoning ordinance. The motion failed to carry on a split decision of the Committee. See, Tr., 06/27/11, p. 128; Section V, C, below. A motion was then made that the Committee should assert its discretionary jurisdiction over the Project. After deliberation on this issue, a majority

of the Committee voted to assert jurisdiction.<sup>2</sup> See, Tr., 06/27/2011, Afternoon Session, at 136; Section V, C, below. Finally, as a requirement of maintaining jurisdiction, the Committee voted to require AWE to file a complete Application for a Certificate of Site and Facility before January 31, 2012. The purpose of this Order is to memorialize the considerations and deliberations of the majority of the Committee on these issues.

### **III. POSITION OF THE PARTIES**

#### **A. Town of Antrim Board of Selectmen**

On February 10, 2011, the Committee received a letter from the Board of Selectmen of the Town of Antrim, signed by then Chairman of the Board, Gordon Webber, requesting the Committee to provide review, approval, monitoring, and enforcement of compliance in the planning, siting, construction, and operation the Project. See, Letter from Gordon Webber dated February 10, 2011. After the March 2011 elections the Board of Selectmen reaffirmed its position before the Committee by letter dated April 20, 2011.<sup>3</sup> See, Letter from Michael Genest dated April 20, 2011.

In their letter of April 20, 2011, the Selectmen provided a history of the municipal process concerning the proposed Project. Id. The letter indicates that the Project was first formally brought to the attention of the community in a conceptual format, at an April 2, 2009 Planning Board meeting. Id. Since that time, and up to the time of the correspondence, the

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<sup>2</sup> The motion passed on a 6-4 vote. Voting in favor of the motion: Director Stewart, Director Morin, Director Normandeau, Director Scott, Commissioner Below and Commissioner Bald. Vote against: Vice Chairman Getz, Commissioner Ignatius, Director Muzzey, and Mr. Harrington.

<sup>3</sup> A second letter dated April 20, 2011, was also filed with the Committee by Mr. Genest on behalf of the Antrim Board of Selectmen objecting to the Petition for Intervention by the Antrim Planning Board and noting that the Selectmen are tasked with managing the prudential affairs of the Town and is the only local governing body with the authority to act on behalf of the Town.

Selectmen assert that the Planning Board held 12 meetings concerning renewable energy facilities and/or wind energy facilities. Id. The Selectmen also report that the Zoning Board of Adjustment (“ZBA”) held 13 meetings on requests for variances for a meteorological tower. Id. The ZBA granted a variance for the meteorological tower. Id. However, the granting of the variance led to two lawsuits against the Town. Id. In their letter, the Selectmen also report that the Planning Board had voted to endorse a zoning amendment that would allow wind energy facilities as a permitted use in the Rural Conservation District. Id. However, due to notice errors, the zoning amendment could not be placed on the ballot for the March, 2011 town meeting. Id. The Selectmen also report that, in light of the notice error, the Planning Board held a public hearing and voted to recommend the zoning amendment and to request a special town meeting. Id. However, after the March, 2011, municipal election the composition of the Planning Board changed and, on March 17, 2011, the "new Planning Board" voted not to recommend the zoning amendment and nullified the special town meeting which had already been approved by the Board of Selectmen. Id.

The Board of Selectmen argues that the Town's land use boards do not have sufficient technical knowledge or expertise to consider the issues that surround the siting, construction, and operation of the Project. Id. The Board of Selectmen believes that invoking the provisions of RSA 162-H and the jurisdiction of the Committee will provide a better alternative. Id.

In support of this position, the Selectmen also proffered the testimony of Michael Genest, the present chair of the Board of Selectmen. Ex. BOS 1. In his testimony, Mr. Genest adopts the position set forth in the letters from the Board of Selectmen. Ex. BOS 1, at 2. Mr. Genest notes that the land use process in the Town has already resulted in two litigations in the Superior Court stemming from the review of the variance for the meteorological tower. Ex. BOS 1, at 2. Mr.



Genest expressed concern that additional litigation will follow if the full Project is considered by the local boards. Ex. BOS 1, at 2. He is concerned about the significant legal costs incurred by the Town as a result of the matter. Ex. BOS 1, at 3. In addition, Mr. Genest points out that the Town's current Ordinances and regulations are not designed to address construction and operation of renewable energy projects. Ex. BOS 1, at 3-4. Mr. Genest is concerned that there is no certainty that an appropriate ordinance and/or regulation will ever be developed in the Town. Ex. BOS 4-5. He is also concerned that any vote on a new local ordinance will result in nothing more than a referendum on this particular Project rather than a fair application of principles for the consideration of such projects. Ex. BOS 1, at 5. In contrast, Mr. Genest notes that the statutory process of RSA 162-H provides a clear framework for review of renewable energy facilities and urges the Committee to assert jurisdiction over the Project, regardless of the Town's progress in developing a new ordinance.

Ex. BOS 1, at 4 – 5; Tr., 06/01/2011, Afternoon Session, at 93-94.

**B. AWE**

AWE submitted the pre-filed and supplemental pre-filed testimony of Mr. Jack Kenworthy, Chief Executive Officer for Eolian Renewable Energy, LLC. Ex. AWE 2, 3. Mr. Kenworthy asserts that the review of the Project by the Town of Antrim will not permit a timely and impartial consideration of the Project and states that it is necessary and appropriate for the Committee to assert jurisdiction over the Project. Ex. AWE 2, at 2. Mr. Kenworthy argues that the Committee is best qualified to evaluate a project of this type, size and scope and that the Town of Antrim does not have the capacity to evaluate an application for a utility-scale facility in a fair, reasonable, and timely manner. Ex. AWE 2, at 14. For example, Mr. Kenworthy states that AWE has dealt with the Town of Antrim on three different matters: (i) when it submitted an

initial height variance application to erect a temporary meteorological tower; (ii) when it submitted a request for a building permit for the temporary meteorological tower; and (iii) when the Town of Antrim attempted to amend the Antrim Zoning Ordinance to expressly identify construction of commercial wind energy facilities as a permitted use in the Rural Conservation District. Ex. AWE 2, at 14, 17-18. According to Mr. Kenworthy, each effort was fraught with procedural errors and entailed lengthy application and appeal processes and the reversal of previous decisions by various Town land use boards. Ex. AWE 2, at 14. Ultimately, AWE's involvement with the Town's land use boards concluded with the litigation currently pending before the Hillsborough County Superior Court and with two cancelled ballot votes concerning the zoning ordinance amendment. Ex. AWE 2, at 14.

As additional support for its claim that the Town of Antrim is not equipped with addressing renewable energy facilities of this magnitude, AWE states that the Town of Antrim does not have a separate ordinance specifically addressing renewable energy facilities of this type. Ex. AWE 2, at 24. Under the current regulatory scheme, the Town's general zoning ordinance and site review process would regulate the construction and operation of the Project. Ex. AWE 2, at 24. According to AWE, this regulatory scheme is not well-suited to evaluate all environmental, economic, and technical issues associated with the construction and operation of the Facility. Ex. AWE 2, at 24. AWE also disputes APB's assertion that an ordinance will be developed and enacted in the timely manner. Tr., 06/01/2011, Afternoon Session, at 33, 60. AWE further disputes the APB *ad hoc* committee's ability to develop the Ordinance which would adequately address the findings and purposes set forth in RSA 162-H:1. Tr., 06/01/2011, Afternoon Session, at 50, 66. According to AWE, the *ad hoc* committee lacks qualification and experience required for development of such Ordinance. Tr., 06/01/2011, Afternoon

Session, at 50-51. Therefore, AWE asserts that the Committee's involvement is needed to ensure the promotion of the purposes set forth in RSA 162-H:1. Ex. AWE 2, at 24.

In his Supplemental Prefiled Testimony, Mr. Kenworthy responds to the position of the Planning Board and argues that the primary issue before the Committee is whether the Committee should assert jurisdiction pursuant to the statute. Ex. AWE 3. Mr. Kenworthy testifies that this decision should be made without regard to the present efforts of the APB to propose and adopt a new Ordinance that might provide new rules and a process for consideration of such projects. Ex. AWE 3, at 1-2. See also, Ex. AWE 3, at 9-14 (disputing various opinions and characterizations of the pending "ad hoc" planning board process).

Mr. Kenworthy also disputes various opinions of Loranne and Richard Block and asserts that the Project is well-defined. Ex. AWE 3, at 3-4. Mr. Kenworthy also disputes the Block's claims that AWE has taken multiple simultaneous approaches to permitting and by doing so demonstrated that the Project is undefined and vague. Ex. AWE 3, at 5-6. Mr. Kenworthy also reiterates his company's credentials in his supplemental testimony and urges the Committee to assert the jurisdiction over the Project. Ex. AWE 3.

### **C. Counsel for the Public**

Counsel for the Public asserts that the Petitions are not ripe for Committee's consideration and requests the Committee to deny them. See, Response of Counsel for the Public to Petition for Jurisdiction dated April 20, 2011. Specifically, Counsel for the Public states that the assertion of jurisdiction in the absence of an Application for a Certificate of Site and Facility to the Committee is premature. See, Response of Counsel for the Public to Petition for Jurisdiction dated April 20, 2011. In addition, Counsel for the Public asserts that the issue of jurisdiction is not ripe because the Project is not yet clearly defined. Id. According to Counsel

for the Public, the Committee may evaluate the extent of the State's interest in the Project only once its size, location, and power production is better defined through an Application with the Committee. Id. Counsel for the Public concluded that in the meantime, the Committee should let the local process work. Tr., 06/27/2011, Afternoon Session, at 42.

**D. Antrim Planning Board**

In a letter dated April 12, 2011, APB advised the Committee that it voted to oppose the Petitions from AWE and the Antrim Board of Selectmen. See, Letter from the Antrim Planning Board dated April 12, 2011. APB requests the Committee to deny the Petitions or, in the alternative, delay consideration of the Petitions until a time when the legislative body of the Town of Antrim votes on an ordinance specifically addressing industrial wind development. Id. In support of its position, APB submitted the testimony of Martha E. Pinello and the testimony of Charles A. Levesque, both present members of the Antrim Planning Board. Ex. PB 1, 2. Generally, Ms. Pinello and Mr. Levesque assert that APB will be able to address the issues raised by the Project in a timely and efficient way in compliance with various statutory requirements. Ex. PB 2, at 8-10; Ex. PB 1, at 7. Furthermore, Ms. Pinello asserts that all prior delays encountered by AWE in its dealings with the Town of Antrim are attributed to AWE's failure to comply with Antrim's procedural requirements, rules, and regulations. Ex. PB 1, at 10-13. Ms. Pinello and Mr. Levesque admit, however, that the Town of Antrim does not have either an ordinance or regulation specifically designed to address large scale wind energy facilities. Ex. PB 2 at 8-10; Ex. PB 1, at 7. They claim that the Town is in the process of adopting an "appropriate ordinance and regulations". Ex. PB 1, at 7; Ex. PB 2, at 9. On April 7, 2011, APB named "a seven member *ad hoc* committee to oversee the investigation of, and to make recommendations for, comprehensive oversight procedures concerning industrial wind-energy

generating facilities within the Town of Antrim.” Ex. PB 1, at 8. The *ad hoc* committee is required to forward its recommendations to the full Planning Board for their review and implementation within six month of the committee’s creation. Ex. PB 1, at 8. The Antrim Planning Board, in turn, is obligated to deliver its final report, including its recommendations and any proposed changes, to the Antrim Board of Selectmen within three months of receiving the *ad hoc* committee’s report. Ex. PB 1, at 8. Ms. Pinello also asserts that the Antrim Board of Selectmen approved this process. Ex. PB 1, at 8. The Committee received testimony and exhibits evidencing the *ad hoc* committee’s efforts to develop an ordinance and regulations pertaining to renewable energy facilities to be available for the Town’s vote by November 1, 2011. Ex. PB 3, Ex. AWE 8. According to Ms. Pinello and Mr. Levesque, the Town of Antrim will have a comprehensive renewable energy ordinance and will be able to address the Project in accordance with the purposes and findings set forth in RSA 162-H:2, rendering the Committee’s intervention unnecessary. Ex. PB 2, at 9-10; Ex. PB 1, at 14.

**E. ASNH and HCCE**

Neither ASNH nor HCCE takes a position regarding whether the Committee should assert its jurisdiction over the Project. See, Petition for Intervention by Audubon Society of New Hampshire dated April 12, 2011; Petition for Intervention by Harris Center for Conservation Education dated April 12, 2011. ASNH generally states, however, that the Committee’s decision should ensure the protection of natural resources and the environment of the site and region. Tr., 06/27/2011, Morning Session, at 179.

**F. Block Group of Intervenors**

The Committee received pre-filed testimony from the following intervenors:

- Janice D. Longgood (Ex. Longgood 1);
- Robert Cleland (Pre-Filed Testimony of Mr. Cleland);

- Annie Law (Ex. Law 1); and
- Richard and Lorraine Block (Ex. Block 1).

The intervenors request the Committee to deny the Petitions and state that: (i) the issue of jurisdiction is not ripe for adjudication; (ii) APB is, or will be, in the near future fully capable and qualified to review any issues arising from the construction and operation of the Project; and (iii) that people of the Town of Antrim should have a right to consider and decide the issues arising from the construction of the Project in their community. See, Ex. Block 1; Longgood 1; Law 1; Pre-Filed Testimony of Mr. Cleland dated May 20, 2011; Tr., 06/27/2011, Afternoon Session, at 16.

In his pre-filed testimony, Mr. Cleland asserts that APB should exercise its jurisdiction over the Project and that the members of APB are qualified, knowledgeable and capable to handle the Project of this magnitude. See, Pre-Filed Testimony of Mr. Cleland. Ms. Law supports Mr. Cleland's position and asserts that the construction and operation of the Facility should be regulated on a local level and that the people of Antrim should have a right to decide whether to allow the construction of the Facility in their community. See, Ex. Law 1; Tr., 6/27/2011, Afternoon Session, at 18-20.

In addition, Richard and Lorraine Block request the Committee to deny the Petitions, stating that the issue of jurisdiction is not ripe for adjudication. See, Block 1, at 2; Tr., 06/27/2011, Afternoon Session, at 21. Specifically, Richard and Lorraine Block assert that AWE did not file an Application for Site and Facility with the Committee and, therefore, the Committee currently cannot ascertain the merits of AWE's Project. See, Block, at 2. Richard and Lorraine Block further assert that the Committee's jurisdiction over the Project is unnecessary because APB is fully capable of reviewing any issues arising in conjunction with the

construction and operation of the Project. See, Block, at 5; Tr., 06/27/2011, Afternoon Session, at 19. Therefore, they requested the Committee to deny the Petitions. Tr., 06/27/2011, Afternoon Session, at 16.

Ms. Longgood asserts that the New Hampshire tradition of local control should be upheld by the Committee and that the citizens of the Town of Antrim are fully capable, mature and knowledgeable to be able to review AWE's proposal, if any. See, Ex. Longgood 1; Tr., 06/27/2011, Afternoon Session, at 17-18, 20. Therefore, Ms. Longgood urged the Committee to deny the Petitions for Jurisdiction. See, Ex. Longgood; Tr., 06/27.2011, Afternoon Session, at 17-18, 20. Ms. Longgood is joined by Mark and Brenda Schaefer and Spencer Garrett. See, Letter from Brenda Schaefer dated April 13, 2011; Motion to Intervene *Pro Se* of Mark and Brenda Schaefer, dated April 15, 2011.

**G. Allen Group of Intervenors**

The Allen Group of Intervenors requests the Committee to deny the Petitions or, in alternative, to defer its decision on Petitions stating that the issue is not ripe for adjudication and that APB will be adequately equipped to resolve all issues arising from the construction and operation of the Facility at the conclusion of the reorganization of the Town's ordinance and regulations. Ex. Allen A; Tr., 06/27/2011, Afternoon Session, at 38-39.

In addition, the Allen Group of Intervenors assert that the Petition from the Antrim Board of Selectmen is not ripe because it requests the Committee's review "if and when an application is made to construct this facility," and, as of the date of this Order, AWE did not file its Application for Site and Facility with the Committee. Ex. Allen A; Tr., 06/27/2011, Afternoon Session, at 39. The Allen Group of Intervenors also asserts that the construction of the Project is a matter of local control and that the jurisdiction by the Committee may invite unnecessary

expenses and litigation for the Town of Antrim. Ex. Allen A; Tr., 06/27/2011, Afternoon Session, at 38. Therefore, the Allen Group of Intervenors requested the Committee to deny the Petitions or, in alternative, to defer its decision so that APB can develop an ordinance addressing construction and operation of renewable energy facilities and schedule a hearing to review the issue of jurisdiction after such an ordinance is fully developed. Ex. Allen A; Tr., 06/27/2011, Afternoon Session, at 39.

**H. Gordon Webber**

Mr. Webber submitted his pre-filed testimony on May 6, 2011.<sup>4</sup> See, Ex. Webber 1. Mr. Webber generally asserts that ABP does not have the qualification and experience to handle a Project of this magnitude. Ex. Webber 1. Specifically, according to Mr. Webber, APB does not have the experience or responsibility to evaluate the regional impact of this proposed project as would the Committee. Ex. Webber 1, at 2. He also characterized APB as a “dysfunctional” board and concludes that it will not be able to review AWE’s Application in an objective and timely manner. Ex. Webber 1, at 3. In addition, according to Mr. Webber, the adequacy of a future ordinance is questionable, because three members of APB already expressed their concern that the ordinance may be too restrictive and will de facto prevent AWE from building the Project. Tr., 06/27/2011, Morning Session, at 56. Mr. Webber asserts that the Committee should take jurisdiction over the Project to ensure a timely, objective and qualified review. Ex. Webber 1, at 3.

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<sup>4</sup> Mr. Webber represents the interests of and speaks on behalf of over 100 registered voters from the Town of Antrim requesting that the Committee assert jurisdiction over the Project.



#### **IV. ANALYSIS AND FINDINGS**

The Committee may assert jurisdiction over a renewable energy facility consisting of electric generating station equipment and associated facilities with a nameplate capacity of 30 megawatts or less but at least 5 megawatts if the Committee determines that asserting jurisdiction over the Project is “consistent with the findings and purpose set forth in RSA 162-H: 1.” See, RSA 162-H:2, XI, XII; see also, Final Order Denying Petitions Filed by Michael Laflamme and Howard Jones, Docket No. 2009-03 (issued Apr. 7, 2010); Jurisdictional Order, Community Energy, Inc. and Lempster Wind, LLC, Docket No. 2006-001 (issued Sept. 23, 2006).

##### **A. Sufficiency of the Petitions**

The Committee has the discretion to exercise its jurisdiction over a renewable energy facility consisting of electric generating station equipment and associated facilities with a nameplate capacity of 30 megawatts or less but at least 5 megawatts. RSA 162-H:2, XI. See, RSA 162-H:2, XII. Procedurally, the Committee may consider asserting jurisdiction over such a Project on its own motion or if the Committee receives a petition requesting the Committee to assert jurisdiction from the Applicant or two or more petitioners defined in RSA 162-H:2, XI. See, RSA 162-H: 2, XII. RSA 162-H:2, XI, defines “petitioner” as a person who files a petition meeting one of the following conditions: (1) a petition endorsed by 100 or more registered voters in the host community or host communities; (2) a petition endorsed by 100 or more registered voters from abutting communities; (3) a petition endorsed by the governing body of the host community or 2 or more governing bodies of abutting communities; or (4) a petition filed by the potential applicant. RSA 162-H:2, XI.

The Committee received three Petitions to assert jurisdiction over the Project: (1) a Petition from the Board of Selectmen of the Town of Antrim filed on February 2, 2011, and reaffirmed by letter dated April 20, 2011; (2) a Petition to assert jurisdiction over the Project filed by AWE on March 11, 2011; and (3) the Webber Petition signed by more than one hundred registered Antrim Voters filed on April 15, 2011. See, Letter from Gordon Webber dated February 7, 2011; Ex. AWE. 1; Webber Petition. The Petitions were filed by the Applicant, by the governing body of the host community, and by more than 100 registered voters of the hosting community, respectively. These parties are authorized to petition the Committee to assert jurisdiction over the Project under RSA 162-H:2, XI, XII. Therefore, the Committee finds that the Petitions are sufficient and authorize the Committee to determine whether it should exercise discretionary jurisdiction over the Project.

**B. Ripeness**

Counsel for the Public requests the Committee to find that the issue as to whether the Committee should assert jurisdiction is not ripe for adjudication and to deny the Petitions. See, Response of Counsel for the Public to Petition for Jurisdiction dated April 20, 2011. According to the Counsel for the Public, it is premature for the Committee to determine whether it should exercise its jurisdiction prior to AWE's filing of the Application for Site and Facility with the Committee. See, Response of Counsel for the Public to Petition for Jurisdiction dated April 20, 2011.

It is well settled law of statutory construction that, where possible, the plain and ordinary meaning should be ascribed to the words used in a statute by the legislature. See, In Re Town of Pittsfield, 160 N.H. 604, 606 (2010) (citation omitted). When a statute's language is plain and unambiguous, it is not necessary to seek further indications of legislative intent. Id.

The interpretation of a statute must focus on the “statute as a whole, not on isolated words or phrases, presuming that the legislature did not use superfluous or redundant words.” Impact Food Sales, Inc. v. Evans, 160 N.H. 386, 397 (2010). We will neither consider what the legislature might have said nor add the words that it did not see fit to include. Id. (citations and quotations omitted).

The statutory language of RSA 162-H does not require the filing of an Application as a prerequisite for the Committee to consider asserting its discretionary jurisdiction. See, RSA 162-H:2, XII. It is improper to add terms and requirements that the legislature did not see fit to include in the statute and, therefore, we do not find that the filing of an Application of Site and Facility is required for the Committee’s jurisdictional determination.

In addition, the legislature specifically noted that the Petition may be filed by the “potential applicant”. RSA 162-H:2, XI (d). The term “potential” is unambiguous and means “possible” or “capable of becoming”. See, Black's Law Dictionary (9th ed. 2009) (defining “potential” as capable of coming into being; possible). It follows that the legislature specifically authorized the Committee to consider the Petitions from potential applicants before they file their Applications for Site and Facility, as opposed to the Applicants who already filed their Applications for Site and Facility. The statute also allows the Committee to assert jurisdiction in circumstances where it is highly unlikely that an Application for a Certificate would be filed. For instance, RSA 162-H:XII allows the Committee to assert discretionary jurisdiction where a petition has not been filed by the Applicant at all. In such cases, an Application would not have been filed. Indeed, a potential applicant might oppose the assertion of jurisdiction. The absence of a formal Application for a Certificate of Site and Facility does not prohibit the Committee from asserting jurisdiction.

Counsel for the Public and the Block Group of Intervenors also assert that the issue of jurisdiction is not ripe because the Project is not yet clearly defined. See, Response of Counsel for the Public to Petition for Jurisdiction dated April 20, 2011. However, as addressed in detail in Section 4.C, below, the Committee's review of the issue of jurisdiction is limited to the determination of whether the exercise of such jurisdiction is consistent with the findings and purpose set forth in RSA 162-H:1, as opposed to the comprehensive review that is required for the issuance of the Certificate of Site and Facility. See, RSA 162-H:2, XII; RSA 162-H:16. The Committee does not require a detailed description of the Project to decide whether the exercise of jurisdiction over the Project is consistent with the findings and purpose articulated in RSA 162-H:1. The issue of Committee's jurisdiction is ripe for adjudication as long as the Committee has sufficient facts to determine if the exercise of the Committee's jurisdiction is consistent with the findings and purpose articulated in RSA 162-H:1. In this docket, the Committee has received information pertaining to the location of the Project, Ex. AWE 1, 4; Ex. AWE 2, at 4-5; the environmental conditions, Ex. AWE 2, at 6; the existence of wildlife in the area, Ex., AWE 2, at 6; and the nature of the Project area which falls within the rural conservation district of the Town, Ex. AWE 1, ¶ 4. A comprehensive description of the rural conservation district is included in the Town's Master Plan. Ex. PB 2, Appx. E. In addition, the Committee has received information regarding the proximity of abutters to the proposed Project. Tr., 06/01/2011, Morning Session, at 80. The Committee has also received evidence of the expected size, heights and likely location of each of the wind turbines. Ex. AWE 1, ¶6; Ex. AWE 1, Antrim Wind Energy Project Map dated 3/10/11. While the information received by the Committee does not compare to the extensive permitting documents and engineering drawings that normally accompany an Application for Site and Facility, it is nevertheless adequate to make a determination as to whether or not the Committee should assert its jurisdiction and require the filing of a detailed application.

The Allen Group of Intervenors argues that the Petition of the Antrim Board of Selectmen is not ripe for adjudication because it is conditioned upon AWE's filing of the Application with the Subcommittee. See, Ex. Allen A; Tr., 06/27/2011, Afternoon Session, at 39. We note that, although the Board of Selectmen's first letter requesting the Committee's jurisdiction contained such a condition precedent, the second letter unconditionally established the Board's request for a jurisdictional determination. See, Letter from Michael Genest dated April 20, 2011; Tr., 06/01/2011, Afternoon Session, at 130.

The Committee finds that the Board of Selectmen's Petition is not conditioned upon the filing of the Application for Site and Facility by AWE and is ripe for adjudication.

**C. Jurisdiction**

The Committee may assert jurisdiction over a renewable energy facility consisting of electric generating station equipment and associated facilities with a nameplate capacity of 30 megawatts or less but at least 5 megawatts if it finds that taking jurisdiction over the proposed facility is consistent with the legislative findings and purposes set forth in RSA 162-H:1. See, RSA 162-H:2, XII; see also, Jurisdictional Order, Community Energy, Inc. and Lempster Wind, LLC, Docket No. 2006-001 (issued Sept. 23, 2006). The legislative findings and purposes outlined in RSA 162-H:1 are:

1. to maintain a balance between the environment and the need for new energy facilities in New Hampshire;
2. that undue delay in the construction of needed facilities be avoided; and
3. that full and timely consideration of environmental consequences be provided;

4. that all entities planning to construct facilities in the state be required to provide full and complete disclosure to the public of such plans;
5. that the state ensure that the construction and operation of energy facilities is treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion;
6. to assure that the state has an adequate and reliable supply of energy in conformance with sound environmental principles.

RSA 162-H:1. The Committee's determination on the issue of jurisdiction is governed by the foregoing declaration of purpose.

In other cases when addressing the issue of jurisdiction over a renewable energy project the Committee considered whether potential applicants have already obtained permits; whether the Town or City where the applicants sought to construct the project had a renewable energy ordinance or other rules and regulations designed to address construction and operation of renewable energy facilities and the extent of such rules and regulations; whether review by the Committee would be duplicative of the work already undertaken by various state agencies and the municipality; whether review by the Committee would guarantee greater disclosure than already provided; and whether the local review of the project has already considered the project as a part of a land use planning scheme in which all environmental, economic and technical issues were resolved in an integrated fashion. See, Final Order Denying Petitions Filed by Michael Laflamme and Howard Jones, Docket No. 2009-03 (issued Apr. 7, 2010) [Clean Power Development Project].

As was the case with the Clean Power Development Project, the construction of the Project will assure that the state has adequate and reliable supply of energy. Tr., 06/01/2011, Afternoon Session, at 42-43. Similar to the Clean Power Development, the Facility is a

renewable energy facility the construction of which is encouraged under and consistent with New Hampshire's renewable energy portfolio standards statute, RSA 362-F, and with the State's "25x25" plan to obtain at least 25% of the state's total energy needs from renewable sources by the year 2025. See, RSA 362-F; Executive Order No. 2007-003; Ex. AWE 10; Tr., 06/01/2011, Afternoon Session, at 42-43.

Here, however, unlike City of Berlin's extensive review of Clean Power Development, the Town's review of the Project was limited to the evaluation of the site plan application and the request for variances for the Project's meteorological tower which, ultimately, led to two lawsuits against the Town. Tr., 06/01/2011, Morning Session, at 58; Tr., 06/01/2011, Afternoon Session, at 63. In addition, although AWE anticipates that it will need to obtain similar environmental permits for the Town's and Committee's review, unlike Clean Power Development it did not obtain and did not submit any permits for the Town's review. Tr., 06/01/2011, Morning Session, at 63; Tr., 06/01/2011, Afternoon Session, at 65. The Committee's review of the Project will not be duplicative of the Town's limited review of the meteorological tower and will guarantee greater disclosure than was already provided.

However, the greatest difference between the City of Berlin's review of Clean Power Development and the Town of Antrim's potential review of the Project stems from the fact that, unlike the City of Berlin, the Town of Antrim does not have an ordinance or any other rules or regulations specifically designed to address the construction and operation of the renewable energy facility. Under the Town's current regulatory scheme, the Project must undergo site plan review and would have to receive variances allowing the construction of the facility of this type and magnitude in the Antrim's Rural Conservation District. Tr., 06/01/2011, Afternoon Session, at 62, 82, 105-106, 152. APB admits, however, the present ordinances are not designed to

address the issues raised by construction of a renewable energy facility of the scale proposed here and, therefore, if applied, would not adequately address the issues of the impact of the renewable energy facility on the region in general and on the Town in particular. Tr., 06/01/2011, Afternoon Session, at 159; Tr., 06/27/2011, Morning Session, at 162, 164-165.

The Town's efforts to address the need for regulations specifically designed to regulate the construction and operation of the renewable energy facilities are commendable. The minutes of the APB *ad hoc* committee demonstrate an effort to propose a workable ordinance. Ex. PB 1, Appx. G-1; Ex. PB 4; Tr., 06/27/2011, Morning Session, at 89, 153157. The *ad hoc* committee may very well succeed in developing a comprehensive ordinance addressing the purpose and findings set forth in RSA 162-H:1. However, the adoption of an appropriate ordinance and regulation is not guaranteed. Although a timeline has been developed, there are still many variables in the Town of Antrim that could lead to further delay. Under APB's resolution, the *ad hoc* committee is required to forward its recommendations to the full Planning Board for review and implementation which, in turn, is obligated to deliver its final report, including its recommendations and any proposed changes, to the Antrim Board of Selectmen within three months of receiving the *ad hoc* committee's report. Ex. PB 1, at 8; Tr., 06/27/2011, Morning Session, at 55. Therefore, it appears that in order to guarantee a timely enactment of an ordinance, the Antrim Board of Selectmen will have to call a special town meeting on November 1, 2011. Tr., 06/27/2011, Morning Session, at 55; Tr., 06/27/2011, Morning Session, at 95-96; Ex. PB 4. Even assuming that the Antrim Board of Selectmen will agree to call the special town meeting and address the ordinance, the implementation of such an ordinance will still be conditioned upon its approval by the voters of the Town of Antrim. Tr., 06/27/2011, Morning Session, at 101. According to the Chairman of the Board of Selectmen, however, the chances are



that the ordinance will be so restrictive that the voters supporting the construction of the Project whom according to certain polls, constitute the majority of Antrim's voting population will not support it and will vote it down. Tr., 06/01/2011, Afternoon Session, at 92-93, 98, 118, 140-141; Ex. BOS 1, 8. The parties agree that it is impossible to predict with any level of certainty whether the people of Antrim will approve an ordinance. Tr., 06/27/2011, Morning Session, at 101.

In the absence of an ordinance, it is not possible to determine, with any degree of certainty, that an eventual ordinance will be consistent with the legislative findings and purposes. Neither the Committee nor general public has been provided with a draft of the ordinance. Tr., 06/27/2011, Morning Session, at 56, 173. At this stage APB requests the Committee to assume that the ordinance will sufficiently assure adherence to the purposes and findings identified in RSA 162-H:1. While we do not question the efforts of the *ad hoc* committee and APB to fashion an appropriate ordinance, we cannot find that such an ordinance will eventually come to fruition or that it will adequately safeguard the purpose and findings of RSA 162-H:1.

Apart from the timing and enactment of a new ordinance and the issue of its adequacy, AWE raised concerns that even if the Town enacts such ordinance, it will not be able to review the Project in a timely and objective manner. AWE asserts that the Committee's jurisdiction is required to avoid such delay. Tr., 06/01/2011, Morning Session, at 40-41. As an example, AWE submits the experience it had with the Town's Zoning Board when it attempted to receive a height variance for its meteorological tower. Tr., 06/01/2011, Morning Session, at 40-41. Specifically, AWE states that it has been nearly two years since it first applied to receive the variance from the Antrim's Zoning Board and the matter is still contested because its initial grant of height variance was reheard, re-decided a year later, and then appealed to the Hillsborough

County Superior Court. Tr., 06/01/2011, Morning Session, at 40-41. AWE asserts that the delay exemplifies the prolonged nature of any type of considerations undertaken by the Town and demonstrates that the review of the Project by the Town will cause undue delay in construction of the Project. Tr., 06/01/2011, Morning Session, at 40-41. In addition, AWE complains that consideration of the Project through town ordinances and review will lead to a fractured and repetitive appeals process. Committee jurisdiction assures consolidation of all land use planning issues into a single proceeding, subject to a single appeal to the New Hampshire Supreme Court. In this regard, AWE claims that Committee jurisdiction is the superior option for the purpose of avoiding undue delay in the construction of needed facilities, providing for full and timely consideration of environmental consequences and assuring that all environmental, economic and technical issues are resolved in an integrated fashion. The majority of the Committee agrees with this assessment.

In sum, there can be no guarantee that an ordinance, if enacted, will be developed and voted upon in a timely manner, will ensure the enforcement of the findings and purposes set forth in RSA 641-H:1, and will be enforced by APB in a timely and objective manner.

The Committee considered deferring its decision until the time identified as a deadline for introduction of a preliminary draft of the ordinance to the public. However, even then, the Committee would have to base its decision on a preliminary draft of the ordinance without knowing whether the final version would actually render the Committee's jurisdiction unnecessary to assure the enforcement of the findings and purposes set forth in RSA 641-H:1.

In contrast, the Committee's review of the Project is statutorily defined and will assure that the findings and purposes identified in RSA 162-H:1 will be enforced and complied with. The Committee already has a well developed regulatory scheme designed to address the siting,

construction and operation of renewable energy facilities consistent with the purposes and findings articulated in RSA 162-H:1.

In addition, under RSA 162-H:6-a, the Committee is required to exercise its review within an eight month timeframe. The timeframe contained at RSA 162-H:6-a, VIII guarantees that consideration of the Project is conducted in a timely manner in keeping with the findings and purposes set forth at RSA 162-H:1.

It is also important to note that the Antrim Board of Selectmen, as the locally elected governing body which has the authority to speak and act on behalf of the town as a whole (see RSA 41:8), petitioned the Committee to assert jurisdiction over the Project and asserted that the Town does not have the level of expertise to address and regulate a project of this magnitude. Although the request from the Town's governing body to assert jurisdiction does not automatically mean that the Committee should assert such jurisdiction, due weight and consideration should be given to such request. See, RSA 162-H:16, IV (B). It is clear that the planning board and the municipal governing body (the Selectboard) are at loggerheads over the manner in which the Project should be considered. The friction between the local governmental entities does not suggest that future consideration of the Project by town boards will be conducted in a timely manner, respecting the due process rights of all participants.

Furthermore, we note that the Committee's jurisdiction will not preclude the Town from raising its concerns during the adjudicative process. The Committee is statutorily required to give due consideration to the views of municipal and regional planning commissions and municipal governing bodies while deciding whether to grant the Certificate of Site and Facility to the Applicant. RSA 162-H:16, IV (b). This statutory requirement guarantees that the Town and

its political sub-entities will have the opportunity to express their respective positions in regard to AWE's Application for Site and Facility.

Taking into consideration that the Town does not have an ordinance designed to address renewable energy facilities, that it is unknown whether and when such an ordinance will actually be enacted and whether it will adequately address the purposes and findings set forth in RSA 162-H:1, together with the findings and substance of the discussion above, a majority of the Committee finds that adequate protection of the objectives and purpose of RSA 162-H:1 requires the Committee to assert jurisdiction over the Project.


However, it is not our intention to allow AWE to delay in filing an Application for a Certificate of Site and Facility. AWE has represented that an Application would be filed before the end of 2011. That representation has informed the majority's decision in this matter and, therefore, as a condition of maintaining jurisdiction, we require that AWE file a complete Application before January 31, 2012.

## **V. CONCLUSION AND ORDER**

Having considered the record of this matter and the legal standards to be applied, a majority of the Committee find that, subject to the conditions discussed herein and made a part of the Order that adequate protection of the objectives and purpose of RSA 162-H:1 requires the Committee to assert the jurisdiction over the Project. In order for the Committee to maintain jurisdiction, AWE shall file a complete Application for a Certificate of Site and Facility on or before January 31, 2012.

By Order of the Site Evaluation Committee this 10th day of August, 2011.

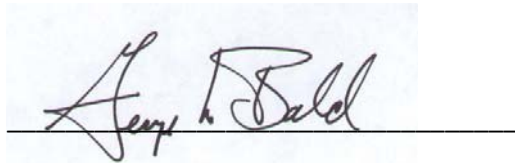
**[MAJORITY SIGNATURES]**



Harry Stewart, Director-Water Division  
Department of Environmental Services



Clifton Below, Commissioner  
Public Utilities Commission



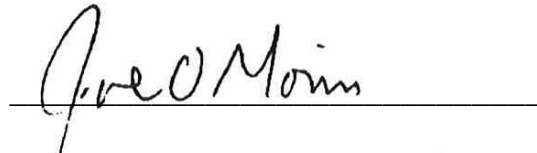
George Bald, Commissioner  
Dept. of Resources & Economic Dev.



Robert Scott, Director-Air Resources Div.  
Department of Environmental Services



Glenn Normandeau, Exec. Director  
NH Fish & Game



Joanne Morin, Director  
Office of Energy and Planning