

**STATE OF NEW HAMPSHIRE  
SITE EVALUATION COMMITTEE**

**Docket No. 2012-01**

**Re: Application of Antrim Wind Energy, LLC for a Certificate of Site  
and Facility for a Renewable Energy Facility Proposed to be  
Located in Antrim, Hillsborough County, New Hampshire**

**May 18, 2012**

**ORDER ON MOTIONS TO INTERVENE**

**Background**

On January 31, 2012, Antrim Wind Energy, LLC (Applicant or AWE) submitted an Application for a Certificate of Site and Facility, seeking authority to site, construct and operate a renewable energy facility in the Town of Antrim, Hillsborough County, New Hampshire (Application). The Applicant proposes the siting, construction and operation of not more than 10 wind turbines, each having a nameplate capacity of 3MW for a total nameplate capacity of 30MW, along with associated facilities, including a substation, distribution lines, and related buildings and structures (Facility or Project).

On February 9, 2012, I was designated to conduct the preliminary review of the Application pursuant to RSA 162-H: 6-a, II<sup>1</sup>. At that time I was a Commissioner on the Public Utilities Commission. On March 5, 2012, I issued an Order finding that the Application contained sufficient information to carry out the purposes of RSA 162-H.

On March 20, 2012, in my capacity as Vice-Chairman of the Committee, I designated a subcommittee to consider the Application pursuant to RSA 162-H: 4, V (Subcommittee). On March 20, 2012, an Order and Notice of Prehearing Conference, Site Visit, and Public Information Hearing issued. That Order designated May 1, 2012, as a deadline for the filing of Motions to Intervene.

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<sup>1</sup> The Chairman of the Committee, Commissioner Thomas Burack has recused himself from hearing this matter. The act of appointing a member of the Committee to conduct the preliminary review pursuant to RSA 162-H:6-a, II, is a purely ministerial act; in the absence of a vice-chair of the Committee, Chairman Burack took the ministerial action necessary to achieve the purpose of RSA 162-H.

The Subcommittee has received motions to intervene from:

The Town of Antrim (Antrim)

The Antrim Planning Board (Planning Board)

The Antrim Conservation Commission (Antrim CC)

The Stoddard Conservation Commission (Stoddard CC)

The Audubon Society of New Hampshire (Audubon)

The Harris Center for Conservation Education (Harris Center)

Industrial Wind Action Group (IWAG)

Appalachian Mountain Club (AMC)

Brenda , Mark and Nathan Schaefer (Schaefer)

Richard and Lorraine Block (Block)

Robert A. Cleland and Annie Law (Law)

Katharine Elizabeth Sullivan (Sullivan)

Elsa Voelcker (Voelcker)

Janice Duley Longgood (Longgood)

Clark A. Craig Jr. (Craig)

Robert Edwards and Mary E. Allen (Allen)

James A. Hankard (Hankard)

Samuel and Michelle Apkarian (Apkarian)

Clifton Burdette (Burdette)

Each party seeking to intervene filed a written a motion and was permitted to address his or her request at the Prehearing Conference held on May 7, 2012. The Applicant filed a written response to each request for intervention and was permitted to further address the requests at oral argument at the Prehearing Conference.

It should also be noted that this is not he first docket in which the Site Evaluation Committee has considered the Facility. In Docket No. 2011-02, upon a petition filed by the Town of Antrim, the Committee determined that it would assert jurisdiction over the Facility pursuant to RSA 162-H:2, XII. At that time the facility was slated to be less than 30 MW. Subsequent design changes to the Facility have increased the nameplate capacity to 30 MW. Several of the parties seeking to intervene in this docket were previously granted intervenor status in the prior docket.

### **The Motions to Intervene**

Each party seeking to intervene in this matter asserts that the instant proceeding affects the party's rights, duties, immunities or other substantial interests. Similarly each party seeking to intervene asserts that allowing intervention will not impair the orderly and prompt conduct of the proceedings. The Applicant has appropriately responded to each of the motions to intervene. The Applicant's responses range from assent to complete objection. In some cases the Applicant assents but seeks limitations on participation. Before addressing each of the requests I will address the standard for intervention.

The New Hampshire Administrative Procedure Act, RSA 541-A: 32, I, sets forth circumstances under which an administrative agency must allow intervention. 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 petitioner qualifies as an intervenor 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.

If a petitioner meets the requirements of RSA 541-A: 32, I, the presiding officer must allow the petitioner to intervene. However, if a petitioner cannot demonstrate that his or her rights duties, immunities or other substantial interest are affected by the proceedings a presiding officer may nevertheless allow intervention. RSA 541-A:32, II, provides that "(t)he presiding officer may grant one or more petitions for 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." The Applicant disputes this interpretation of the statute.

In its response to the various motions to intervene the Applicant argues that the discretionary authority of the presiding officer to allow intervention is limited to motions to intervene that are not timely filed. In its argument and without the benefit of case-law the Applicant asserts that RSA 541-A: 32, II, is simply a temporal contingency that addresses situations where a motion to intervene is not filed in a timely manner. However, nothing within the statute itself supports such an interpretation.

In interpreting the intervention statute I must ascribe the "plain and ordinary meaning" to the words used in the statute and may not "consider what the legislature might have said or add language that the legislature did not see fit to include." *Frost v. Comm'r, New Hampshire Banking Dept.*, 2011-121, 2012 WL 892215 (N.H. Mar. 16, 2012). I must also consider the context of the overall statutory scheme. *Id.*

The language used in the intervention statute makes no mention of a temporal limitation. In fact the plain words of the statute permit the presiding officer to allow discretionary intervention "at any time." The language in RSA 541-A: 32, II, is broad. Similarly, the Committee's enabling statute, RSA 162-H, contains no limitation on the standing of intervenors. The statute envisions intervenors, see RSA 162-H: 6-a, VII, but does not set forth criteria that limits standing to intervene before the Committee. The broad language of RSA 541-A: 32, II, is consistent with generally accepted principles of administrative law and practice. An administrative agency "is free to permit third parties to participate in proceedings before it, for such assistance as those parties may offer, without creating a right in those parties to review a negative decision that the [agency] may ultimately make." See, *Ruel v. New Hampshire Real Estate Appraiser Board*, 163 NH 34, 41 (2011), quoting *Consolidated Edison of New York v. O'Leary*, 131 F.3d 1475, 1481 (Fed. Cir., 1997).

The Applicant also invokes the Committee's administrative rules to support its argument. That argument is misplaced. New Hampshire Administrative Rule Site 201.11 requires the presiding officer to grant a "late-filed petition to intervene pursuant to RSA 541-A:32, II upon determining that such intervention would be in the interest of justice

and would not impair the orderly and prompt conduct of the hearings.” Nothing within the rule requires that such intervention be limited to a party that has demonstrated a substantial interest. Moreover, the rule itself refers to RSA 541-A: 32, II which, as discussed above, cannot be interpreted as narrowly as the Applicant pleads.

With this interpretation of the statutes governing intervention in proceedings before this Subcommittee I will now address each motion to intervene:

**Town of Antrim.** The Facility proposed in the Application is located entirely within the Town of Antrim, New Hampshire (Antrim). The Town, through its select board, previously petitioned the Committee requesting that the Committee exercise jurisdiction over the siting, construction and operation of the proposed Facility. See, Docket No. 2011-02. That petition was granted. Antrim, through its select board, has now moved to intervene in these proceedings. The Applicant does not object to Antrim’s Motion and points out that it has signed a comprehensive agreement with the Town. See, Application, Volume 3, Appendix 17A. According to the Applicant, Antrim has agreed to support the Application. See, Applicant’s Response to Antrim Board of Selectmen’s Petition for Intervention.

Participation of local municipalities is consistent with RSA 162-H: 16, IV (b), requiring the Committee to give due consideration to the views of municipal and regional planning agencies and municipal governing bodies with respect to the orderly development of the region. Likewise, RSA 541-A:39 requires an administrative agency to give notice to and afford all affected municipalities a reasonable opportunity to submit data, views or comments with respect to the issuance of a permit, license, or other action within its boundaries that directly affect the municipality. Therefore, the Motion of the Town of Antrim to intervene in this docket is granted. Antrim shall participate fully as an intervenor.

**Antrim Planning Board.** The Antrim Planning Board (Planning Board) also moves to intervene in this docket. The Planning Board asserts that its request to intervene should be granted because it is the elected statutory body that is principally responsible for the creation and implementation of land use planning regulations in Antrim. The Planning Board points out that it was granted intervenor status in the previous docket and that it has been involved with the development of the facility as a result of its consideration of the Applicant’s siting and construction of meteorological towers within the project area. It appears that the Planning Board and Antrim have significantly different views and opinions about the proposed facility and the Applicant objects to the Planning Board’s motion to intervene. The Applicant asserts that the Planning Board’s statutory role does not involve substantial rights, privileges, immunities or other interest that would permit intervention in this docket.



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. In the light of the Subcommittee's statutory obligation to consider the views of local planning agencies I find that the Planning Board should be permitted to fully participate in this docket as an intervenor.

**Antrim Conservation Commission.** The Antrim Conservation Committee (Antrim CC) has filed a motion to intervene in this docket. Antrim CC did not participate in the previous proceedings regarding the Facility. In its motion Antrim CC asserts that it "is neither for nor against the project" and seeks to intervene in order to "bring focus to the local, state and nationally significant landscape-scale conservation lands in Antrim and adjacent towns." Antrim CC notes that pursuant to RSA 36 (sic) it has served the Town of Antrim for nearly 40 years and has a history of successfully interacting with other town boards, developers and conservation trusts. The Applicant objects to Antrim CC's motion to intervene and asserts that the Antrim CC lacks standing and that its participation would interfere with the prompt and orderly conduct of the proceedings because of the participation of several different town boards

Pursuant to RSA 36-A: 2 a city or town may choose to create a conservation commission "for the proper utilization and protection of the natural resources and for the protection of the watershed resources" of the municipality. The statutory authority of municipal conservation commissions is outlined in RSA 36-A: 2 and includes: research of local land and water areas; coordination of unofficial bodies organized for similar purposes; the publication of books maps and charts relevant to its work; maintain an index of open space, natural aesthetic and ecological areas within the town; obtaining information concerning the proper utilization of such areas. In addition a conservation commission is charged with recommending a program for the protection, development and better utilization of such natural, aesthetic and ecological areas. The statutory obligations of a municipal conservation commission include planning functions pertaining to the protection of the natural environment and watershed resources. Pursuant to RSA 162-H:16, IV (b) the Subcommittee is required to give due consideration to the views of such commissions when determining whether the facility will interfere with the orderly development of the region. The balance weighs in favor of allowing intervention to Antrim CC. The purpose and breadth of the Antrim CC's statutory obligations and its knowledge of the various conservation lands in Antrim,

many of which are within or directly about the Project area, outweigh any concerns regarding the participation of duplicative town boards.

The Applicant's final objection to Antrim CC's motion to intervene is based upon a claimed lack of statutory authority for the Antrim CC to intervene. In lodging its objection the Applicant relies on *Hooksett Conservation Commission v. Hooksett Zoning Board of Adjustment*, 149 NH 63, 68 (2003). The *Hooksett* decision resulted from an appeal lodged by the municipal conservation commission from a ruling of the municipal zoning board. The appeal was governed by RSA 677:4 relating to zoning board appeals to the superior court. The Court determined that neither the statute itself nor its legislative history clearly defined who had standing to appeal a zoning board decision to the superior court. In the face of such ambiguity the Court examined the "policy sought to be advanced by the statutory scheme." Ultimately the Court held that the conservation commission did not have standing to bring the appeal to the superior court because to allow such appeals by multiple local boards would interfere with "the prompt and orderly review of land use applications," "cause considerable delays," require public funds to support both sides of an issue and thereby cause "political wrangling" among governmental units. See, *Hooksett* at p. 953.

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. The case did not address participation of the conservation committee before the zoning board itself. Consideration of RSA 162-H does not require the same result. RSA 162-H serves a different purpose than that of a local zoning board. Pursuant to RSA 162-H: 16, IV, (b) the Subcommittee is statutorily required to consider the views of both municipal planning commissions and municipal governing bodies. The *Hooksett* case does not prohibit the participation of a conservation commission before the Subcommittee. Antrim CC's motion to intervene is granted and it may fully participate in this docket.

**The Stoddard Conservation Commission.** The Town of Stoddard abuts the Town of Antrim to the west and the north of the project site. In its motion to intervene Stoddard Conservation Commission (Stoddard CC) asserts that the facility will have impacts on conservation lands in Stoddard that are contiguous to conservation lands in Antrim and make up an unfragmented block of forest that it describes as a "super-sanctuary." In addition Stoddard CC claims that the Facility will have an aesthetic impact on the view shed from various conservation lands located within the Town of Stoddard. The Applicant objects to participation by Stoddard CC asserting the same arguments pertaining to the statutory authority of a conservation commission to intervene. In addition the Applicant suggests that Stoddard CC's interests are duplicative of others and that any impact on the Town of Stoddard will be minimal.



For the reasons discussed above, the Applicant's objections pertaining to the authority of a conservation commission are overruled. As an abutter to the west and north of the project site, Stoddard CC has demonstrated a substantial interest in the proceedings and will be permitted to fully participate as an intervenor.

**The Audubon Society of New Hampshire.** The Audubon Society of New Hampshire (Audubon) is an advocacy organization as well as a conservation land trust. Audubon either owns or holds conservation easements on more than 2000 acres of land that abuts the Project area. The Applicant does not object to intervention by Audubon but argues that its intervention should be limited to exclude Audubon from participation based upon additional properties protected by Audubon or based upon Audubon's "wind power policy."

The objection is overruled. Audubon's property interest in the abutting conservation land warrants full participation as an intervenor in this docket. While the Applicant seeks to exclude Audubon's "wind power policy," there is no valid reason to do so. Audubon may seek introduction of its wind power policy in the same fashion as any party would seek the introduction of evidence before the Subcommittee. The admission of the policy as evidence will be subject to the same rules as any other item of evidence.

**The Harris Center for Conservation Education.** The Harris Center for Conservation Education (Harris Center) is a land conservation trust that holds conservation easements on properties that do not abut the Project area but are in close proximity in the region. In addition the Harris Center has an agreement with the Applicant and the four owners of the land within the Project area to obtain approximately 685 acres of conservation easements over portions of the Project area and abutting properties. The Applicant does not object to the Harris Center's participation but requests that it be limited to issues pertaining to its property interests.

Discerning which issues may pertain to the Harris Center's particular property interest as opposed to a more general interest would, in my view, require an unproductive and unnecessary analysis. The Harris Center has asserted substantial interests that warrant full participation as an intervenor in this proceeding.

**Industrial Wind Action Group.** Industrial Wind Action Group (IWAG) is an advocacy group that generally opposes land based utility scale wind energy projects. IWAG asserts that it has a substantial interest which may be affected by the outcome of these proceedings because it represents "subscribers" who have an interest in whether the Committee will find that the proposed Project can satisfy the criteria for approval set forth in RSA 162-H:16. The Applicant objects and argues that IWAG's representation of



its unnamed subscribers does not vest it with any substantial interest in the outcome of the proceedings.

IWAG has intervened in other proceedings before the committee concerning wind energy facilities. In those proceedings IWAG has demonstrated knowledge of the issues pertaining to such facilities and an ability to operate within the rules, regulations and orders of the Subcommittee. IWAG has not demonstrated a substantial interest that would require the Subcommittee to permit intervention. However, I find that IWAG's participation in this docket may be helpful to the Subcommittee and will not interfere with the prompt and orderly conduct of the proceedings. IWAG's motion to fully participate as an intervenor is granted pursuant to RSA 541-A:32, II. *See also, Ruel v. New Hampshire Real Estate Appraiser Board*, 163 NH 34, 41 (2011).

**Appalachian Mountain Club.** The Appalachian Mountain Club (AMC) seeks to intervene in this proceeding primarily as an advocacy organization whose self-stated mission is to "promote the protection, enjoyment and wise use of the mountains, rivers and trails of the Appalachian region." AMC has in the past participated in proceedings before the Committee pertaining to wind power facility siting and construction. In those proceedings AMC has demonstrated knowledge of the important issues that surround the siting, construction and operation of wind power facilities and an ability to operate with the rules regulations and orders of the Subcommittee. The Applicant objects to intervention by AMC because AMC's motion does not demonstrate a substantial interest that may be affected by the outcome of the proceedings.

AMC's motion does not demonstrate a direct substantial interest that would be affected by the outcome of this proceeding. However, I find that the AMC's participation in this docket may be helpful to the Subcommittee and will not interfere with the prompt and orderly conduct of the proceedings. AMC's motion to fully participate as an intervenor is granted pursuant to RSA 541-A:32, II. *See also, Ruel v. New Hampshire Real Estate Appraiser Board*, 163 NH 34, 41 (2011).

**Abutting Landowners.** Brenda, Mark and Nathan Schaefer (Schaefer), Janice Duley Longgood (Longgood) and Clark Craig Jr. (Craig) have filed motions to intervene asserting that their homestead property directly abuts the project area and that they will be in close proximity to the Facility if constructed. The Applicant does not object to intervention by these abutters but does suggest that they be grouped and required to designate a spokesperson for the group pursuant to RSA 541-A: 32, III.

The abutting land-owners have demonstrated that their rights, privileges, immunities and other substantial interests are directly affected by the outcome of these proceedings. The motions are granted. Schaefer, Longgood and Craig are hereby directed to participate together in the proceeding. They shall designate a spokesperson for their group to deal with issues that are common to each of them. However, Schaefer,

Longgood and Craig are free to act separately with respect to those issues that specifically pertain to the effect of the siting, construction and/or operation of the facility on their individual residences and properties.

**North Branch Residents.** Richard and Lorraine Block (Block), Robert Cleland and Annie Law (Law), Elsa Voelcker (Voelcker), James Hankard (Hankard), Samuel and Michelle Apkarian (Apkarian) and Clifton Burdette (Burdette) are residents of the area in Antrim known as the North Branch. The North Branch does not directly abut the project area but occupies a ridgeline that directly faces the Project area. Substantial portions of the North Branch area will have views of the Project if constructed. The Facility as proposed may have an effect on the viewshed from the North Branch and may affect their individual properties. The Applicant takes no position on these motions other than to request that the parties be consolidated pursuant to RSA 541-A:32, III.

I find that these residents have demonstrated a substantial interest that may be affected the outcome of the proceeding. Block, Law, Voelcker, Hankard, Apkarian and Burdette shall be permitted to intervene. Pursuant to RSA 541-A:32, III, I further order that they shall combine as a single party for the purpose of discovery, presentation of evidence and examination of witnesses. The group shall designate a single spokesperson for these purposes and shall participate fully through their spokesperson.

**Katherine Elizabeth Sullivan.** Katherine Elizabeth Sullivan (Sullivan) is neither an abutting property owner nor a resident of the North Branch area of Antrim. However she lives within two miles of the proposed Facility. Her property is completely surrounded by property owned by Audubon. The Applicant objects to participation by Ms. Sullivan asserting that her non-abutting property ownership fails to establish a substantial interest that may be affected by the outcome of the proceedings.

I find that Ms. Sullivan's proximity to the proposed project and to conservation lands surrounding the Project demonstrates a substantial interest that may be affected by the outcome of these proceedings. Though the Applicant urges that Sullivan be combined with others, I find her interests are not consistent with Audubon, the abutting property owners or the North Branch residents. Therefore she may participate as an intervenor without combination or limitation.

**Robert Edwards and Mary E. Allen (Allen).** Robert Edwards and Mary E. Allen (Allen) have filed a joint motion to intervene. Although residents of Antrim they are not abutters to the project nor do they reside in the affected North Branch area of the town. Each has held positions in town government over the years. Their motion to intervene asserts that they are concerned primarily with the financial aspects of the Application and its effect on the financial prospects for the town.

Neither has demonstrated a substantial interest that would require that they be permitted to intervene in this proceeding. However, the viewpoint they express may be helpful to the Subcommittee particularly with regard to the impact of the proposed facility on the orderly development of the region. Therefore I will grant their motion to intervene pursuant to RSA 541-A: 32, II. *See also, Ruel v. New Hampshire Real Estate Appraiser Board*, 163 NH 34, 41 (2011).

### **Conclusion and Order**

It is therefore ordered that:

The Town of Antrim's motion to intervene is granted. The Town may fully participate in the proceeding.

The Antrim Planning Board's motion to intervene is granted. The Antrim Planning Board may fully participate in the proceeding.

The Antrim Conservation Commission's motion to intervene is granted. The Antrim Conservation Commission may fully participate in the proceeding.

The Stoddard Conservation Commission's motion to intervene is granted. The Stoddard Conservation Commission may fully participate in the proceeding.

The Harris Center for Conservation Education's motion to intervene is granted. The Harris Center may fully participate in the proceeding.

The Industrial Wind Action Group's motion to intervene is granted. The Industrial Wind Action Group may fully participate in the proceeding.

The Appalachian Mountain Club's motion to intervene is granted. The Appalachian Mountain Club may fully participate in the proceeding.

The Motions to intervene filed by Brenda, Mark and Nathan Schaefer, Janice Duley Longgood and Clark Craig Jr. are granted. These intervenors shall be combined for the purposes of discovery, presentation of evidence and examination of witnesses pursuant to RSA 541-A: 32, III. The group shall designate a spokesperson for said purposes within seven (7) days. Nothing herein shall be construed to prohibit the individual intervenors from presenting evidence, seeking discovery or conducting



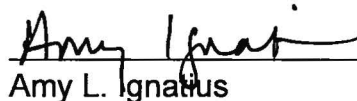
examination of witnesses with regard to matters that directly affect their abutting properties.

The motions to intervene filed by Richard and Lorraine Block, Robert Cleland and Annie Law, Elsa Voelcker, James Hankard, Samuel and Michelle Apkarian and Clifton Burdette (Burdette) are all granted. These intervenors shall be combined for the purposes of discovery, presentation of evidence and examination of witnesses pursuant to RSA 541-A: 32, III. The group shall designate a spokesperson for said purposes within seven (7) days.

Katherine Elizabeth Sullivan's motion to intervene is granted. She may fully participate in the proceeding.

The motion of Robert Edwards and Mary E. Allen to jointly intervene is granted. They may fully participate in the proceeding but shall designate a spokesperson for the purpose of discovery, presentation of evidence and examination of witnesses.

So ordered this eighteenth day of May, 2012 by the Site Evaluation Committee.

A handwritten signature in black ink, appearing to read "Amy Ignatius", is written over a horizontal line.

Amy L. Ignatius

Vice Chairman and Presiding Officer  
NH Site Evaluation Committee