

**THE STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

**In the matter of the
Application for Certification**

**Pursuant to RSA 162-H of
ANTRIM WIND ENERGY, LLC**

Docket No. 2012-01

**REPLY OF COUNSEL FOR THE PUBLIC TO APPLICANT'S RESPONSE TO
MOTION TO COMPEL**

Counsel for the Public, by his attorneys, the Office of the Attorney General, hereby replies to the Applicant's Response To Motion of Counsel for the Public to Compel. The Applicant's Response and objections should be overruled and it should be compelled to produce the information sought. In support hereof, Counsel for the Public respectfully represents as follows:

1. Counsel for the Public served a limited number of data requests on the Applicant, Antrim Wind Energy, LLC ("AWE" or "Applicant"), to produce relevant information.
2. The Applicant produced a limited amount of information and made unsupported objections.
3. In its Response, the Applicant seems to adopt the position that all it needs to do to satisfy the requirement of financial and managerial capability is to have paid consultants and their own principals say that they have financial capability and hang tough through cross examination. In the Applicant's view whether the Applicant can produce a viable financial model, appropriate contracts, including a power purchase agreement, and demonstrate appropriate levels of experience and sophistication, are irrelevant, so long as

they can show that at sometime in the past, some of their people have participated in unspecified efforts and in unspecified ways to do these things while working on other projects. Applicant cites the decision reached in *Granite Reliable* as authority for the proposition that this model works and is lawful and tenable.

4. *Granite Reliable* is easily distinguishable. In that case, the applicant included Noble Environmental Power which itself had actually developed, financed, installed and operated numerous other projects. Here neither AWE, Eolian, or Westerly has any such accomplishments. *Granite Reliable* is also a poor choice for a model, because, notwithstanding the finding of financial capability, the project was sold under distressed circumstances before construction. Finally, *Granite Reliable* is not a precedent for refusing to disclose the information Counsel for the Public seeks, since much of the same type of information was sought in that case and provided and used for evidence in the hearing.

5. The Applicant also does not address the issue that just because information is confidential does not mean it is not subject to discovery. Applicant refers to no authority for its implicit assertion that confidential = privileged. Further, in neither the objections it made or the Response does the Applicant take the position that any of the information is privileged on any recognizable ground. "It is clear that no absolute privilege for trade secrets is recognized." *Spain v. United States Rubber Co.*, 94 N.H. 400, 401 (1947). The Applicant has not claimed that any of the information being sought is a trade secret and instead that it is "confidential, sensitive, commercial information." Where the financial resources of the party are at issue in the litigation, the financial affairs of the party are discoverable. *Sawyer v. Bouford*, 113 N.H. 627, 628-29 (1973). The Applicant bears the burden of showing financial and managerial capability to construct and operate the facility, and financial information

about the Applicant's resources is essential. Financial information about the people behind a newly minted single purpose LLC is essential. Information about a key business element (the PPA) is relevant to whether the Applicant's business model will work. In particular, where the Applicant's financial model depends upon a PPA, and that agreement has not been made yet, information about what the Applicant has done to get one is very relevant. Is it because the project's sponsors lack credibility? Is it because the financial models developed will not work? Or is it because the Applicant has made little or no attempt to do so, which indicates a certain level of unpreparedness which is evidence of a lack of capability? The Applicant's objections would ask the parties to accept the Applicant's answers at face value and not require them to 'show their work.' But Counsel for the Public has a right to cross examine the Applicant's witnesses on their self-referential testimony to arrive at truth.

6. The PUC's decision in the *Laidlaw* proceedings by Public Service Co. of New Hampshire is not precedent and is not persuasive. In that case the PPA negotiations material was deemed not relevant because the issue before the PUC was not capability, but instead approval of a *final* PPA. *In re Public Serv. Co. of N.H. Petition for Approval of Power Purchase Agreement with Laidlaw Berlin BioPower, LLC*, NH PUC no. DE 10-195, Order no. 25,174, dated 11/24/2010 at 18 ("We are required to review the PPA to determine if it is in the public interest in its final form.") The issues in front of the PUC in *Laidlaw* did not involve managerial and financial capability and instead involved an application of the standards for approvals of PPAs as in the public interest under RSA 362-F:9. None of the criteria under section 362-F:9 addresses whether the petitioner has the requisite financial and managerial capability to construct and operate a renewable energy facility. *See* RSA 362-F:9, II (listing the criteria). In this case, the Applicant's burden is to demonstrate financial

and managerial capability and the steps taken towards securing a PPA (or not taken), when one has not been obtained so far, are relevant.

7. The Applicant states that Professor Gittell has refused to supply the information Counsel for the Public requested. The Applicant also argues that based on the professor's resume Counsel for the Public could find the same information by other means. These oppositional stances do not help at arriving at the truth. The extent to which Professor Gittell is enriched by the renewable energy industry for producing non-peer reviewed reports such as those submitted here while attempting to appear 'scholarly' is relevant to his credibility. The information sought is not available through other means. Professor Gittell's refusal to produce the information requested is unreasonable and means that his testimony should be stricken. *In re Letendre*, 149 N.H. 31, 37-38 (2002).

Therefore, Counsel for the Public respectfully asks that the Committee compel the Applicant to deliver the information requested, order the testimony and reports of Professor Gittell be stricken from the record, and grant such other and further relief as may be just.

Respectfully submitted this 11th day of July, 2012,

PETER C.L. ROTH
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By his attorneys

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Certificate of Service

I, Peter C.L. Roth, do hereby certify that I caused the foregoing to be served upon each of the parties named in the Service List of this Docket.

Dated: July 11, 2012


Peter C.L. Roth