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

August 22, 2012

ORDER ON OUTSTANDING MOTIONS

I. PROCEDURAL HISTORY

On January 31, 2012, Antrim Wind Energy, LLC (Applicant) 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 ten (10) wind turbines, each having a maximum nameplate capacity of 3MW for a total maximum nameplate capacity of 30MW, along with associated facilities, including a substation, distribution lines, and related buildings and structures.

On April 30, 2012, the Attorney General appointed Senior Assistant Attorney General Peter C.L. Roth as Counsel for the Public in accordance with RSA 162-H: 9. On May 7, 2012, a prehearing conference was held. As a result of the prehearing conference, a procedural order was issued on May 18, 2012. The procedural order set forth a schedule with discovery deadlines and technical sessions to allow the parties to conduct discovery.

Counsel for the Public and the intervenors were to propound data requests to the Applicant on or before June 1, 2012. Answers to the requests were due on June 20, 2012. A technical session was held on June 27 through June 29, 2012. As a result of the technical session, certain additional data requests were propounded. Throughout the course of discovery, the Applicant objected to providing various types of information. Between all of the parties to this proceeding, there have been twenty-two pleadings filed related to discovery issues. This order addresses those pleadings.

In the course of discovery, the Applicant has filed two (2) motions seeking protective orders. This Order also addresses the requests for protective orders.

On July 26, 2012, the Gregg Lake Association (GLA) filed a Motion to Intervene. The Applicant Objected on August 1, 2012. This order will also address the GLA motion.

II. MOTIONS TO COMPEL

A. Standard of Review

New Hampshire Administrative Regulation Site 202.12(a) sets forth the standard that the Committee should employ when considering discovery issues. In pertinent part, the rule permits discovery when it "is necessary to enable a party to acquire evidence admissible in a proceeding and when such method will not unduly delay prompt and orderly conduct of the proceeding." *Id.* The formal rules of evidence do not govern admissibility in administrative proceedings. *See*, RSA 541-A: 33, II. Consistent with the administrative rule, RSA 541-A: 33, II permits the presiding officer in an adjudicatory proceeding to "exclude irrelevant, immaterial or unduly repetitious evidence."

B. Discovery Sought by Counsel for the Public

Counsel for the Public seeks an order compelling the Applicant to respond to seven (7) separate data requests. The Applicant objects to some of the requests and seeks protective orders with respect to others. The majority of the data requests referenced in Counsel for the Public's Motion to Compel relate to information and documents concerning the financial, managerial and technical capability of the Applicant to site, construct and operate the proposed facility consistent with the terms of the Certificate. See, RSA 162-H:16, IV(a). In his data requests, Counsel for the Public sought the following information which was objected to by the Applicant: (1) the salary histories for Messrs. Kenworthy and Soinin; (2) a "constructability analysis study" and projected construction cost estimates prepared by Reed & Reed; (3) a copy of all documents relating to activities in which the Applicant has engaged in order to obtain off-take agreements; (4) all documents pertaining to the business plan and financial pro-formas for the Applicant; (5) a copy of all agreements between the Applicant or Westerly Wind as the first party and Mr. Cofelice as the second party; (6) a listing of all meetings and teleconferences and documents pertaining to any meetings or teleconferences between the Applicant, Mr. Kenworthy, Mr. Soinin or any other person, and Mr. Pasqualini; (7) the income derived by Professor Gittell for producing reports and papers, for hire, on an annual basis for the past five (5) years.

i. Salary Histories

Counsel for the Public argues that salary histories are relevant to the managerial capacity of the Applicant's principals and are illustrative of a person's "growth and success in a particular profession or business." The Applicant objects and asserts that salary history is irrelevant to managerial capacity.

There certainly are better measures of managerial capacity than salary history. The information, even if admitted as evidence, would not assist the Subcommittee in undertaking its obligation to determine the financial, managerial and technical capabilities of the Applicant. This request, therefore, is denied.

ii. Construction Cost Estimates

Counsel for the Public argues that the "constructability analysis" and construction cost estimates from Reed and Reed are relevant and admissible in determining the financial managerial and technical capabilities of the Applicant. The Applicant responds that there is no document that can be characterized as a "constructability analysis". The Applicant also objects to providing Reed and Reed's construction cost estimates, asserting that such estimates are not relevant to the Applicant's near term prospects for project financing and that disclosure may harm Reed and Reed and the Applicant's competitive position when it bids out the project for construction. Nevertheless, after lodging its objections, the Applicant agrees to provide the information to Counsel for the Public only and subject to a protective order.

The requests will be granted, subject to a protective order. The terms and conditions of the protective order are set forth in section III (b) of this order.

iii. Off-Take Agreement Negotiations

Counsel for the Public seeks "details of all activities in which the Applicant has been engaged to obtain an off-take agreement and documents relating to those activities". The Applicant provided a response that indicated that it had participated in a solicitation for Renewable Energy Credits (RECs) and renewably generated electricity that was issued by the Massachusetts Department of Energy and Resources on behalf of Massachusetts investor utilities in October 2010. In its response, the Applicant indicates that it was not selected for the "short list" and, therefore, negotiations did not occur. The Applicant also responded that it had engaged in "preliminary conversations" with several potential parties over the past two (2) or three (3) months regarding a potential off take agreement. However, the Applicant did not provide further information regarding those conversations and objected to the data request on the basis that its "conversations" and negotiations regarding possible off take agreements are of a highly confidential nature and should not be disclosed to anyone. In his Motion to Compel, Counsel for the Public simply states that the information is "important to the issue of financial and managerial capability".

Counsel for the Public does not identify how the information is important for a determination by the Subcommittee, or why these particular negotiations which have not resulted in any agreement are important to the issue of financial and managerial capability. It is difficult to conceive how preliminary discussions and negotiations regarding the *possibility* of an off take agreement will add any meaningful, let alone relevant, information in these proceedings. Therefore, Counsel for the Public's Motion to Compel the answer to data request 1-12 is denied.

iv. Business Plan and Pro-Formas

Counsel for the Public's data request 1-14 seeks copies of documents containing or referencing a business plan or pro-forma for the project in operation. The Applicant objected to the request, asserting that such documents are confidential and the request to provide "any document" referencing the business plan or pro-forma is overbroad and onerous. In his reply to the Applicant's objection to his motion, Counsel for the Public submits that confidential financial

information is not necessarily privileged and may be an important consideration in determining the financial prospects and capability of the Applicant to construct and operate the proposed project. The Applicant objects to providing this type of information on the basis that we have previously ruled that the important and relevant question with respect to the Applicant's financial capability in this docket is whether the Applicant has the financial ability in the near term to obtain project financing.

The Applicant's reliance upon a prior Site Evaluation Committee order is misplaced because the business plan and pro-forma does, in fact, have a direct bearing on the prospects of the Applicant to obtain project financing in the near term. The projected costs, the estimated revenues, and the estimated costs of operation, are precisely the type of financial information that will determine whether the Applicant is likely to obtain project financing in the near term. Nevertheless, we recognize that this information is highly confidential and could negatively affect the competitive interests of the Applicant if disclosed in public or to competitors, vendors, or suppliers. Therefore, we will order that the Applicant provide to Counsel for the Public a copy of any document outlining its business plan for the project; all financial pro-formas that have been considered by the company and any document which is necessary to understand the estimates contained in the pro-forma. It is not necessary that the Applicant disclose any and every document that refers to the pro-forma or business plan. The response to this request shall be provided solely to Counsel for the Public pursuant to the terms of a protective order which is discussed below in section III (b) of this order.

v. Cofelice Agreement

In data request 1-16, Counsel for the Public sought a copy of documents relating to any agreements between the Applicant, Westerly Wind, LLC and Joseph Cofelice. Mr. Cofelice is the Chief Executive Officer of Westerly Wind. Counsel for the Public asserts that agreements between Mr. Cofelice and Westerly Wind are relevant to the financial and managerial capabilities of the Applicant. The Applicant objects asserting that the information is irrelevant to the issue of the Applicant's financial and managerial capabilities. The Applicant also objects on the basis that agreements between Mr. Cofelice and Westerly Wind may include confidential information. Nevertheless, the Applicant agrees to provide only to Counsel for the Public, subject to a protective order, copies of the Westerly Wind, LLC agreement to which Mr. Cofelice is a party. The Applicant also agrees to provide Mr. Cofelice's services agreement with Westerly Wind, subject to a protective order. Both documents will have limited redactions relating to base salary and compensation.

An agreement between an employee and one of the companies that are sponsoring the Applicant does not appear to add much in the way of meaningful information to the evidence that the Subcommittee must consider in determining whether the Applicant has the requisite financial and managerial capabilities to undertake construction and operation of the project. Nonetheless, because the Applicant has agreed to provide the information to Counsel for the Public, we will grant the motion of Counsel for the Public and order that Mr. Cofelice's agreements with Westerly Wind, LLC shall be provided to Counsel for the Public only, subject to a protective order. The terms of the protective order are set forth below in section III (b) of this order.

vi. Pasqualini Meetings

In data request 1-18, Counsel for the Public asks the Applicant's financial consultant, Martin Pasqualini, to identify every meeting and telephone conference that he has had with the Applicant or any person associated with the project since January 1, 2009. The data request also requests that Mr. Pasqualini provide copies of all documents relating to such meetings or telephone conferences. In response, the Applicant has identified times when Mr. Pasqualini has met with Jack Kenworthy, CEO of the Applicant or other representatives of the Applicant, either in person or by conference call. Three conference calls occurred in December of 2011. A meeting took place on June 5, 2012. The Applicant advises Counsel for the Public that an overview of the project was distributed at the June 5, 2012 meeting. However, the Applicant objected to providing the overview document on the grounds that it contains confidential information. In its objection to Counsel for the Public's Motion to Compel, the Applicant indicates that it is willing to provide the document to Counsel for the Public only, subject to a protective order.

Presumably, because Mr. Pasqualini is a financial consultant, the document provides a financial overview of the project. In this regard, it is similar to the business plan and pro-formas discussed above. Like the business plan and pro-formas, a financial overview of the project is the type of information from which one can evaluate the Applicant's financial and managerial capability to construct and operate the project and is also relevant to the prospects of the Applicant for project financing. Therefore, I find that the information is, in fact, relevant and likely admissible. However, I also recognize the confidential nature of the information. If the information were to be disclosed to the public or to competitors, vendors, and suppliers of the Applicant, it could cause financial harm and unfairly disadvantage the competitive interests of the Applicant. Therefore, this information shall be disclosed to Counsel for the Public only, subject to a protective order. The terms of the protective order are discussed below in section III (b) of this order.

vii. Professor Ross Gittell

Counsel for the Public's data request 1-23 asks that Professor Ross Gittell, the Applicant's expert witness with respect to the effect of the project on real estate values, provide a statement listing the amount of income that he receives from producing reports and papers for hire on an annual basis. The request also asks Professor Gittell to list the sources of such income for the past five (5) years when they are related to renewable energy or "green industry" or the economic effects thereof. The Applicant initially objected to this request on the ground that it seeks personal financial information which is confidential, irrelevant and unlikely to lead to the discovery of admissible evidence. Counsel for the Public asserts that Professor Gittell's testimony is expected to be relied upon with respect to the effect of the project on the orderly development of the region. Counsel for the Public asserts that the question addresses possible bias by the witness.

Professor Gittell has an extensive resume and has written on a scholarly basis regarding the economy in New Hampshire and the impact of various energy projects on either the regional

or statewide economy. The payment of an expert witness is traditional fodder for cross-examination and is relevant with respect to the issue of the bias or prejudices of the witness. The request from Counsel for the Public is limited in that it is related only to reports prepared or papers written for hire regarding the renewable energy industry and its economic effects. It is also limited to the past five (5) years. However, it is important to note that Professor Gittell has a responsibility to the organizations or individuals who hired him to prepare reports. It appears, in many cases, that such reports were not prepared for release in a public forum. Therefore, we will not require Professor Gittell to reveal each report and the source of the income. It will be sufficient for the Applicant to provide Professor Gittell's overall income from preparing and producing reports and/or paper on a retained basis regarding the renewable energy industry or the economic effects thereof in total over the past five (5) years. The total should be broken down on a yearly basis and shall indicate whether the report or paper was on behalf of an entity supporting wind development, an entity opposing wind development or an entity that is neutral on the issue of wind energy. The Applicant is not required to specify the sources of the income. However, the Applicant shall disclose to the parties the amounts paid and to be paid to Professor Gittell in this docket. Because of the limitations we place on the disclosure of a portion of Professor Gittell's income from such reports and papers, I do not find a need for a protective order.

B. Data Requests of Industrial Wind Action Group

The Industrial Wind Action Group (IWAG) has filed a Motion to Compel the Applicant to respond to three (3) separate data requests. IWAG also requests clarification that confidential documents on file with the Subcommittee that are subject to a protective order and confidentiality agreement may be provided in copy form to the parties to the protective order and confidentiality agreement. We will address IWAG's Motion to Clarify first.

i. Clarification

By Order dated June 4, 2012, we issued an order on the Applicant's Motion for Protective Order and Confidential Treatment pertaining to certain unredacted financial information in the form of a balance sheet setting forth the assets and liabilities of the Applicant (the "Balance Sheet"). The Applicant construes the June 4, 2012 protective order to require that the Balance Sheet, which consists of one page, be reviewed by parties who have signed the confidentiality agreement in private at the DES office where the Subcommittee's file is maintained. IWAG argues that it should be provided with a copy of the material based upon its signature on the confidentiality agreement. The Applicant argues that e-mailing the Balance Sheet to IWAG runs the risk of improper disclosure, inadvertent or intentional.

Recognizing the Applicant's concern that e-mails are sometimes inadvertently misdirected, we will not require that the Balance Sheet be provided to the parties by e-mail. However, the Applicant shall provide a paper copy of the Balance Sheet to each party who has signed the confidentiality agreement. The parties may make copies of the Balance Sheet for the sole purpose of preparation for these proceedings. At the conclusion of the proceedings, each party shall return the Balance Sheet and any copies made to the Applicant. No party shall disseminate the Balance Sheet or the information contained therein to any other person. The

information shall not be alluded to except within the proceedings before the Subcommittee and only with appropriate notice and a protective order. The parties are warned that the improper dissemination of the Balance Sheet or any other protected material from this docket or any of the information contained therein can result in the revocation of their ability to participate in these proceedings.

IWAG has filed a Motion to Compel the Applicant to answer three (3) data requests. We will address each of them:

ii. Construction Costs

In data request 1-13, IWAG requested the Applicant to provide "all spreadsheets and quotes containing expected capital expenditures and labor estimates for the project as referenced in Footnote 1, Appendix 14B." The Applicant objects to the request, asserting that this is commercially sensitive information which is not normally disclosed to the public and is irrelevant to the Applicant's near term prospects to obtain project financing. In the Motion to Compel, IWAG asserts that this information is necessary so that it can fully present its case to the Subcommittee. However, IWAG does not indicate why this confidential business information is necessary for the proper presentation of IWAG's case. While the Applicant agrees that the information can be provided, under a protective order, to Counsel for the Public given his important statutory role, the Applicant objects to providing the information to other parties, including IWAG.

IWAG responded to the objection, asserting that the capital costs of a wind energy project represents a dominant factor in determining the price of its energy. IWAG further asserts that ratepayers will pay for the energy produced by the project and that full disclosure of this information is necessary in order to resolve any economic issues pertaining to the project. In essence, IWAG asserts that the cost of the energy and its impact on ratepayers is a dominant economic issue.

As with the business plan and pro-formas addressed above, it is clear that the information sought by IWAG is relevant to the prospects of the Applicant for obtaining project financing. In its Application, the Applicant asserts that this project will be totally funded through project financing. The expected revenues and costs of the construction and operation of the project are important to determine whether or not the project is likely to obtain project financing that would allow it to construct and operate the project within the terms and conditions of any Certificate granted. However, the Applicant is correct in asserting that the information sought is commercially sensitive. If revealed to the public or to other parties in this docket, it could put the Applicant at a significant competitive disadvantage with competitors, vendors and suppliers. In fact, it can be argued that disclosure of this information by the company in and of itself would demonstrate insufficient managerial capabilities. Given the competing interests, we will deny IWAG's Motion to Compel production of this information to any other party other than Counsel for the Public. We note that Counsel for the Public has retained a respected financial consultant to review the information provided to it by the Applicant. We are confident that Counsel for the Public will adequately address this issue. It is unnecessary for this commercially sensitive information to be provided to additional parties.

In denying this request, our goal is to maintain a balance between the need to protect the Applicant's competitive position and the need to have a full and fair hearing on the issues surrounding the Applicant's financial, managerial and technical capabilities. Should another party identify and retain a competent financial consultant, it is free to assert a change of conditions and file a motion to that effect.

IWAG's argument that the cost of energy and its impact on ratepayers is a dominant issue for the Subcommittee is misplaced. It is true that all costs, including construction costs, contribute to the price of energy produced. However, the Site Evaluation Committee does not regulate the rates paid by consumers for electricity. Regulated electricity rates are determined by the Public Utilities Commission in the context of all electricity distributed by the regulated transmission company. The Public Utilities Commission will determine what costs or how much of what costs are included in the rates of a regulated utility. That decision is not part of the Site Evaluation Committee's jurisdiction.

IWAG's Motion to Compel a response to data request 1-13 is, therefore, denied.

iii. Power Purchase Solicitation and Negotiation

IWAG seeks to compel the Applicant to provide the names of utility companies or entities with whom the Applicant may be negotiating a power purchase agreement, as well as the dollar amount per kilowatt hour under consideration. The Applicant has objected, indicating that such information is not discoverable.

We agree. The fact that the Applicant may be *negotiating* a power purchase agreement is not relevant to the considerations of the Subcommittee. Moreover, one cannot think of a situation that could cause more harm to the Applicant and any other party to such a power purchase agreement than requiring the Applicant to reveal the terms under negotiation. The power purchase agreements are negotiated in a highly competitive market. Requiring companies to reveal the state of negotiations for power purchase agreements that have not yet been executed would cause substantial harm to those companies. Moreover, such information does not provide useful or relevant information to the Subcommittee with regard to the financial and managerial capabilities of the Applicant. Either party may back out of negotiations at any point in time. Only a confirmed and executed power purchase agreement is relevant in these proceedings.

C. Motion to Compel Responses to Data Requests by Appalachian Mountain Club

The Appalachian Mountain Club (AMC) filed a Motion to Compel the Applicant to respond to three (3) data requests. The Applicant subsequently agreed to provide the information in AMC data request 1-2 and 1-3 but objects to AMC data request 1-7.

i. Information Regarding Natural Conditions of Atmospheric and Linear Perspective

Request 1-2 seeks data upon which the Applicant makes the claim that "natural conditions of atmospheric and linear perspective will mitigate potential visual impacts beyond 5 miles for the project at this location, hence are not in need of further study."

The request has since been agreed to by the applicant and thus it is hereby granted.

ii. Ten (10) Mile Viewshed

AMC data request 1-3 states: "Please provide a map and an expanded list of visual resources impacted to a 10 mile radius from the project that are not topographically or vegetatively screened, and the expected duration and number of turbines to be seen from those vantage points. Please provide these data in the same Figure and Table format as those used for the 5 mile radius analysis, i.e. Figures 1 and 2 and Table 2 in Appendix 9. Please also provide the raw ARC data files used to generate Figures 1 and 2 for a 10 mile radius."

The Applicant has agreed to provide this information and the request is therefore granted.

ii. FAA Data

AMC issued a data request to the Applicant seeking "the data and assumptions used as to why the Application remains silent on commercially available technologies that are a reasonable mitigation strategy to tone back the large visual intrusions of the project would have on the landscape including visually prominent tower coloration and nighttime red lighting for FAA required aircraft warning". While AMC data request 1-7 is less than clear in its meaning, the Applicant did respond to the data request, indicating that the Applicant would comply with the Federal Aviation Administration (FAA) requirements for lighting the turbines. The Applicant advised AMC that the FAA "at this time, required red synchronized lights on 6 of 10 turbines and all turbine structures painted white". The Applicant also advised AMC that the use of radar activated lighting systems on wind turbines has been tested in the United States but has not been approved by the FAA. The Applicant also provided, in Appendix 2-E of the Application, all of the FAA determinations on lighting requests. AMC notes that those determinations indicate that the request for consideration to utilize "an audio visual warning system" is not approved. AMC asserts that the Applicant must have developed a plan for the technology prior to submission to the FAA and that plan should be provided in discovery. The Applicant objects to the Motion to Compel but has agreed to provide copies of correspondence with the FAA dealing with the potential use of an audio visual warning system at the project.

We note that the FAA determinations are, for all practical purposes, the final word with respect to turbine color and lighting. It is clear from the materials submitted by the Applicant that the FAA has required synchronized nighttime red lighting and turbines that are painted white. Any efforts made by the Applicant to seek a different result are really not relevant to these proceedings. The Site Evaluation Committee has no control over aviation in the State of

New Hampshire and aviation throughout the State of New Hampshire is subject to regulation by the Federal Aviation Administration. The requirements of the FAA are important to assure public health and safety. If the turbines with the coloration and lighting required by the FAA have an unreasonable adverse impact upon aesthetics, then the Subcommittee will address that impact as part of its decision. However, attempts by the Applicant to obtain a different ruling from the FAA are not relevant to our consideration. Therefore, AMC data request 1-7, to the extent that it seeks information beyond what the Applicant has agreed to provide, is denied.

D. Motion to Compel Answers to Data Requests by Janice Dooley Longgood

Janice Dooley Longgood has requested that the Applicant be required to prepare visual simulations and a horizon profile from her home for both the summer season and winter season. Ms. Longgood asserts that as a direct property abutter, it is reasonable to request that the Applicant perform such studies. She asserts that her road, Salmon Brook Road, was not considered in the visual impact assessment. The Applicant objects to Ms. Longgood's request, asserting that it has already provided a visual impact assessment that addresses impacts within five (5) miles of the project. The Applicant asserts that Ms. Longgood's residence is within that area and, therefore, already addressed. The Applicant further asserts that the view shed maps contained in Figures 1 and 2 of Appendix 9-A adequately disclose the extent of the project's visibility at all locations within a five (5) mile radius. The Applicant submits that performing a further study or photo simulations would be unnecessary, unduly burdensome and unlikely to lead to the discovery of admissible evidence.

We note that the Applicant has provided a visual impact assessment that studies the visual impacts of the proposed project within a five (5) mile radius. We also note that the Applicant has agreed to extend that visual impact assessment to ten (10) miles. (See, AMC data request 1-3 above). We also note that there is at least one photo simulation contained within the visual impact assessment from Salmon Brook Road. See, Figure A 4-B, Appendix 9-A. It would be unreasonable to require the Applicant to prepare a photo simulation demonstrating the view from each and every residence, either on Salmon Brook Road or elsewhere within the project area. Therefore, Ms. Longgood's Motion to Compel is denied.

E. Motion to Compel Responses to Data Requests Filed By North Branch Residents Intervenors Group

The North Branch Residents Intervenors Group have filed a Motion to Compel the Applicant to respond to eleven (11) data requests. The Applicant has objected to each request for various reasons.

i. Wind Resource Data

In its data request 1-1, the North Branch intervenors request the "on-site wind resource measurement data and analyses both this data and the specific conditions in Antrim for this projection." The Applicant objected to this data request.

The Applicant asserts that on-site wind data is commercially sensitive information that falls within the definition of trade secrets. *See*, RSA 350-B:1, IV. The Applicant claims that wind data is central to competitive negotiations for "off-take" and power purchase agreements. The Applicant also objects stating that the North Branch intervenors do not explain how the raw wind data will assist the group to "fully and fairly present its case to the Committee".

Raw wind data is at the core of the commercial decision to pursue the siting and construction of a wind energy facility. A developer will expend significant sums of money to measure and accumulate such data. Publication of raw wind data would clearly put the Applicant at a competitive disadvantage with respect to the negotiation of further off-take agreements and power purchase agreements.

In addition, the North Branch intervenors have not asserted any specific need for the raw wind data. A blanket assertion of need without specifics does not satisfy either Site 202.12(a) or RSA 541-A:33. Therefore, the request for the raw on-site wind data is denied. However, a better description of the wind source and the Applicant's conclusions after analysis of the raw wind data would be helpful to the parties and the Subcommittee. Therefore, the Applicant shall supplement the Application, Section F.3 a, with a comprehensive description of the wind resource available at the project site. The description should include, but not be limited to, typical wind patterns, directions, density and speeds at the site. The description should also describe diurnal and seasonal wind patterns at the site. The supplement should include a summary of the analysis and how the analysis assists the Applicant in sizing the project. The supplement should also discuss the role that the wind study plays in the choice of turbines (style, size, etc.) and other associated facilities. The supplement must be filed within two (2) weeks of the date of this Order.

ii. Residential Analysis

In data request 1-2, the North Branch Residents Group requests the Applicant to provide the "number of residences within a ½ mile radius, a 1 mile radius and a 2 mile radius of the turbines, broken down into year round and seasonal subtotals". The North Branch Group recognizes that responses were provided for the ½ mile and one (1) mile radii. However, the Applicant objected to providing additional data. The North Branch Group argues that because the Applicant has analyzed the visual impact of the turbines over a five (5) mile radius, the ecological impact over six (6) miles and the noise impact over three (3) miles that it is "not unreasonable" to require the Applicant to assess the number of residences that lie within a two (2) mile radius of the turbines. The Applicant objects to the data request and asserts that it had voluntarily mapped all residences within ½ mile and one (1) mile of the proposed turbine locations. The Applicant points out that in order to determine the number of residences, it must manually map the residences from high quality aerial imagery and "ground truth" the information. One implication of the Applicant's response to the data request is that it has not undertaken such a study. Thus, it appears that the information requested is not presently in the possession of the Applicant and will not be in the possession of the Applicant without further substantial data collection and analysis.

The information sought by the North Branch Group is not specific to the Applicant. Any party can undertake its own study to determine the number of residences that are within two (2) miles of the proposed facility. It is not necessary to require the Applicant to undertake additional study merely because an intervenor requests the study. The only basis for the intervenors' request is the unsubstantiated suggestion that a three (3) mile set back is being "suggested in various countries". While there are occasions where the need for additional information from the Applicant itself may result in requiring the Applicant to collect further data and perform further study, in this case, does not appear to be necessary. The fact that there may be suggestions of a three (3) mile set back from turbines in other countries is not relevant to the determinations that the SubCommittee must make in this case. The North Branch Group, if it believes such information is relevant, is free to do its own study, review the aerial photographs and "ground truth" the number of residences that are within a two (2) mile radius.

Finally, it is noted that the Applicant has not made any distinction between year round and seasonal residences. The Applicant does not believe such a distinction is important and we agree. There is no distinction made between year round and seasonal residences by the Subcommittee. Therefore, the Motion to Compel a response to North Branch Group data request 1-2 is denied.

iii. Town Meetings

In data request 1-7, the North Branch Group seeks a list and documentation for all meetings held between the Applicant and any officials of the Town of Antrim, whether in public or private. The North Branch Group alleges that there have been a number of meetings and not all were posted as public meetings. The North Branch Group asserts that the data is necessary to help "determine how the various permit applications, operating agreement, and pilot agreement were effected, and how the Applicant has conducted business in Antrim".

The interactions between the Applicant and the Town of Antrim in various meetings in the Town of Antrim and whether they comported with public notice requirements are not matters within the jurisdiction of the Site Evaluation Committee. If the Applicant and the Town have reached agreements that are sought to be approved as part of a Certificate in this case, then it is the agreement itself that is relevant. The process of how the parties arrived at the agreement is irrelevant to the Subcommittee. The North Branch Group's Motion to Compel an answer to data request 1-7 is hereby denied.

iv. Operating Agreement Negotiations

Similarly, the North Branch Group seeks an order compelling the Applicant to respond to data request 1-8 which seeks information about how the operating agreement between the Applicant and the Antrim Board of Selectmen was negotiated. The Applicant objects on the basis of relevance. Nonetheless, it is noted that the Applicant has provided the parties with the original first draft of the proposed operating agreement which the parties can compare against the final operating agreement. As a result, the North Branch intervenors have withdrawn this request.

v. Panorama

The North Branch intervenors, in data request 1-15, sought copies of the "50 mm simulations" for the 11x17 panorama contained in the visual impact assessment. The Applicant agreed to provide the individual still photos from which the panorama was created. This request, therefore, is resolved.

vi. Sound Requests

The North Branch Group's motion requests that we compel the Applicant to provide further responses to data request 1-9 and 1-10. The requests seek sound data, including both "audible and subsonic projections for nighttime, day time and 4 seasonal variations" for specific locations. The Applicant objects to performing additional sound surveys or analysis at the two (2) locations identified by the North Branch Group. The Applicant asserts that the analysis that has been performed so far suggests that sound levels at low frequency octave bands at each of the proposed locations will be far below any thresholds for perceptible vibration or annoyance.

The Applicant has properly responded to data requests 1-9 and 1-10. Therefore, the requests are denied. To the extent that the North Branch Group is requesting the Applicant to undertake additional sound testing, that request is also denied. If the Subcommittee determines that it has insufficient information regarding the sound impacts of the proposed project, then a Certificate will not be granted. However, it is unnecessary to require the Applicant to undertake sound studies at locations that are unlikely to provide relevant data.

vii. Additional Visual Simulations

The North Branch Group propounded a series of data requests seeking additional visual simulations with winter views from four (4) separate locations. The North Branch Group asserts that its request is reasonable because it does not believe that the visual impact assessment is complete and that the additional sites will "address the concerns of year round residents." The Applicant objects to the data requests. The Applicant asserts that its visual impact assessment, as filed, is thorough and completely addresses the need of the Subcommittee to determine whether there will be an unreasonable adverse effect on aesthetics. The Applicant also asserts that the areas where the North Branch Group seeks additional visual simulation photos are private residences and are not frequented by the public at large. The Applicant also points out that it cannot now provide winter views because it does not have the imagery for a winter view simulation.

The Motion to Compel a response to these data requests is denied on the basis of relevance. The purpose of Site Evaluation Committee review is to determine whether the proposed project will have unreasonable adverse effects. It is not the role of the Subcommittee to "address the concerns" of individual residents whether they be year round or seasonal. The visual impact assessment as filed by the Applicant will be considered as part of the Subcommittee's undertaking. To the extent that the visual impact assessment may be found to be incomplete or otherwise lacking, that determination will be reflected in the Subcommittee's

ruling on whether to grant or deny a Certificate. The Motion to Compel answers to data requests 18, 19, 20 and 21 are hereby denied.

viii. Additional Shadow Flicker Patterns

The North Branch intervenors also request the Applicant to provide illustration of the typical shadow patterns for turbines 2 and 3. The North Branch intervenors assert that turbines 2 and 3 are located atop the ridge and would provide a more accurate indication of the overall shadow flicker.

While the Applicant has not responded directly to this request, we assume that it objects and would state that the shadow flicker pattern previously filed is more than adequate to determine if shadow flicker will have an impact at the site or on surrounding communities. Nonetheless, if the data has already been collected, such an analysis may be useful. Therefore, to the extent that the Applicant has sufficient data to prepare a typical shadow flicker pattern for turbines 2 and 3, the request is granted. If the Applicant does not have sufficient data to prepare a typical shadow flicker patter for turbines 2 and 3, then it should so notify the parties and the Subcommittee. If sufficient data does not exist, the request will be denied.

F. Motion of the Audubon Society of NH to Compel Responses to Data Requests

i. Additional Sound Monitoring – Willard Pond

The Audubon Society of NH (Audubon) has filed a motion that, in part, requests the Subcommittee to compel the Applicant to measure ambient sound levels on the eastern shore of Willard Pond along the northern property line of Audubon's sanctuary. Audubon asserts that this area is open to the public, insulated from major roads and that the lack of induced noise is a significant feature that visitors experience at the sanctuary for the quiet enjoyment of the natural environment. (Gas powered motor boats are prohibited from Willard Pond, though electric powered motor boats are not prohibited.) The Applicant objects to conducting additional sound monitoring asserting two (2) objections. First, it points out that the overall sound modeling conducted by its experts predicts that the sound to be produced by the project as heard at the Willard Pond area is within an acceptable range of 30 to 35 dBa. The Applicant also objects on the basis that its estimate that the sound levels at Willard Pond will be similar to those as measured at Salmon Brook Road is a reasonable assessment and, therefore, the additional sound monitoring is not necessary. Finally, the Applicant asserts that it does not object if Counsel for the Public seeks to have his consultant include sound monitoring at this location.

The Applicant has not conducted sound monitoring at the Willard Pond location. Given the extensive sound monitoring that has already been performed, we find it to be unnecessary. We also note that this is not truly a data request but a request for the Applicant to go out and affirmatively discover new and additional data that is not presently in its possession. Finally, we note that the Audubon Society is free to undertake its own ambient sound monitoring. Counsel for the Public has retained a sound expert who is also capable of conducting ambient sound

monitoring if Counsel for the Public believes it to be relevant. The request for additional sound monitoring by the applicant at Willard Pond, therefore, is denied.

ii. Additional Visual Simulations

Audubon also requests the Subcommittee to compel the Applicant to provide visual simulations from the summit of Goodhue Hill and Robb Mountain. The Applicant objects to these requests, stating that it has performed a visual simulation from the summit of Bald Mountain and that the views from Goodhue Hill and Robb Mountain would be expected to be similar to those from Bald Mountain. However, the Applicant does not object if Counsel for the Public directs his visual consultant to undertake photo simulations from these points.

Once again, the Applicant is being requested to perform additional studies. The requests are not for data that is presently in the possession of the Applicant and, therefore, these are not true data requests. Rather, it is a claim that the information provided by the Applicant to date is incomplete. If the Subcommittee finds that the data is incomplete and fails to establish that there would be no unreasonably adverse impact on aesthetics, then it will consider that fact in its determination as to whether or not to grant a Certificate. However, given that the Applicant asserts that the views would be similar to other views already simulated, we find the requests to be unnecessary and I will deny those requests. To the extent that Counsel for the Public or the Audubon Society wishes to conduct its own visual simulations and present them to the Subcommittee from these locations, they are free to do so if they believe they are relevant.

III. MOTIONS FOR PROTECTIVE ORDERS

A. Applicant's Motion for Protective Order and Confidential Treatment for Acciona Sound Data

During the course of the technical sessions held on June 27, June 28, and June 29, 2012, various parties requested that the Applicant provide all data from the turbine manufacturer, Acciona, that was used in determining the sound modeling and noise impact assessment provided by the Applicant and its consultant. The Applicant agreed to provide that information. Subsequent to the technical sessions, the Applicant filed a Motion for Protective Order and Confidential Treatment for that information. The Applicant asserts that the information from Acciona is commercially sensitive and proprietary data and is not normally disclosed publically. The Applicant further asserts that Acciona provided this information to the Applicant on a confidential basis with the understanding that confidentiality would be maintained. The Applicant reports that it has authority to make the data available to parties so long as there is a protective order. The Applicant agrees to provide the information regarding the Acciona sound data to any party that signs a confidentiality agreement. The Applicant has provided a sample agreement. The Applicant also requests that it not be required to provide this data via electronic mail and that the parties be required to view the data, without making copies, at the offices of the Site Evaluation Committee.

IWAG has advised the Applicant that it objects to protective treatment for this information. IWAG complains that there has been no documentation to demonstrate that the

information is considered confidential by Acciona despite the assertions by the Applicant. IWAG also objects to the restrictions on access to the information and complains that requiring in-person review at the Site Evaluation Committee's offices is inappropriate and will do nothing but impair the orderly and prompt conduct of the proceedings.

The Audubon Society of New Hampshire has filed a limited objection to the motion for confidential treatment. While the Audubon Society does not object to the Applicant's need for confidentiality and protective orders for the sound data, the Audubon Society objects to the "attempt to use the Counsel for the Public as a shield against disclosure of the financial data which is relevant to the issues of this proceeding".

Notably, the sound data is not subject to such a request. Therefore, it appears that the Audubon Society's objection does not apply to the sound data. No other party has filed an objection to the motion for confidential treatment of the sound data.

The sound data is the type of commercial information that is normally proprietary to the manufacturer of the machinery. However, it is not uncommon for a manufacturer to provide such data and specifications to its customers based upon an obligation of confidentiality. Such arrangements are necessary for the ability of manufacturers to maintain control over their proprietary information and the need to provide an efficient method of commerce.

In determining whether or not to grant confidential treatment to such information, we apply the three prong analysis set forth in *Lambert v. Belknap County Convention,* 157 NH 375 (2008) and *Lamy v. New Hampshire Public Utilities Commission*, 152 NH 106 (2005). Those cases guide the Site Evaluation Committee in its determination as to what information may be exempt from public disclosure under RSA 91-A:5, IV. The first prong of the analysis is to determine if the Applicant has identified a privacy interest. If a privacy interest is invoked, then the agency must assess whether there is a public interest in disclosure. Disclosure should inform the public of the activities and conduct of the government. If disclosure does not serve that purpose, then disclosure is not required. Finally, when there is a public interest in disclosure, that interest is balanced against any privacy interests in non-disclosure. *Lambert v. Belknap County Convention*, 157 NH 375 (2008) and *Lamy v. New Hampshire Public Utilities Commission,* 152 NH 106 (2005); *see also, Union Leader Corp. v. New Hampshire Housing Finance Authority*, 142 NH 540, 535 (1997) (An agency must perform a balancing test to determine whether the record should be protected or if the public's interest in disclosure is outweighed by the interest in protecting confidential financial or commercial information.)

In this case, the information sought to be protected is commercial information in which the manufacturer has a proprietary interest which flows to the Applicant who has obtained the information subject to confidentiality. The Applicant has a clear privacy interest in this commercial information. Disclosure of this commercial information could significantly harm the Applicant and Acciona, but would do little to inform the public of the conduct or activities of the government. The Subcommittee will eventually be required to determine whether the proposed facility will have an unreasonable adverse impact on aesthetics and public health and safety. That determination will be made based upon a constellation of information and will not be solely dependent upon the turbine manufacturer's proprietary specifications. The Applicant is correct

in indicating that it is unlikely that the turbine manufacturer's proprietary specifications would be referenced in a Certificate of Site and Facility. Traditionally, Certificates of Site and Facility include an allowable range of sound impact (e.g "shall not exceed 55dBA during the day.")

It is clear that in this case, the proprietary interest of the turbine manufacturer and the Applicant outweighs the limited public interest that there may be in disclosure of this information. Therefore, we will grant the Applicant's motion in part. The Applicant shall disclose the aforementioned information to any party to the proceedings who is willing to sign a confidentiality agreement in the form set forth as an attachment to the Applicant's motion.

To the extent that the Applicant's motion includes a request that the parties must review the information at the Committee's offices, that request is denied. The Applicant shall provide the documents, in hard copy only, to each party who forwards an original signed confidentiality agreement to the Applicant. The Applicant may take measures to number or otherwise identify and control the document sent to other parties. At the conclusion of this case, each party who was provided a copy of the documents shall return them to the Applicant. No party shall further distribute the document or the information contained therein to anyone else. To the extent that a party makes a working copy of the information for the purposes of preparing for the adjudicative phase, those copies shall be either destroyed upon conclusion of the case or forwarded to the Applicant. A party who provides the protected documents to a witness is responsible for the return of the documents at the conclusion of this docket. Therefore, the Applicant's Motion for a Protective Order and Confidential Treatment for the Acciona sound data is granted in part and denied in part.

B. Applicant's Motion for a Protective Order and Confidential Treatment of Certain Financial Information and Other Information

As referenced above, Counsel for the Public has propounded data requests to the Applicant seeking the following information: construction cost estimates (Counsel for the Public Data Request 1-9); the project's pro-forma financial model or business plan (Counsel for the Public Data Request 1-14); copies of documents relating to agreements between the Applicant, Westerly Wind, LLC and Mr. Cofelice (Counsel for the Public Data Request 1-16); a listing of meetings or teleconferences held between Mr. Pasqualini and the Applicant, Mr. Kenworthy, Mr. Soininen or any other person associated with the Applicant since January 1, 2009 (Counsel for the Public Data Request 1-18). Additionally, at the technical sessions, the parties requested the following information from the Applicant: a copy of the option agreement that would permit the Applicant to purchase land upon which the substation is to be sited (Request TS 1-3); a spreadsheet or similar data aggregation explaining the statement that "Antrim Wind has spent over $1.85 million to date on development activities with over 45% being spent in New Hampshire and services such as professional services surveying legal and project impact analysis". (Request TS 1-9); all spreadsheets and quotes containing expected capital expenditures and labor estimates for the project as referenced in Footnote 1, Appendix 14(B) (Request TS 1-12); the project's pro-forma schedule (Request TS 1-13); all scenario pro-forma schedules (Request TS 1-17).

The Applicant requests that the foregoing information be provided to Counsel for the Public but not the other parties in this proceeding. The Applicant asserts that the Committee has recognized that Counsel for the Public has an important statutory role in the proceeding and that full and vigorous participation is necessary to insure that the goals of RSA 162-H are met. With the exception of the information requested by Request TS 1-3, I will grant the Applicant's Motion and order that the Applicant respond to said requests to Counsel for the Public only. The Applicant need not provide the information to the other parties.

The information shall be provided to Counsel for the Public subject to a protective order. Counsel for the Public shall not further disseminate the material except to its consultants for the purposes of preparing for the proceedings in this docket. While Counsel for the Public may provide copies to its consultants, Counsel for the Public shall control the dissemination of those copies and, at the conclusion of the proceedings, shall retrieve all copies provided to consultants including any working copies used by consultants and shall destroy same. In making this ruling, I note that Counsel for the Public has retained Deloitte Financial Advisory Services, LLP as a financial consultant to assist Counsel for the Public in its review of the financial and managerial capabilities of the Applicant. The financial information sought in the foregoing data requests is financial information that is clearly subject to a privacy interest. Disclosure of the information to the public is not required at this time, as it would not inform the public of the activities and conduct of government or this agency. Disclosure at this point in time simply supports the ability of Counsel for the Public to prepare for an eventual adjudicatory proceeding. It has not yet been determined whether this financial information will actually be admitted as an exhibit. It is uncertain whether the Subcommittee will rely on this type of information or whether any party will seek to admit it as evidence during the proceeding. Therefore, it cannot be said that there is a public interest in the disclosure of the information. To the extent that there is any public interest in the disclosure of the information at this time, the privacy interests of the Applicant far outweigh that public interest. Therefore, a protective order is appropriate at this time in this case and public disclosure is inappropriate. *See, Lambert v. Belknap County Convention,* 157 NH 375 (2008).

In Request TS 1-3, Counsel for the Public and the intervenors seek a copy of the option agreement to purchase a certain plot of land where the substation is proposed to be located. This type of information is different than the financial documents sought by the parties. The issue of granting a subdivision has been raised before the Subcommittee. The Applicant's ability to obtain the land is a relevant issue. Therefore, we deny the request for a protective order and order that the option agreement be provided to the parties.

IV. GREGG LAKE ASSOCIATION MOTION TO INTERVENE, *PRO SE*

The Gregg Lake Association has filed a Motion to Intervene, *pro se*, in this docket. The Gregg Lake Association (GLA) asserts that it is a voluntary organization that has been in existence since the 1960s. GLA consists of approximately forty-three (43) member families, most of whom are seasonal residents of Antrim. The members own homes that are either on or near Gregg Lake. GLA asserts that it was established for the "conservation and protection of the lake, forests, woodlands, marshlands, and wild life surrounding Gregg Lake" and to "promote the responsible and equitable use and enjoyment of Gregg Lake by property owners and town

residents." While membership is open to any person who has a strong and vital interest in the conservation of Gregg Lake and its watershed, most of the members are seasonal residents owning homes on or near the lake.

GLA asserts that it has a substantial interest which may be affected by the outcome of the proceedings in this case. GLA claims a concern about the affect of the sound of wind turbines during various weather and wind conditions and how that sound will be heard in the vicinity of the lake during the daytime and the nighttime when its family members are indoors and outdoors. GLA also expresses concerns regarding the prevention of invasive plant species during construction of the turbines, changes in water quality from road construction runoff and the impact on wildlife and watersheds that empty into Gregg Lake. GLA asserts that it is the organization that is uniquely suited to address these issues and that no other intervenor will adequately protect these interests.

The Applicant objects to GLA's Motion to Intervene. The Applicant asserts that the motion is exceedingly late. The Applicant is concerned that the late intervention of GLA will impair the prompt and orderly conduct of the proceedings. By way of an alternative objection, the Applicant asserts that if GLA is permitted to intervene, there should be limits upon GLA's intervention pursuant to RSA 541-A: 32, III.

There is no question but that GLA's Motion to Intervene comes exceedingly late in the proceedings. Many deadlines have passed including the deadline for propounding data requests to the Applicant and a deadline for intervenors to identify and file their own witness testimony. The prompt and orderly disposition of this matter would be jeopardized if GLA was permitted to fully intervene.

However, RSA 541-A: 32, III, does allow the Subcommittee to allow late intervention and also to limit the scope of intervention by a party. In this case, where the administrative record is substantially developed, it would be unfair to the Applicant and the other parties to allow GLA to fully intervene, to propound data requests, to identify witnesses, and to file prefiled testimony. The Gregg Lake Association does indeed assert a substantial interest which may be affected by the outcome of the proceedings. However, its full participation in these proceedings would disrupt the prompt and orderly disposition of the proceedings and would not be in the interests of justice. Therefore, GLA may participate in these proceedings as a limited intervenor and may, during the course of the adjudicative proceedings, cross-examine the Applicant's and the witnesses for the other parties, and make its argument with respect to whether or not the Subcommittee should grant or deny a Certificate of Site and Facility. It may not, however, proffer data requests or put forth witnesses.

Based upon the foregoing it is hereby

Ordered that the motions to compel are resolved as explained herein; and it is

Further Ordered that the motions for protective orders are granted in part and denied in part as explained herein; and,

Further Ordered that the Gregg Lake Association Motion to Intervene Pro se is granted in part and the Gregg Lake Association may intervene on a limited basis, as explained herein.

SO ORDERED, this twenty-second day of August, 2012.

Amy Ignatius, Vice Chair
NH Site Evaluation Committee