

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

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

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

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**Docket No. 2012-01**

**OBJECTION OF COUNSEL FOR THE PUBLIC  
TO TOWN OF ANTRIM'S MOTION FOR REHEARING**

Counsel for the Public, Peter C.L. Roth, by his attorneys, the Office of the Attorney General, hereby submits this objection to the Town of Antrim's Motion for Rehearing and/or Reconsideration.<sup>1</sup>

The Town of Antrim's Motion for Rehearing and/or Reconsideration filed on May 15, 2013 should be denied for two primary reasons; (1) the Town of Antrim (the "Town") does not include any facts in its Motion for Rehearing and/or Reconsideration that were not already discussed and considered in the Site Evaluation Committees initial proceedings and therefore does not provide "good reason"<sup>2</sup> for a rehearing to be granted and (2) the Town's inclusion of an agreement reached between the Town and Antrim Wind Energy, LLC (the "Applicant") purportedly to mitigate or compensate for aesthetic harm on Gregg Lake is not grounds for granting a rehearing under RSA 541:3.

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<sup>1</sup> It should be noted at the outset that the Town's Motion appears to have been prepared by the Applicant's attorney and edited by Mr. Kenworthy. *See Residents Question Why Wind Developer Wrote Town's Appeal*, MONADNOCK LEDGER-TRANSCRIPT, May 21, 2013.

(<http://www.ledgertranscript.com/search/6350696-95/residents-question-why-wind-developer-wrote-towns-appeal>) (Mr. Stearns quoted as acknowledging that motion was drafted by Attorney Geiger, and quoting Ms. Block noting that it was edited by Mr. Kenworthy).

<sup>2</sup> RSA 541:3.

Under RSA 541:3 parties are permitted, in certain circumstances, to apply for a rehearing. The Section states that;

any party to the action or proceeding before the commission, or any person directly affected thereby, may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion all grounds for rehearing, and the commission may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion.

### **ARGUMENT**

#### **A. The Town Has Asserted No Facts In Its Motion For Rehearing And/Or Reconsideration That Were Not Already Considered By The Committee.**

In the Town's Motion for Rehearing and/or Reconsideration, the Town cites RSA 162-H:16, IV (b) which requires the SEC to give "due consideration" to the views of municipal governing bodies. In the initial decision made by the SEC, the SEC acknowledged that the Committee must consider the views of municipal and regional planning commissions in coming to a decision.<sup>3</sup> The Committee considered the views of multiple stake holders including the Board of Selectman of the Town, the Antrim Planning Board, and the Antrim Conservation Commission during the three day deliberation and the eleven day evidentiary hearing. Additionally, while the Committee must consider the views of municipal and regional planning commissions, the Committee is still free to take a position different from these views.<sup>4</sup>

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<sup>3</sup> *Decision and Order Denying Application for Certificate of Site and Facility (In re Antrim Wind LLC)*, N.H. Site Eval. Comm., no 2012-01, dated April 25, 2013, at 45 ("Decision").

<sup>4</sup>Decision at 45.

The Town claims that the SEC failed to give due consideration or overlooked the Town's position on aesthetic impact. The Town, however, did not take a position on the aesthetic impacts of the project. The Town attended nearly every day of the hearings but presented no witnesses, offered no exhibits or documents, and conducted little cross examination of any of the other witnesses.<sup>5</sup> The Town had no questions about visual impacts or their mitigation. The Town submitted a two page "Post Hearing Brief" where it addressed the decommissioning agreement, the PILOT agreement, town popular referenda, and the conservation easements.<sup>6</sup> The Town's intervention and its single submission during the evidentiary phase of the case (a letter of support), focus exclusively on the economic value of the project.<sup>7</sup> Having sat silent on the issue through the case as a full party, it is too late for the Town to announce its position on aesthetics in a rehearing motion.<sup>8</sup>

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<sup>5</sup> Hearing Transcript Day 1, AM, at 55 (Mr. Stearns: "No questions"); Day 3, AM at 36 (Mr. Genest: "No questions"); Day 3, PM, at 136 (Mr. Stearns: "No questions"); Day 4, PM at 7 & 95 (Mr. Stearns: "No questions."); Day 5, AM, at 99 (Mr. Stearns: "No questions."); Day 5, PM at 15-16 (no indication that either Mr. Genest or Mr. Stearns raised a hand indicating a desire to question Mr. Guarglia); Day 6, AM, at 16 (Mr. Stearns: "No questions at this time."); Day 6, PM at 11, 80, 164 (Mr. Stearns: "No questions."); Day 7, AM at 46 (Mr. Stearns: "No questions."); Day 7, PM at 116 (Mr. Stearns: "No questions."); Day 8, AM, at 14, 170 (Mr. Stearns: "No questions."); Day 8, PM, at 159 (Mr. Stearns: "No questions."); Day 9, AM at 92 (Mr. Stearns: "No questions."); Day 9, PM, at 30; Day 10, AM, at 43 (Mr. Stearns: "No questions."); Day 10, PM, at 39 (Mr. Stearns: "No questions."); Day 11, AM, at 86 (Mr. Stearns: "No questions.");

<sup>6</sup> Town of Antrim Post Hearing Brief, dated Jan. 14, 2013. It is notable that on May 20, 2013, the Hillsborough County Superior Court voided the PILOT agreement because it was negotiated by the Town selectmen in violation of RSA 91-A.

<sup>7</sup> Town of Antrim Petition for Intervention, dated April 5, 2012; Letter from the Antrim Board of Selectmen, dated October 22, 2012.

<sup>8</sup> *Appeal of Campaign for Ratepayers Rights*, 133 N.H. 480, 485 (1990) ("since the CRR did not itself submit any requests for findings, we hold that it has no standing to challenge the actions of the committee as they pertain to findings submitted by third parties.")

In its Motion for Rehearing and/or Reconsideration, the Town cites facts which were litigated during the hearings. The Committee considered and addressed conflicting testimony by two witnesses, Mr. Guariglia and Ms. Vissering, with regard to the potential aesthetic impact associated with the project.<sup>9</sup> The Town asserts in its Motion for Rehearing that “the Town of Antrim is fully aware of the Project’s physical dimensions and impacts... [and that] it will not have an unreasonable adverse effect upon aesthetics.” The record shows that the Committee very carefully considered the views of many parties to the case, including the Town’s views on the concerns it raised.<sup>10</sup> In weighing all of the interests of various parties, however, the Committee denied the certificate based on the aesthetic impact the project would have on the area. The Decision focused particularly on the impact to Willard Pond.<sup>11</sup> The Committee spent a great deal of time hearing evidence on and deliberating over the visual impacts but did not discuss the Town’s view on the subject because the Town had never provided it. Nothing was overlooked or misapprehended. The Committee determined that based on the impact, given the character of the surrounding area including the Wildlife Sanctuary, as well as a lack of adequate mitigation measures to reduce the impact on the Willard Pond Sanctuary, this specific wind project could not be approved.

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<sup>9</sup> Deliberation Tr. Day 1, PM, at 41 (Mr. Dupee: “the Guariglia testimony...concluded the project would not have an unreasonable adverse impact.”); Day 1, PM, at 42 (quoting Guariglia testimony, “given the relatively small affected viewshed area, the collective impact of the study area will be low.”); Day 1, PM, at (quoting Vissering testimony, “the impacts would be significant because of the existing condition which is entirely natural, with no development.”); Day 1, PM, at 51 (Ms Bailey: “Mr. Guariglia...took the position, I think, that Willard Pond wasn’t significant enough to consider it—consider the visual impact on it.”); Day 1, PM, at 58 (Ms. Bailey: “I was troubled by Mr. Guariglia’s testimony. To say that Willard Pond is not significant, I think that there’s a lot of testimony that refutes that point.”).

<sup>10</sup> *E.g.*, Deliberation Tr. Day 1, PM, 30-32 (discussing PILOT), at 48-50 (discussing Willard Pond and Audubon’s concern about aesthetic impact on the area); Day 3, PM, at 31-32 (discussing town vote/poll).

<sup>11</sup> Decision at 1, 49.

In its Motion for Rehearing the Town also asserts that the Committee's finding that the project would have an unreasonable aesthetic impact is unreasonable because it is inconsistent with past SEC decisions that have granted certificates to ridgeline wind projects. The SEC addressed this point both in their final decision as well as in their discussion of the project. Chairman Ignatius during discussion and deliberation, said that this project "seemed very, very different ... than other projects that [she had] seen before, where you may have some impacts, but they're away from kind of the majority of the community, and they don't overwhelm the location."<sup>12</sup> In the Town's Motion for Rehearing, the Town cites the Granite Reliable Power project as one example of where SEC granted a certificate even though the structures would extend beyond the tree top level. However, Chairman Ignatius also addressed this stating that in the Granite Reliable project the SEC was dealing with a fairly remote part of the State where it is difficult to find the turbines from a lot of vantage points.<sup>13</sup> In contrast, the Antrim project is proposed for a small community setting and would surround the pristine shores of Willard Pond.<sup>14</sup> The Town also cites Lempster Wind, LLC as another example of an approved ridgeline project that is inconsistent with the denial of the Antrim project. However, in discussion of this project the Committee noted that in the Lempster case, the SEC was dealing with a private landowner who consented to the location of the towers.<sup>15</sup> Chairman Ignatius said "a big tall structure in and of itself isn't the problem ...[it's] ...

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<sup>12</sup> Deliberation Tr. Day 1, PM, at 63-64 (After broadly discussing the aesthetic impact to the community, the Chairmen then more specifically stated that the current proposed project differed from other projects because of the scale of the impact the project would have in the surrounding community.).

<sup>13</sup> Deliberation Tr. Day 1, PM, at 63.

<sup>14</sup> *Id.*

<sup>15</sup> Deliberation Tr. Day 1, PM, at 69.

the context in which it appears.”<sup>16</sup> While the Committee noted that it needed to treat this project like it had treated other wind projects in the past and apply the same type of analysis, the fact that the Committee had approved prior similar projects did not require that it automatically approve the Antrim project when there are clear obvious differences between them.

Additionally, the proposed turbines would be the tallest ever to be certificated in the State.<sup>17</sup> Yet, inexplicably the Town claims that the Decision fails to “explain why the Antrim site is any different from the ridgelines where other New Hampshire wind farms are currently operating.” In looking through the transcript and discussion by the Committee on this issue, the differences between this project and prior approved projects were clearly discussed and considered. Chairman Ignatius laid out the primary differences between the current Antrim project and prior approved projects; “the scale in the context of the community, as opposed to those towers in a remote ridgeline and higher elevations...which is what you have in Granite Reliable; and...the conditions or the circumstances of the land on which those towers are being erected and...the location of Willard Pond in particular [is] different from some other situations.”<sup>18</sup>

The Town in essence suggests that the Committee must treat all tall structures on ridgelines the same: approve one, approve them all. This sort of short-cut by eliminating fact specific context is not what the Committee can reasonably do in exercising its discretion.

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<sup>16</sup> Deliberation Tr. Day 1, PM, at 69; *see also* Deliberation Tr. Day 3, PM, at 21-24.

<sup>17</sup> Decision, at 50.

<sup>18</sup> Deliberation Tr. Day 1, PM, at 69; *see also* Decision, at 50.

**B. The Town's New Evidence Relates To A New Issue Which Was Not Raised By the Town In Any Previously Filed Documents And Was Not Preserved For Rehearing During The Proceedings.**

The Town's offering of a post decisional agreement reached between the Town of Antrim and the Applicant purporting to provide "full and adequate" mitigation for the unquantifiable aesthetic harm on Gregg Lake should be rejected because it is evidence relating to a new issue which was not preserved for rehearing during the earlier proceedings. RSA 541:3 permits any party to a proceeding before the Committee to apply for a rehearing "in respect to any matter determined in the action or proceeding, or covered or included in the order." A party is not permitted to assert new grounds for rehearing once a decision has been reached by the Committee which they did not raise prior to the final decision.<sup>19</sup> During the hearings the issues of mitigation measures and monetary compensation for visual impacts at Gregg Lake were never addressed or raised by the Applicant or by the Town.

The Town is under no affirmative duty to update the record. While RSA 162-H: 7 (IX) requires that an applicant for a proposed project maintain the record of its application and immediately inform the Committee of any substantive modification to its application prior to its being denied, an intervener, such as the Town, is not under any similar obligation. In contrast, "a litigant's failure to buttress its position because of confidence in the strength of that position is always indulged in at the litigant's own

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<sup>19</sup> See *Appeal of Working on Waste*, 133 N.H. 312, 317 (1990)(holding that prior to its motion for rehearing, the appellant did not raise any claim related to the issue then asserted as grounds for a rehearing and therefore the appellant did not effectively preserve the issue for rehearing.).

risk.”<sup>20</sup> The Town could have negotiated an agreement with the Applicant over a year ago but chose not to do so, and should not be permitted to present such information to the Committee as grounds for rehearing.

Additionally, the Town intervened in the proceeding emphasizing the economic benefits of the project and its duty to “manage the prudential affairs of the town.”<sup>21</sup> Shortly after filing the petition to intervene in the proceedings, the Town and the Applicant, entered into an agreement. The agreement stipulated unconditionally that the Town would “support the Project during the SEC process.”<sup>22</sup> The Town also filed a subsequent letter with the SEC on October 22, 2012, in support of the project emphasizing the “economic benefits to the Town and the region.”<sup>23</sup> None of these submissions referenced any concerns regarding visual impacts to Gregg Lake or anywhere else or the need for any compensation or mitigation thereof.

As previously noted, representatives of the Town attended nearly every day of the hearings but presented no witnesses, no documents, and conducted little cross examination of any of the other witnesses.<sup>24</sup> The Town had no questions about visual impacts or their mitigation.<sup>25</sup> While aesthetic impact was an issue addressed extensively by the SEC during the hearings, monetary compensation for aesthetic and visual impacts

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<sup>20</sup> *Lujan v. National Wildlife Federation*, 497 U.S. 871, 897 (1990).

<sup>21</sup> Antrim Board of Selectmen Petition for Intervention, dated March 30, 2012.

<sup>22</sup> Appx. 17A, vol. 3 of Application ¶ 16.1; *see also*, Applicant’s Response to Antrim Board of Selectmen’s Petition For Intervention, dated April 16, 2012 (implicitly conditioning its assent to the intervention on the Town’s agreement to support the project.).

<sup>23</sup> Exhibit AWE-36 at 1 (Letter from Eric Tenney, Antrim Selectman Chair, to Amy Ignatius, SEC Chair, dated Oct. 22, 2012).

<sup>24</sup> *See supra* note 5 and accompanying text.

<sup>25</sup> Hearing Transcript Day 5, PM at 15-16 (no indication that either Mr. Genest or Mr. Stearns raised a hand indicating a desire to question Mr. Guarglia); Day 7, AM at 46 (when offered an opportunity to cross examine Ms. Vissering, Mr. Stearns said: “No questions.”).



on Gregg Lake was not brought up by the Town or any party prior to the final SEC decision in any of the hearings or documents filed. Further, because the Town bound itself to support the project --no matter what-- months before the hearings, the credibility of its alleged (and belated) concern over the project's aesthetics and how to mitigate them must be viewed in the context of the economic benefit of the agreement which was the Town's primary if not sole focus throughout this process.

Finally, even if the new agreement is permitted to be entered into the record, the SEC has already considered other indirect types of mitigation measures, of far greater value, to compensate for the aesthetic impacts from the proposed project and concluded that such mitigation measures were insufficient.<sup>26</sup> In the Decision, the SEC concluded that the dedication of a conservation easement of over 800 acres in and around the proposed facility would not adequately mitigate the visual and aesthetic impact on the area.<sup>27</sup> The Decision stated that "while additional conserved lands would be of value to wildlife and habitat, they would not mitigate the imposing visual impact that the Facility would have on valuable viewsheds."<sup>28</sup> Monetary compensation to the Town provides even less mitigation for the imposing visual impact. Consequently, the new agreement should be given no weight.

## CONCLUSION

Because the Town has not shown good cause for rehearing, its motion should be denied. The Town did not properly preserve any factual issue concerning its views on the

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<sup>26</sup> Decision, at 52-53.

<sup>27</sup> Decision, at 53.

<sup>28</sup> *Id.*

aesthetic impacts of the project, or their compensation or mitigation. Therefore, it cannot now claim that it was error for the Committee not to have considered its position.

Further, the new evidence of the post-decisional compensation agreement for Gregg Lake should be rejected as grounds for rehearing and not allowed in the record because the issue of compensation for aesthetic harm to Gregg Lake was not litigated in this proceeding.

WHEREFORE, Counsel for the Public respectfully requests that the Committee deny the Town's motion for rehearing.

Respectfully submitted,

COUNSEL FOR THE PUBLIC

By his attorneys

JOSEPH A. FOSTER  
ATTORNEY GENERAL



Dated: May 23, 2013

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### **CERTIFICATE OF SERVICE**

I, Peter C.L. Roth, do hereby certify that on May 23, 2013, I caused a true copy of the foregoing to be served upon the Parties and Intervenors in this case identified on the official service list, by electronic mail.

Dated: May 23, 2013

/s/ Peter C.L. Roth