

**In the matter of the  
Application for Certification  
Pursuant to RSA 162-H of  
ANTRIM WIND ENERGY,**

In their Motion for Rehearing, the Landowners cite RSA 541:3 which permits “any person directly affected” by an SEC order to file a motion for rehearing. However, there are requirements which a person must meet in order to permit them to fall within the class of people who are permitted to file a motion for rehearing. In order to have standing to request

a rehearing one “must demonstrate that [ones] rights ‘may be directly affected’ by the decision.”<sup>1</sup> In their Motion for Rehearing, the Landowners assert that the Committee’s denial of the certificate for the wind facility directly and negatively affects their “freedom to use [their] property.” However, the SEC decision in this particular instance does not prevent the Landowners from leasing their land for any other development purpose. The final decision filed does not even prevent the Landowners from leasing their land for wind projects in the future. The SEC explicitly stated in their conclusion that the “decision is not a determination that a wind facility should never be constructed in the Town of Antrim or on the Tuttle Hill/Willard Mountain ridgeline... [a] different facility may be adequately suited to the region.”<sup>2</sup> The Landowners have not included in their Motion for Rehearing evidence to suggest that any of their rights are directly affected by the SEC decision in order to establish standing at this point in the proceedings to request a rehearing.

Further, the Landowners had an easement agreement with the Harris Center for Conservation Education which was expressly made conditional on the Project achieving Commercial Operation. The agreement defines the “Commercial Operation Date” as “the date on which all permitted wind turbines have been fully commissioned and accepted by AWE, in accordance with industry practices, and ISO New England Inc.”<sup>3</sup> While the Landowners did not include copies of their leases as evidence of their rights, it is likely that those leases were similarly made conditional upon approval of the Project. Thus, failure of the Project to become approved was a business risk that the Landowners accepted.

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<sup>1</sup> *Appeal of Richards*, 134 N.H. 148, 154 (1991).

<sup>2</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 70 (“*Decision*”).

<sup>3</sup> Redacted Conservation Easements, date June 4, 2012 at 3.

The SEC decision to deny certification for the project did not limit or diminish the landowner's rights to contract for the use of their land. A denial during that process is not an infringement on the landowner's rights, it is simply part of the understood and agreed upon process. Because none of the landowner's rights have been violated by the SEC decision, the Landowners do not have adequate ground to request a rehearing under RSA 541:3.

**B. The Landowners do not have standing to seek rehearing because of their limited involvement in the prior proceedings and because their interests were adequately represented by participating parties.**

In order to determine whether a party has a sufficient, direct, definite interest to confer standing in order to bring a Motion for Rehearing, the trier of fact may consider, as one of the factors for such a determination, "the challenging party's participation in the administrative hearings."<sup>4</sup> While numerous land owners with property abutting or surrounding the proposed project site filed motions to intervene during the course of the SEC proceedings, the Landowners who filed the Motion for Rehearing never sought to intervene in the earlier proceedings. The Landowners' only participation in the prior proceeding included two letters of support filed by Michael J.H. Ott and Paul J. Whittemore on February 6, 2013. The Letter of Support submitted by Paul J. Whittemore states that the project is important because it allows him "to keep the property in the family without the burden of a family feud over who owes what."<sup>5</sup> The Whittemore letter did not emphasize or address the conservation benefits of the project, which is the main focus of the subsequent Motion for Rehearing filed collectively by the Landowners. In contrast, the letter emphasized the financial benefit from the lease agreement which will help offset some of the costs of the

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<sup>4</sup> *Golf Course Investors of NH, LLC v. Town of Jaffrey*, 161 N.H. 675, 680 (2011).

<sup>5</sup> Letter from Paul J. Whittemore, dated February 6, 2013.

land. The Landowners' failure to actively participate in the earlier proceedings and their request for a rehearing after a final decision had been reached does not provide an adequate basis to grant them standing to request a rehearing under RSA 541:3.

Additionally, the Landowners suggest that the SEC's decision regarding aesthetic impacts was heavily influenced by the New Hampshire Audubon Society. However, the Audubon Society participated in and intervened in the initial proceedings and their interests were considered just as the Town of Antrim's interests and Antrim Wind LLC's interests were considered by the SEC in coming to a final decision. The SEC carefully weighed the competing interests of each party involved or impacted by the project proposal. The Landowners failure to directly intervene in the proceedings resulted in their interests being represented by parties in which they were in privity, including the Town and Antrim Wind LLC. If the Landowners wanted to represent their own interests as individuals they could have intervened in the initial proceedings. Their failure to do so does not provide them with a second opportunity to raise their concerns individually in a post decision motion for rehearing.

Additionally, through their lease agreement with the Applicant and their conservation agreements with the Harris Center, the Landowners were in privity with parties who were active participants in the proceedings. Preclusion to bring a Motion for Rehearing or any appeal may be permitted where privity exists in which "the interests of the non-party [are] in fact represented and protected in the prior litigation."<sup>6</sup> Courts have held that "adequate representation is presumed where the goals of the applicants are the same as those of the

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<sup>6</sup> *Sleeper v. Hoban Family P'ship*, 157 N.H. 530, 534 (2008) (Petitioner was a successor in interest to a prior owner and the court held that he is therefore in privity with prior owner and bound by the judgment in their prior action.).

plaintiff or defendant.”<sup>7</sup> The goals of the Landowners mirror the goals and interests of Antrim Wind LLC’s goal of gaining certification for the facility and the Harris Center’s goal of obtaining the conservation easements.

Where there is privity, there is a presumption of adequate representation that a party must overcome in order to assert that they have standing to request an appeal or motion for rehearing and/or reconsideration. To determine whether a party has overcome the presumption of adequate representation a court will consider; “(1) [whether] the interests of a present party in the suit sufficiently similar to that of the absentee such that the legal arguments of the latter will undoubtedly be made by the former; (2) [whether] that present party capable and willing to make such arguments; and (3) if permitted to intervene, [whether] the intervenor add[s] some necessary element to the proceedings which would not be covered by the parties in the suit[.]”<sup>8</sup> The Landowners have not overcome the presumption of adequate representation because the interests and legal arguments of parties who were involved in the proceedings are substantially similar to the Landowners and the participating parties raised these arguments prior to SEC’s issuance of the final decision.

The Landowners chose not to intervene and not to substantially participate in the SEC proceedings. The Landowners’ decision to “hitch their fortunes”<sup>9</sup> to the representation made by parties with whom they are in privity does not permit them to now, after a decision has been reached, request a rehearing on issues that were already considered by the Committee.

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<sup>7</sup> *Daggett v. Comm’n on Governmental Ethics & Election Practices*, 172 F.3d 104, 111 (1st Cir. 1999).

<sup>8</sup> *Public Serv. Co. of New Hampshire v. Patch*, 173 F.R.D. 17, 27 (D.N.H. 1997) aff’d, 136 F.3d 197 (1st Cir. 1998).

<sup>9</sup> *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 322 F.3d 1064, 1082 (9th Cir. 2003)(Holding that the individual members of a homeowner’s association were in privity with the association and were bound by the previous decision and were barred from appealing the planning agency decision under the doctrine of res judicata.).

**C. The Landowners have not stated good cause for rehearing.**

Finally, in their Motion for Rehearing the Landowners claim that the failure of the SEC to consider the benefit of conservation as mitigation establishes good cause for a rehearing. However, under RSA 541:3 to establish good cause for granting a rehearing the Landowner's needed to show by a clear preponderance that the SEC's resolution of an essential fact was unreasonable. The Landowners fail to assert grounds for rehearing that were not already discussed and considered by the SEC in making its final decision and therefore the Landowners fail to establish good cause under RSA 541:3. In coming to a final decision, the Committee did consider proposed indirect types of mitigation measures to compensate for the aesthetic impact from the proposed project and concluded that such mitigation measures were insufficient.<sup>10</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>11</sup> The SEC final 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>12</sup>

**CONCLUSION**

The Landowners failed to identify rights which would be directly affected by the SEC decision in order to provide an appropriate basis for a rehearing to be granted. Additionally, the Landowners failure to participate in the earlier proceedings and their reliance on the

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<sup>10</sup> *Decision*, at 52-53; *See also* Deliberation Tr., Day 2, AM, at 50-59.

<sup>11</sup> *Decision*, at 53.

<sup>12</sup> *Id.*

adequate representation of their interests by other parties who were in privity with them support the conclusion that the Landowner's do not have standing to request a motion for rehearing and therefore the motion should be denied.

WHEREFORE, Counsel for the Public respectfully requests that the Committee deny the Landowners' Motion for Rehearing.

Respectfully submitted,  
COUNSEL FOR THE PUBLIC

By his attorneys

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Dated: June 3, 2013

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