THE STATE OF NEW HAMPSHIRE
BEFORE THE
SITE EVALUATION COMMITTEE

DOCKET NO. 2012-01

APPLICATION OF ANTRIM WIND ENERGY, LLC
FOR A CERTIFICATE OF SITE AND FACILITY

OBJECTION OF AUDUBON SOCIETY OF NEW HAMPSHIRE TO THE APPLICANT'S MOTION FOR REHEARING AND TO REOPEN

The Audubon Society of New Hampshire ("Audubon"), by and through its attorneys, BCM Environmental & Land Law, PLLC, files the following objection pursuant to Site 202.14 to the Applicant's Motion for Rehearing and Motion to Reopen the Record (one pleading dated June 3, 2013) ("Motions"), and states as follows:

I. INTRODUCTION

1. The Applicant points to no error of fact, reasoning, or law on the part of the subcommittee that rendered the subcommittee's decision unlawful or unreasonable.

2. The Applicant simply disagrees with the result of the subcommittee's reasoning of the facts and law, and the consequent conclusion that the subcommittee made.

3. The Applicant improperly introduces extensive new evidence and provides no justification of why it could not have introduced it before the subcommittee closed the evidence.

4. The Applicant cannot have another hearing or reopen the record after having failed the first time to present an approvable project.

5. If the Applicant were given another hearing or the record were reopened, the other parties would have to be afforded equal right and due process to meaningfully respond, which would result in a never-ending sequence of evaluation.

II. PERTINENT PROCEDURAL HISTORY

6. Antrim Wind Energy, LLC ("Applicant"[1]) applied for a Certificate of Site and Facility to construct and operate a renewable energy facility in the Town of Antrim, New Hampshire which would consist of not more than ten (10) wind turbines of up to 500 feet in height by application dated January 31, 2012, and by several supplements to the application, including on August 10 and 22, 2012, September 5, 2012, and October 11, 2012.

7. A duly appointed subcommittee of the Site Evaluation Committee conducted an adjudicative hearing on the matter over several days during October through December of 2012.

8. Following the hearing, the parties submitted legal memoranda in January of 2013.

9. The subcommittee deliberated in February of 2013 and issued its written decision denying the Applicant's request on May 2, 2013 ("Denial").

10. The Applicant moved on June 3, 2013 that the subcommittee rehear the matter and reopen the record.

III. STANDARD OF REVIEW

11. The subcommittee is authorized with the discretion to grant rehearing if in its opinion the movant has stated good reasons why the decision "complained of is unlawful or unreasonable." RSA 541:3; 541:4.

[1] Please note that the term "Applicant" as used in this document includes the applicant's agents, witnesses, representatives, and counsel.

12. Motions for rehearing must identify every error of fact, error of reasoning, or error of law the movant wishes to have considered and then describe how each such error rendered the resultant decision unlawful or unreasonable. N.H. Admin. R. Site 202.09.

13. Issues not identified in the motion are not generally considered on appeal. RSA 541:4.

14. The evidentiary portion of this matter may be reopened only for evidence or argument that is: (1) "relevant"; (2) "material"; (3) "non-duplicative"; and (4) "necessary for a full consideration of the issues presented at the hearing…." N.H. Admin. R. Site 202.07.

15. New evidence or argument must possess all four attributes for it to qualify for re-opening.

IV. THE SUBCOMMITTEE APPROPRIATELY APPLIED CORRECT PRECEDENTS AND STANDARDS.

16. The Applicant recites at great length much of the same argument it made during the hearing and relies heavily on what it strenuously purports are the "precedent" and "standards" that the subcommittee should have applied.

17. The Applicant uses the word "precedent" over 30 times and the word "standard" over 60 times in its Motions, but never provides any meaningful specification of exactly to what precedent and standard it refers.

18. But, the totality of the Motions lays bare the "precedent" and "standard" that the Applicant wishes the subcommittee had applied: Certificates of Site and Facility for all wind energy facilities shall be granted because, first, all "clean energy" projects must be

approved; and second, because Certificates were granted to the three projects the Site Evaluation Committee evaluated prior to the Applicant's.

19. Such a "precedent" or "standard" is completely unsupported by the law or the facts, whether in general or in particular to this case.

20. Instead of a *pro forma* review whereby the subcommittee granted the Certificate to the Applicant simply because it had granted a Certificate to the three prior wind facilities, the subcommittee appropriately evaluated the facts unique to this application and then applied them to the objective standards set forth in RSA 162-H:16.[2]

21. The Applicant seems to misunderstand that the subcommittee is authorized to evaluate both qualitatively and quantitatively.

22. The subcommittee also appropriately considered applicable precedents, including the three prior wind energy facilities sited in New Hampshire, other energy facilities in New Hampshire, and other wind energy facilities out-of-state.

23. While decisions concerning non-wind energy facilities and non-New Hampshire wind facilities should not bind the subcommittee, those decisions are not "totally irrelevant" as the Applicant claimed, and the subcommittee gave them due and appropriate consideration.

24. Moreover, to read RSA 162-H to mean that all wind energy facilities must be issued a Certificate would be to substantially eviscerate what must have been the Legislature's intent when it carefully enumerated so many different topics and standards.

[2] While outside of this docket, a statewide discussion is underway about the adequacy of these standards, in the absence of any more specific law, the standards set forth in RSA 162-H are those that govern this application and those that the subcommittee must apply.

25. While Audubon agrees wholeheartedly that it is of critical import for energy generation to become cleaner, that end must come by appropriate means and not through simply approving every wind energy facility application in complete disregard for the particulars of the project.

V. THE RECORD SHOULD NOT BE REOPENED BECAUSE NO NEW EVIDENCE IS "RELEVANT, MATERIAL AND NON-DUPLICATIVE" AND REOPENING WOULD FRUSTRATE FINALITY.

26. The evidentiary portion of this matter closed on the final day of the adjudicative hearing, which was December 6, 2012, and the record should not be reopened now.

27. The Applicant's one-time-only ability to put forward its absolute best project, the version with the design that the Applicant decided optimally balanced certificatability, profitability, and palatability to abutters and the public, was during the evidentiary hearing on this matter.

28. When the evidentiary portion closed, so expired the Applicant's ability to further modify the project's features, designs, mitigation, etc.

29. Nevertheless, the Applicant has been negotiating tirelessly since December 6, 2012 to change the project, for examples with the Town to pay it $40,000, and with private landowners to secure agreements for conservation easements, and now the Applicant relies on this new version of the project to argue that the Denial was error.

30. So long as these arrangements are reached lawfully (some of the Applicant's arrangements have recently been invalidated by a superior court), this kind of deal-making is completely appropriate, but only in advance of the close of evidence.

31. The Applicant should have made all of its deals and arrangements, and adduced those arrangements into evidence, before the close of evidence.

32. None of the Applicant's new evidence is relevant and material and non-duplicative and needed for full consideration of the issues presented at the hearing. N.H. Admin. R. Site 202.07.

33. Were the Applicant allowed to continue to introduce new arrangements designed to make the facility more certificatable, and to continue to introduce new facts, this docket would never end.

34. Due process requires that other parties be afforded a meaningful opportunity to examine and test the new evidence, including through discovery and cross examination of applicable witnesses and presentation of their own witness.

35. If such process then caused the Applicant to identify further changes to the project described by submission of yet further new evidence into a reopened record, the other parties would then have the right to examine the new changes and new evidence, and so on *ad infinitum*.

36. To avoid this circular track, the record should not be reopened and all new evidence should be struck from this docket and not considered by the subcommittee, including at least the following:

a. All new discussion, argument, facts, and evidence of any docket of the Site Evaluation Committee to the extent that it was not discussed, or not noticed pursuant to

RSA 541-A:33, V(b) or RSA 541-A:33, V(a) [3], prior to the close of evidence, including Re: Merrimack Station, SEC Docket No. 2009-01;

b. All new discussion, argument, facts, and evidence of additions to the Applicant's mitigation package, including removal of turbine 10; contingent agreement for more area subject to conservation easement; contingent agreement for payment to the Town of Antrim; assertions of contingent offer to pay Audubon;

c. All new discussion, argument, facts, and evidence of interest of financial institutions in the project;

d. All new discussion, argument, facts, and evidence of Pillsbury State Park;

e. All new discussion, argument, facts, and evidence of the decisions concerning the Passadumkeag, Redington, and Bowers proposals and projects; and

f. All attachments to the Motions.

VI. PAYMENT TO AUDUBON

37. The bulk of the Applicant's late and additional mitigation appears to be agreed upon between the Applicant and the other party to the agreement.

38. For examples, Attachment C shows that the Town has agreed to accept a $40,000 payment from the Applicant, and Attachment F shows that Charles S. Bean, III has agreed to convey a conservation easement.

39. No such agreement has been reached—or even offered—to either undersigned, as Audubon's counsel of record in this matter, or any official at Audubon.

[3] The Applicant must have requested that the subcommittee take such notice before the close of evidence.

VII. RESERVATIONS OF RIGHTS

40. In the event that the subcommittee reopens the record, Audubon requests the subcommittee set the maximum time allowable as the deadline by which other parties must respond to or rebut the new information, and further, requests that the other parties be accorded due process for such response and rebuttal, including discovery, cross examination, and the right to present witnesses.

41. If the subcommittee reopens the record or rehears this matter, Audubon reserves the right to refute the Applicant's assertions that the late and additional mitigation somehow renders the project approvable.

42. If the subcommittee reopens the record or rehears this matter, Audubon reserves the right to refute the Applicant's implication that a payment to Audubon somehow renders the project approvable.

43. If the subcommittee reopens the record or rehears this matter, Audubon reserves the right to refute erroneous assertions raised in the Motions, for example that the subcommittee focused its evaluation of visual impacts only on "privately-owned locations," or that Audubon deliberately harvested forested areas for the purpose of making the project more easily viewed from its Sanctuary.

44. If the subcommittee reopens the record or rehears this matter, Audubon reserves the right to present its case in opposition to the same extent that the Applicant is permitted to present its case.

45. Should the subcommittee decide to rehear based on any standard other than that in the enabling state RSA 541:3 ("unlawful or unreasonable"), Audubon reserves the right to argue that the subcommittee has unconstitutionally exceeded its statutory delegation.

VIII. CONCLUSION

46. The subcommittee did not permit a "vocal minority" or "the views of a small minority of stakeholders" to hijack its process or dictate its decision, as the Applicant asserts.

47. It is not dispositive that the Appalachian Mountain Club was satisfied that the Applicant agreed to use radar-activated lights; that the Town of Antrim's Selectboard supports the project; or that someone has organized for tens of form letters to have been submitted in support of the project.

48. The subcommittee appropriately decided this matter by considering all of the evidence, weighing conflicting expert and lay evidence, and then determining if the Applicant met its burden of adducing evidence that measured up to the applicable standards set forth in RSA 162-H.

49. Nothing requires the subcommittee to design mitigation that would render a project approvable, assuming such mitigation were possible because the subcommittee's authority to condition approvals is discretionary, not mandatory.

50. Overall, the subcommittee's Denial is neither unlawful nor unreasonable, and nothing justifies reopening the record.

WHEREFORE the Audubon Society of New Hampshire respectfully requests that the subcommittee:

A. Deny the Applicant's Motion for Rehearing and Motion to Reopen the Record in its entirety; and

B. Grant other such relief as is just.

Respectfully Submitted

AUDUBON SOCIETY OF NEW HAMPSHIRE

By its Attorneys
BCM Environmental & Land Law, PLLC

Dated: June 13, 2013 By: Amy Manzelli

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of June 2013, a copy of the foregoing has been delivered to those on the Service List of this Docket.

Amy Manzelli

Amy Manzelli, Esq.