THE STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

In the matter of the	)	
Application for Certification	)	
Pursuant to RSA 162-H of	)	**Docket No. 2012-01**
ANTRIM WIND ENERGY, LLC	)	
	)	

OBJECTION OF COUNSEL FOR THE PUBLIC TO APPLICANT'S MOTION FOR REHEARING AND MOTION TO REOPEN RECORD

Counsel for the Public, Peter C.L. Roth, by his attorneys, the Office of the Attorney General, hereby objects to the Applicant's Motion for Rehearing and Motion to Reopen the Record.

The Motion for Rehearing should be denied because it presents no good cause for rehearing.[1] The Subcommittee did not depart from preexisting standards – it conducted the case-by-case adjudication that it was required to, and the Applicant failed to meet its burden of proof. There is ample evidence in the record supporting the Subcommittee's findings and they will easily be sustained. The Motion to Reopen should be denied because the Applicant has not shown exceptional circumstances for doing that. In addition, reopening should be denied because such is beyond the terms of the Subcommittee's 2011 jurisdictional order. The Applicant should not be permitted to redesign its project after it failed to prove its case.[2]

[1] The Applicant cites *Dumais v. State* as providing the standard for rehearing. *Dumais*, however, is not the correct standard. The correct standard is RSA 541:3.

[2] The Applicant was afforded five months to develop its application and subsequently submitted five separate supplements to it. The Applicant also was afforded eleven days of evidentiary hearings during which it presented eighteen witnesses and thousands of pages of documents, maps, and photos. The fifty-four page Motion for Rehearing comes on the heel of a ninety-nine page Post Hearing Brief. The Applicant has no cause to complain of insufficient opportunity to determine the best project it could and prove its case.

Argument

I. There Is No Reason For A Rehearing On Visual Impacts.

A. The Subcommittee Did Not Adopt A New Standard.

The Subcommittee did not surprise anyone with a new standard on aesthetic impacts. The Subcommittee applied RSA 162-H:16, IV(c), and reviewed evidence presented by the parties in much the same manner as previous developers had in prior cases, but apparently abandoned by this one. As noted in our Post-Hearing Memorandum of Law on pages 10-12 the credible evidence in this case was largely the same kind of analysis as had been used in the *Granite Reliable* and *Groton* cases. In contrast, the Applicant's analysis was weak and not consistent with the sort of evidence presented to the SEC by applicants in prior cases. The Subcommittee carefully applied the evidence to the only standard there is: "unreasonable adverse effect on aesthetics."[3] The critical difference between this case and others was not the standard applied, but the quality of the evidence that the Applicant brought to it.

The Applicant, in a departure from what applicants have done in previous projects, presented a bare bones visibility analysis which discounted the importance of virtually all of the publically accessible and publically funded resources that would be affected by the proposed project. The Subcommittee made no mistake in rejecting the Applicant's expert's unpersuasive testimony. Many members of the Subcommittee expressed serious and numerous concerns about the quality of the analysis presented by Mr. Guariglia. During deliberation members made comments such as,

"very inadequate,"

"it's a concern,"

[3] RSA 162-H:16, IV(c).

> "those things troubled me… I didn't find it very satisfying,"
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> "I was also troubled by Mr. Guariglia's testimony,"
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> "I, too, had problems, very clearly with his testimony,"
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> "as sort of an analytical model, that wasn't very helpful,"
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> "I also found this issue to be very troubling,"
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> "he didn't seem helpful in finding an analytical method to make sense of it," and
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> "it just did not come together for me."[4]

Dr. Boisvert was singularly unimpressed by the Applicant's witness and said with regard to Mr. Guariglia's approach,

> …I found that to be a standard that was no standard at all. By his reckoning, it would be virtually impossible, under his system, his methodology, to find there was ever any unreasonable adverse effect in the aesthetics. And for me, that is such a prejudged, prejudicial approach, that I could not find much utility in what he had to offer. It was such an extreme position, from my point of view…I did not find a way that you could fairly and equitably use his methodology to determine that there were, indeed, any possible cases of adverse – or unreasonable adverse effect and that troubled me.[5]

It is unprecedented to see this level and intensity of criticism of a witness in recent SEC deliberations.[6] What this means is that the Subcommittee did not apply any particular new rule or departure but instead, quite plainly, the Applicant's witness failed to carry the Applicant's burden to show a lack of unreasonable adverse effect on aesthetics.

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[4] Transcript of Deliberations, Day 1, PM at 56, 57, 58, 60, 63, 64, 65 (hereinafter "Tr. D.").
[5] Tr. D., Day 1, PM, at 61-62.
[6] A search of the deliberative transcripts for *Groton* and *Granite Reliable* reveal no occurrences of the words "troubled" or "troubling."

B. The Subcommittee Followed The Same Approach As Was Employed In Previous Cases.

In the *Granite Reliable* case, the way the SEC drew conclusions from the evidence presented by Ms. Vissering was far less detailed than in the present case yet still consistent.[7] There, as here, the SEC focused on whether the project would "detract from the scenic resources of the area."[8] It is difficult to gather any meaningful conclusions from the *Groton* case because, even though serious issues were identified, the SEC in that case was constrained by the fact that "ultimately only one scientific analysis addressed the visual impacts of the turbines."[9] The analysis that was used in that case engaged in a methodology very much like that employed here: what are the effects of the turbines on important scenic resources of the area.[10] In the *Groton* VIA, after conducting a viewshed analysis, Mr. Hecklau selected significant and representative viewpoints and then determined "the effect of the proposed Project on the existing visual conditions in terms of its contrast with existing components of the landscape."[11] The Subcommittee in *Groton* accepted Mr. Hecklau's impacts and visibility analysis which analyzed effects of the project on particular places without much debate.[12] The discussion of the Subcommittee demonstrates, however, that it was not merely a visibility analysis that was considered. The *Lempster* decision is no place to find any rules of decision on which a developer of a project might reasonably rely because

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[7] *See* Decision and Order Granting Certificate of Site and Facility, *In re Granite Reliable Power, LLC*, N.H. Site Eval. Comm., no. 2009-01, dated July 9, 2010 at 42-43.
[8] *Id*. at 42-43.
[9] Decision and Order Granting Certificate of Site and Facility, *In re Groton Wind, LLC*, N.H. Site Eval. Comm., no. 2010-01, dated May 6, 2011, at 49.
[10] *See* Environmental Design & Research, *Visual Impact Assessment, Groton Wind, December 2009,* Appendix 24 to Application, at 43-48.
[11] *Id*. at 43, 45.
[12] *See* Transcript of Deliberations, dated April 7, 2011, afternoon, *In re Groton Wind Energy, LLC*, N.H. Site Eval. Comm., no 2010-01, at 89-92.

in addition to it being the first wind case that the SEC dealt with, there was no visual impacts study conducted and there was no significant dispute over visual impacts actually litigated.

Other than the fact that both *Granite Reliable* and *Groton* both logically start from a simple viewshed analysis – as did both experts in this case—there is no clearly specified methodological approach to be found in the SEC's prior orders. Nevertheless, it is fair to say that in the cases where independent scientific analysis was done, *Granite Reliable*, *Groton*, and except for Mr. Guariglia's approach, in this case also, the presentations to the SEC combined a quantitative viewshed analysis to determine where the project elements could be seen *and* specific view-points assessments to determine whether the view at a given location would have an unreasonable adverse effect on aesthetics of the location in question.[13] While he did not use this approach, even Mr. Guariglia's testimony suggested he would agree with it.[14] Consequently, while the Subcommittee in this case was required to do a more thorough analysis because of conflicting expert testimony and the weakness of that introduced by the Applicant, its approach to evaluating the evidence has been largely the same.

The Applicant's complaint about the similarities to previous cases is largely a results issue and perhaps says more about those cases than about this one.[15] The facts of the previous cases may suggest that the SEC erred in those cases, but it does not prove any mistake in this case. Nevertheless, Applicant's apparent desire to revisit the visual impacts

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[13] In *Lempster*, the only information on visual impacts was contained in the Application itself. And still, the applicant used specific photo-simulations at particularly important scenic locations around the Town of Lempster.

[14] Supplemental Prefiled Testimony of John Guariglia, dated October 11, 2012, at 11-12 (describing impacts-on-resource and types of use analysis); Transcript of Hearing, Nov. 2, 2012, *In re Antrim Wind Energy, LLC*, N.H. Site Eval. Comm., no. 2012-01, at 9 (Mr. Guariglia stating that a proper assessment required "going out and actually looking at each individual resource, understanding what the resource is about, what's going on at the resource…").

[15] *See* Rehearing Motion at 9-14.

decisions in *Lempster, Granite Reliable* and *Groton,* comes too late and is completely unnecessary because the Subcommittee is required to makes its own decision each time and is not bound by previous results.

C. The SEC's Prior Decisions Are Not Policy And The Subcommittee Must Make Case Specific Determinations Each Time.

The SEC's prior decisions are not "policy" as the Applicant asserts, but case by case rulings based on particular facts and evidence. Other than through appropriate rule-making, the SEC does not make policy or set standards through its decisions.[16] The SEC's powers and authority are entirely conferred by statute, which powers do not include the ability to make a common law of standards for assessing the impacts of energy facilities through declaratory rulings or otherwise.[17] The New Hampshire Supreme Court has "long held that an agency may not add to, change or modify statutory law by regulation or through case-by-case adjudication."[18] Under 162-H:16, the legislature gave the Subcommittee the power to determine whether a project might have unreasonable adverse effects on aesthetics. It has not specified how that is done in any rules and instead left it to a case-by-case adjudicative

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[16] *Appeal of Monsieur Henri Wines, Ltd.*, 128 N.H. 191, 194 (1986).

[17] *Id*. at 194. This is to be contrasted with the declaratory orders regime used by the FCC and addressed in *FCC v. Fox Television Stations*, 556 U.S. 502 (2009), and upon which Applicant heavily relies. In *Fox*, the FCC issued a series of declaratory orders over a period of 40 years to remove uncertainty about the boundaries of obscenity in broadcasting. *Id*. at 506-510; 47 C.F.R. § 1.2(a). Here, there is neither an official policy of the SEC regarding construction or operational parameters, there is no constitutionally protected activity such as speech at stake, and most importantly, the SEC does not issue declaratory rulings that the world of potential applicants is entitled to rely on. Equally unhelpful, the D.C. Circuit's *Verizon* decision dealt with the retroactive effect of a liability order, not adjudicative decision making on a permit. *See Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001). Likewise, *Puerto Rico Aqueduct,* dealt with the EPA's making of legal rules in an adjudicatory setting. Nothing of the sort is permitted under RSA 162-H nor has it been undertaken by the SEC.

[18] *Appeal of Monsieur Henri Wines*, 128 N.H. at 194.

basis.[19] When the legislature provided the SEC as much discretion as it did with RSA 162-H:16, it did so contemplating that the SEC "might reach different outcomes under different circumstances."[20] In adjudicating particular cases, the Subcommittee should not, as the Applicant urges, create substantive rules binding in future cases involving other projects.[21]

For obvious reasons the Subcommittee is not bound by its own previous decisions in prior cases; as the New Hampshire Supreme Court said, "an administrative agency is not disqualified from changing its mind."[22] Similarly, the United States Supreme Court observed in *SEC v. Chenery Corp.*,

> The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future. But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise. . . . Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.
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> In other words, problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient

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[19] *See* RSA 162-H:1 ("The legislature, therefore, hereby establishes *a procedure* for the review, approval, monitoring, and enforcement of compliance in the planning, siting, construction, and operation of energy facilities.") (emphasis added).

[20] *Petition of Concord Teachers*, 158 N.H. 529, 536 (2009).

[21] Moreover, the Applicant cannot credibly claim (in part because it has not made any record) that its project is an "identical situation" or "present[s] exactly the sort of circumstances" found in other projects previously approved. *See Davila-Bardales v. Immigration and Naturalization Serv.*, 27 F.3d 1, 4-5 (1st Cir. 1994). As such it is impossible to show that there has been a significant departure from precedent.

[22] *Appeal of Pub. Serv. Co. of N.H.*, 141 N.H. 13, 22 (1993) (*citing and quoting Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993)) (holding that historic interpretations of issues do not bind agency from adopting a new interpretation when facts warrant).

> experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards.[23]

What the Applicant is calling 'rules' or 'policies' upon which they are entitled to rely are not that at all and instead, what is happening is the case-by-case evolution of the statutory standards. As cautioned by the Supreme Court in *Chenery Corp.*, and Judge Bownes in *Baker-Chaput*, the Applicant's ossifying approach would result in rendering the administrative process rigid and incapable of addressing the many variables that arise from one case to the next.

The Applicant's argument that the *PSNH* case may no longer be good law because it relied on *Good Samaritan Hospital* and *Good Samaritan Hospital* was followed by *Fox Television*, does not hold up under scrutiny. *Fox Television* has never been cited by a New Hampshire court, and *Fox Television* does not even mention, much less purport to overrule *Good Samaritan Hospital*. Finally, as recently as 2009 the New Hampshire Supreme Court has followed *PSNH* as the law in this State that the Subcommittee must follow.[24] Under the

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[23] *SEC v. Chenery Corp.*, 332 U.S. 194, 202-203 (1947); *see also Bocova v. Gonzalez*, 412 F.3d 257, 263 (1st Cir. 2005) ("For the most part, the BIA has eschewed the articulation of rigid rules for determining when mistreatment sinks to the level of persecution, preferring instead to treat the issue on an ad hoc, case-by-case basis. That is a legitimate praxis. Indeed, given the nearly infinite diversity of factual circumstances in which asylum claims arise, it would be difficult to develop meaningful generalities that could easily be applied to a broad spectrum of cases.") (citations omitted); *Baker-Chaput v. Cammett*, 406 F. Supp. 1134, 1139 (D.N.H. 1976) (Bownes, J.) ("When an agency is presented with a situation which it could not have reasonably foreseen or in which it does not possess sufficient expertise, it would be unwise to prevent it from proceeding on an ad hoc basis. A rigid set of standards would only retard the administrative process.")

[24] *Petition of Concord Teachers*, 158 N.H. at 536.

case by case determination that the law requires, the Subcommittee was free to approach the evidence in this case the way it did.

D. The Subcommittee's Decision Was Adequately Explained.

Even though the circumstances of the various projects are not the same, the Subcommittee more than adequately explained the distinctions between this project and the others, finding key differences.[25] The projects and their settings are not, as the Applicant *now* claims "virtually indistinguishable."[26] In its Post Hearing brief, the Applicant reminded the Subcommittee that the simple fact of very tall turbines was not a sufficient basis to find an unreasonable adverse impact on aesthetics. The Subcommittee carefully considered that issue and others relating to past cases. Chairman Ignatius said:

> my starting point was the context that these turbines would be in. It is in a small community with a ridgeline that sort of runs throughout and around the community, as opposed to a remote area. You know when you think of things like *Granite Reliable*, where you've got a ridgeline that is in a fairly remote part of the state. Roads don't go near there. It's hard to find those turbines from a lot of vantage points. And these are the same size as that. They're the largest models that we have yet to see proposed and yet in a very, very small community setting ringing around the Willard Pond and rising up over Gregg Lake…It seemed very different to me than other projects that I'd seen before…Its just radically different from any of the simulations that I'd seen in other contexts and I found it very troubling."[27]

The Subcommittee specifically addressed the tallness question raised by the Applicant and found that tallness plus context distinguished the Applicant's project from *Granite*

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[25] *See* Decision, at 48-55; Tr. D., Day 1, PM, at 63, 68-69; Tr. Day 3, PM, at 21-23, 30, 52. The Applicant cites two Massachusetts decisions for the proposition that if an agency changes its mind it must provide a "valid explanation." Massachusetts, however, employs a doctrine of "reasoned consistency" that is reflected in the cases the Applicant cites, which is unique to Massachusetts and certainly has not been adopted here. *See, e.g., Boston Gas Co. v. Department of Pub. Utilities*, 324 N.E.2d 372, 379 (Mass. 1975). Nonetheless, the Subcommittee sufficiently explained its decision to satisfy even the inapplicable Massachusetts standard.

[26] Applicant's Motion for Rehearing and Motion to Reopen the Record, dated June 3, 2013, at 3.

[27] Tr. D., Day 1, PM, at 63-64.

Reliable.[28] The Subcommittee also considered the project in comparison to *Lempster* and *Groton*; again context was the key difference.[29] There Chairman Ignatius again pointed out (with no disagreement voiced by other Subcommittee members) that

> It's very different from thinking about the ridgeline in *Lempster* and the development in *Granite Reliable* up in the White Mountain, and even the *Groton* ridgelines, where far more of it is isolated and is away from the kind of the heart of the community. There's certainly people impacted, at least in *Groton* and *Lempster*. But in *Lempster*, far less so. And when you think about *Granite Reliable*, you know, that's really so remote, that most of the impact is on the natural wildlife than on any humans…[30]

Significantly, the Deliberations do not reveal even much disagreement from the three Subcommittee members who dissented. Ms. Lyons shared the perspective that the impacts would be unreasonably adverse but expressed concern that there should be a mitigation package.[31] Mr. Green agreed with the rest of the Subcommittee that the Willard Pond area was "a really special place" that would be lost if the project was built as planned but he was resigned that there did not seem to be a satisfactory solution to protect it from development, and, like Ms. Lyons, he hoped mitigation could be found.[32] Dir. Stewart did express concern that at least from his admittedly subjective perspective he could not "as an engineer" know

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[28] Tr. D., Day 1, PM, at 67-70 (considering Applicant's contention and still finding "A big tall structure in and of itself isn't the problem …it's sort of the context in which it appears."); Tr. D., Day 3, PM, at 21-23. The Applicant also suggests that the record lacks evidence that the turbines in this case would be the largest free standing structures in the State. The evidence is there and even Mr. Kenworthy agreed that a smaller version of the turbines he had in mind would be the tallest in New Hampshire. Transcript of Hearing Dated June 1, 2011, *In re Petition for Jurisdiction of Antrim Wind Energy, LLC*, N.H. Site Eval. Comm., no. 2011-02, ("Jurisdictional Transcript"), at 20.

[29] Tr. D., Day 3, PM, at 21-22.

[30] *Id*.

[31] *Id*. at 26-29.

[32] *Id*. at 31-32, 33 ("I think it's an intrusion into that area, but I think something's going to happen one way or the other. And if it's going to happen, I'd like to see some sort of mitigation measure put in place to offset that.")

where to draw the "bright line" between this project and those previously approved or any that might come along in the future.[33]

All of this is simply to show that the Subcommittee very carefully considered the differences and similarities between the Applicant's proposal and the three wind projects in the State that have been approved. Dir. Stewart's dissenting voice assured during deliberations that the Subcommittee did not simply rush headlong into a decision without considering the previous cases to some degree. A difference of opinion by one member on that issue, however, does not constitute good cause for rehearing. Moreover, the Decision itself, while not mentioning previous cases, more than adequately explained that in evaluating this case the context of the project in its setting was the driving force that made this project un-approvable. Thus, even if the Subcommittee were required to justify a departure from an existing rule (which it is not) under the cases cited by the Applicant, all that is required is an adequate explanation of the reasons for its decision. Clearly this standard has been easily met.

Significantly, however, the Subcommittee need only be concerned that its decision in this case is supported by some evidence, not that it be strictly supported by prior cases. The Subcommittee's findings of fact are deemed *prima facie* lawful and reasonable and may be overcome only by a showing that there was no evidence from which it could conclude as it

[33] Tr. D., Day 3, at 29-30. Dir. Stewart's engineering perspective favoring clear, calculable standards, shows, and suggests that the statutory standard might not allow him to find an unreasonable adverse impact on aesthetics in any case – "what I continue to ponder, is, what is the, you know, bright line we're going to draw as a committee long term, in terms of where aesthetics becomes a deal breaker for a project?")

did.[34] As a fact finder, the Subcommittee was at liberty to accept or reject the testimony before it as it saw fit and its conclusions are entitled to great weight.[35] There is ample evidence in the record supporting the Subcommittee's decision.

E. The Applicant Cannot Complain Of Different Treatment.

1. The Applicant Is Judicially Estopped From Complaining That The Subcommittee Did Not Consider Prior Cases' Methodologies.

The Applicant is judicially estopped from taking the position that the methodology of *Granite Reliable* and other cases ought to have been considered. Judicial estoppel "prevents a party from prevailing in one phase of a case using one argument and then relying upon a contradictory argument to prevail in another phase." [36]

When Counsel for the Public attempted during the evidentiary hearing to introduce testimony showing that Ms. Vissering followed the same methodology she had used in *Granite Reliable*, the Applicant *objected*.[37] The Chair sustained the objection and the witness was not allowed to make that testimony.[38] Later, the Applicant rebuffed another opportunity to have a meaningful discussion about the approach taken in *Granite Reliable*

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[34] *See, e.g., Appeal of Regenesis Corp*., 156 N.H. 445, 451 (2007); *Appeal of Town of Bethlehem*, 154 N.H. 314, 318 (2006); *Appeal of Basani*, 149 N.H. 259, 261-62 (2003).
[35] *Appeal of Regenesis Corp.,* 156 N.H. at 451.
[36] *Pike v. Mullikin*, 158 N.H. 267, 270 (2009) ("The doctrine of judicial estoppel generally prevents a party from prevailing in one phase of a case using one argument and then relying upon a contradictory argument to prevail in another phase. The general function of judicial estoppel is to prevent "abuse of the judicial process, resulting in an affront to the integrity of the courts." While the circumstances under which judicial estoppel may be invoked vary, three factors typically inform the doctrine's application: (1) whether the party's later position is clearly inconsistent with the party's earlier position; (2) whether the earlier position was accepted by the court; and (3) whether the party seeking to assert a later inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.")
[37] Transcript of Hearing, November 28, 2012, *In re Antrim Wind Energy, LLC*, N.H. Site Eval. Comm., no. 2012-01, at 39-40.
[38] *Id*. at 40.

and instead chose to use only Ms. Vissering's conclusion in that case in a failed attempt to discredit Ms. Vissering's testimony, which the Chair also allowed over objection.[39] Now the Applicant argues that it was reversible error requiring rehearing for the Subcommittee not to do that which the Applicant itself successfully prevented the Subcommittee from doing during the hearing: taking evidence about the methodology used in a prior case. The Applicant cannot have it both ways and have the process still be fair to other parties. Therefore, the Applicant is judicially estopped from now claiming that the Subcommittee erred in not considering the methodology of prior cases, when the Applicant's successful litigation strategy was to prevent that from happening.[40]

2. The Applicant Failed To Make A Record.

Finally, the question of similarities and differences among the various projects that is at the center of the Applicant's request for rehearing was not timely raised by the Applicant and the Applicant presented no evidence that its proposed project and its setting had anything in common with those previously approved by the SEC.

Nothing in any of Mr. Guariglia's prefiled direct, his supplemental prefiled direct, his on the stand direct or cross, or his report even mention *Groton* or *Granite Reliable*. The report said that the Antrim project would have lights similar to what could be seen on the *Lempster* turbines, but that was it as far as any comparison went.[41] At this point, not even the lighting is the same as any other project. The time and opportunity for raising issues of

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[39] *Id*. at 105-114.
[40] "[I]t requires a good measure of 'chutzpa.'" *Kimberly F. v. Mary Hitchcock Mem. Hosp.*, 1993 U.S. App. LEXIS 31541 (1st Cir. Dec. 3, 1993).
[41] Saratoga Assocs., *Visual Impact Analysis*, dated Jan. 9, 2012 (appdx. 9 of Application), at 3. On cross examination Guariglia also referred to Lempster but only in discussing cumulative impacts as seen from Pitcher Mt. Tr., Day 5, PM, at 55, 57.

fact about the effects of other facilities and how those were treated by the SEC was not in a post-hearing brief or motion for rehearing, but was instead during the Applicant's evidentiary presentation. The Applicant bore the burden of production and persuasion; any failure of the sufficiency of the evidence belongs to it, not the Subcommittee.[42] At bottom, there is nothing in the evidentiary record which would lead one reasonably to believe that the Applicant was relying upon any of the SEC's previous determinations with respect to comparability in visual impacts analysis. Mr. Guariglia went his own way and it bombed.

II. There Is No Reason For Rehearing On Other Issues.

The Subcommittee's findings on noise and financial capability do not warrant rehearing either. The noise conditions that the Applicant takes issue with were fully considered and well within the Subcommittee's discretion to make "such reasonable terms and conditions as the committee deems necessary…" based on evidence in the record and upon Subcommittee members' own scientific knowledge and analysis.[43] In an area of evolving scientific knowledge,[44] and given the gaps in the Applicant's approach and in the face of the expert testimony of two other witnesses, [45] it is not unreasonable that the Subcommittee would suggest conditions that are more protective of the community and easy to enforce. Moreover, the Applicant's self-serving argument over the 2009 WHO guidelines misses the point. The Subcommittee is not bound to follow any particular guidelines not of

[42] N.H. Admin. R. Site 202.19(b) ("an applicant for a certificate of site and facility shall bear the burden of proving facts sufficient for … the designated subcommittee, in the case of a renewable energy facility, to make the findings required by RSA 162-H:16.")
[43] RSA 162-H:16, VI; Order on Motions for Clarification, Rehearing and Reconsideration, *Application of Groton Wind, LLC*, N.H. Site Eval. Comm., no. 2010-01, dated Aug. 8, 2011, at 8.
[44] Decision at 68 (referring to 2009 WHO guidelines.)
[45] Decision at 67 (observing that O'Neal was criticized for faulty background measurements).

its own and was free to use them as a source from which to derive an absolute limit and avoid the impossible-to-enforce averaging that the Applicant urges be adopted.

Rehearing and reopening on financial capability is also not warranted where quite simply, the Applicant is too far from being financially prepared to build and operate the project that the Subcommittee denied. The Applicant's purported 'this-is-project-finance, it's special' approach is not one that the SEC has adopted before or should adopt now. Public protection requires that to the extent possible the economic viability of an energy project and its promoters be carefully scrutinized and not be left to guesswork or the hazards of the marketplace. The Applicant's wished for approach provides no guidance, no assurances to the people of the State, and ultimately no standard other than 'trust us we are good business people.'

Had the application not been denied on aesthetic grounds it should have been denied on the basis of financial capability. Consequently, if rehearing on this issue is granted it should be for the purpose of denying the application based on the Applicant's failure to carry its burden on financial capability.

III. In The Absence Of "Exceptional Circumstances" The Motion To Reopen Must Be Denied.

A. There Are No Exceptional Circumstances.

The Motion to Reopen the Record should be denied because in essence it is the wrong vehicle for the Applicant to redesign its project. The Applicant was required to submit a complete application at the beginning of this proceeding and was required to make its case and meet its burden in the full and fair hearing that it was afforded. It is simply too late to start over in this docket. The denial of the Applicant's application does not preclude it from

resubmitting a new application for a different project (provided it can establish jurisdiction) so a reopening of this record to allow the Applicant another whole apple should not be granted.

The Subcommittee has broad discretion not to reopen an evidentiary record in a proceeding. Courts have consistently held that agencies are not to be required to reopen except in the most extraordinary circumstances. This rule evidences a strong preference for finality of agency proceedings; otherwise the agency could never consummate any administrative proceeding.[46] It is a "rule of necessity" that rehearings are not matters of right but instead pleas for discretion.[47] Reopening the record is rare and reserved for "exceptional circumstances" and the movant bears a heavy burden.[48] Here the Applicant offers nothing that was not within the Applicant's control before the Decision and was only developed in response to it. The Supreme Court has said, "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 risk."[49]

The information that the Applicant seeks to introduce on aesthetics mitigation was already considered by the Subcommittee in the abstract over an entire afternoon and rejected as an approach because the complexity of the case, including the financial issues, made such a retrofit unworkable.

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[46] *Northern Ind. Pub. Serv. Co. v. Federal Energy Regulatory Comm.*, 782 F.2d 730, 744 (7th Cir. 1985); *see Seacoast Anti-Pollution League v. Nuclear Reg. Comm.*, 598 F.2d 1221, 1230 (1st Cir. 1979) ("The administrative process has to have structured time limits, lest decisions never be reached…")

[47] *ICC v. Jersey City*, 322 U.S. 503, 514 (1944); *see Vermont Yankee Nuclear Power Corp. v. Natural Res. Defense Council, Inc.*, 435 U.S. 519, 555 (1978) (quoting *ICC v. Jersey City*).

[48] *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281 (1974) (describing reopening as only in "exceptional circumstances" putting a "heavy burden" on one seeking it).

[49] *Lujan v. National Wildlife Federation*, 497 U.S. 871, 897 (1990).

The Applicant "strenuously object[ed] for financial reasons" to the same kind of mitigation it is suggesting now because it would "materially increase the Project's construction costs per MW of installed capacity. The resulting loss of economies of scale in the construction of the Project would make the Project far less competitive and thus unlikely to secure a PPA and obtain financing."[50] Surprisingly, the Applicant now proposes changes that it denounced as unreasonable and impossible.

There is also no evidence in the record that the proposed changes would sufficiently soften the impact that the project would have on aesthetics. Mr. Guariglia, obviously, made no mitigation recommendations and did not comment on those recommended by Ms. Vissering. On the other hand, Ms. Vissering's testimony and report made clear that the only way to mitigate the visual impacts was with *all* of her recommendations, which included removing two turbines and making all the rest significantly smaller.[51] Thus, introducing some new and uncertain conservation land easements, cash offers, and removing one turbine does not provide anywhere near the kind of mitigation that the undisputed record shows would be necessary. In sum, with these new submittals and redesign the Applicant is trying to do that which its witnesses and counsel stated in no uncertain terms could not be done and which is unsupported by any evidence as being effective for its intended purpose.

The new financial information is similarly too little and too late. The two lender letters smack of boosterism and are notable in their lack of commitment and generality but more importantly, they signal that without all of the other evidence of readiness that caused

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[50] Applicant's Post Hearing Brief at 45.
[51] Transcript of Hearing, dated Nov. 28, 2012, afternoon, at 62 ("That plus the other recommendations that I made."); *Visual Impact Assessment Antrim Wind Project* report, dated July 30, 2012, at 18.

the Subcommittee to question the Applicant's financial capability, they too are wisely unwilling to move forward.

In addition, aside from serious problems that remain concerning financial and managerial capability, should the record be reopened, the process would necessitate a thorough and far-reaching review of the new evidence and the implications that the redesign would have on noise, project economics, and visual impacts, among other things. Given the denial of the certificate, the voiding of the PILOT agreement, and the now extended time frame (and the further time that will be required) the evidence of financial capability (some of which is now over a year old) is in serious question and would require further investigation and analysis by expert witnesses.[52] In short, the entire process would practically have to start over again, with a revised application, testimony, experts, discovery, public meetings, and adjudicatory hearings, all of which could go on for many more months, at great expense to all parties.[53]

The Applicant has not demonstrated anything near exceptional circumstances nor carried a heavy burden in showing that reopening with all the attendant burdens would be necessary or even a good idea.

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[52] *See* Jurisdictional Transcript, at 43-45 (Mr. Kenworthy testifying that delay affects project's access to turbine supply markets PPA "it really hampers our ability to advance the project at all" "In the absence of a permitting pathway or regulatory standards at all, it would preclude us from having meaningful conversations for a power purchase agreement…"), at 52 (""I believe we cannot enter into meaningful conversations with counterparties for PPAs … without a project that has a reasonable permitting path forward. These negotiations do not happen in a speculative environment on projects that do not have a good chance of occurring."); *see* Jurisdictional Transcript, (Day 2, PM) at 46 (Atty. Richardson ("The delays will kill the project financing."); Request for Deliberations, dated June 24, 2011, by Counsel to the Petitioner (in the absence of a jurisdictional decision "in the very near future, the project faces great uncertainty and may not go forward on schedule or even at all.")

[53] *See* Tr. D., Day 3, PM, at 63 (remarks of Chairman Ignatius making this same point.)

B. The Subcommittee Lacks Jurisdiction To Reopen The Application And Record Under Its August 2011 Jurisdictional Order.

In early 2011, the Applicant represented to the Subcommittee that it would submit a completed application before the end of 2011. In reliance on that representation, the Subcommittee conditioned the grant of its jurisdiction upon the Applicant meeting a hard-stop date of January 31, 2012 for submission of a complete application.[54] The Applicant did not object to or seek any modification of that condition. The Applicant then submitted five more supplements to it during the following months. Now, however, the Applicant's motion is saying essentially that its application and all its supplements was not in fact ready and complete on January 31, 2012, or even on October 11th when the last supplement came in. The Applicant has not met the Subcommittee's deadline. As a result, the Subcommittee should decline any further jurisdiction over it, and in particular, over any modifications. As Commissioner Harrington said, "…if they don't file by that time, then, you know, we start all over again."[55]

Given the time and expense that have already been sunk into a project that is below the Subcommittee's jurisdictional threshold (and with the latest proposal even more so),[56]

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[54] Jurisdictional Order, *In re Petition for Jurisdiction of Antrim Wind Energy, LLC*, N.H. Site Eval. Comm, no 2011-02, dated Aug. 10, 2011, at 28; Jurisdictional Transcript (Day 2, PM), at 104-105 (discussing 6/24/11 Request for Deliberation where counsel renewed assertion that application would be filed by year's end in context of deferring decision to give Antrim Planning Board some time to draft regulations), at 132-43 (discussing the condition that an application be filed by January 31, 2012 and importance of not leaving it "open ended" "simply so the process can't be stretched out").

[55] Jurisdictional Transcript (Day 2, PM), at 141 (Commr. Harrington).

[56] RSA 162-H:2, XII.

very nearly escaped it altogether,[57] and is now outside the condition on which jurisdiction was granted, it makes little sense to go back and attempt to redo it with an already completed and closed record and significant findings already made by the Subcommittee on many key issues with a final and well thought Decision that will now all have to be revisited. This project has been before the Subcommittee for over two years. All the parties need finality and to achieve that the Applicant's motions should be denied.

WHEREFORE, Counsel for the Public respectfully requests that the Committee deny the Applicant's Motion for Rehearing and to Reopen the Record, and grant Counsel for the Public such other and further relief as may be just.

Respectfully submitted,

COUNSEL FOR THE PUBLIC

By his attorneys

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Dated: June 13, 2013

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[57] *See* Dissent from Jurisdictional Order, *In re Antrim Wind, LLC*, N.H. Site Eval. Comm, no 2011-02, dated Aug. 23, 2011; Jurisdictional Order, at 28.

CERTIFICATE OF SERVICE

I, Peter C.L. Roth, do hereby certify that on this day, I caused a true copy of the foregoing to be served upon the Parties on the official service list, by electronic mail.

Dated: June 13, 2013 /s/ Peter C.L. Roth