

**STATE OF NEW HAMPSHIRE  
SITE EVALUATION COMMITTEE**

**Docket No. 2014-05**

**Petition for Jurisdiction  
Over a Renewable Energy Facility Proposed by Antrim Wind Energy, LLC**

**September 29, 2015**

**JURISDICTIONAL DECISION AND ORDER**

This Order memorializes the Subcommittee's decision to assert jurisdiction over a proposed wind energy facility with a nameplate capacity of less than 30 MW proposed to be constructed in the Town of Antrim. Five members of the Subcommittee voted to assert jurisdiction. Two members of the Subcommittee voted against the assertion of jurisdiction.

**I. INTRODUCTION**

On November 6, 2014, the current Board of Selectmen for the Town of Antrim (Antrim) filed correspondence with the Committee (Committee), requesting that the Committee assert jurisdiction over the review, approval, monitoring, and enforcement of compliance in the planning, siting, construction, and operation of a renewable energy facility proposed to be located in the Town of Antrim, Hillsborough County (Facility or Project) and developed by Antrim Wind (Antrim Wind). See Petition from the Town of Antrim, Docket No. 2014-05 (Nov. 6, 2014).

On November 26, 2014, Antrim Wind filed a Petition for Jurisdiction Over a Renewable Energy Facility (Petition). Antrim Wind proposes to site, construct, and operate 9 wind turbines capable of generating 3-3.3 MW for a total nameplate capacity of 27-29.7 MW. See Petition, at 5. The Facility is proposed to be located in the Town of Antrim on the Tuttle Hill ridgeline

spanning southwestward to the northeastern slope of Willard Mountain. Id. The Facility will be located in the rural conservation zoning district and highway district on private lands owned by five landowners and leased by Antrim Wind. Id.

To understand the parties' positions in this matter, it is necessary to review the Applicant's prior request to issue a certificate of site and facility for the proposed project that was similar to the Project reviewed in this docket.

In February 2011, the Town of Antrim through its former Board of Selectmen and Antrim Wind, filed petitions asking the Site Evaluation Committee to assert jurisdiction over a proposed wind energy facility with a nameplate capacity of less than 30 MW (2012 facility). See Site Evaluation Committee Docket No. 2011-02. On August 10, 2011, the subcommittee granted the petitions and asserted jurisdiction under RSA 162-H:2, XII. On January 31, 2012, Antrim Wind filed an application for a certificate of site and facility in Docket No. 2012-01 (2012 Application). The application was accepted and a subcommittee was assigned to consider whether to grant or deny the application.

The 2012 Application proposed to site and construct a wind energy facility on land located at and adjacent to 354 Keene Road (NH Route 9). The 2012 Application proposed to site the wind energy facility on 1,850 acres of private land occupying the area from Route 9 southward to the east summit of Tuttle Hill and to the north flank of Willard Mountain to the west. See Application of Antrim Wind Energy, LLC for a Certificate of Site and Facility, Docket No. 2011-02, at 5 (Jan. 31, 2012). The 2012 facility would have been constructed primarily on the ridgeline that starts approximately 0.75 miles south of NH Route 9 and runs south southwest, for approximately 2.5 miles. Id. The 2012 facility would have consisted of ten (10) Acciona 3000 wind turbine generators each having a nameplate capacity of three (3) MW. Id. at 16. Each

turbine would have risen to 492 feet above ground level when measured from its base to the tip of its blade. Id. As proposed in 2012, each of the turbines would have been constructed at the following site elevation: (1) WTG-1 1,431 feet; (2) WTG-2 1,743 feet; (3) WTG-3 1,758 feet; (4) WTG-4 1,682 feet; (5) WTG-5 1,726 feet; (6) WTG-6 1,516 feet; (7) WTG-7 1,676 feet; (8) WTG-8 1,700 feet; (9) WTG-9 1,646 feet; (10) WTG-10 1,896 feet. See Decision and Order Denying Application for Certificate of Site and Facility, Docket 2012-01, at 11 (May 2, 2013); Ex. AWE 3, at 11.<sup>1</sup>

The ridgeline designated for the location of the turbines in 2012 had a site elevation fluctuating between 1,042 feet and 1,904 feet. Id. As originally proposed, each turbine would have been between 25% and 35% of the elevation of the ridge line where it would be located. Id. In addition, the 2012 Application indicated that the 2012 facility would have included approximately 4 miles of new gravel surfaced roads within the project area, a joint electrical collector system consisting of both underground and overhead collection lines, an interconnection substation, and an operations and maintenance building of approximately 3,000 square feet. Id. Antrim Wind proposed to interconnect the 2012 facility to an existing Public Service Company of New Hampshire (PSNH) 115 kV electric transmission line through a proposed interconnection substation which built adjacent to an existing electric transmission line. Id. As proposed in 2012, an underground electrical collection system would have transferred the electricity generated by the turbines to the substation. Id. The interconnection substation would have been a standard three phase 115 kV transmission level substation designed and constructed by PSNH. Id. The switchyard and substation would have included transformers, switching equipment, protective relay and control equipment, transfer trip equipment, disturbance analyzer

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<sup>1</sup> Exhibits submitted by Antrim Wind are identified as “AWE.”

equipment, transducers, a Remote Terminal Unit, telemetry equipment and meters. Id. The operation and maintenance building, as proposed in 2012, would have been a single story structure of approximately 3,000 square feet that would include offices and associated facilities (bathrooms, kitchen, and storage) for technicians, a garage for spare parts and supplies, and a computer server room. Id., at 13. In 2012, Antrim Wind also proposed installation of a permanent meteorological tower on the ridgeline between turbine #3 and turbine #4 to obtain wind data at the Project Site for wind turbine performance management. Id.

After an eleven-day evidentiary hearing and three days of public deliberations, the subcommittee denied the 2012 Application. See Decision and Order Denying Application for Certificate of Site and Facility, Docket 2012-01 (May 2, 2013); Ex. AWE 3, at 11.

Antrim Wind asserts in this docket that the Facility's location will be similar to the Facility reviewed and denied by the subcommittee in Docket No. 2012-01. Id., at 11 ("Indeed, this is in most key aspects the same project that the Committee considered in Docket 2012-01 . . .").

## **II. PROCEDURAL BACKGROUND**

On December 30, 2014, the Committee issued an Order and Notice of Public Meeting scheduling a pre-hearing conference for January 30, 2015. See Order and Notice of Public Meeting, Docket No. 2014-05 (Dec. 30, 2014). The Order and Notice established a deadline for motions to intervene to be filed by January 23, 2015. Id., at 2.

On January 23, 2015, Counsel for the Public filed an Objection to the Petition for Jurisdiction. The Committee received fourteen motions to intervene. Antrim Wind filed timely responses to those motions.

On March 13, 2015, an Order on Pending Motions, Appointment of Subcommittee and Procedural Order was issued. The following parties were allowed to intervene:

- Antrim Board of Selectmen (Board of Selectmen) and the Antrim Planning Board (Planning Board) - as a full party;
- The Harris Center for Conservation Education (HCCE) - as a full party;
- The Audubon Society of New Hampshire (ASNH) - as a full party;
- Brenda Schaefer, Mark Schaefer and Nathan Schaefer (Schaefer Family), Clark Craig, Jr., and Janice Dooley Longgood (Abutting Property Owners);
- Lorraine Carey Block and Richard Block, Charles A. Levesque, Fred Ward, Ph.D., Annie Law and Robert Cleland and Elsa Voelcker (Non-Abutting Property Owners); and
- WindAction Group (WindAction).

On April 7, 2015, Counsel for the Public filed a Motion for Leave to Retain Jean Vissering and for an Order Directing Antrim Wind to Bear Cost Thereof. Counsel for the Public's motion was granted on April 23, 2015. See Order on Motion to Retain Consultant, Docket No. 2014-05 (April 23, 2015).

On June 26, 2015, the Town of Antrim filed a Memorandum of Law in Support of Jurisdiction. On July 2, 2015, Non-Abutting Property Owners moved to strike the Town's Memorandum. The Town of Antrim responded on July 2, 2015. On July 4, 2015, WindAction filed its Response to the Town's Memorandum. The Motion to Strike was orally denied at the adjudicative hearing. Tr., 7/6/2015, Morning Session, at 12.

On July 7, 2015, Counsel for the Public filed a Memorandum in Support of Objection to Petition for Jurisdiction.

An adjudicative hearing was held on July 6 and July 7, 2015.

Following the adjudicative hearing, the Subcommittee received the following Memoranda and Statements:

- A Memorandum of Law in Support of Petition from Antrim Wind.
- A Memorandum in Support of Denial of Jurisdiction from the Audubon Society of New Hampshire.
- A Post-Hearing Memorandum in Support of Jurisdiction from the Town of Antrim.
- A Statement in Support of Denial of the Petition from the Abutting Property Owners.
- A Concluding Statement from the Non-Abutting Group of Intervenors.
- A Post-Hearing Memorandum from WindAction.
- A Response to Petitioner's Memoranda from Counsel for the Public.

On July 22, 2015, Counsel for the Public filed a Partially Assented-To Motion for Leave to File a Limited Response. The Town of Antrim and Antrim Wind objected to the Counsel for the Public's request on July 23, 2015.

### **III.POSITION OF THE PARTIES**

#### **A. Antrim Wind.**

Antrim Wind claims that the Committee has already asserted its jurisdiction over the Project by virtue of its jurisdictional ruling in Docket No. 2011-02. See Petition, at 7-8 (citing Jurisdictional Order, Docket No. 2011-02 (August 10, 2011)). In the alternative, Antrim Wind requests that the Committee re-assert jurisdiction over the Facility so that Antrim Wind can file a full Application for a Certificate of Site and Facility required for the siting, construction and operation of the Facility. Id., at 8.

Antrim Wind offered testimony in support of its position from:

- John (Jack) B. Kenworthy - Chief Executive Officer of Eolian Renewable Energy, LLC, a minority owner of Antrim Wind Energy, LLC ("Eolian"). Ex. AWE 1; and
- David Raphael - a Professional Landscape Architect and Planner, a Lecturer in the School of Natural Resources at the University of Vermont, and the Principal and owner of LandWorks. Ex. AWE 2.

Mr. Kenworthy testified that the Facility will be substantially similar to the facility that was proposed in Docket 2012-01. Ex. AWE 1, at 2. Mr. Kenworthy further asserted, however, that the Facility differs “substantially in several critical and fundamental ways” from the facility proposed in 2012. Ex. AWE 1, at 2. Specifically, Mr. Kenworthy identified the following modifications: (1) turbine #10 and all civil and electrical infrastructure associated with that turbine were removed; (2) turbine #9 was reduced in height from the 492 feet as proposed in Docket 2012-01 to 446.2 feet in height from foundation to blade; (3) the height of turbines ## 1-8 was reduced from 492 feet to 488.8 feet; and (4) the Facility is now planned to be powered by Siemens Energy Inc. SWT 3.2/113 direct drive turbines, with a nameplate capacity of 3.2 MW each. Ex. AWE 1, at 3-4. The total nameplate capacity is expected to be 28.8 MW. Tr., 07/06/2015, Morning Session, at 69, 93; Tr., 07/06/2015, Afternoon Session, at 9-11. Although Mr. Kenworthy acknowledged that the reduction in the height of Turbines #1-8 did not materially change the Facility’s effect on aesthetics, he argued that “[a]ll of the impacts of the previously proposed facility will be reduced as a result” of the identified changes. Ex. AWE 1, at 4; Tr., 07/06/2015, Afternoon Session, at 11. Mr. Kenworthy also asserted that an updated Sound Level Assessment Report prepared by Epsilon Associates, Inc. (Epsilon) will demonstrate that the sound levels generated by the Siemens turbines will be lower than generated by Acciona turbines. Ex. AWE 1, at 4-5. He also testified that a Shadow Flicker Analysis prepared by Epsilon will demonstrate that the flicker effect of the Facility will be diminished. Mr. Kenworthy recognized that the only changes in the ground clearing and the footprint of the Project will be due to the removal of Turbine #10, he asserted that overall ground clearing and grading amounts will be significantly reduced and the overall footprint of the Project will become smaller. Ex. AWE 1, at 5; Tr., 07/06/2015, Morning Session, at 91-92. Mr. Kenworthy opined that the visual

impact of the Facility has been significantly reduced due to elimination of Turbine #10 and the reduction in height of remaining turbines. Ex. AWE 1, at 5.

Mr. Kenworthy also testified about new mitigation measures not previously considered by the subcommittee: (1) the new plan increases conservation land from 808 acres to 908 acres, including the area surrounding turbines 5,6,7 and 8; (2) the new plan calls for a one-time payment of \$40,000.00 to the Town of Antrim for the enhancement of the recreational activities and aesthetic experience at the Gregg Lake Recreational Area; (3) the new plan will include a Payment in Lieu of Taxes (PILOT) agreement with the Town of Antrim providing for revenue to the Town of Antrim for the first twenty years of the Project's life; (4) the new plan includes a Land Conservation Funding Agreement with the New England Forestry Foundation (NEFF) that grants \$100,000 to NEFF in order to acquire new permanent conservation lands in the general region of the Project "for the enhancement and maintenance of the region's aesthetic character, wildlife habitat, working landscape, and public use and enjoyment." Ex. AWE 1, at 6-7; Tr., 07/06/2015, Afternoon Session, at 71-79. Mr. Kenworthy's testimony acknowledged that the decision denying the application in the 2012 docket noted that dedication of land to a conservation easement, although of value to wildlife and habitat, does not mitigate the Facilities impact on aesthetics of the region. Tr., 07/06/2015, Afternoon Session, at 15-16. Mr. Kenworthy considered land conservation as a useful form of mitigation of the impact of the Facility on the aesthetics of the region. Tr., 07/06/2015, Afternoon Session, at 16, 33.

Mr. Kenworthy testified that Antrim Wind did not incorporate all of the recommendations suggested by Ms. Jean Vissering in the 2012 docket. He stated that Ms. Vissering's recommendations were addressed "in some fashion." Tr., 07/06/2015, Afternoon Session, at 19. He noted that neither the subcommittee nor Antrim Wind considered



incorporation of Ms. Vissering's recommendation into the revised Project to be necessary or warranted. Tr., 07/06/2015, Afternoon Session, at 19.

Mr. Kenworthy concluded that "[t]he reduced physical scale and impacts of the Project, combined with increased mitigation measures, make the Project that [Antrim Wind] now asks the SEC to take jurisdiction over significantly different in its impacts than the project proposed in Docket 2012-01." Ex. AWE 1, at 7.

Mr. Raphael conducted a Visual Assessment (VA) of the proposed Project and reviewed the prior Visual Impact Assessment (VIA) submitted by Antrim Wind in the 2012 docket. Ex. AWE 2, at 2; Ex. AWE 6. Mr. Raphael acknowledged visual impacts on some resources identified by the subcommittee in the Decision denying the Application in the 2012 docket, *i.e.* Pitcher Mountain, Goodhue Hill, Gregg Lake, Robb Reservoir, Island Pond, Highland Lake, Nubanusit Pond, Black Pond, Franklin Pierce Lake, and Meadow Marsh. Mr. Raphael determined that the resource did not merit a viewer effect rating. Tr., 07/06/2015, Afternoon Session, at 45-54. Based on his review, Mr. Raphael concluded that the newly proposed Facility will have a substantially different effect on the aesthetics of the region as compared to the 2012 Facility. Ex. AWE 2, at 4. Specifically, Mr. Raphael concluded that the area with potential visibility of the Project within the 10-mile radius has been reduced by 12%. Ex. AWE 2, at 4. Turbine #10's effect was completely eliminated and turbine #9's effect was minimized by decreasing its height and ensuring that its hub and tower would sit below the treeline so that only the blade tips of the Turbine would be visible from certain locations. Ex. AWE 2, at 4; Tr., 07/06/2015, Morning Session, at 70.

Mr. Raphael testified that the change in effect on aesthetics of the region can also be measured "in part" by the angle of view. Ex. AWE 2, at 4. As a result of elimination of turbine

#10 and the decrease in height of turbine #9, the angle of view decreased from 7.9% to 4.5% from the southeast corner of Willard Pond and from 10.7% to 6.4% from the northeast portion of Willard Pond. Ex. AWE 2, at 4. The field of view from the vantage point on Bald Mountain decreased from 12.31% to 5.92%. Ex. AWE 2, at 5. The field of view from the waters of Gregg Lake at the point of highest potential visibility was reduced from 17.28% to 16.14%. Ex. AWE 2, at 5. Mr. Raphael further asserted that the Project will not be visible from Center Pond in Stoddard, Spoonwood Pond in Nelson, Nubanusit Lake in Hancock, Dublin Lake or Beech Hill. Ex. AWE 2, at 5. Mr. Raphael also testified that the Project, as now proposed, reduces the total number of turbines visible from various viewpoints. Ex. AWE 2, at 5. On Willard Pond, the number of visible turbines decreased from 8 or 9 turbines to 6 or 7 turbines. Ex. AWE 2, at 5. On Gregg Lake, the number of visible turbines decreased from 9 to 6 or 7. Ex. AWE 2, at 5. Mr. Raphael denied that his simulations were manipulated or otherwise inaccurate. Tr., 07/06/2015, Morning Session, at 45-46.

Mr. Raphael opined that the recommendations and report provided to the subcommittee in the 2012 docket by Jean Vissering were incomplete and inaccurate. Tr., 07/06/2015, Afternoon Session, at 35-36. He claimed that Ms. Vissering failed to use a consistent methodology and relied on the assistance of third parties in preparing her visual simulations. Tr., 07/06/2015, Afternoon Session, at 35-36.

He concluded that “given other factors such as angle of view, proximity, or dominance, the reduction of 1 or 2 turbines can have a dramatic effect on the change of context and nature of view, downgrading an impact from moderate or high, to low or moderate.” Ex. AWE 2, at 5.

Based on the testimony provided by Mr. Kenworthy and Mr. Raphael, Antrim Wind asserts that “[w]hile the proposed Project in many aspects is similar to the project proposed in

Docket 2012-01, on the whole it is materially and substantially different due to numerous substantial changes.” See Memorandum of Law in Support of Antrim Wind Energy LLC’s Petition for Jurisdiction, Docket No. 2014-05, at 1, 8-12 (July 17, 2015).

Antrim Wind also argues that the subcommittee has already determined that changes such as the removal of Turbine #10 and payments to the Town of Antrim and NEFF are material. Antrim Wind bases its argument on a portion of the Order denying rehearing in the 2012 docket. In that proceeding, the subcommittee explained that such changes “would require the review of the entire Application in light of the requirements set forth by RSA 162-H” and stated that such changes “would materially change the original Application and would require extensive *de novo* review.” See Memorandum of Law in Support of Antrim Wind Energy LLC’s Petition for Jurisdiction, Docket No. 2014-05, at 5 (July 17, 2015) (quoting and citing Order on Pending Motions, Docket 2011-02, at 10-11 (Sept. 10, 2013)).

Antrim Wind also argues that the same circumstances underlying the subcommittee’s initial assertion of jurisdiction remain present in this docket. See Memorandum of Law in Support of Antrim Wind Energy LLC’s Petition for Jurisdiction, Docket No. 2014-05, at 13 (July 17, 2015).

Antrim Wind acknowledges that it is normal for the Town of Antrim to review land use projects. Tr., 07/06/2015, Morning Session, at 83-84. It asserts, however, that the Committee should assert jurisdiction over the Project because the Town of Antrim does not have an ordinance designed to address wind energy facilities, will not be able to provide the level of review that is required under 162-H, and to avoid unreasonable adverse impacts on aesthetics, the environment and public health and safety (including noise issues). See Memorandum of Law in Support of Antrim Wind Energy LLC’s Petition for Jurisdiction, Docket No. 2014-05, at 13

(July 17, 2015); Tr., 07/06/2015, Morning Session, at 83-84. Antrim Wind also emphasizes that Board of Selectmen and the Planning Board testified that the Town lacks the expertise and resources to evaluate the Project and were concerned that review of the Project by the Town may cause years of litigation. See Memorandum of Law in Support of Antrim Wind Energy LLC's Petition for Jurisdiction, Docket No. 2014-05, at 13-14 (July 17, 2015). Antrim Wind concurs with the Town's position that local review would require at least two variances and major site plan review that may lead to appeals and untimely resolution of the request to construct the Project. Tr., 07/06/2015, Morning Session, at 54, 57.

Finally, Antrim Wind claims that legislative changes to RSA 162-H following the denial of the original Application constitute a material change in circumstances warranting review of the Application by the Committee. See Memorandum of Law in Support of Antrim Wind Energy LLC's Petition for Jurisdiction, Docket No. 2014-05, at 14-15 (July 17, 2015) (citing Brandt Development Co. of New Hampshire, LLC v. City of Somersworth, 162 N.H. 553,559-60 (2011)).

#### **B. Town of Antrim.**

The Antrim Board of Selectmen and the Planning Board request the Committee to re-assert its jurisdiction over the Project. See Petition from the Town of Antrim, Docket No. 2014-05 (Nov. 6, 2014).

The Town of Antrim submitted the following pre-filed testimony:

- Pre-filed testimony of Christopher Condon, a Chairman of the Planning Board for the Town of Antrim on behalf of Antrim Planning Board; and
- Pre-filed testimony of Gordon Webber, a Chairman of the Antrim Board of Selectmen, Michael Genest, a member of the Board of Selectmen, and John Robertson, a member of the Board of Selectmen for the Town of Antrim Board of Selectmen.

In his pre-filed testimony, Mr. Condon stated that the Committee's jurisdiction is warranted because the Town does not have industrial wind ordinances and the Planning Board does not have the technical expertise or resources to address a Project of this magnitude. See Pre-filed Testimony, Christopher Condon, at 2. Mr. Condon asserted that the Committee should take jurisdiction over the Project because it did so in 2012 and because the Project is "divisive" within the Town. See Pre-filed Testimony, Christopher Condon, at 2.

Mr. Webber, Mr. Genest, and Mr. Robertson, on behalf of the Board of Selectmen, asserted that, although the Town has a Zoning Ordinance and a Master Plan, it does not have an Ordinance that would specifically address wind energy facilities. See Pre-filed Testimony, Gordon Webber, Michael Genest, John Robertson, at 3-4; Tr., 07/06/2015, Afternoon Session, at 99-100. They explained that, because the Town does not have a renewable energy ordinance, it will be highly problematic for the Town to review the Project and to determine whether the Project should be allowed and/or under which conditions construction and operation of the Project should be conducted. See Pre-filed Testimony, Gordon Webber, Michael Genest, John Robertson, at 3-4. The Board of Selectmen further asserted that the Committee is better equipped to evaluate the Project. See Pre-filed Testimony, Gordon Webber, Michael Genest, John Robertson, at 4-5. The Board of Selectmen also raised its concern that if the Committee refuses to assert its jurisdiction over the Project and Antrim Wind fails to obtain a variance for construction and operation of the Project from the Town, the Town may lose significant benefits associated with the Project, including, but not limited to the PILOT agreement with Antrim Wind and associated taxes in the estimated amount of \$324,000.00 per year and other commercial opportunities that the Project may attract. See Pre-filed Testimony, Gordon Webber, Michael Genest, John Robertson, at 5-6.

The Board of Selectmen also argued that, under RSA 162-H:2, the Committee is required to assert jurisdiction over the Project if it finds that the Project is “consistent with the findings and purposes set forth in RSA 162-H:1.” See Pre-filed Testimony, Gordon Webber, Michael Genest, John Robertson, at 7. The Board of Selectmen asserted that the construction and operation of the Project will ensure the Town’s economic growth and development as Antrim Wind will make significant contributions in taxes and will attract new business. See Pre-filed Testimony, Gordon Webber, Michael Genest, John Robertson, at 7-8. According to the Board of Selectmen, the welfare of the population, aesthetics, air and water quality will be better addressed by the Committee because the Committee has resources and the expertise that are required for consideration of the effect of a Project of this magnitude. See Pre-filed Testimony, Gordon Webber, Michael Genest, John Robertson, at 7-8. The Board of Selectmen further stated that assertion of jurisdiction over the Project by the Committee will ensure maintenance of a balance among those potential significant impacts and benefits of the Project, avoidance of undue delay in the construction of the Project, full and timely consideration of environmental consequences of the Project, full and complete disclosure to the public, and treatment of construction and operation of the Project as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion. See Pre-filed Testimony, Gordon Webber, Michael Genest, John Robertson, at 8-9.

The Town admits that it has a procedure and an ordinance in place that could accommodate a site review, can issue variances, and can hire consultants that could advise the Boards on various issues. Tr., 07/06/2015, Afternoon Session, at 99-100, 108-110, 116-119. It asserts, however, that in the 2012 docket, the subcommittee has already determined that the Town does not have an Ordinance that would address wind energy facilities, current ordinances

cannot and will not adequately address the Project, review by the Town will require issuance of multiple variances and will cause multiple appeals and consequential delays, and the Committee is better equipped to address a Project of this magnitude. See Tr., 07/06/2015, Afternoon Session, at 928-129; Pre-filed Testimony, Gordon Webber, Michael Genest, John Robertson, at 9; Memorandum of Law In Support of Jurisdiction, Docket No. 2014-05, at 2-3, 9-11 (June 26, 2015); Post-Hearing Memorandum In Support of Jurisdiction, Docket No. 2014-05, at 2-3, 9-13 (July 17, 2015). The Town asserts that these findings remain the same in this docket and, therefore, the Committee should assert jurisdiction over this Project for the same reasons it asserted jurisdiction over the 2012 Project docket. See Pre-filed Testimony, Gordon Webber, Michael Genest, John Robertson, at 9; Memorandum of Law In Support of Jurisdiction, Docket No. 2014-05, at 2-3 (June 26, 2015).

The Town of Antrim also argues that the Committee must assert jurisdiction and conduct *de novo* review of the Project under Fisher v. Dover, 120 N.H. 187 (1980) because (i) the subcommittee “specifically invited submission of a subsequent application modified to meet its concerns”; (ii) Antrim Wind allegedly materially and substantially revised its application in response to comments made by the 2012 subcommittee; and (iii) Antrim Wind submitted a new proposal in an effort to meet the subcommittee’s concerns. See Memorandum of Law In Support of Jurisdiction, Docket No. 2014-05 (June 26, 2015); Post-Hearing Memorandum In Support of Jurisdiction, Docket No. 2014-05, at 3-5 (July 17, 2015).

The Town also asserts that Counsel for the Public argument that Antrim Wind did not materially revise its application because it did not incorporate all recommendation made by Ms. Vissering is misplaced. See Post-Hearing Memorandum In Support of Jurisdiction, Docket No. 2014-05, at 8-9 (July 17, 2015). According to the Town, the Subcommittee should not give

significant weight to Ms. Vissering's testimony because Ms. Vissering failed to conduct independent Visual Assessment analyses. See Post-Hearing Memorandum In Support of Jurisdiction, Docket No. 2014-05, at 8-9 (July 17, 2015).

The Town of Antrim claims that the parties in this proceeding are precluded from arguing that the Committee should not assert jurisdiction over the Project and conduct *de novo* review by doctrine of judicial estoppel because, during adjudication of Antrim Wind's Motion to Reopen the Record, they argued that proposed amendments required *de novo* review by the Committee. See Memorandum of Law In Support of Jurisdiction, Docket No. 2014-05, at 8-9 (June 26, 2015).

### **C. Counsel for the Public.**

Counsel for the Public opposes the Petition. Counsel for the Public asserts that the proposed Project differs very little from the 2012 Project. See Objection to Petition for Jurisdiction, Docket No. 2014-05, at 3 (Jan 23, 2015). Counsel for the Public claims that "the Project's infrastructure will be the same as the infrastructure for the 2012 project with the exception of the elimination of turbine 10, the reduction in height in turbine 9 (approximately 40-45 feet) and a change in turbine manufacturer." See Objection to Petition for Jurisdiction, Docket No. 2014-05, at 3 (Jan 23, 2015).

Counsel for the Public points out that, when deciding whether to assert jurisdiction in the past, the Committee considered the following purpose clauses articulated in RSA 162-H:1:

- Maintain a balance between the environment and the need for new energy facilities in New Hampshire;
- Avoid undue delay in the construction of needed facilities and provide full and timely consideration of environmental consequences;



- Ensure that all entities planning to construct facilities in the state be required to provide full and complete disclosure to the public of such plans; and,
- Ensure that the construction and operation of energy facilities are treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion.

See Objection to Petition for Jurisdiction, Docket No. 2014-05, at 3-4 (Jan 23, 2015) (citing RSA 162-H:1; Petition for Jurisdiction of Timbertop Wind I, LLC, Docket No. 2012-04; Petitions of Laflamme and Jones (In re: Clean Power Development, LLC), Docket No. 2009-03).

Counsel for the Public argues that Antrim Wind failed to articulate and satisfy any of these factors. See Objection to Petition for Jurisdiction, Docket No. 2014-05, at 4 (Jan 23, 2015).

Counsel for the Public also claims that the Town of Antrim is capable and well equipped to address Antrim Wind's requests. See Objection to Petition for Jurisdiction, Docket No. 2014-05, at 8 (Jan 23, 2015). Although Counsel for the Public admits that the Town of Antrim does not have ordinance addressing wind energy facilities, she asserts that Antrim's Board of Selectmen, the Planning Board, and the Board of Adjustment, with the assistance of consultants and experts that they may employ, are capable of reviewing Antrim Wind's Application. See Memorandum In Support of Objection to Jurisdiction, Docket No. 2014-05, at 9 (July 7, 2015). Counsel for the Public further emphasizes that, unlike in 2012, the Town's Boards are not antagonistic to each other and are capable of addressing Antrim Wind's Application and granting variances, if needed, in a timely and integrated manner. See Memorandum In Support of Objection to Jurisdiction, Docket No. 2014-05, at 9 (July 7, 2015).

Counsel for the Public argues that modifications offered by Antrim Wind are not substantial and do not cure the subcommittee's concerns about unreasonable adverse impact on the aesthetics of the region. See Memorandum In Support of Objection to Jurisdiction, Docket

No. 2014-05, at 5-6 (July 7, 2015). In making this claim, Counsel for the Public relies on a report prepared by Ms. Jean Vissering. See Objection to Petition for Jurisdiction, Docket No. 2014-05, at 4 (Jan 23, 2015). In her report, Ms. Vissering identified the following mitigation measures for the following reasons:

- Eliminate turbines #9 and #10. These two turbines are the most prominent as viewed from Willard Pond, Bald Mountain and Goodhue Hill and will result in unreasonable adverse aesthetic impacts. Visibility of clearing around turbine #9 will also result in significant visual impacts.
- Use an OCAS or similar motion activated collision avoidance system. This will be essential as night lighting will result in significant and unreasonable adverse aesthetic impacts to the area given the high visibility of the project from numerous lakes and ponds and especially from within wildlife sanctuaries and conservation areas.
- Use smaller turbines. The scale of the landscape in this part of New Hampshire is small with relatively low hills and mountains. The proposed turbines will overwhelm the ridgeline especially from a vantage point like Gregg Lake.
- Specific plans for land conservation as part of an off-site mitigation program must be identified and provide a meaningful counterbalance to the impacts of the natural and scenic resources of the area. Audubon's dePierrefeu-Willard Pond Sanctuary will be heavily impacted as a result of the project. The developer should work with Audubon to find a reasonable conservation off-set in conjunction with other measures identified here to reduce the visual impacts of the project.
- Identify and address all areas from which portions of roads, ridgeline clearing, cut and fill slopes and/or turbine pads may be visible. Of particular concern is the visibility of the road between turbines #5 and #6 from Goodhue Hill. Any other areas where project infrastructure other than turbines are visible will be a significant concern. The applicant should conduct line-of-sight studies from portions of roadway and turbine clearings to all sensitive vantage points. Specific plans need to be provided showing how these areas of project infrastructure visibility will be mitigated. Among the measures that must be considered would be reducing the size of clearings, reducing the size of cut and fill slopes, eliminating turbines in areas where visibility could be high, revegetating cut and fill slopes using indigenous species.
- General revegetation of cut and fill slopes and all non-permanent surfaces must occur immediately following construction. Revegetation must be with native plants and seed sources preferably using stockpiled soil. Introduction of exotic species should be avoided. Planting of indigenous species may be required in some areas as discussed above. A specific plan should be developed and approved by the New Hampshire

Department of Forestry and Lands including on-going monitoring to ensure revegetation is successful.

- Any significant visibility of the substation and O&M facility may need to be mitigated with screening plantings.

See Objection to Petition for Jurisdiction, Docket No. 2014-05, at 5-6 (Jan 23, 2015).

Counsel for the Public asserts that Antrim Wind failed to implement Ms. Vissering's recommendations and, therefore, failed to ensure that the new Project will not have unreasonable adverse effect on aesthetics of the region. Id., at 6-7.

Ms. Vissering reported that the turbines that Antrim Wind seeks to use will be 93 feet taller than those used in the Lempster Wind Project. Tr., 07/07/2015, Morning Session, at 9. Ms. Vissering also asserted that the removal of turbine #10 will not substantially change the resulting aesthetic impacts. Ex. PC 1, at 9; Tr., 07/07/2015, Morning Session, at 64. She confirmed that Turbine #9 will be less visible. Ex. PC 1, at 8; Tr., 07/07/2015, Morning Session, at 68. She asserted, however, that its height will still be 50 feet taller than the Lempster turbines and it will still be quite intrusive. Ex. PC 1, at 8. Ms. Vissering also asserted that the blade of turbine #9 is likely to be a moderately strong presence, especially since it will be a moving element in the landscape. Ex. PC 1, at 12; Tr., 07/07/2015, Morning Session, at 38, 70-71. According to Ms. Vissering, Turbine #9 as well as the other remaining 8 turbines would remain visible from Goodhue Hill, Gregg Lake, Pitcher Hill and other locations. Ex. PC 1, at 9.

Ms. Vissering acknowledged that Antrim Wind agreed to use the OCAS system once it becomes available. Tr., 07/07/2015, Morning Session, at 72. She further opined, however, that night lighting will remain concerning because it is unclear when and if the OCAS system will be accepted by the FAA. Ex. PC 1, at 8.

Ms. Vissering recognized that Antrim Wind followed her recommendations and developed plans for minimization of the clearings and roads as well as developed the plan for vegetation around the operation and maintenance building. Tr., 07/07/2015, Morning Session, at 98-100. She argued, however, that views of roads and clearings will still be visible along the Project ridge and visible from off-site viewpoints including those within the Sanctuary. Ex. PC 1, at 8-9.

As to the mitigation measures, Ms. Vissering acknowledged that she had recommended preservation of the ridgeline as one of the measures that could decrease the effect of the Project on the aesthetics of the region. Tr., 07/07/2015, Morning Session, at 84-90. She asserted, however, that acquisition of additional conservation land or payment to the Town of Antrim proposed by Antrim Wind, will only slightly mitigate the overall effect of the Project, but not materially contribute to the mitigation of aesthetic impacts. Ex. PC 1, at 9; Tr., 07/07/2015, Morning Session, at 16-17, 21, 84-90. Ms. Vissering further opined that, in light of the subcommittee's finding that acquisition of conservation land does not significantly mitigate the effect of the Project on aesthetics, she did not consider Antrim Wind's proposed contribution to NEFF for acquisition of conservation land as a significant mitigation measure. Tr., 07/07/2015, Morning Session, at 91-92. Ms. Vissering opined that the only way the effect of the Project on the aesthetics of the region can be mitigated is by implementing all seven mitigation measures that were recommended by her in the 2012 docket. Tr., 07/07/2015, Morning Session, at 59.

As to Mr. Raphael's report, Ms. Vissering confirmed that one less turbine will be visible from Gregg Lake and Meadow Marsh. Ex. PC 1, at 9. Ms. Vissering also did not dispute that the visibility of the turbines within a 10-mile radius may decrease by 12%. Ex. PC 1, at 12. She agreed that angle of view may decrease. Ex. PC 1, at 12; Tr., 07/07/2015, Morning Session, at

83. She opined, however, that from “sensitive viewpoints in the surrounding area, the scale, appearance, and impacts of the project would remain virtually identical to the previously proposed project” and “[t]he turbines will remain visually dominant from the three major focal points within the Sanctuary, and from other sensitive vantage points throughout the region.” Ex. PC 1, at 9-10; Tr., 07/07/2015, Morning Session, at 19-21.

Counsel for the Public and Ms. Vissering acknowledged that Ms. Vissering has not conducted a visual assessment of newly proposed Project, but simply reviewed the Visual Assessment that was prepared by Mr. Raphael. See Response to Petitioner’s Memoranda in Support of Petition for Jurisdiction, Docket No. 2014-05, at 5-6 (July 22, 2015); Tr., 07/07/2015, Morning Session, at 23-27, 41. Ms. Vissering testified, however, that a complete visual assessment was not necessary because the changes to the 2012 Project were limited to the removal of Turbine #10 and 45 foot reduction in height to Turbine #9. Tr., 07/07/2015, Morning Session, at 45-46. According to Ms. Vissering, such changes did not alter the fact that the remainder of the turbines will remain the tallest turbines in the region and her opinion that the effect of the entire Project on the aesthetics of the region will remain substantially similar to the effect of the previously proposed project. Tr., 07/07/2015, Morning Session, at 66-68, 105-106.

Counsel for the Public further asserts that, contrary to Antrim Wind’s interpretation of the subcommittee’s Order on Antrim Wind’s Motion to Re-Open the Record, the subcommittee has never determined that the proposed changes are in fact substantial and/or material. See Memorandum In Support of Objection to Jurisdiction, Docket No. 2014-05, at 10 (July 7, 2015). According to Counsel for the Public, while reviewing Antrim Wind’s request to re-open the record, the subcommittee found that suggested changes were so material so that they could not be addressed by the subcommittee through the process of reopening the record. See

Memorandum In Support of Objection to Jurisdiction, Docket No. 2014-05, at 10 (July 7, 2015). The subcommittee has never held or stated that the changes absolutely and undeniably warranted review of the Application that incorporates them without prior determination of whether jurisdiction should be asserted. See Memorandum In Support of Objection to Jurisdiction, Docket No. 2014-05, at 10 (July 7, 2015). Similarly, Counsel for the Public asserts that Counsel for the Public has never argued that the Committee should conduct *de novo* hearing on proposed changes, but argued that the subcommittee could not address these changes at the stage of the hearing on the motion to re-open the record. See Memorandum In Support of Objection to Jurisdiction, Docket No. 2014-05, at 10-11 (July 7, 2015).

Counsel for the Public concludes that, because the Antrim Wind failed to demonstrate that it proposes a substantially different Project from the one that was already addressed by the subcommittee in the 2012 docket, the Committee should not exercise its jurisdiction and re-litigate a Project “that is substantially or materially the same project it denied in 2013.” See Tr., 07/07/2015, Afternoon Session, at 112-114; Memorandum In Support of Objection to Jurisdiction, Docket No. 2014-05, at 8, 14 (July 7, 2015). Counsel for the Public further asserts that the Subcommittee should refuse to re-litigate substantially the same Project under the doctrines of collateral estoppel and res judicata. See Memorandum In Support of Objection to Jurisdiction, Docket No. 2014-05, at 15-19 (July 7, 2015).

#### **D. Non-Abutting Property Owners.**

The Non-Abutting Property Owners request that the Subcommittee deny Antrim Wind’s Request to assert jurisdiction over the Project. In support, the Non-Abutting Property Owners Group of Intervenors submitted the following pre-filed testimony:

- Pre-filed testimony of Lorraine Carey Block and Richard Block. Ex. NIE 3;
- Pre-filed testimony of Elsa Voelcker Ex. NIE 4; and
- Annie Law and Robert Cleland. Ex. NIE 5.

The Subcommittee also received a statement from Dr. Ward.

Lorraine Carey Block and Richard Block, in their pre-filed testimony, claimed that the changes proposed by Antrim Wind do not constitute significant changes to the 2012 Project. Ex. NIE 3, at 3. Specifically, they asserted that (i) removal of Turbine #10 does not significantly change the overall footprint of the Project, (ii) Turbine #9, even with the reduction, is still over 170 feet taller than the tallest building in the state and still taller than any wind turbine in operation in New Hampshire and (iii) the 38-inch reduction in height of turbines #1-8 will not dramatically decrease the effect of the Project on the aesthetics of the region. Ex. NIE 3, at 3-4. They further asserted that Antrim Wind's expert modified a photograph identifying proposed 9-turbine layout so that it demonstrates less contrast between the turbine and the sky making the turbines to appear less visible. Ex. NIE 3, at 6; Tr., 07/07/2015, Afternoon Session, at 75. As to the proposed mitigation measures, they opined that an addition of 100 acres of conservation land is not sufficient to mitigate the impact of the Project on the region because while it would be of value to wildlife and habitat, it would not mitigate the imposing visual impact that the Project would have on valuable viewsheds. Ex. NIE 3, at 6-7. The Blocks also argued that the \$40,000 payment to the Town, is inadequate and insufficient to mitigate the effect of the Project on the aesthetics of the region. Ex. NIE 3, at 7.

Elsa Voelcker, in her pre-filed testimony, asserted that the proposed Project is "essentially the same" as the project considered by the subcommittee in 2012 docket. Ex. NIE 4, at 1. According to Ms. Voelcker "[o]ver half of Antrim will be viewing these towers in the winter time and what is more disturbing, since Antrim lays immediately West of them and wind

direction is generally west, they will be hearing the noise of them 24 hours a day 7 days a week.” Ex. NIE 4, at 1. Ms. Voelcker further asserted that simulation photographs submitted by Mr. Raphael were intentionally designed to “fade the wind towers into the haze.” Ex. NIE 4, at 1.

Annie Law and Robert Cleland asserted their concern, about the effect of the Project on aesthetics of the region, noise, and value of real estate owned by them. Ex. NIE 5.

Dr. Ward, in his comments, urged the Subcommittee to consider various weather conditions while addressing the Project and to consider that there is no such thing as typical or average effect of the Project on the aesthetics of the region. See Dr. Ward’s Comments.

The Non-Abutting Property Owners, excluding Dr. Ward, in their Concluding Statements asserted that Dr. Raphael erroneously underestimated that value of Willard Pond and other natural resource in the region. See Non-Abutting Group of Intervenors Concluding Statements, Docket No. 2014-05, at 2 (July 17, 2015). The Non-Abutting Property Owners further asserted that Dr. Raphael manipulated his findings and presented the pictures that minimize the appearance of the Project. See Non-Abutting Group of Intervenors Concluding Statements, Docket No. 2014-05 (July 17, 2015). Therefore, the Intervenors concluded that the Subcommittee cannot and should not rely on Dr. Raphael’s findings while deciding whether the revised Project will have substantially and/or materially less impact on the aesthetics of the region. See Non-Abutting Group of Intervenors Concluding Statements, Docket No. 2014-05 (July 17, 2015). In addition, the Non-Abutting Property Owners asserted that, although the Town of Antrim does not have a specific Ordinance addressing renewable energy facilities, the Town, through its Boards, is well equipped to address Antrim Wind’s Application by applying the Town’s Zoning Ordinance. See Non-Abutting Group of Intervenors Concluding Statements, Docket No. 2014-05 (July 17, 2015). They also urged the Subcommittee to disregard any potential delay that may be caused by the



appeals that may be filed as a result of the Town's review of the Application and asserted that appeals and associated delay is a part of a process regardless of whether such appeals are triggered by the Subcommittee's decision or for the Town's Boards' decision. See Non-Abutting Group of Intervenors Concluding Statements, Docket No. 2014-05, at 6 (July 17, 2015).

**E. WindAction Group.**

Lisa Linowes, on behalf of WindAction Group, requests that the Subcommittee deny the Petition. In support, she filed pre-filed testimony and submitted Memorandum that states her position on legal issues in this matter.

In her pre-filed testimony, Ms. Linowes claimed that the Project is essentially the same as the project considered by the subcommittee in Docket 2012-01. Ex. WA 4, at 3. Specifically, Ms. Linowes asserted that the Project layout, with exception of removal of Turbine #10, will remain the same. Ex. WA 4, at 3-4. Ms. Linowes argued that the turbines will remain dominant structures in the region and, will continue to have an unreasonable adverse effect on aesthetics of the region. Ex. WA 4, at 5-7. Finally, Ms. Linowes asserted that proposed mitigation measures will not address and will not mitigate the effect of the Project on aesthetics of the region. Ex. WA 4, at 8-10.

Although Ms. Linowes did not dispute the Committee's ability to review the Project, she asserts that the Town is well-equipped to address Antrim Wind's Application. See Tr., 07/06/2015, Afternoon Session, at 99-100, 108-109; Tr., 07/07/2015, Afternoon Session, at 42; The WindAction Group Response to Town of Antrim Memorandum of Law in Support of Jurisdiction, Docket No. 2014-05, at 4 (July 4, 2015); WindAction Group Post-Hearing Memorandum Recommending Denial of the petition for Jurisdiction, Docket No. 2014-05, at 3-6 (July 17, 2015). She asserted that the Town has a Zoning ordinance and it has Boards can review

the Application, may grant or deny variances, may issue new rules and requirements, and may retain various experts that may assist the Town with understanding of the Project and Project's impact. See Tr., 07/06/2015, Afternoon Session, at 99-100, 108-109; Tr., 07/07/2015, Afternoon Session, at 42; The WindAction Group Response to Town of Antrim Memorandum of Law in Support of Jurisdiction, Docket No. 2014-05, at 4 (July 4, 2015); WindAction Group Post-Hearing Memorandum Recommending Denial of the Petition for Jurisdiction, Docket No. 2014-05, at 3-6 (July 17, 2015). As to the areas of impact that cannot be regulated by the Town, Ms. Linowes asserted that the Project will be required to comply with the State law and requirements of various state agencies even if the Subcommittee decides not to assert its jurisdiction over the Project. See The WindAction Group Response to Town of Antrim Memorandum of Law in Support of Jurisdiction, Docket No. 2014-05, at 4 (July 4, 2015). Ms. Linowes asserted that Antrim Wind failed to demonstrate that the resolution of the Application, in fact, will be delayed by the appeals. See WindAction Group Post-Hearing Memorandum Recommending Denial of the Petition for Jurisdiction, Docket No. 2014-05, at 5-6 (July 17, 2015). As to the legal arguments submitted by the parties in this docket, Ms. Linowes argued that the subcommittee, while addressing the Project, did not invite Antrim Wind to revise the 2012 Application and to resubmit it to the Committee. See The WindAction Group Response to Town of Antrim Memorandum of Law in Support of Jurisdiction, Docket No. 2014-05, at 2-3 (July 4, 2015). According to Ms. Linowes, during the deliberations, the subcommittee members discussed whether any mitigation could lessen the 2012 Project's impact on the aesthetics and concluded that none existed and the 2012 Project, as proposed, could not be approved. See The WindAction Group Response to Town of Antrim Memorandum of Law in Support of Jurisdiction, Docket No. 2014-05, at 3-4 (July 4, 2015). The members of the subcommittee did not specifically address

Antrim Wind and did not direct or “invite” Antrim Wind to submit the revised Application. See The WindAction Group Response to Town of Antrim Memorandum of Law in Support of Jurisdiction, Docket No. 2014-05, at 3-4 (July 4, 2015). Ms. Linowes further asserted that, unlike various Board in cases cited by the Town of Antrim, the Committee is not obligated to assume jurisdiction, but may do so if it finds that it is required. See The WindAction Group Response to Town of Antrim Memorandum of Law in Support of Jurisdiction, Docket No. 2014-05, at 3-4 (July 4, 2015).

**F. Audubon Society of New Hampshire (ASNH).**

ASNH did not file testimony but did file a Memorandum of Law at the conclusion of the adjudicative process. See Memorandum in Support of Denial of Jurisdiction, Docket No. 2014-05 (July 17, 2015). ASNH argues that the changes proposed in the revised Project “are not sufficient to warrant de novo review.” See Memorandum in Support of Denial of Jurisdiction, Docket No. 2014-05, at 3 (July 17, 2015). In coming to this conclusion ASNH relies on the testimony of Ms. Vissering. See Memorandum in Support of Denial of Jurisdiction, Docket No. 2014-05, at 3 (July 17, 2015). ASNH also asserts that Mr. Raphael’s report and testimony were flawed because Mr. Raphael “did not use the findings of the Committee in the 2012 docket as a starting point, but rather started from scratch in his visual assessment.” See Memorandum in Support of Denial of Jurisdiction, Docket No. 2014-05, at 3 (July 17, 2015). Relying on the claim that the changes are insufficient ASNH argues that the Fisher v. Dover line of cases relied on by the Town of Antrim does not apply. See Memorandum in Support of Denial of Jurisdiction, Docket No. 2014-05, at 3 (July 17, 2015). ASNH also argues that the doctrine of collateral estoppel bars reconsideration of the present Project because it is not sufficiently

different than the previous Project. See Memorandum in Support of Denial of Jurisdiction, Docket No. 2014-05, at 2-3 (July 17, 2015).

#### **G. Other Intervenors.**

Although the Harris Center for Conservation Education (HCCE) did not file a pre-filed testimony and did not actively participate in this docket, it expressed its position in the request to intervene where HCCE stated that “it should not be identified as ‘for’ the Proposal or ‘against’ the Proposal.” See Petition for Intervention by Harris Center for Conservation Education, Docket No. 2014-05, at 4 (Jan. 14, 2015).

Abutting Property Owners Group of Intervenors did not file pre-filed testimony and did not actively participate in this docket. At the time of the hearing, Ms. Longgood, however, indicated that she concurred with Counsel for the Public’s position. Tr., 07/07/2015, Afternoon Session, at 117.

#### **IV. ANALYSIS AND FINDINGS**

The Subcommittee may assert jurisdiction over a renewable energy facility with a nameplate capacity of 30 megawatts or less but at least 5 megawatts if the Subcommittee determines that asserting jurisdiction over the Project is “consistent with the findings and purpose set forth in RSA 162-H: 1.” See RSA 162-H:2, XI, XII; see also Jurisdictional Order, Antrim Wind Energy, LLC, Docket No. 2011-02 (Aug. 10, 2011); Final Order Denying Petitions Filed by Michael Laflamme and Howard Jones, Docket No. 2009-03 (Apr. 7, 2010); Jurisdictional Order, Community Energy, Inc. and Lempster Wind, LLC, Docket No. 2006-001 (Sept. 23, 2006).

The legislative findings and purposes outlined in RSA 162-H:1 are:

1. to maintain a balance among those potential significant impacts and benefits in decisions about the siting, construction, and operation of energy facilities in New Hampshire;
2. that undue delay in the construction of new energy facilities be avoided;
3. that full and timely consideration of environmental consequences be provided
4. that all entities planning to construct facilities in the state be required to provide full and complete disclosure to the public of such plans; and
5. that the state ensure that the construction and operation of energy facilities is treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion.

RSA 162-H:1.

The Subcommittee's determination on the issue of jurisdiction is governed by the declaration of purpose:

The legislature recognizes that the selection of sites for energy facilities may have significant impacts on and benefits to the following: the welfare of the population, private property, the location and growth of industry, the overall economic growth of the state, the environment of the state, historic sites, aesthetics, air and water quality, the use of natural resources, and public health and safety.

RSA 162-H:1.

**A. Sufficiency of the Petitions.**

The Committee is not required to but has the discretion to exercise jurisdiction over a renewable energy facility consisting of electric generating station equipment and associated facilities with a nameplate capacity of 30 megawatts or less but at least 5 megawatts. RSA 162-H:2, XI. See, RSA 162-H:2, XII. Procedurally, the Committee may consider asserting

jurisdiction over such a Project on its own motion or if the Committee receives a petition requesting the Committee to assert jurisdiction from the Applicant or two or more petitioners defined in RSA 162-H:2, XI. See RSA 162-H: 2, XII. RSA 162-H:2, XI, defines “petitioner” as a person who files a petition meeting one of the following conditions: (1) a petition endorsed by 100 or more registered voters in the host community or host communities; (2) a petition endorsed by 100 or more registered voters from abutting communities; (3) a petition endorsed by the governing body of the host community or 2 or more governing bodies of abutting communities; or (4) a petition filed by the potential applicant. RSA 162-H:2, XI.

The Committee received three Petitions to assert jurisdiction over the Project: (1) a Petition from the Board of Selectmen of the Town of Antrim filed on November 6, 2014; (2) a Petition to assert jurisdiction over the Project filed by Antrim Wind on November 26, 2014; and (3) a Petition signed by more than one hundred registered Antrim Voters filed on December 8, 2015. The Petitions were filed by the governing body of the host community, by the Applicant, and by more than 100 registered voters of the hosting community. These parties are authorized to petition the Committee to assert jurisdiction over the Project under RSA 162-H:2, XI, XII. Therefore, the Subcommittee finds that the Petitions are sufficient and authorize the Subcommittee to determine whether it should exercise discretionary jurisdiction over the Project.

#### **B. *Res Judicata* and Claim Preclusion Issues.**

During the pendency of the Petitions in this docket, numerous parties argued that the Subcommittee is either required to assert jurisdiction or is precluded from asserting jurisdiction under various legal theories.

The Town of Antrim argues that the Committee should assert jurisdiction and conduct a *de novo* review of the Project under Fisher v. Dover, 120 N.H. 187 (1980) because (i) the

subcommittee “specifically invited submission of a subsequent application modified to meet its concerns”; (ii) Antrim Wind allegedly materially revised its application in response to comments made by the subcommittee; and (iii) Antrim Wind submitted a new proposal in an effort to meet the subcommittee’s concerns.

In support of its proposition that the subcommittee “invited submission of a subsequent application,” the Town of Antrim cites the subcommittee’s Decision and Order denying Application for Certificate of Site and Facility, Docket No. 2012-01 (May 2, 2013). Specifically, the Town quotes the following provision of the Decision:

The Subcommittee’s 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. The decision is based solely on the information provided regarding the specific Facility presented in this docket. A different facility may be adequately suited to the region.

The Town also relies on the following language of the Subcommittee’s Order on the Applicant’s Motion for Rehearing:

The Subcommittee finds that review of the new evidence submitted by the Applicant would require the re-review of the entire Application in light of the requirements set forth by RSA 162-H. . . . Here, the Applicant seeks to introduce evidence which would materially change the original Application and would require extensive *de novo* review as opposed to a full consideration of the issues presented at the hearing.

See Order on Pending Motions, Docket No. 2012-01, at 10-11 (Sept. 10, 2013).

While arguing that Antrim Wind materially revised its Application, the Town identifies the changes and argues that they are material because “[e]ven small changes are considered material when they are intended to address the reasons a board or agency denied a prior

application.” See Post-Hearing Memorandum In Support of Jurisdiction, Docket No. 2014-05, at 4-8 (July 17, 2015).

Antrim Wind concurs with the Town’s argument and also asserts that recent legislative changes to RSA 162-H constitute a substantial change in circumstances that warrants Committee review.

The line of cases cited by the Town of Antrim does not address the issue of jurisdiction. The Fisher case simply articulates the rule that requires town boards and arguably state agencies, prior to considering re-filed applications, to determine that (i) a material change of circumstances affecting the merits of the application has occurred or (ii) the application is for a use that materially differs in nature and degree from its predecessor.

In Fisher, the applicant filed a second application for a variance after the first was denied and the Board granted the application without finding either that a material change of circumstances affecting the merits of the application had occurred or that the second application was for a use that materially differed in nature and degree from the use previously applied for and denied for the Board. 120 N.H. at 190-91. The Court ruled that the Board’s consideration of second applications without addressing these issues was erroneous. Id.

In Morgenstern v. Town of Rye, 147 NH 558 (2002) and Appeal of Town of Nottingham, 153 NH 539 (2006), the Supreme Court further clarified that the second applications to zoning board of adjustment and the Department of Environmental Services, respectively, were not substantially the same applications as originally filed because they supplemented the original applications in response to comments made by the ZBA and DES. Appeal of Town of Nottingham, 153 N.H. at 566; Morgenstern, 147 N.H. at 566.



In Hill-Grant Living Trust v. Kearsarge Lighting, 159 NH 529 (2009), the Supreme Court reconciled the rules articulated in Fisher, Town of Nottingham and Morgenstern and held that if the Board “invites submission of a subsequent application modified to meet its concerns, it would find an application so modified to be materially different from its predecessor, thus satisfying Fisher.” 159 N.H. at 536.

The cases cited by the Town do not support the conclusion that an agency must assume jurisdiction over a second application simply because a second application addresses concerns expressed by the agency. The cases simply require town boards, in the exercise of non-discretionary jurisdiction, to review the merits of re-filed applications if they previously invited a subsequent application.

The jurisdiction of the Committee in this case is distinguishable. The Committee does not have automatic jurisdiction over the Project and is not required to assert jurisdiction. The standard that guides the Subcommittee’s decision whether to assert jurisdiction is clearly set forth by the legislature in RSA 162-H:2, XII. The Committee may assert jurisdiction if it determines that it “requires a certificate, consistent with the findings and purposes set forth in RSA 162-H:1.” See 162-H:2, XII. In addition, nothing in the decision denying the original application or in the order denying rehearing can reasonably be construed as an invitation to file a subsequent application. Both the decision and the order denying rehearing were final orders that rejected the proposed Project.

The Town also argues that the Subcommittee should be estopped from refusing to exercise jurisdiction because, in its order on pending motions (including its motion to reopen the record), it found that “the Applicant seeks to introduce evidence which would materially change the original Application and would require extensive *de novo* review . . . .”

The Subcommittee finds that it is not required to assume jurisdiction simply because the subcommittee in 2012 docket stated that changes offered by Antrim Wind could not be reviewed during the hearing on Motion for Rehearing and warranted *de novo* review. Review of the order demonstrates that the 2012 subcommittee has never indicated or affirmatively stated that it will exercise jurisdiction over a modified project if Antrim Wind amends and refiles its application. The subcommittee indicated that consideration of such application “would require” *de novo* review, not that such review “will be conducted.” The 2012 subcommittee did not invite a re-filed application. Assuming *arguendo* that the subcommittee found that *de novo* review was warranted, nothing in the record indicates that the subcommittee in the 2012 docket considered the issue of jurisdiction and/or found that assertion of jurisdiction over an amended project is warranted under 162-H:2, XI. Antrim Wind could have presented its project to town boards and state agencies and forego the discretionary jurisdiction of the Committee. Counsel for the Public asserts that Antrim Wind failed to substantially and/or materially revise its Application and that the Subcommittee should refuse to re-litigate the Application under doctrines of *res judicata* and collateral estoppel. Neither the doctrine of collateral estoppel nor *res judicata*, relate to the issue of jurisdiction in this case. These doctrines are used to prevent parties from litigating claims or issues that have previously been litigated, not to preclude courts or agencies from asserting jurisdiction over a particular claim or application. If a future application raises issues of *res judicata* or collateral estoppel, these issues will be determined in the context of that application, not as an issue pertaining to jurisdiction.

The Subcommittee finds that neither Fisher v. Dover, 120 N.H. 187 (1980) nor the doctrines of collateral estoppel and *res judicata* preclude the Committee from reviewing the Petitions and determining whether it should assert its jurisdiction over the Project.

When determining whether to exercise jurisdiction, the Subcommittee applies the standard set forth by the legislature in 162-H:2, XI. The Subcommittee will determine whether the Project “requires a certificate, consistent with the findings and purposes set forth in RSA 162-H:1.”

### **C. Jurisdiction.**

After deliberation five members of the Subcommittee voted to assert discretionary jurisdiction. Two members of the Subcommittee voted to refrain from asserting jurisdiction.

The Subcommittee extensively discussed and considered whether the town of Antrim through its land-use boards and ordinances is capable of balancing the impacts and benefits of the proposed Facility. Both the Board of Selectmen and the Planning Board indicated that they feel the town is ill-equipped to undertake such a task. The Selectmen and the Planning Board pointed out that a large-scale wind energy ordinance, although proposed, has never been adopted by the Town. Additionally, the Town entities asserted that they do not have the requisite experience and expertise to conduct the necessary analysis. They pointed to the experience of and the procedures available to the Site Evaluation Committee as a paramount reason why the Committee can perform the delicate balancing test more completely and efficiently in a timely manner. The Town entities are also concerned that the Town will become embroiled in multiple lawsuits and appeals if review is undertaken at the local level.

A majority of the Subcommittee understands and accepts the concerns expressed by the Town. The Town ultimately may be capable of satisfactorily balancing the impacts and benefits of the Project. However, the method by which the Town would come to that point is, at best, unclear. The Town, despite several referenda, does not have an ordinance that addresses large-scale wind facilities. Previous efforts to review various portions of large-scale wind energy

proposals spawned appeals and significant litigation. See Docket 2011-02, Petition for Jurisdiction for a Renewable Energy Facility by Antrim Wind LLC, Jurisdictional Order, at 8-9. On the other hand, the Committee has a straightforward process that is well defined by statute and provides the opportunity for substantial participation by the public. The Committee has extensive experience in balancing the impacts and benefits of wind energy facilities and, indeed, has considered and denied an application for a larger facility that was proposed for the site. The Committee also has the statutory benefit of the participation of Counsel for the Public and the ability to employ necessary experts and consultants. On balance, a majority of the Subcommittee finds that exercising jurisdiction over the proposed Facility is consistent with the statutory purpose of assuring that the potential impacts and benefits of the Facility are appropriately balanced.

In addition to providing a well-defined process for determining whether to issue a certificate, RSA 162-H provides a statutory method of monitoring compliance with certificate conditions and an enforcement mechanism. See generally RSA 162-H: 4 and RSA 162-H: 12.

RSA 162-H:1 also provides that a purpose of the statute is to “avoid undue delay in the construction of new energy facilities.” The Applicant and the Town Boards argued that the assertion of jurisdiction will eliminate multiple appeals to the superior and supreme courts and other litigation. Counsel for the Public admitted that consideration of the proposal within the local government framework and ordinances would be “laborious.” See Memorandum in Support of Objection to Jurisdiction, at 9 (July 7, 2015). The opponents of jurisdiction argued that appellate and litigation delays are simply a part of the process. See Non-Abutting Group of Intervenors Concluding Statements, at 2 (July 17, 2015). A majority of the Subcommittee finds that the exercise of jurisdiction by the Committee will avoid undue delay in the consideration of

new energy facilities. While there is no guarantee that the Committee will issue a certificate of site and facility, RSA 162-H:7 requires compliance with specific time frames that assure all parties of a timely determination. There is no evidence that consideration of the Facility at the local level will expedite review of the proposed Facility or provide a more efficient process. The history of prior appeals and litigation over the local process suggest that Committee review of the proposed Facility is the most efficient course of action and the course that is best predicted to avoid undue delay. Of course, the Committee's ultimate decision to grant or deny a Certificate may be appealed. But, that appellate process is similarly well defined. See RSA 541.

A majority of the Subcommittee is also persuaded by the fact that the Town Boards appear united in their request of the Subcommittee to assert jurisdiction. While it is possible that the request is somewhat politically based, the majority of the Subcommittee accepts the assertions and claims made by the Selectmen and the Planning Board that the Town is unprepared to undertake consideration of the myriad issues that accompany the siting, construction and operation of a large-scale wind energy facility.

Another issue that has been argued in the context of whether or not the Subcommittee should assert jurisdiction is the question of whether the Facility as currently proposed is materially different than the facility as proposed in the failed 2012 Application. As detailed above, the parties presented witnesses who testified about the extent of the impacts of the previously proposed facility and the Facility as presently proposed. The testimony was detailed, complex and contradictory. The primary focus of the witnesses was on aesthetic impacts – an issue that was vigorously litigated in 2012 and the subject of dissent within the 2012 subcommittee. We note that the 2012 Application was 106 pages long and included 18 appendices contained in four 3 ring binders. We expect that an application for the presently

proposed Facility will contain at least as much information. On its face the Facility, as presently proposed, is different than the one previously rejected. At a minimum it contains one less turbine. Whether the differences in the proposals are material enough to require a different result, or even to survive claims of issue preclusion or *res judicata*, cannot be determined on this record because we do not have a complete application before us.

What we can determine is that the weight of the evidence in this docket demonstrates that the legislative purposes set forth in RSA 162-H:1 require the assertion of our discretionary jurisdiction.

Having considered the legislative purposes of RSA 162-H, the Subcommittee finds that the exercise of discretionary jurisdiction will assure a balance between the benefits and impacts of the proposed Facility, avoid undue delay in consideration of the proposed Facility, and will assure that consideration of the proposed Facility will be treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion. The petitions for jurisdiction are granted.

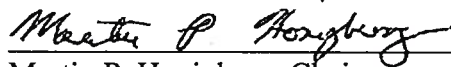
Antrim Wind represented that an Application can be filed within weeks of the Subcommittee's decision. That representation has informed the majority's decision in this matter and, therefore, as a condition of maintaining jurisdiction, we require that Antrim Wind file a complete application on or before January 24, 2016.

## **V. CONCLUSION AND ORDER**

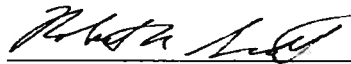
Having considered the record in this matter and the legal standards to be applied, a majority of the Subcommittee finds that, subject to the conditions discussed herein and made a part of the Order that adequate protection of the objectives and purpose of RSA 162-H:1 requires the Committee to assert jurisdiction over the Project. In order for the Committee to maintain

jurisdiction, Antrim Wind shall file a complete Application for a Certificate of Site and Facility on or before January 24, 2016.

By Order of a Majority the Site Evaluation Committee this twenty-ninth day of September, 2015.



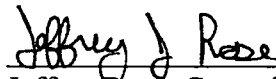
Martin P. Honigberg, Chairman  
N.H. Public Utilities Commission  
Presiding Officer



Robert R. Scott, Commissioner  
N.H. Public Utilities Commission



Eugene J. Forbes, Director  
Department of Environmental Services – Water Division



Jeffrey Rose, Commissioner  
Department of Resources and Economic Development



Roger Hawk, Public Member

Voting nay:

Elizabeth Muzzey  
Director, Division of Historical Resources

Patricia Weathersby, Esq.  
Public Member