

THE STATE OF NEW HAMPSHIRE  
SITE EVALUATION COMMITTEE

Docket No. 2015-02

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

**COUNSEL FOR THE PUBLIC'S MOTION TO RECONSIDER EVIDENTIARY  
RULING AND REQUEST TO RE-OPEN THE RECORD IN ORDER FOR  
COUNSEL FOR THE PUBLIC'S EXPERT TO RESPOND TO ANTRIM WIND  
ENERGY'S EXPERT'S REBUTTAL TESTIMONY**

Counsel for the Public hereby submits this Motion to Reconsider and Request to Re-open the Record, and as grounds submits the following:

1. On March 25, 2016, the Site Evaluation Committee ("Committee") issued a Procedural Schedule containing discovery and filing deadlines, technical session deadlines, and hearing dates for the instant docket. ("Schedule") 3/25/16 Procedural Schedule, *Petition of Antrim Wind Energy, LLC*, N.H. Site Eval. Comm. # 2015-02. Among the deadlines within the Procedural Schedule were the deadline for State agencies to issue final permits and conditions (July 28, 2026), and the deadline for filing supplemental pre-filed testimony for all parties (August 18, 2016).<sup>1</sup> *Id.* There were no specific provisions in the Procedural Schedule specifically addressing expert testimony, expert rebuttal testimony and/or expert sur-rebuttal testimony. *Id.*
2. Earlier in the proceedings at a Prehearing Conference that occurred on February 25, 2016, the presiding officer explained that the parties were being afforded an opportunity to file supplemental testimony two weeks after the deadline for State agencies to issue final permits

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<sup>1</sup> Originally August 15, 2016, modified by Order dated August 16, 2016.

and conditions. [2/25/16, Transcript of Prehearing Conference, *Petition of Antrim Wind Energy, LLC*, N.H. Site Eval. Comm. # 2015-02, page 70, lines 19-24, and Page 71 Lines 1-7. The presiding officer explained that all of the parties' testimony would be due on the same date. *Id.*, Page 71 Lines 1 – 7. He further explained that in the purpose of allowing for supplemental pre-filed testimony was to give the parties an opportunity to respond to the state agencies final recommendations or conditions that were being filed on July 28, 2016. *Id.*<sup>2</sup>

3. On August 18, 2016, Antrim Wind Energy, LLC (“AWE”) filed supplemental testimony from a variety of witnesses including that from its visual impact expert, David Raphael. Mr. Raphael’s testimony consisted of rebuttal testimony to that of Counsel for the Public’s visual impact expert, New Hampshire Audubon’s visual impact expert and also to the testimony of an intervenor, Richard Block, regarding Mr. Block’s testimony about visual impacts.

4. Because the parties against whom the rebuttal testimony was filed could not have anticipated what was being proffered by AWE’s witness by way of expert rebuttal testimony, and August 18, 2016 was last date designated by the Committee for filing testimony, none of those parties were afforded a formal opportunity to respond to the rebuttal testimony prior to the commencement of the adjudicatory hearings on September 12, 2016. These parties including Counsel for the Public assumed that it could be addressed during the course of the adjudicatory hearings through the testimony of their witnesses.

5. On October 3, 2016, a panel of witnesses testified on behalf of New Hampshire Audubon. Included on that panel was Francie Von Mertons, Douglas Bechtel, Carol Foss and

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<sup>2</sup> Subsequent to the February 25, 2016 Pre-hearing conference, the Committee expanded upon the purpose for filing supplemental testimony and indicating that it had been the longstanding practice of the committee to permit parties to address matters that were not known before the filing of direct testimony or to address issues and arguments that arose during the discovery phase. See Order on Motion to Strike. pp 2-3.

Michael Buscher, New Hampshire Audubon's visual impact expert. During the course of their testimony, counsel for New Hampshire Audubon asked Mr. Buscher whether he had read the Supplemental Pre-filed Testimony of David Raphael. See 10/3/16 Transcript of Adjudicatory Hearing Day 8, Afternoon Session, *Petition of Antrim Wind Energy, LLC*, N.H. Site Eval. Comm. # 2015-02, page 155 Lines, 3-4. This question was met by an objection from counsel for AWE on the basis that it was beyond the scope of the cross-examination. *Id.*, at Lines 5 – 8. Counsel for New Hampshire Audubon responded stating that it was not in relation to how his witness was cross-examined; rather it was in response to the rebuttal testimony. *Id.*, at lines 9 – 12. Counsel for AWE then took the position that because he did not cross examine the witness concerning Mr. Raphael's critique then he should not be given the opportunity to respond to it. *Id.*, at line 21-24, P. 156 Line 1.

6. Counsel for the Public joined N. H. Audubon in its argument, pointing out that Counsel for the Public's expert was in the same position, to wit: that AWE's expert submitted supplemental testimony against Ms. Connelly and she has not been afforded an opportunity to respond to it. *Id.*, at Lines 2 – 9. Following that exchange, the presiding officer permitted New Hampshire Audubon's witness to address David Raphael's rebuttal testimony. *Id.*, at 10 – 12.

7. Subsequent to that testimony the subject of David Raphael's rebuttal testimony was not addressed by the Committee or AWE. However, on November 7, 2016, when Counsel for the Public began Ms. Connelly's redirect testimony, and began to question her regarding Mr. Raphael's critiques it drew an objection from counsel for AWE on the basis that it was beyond the scope of the cross-examination. See 11/7/16, Transcript, Adjudicatory Hearing, Day 13, Afternoon session, *Petition of Antrim Wind Energy, LLC*, N.H. Site Eval. Comm. # 2015-02, page 7, Lines 7-22. This was precisely the same objection that AWE made to New Hampshire

Audubon's expert being afforded the opportunity to address the critique of his work in David Raphael's rebuttal testimony, which was overruled by the committee at that time.

8. After arguments were made, the Committee took as recess and when it returned it sustained the objection and gave Counsel for the Public leave to file a written offer of proof as to what Ms. Connelly would have testified to had she been permitted to address David Raphael's rebuttal testimony after the record was closed.

#### ARGUMENT

1. It is without dispute that the Committee has authority to determine procedural and discovery schedules. RSA 162-H:4, V. While the board has this discretion, it should not exercise that discretion arbitrarily or so that it serves to deny a party a fair hearing. *In re Sprague*, 132 N.H. 250, 2261 (1989).

2. Under Site 202.22, an applicant is required to file pre-filed testimony and exhibits with its application. Site 202.22(a). This rule also affords the presiding officer the authority to establish a schedule relating to pre-filed testimony and exhibits from other parties or rebuttal testimony from the applicant or any other party. Site 202.22 (b).

3. In the instant case, the Procedural Order issued by the Committee allowed for only one date to file responsive testimony that being the deadline for supplemental testimony. That date was utilized by AWE to file rebuttal testimony against witnesses including expert witness. The Procedural Schedule did not include a deadline for any other party to file responsive rebuttal testimony although that authority is provided for in the rules. Site 202.22 (b).

Therefore, the Procedural Order afforded none of the Counsel for the Public's or the Intervenors' experts the ability to respond to AWE's experts' critique's prior to the commencement of the adjudicatory process. Thus unless any of the Intervenors' experts or Counsel for the Public's

expert were allowed to respond to the rebuttal during the course of their testimony then the rebuttal testimony would go unanswered even if included any number of mistakes, misleading statements or falsehoods.

4. Expert testimony is unlike other lay testimony in that it involves opinions of persons who have a level of skill and expertise not possessed by the average person. The New Hampshire General Court has recognized this and has enacted statutes applying specifically to expert testimony. See RSA 516:29-b, generally. There it is recognized that specific rules should apply to disclosures made by expert witnesses at times, and in the sequence directed by the tribunal. RSA 516:29-b, III. The statute also contemplates that the nature of this evidence includes evidence intended solely to contradict or rebut evidence on the same subject matter identified by another party, and that parties shall supplement these disclosures when required in accordance with the court's rules. *Id.*

5. It is very common practice in New Hampshire court for expert's to submit reports, supplements to their reports, corrections to reports, rebuttals and sur-rebuttals to their reports. It is true, at some point discovery ends and the testimony is what it is. But it also true, that there are no restrictions in Court practice preventing an expert from addressing rebuttal testimony in the expert's direct or cross examination. Here, before the SEC, the practice is to limit the direct testimony to adoption of the pre-filed testimony and any additions and corrections. But it is clear that those changes are intended to apply to the direct testimony. The Committee did not account for sur-rebuttal testimony and it has no written rule or practice to address that kind of testimony during the proceedings.

6. The failure of the Committee to include in its procedural schedule an opportunity for Counsel for the Public or any other party to submit sur-rebuttal testimony would not have

resulted in a denial of fundamental fairness if the Committee had permitted Ms. Connelly to respond to Mr. Raphael's rebuttal testimony. But it did not. Thus, coupled with the ruling of the Committee denying Counsel for the Public's expert witness of an opportunity to address the rebuttal testimony of AWE's expert at the adjudicatory hearing, the exclusion of this evidence was fundamentally unfair and constitutes a denial of due process undermining the integrity of the proceedings.

7. Adjudicatory hearings before the Committee are governed by RSA 541-A. Under, RSA 541-A:31, IV, the opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved. While the rules of evidence do not apply in administrative proceedings, the receipt of evidence is governed by RSA 541-A:33. Site 202.24. Under RSA 541-A:33, II, a presiding officer may exclude irrelevant, immaterial or unduly repetitious evidence. See also, Site 202.02(c)(4). But the presiding officer is also required to cause a complete record of any hearing to be made. Site 202.02(c)(7). Further, Counsel for the Public does not dispute that the Committee has authority to determine the scope of the testimony, but in any adjudicatory proceeding a full and true disclosure of the facts is required. *In re Sprague*, 132 N.H. at 258.

8. In the instant case, there was no objection, and no finding by the Committee that the testimony of Counsel for the Public's expert was irrelevant, immaterial or repetitious. Instead counsel for AWE objected on the basis that its counsel did not bring up the rebuttal testimony during cross-examination. He also argued that since the applicant has the ultimate burden of proof they should permitted the last word. Further, he argued that Counsel for the Public could have cross examined Mr. Raphael on this rebuttal testimony.

9. With regard to counsel's argument that the scope of re-direct should have been thus limited to the scope of the scope of the cross, there is no rule restricting re-direct testimony in administrative adjudicatory hearings. Further, the New Hampshire Rules of Evidence contain no rule restricting re-direct testimony to that which was raised in cross examination. N.H. Rules of Evidence 611(a) and (b). And while that may be the practice in most New Hampshire courts, the hallmark of all adjudicatory proceedings whether it be an administrative body or a court, is that the proceeding is essentially a search for the truth. *Fenlon v. Thayer*, 127 N.H. 702, 705 (1986); N. H. Rule of Evid. 102. But neither here nor anywhere in New Hampshire law is there any support for the notion that because a party has the burden of proof, only that party is entitled to submit rebuttal testimony. Further, there is no support in New Hampshire law for the notion that because a party has the burden of proof, only that party is entitled to submit rebuttal testimony. In the absence of the Committee affording the other parties in this case a pre-adjudicatory hearing opportunity to respond to expert rebuttal testimony, the Committee should not have so strictly adhered to an unwritten rule of process to exclude this otherwise relevant and material evidence. To do so would allow the procedural maneuvering of counsel to dictate a whether there is full and fair hearing on all of the evidence.

10. In this case, Mr. Raphael's rebuttal testimony not only disputed Ms. Connelly's opinion, he called her methodology "misleading", "invented" and lacking in "common sense." The examples he used to support these finding were detailed in his rebuttal. This was not the kind of testimony that could have been rebutted through the cross examination of the accusing party. Counsel for the public's expert should have been permitted to defend her report and opinion, and the Committee should have been afforded an

opportunity to see and hear the testimony of this witness to judge both the credibility of both the allegations and the response.

11. The ruling of the Committee excluding this evidence was also concerning because it was inconsistent with the ruling it made on exactly the same issue with regard to Audubon's expert witness. In that sense this ruling was arbitrary. It is even more disconcerting, given that Counsel for the Public joined Audubon in its position, and made the Committee aware at that time that her witness was in the same position – i.e. needing to respond to David Raphael's rebuttal testimony. Barring the Committee notifying Counsel for Public that it wanted that testimony addressed in a different manner or at a different stage in the proceedings, Counsel for the Public could not have anticipated that such testimony would be excluded. Counsel for AWE was aware in October that Counsel for the Public intended for her expert witness to respond to the rebuttal testimony. Thus it was incumbent upon him to raise that objection at that time. That way the parties could have addressed and avoided all of the issues involved with the re-direct testimony going beyond the scope of the cross-examination or his inability to fully cross-examine Ms. Connelly. Counsel for AWE's failure to make known his objection to Counsel for the Public's expert to address the Raphael rebuttal testimony in the same manner as N.H. Audubon when he received that notice at the October 3, 2016 hearing constitutes a waiver of that objection and it should have been denied by the Committee.

12. Finally, as to counsel for AWE's argument that he would not get the last bite at the apple, he most certainly could have asked for re-cross and Counsel for the Public would have had no objection.<sup>3</sup>

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<sup>3</sup> Counsel for AWE also argued that it was surprise testimony that he would not have been prepared for. To the contrary, he knew the content of his own expert's rebuttal testimony and he could anticipate that any response to that testimony would be related to it. Further, this is no different than what occurs during cross-examination. It is highly



13. Given that the Committee did not afford the Intervenors or Counsel for the Public an opportunity to submit sur-rebuttal testimony, it was incumbent on the Committee to permit the parties' witnesses to respond to that testimony during the adjudicatory process. None of the reasons suggested by counsel for AWE to exclude said testimony rise to the level of that which should inhibit a full and true disclosure of the facts and deny a party a full and fair hearing. The ruling by the Committee excluding Ms. Connelly's testimony is all the more arbitrary in light of the ruling it made with regard to N.H. Audubon's expert witness permitting him to respond to the rebuttal testimony wherein with Counsel for the Public's expert witness it did not.

WHEREFORE, for the reason stated herein, Counsel for the Public respectfully requests that the Committee:

- A. Reconsider its Evidentiary Ruling;
- B. Re-open the Hearing so that Counsel for the Public's Expert Witness may Respond to AWE's Rebuttal Testimony; and
- C. For such other relief as is just and reasonable.

Respectfully submitted,

COUNSEL FOR THE PUBLIC  
By her attorneys

Joseph A. Foster  
ATTORNEY GENERAL

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unlikely that any lawyer can fully anticipate every topic upon which his or her witness will be cross-examined. That's simply the nature of the beast.

Dated: Nov. 14, 2016



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**CERTIFICATE OF SERVICE**

I, Mary E. Maloney do hereby certify that on this day, I caused a true copy of the foregoing to be served upon the Parties by electronic mail.

Dated: Nov. 14, 2016



Mary E. Maloney