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November 21, 2016

**VIA ELECTRONIC MAIL & HAND-DELIVERY**

New Hampshire Site Evaluation Committee  
Pamela G. Monroe, Administrator  
21 South Fruit Street, Suite 10  
Concord, NH 03301

**Re: NH Site Evaluation Committee Docket No. 2015-02:  
Application of Antrim Wind Energy, LLC – Objection to Counsel for the Public’s  
Motion to Reconsider Evidentiary Ruling and Request to Re-Open the Record**

Dear Ms. Monroe:

Please find enclosed for filing in the above-captioned matter, an original and one copy of Applicant’s Objection to Counsel for the Public’s Motion to Reconsider and Request to Re-Open the Record.

We have provided members of the distribution list with electronic copies of this Objection, pending addition of the document to the Committee’s website.

Please contact me directly should you have any questions.

Very truly yours,

Rebecca S. Walkley

RS3:

Enclosure

cc: Distribution List

McLane Middleton, Professional Association  
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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

**APPLICANT'S OBJECTION TO 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**

NOW COMES Antrim Wind Energy, LLC ("AWE" or the "Applicant") by and through its attorneys, McLane Middleton, Professional Association, and respectfully submits this Objection to Counsel for the Public's Motion to Reconsider and Request to Re-open the Record (the "Motion"). In support of this Objection the Applicant states the following:

**I. Procedural Background**

1. On March 25, 2016, the Committee issued a Procedural Schedule stating that Supplemental Pre-Filed Testimony was due on August 15, 2016. Subsequently, the Committee issued an Order on August 15, 2016, extending that deadline to August 18, 2016.
2. On July 13, 2016, the Committee held a technical session for the intervenor and Counsel for the Public's witnesses. During the technical session, Counsel for the Committee discussed the deadline for filing supplemental pre-filed testimony and the appropriate purposes for such testimony.
3. Counsel for the Committee reiterated the long-standing practice of the SEC, stating that supplemental testimony is not intended to allow parties to submit additional material or make arguments that they could have made at the time initial pre-filed testimony was due. Rather, it is intended for parties to address information that was not available to them at the time

their original pre-filed testimony was filed. This long-standing practice was reaffirmed by the Committee in this docket, noting that “[t]he Applicant’s description of the purpose of supplemental testimony is correct.” *Order on Motion to Strike*, p. 3 (September 19, 2016). The Committee again reaffirmed that “[t]he practice before the Site Evaluation Committee has been to allow the filing of supplemental testimony after the discovery process has terminated. Supplemental testimony usually addresses matters that were not known before the filing of direct testimony or to address evidence, issues and arguments that arise during the discovery phase of the matter.” *Order on Motion to Strike*, p. 3-4 (September 19, 2016).

4. Consistent with the Committee’s practice, the Applicant filed Supplemental Testimony on August 18, 2016. The subject of that testimony was to respond to information not in the record at the time the Applicant’s expert witnesses had filed their initial testimony. This additional information includes testimony submitted by other parties in this docket, including Counsel for the Public’s visual expert, Kellie Connelly, as well as any reports submitted by other parties, such as Terraink’s Visual Impact Assessment.

5. The Applicant chose to have Mr. Raphael file supplemental testimony, rather than wait until the final hearing to rebut testimony filed subsequent to the application, as Counsel for the Public now seeks to do, in order to give parties a full and fair opportunity to review the testimony and cross-examine Mr. Raphael on the testimony submitted. This process is consistent with the procedural order in this docket and common practice before the Committee.

## **II. Argument**

6. As a preliminary matter, Counsel for the Public has asserted that the Applicant’s supplemental testimony should have been limited to responses to state agencies final recommendations or conditions. *Motion*, p. 2. Given the explanation provided by the presiding

officer during the technical session, as well as the language in the Committee's Order on Motion to Strike and prior SEC practice, there is no support for Counsel for the Public's position.

7. Principally the Applicant objects to the Motion because it violates the Applicant's due process rights. The Applicant bears the burden of proving facts sufficient for the Subcommittee to make the findings required under RSA 162-H:16 by a preponderance of the evidence. N.H. Admin. Rule Site 202.19 (a) and (b).

8. As Counsel for the Public stated in the Motion, the rules do not contemplate sur-rebuttal testimony. *Motion*, p. 5. This is because the rules are structured to provide the Applicant with the opportunity to meet its burden of proof and respond to all opposing arguments.

9. During the pre-hearing conference, Counsel for the Committee explained that "the reason why we have prefiled testimony is we want to avoid surprises." *Tr. Prehearing Conference*, p. 121 (February 25, 2016). Attorney Maloney's request on the final day of hearings to allow Ms. Connelly to provide new rebuttal testimony on the stand, contradicts the Committee's clear purpose for requiring prefiled testimony and, if it had been permitted, would unfairly prejudice the Applicant.

10. Counsel for the Public has had the Procedural Schedule in this docket since March 25, 2016 and has known the due date for supplemental testimony since August 15, 2016. The Procedural Schedule does not permit, nor do the SEC rules permit sur-rebuttal testimony, as Counsel for the Public now seeks to introduce after the docket has closed. It would be fundamentally unfair and contrary to purpose of RSA 541-A:31, IV to permit Counsel for the Public's expert to be able to now provide new testimony without the opportunity for the Applicant to address any rebuttal arguments or re-cross Ms. Connelly on this new testimony. If

the Committee permits this additional testimony, it is unclear at what point the process of reply and sur-reply would or should end.

11. The Applicant will be placed at a disadvantage if Counsel for the Public is allowed to have her consultant submit new testimony at this late date. It would be unfair and contrary to due process to allow additional testimony at this point.

12. If Counsel for the Public felt that Ms. Connelly needed to further supplement her testimony or needed to respond to criticisms raised by Mr. Raphael in his supplemental testimony, Counsel had several options and opportunities to address those concerns without waiting until the 13<sup>th</sup> day of the final hearings, after the Applicant, the Committee, and all other parties had already questioned Ms. Connelly regarding her prefiled testimony and report.

13. After receiving Mr. Raphael's supplemental testimony on August 18<sup>th</sup>, Counsel for the Public was free to file a motion for leave to supplement Ms. Connelly's testimony, if she felt it was necessary. While the Applicant does not believe this is the procedure intended by the rules, this would have at least given the Applicant the opportunity to evaluate Ms. Connelly's additional testimony and incorporate a response into cross examination of Ms. Connelly during the final hearing.

14. Alternatively, Counsel for the Public could have asked Ms. Connelly on direct to respond to Mr. Raphael's supplemental testimony, which would allow all parties, including the Applicant and the Committee to ask questions about Ms. Connelly's additional testimony. While Counsel for the Public argues that the practice before the committee is to limit direct examination to adoption of testimony and any additions and corrections, there is no specific rule which disallows "additions" to include responses to supplemental testimony. This approach would at least have allowed all parties to hear and respond to the additional testimony. Further,

it is also the practice before this Committee to allow parties to file supplemental testimony without a sur-reply from opposing parties. Yet this is the relief Counsel for the Public now seeks.

15. Counsel for the Public also had the opportunity to cross examine Mr. Raphael regarding his supplemental testimony and could have raised those issues in cross examination; the same opportunity the Applicant should have for any testimony filed by Counsel for the Public's expert. In addition, Counsel for the Public may also address arguments raised by Mr. Raphael in his supplemental testimony in her closing brief.

16. Finally, to the extent the Committee feel Counsel for the Public's argument had any credence, the Committee Chair gave Attorney Maloney the opportunity to file a written offer of proof in this docket, which she has done. *Tr. Day 13/Afternoon Session*, p. 16. Thus, the points Counsel for the Public would have wanted to make have been made, thereby negating any due process claims.

WHEREFORE, Antrim Wind Energy, LLC respectfully request that this Committee:

- A. Deny Counsel for the Public's Motion for Reconsideration and Request to Re-open the Record; and
- B. Grant such further relief as it deems appropriate.

Respectfully Submitted,

Antrim Wind Energy, LLC

By its attorneys,

McLANE MIDDLETON,  
PROFESSIONAL ASSOCIATION

Dated: November 21, 2016

By: Rebecca S. Walkley  
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Certificate of Service

I hereby certify that on the 21st day of November 2016, an original and 1 copy of the foregoing Motion was hand-delivered to the New Hampshire Site Evaluation Committee.

Rebecca S. Walkley  
Rebecca Walkley