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Please respond to our Exeter office

April 14, 2017

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

Re: Antrim Wind Energy, LLC
Docket No. 2015-02

Good Afternoon Ms. Monroe:

Enclosed please find for filing in the above referenced matter, a Joint Motion for Rehearing of the Abutting Landowners Group, Non-Abutting Landowners Group, The Levesque-Allen Group, The Stoddard Conservation Commission, and The Windaction Group.

Please let me know if you have any questions.

Very truly yours,
DONAHUE, TUCKER & CIANDELLA, PLLC

Eric A. Maher, Esq.
emaher@dtclawyers.com

Enclosure
cc: Client (via email)
Distribution List, Docket No. 2015-02 (via email)

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

JOINT MOTION FOR REHEARING OF THE ABUTTING LANDOWNERS GROUP, NON-ABUTTING LANDOWNERS GROUP, THE LEVESQUE-ALLEN GROUP, THE STODDARD CONSERVATION COMMISSION, AND THE WINDACTION GROUP,

NOW COME, Janice Longgood, Bruce and Barbara Berwick, and Mark and Brenda Schaefer on behalf of the Abutting Landowners Group, Richard and Loranne Block, Annie Law, Robert Cleland, Jill Fish, and Kenneth Henninger on behalf of the Non-Abutting Landowners Group, Mary Allen on behalf of the Levesque-Allen Group, Geoffrey Jones on behalf of the Stoddard Conservation Commission, and Lisa Linowes on behalf of the Windaction Group, (collectively "the Opposing Intervenors") and hereby move this Subcommittee of the Site Evaluation Committee (hereinafter "the Subcommittee") to grant a rehearing with regard to its Decision and Order Granting Application for Certificate of Site and Facility (hereinafter "Antrim II Decision") dated March 17, 2017. In support thereof the Opposing Intervenors state as follows:

I. FACTUAL AND PROCEDURAL BACKGROUND

1. On January 31, 2012, Antrim Wind Energy, LLC (hereinafter "the Applicant") filed an Application for Site and Facility with the Site Evaluation Committee ("the Committee"), seeking authorization to construct ten wind turbines along the ridgeline of Tuttle Hill in the Town of Antrim, New Hampshire (hereinafter "the 2012 Application"), said case having Docket No. 2012-01 (hereinafter "Antrim I").

2. On April 25, 2013, the Committee denied the 2012 Application in a 71 page decision, following 11 days of hearings on the merits and 3 days of deliberations, wherein it that the proposed project would have an adverse aesthetic impact upon the area, including "significant qualitative impacts upon Willard Pond, Bald Mountain, Goodhue Hill, and Gregg Lake." See Antrim I, Decision and Order Denying Application for Certificate of Site and Facility at *50 (issued April 25, 2013) (hereinafter "Antrim I Decision").

3. On October 2, 2015, the Applicant filed another Application for a Certificate of Site and Facility (hereinafter "the Application"), in which it sought to install 9 wind turbines and a meteorology tower along the ridgeline of Tuttle Hill in the Town of Antrim, New Hampshire (hereinafter "the Project").

4. As set forth in the Application, the Applicant seeks to construct nine Siemens SWT-3-2-113 direct drive turbines each with a nameplate generating capacity of 3.2 MW. The turbines would run approximately 2 miles along the ridgeline toward nearby Willard Mountain. Excluding turbine blades, 8 of the turbines would be 92.5 meters tall (303.5 feet) and 1 turbine would be 79.5 meters tall (260.9 feet); including turbine blades, 8 of the turbines would be 488.8 feet tall and turbine 9 would be 446.2 feet tall. The 9 turbines are to be placed on the Tuttle Hill ridgeline, the elevation of which ranges between 1760 feet and 1830 feet, a rise of 610 to 680 feet above the valley floor.

5. On December 1, 2015, the Subcommittee accepted the Application.

6. On March 17, 2017, after thirteen days of hearings on the merits and three days of deliberations, the Subcommittee granted the Applicant a Certificate of Site and Facility.

7. On April 3, 2017, the Subcommittee suspended the Antrim II Decision in light of a Motion for Rehearing filed by Meteorological Intervenors.

8. As will be set forth in detail below, the Subcommittee should have ruled as the Committee did in 2012: "the turbines are too tall and too imposing in the context of the setting" and that "[t]hey would overwhelm the landscape and would have an unreasonable adverse impact upon valuable viewsheds." See Antrim I Decision at 51.

II. STANDARD FOR REHEARING

9. Within thirty days after any order or decision has been made by [the Subcommittee], any party to the action or proceeding before the [Subcommittee], or any person directly affected thereby, may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion all grounds for rehearing." See RSA 541:3. "Such motion shall set forth fully every ground upon which it is claimed that the decision or order . . . is unlawful or unreasonable." See RSA 541:4.

10. Said motion shall: (1) identify each error of fact, error of reasoning, or error of law; (2) describe how each error causes the committee's order or decision to be unlawful, unjust, or unreasonable; (3) state concisely the factual findings, reasoning, or legal conclusion proposed by the moving party; and include any argument or memorandum of law the moving party wishes to file. See N.H. CODE OF ADMIN. R. Site 202.29 (d).

11. A rehearing may be granted when the Subcommittee finds "good reason." See RSA 541:3; see also Antrim I, Order on Pending Motions at * 2 (issued September 10, 2013) (cases cited). A rehearing may be denied when the Subcommittee finds that "no good reason" exists. Id.

III. ARGUMENT

12. The Subcommittee should grant rehearing in this case because of errors of fact, reasoning, and law in matters of both procedure and substance. With regard to procedure, the Subcommittee should grant rehearing because the Subcommittee was unlawfully constituted and because the Committee made procedural and evidentiary rulings in a manner that prejudiced the full development of the record and the fair involvement of the parties.

13. With regard to substance, the Subcommittee should grant rehearing because the Subcommittee made errors of fact, reasoning, and law when it found that the proposed project would not have unreasonable adverse effects on aesthetics, natural environment, public health and safety, and orderly development of the region. See RSA 162-H:16, IV. Specifically, the Subcommittee either misinterpreted or ignored significant errors and defects in the analysis submitted by the Applicant with regard to the Applicant's Visual Impact Assessment, Sound Study, Shadow Flicker Analysis, Wildlife Study, Real Estate Analysis, and review of local land use regulations and/or ignored compelling evidence from Counsel for the Public and the Opposing Intervenors as to the Project's impacts. Each issue will be addressed in turn.

IV. RES JUDICATA

14. At the outset, the Subcommittee erred when it determined that the doctrine of Res Judicata/Collateral Estoppel does not apply to preclude the Applicant from putting forth a proposal for a wind farm so substantially similar to that proposed in Antrim I. The Subcommittee erred because the factual circumstances surrounding the two applications are not sufficiently distinct to allow the Applicant to obtain a new adjudication on what is, in essence, the same Application with de minimis modifications.

15. "Res judicata, or claim preclusion, bars litigation of any issue that was or might have been raised with respect to the subject matter of the prior litigation." See North Country Envtl. Servs. v. Town of Bethlehem, 150 N.H. 606, 621 (2004). For the doctrine to apply, 3 elements must be met: (1) the parties must be the same or in privity with one another; (2) the same cause of action must be before the Subcommittee in both instances; and (3) a final judgment on the merits must have been rendered on the first action. Considering the similarities of the parties in the Antrim I and Antrim II dockets, there can be no serious contention that the first element of res judicata is met. It further cannot be contested that the Subcommittee issued a decision on the merits in Antrim I.

16. The primary issue is whether the current Project constitutes "the same cause of action" as that brought forth in Antrim I. In the context of siting matters, a successive proposal can be brought if there is a material change in the proposed use of the land or there are material changes in the circumstances affecting the merits of the application. See Brandt Dev. Co. v. City of Somersworth, 162 N.H. 553, 557 (2011). The Applicant bears the burden of proving such material changes.

17. The Subcommittee ruled that the Project is materially different from the project proposed in Antrim I, based on the mitigation measures proposed by the Applicant. The Subcommittee's ruling, however, ignores the Committee's rationale in Antrim I, specifically with regard to the impact of non-aesthetic related mitigation measures.

18. The reduction of turbine heights by roughly 38 inches, the elimination of one tower, and various off-site mitigation measures, do not amount to such a material change that the impact would affect the overall outcome of the Antrim I decision. As is discussed in depth

below, the Committee in Antrim I clearly found that the non-aesthetic related impacts would not mitigate a project's adverse effect on aesthetics. See Antrim I Decision at 53.

19. The Committee in Antrim I also focused heavily on the extensive impact the proposed project would have on Willard Pond and the dePierrefeu Wildlife Sanctuary. The Project would continue to have a "profound" impact on Willard Pond. All nine of the turbines would be visible from Willard Pond. See Exhibit 3 to Visual Assessment prepared by Landworks. The Project will also continue to be visible from prominent viewsheds on Bald Mountain and Goodhue Hill, both of which are part of the dePierrefeu Wildlife Sanctuary. There is no indication that the change in the Committee's rules regarding Visual Impact Assessments and the consideration of aesthetic impacts are so material as to now call the Antrim I Decision into question.[1]

20. The Applicant cannot claim that the change in the Committee's rules now allows it to present the Project anew in its (slightly) modified form because, unlike Brandt, the change in the Committee's rules would not have altered the Committee's decision in Antrim I. See Brandt 162 N.H. at 556. The change in the Committee's rules would not likely have altered the Antrim I decision because the Committee's deliberations in Antrim I consider many, if not all, of the considerations now codified in Rule Site 301.14(a). This is particularly evident with regard to the Committee's analysis of Willard Pond and the dePierrefeu Wildlife Sanctuary, whereupon the Committee's analysis addressed: (a) the character of the area, (b) the significance of an affected resource; (c) the extent, nature, and duration of the public use; (d) the scope and scale in the change in landscape; (e) the extent to which the Project would be a dominant and prominent

[1] Indeed, the rule change appears to have such a limited impact on the Visual Impact Assessment of Landworks that Landworks only had to provide limited additional information with regard to photosimulations.

feature within a natural or cultural landscape of high scenic quality; and (f) the effectiveness of mitigation measures. See N.H. CODE OF ADMIN. R. Site 301.14(a). Each of these criteria is addressed in the substance of the Committee's analysis in Antrim I. See Antrim I Decision at 50-52. Therefore, there have been no material changes with regard to the facts or law which would permit the adjudication of the Project a second time.

21. The Applicant cannot show that the proposed changes in the Project are so material as to now call into question the Committee's determinations in Antrim I. The Subcommittee's finding that the Project contains material modifications was contrary to the evidence and ignores the substantial analysis performed by the Committee in Antrim I. The Subcommittee's ruling with regard to the issue of res judicata is unreasonable and unlawful. The Subcommittee should grant rehearing on this matter, determine that the doctrine of res judicata is applicable here, and deny the application based on the aesthetic concerns fully adjudicated in Antrim I.

V. PROCEDURAL ISSUES

a. The Subcommittee was not lawfully constituted

22. The Subcommittee's decision was unlawful and unreasonable because the Subcommittee was missing a public member. RSA 162-H:4, II provides that "[w]hen considering the issuance of a certificate or a petition of jurisdiction, a subcommittee shall have no fewer than 7 members. The 2 public members shall serve on each subcommittee with the remaining 5 or more members selected by the chairperson from among the state agency members of the committee." (Emphasis added.)

23. In the case of a public member, "if at any time a member must recuse himself or herself on a matter or is not otherwise available for good reason," the chairperson of the Committee "shall appoint the alternate public member, or if such member is not available, the governor and council shall appoint a replacement upon petition of the chairperson." See RSA 162-H:3, X (emphasis added). This process is applicable to both the committee and subcommittee members. See RSA 162-H:3, XI.

24. Here, Chairman Honigberg appointed Roger Hawk and Patricia Weathersby as the original two public members of the Subcommittee on October 20, 2015. Unfortunately, on January 7, 2016, Mr. Hawk died. On January 11, 2016, Chairman Honigberg appointed Rachel Whitaker to serve on the Subcommittee as an alternate public member. However, Member Whitaker did not preside over any proceedings in this matter, as she shortly went on maternity leave.

25. With the exception of an informational session held on February 22, 2016, Member Whitaker was not present for, and did not preside over, any other hearing, including the adjudicative hearing or the deliberative sessions, nor did Member Whitaker execute or sign any orders docket. For all intents and purposes, Member Whitaker was absent from the proceedings, and, upon information, with good reason, as she went on maternity leave after being appointed. Notwithstanding the good reason for Member Whitaker's absence, there clearly was a vacancy of a public member from the Subcommittee, and that vacancy was not duly filled as required by RSA 162-H:3.

26. As a result, the public did not have a full "seat at the decision-making table" as was intended when RSA 162-H:3 was amended in 2014 to expressly require that the Committee

have public members and that those public members preside on all subcommittees. When the Legislature enacted RSA 162-H, and required the participation of public members on all subcommittees, the Legislature made a clear statement: the voice of the public shall be heard on the important matter of siting energy facilities, and that voice shall carry considerable weight (2 out of 7 members). One of those critical voices was absent from the Subcommittee and the virtual entirety of the proceedings.[2]

27. While the impact of that absence is impossible to determine, one instance shines brightly as an example of when that extra public member would have had a meaningful impact in this case. On December 12, 2016, while deliberating the Project's impact to property values, the Subcommittee deliberated the issue of the property value guaranty, a matter of critical importance to several of the Opposing Intervenors. See December 12, 2016 Transcript, Afternoon Session, at 141-42.[3]

28. The property value guaranty was being considered after several Subcommittee members expressed skepticism as to the opinions of the Applicant's real estate expert, Matthew Magnuson. See e.g., 12/9/2016 PM Transcript at 169-70; 12/12/16 PM Transcript at 71, 102, 104, 128, 137. Despite recognizing the impact to property values associated with the Project that Antrim residents will have involuntarily thrust upon them, the Subcommittee voted 3 to 3 with

[2] It will likely be argued that RSA 162-H:4 allows for Subcommittees to have a quorum of five members and that the Subcommittee's acts in this case, made through six members, was valid.

This argument ignores the fact that throughout the entirety of this proceeding, the Subcommittee was missing a public member, whom the Legislature mandates preside over these matters. To say that the mere act of appointing Member Whitaker to the Subcommittee satisfied RSA 162-H:4 effectively nullifies that provision of the statute, i.e. that vacancies are to be filled, and undermines the Legislature's intent. It was clear that Member Whitaker was absent from the proceedings, that the Subcommittee had a vacancy, and that vacancy was not filled as required by RSA 162-H:4.

The Subcommittee was unlawfully constituted and the decision of the Subcommittee is invalid.

[3] Hereinafter transcripts will be cited as using the following format: month/day/year AM/PM Transcript at __.

regard to adopting a property value guaranty. See 12/12/16 Transcript at 141-42. Because of the deadlock, the motion was defeated. Had the requisite number of seven members been there to vote, this deadlock would not have occurred, and, considering that the missing member was a Public Member, the very real possibility existed that the motion would have passed.

29. The Subcommittee would later go on to write that it was "not convinced that the Project will . . . not have any effect on values of some properties," but dismissed those concerns stating that the Subcommittee did not believe that the project would have an adverse effect on orderly development in the region. See Antrim II Decision at 85-86.

30. In short, the Subcommittee acknowledged that Mr. Magnuson's analysis was less than credible, but still ruled in favor of the Applicant without any mitigation to impacted property owners, all due to a tie vote during deliberations. Had the Subcommittee been lawfully constituted, the Subcommittee may have voted to adopt a property value guaranty, thus protecting the interests of the Opposing Intervenors.

31. In conclusion, the Subcommittee was not lawfully constituted because a public member was absent, and the Chairman did not petition to have that public member replaced by a member of the Governor and Council. The Subcommittee's decision, made whilst unlawfully constituted, was unreasonable and unlawful as a result. The Subcommittee should grant rehearing and, at the least, arrange for Chairman Honigberg to have the Governor and Council fill the vacancy, whereupon a second public member can consider the evidence and testimony and participate in deliberations anew.

b. Waiver of Requirements

32. The Subcommittee's decision is unlawful and unreasonable because the Subcommittee granted the Applicant a waiver with regard to the Application of various sound and shadow flicker impacts with regard to "participating property owners" without complying with Rule Site 202.15.

33. The Subcommittee correctly determined that the Committee's rules "do not differentiate between participating and non-participating landowners." See Antrim II Decision at 168. The Subcommittee went on, however, to state that "the landowners have a right to voluntarily agree to subject themselves to different environments" and, for that reason, waived the "noise and shadow flicker restrictions set forth in N.H. CODE OF ADMIN. RULES, Site 301.14(f)(2)a and b., as applied to participating landowners. See Antrim II Decision at 168-69.

34. The Subcommittee's ruling is inconsistent with Rule Site 202.15 because the Subcommittee did not make the requisite finding that said waiver was within the public interest. Rule Site 202.15 provides that a subcommittee "shall waive any of the provisions of [the Committee's] rules . . . on its own motion if the . . . subcommittee finds that: (1) [t]he waiver serves the public interest; and (2) [t]he waiver will not disrupt the orderly and efficient resolution of matters before the subcommittee." The rule expressly notes that the public interest would compel waiver if "[c]ompliance with the rule would be onerous or inapplicable given the circumstances of the affected person; or (2) [t]he purpose of the rule would be satisfied by an alternative method proposed." See N.H. CODE OF ADMIN. R. Site 202.15(b). Prior to granting the waiver, the Subcommittee shall allow other parties "the opportunity to comment on any waiver request before" the subcommittee. See N.H. CODE OF ADMIN. R. Site 202.15(f).

35. Here, the Subcommittee did not make the required findings that the grant of a waiver was in the public interest. For one, the Subcommittee expressly found that the rules were applicable under these circumstances. See Antrim II Decision at 168. Moreover, the requirement that "compliance with the rule" being onerous is more geared toward procedural or application criteria not waiver of a substantive criteria meant to preserve the public health and safety, such as the case with sound and shadow flicker. See N.H. CODE OF ADMIN. R. Site 301.14(f)(2). As such that criteria for determining "public interest" is not applicable. The waiver also does not reflect any "alternative method" that would satisfy the purpose of the rule because Rule Site 301.14(f)(2) clearly exists to protect the public health and safety and merely giving the Applicant a pass on certain individuals does not serve the purpose of the rule.

36. Further, the Subcommittee violated Rule Site 202.15 because the Subcommittee raised the prospect of a waiver for the first time during deliberations and did not allow the opportunity for comment. In fact, Lisa Linowes expressly noted that there was no request for waiver on the last day of the hearing on the merits in this matter. See 11/7/16 PM Transcript at 24.

37. For these reasons, the Subcommittee acted unlawfully and unreasonably when it unilaterally decided to grant a waiver of the Committee's sound and shadow flicker rules. The Subcommittee should grant rehearing, determine that a waiver under these circumstances does not satisfy the criteria set forth in Rule Site 202.15, and find that Project exceeds permissible sound and shadow flicker requirements at participating properties.

c. Procedural Fairness

38. The Subcommittee should grant rehearing on this matter because the proceedings in this matter were replete with procedural unfairness to the prejudice of Counsel for the Public and the Opposing Intervenors. The result of this procedural unfairness was a chilling effect on intervenor involvement and an inability to fully develop the factual record for this Subcommittee's consideration.

39. In an administrative proceeding, a party "may conduct cross-examinations required for a full and true disclosure of the facts." See RSA 541-A:33. Pursuant to Rule Site 202.02, the presiding officer shall "conduct any hearing in a fair, impartial, and efficient manner," "admit relevant evidence and exclude irrelevant, immaterial, or unduly repetitious evidence," and "provide opportunities for the parties and committee members to question any witness."

40. At the heart of the procedural unfairness in this case was the issue of friendly cross-examination and inability to rehabilitate critical witnesses. The procedure established by the Subcommittee, i.e. requiring the Applicant and Intervenors to submit supplemental pre-filed testimony on the same day permitted the Applicant to effectively respond to the critiques of the its witnesses from Counsel for the Public and the Applicant, but precluded Counsel for the Public and the Intervenors from effectively rehabilitating their witness. The procedure was contrary to the spirit of RSA 541-A:33 because it prevented a full and true disclosure of the facts. See RSA 541-A:33. Further, the procedure was contrary to Rule Site 202.02 because it was unfair, benefited the Applicant and those intervenors supporting the Project, and did not allow for the admission of relevant evidence.

41. Indeed, Counsel for the Public particularly was prejudiced by this procedure, as she was incapable under the procedure of responding to the Applicant's criticisms through the supplemental pre-filed testimony and was precluded from asking questions on rebuttal which would have rehabilitated her witness. See e.g. 11/7/16 PM Transcript at 10-17 (argument of Counsel for the Public regarding her inability to rehabilitate Ms. Connelly regarding her visual impact assessment and Subcommittee's sustaining of objection precluding rehabilitation testimony). As is reflected by the Subcommittee's deliberations, Ms. Connelly's testimony was of critical importance with regard to aesthetic impacts; however, the Subcommittee was prevented by its own procedural rulings from being able to meaningfully weigh and consider Ms. Connelly's testimony.

42. Compounding this issue is the fact that Applicant and supporting intervenors were allowed to engage in friendly cross-examination, the result of which allowed parties to rehabilitate witnesses that had been impeached and criticized during cross-examination. This privilege was not shared by Counsel for the Public and the Opposing Intervenors, who were subjected to frequent objections. Indeed, counsel for the Town of Antrim was permitted to engage in substantial friendly cross-examination of Mr. Raphael, see 9/22/16 PM Transcript at 66, whereas Counsel for the Public and Opposing Abutters were frequently precluded from any and all efforts to rehabilitate witnesses.[4]

43. The impact of this procedural schedule was an unreasonable constraint on the full development of the factual record, resulting in the Subcommittee being deprived of the ability to consider fully-vetted evidence and testimony. The Subcommittee's reliance on such an

[4] This is not to mention that the Opposing Intervenors were frequently told to "hurry" and to move "quickly," instructions which were not directed at parties supporting the Project. +-

undeveloped record in this matter renders the Subcommittee's ultimate determinations unlawful and unreasonable. Accordingly, the Subcommittee should grant rehearing to allow for the full development of a factual record with the opportunity to rehabilitate witnesses.

VI. SUBSTANTIVE ISSUES

a. *The Subcommittee should grant rehearing with regard to its determination that the proposed wind farm would not have unreasonable adverse effects on aesthetics*

44. The Subcommittee should grant the Intervenor's Motion for Rehearing because the Subcommittee's ruling with regard to several criteria set forth in RSA 162-H:10 was unjust and unreasonable. The Subcommittee's findings were unjust and unreasonable because the Subcommittee made several errors of fact and/or law with regard to the following areas: (i) aesthetics; (ii) sound; (iii) shadow flicker; (iv) orderly development in the region; (v) wildlife habitat; and (vi) ice throw.

i. Standard for Issuance of a Certificate of Site and Facility

45. To grant a Certificate of Site and Facility, the Subcommittee must first find, in part, that the project will not have an unreasonable adverse effect on aesthetics, historic sites, air and water quality, the natural environment, and public health and safety. See RSA 162-H:16, IV (c). The Subcommittee must also find that the project will not unduly interfere with the orderly development of the region. See RSA 162-H:16, IV(b).

46. With regard to wind projects, the Subcommittee imposes various criteria that must be met in order to find that a project will not have unreasonable adverse effects on aesthetics, historic sites, air and water quality, the natural environment, and public health and safety. Those specific criteria are addressed below.

ii. The Subcommittee's finding that the Project will not have unreasonable adverse impacts on aesthetics is unlawful and unreasonable.

47. The Subcommittee's determination is unlawful and unreasonable with regard to aesthetics because the Applicant did not submit a compliant visual impact assessment in accordance with Rule Site 301.05. Rule Site 301.05 requires the Applicant to provide a visual impact assessment, "prepared in a manner consistent with generally accepted professional standards" regarding the "effects of, and plans for avoiding, minimizing, or mitigating potential adverse effects of the proposed facility on aesthetics." The visual impact assessment must further identify "all scenic resources within the area of potential visual impact and a description of the scenic resources from which the proposed facility would be visible." N.H. CODE OF ADMIN. R. Site 301.05(b)(5).

48. Further, the visual impact assessment must provide photosimulations from "representative key points, from other scenic resources for which the potential visual impacts are characterized as 'high' . . . and, to the extent feasible, from a sample of private property observation points within the area of potential visual impact, to illustrate the potential change in the landscape that would result from construction of the proposed facility and associated infrastructure, including land clearing and grading and road construction." N.H. CODE OF ADMIN. R. Site 301.05(b)(7). These photosimulations "shall be taken at high resolution and contrast . . . under clear weather conditions and at a time of day that provides optimal clarity and contrast, and shall avoid if feasible showing any utility poles, fences, walls, trees, shrubs, foliage, and other foreground objects and obstructions." N.H. CODE OF ADMIN. R. Site 301.05(b)(8). With regard to wind turbines, the photosimulations must reflect turbines placed "with frontal views and no haze or fog effect applied," with blades "set at random angles with some turbines

showing the 12 o'clock position." N.H. CODE OF ADMIN. R. Site 301.05(b)(8)(e). In projects requiring nighttime lighting per Federal Aviation Administration (hereinafter "FAA") regulations, the visual impact assessment must describe and characterize the potential visual impacts of this lighting, including the number of lights visible and their distance from key observation points. N.H. CODE OF ADMIN. R. Site 301.05(b)(9).

49. Here, the Visual Assessment for the Antrim Wind Project prepared by David Raphael of Landworks (hereinafter "Landworks VIA") fails to meet the above referenced criteria because (1) Mr. Raphael did not consider the full extent of visual impact to scenic resources in his viewshed analysis; (2) Mr. Raphael applied unreliable methodologies to select impacted sites for further analysis; (3) Mr. Raphael's determination of visual effect is based on incomplete and irrational factors and methodologies; (4) Mr. Raphael's determination of viewer effect is incomplete and contradictory; (5) the photosimulations prepared by Mr. Raphael are inconsistent with the criteria set forth in Rule Site 301.05; and (6) Mr. Raphael's consideration of mitigation measures is inconsistent with Rule Site 301.05.

50. Ultimately, each of these flaws appear in the Subcommittee's deliberations, and find their way into the Subcommittee's ultimate conclusions. As such, the Subcommittee acted unlawfully and unreasonably in finding that the Project would have no adverse aesthetic impacts based, in part, on Mr. Raphael's analysis.

1. Viewshed Analysis

51. First, the Subcommittee erred in not applying the doctrine of collateral estoppel when determining the "scenic resources" that would be affected by the Project. For collateral estoppel to apply, three basic conditions must be satisfied: (1) the issue subject to estoppel must

be identical in each action; (2) the first action must have resolved the issue finally on the merits; and (3) the party to be estopped must have appeared in the first action, or have been in privity with someone who did so. See Gephart v. Diagneault, 137 N.H. 166, 172 (1993).

52. In Antrim I, the Committee analyzed the proposed project's impacts on various scenic resources including Willard Pond, Goodhue Hill, Gregg Lake, Robb Reservoir, Island Pond, Highland Lake, Lake Nubanusit, Black Pond, Franklin Pierce Lake, Meadow Marsh, and Pitcher Mountain. See Antrim I Decision at 49-50. The Committee further noted the "profound impact" the proposed project would have on Willard Pond and the dePierrefeu Wildlife Sanctuary in its entirety. See Antrim I Decision at 51.

53. The Applicant should be collaterally estopped from challenging the Committee's prior determination that the above-referenced are impacted scenic resources because they are the same party, the issue was fully adjudicated to a final decision on the merits in Antrim I, and the criteria to be employed to determine scenic resources in Antrim II is identical to that actually employed in Antrim I creating the same pertinent issue. See Gephart, 137 N.H. at 172.

54. Here, the Subcommittee did not consider the impacts to such resources as Highland Lake or Lake Nubanusit. See Antrim II Decision at 117-120. Moreover, Mr. Raphael did not analyze, nor did the Subcommittee consider the significance and impact of the Project on the dePierrefeu Wildlife Sanctuary in its entirety (as opposed to distinct segments of the Sanctuary). See Antrim II Decision at 117-121. The Subcommittee's failure to consider such impacts results in an incomplete analysis of the potential aesthetic impacts of the Project and renders the Subcommittee's determination unlawful and unreasonable.

55. Moving past the issue of collateral estoppel, Mr. Raphael's determination of the scenic resources with a view of the project is based upon the erroneous limitation that only properties with potential visibility of the turbine hubs needed to be analyzed. See Landworks VIA at 10. In doing so, Mr. Raphael's analysis only considers the project to be 92.5 meters tall (79.5 meters for turbine 9), instead of 149 meters (136 for turbine 9). Id. The impact of said limitation is that critical scenic resources are determined to have limited visibility, when in actuality those resources will have a significant viewshed.[5] Compare Exhibit 3 of Landworks VIA with Exhibit 4 to Landworks VIA (reflecting that turbine visibility of Gregg Lake, Franklin Pierce Lake, Kimball Hill, and Willard Pond was reduced with the removal of consideration of turbine blades). The impact of this assessment is that Mr. Raphael determined that:

- Gregg Lake would have views of 8 turbines rather than 9 turbines;
- Franklin Pierce Lake would have views of 8 turbines rather than 9 turbines;
- Island Pond would have views of 3 to 7 turbines rather than 3 to 8 turbines; and
- The Robb Reservoir would have views of 4 turbines as opposed to 8 turbines.

Compare Exhibit 3 of Landworks VIA with Exhibit 4 of Landworks VIA.[6] This does not include those scenic resources that Mr. Raphael discounted based on the assumption that a smaller geographic area would be subjected to the project's viewshed. Interestingly, although each of

[5] Mr. Raphael's decision to analyze scenic resources based on sites that will have a view of the hub only is contradictory. He initially claimed that the hub was analyzed because the blades' aesthetic impact is transient, but then analyzes 10 scenic resources based on the number of turbines (including blades) visible from those sites. See 9/22/16 PM Transcript at 155.

Mr. Raphael's assertion that the blade height did not need to be factored is without merit. The animation prepared by Michael Buscher of T.J. Boyle Associates, clearly reflect that spinning blades will attract attention. See Audubon Society Exhibit 7; see also 0/3/16 PM Transcript at 64-65. There is no indication that this piece of evidence was considered by the Subcommittee.

[6] Interestingly, Loon Pond, which would have a viewshed of nine turbines was not even analyzed by Mr. Raphael. See Exhibit 3 to Landworks VIA.

these resources were identified as resources having potential visibility, these resources were removed from further consideration based on Mr. Raphael's determination that their overall sensitivity ratings were "Low-Moderate," thereby disqualifying these resources from further consideration and analysis. See Landworks VIA at 71.

56. Compounding Mr. Raphael's errors in determination of scenic resources and viewshed impacts is Mr. Raphael's culling process, whereby numerous scenic resources whose viewsheds will be impacted by the Project are removed from consideration.[7] Mr. Raphael erroneously concludes that resources such as Franklin Pierce Lake and Gregg Lake do not merit extended consideration because they are not identified by any federal or state department as scenic resources, and further determined that there is no provision in any municipal master plans designating these bodies as scenic resources. See Landworks VIA at 61-70. This conclusion is completely incorrect. The Antrim Master plan states that "Antrim's lakes, ponds, and streams are important water, recreational, and scenic resources" that must be "protected from overdevelopment and pollution." See Antrim Master Plan, Water Resources at V-5, submitted as Exhibit Cal-B. The Master Plan goes on to expressly identify Franklin Pierce Lake and Gregg Lake as waterbodies deserving of protection. See id. Therefore, despite Franklin Pierce Lake and Gregg Lake receiving "moderate" scenic quality designations, they are removed from further consideration based upon a "low" "cultural designation" predicated upon an erroneous review of the Antrim Master Plan. See Landworks VIA at 71.

[7] Mr. Raphael further appears to have erroneously limited his consideration of scenic resources. Mr. Raphael did not consider the Meeting House Hill Town Cemetery because it was a historic as opposed to a scenic resource. See 9/22/16 PM Transcript at 146-47. In doing so, Mr. Raphael ignores that "scenic resource" as defined by the Committee's rules include "historic sites that possess a scenic quality." See N.H. CODE OF ADMIN. R. Site 102.45; see also 9/22/16 PM Transcript at 147 (testimony of Mr. Raphael that he was not asked to review historic resources).

57. The foregoing is just one example of Mr. Raphael's unreliable and un-credible methodologies with regard to identification of scenic resources. The end result of these methodologies is an incomplete visual impact assessment that does not fully describe the scenic resources from which the project will be visible and deprives the Subcommittee of the necessary analysis and photosimulations to make a knowing and intelligent determination of aesthetic impacts. See N.H. CODE OF ADMIN. R. Site 301.05.

58. For the reasons stated above, the Landworks VIA is considerably lacking and incomplete with regard to its analysis of aesthetics, and the Subcommittee should have found that the Applicant did not satisfy its burden of proof of showing that there was no unreasonable adverse effect on scenic resources.

2. Project's Aesthetic and Viewer Effects

59. Second, Mr. Raphael's methodology to determine the Project's effects to his list of 10 sites is based upon a specious analysis predicated upon faulty assumptions, the results of which are inaccurate conclusions. Mr. Raphael rated the Project's impacts on the 10 sites based on, amongst other factors, number of turbines visible and percentage of the site from which the Project is visible.

60. With regard to number of turbines visible, Mr. Raphael essentially averaged the number of turbines from each of the 3 pre-existing wind projects in the State, and stated that an amount of turbines over that average would contribute to a "high" impact rating. See Landworks VIA at 82; see also 9/22/16 PM Transcript at 154-56. This standard was borrowed from the analysis employed by another visual impact assessor in Maine, but, by doing so, Mr. Raphael ignored that the Maine methodology was predicated upon a sample size 4 times larger than what

exists in New Hampshire. See id. Consequently, the baseline for Mr. Raphael's turbine visibility analysis is subject to considerable skewing and has suspect confidence levels.

61. In applying the percent of visibility criteria to trails, Mr. Raphael utilized the footage of the total trail from which the Project is visible, rather than from a particular overlook or viewshed. The impact of the number of the turbines visible and the percent visible criteria is profound on the 10 scenic resources selected by Mr. Raphael. For example, Bald Mountain was dismissed from extended consideration because it received a "low-moderate" overall visual effect score, based primarily on the fact that 6 turbines will be visible from the site and the project is visible from 1.07% of the total trail. See Landworks VIA at 87. This analysis, particularly its inclusion of the entire trail length, ignores that users will often hike for hours to enjoy a particular view and that the entire trail length is not a proper indicator of extent of resource impact. In short, Mr. Raphael's visual effect scores, which in turn determined his consideration of resources for which to prepare photosimulations is fundamentally flawed.[8]

62. With regard to Viewer Effects, Mr. Raphael's analysis is contradictory and arbitrary. Mr. Raphael's viewer effect methodology is contradictory because two of the factors – extent of use and remoteness – consider "interaction between users." For remoteness, a higher likelihood of user interaction can lead to a lower score, whereas that same level of interaction can lead to a higher score for extent of use, and visa-versa. See Landworks VIA at 88-89. As such, these two criteria are offsetting and contradictory, a factor Mr. Raphael himself acknowledged except in limited and rare instances. See 9/22/16 PM Transcript at 161-62.

[8] The analysis is further flawed because of its failure to consider the existence of other projects within a viewshed. For example, although the Project is distal from the Pitcher Mountain, two separate wind projects would be viewable from the summit, and the Project will actually obstruct the summit's view of Crotched Mountain. A user that climbed to the summit of Pitcher Mountain, therefore, would be incapable of escaping a view of industrial infrastructure.

Moreover, other factors included in Mr. Raphael's analysis, such as activity, ignores the contributory impact of scenic views and the role of scenic impacts upon outdoor activities.

63. The Subcommittee's deliberations reflect a line of thinking much in line with Mr. Raphael's reasoning. Indeed, the Subcommittee appeared to take an unduly restrictive view of scenic resources and, instead dismissed, rather than acknowledged, the contributory value of a scenic view to recreational activities. See12/7/16 PM Transcript at 29-31. Indeed, under the Subcommittee's analysis, as reflected during deliberations, it is difficult to see what un-developed resources that are used for recreational purposes would ever be spared from industrial wind projects when the use of that area is limited to "transient" recreation. See 12/7/16 PM Transcript at 39-40. In this regard, the Subcommittee's analysis is unlawful and unreasonable.

3. Photosimulations

64. Third, Mr. Raphael's analysis is further unreliable, un-credible, and undeserving of any weight because of the faulty photosimulations of his 10 selected sites. Rule 301.05(b)(7) and (8) is quite clear: photosimulations are to be prepared under clear weather conditions, at a time of day that provides optimal clarity and contrast, and should avoid if feasible all utility poles, fences, walls, trees, shrubs, foliage, and other foreground obstructions. Mr. Raphael's photosimulations fail each of these requirements.

65. Without exception, each of Mr. Raphael's photosimulations were taken during cloudy or hazy conditions, which have the effect of diminishing the anticipated visual impacts from various scenic resources. See Landworks VIA at Exhibits 6 through 18. While Mr. Raphael's justification for these deviations was that he made photosimulations under anticipated weather conditions, such an approach ignores the purpose of photosimulations. See N.H. CODE

OF ADMIN. R. Site 301.05(b)(7). Photosimulations are intended to provide a "worst case scenario" view of the project, i.e. circumstances when an individual will be able to see the Project to the greatest extent possible.

66. Moreover, in various photosimulations, Mr. Raphael has framed the windmills among objects in the foreground, which again, has the effect of diminishing the Project's aesthetic impacts. This is particularly evident with regard to Gregg Lake, where the Project is framed next to a sailboat. See Landworks VIA at Exhibit 8. A similar phenomenon can be observed in a photosimulation on Willard Pond, where a photosimulation of the project is framed by rocks in the foreground. See Landworks VIA at Exhibit 12.

67. These deviations were not without impact. Over 60 pages of deliberation transcript are dedicated to analyzing the various photosimulations provided by Landworks and Terraink. 12/7/16 PM Transcript at 80-146. Indeed, the Subcommittee's review of the photosimulations provided the primary basis for the Subcommittee's ultimate determination on the Project's aesthetic impact.

68. The Subcommittee members frequently noted that the clouds and haze from the photosimulations made this analysis difficult. Indeed, Dr. Boisvert stated during deliberations, "I wish that the background was clear, not hazy. I think that could affect our interpretation." See 12/7/16 PM Transcript at 82; see also 12/7/16 PM Transcript at 80 (statement of Dr. Boisvert stating "[t]he cloudy sky is not our friend here"); 12/7/16 PM Transcript at 125-26 (statement of Dr. Boisvert, "I have difficulty seeing the turbines in this one because of the sky color and the color of the turbines"). Attorney Weathersby expressed similar frustration with Mr. Raphael's

photosimulations with regard to the sailboat in the foreground because it "clearly distracts from the turbine." See 12/7/16 PM Transcript at 92.

69. In other instances, the obstructed photosimulations from Mr. Raphael caused the effect that Rule Site 301.05(b)(7) and (9) was intended to prevent — specifically considering circumstances which may ameliorate an otherwise unreasonable aesthetic effect — as evidenced by Mr. Clifford's comment that the sailboat depicted "what I'm going to see if I walk out there," a contention which was shared by Mr. Rose. See 12/7/16 PM Transcript at 92-93, 94.

70. In short, the photosimulations from the Applicant's expert was deficient under Rule Site 301.05, and the Subcommittee's determinations on aesthetics was tainted by the impermissible depictions shown in those photosimulations. The Subcommittee' determination was unlawful and unreasonable, and the Subcommittee should grant rehearing with regard to the issue of aesthetics to allow for submission of compliant photosimulations of impacted sites based on objective and soundly-applied criteria.

4. Mitigation Measures

71. Fourth, Mr. Raphael's inclusion of mitigation measures is inconsistent with Site Rule 301.05 because the mitigation measures do not go toward aesthetics, and the bulk of the proposed mitigation measures will not be realized for, at least, half of a century. Mr. Raphael considered, and this Subcommittee further credited, various proposed mitigation measures in determining whether the Project had an unreasonable adverse effect on aesthetics. Those mitigation measures include: placing 908 acres in conservation easement; giving $40,000.00 to the Town of Antrim for the enhancement of Gregg Lake; giving $100,000.00 to the New England Forestry Foundation; and employing radar detection lighting.

72. Rule Site 301.05 requires visual impact assessments to analyze the effect of "mitigating potential adverse effects of the proposed facility on aesthetics." The mitigation measures to be analyzed must specifically pertain to relieving aesthetic impacts; mere consideration of mitigation measures which may relieve certain ecological impacts is a separate consideration. This conclusion is supported by the plain meaning of Rule Site 301.14, which requires the Committee to consider "[t]he effectiveness of the measures proposed by the applicant to avoid, minimize, or mitigate unreasonable adverse effects on aesthetics." (Emphasis added.)

73. The Committee has previously recognized this principle in Antrim I, when the Committee considered the Applicant's offer to place 800 acres into conservation easements: "While additional conserved lands would be of value to wildlife and habitat, they would not mitigate the imposing visual impact that the Facility would have on valuable viewsheds." See Antrim I Decision at 53.

74. This prior determination by the Committee in Antrim I should collaterally estop the Applicant from seeking to put forth such a similar proposal now, and should preclude the Subcommittee from considering such mitigation measures in its analysis of aesthetic impacts. As stated above, for collateral estoppel to apply, three basic conditions must be satisfied: (1) the issue subject to estoppel must be identical in each action; (2) the first action must have resolved the issue finally on the merits; and (3) the party to be estopped must have appeared in the first action, or have been in privity with someone who did so. See Gephart, 137 N.H. at 172 (1993). There can be no doubt that the Applicant is the same party as was in Antrim I. Additionally, it cannot be credibly argued that the Committee in Antrim I did not resolve the issue of aesthetics,

and the proper mitigation measures to alleviate aesthetic impacts, finally on the merits. Most importantly, the issues to be collaterally estopped are identical in each action: whether the mitigation measures which do not actually impact the aesthetics of a Project can be considered by the Subcommittee with regard to determining adverse aesthetic effects of the Project. While the mitigation measures have been tweaked since Antrim I, the flavor of the mitigation, i.e. donations and placing land into conservation easements, is the same.[9] It is unreasonable that the Committee in Antrim I found that placing land into conservation easement does not mitigate aesthetic effects, but the Subcommittee in Antrim II found that the same practice does mitigate aesthetic effects. The Subcommittee should not have considered the Applicant's mitigation efforts in its determination of aesthetic effects.

75. Even if the Subcommittee does not find the matter to be collaterally estopped, Committee's decision in Antrim I still remains valid and should be followed here. The Subcommittee erred in its consideration of the Applicant's proposed mitigation measures because with the exception of the radar detection lighting (which has its own issues) none of these mitigate the aesthetic impacts from the Project.

76. The Project will be the largest free-standing structures in the State of New Hampshire. The turbines will be taller than the tallest office building in Manchester and will be

[9] To the extent that the Applicant, or others, claim that the change in the rule alters the application of collateral estoppel with regard to this issue, the argument is a red herring. While the rules were changed since Antrim I, they were not changed in such a way such that the Committee's analysis in Antrim I should not be called into question. The only pertinent revision with regard to mitigation is that the Committee now must consider mitigation measures, whereas before that requirement was not codified.

As reflected above, the Committee in Antrim I did actually consider mitigation measures in a manner consistent with what the Committee's administrative rules now require. There is no indication that the change in the administrative rules call the Committee's determination in Antrim I into question. See Monarch Life. Ins. Co. v. Ropes & Gray, 65 F.3d 973, 981 (1st. Cir. 1995) (noting that "changed circumstances will preclude the application of collateral estoppel only if they might have altered the decision the court made in the first proceeding") (emphasis added).

located atop of a prominent ridge. The placement of property in conservation easement, which, according to Mr. Raphael, will protect the project site from further development after the project is decommissioned, see 9/22/16 PM Transcript at 77, does not mitigate the aesthetic impacts of the Project; it merely partially restores the property to a status quo years later.[10] The consideration of these measures as measures to mitigate aesthetic impact is inconsistent with the Committee's administrative rules and the Subcommittee erred in considering them with regard to aesthetic effects. See N.H. CODE OF ADMIN. R. Site 301.14(a)(7).

77. With regard to the use of radar detection lighting systems, the Subcommittee found that the "[i]nstallation of such systems will effectively minimize the nighttime impact of the Project while ensuring its operation." See Antrim II Decision at 118. However, there is no evidence in the record as to what visual impact this system will have. With the exception of the Applicant, no party has seen the FAA permit. The Subcommittee has not seen the FAA's permit. There is no evidence in the record as to the frequency with which this system will be activated. There is no evidence as to what size object will trigger the lights to activate, or the distance at which a flying object will activate it. There is no evidence as to what impact the Manchester Airport, and flight patterns coming from it, will have on the radar detection lighting system. In short, there is no evidence from which to draw any conclusions from the Applicant's agreement to employ a radar detection lighting system. As such, Mr. Raphael's consideration of this measure as a mitigation system is without any foundation, and the Subcommittee's finding in this regard is unlawful, unreasonable, and unsupported by any evidence.

[10] To say that this land will be developed in the absence of conservation easements defies logic and economics. The amount of money necessary to develop the top of the ridge and the surrounding hills (much of which is already in conservation easement) would likely be prohibitively expensive. This is demonstrated by the fact that Mr. Ott reserved the right in his conservation easement to build a house atop the ridge after the Applicant has installed the necessary roads and infrastructure for him to do so. See Appendix 10 to Application, at *9.

78. The Subcommittee should grant rehearing on the issue of aesthetics and, consistent with prior decisions of the Committee, give proper consideration to the only those proposed mitigation measures that actually address aesthetics. The Subcommittee should further grant rehearing on the issue of aesthetics, find that the Applicant has not supplied sufficient evidence to carry its burden of demonstrating that the FAA lighting system will be sufficient so as to not create an adverse aesthetic impact, and, thus, deny the Application.

ii. Conclusion: Aesthetics

79. In short, the Subcommittee's finding that the Project would not have unreasonable adverse aesthetic impacts is unsupported by the evidence and is unlawful and unreasonable. The Applicant did not submit any credible evidence as to the visual impact of the Project. The Subcommittee took an unduly constrained view on the impact the Project would have on public uses at various scenic resources. Landwork's photosimulations, which served as a primary tool for the Subcommittee's determination on aesthetics, were prepared in violation of the Committee's administrative rules. The Subcommittee unreasonably considered the effect of mitigation measures, all but one of which did not involve aesthetics (and the remaining one having no evidence regarding the impact to aesthetics), in determining whether the Project would have an unreasonable impact on aesthetics.

80. Moreover, the Subcommittee's deliberations and ultimate decision on the merits do not reflect any clear findings or consideration of the various factors set forth in Rule Site 301.14. The Subcommittee's deliberations are lacking in a meaningful discussion of the public uses as the various scenic resources, the significance of various affected resources, or the nighttime impacts from the project. See N.H. CODE OF ADMIN. R. Site 301.14. Rather, the

Subcommittee's deliberations largely address only whether the Project would be a dominant and prominent feature within a natural or cultural landscape, with sporadic references to the scope and scale of the change in the landscape. See N.H. CODE OF ADMIN. R. Site 301.14.

81. As such, the Subcommittee's decision is unlawful, unreasonable, and unsupported by the evidence. See RSA 541:4. The Subcommittee has not reflected that it considered the appropriate factors in determining whether the Project would have unreasonable aesthetic effects. See N.H. CODE OF ADMIN. R. Site 301.14. The Subcommittee should grant rehearing on the issue of aesthetics and, ultimately, deny the Application as the Applicant has not submitted sufficient or credible evidence to demonstrate that the Project will not have an adverse effect on aesthetics.

iii. The Subcommittee's finding that the Project will not have unreasonable adverse impacts on public health and safety is unjust and unreasonable.

82. The Subcommittee's finding that the Project will not have unreasonable adverse impacts on public health and safety is unjust and unreasonable because the Subcommittee made erroneous factual findings with regard to (1) the sound which will emanate from the Project, (2) the shadow flicker that the Project will cause, (3) the potential hazards presented by ice throw; and (4) the decommissioning of the Project. Each point shall be addressed in turn.

1. Sound

83. The Subcommittee's determination that the Project would not have an unreasonable effect on public health and safety is essentially based on the Applicant's promise that the Project will not exceed sound levels, and if it does, the Applicant will engage in Noise Reduction Operations ("NRO") to bring sound levels down to regulatory limits.

84. The Subcommittee's determination is unlawful and unreasonable because it impermissibly shifts the burden to abutting property owners to notify the Applicant or the Town of Antrim of a potential exceedance of the 40 dBA limit. The abutting property owners then must wait for the Applicant or the Town to act upon said complaint to notify an unidentified sound expert to then measure the sound exceedance at a time indeterminate, which will then be used to make a decision as to whether the Applicant will initiate NRO.

85. Regardless of whether this procedure will be deployed in any timely fashion sufficient to allow for a meaningful opportunity to observe exceedances such that NRO are initiated, the uncontroverted testimony of Richard James was that NRO necessarily will reduce the Project's production capabilities by upwards of 10 percent per decibel. See 10/19/16 PM Transcript at 66-67; see also 9/22/16 PM Transcript at 38 (testimony of Mr. O'Neal stating "you could step down each turbine in one decibel increments and turn it down. There's obviously a penalty for that in terms of electricity produced but you can reduce sound levels as well").

86. There is no analysis submitted by the Applicant to demonstrate that the Project will continue to be economically and financially feasible in light of the reduced production capabilities to make NRO an economic and feasible mitigation measure. See 9/22/16 AM Transcript at 136 (testimony of Mr. O'Neal stating that he did not know what the amount of reduction in output would be as a result of NRO).

87. This scenario, i.e. proposing a mitigation measure mid-hearing, is very similar to the Counsel for the Public's efforts in Antrim I, wherein Counsel for the Public in that case sought to impose various mitigation measures upon the proposed project, include turbine reduction and height. In that instance the Committee stated that the proposed mitigation efforts

"would likely change other dynamics of the Project to such a degree that the Subcommittee would be unable to confidently assess the consequences of issuing a Certificate." See Antrim I Decision at 54.

88. The scenario here is no different; the Applicant is proposing mitigation measures that may have fundamental impacts upon the dynamics of the Project. Yet, the Subcommittee here unreasonably and unlawfully allowed the Applicant to make this half-baked proposal without a full consideration of the dynamics, logistics, the impacts, and the hardships that would be associated with such a proposal. Moreover, until the NRO is fully implemented, the fact of the matter remains that many properties within 2 miles of the Project will experience sound levels in excess of regulatory limits.[11]

89. The fact remains that the Subcommittee approved a Project where there is the very real possibility that sound will exceed maximum levels. For that reason, the Subcommittee's decision is unlawful and unreasonable.

90. Here, the Applicant had the burden of proving the Project would be capable of operating within the limits set forth in Rule Site 301.14(f)(2)(a). The Applicant cannot meet that burden because the sound study prepared by the Applicant's expert, Robert O'Neal is unreliable and not entitled to any weight. Mr. O'Neal's sound study is not reliable and is not entitled to any weight because Mr. O'Neal did not make necessary adjustments to his predictive modelling to reflect a credible worst case condition for sound emission and propagation. Had these necessary adjustments been made, the modeled sound levels at various abutting properties would have far exceeded maximum allowable sound levels.

[11] Notably, the Committee did not find that Mr. O'Neal's modeling was accurate when he excluded these factors. See Antrim II Decision at 153-54. The Opposing Intervenors assert that the Committee overlooked the substantial evidence reflecting Mr. O'Neal's errors when it granted the Certificate of Site and Facility to the Applicant.

91. Rule Site 301.14(f)(2)(a) provides that a wind project shall comply with the following sound standard:

> the A-weighted equivalent sound levels produced by the applicant's energy facility during operations shall not exceed the greater of 45 dBA or 5 dBA above background levels, measured at the L-90 sound level, between the hours of 8:00 a.m. and 8:00 p.m. each day, and the greater of 40 dBA or 5 dBA above background levels, measured at the L-90 sound level, at all other times during each day, as measured using microphone placement at least 7.5 meters from any surface where reflections may influence measured sound pressure levels, on property is used in whole or in part for permanent or temporary residential purposes, at a location between the nearest building on the property used for such purposes and the closest wind turbine.

92. The predictive sound study to be supplied by the Applicant must be "conducted in accordance with the standards and specifications of ISO 9613-2 1996-12-15." N.H. CODE OF ADMIN. R. Site 301.18(c). The modeling shall also include an adjustment to the Leq sound level produced by the model applied in order to adjust for turbine manufacturer uncertainty factor ("k-factor") per the standard covering such data IEC 61400-11. Id. The modeling must also include predictions made "at all properties within 2 miles from the project for the wind speed and operating mode that would result in the worst case wind turbine sound emissions during the hours before 8:00 a.m. and after 8:00 p.m. each day." Id. Additionally, the model must incorporate other corrections for model algorithm error to be disclosed and accounted for in the model. Id. The ISO 9613-2 standard specifies a tolerance of ±3 decibels which was not included in the model assumptions. See ISO 9613-2 1996-12-15 at §9 (titled "Accuracy and limitations of the method") appended as Appendix B to N.H. CODE OF ADMIN. R. Site 300, et seq.

93. In a nutshell, the predictive modeling performed by Mr. O'Neal understates sound levels at all properties by at least 6 decibels because Mr. O'Neal used a completely erroneous

ground factor of 0.5 representing sound propagation over unfrozen ground and because Mr. O'Neal failed to include tolerances to the ISO 9613-2 model for variability of sound propagation as atmospheric conditions change at the Project site.

94. First, Mr. O'Neal utilized a ground factor of 0.5 to his predictive modeling, meaning that he anticipated that the ground was going to absorb a portion of the sound. However, due to the Project's height, Mr. O'Neal should have used a ground factor of 0.0. See Pre-filed Testimony of Richard James at 17. The use of a 0.0 ground factor would have been appropriate because the height of the turbines meant that the likelihood of the sound coming from the Project would not interact or be absorbed by the ground prior to reaching a structure. Id. This is especially true during winter periods with frozen ground and snow cover. Id. In fact, using a ground factor other than 0.0 is not supported under the ISO 9613-2 standard which states that "the method of calculating ground effect is applicable only to ground which is approximately flat either horizontally or with a constant slope. See ISO 9613-2 1996-12-15 at § 7.3.1 (titled "Ground effect: General method of calculation") appended as Appendix B to N.H. CODE OF ADMIN. R. Site 300, et seq. (emphasis added). Such terrain is not characteristic of the Antrim site. Therefore, the appropriate g-factor is that of "hard ground" or "reflective surfaces." See 10/19/16 PM Transcript at 32. Using a ground factor of 0, Mr. O'Neal's predictive modeling should have been 3 decibels higher based on ground factor alone. See Pre-filed Testimony of Richard James at 17-18; see also 9/22/16 AM Transcript at 72; Wind Action Exhibit 8 at 10.

95. The use of a ground factor of 0.0 was supported by the evidence. The National Association of Regulatory Utility Commissioners ("NARUC") notes that the use of a 0.5 ground

factor is appropriate for flat topography, such as farmlands in the Great Plans. See Wind Action Exhibit 28 at *3. Richard James, expert for Abutting Intervenors further opined that the use of a ground factor of 0.5 would be inappropriate due to the few opportunities for sound from elevated noise sources on the ridge top to interact with the ground prior to reaching a structure. See Pre-filed Testimony of Richard James at 17-18.

96. Second, Mr. O'Neal's predictive modeling is inaccurate because it does not fully account for atmospheric impacts that are not represented in the ISO 9613-2 model. As stated above, the predictive modeling is to anticipate "worst case wind turbine sound emissions" during the hours of 8:00 p.m. to 8:00 a.m. The ISO 9613-2 model, however, is predicated upon facilities operating on flat ground where the noise sources are below 30 meters above grade and then only for receptors that are within 1,000 meters. See ISO 9613-2 1996-12-15 at § 9 (titled "Accuracy and limitations of the method"). It does not factor in atmospheric effects associated with wind turbines that exceed 30 meters in height and are not situated on flat land. See id. Uncertainties are more than ± 3 decibels for projects that exceed 30 meters in height above the receptor, which is assured when locating wind turbines on towers over 90 meters tall on top of a ridge. See id. The ISO 9613-2 standard cautions that sound levels can exceed the tolerances of 3 decibels for projects that are more than 30 meters in height above the receptor or during weather conditions that more strongly favor sound propagation. See id. This assertion is supported by NARUC which stated that under such weather conditions, operational turbine projects commonly produced sound levels that fluctuated by ± 5 decibels above the mean trend line and that, on some occasions, noise spikes of 15 to 20 decibels were observed. See Wind Action Exhibit 28 at *12. The study titled, "Wind turbine noise modeling and verification: two case studies – Mars

Hill and Stetson Mountain I, Maine," which was cited by Mr. O'Neal, reflects that the experts in those case studies accounted for atmospheric impacts to the ISO 9613-2 model, adding 3 decibels for "published limitations inherent in ISO Standard 9613-2." See Wind Action Exhibit 6, Wallace, J. et. al, "Wind Turbine noise modeling and verification: two case studies—Mars Hill and Stetson Mountain I, Maine" at *2, 7, 17 (July 25-27, 2011). Finally, Mr. James opined that the ISO 9613-2 model needed to be adjusted to account for model limitations, which involved an adder of approximately 3 decibels to predictive sound levels. See Pre-filed Testimony of Richard James at 10-11.

97. Mr. O'Neal cited a document titled "Massachusetts Study on Wind Turbine Acoustics," to which Mr. O'Neal's company was a contributor to support his contention that ISO 9613-2 did not need to be adjusted for the model's published limitations. In fact, the Massachusetts Study experienced numerous exceedances when ISO 9613-2's modeling limitations were not taken into consideration.[12] Mr. O'Neal ignored that pursuant to Rule 301.18, the sound study is to be a worst case scenario and the Massachusetts Study experienced exceedances when ISO 9613-2's modeling limitations were not taken into consideration. See WindAction Exhibit 12, Resource Systems Group, Inc., "Massachusetts Study on Wind Turbine Acoustics" at *65.

[12] Mr. O'Neal opined that some of the exceedances were due to turning the turbines on and off during the tests, which, assuming for the sake of argument is correct, is a phenomenon that would not account for all of the exceedances. See 9/22/16 AM Transcript at 114. Mr. O'Neal acknowledged that the purpose of the Massachusetts study was, in part, to assess how well predictive modeling matched actual measurements taken at an operating wind project. See 9/22/16 AM Transcript at 102-103.

Notwithstanding, Mr. James testified that it would be unreasonable to expect competent researchers to allow their data to be contaminated with artifacts from the test, i.e. not accounting for turning the turbines on and off. See 10/19/16 PM Transcript at 62-63. Doing so "throws into doubt the entire study." See 10/19/16 PM Transcript at 61-62. Even if the data were contaminated by the test, Mr. James testified that measurements during the much quieter 'turbine-off' condition would have resulted in lower and not higher measurements. See 10/19/16 PM Transcript at 62-63.

98. As reflected above, the overwhelming weight of the evidence reflects that the ISO 9613-2 model needs to be adjusted to account for atmospheric conditions that are not captured by the basic model. Mr. O'Neal's predictive sound levels, therefore, should have been increased by three (3) decibels to account for the improper use of a 0.5 ground factor and, at least an additional three decibels to account for ISO 9613-2's limitations — a total of six (6) decibels. Adding six (6) decibels to the predictive sound levels, results in numerous properties predicted to experience sound levels that exceed 40 dBA.[13]

99. As such, the Project exceeds the maximum threshold allowed for sound from a wind energy project. See N.H. CODE OF ADMIN. R. Site 301.14(f)(2)(a). The Subcommittee made an erroneous finding of fact when it determined that the Project would not have an adverse effect on public health and safety due to sound when the evidence clearly demonstrates that the maximum sound thresholds would be surpassed and when the Subcommittee approved the Project based upon an un-vetted and unanalyzed mitigation proposal.[14]

2. Shadow Flicker

100. The Subcommittee's determination that the Project will not have an adverse effect on public health and safety with regard to shadow flicker is unlawful and unreasonable because the Shadow Flicker Analysis prepared by Mr. O'Neal of Epsilon Associates, Inc. found that properties within a mile of the Project would experience shadow flicker in excess of 8 hours during a year. The Subcommittee's decision to grant a Certificate of Site and Facility, despite

[13] The standard is 40 dBA, as Mr. O'Neal's ambient background sound levels reflect an average L90 sound level of between 27 and 36 decibels. See Sound Level Assessment Report, prepared by Epsilon Associates, Inc. at 5-8.

[14] Regardless of the inclusion of the 6 decibels, one property – a hunting cabin – had a rounded sound level of 40 dba. The Committee erroneously excluded this hunting cabin from consideration on the basis of Mr. O'Neal's unilateral conclusion that the hunting cabin was "dilapidated." The hunting cabin is, in fact, in use, and would qualify as "temporary residence" under Rule Site 301.14(f)(2)(a).

acknowledging this finding, is contrary to the rules of the Committee and is predicated upon the Applicant implementing an untested "shadow control protocol" that has not been used in the United States.

101. Rule Site 301.14(f)(2)(b) states that "the shadow flicker created by the applicant's energy facility during operations shall not occur more than 8 hours per year at or within any residence, learning space, workplace, health care setting, outdoor or indoor public gathering area, or other occupied building." To allow the Subcommittee to analyze shadow flicker, the Applicant must provide:

> [a]n assessment that identifies the astronomical maximum as well as the anticipated hours per year of shadow flicker expected to be perceived at each residence, learning space, workplace, health care setting, outdoor or indoor public gathering area, other occupied building, and roadway, within a minimum of 1 mile of any turbine, based on shadow flicker modeling that assumes an impact distance of at least 1 mile from each of the turbines.

N.H. CODE OF ADMIN. R. Site 301.08(a)(2).

102. While the Shadow Flicker Analysis expressly acknowledges that 24 properties within 1-mile of the project site will experience more than 8 hours of shadow flicker per year, the fact remains that this estimate was calculated based upon a methodology that does not comport with Rule Site. 301.08(a)(2). The Applicant's Shadow Flicker Analysis does not comport with Rule Site 301.08(a)(2) because the analysis only calculated shadow flicker impacts out to 1-mile despite the rule assuming an impact distance of "at least 1 mile from each of the turbines." See id. Mr. O'Neal agreed that structures outside of one mile would experience shadow flicker, however, the Shadow Flicker Analysis shows these properties experiencing zero (0) hours of shadow flicker per year. See Antrim II Decision at 161; see also Shadow Flicker Analysis at Figure 4-2. Mr. O'Neal opined that Rule Site 301.08(a)(2) did not require a shadow flicker

analysis beyond one mile. See id. However, the consequences of assuming a shortened impact distance is more pervasive and also extends to properties within the 1-mile distance by failing to fully assess the contribution of multiple wind turbines casting shadows on those properties. Running the model using larger impact distances could result in more hours per year of shadow flicker at any property, and consequently could shift the determination that the Project would not have an adverse effect on public health and safety. See 9/22/16 PM Transcript at 8-9 (testimony of Mr. O'Neal stating "as you change the distance ...a location such as a residence could now be potentially experiencing shadow flicker from another turbine that wasn't in the analysis before. Now it is included, in not all cases of course, but in some cases it could potentially be in line to cause some additional hours or minutes of shadow flicker").

103. Moreover, the Shadow Flicker Analysis appears to be predicated upon historic, average meteorological conditions as evidenced by the fact that Epsilon Associates, Inc. relied upon the "historical dataset for Concord New Hampshire from the National Climatic Data Center." See Shadow Flicker Analysis at 4-2; see also 9/20/16 PM Transcript at 60-61. The result of using an impact distance of just one mile and relying on historic, average weather data is that the anticipated hours of shadow flicker is underestimated.[15]

104. Notwithstanding the understated hours of shadow flicker, the Shadow Flicker Analysis concluded, and the Subcommittee ultimately found, that the Project will exceed the maximum shadow flicker threshold set forth in Rule Site 301.14(f)(2)(b). The Subcommittee issued the Certificate of Site and Facility based upon the Applicant's promise to implement "shadow control protocols." These protocols, however, are untested in the United States and

[15] Additionally, the Shadow Flicker analysis, like the Sound Report, excludes "participating properties," the error of which is discussed in Section II (c) infra.

have only been deployed in Europe. See 9/28/16 PM Transcript at 160-61 (testimony of Mr. Kenworthy). Much like the implementation of NRO, these "shadow control protocols," which appear to involve suspension of turbine operations during certain times may have impacts on the energy to be produced by the Project and may impact the Project's financial feasibility in a manner that has not been discussed or analyzed during these proceedings.

105. As a result of this decision, residents falling under the shadow of the Project will be forced to endure shadow flicker that may exceed 8 hours in a given year. Their only recourse would be to either trust the Applicant to implement an untested technology to mitigate this shadow flicker (the extent of which remains uncertain due to the Shadow Flicker Analysis' underestimated hours of sunlight), or to resort to further proceedings before this Committee for relief after the Project has been built, the money spent, and the impacts felt.

106. Respectfully, the Committee's determination with regard to shadow flicker is unlawful and unreasonable. The Committee should grant a rehearing on this matter and find that the Project will not comport with Rule Site 301.14(f)(2).

3. Ice Throw

107. The Subcommittee acted unlawfully and unreasonably when it determined that the Project did not present an unreasonable adverse effect to public health and safety based with regard to ice throws. The Subcommittee acted unlawfully and unreasonably because its determination that the Applicant provided more credible evidence of the potential distance of ice throw ignores the uncontroverted and credible evidence presented by the Opposing Intervenors for conclusory and self-serving assertions from the Applicant. The Subcommittee should grant rehearing on this issue.

108. Rule 301.08(a)(4) requires that the applicant provide an "assessment of the risk of ice throw, blade shear, and tower collapse on public safety, including a description of the measures taken or planned to avoid or minimize the occurrence of such events, if necessary, and the alternative measures considered but rejected by the applicant."

109. The Applicant presented, and the Subcommittee specifically found, that the maximum ice thrown distance is 250 meters. See 9/15/16 AM Transcript at 144. This evidence was presented by Darrell Stovall of DNV GL during the hearing on the merits in this matter and by the Applicant. See id. Mr. Stovall presented no evidence to corroborate this figure, other than to state the 250 meters is "a general assessment and it is somewhat of an industry-accepted number," even though Mr. Stovall's admission that he "is not an expert on ice throw." See id. Utilizing this figure alone, the risk of ice throw would intrude upon individual's property lines. See at 9/29/16 AM Transcript at 88-89. However, the evidence clearly reflects that ice thrown from the project turbines can be thrown over 300 meters. See at Abutters Exhibit 52, Bredesen, et. al, "Methods for evaluating risk caused by ice thrown and ice fall from wind turbines and other tall structures" at *4. The Bredesen Report reflects that that the calculated ice throw zone "is dependent on local wind conditions and may in the worst cases with modern turbines exceed the general rule of 1.5 * (H + D), where H is hub height and D is the rotor diameter". Id. Turbines situated at elevations above surrounding properties would also add the 'overheight' to the H. Id. Applying this documented and published industry standard to the Antrim turbines, where (H is equal to 92.5 meters and D is equal to 113 meters) and assuming flat ground, ice throw would exceed 300 meters at the project site.

110. Unlike the Applicant's off-the-cuff remarks, the Opposing Intervenors submitted objective evidence from disinterested third-parties as to the potential "zone of danger" for ice throws. Using the 300 meter figure, these ice throws will extend well into individual's properties and pose a danger to the individuals that may be enjoying their property. It is fundamentally unreasonable and unfair to expect residents to incur these risks.

111. For this reason, the Subcommittee erred in its determination of the adverse effect to public health and safety resulting from ice throw and, consequently, its decision on said issue is unjust and unlawful.

4. Decommissioning

112. The Subcommittee misapplied its rules and, in doing so, effectively granted the Applicant a waiver from Rule Site 301.08(7) when it approved the Applicant's decommissioning plan to excavate a trench and pulverize and bury on-site the concrete comprising the turbine foundations. Rule Site 301.08(7) states that "[a]ll underground infrastructure at depths less than four feet below grade shall be removed from the site." The Subcommittee's decision is clearly at odds with this rule. Although the Department of Environmental Services permits pulverization and burying of concrete as a best management practice, such practice is not authorized by the rules of the Committee.

113. Had the Subcommittee intended to adopt a rule similar to the Department of Environmental Services best management practice and limit Rule 301.08(a)(7) applicability with regard to on-site concrete, it could have done so. Cf. Grafton County Attorney's Office v. Canner, 169 N.H. 319, 327 (2016) (noting that "if the legislature desired to limit the application of a statute it could have done so explicitly").

114. The Subcommittee should grant rehearing on the matter of decommissioning.

iv. The Subcommittee's finding that the Project will not have unreasonable adverse impacts on the natural environment is unjust and unreasonable.

115. The Subcommittee's finding that the Project will not have unreasonable adverse impacts on the natural environment is unjust and unreasonable because the Applicant did not submit any evidence with regard to the Project's impact on mammals, other than bats. The Subcommittee's decision makes no mention of the potential impact to large mammals, specifically bears, as a result of the Project. See Antrim II at 129-44. In this regard, the Application, and consequently the Subcommittee's determination is incomplete, unjust, and unlawful.

116. Rule Site 301.07(c) requires the Applicant to provide information relating to "[t]he identification of critical wildlife habitat and significant habitat resources potentially affected by construction and operation of the proposed facility" and an "assessment of potential impacts of construction and operation of the proposed facility on . . . critical wildlife habitat and significant habitat resources." "Significant habitat resource" is defined as a "habitat used by a wildlife specific for critical life cycle functions." N.H. CODE OF ADMIN. R. Site 102.49.

117. Here, the Subcommittee heard evidence of the existence of bear and bobcat in and around the Project area. See e.g. 10/18/16 PM Transcript at 118, 121 (testimony of Mr. Block); 10/19/16 AM Transcript at 27-31 (noting that area in and around Project was "core habitat for black bear, bobcats, coyotes, moose, deer, and other big game species"). Specifically, the Subcommittee heard from Geoffrey Jones of the Stoddard Conservation Commission regarding the quality of the habitat with regard to the boulder fields, which the Applicant initially proposed to destroy to construct access roads to the Project ridge. See 10/19/16 AM Transcript at 34, 94.

In light of this analysis, there appear to be areas of the Project site which would constitute "significant habitat resources," i.e. areas used by bears and other animals for "critical life cycle functions." Indeed, Mr. Jones stated that blasting associated with the Project could impact denning bears, particularly newborn cubs, who may be placed at risk if they (understandably) flee the blasting to occur at the Project. See 10/19/16 AM Transcript at 59-60.

118. While other intervenors submitted evidence regarding the presence of bears and the existence of "significant habitat resources," the Applicant has not submitted any evidence or analysis to satisfy the Committee's rules.

119. Notwithstanding the deviation from the Committee's rules, the Subcommittee granted the Applicant a Certificate of Site and Facility, without the opportunity or ability to adequately analyze the Project's impacts on large mammals and the possibility of habitat fragmentation associated with the Project. Moreover, while it is commendable that the Subcommittee restricted the blasting and destruction of the aforementioned boulder fields, the Subcommittee did not go far enough with regard to restricting the Applicant. See Antrim II Decision at 143. The Subcommittee's decision leaves too much discretion to the Applicant with regard to the decision to blast boulders in these sensitive and ecologically important areas. See Antrim II Decision at 143 (stating that "the Applicant shall, to the extent possible, use all reasonable efforts to avoid, rather than demolish, any boulders identified during" the proceedings). The Subcommittee has identified the boulder field as a sensitive resource, and intervenors have testified that the boulder field is a potential habitat for large mammals; the Applicant should not be afforded the considerable discretion to decide which aspects of this

habitat it will be able to destroy, especially when the Applicant has put forth no analysis of the Project's impacts on large animals.

120. Therefore, the Subcommittee should grant rehearing on this matter because the Applicant has not submitted the requisite information to allow this Subcommittee to make a sufficient finding regarding the Project's impacts on large mammals.

v. The Subcommittee's finding that the Project will not have unreasonable adverse impacts on the orderly development of the region is unjust and unreasonable.

1. *Consideration of municipal views regarding the Project.*

121. The Subcommittee's determination that the Project would not have an unreasonable adverse impact on the orderly development of the region is predicated upon erroneous considerations of municipal land use regulations and priorities.

122. Pursuant to Rule Site 301.09, the Applicant, and by extension the Subcommittee, must give due consideration to municipal and regional planning commissioners and municipal governing bodies, including consideration of master plans and zoning ordinances of the proposed facility host municipalities. The Applicant must further provide analysis and consideration of the Project's impacts upon "prevailing land uses in affected communities" and "how the proposed facility is inconsistent with such land uses." See N.H. CODE OF ADMIN. R. Site 301.09.

123. Here, the Subcommittee did not properly consider various provisions of the Antrim Zoning Ordinance or the Master Plan. Primarily, the Subcommittee did not adequately weigh that the proposed use is not permitted in the Rural Conservation Zone under the Zoning Ordinance. The Subcommittee further did not sufficiently weigh that the Town of Antrim was

faced with proposals to amend the Zoning Ordinance on three separate occasions to allow for the Project, and each time, the Town declined to adopt the proposed ordinance.

124. Moreover, the Subcommittee's determination that the people of Antrim want the Project based on their re-election of various Selectboard members reads too much into the election. The re-election of a Selectboard member can be predicated upon numerous considerations that do not relate in any way to that member's support of the Project. To extrapolate public support of the Project based on the citizen's re-election of a Selectboard member that supports the Project is specious reasoning. The more telling indication of public support is the Town Meeting's rejection of proposed zoning articles that would have allowed the Project in its proposed location – when faced with the specific decision of allowing the Project, the citizens of the Town voiced their opposition through their vote. The Subcommittee's determination does not give adequate weight to this consideration.

125. Moreover, the Subcommittee's consideration of conservation easements as a means to make the Project consistent with the Town of Antrim's Master Plan ignores that the Master Plan prioritizes the preservation of sensitive areas and watersheds. See Antrim Master Plan, Water Resources at V-5, submitted as Exhibit Cal-B. The Project will be an industrial use in these scenic areas, which remain for half of a century. The Project will involve placing the tallest free-standing structures in the State in an area which does not permit basic commercial uses. See Article IX of the Antrim Zoning Ordinance, submitted as an exhibit to the Pre-filed Testimony of Charles Levesque. The much-touted conservation easements will not diminish the impact of this industrial use and will not go into effect until after the Project is decommissioned — a date presently undetermined. As previously indicated, the nature of the terrain begs the

question as to the level of risk the subject areas are to development, particularly given the varying and steep slopes and various wetlands, and calls into question the value of the conservation easements proposed as part of the Applicant's mitigation package.

126. Moreover, the Subcommittee does not appear to give any consideration to any neighboring municipalities. Indeed, even small-scale wind projects require reviews of regional impacts, notification of abutting municipalities, and consideration of the input of affected municipalities. See RSA 36:57; RSA 674:66. Notwithstanding that these structures will impact the viewsheds of surrounding communities such as Deering, Bennington, Windsor, Stoddard, Hancock, Washington, and Hillsborough, the Applicant did not submit, and the Subcommittee did not consider, the land use considerations and planning goals of those affected communities. In that regard, the Subcommittee's determination is fundamentally insufficient. Further, no information was submitted by the Applicant or considered by the Subcommittee pursuant to Rule Site 301.09(b)(1) which requires an assessment of the "economic effect of the facility on the affected communities." The PILOT agreement negotiated between the Town of Antrim and the Applicant, particularly its reliance on an understated agreed-upon assessed value, will have an economic impact on the ConVal Cooperative School District which includes Antrim and nine other New Hampshire communities. 10/20/16 PM Transcript at 41-42.

127. The Subcommittee should grant rehearing on the issue of views of municipal boards and officials and give due consideration to the master plans and zoning ordinances of all impacted municipalities.

2. *Impact of proposed facility on real estate values.*

128. As reflected above in Section II(a), the Subcommittee acknowledged that the Project may have adverse effects on property values but still granted the Applicant a Certificate of Site and Facility and declined to adopt a property value guaranty to protect the residents of Antrim. The Subcommittee's decision on this matter is unlawful and unreasonable.

129. The Subcommittee stated that it was "not convinced that the Project will not have any effect on value of some properties, the Subcommittee received no evidence indicating that this impact, if any, will have unreasonable adverse effects on the orderly development of the entire region." Antrim II Decision at 86. The Subcommittee's decision to grant a Certificate of Site and Facility in light of being "unconvinced" of adverse effects to property values was unlawful and unreasonable because it impermissibly shifted the burden of proof as to adverse effects from the Applicant to the Opposing Intervenors.

130. The burden of proof with regard to establishing no adverse effects is on the Applicant. See N.H. CODE OF ADMIN. R. Site 202.20 (noting that Applicant typically bears the overall burden of proof). The Subcommittee, as the trier of fact, "may accept or reject, in whole or in part, the testimony of any witness or party." See Brent v. Paquette, 132 N.H. 415, 418 (1989). The Subcommittee was "not required to believe even uncontroverted testimony." See id.

131. The Subcommittee's determination ignores this principle and indicates that the Subcommittee held the erroneous belief that, because Mr. Magnusson's real estate analysis was not rebutted, the Subcommittee was compelled to adopt his conclusion that there would be no adverse effects to real estate values. See id. That is simply not the case, if the Subcommittee

was not convinced, the Subcommittee should not have granted the Certificate of Site and Facility or, at the least, reopened the record to consider further evidence to satisfy its concerns. See N.H. CODE OF ADMIN. R Site 202.27(b)("[i]f the presiding officer determines that additional testimony, evidence or argument is necessary for full consideration of the issues presented in the proceeding, the record shall be reopened to accept the offered testimony, evidence, or argument").

132. This analysis, however, assumes that there was no contrary evidence of real estate impacts. The Subcommittee heard comments from interested individuals that wind projects have an impact on real estate values. See 10/3/16 AM Transcript at 108-11 (comment of Justin Lindholm regarding flaws in Mr. Magnusson's analysis and the reality of the real estate market surrounding the Lempster Wind project); see also Comment of Justin Lindholm dated October 3, 2016. Mr. Lindholm's comments, and the submitted map reflecting properties that are still for sale around the Lempster Wind Project, struck at a fundamental and documented flaw in Mr. Magnusson's analysis: Mr. Magnusson did not analyze properties that were still for sale or had been taken off of the market. The deficiencies in Mr. Magnusson's analysis should have led this Subcommittee to reject that analysis and rule that the Applicant did not submit sufficient evidence to carry its burden that there would be no adverse effects on orderly development in the region. See N.H. CODE OF ADMIN. R. Site 301.09(b)(4). At the least, it should have compelled the Subcommittee to reopen the record for the submission of additional evidence as to the impact to real estate markets.

133. Even assuming, without conceding, that the Subcommittee had sufficient evidence to find that the project would not have an adverse effect on the orderly development of

the region, the Subcommittee acted unlawfully and unreasonably with regard to its determination of the property value guaranty. Throughout the Subcommittee's deliberations, the Subcommittee frequently noted that intervenors did not submit any evidence or proposals with regard to property value guaranties. However, in making those comments, the Subcommittee completely ignored that the intervenors did try to introduce evidence of a property value guaranty related to a Massachusetts project, and the Subcommittee excluded the evidence. See Letter from McCann Appraisal, LLC attached to Supplemental Pre-filed Testimony of Annie Law and Robert Cleland; Order on Motions to Strike at 5-6 (dated September 19, 2016). The Subcommittee noted the McCann letter was "not relevant or material to the issues before the Subcommittee." See Order on Motions to Strike at 5-6. Additionally, Mr. Block, during his cross-examination of the members of the Antrim Board of Selectmen, submitted a letter previously delivered to the Selectmen from ten intervening property owners requesting support in the establishment of a Property Value Guaranty as a condition to be added to the agreement between the Town of Antrim and the Applicant. See 9/29/16 PM Transcript at 104-21; see also Exhibit NA-18.

134. The Subcommittee's deliberations regarding the property rights guaranty, and the Subcommittee's ultimate rejection of such a guaranty in light of the fact that no evidence was presented regarding the guaranty and no testimony was elicited regarding the guaranty, reflects that the Subcommittee's order on the Motion to Strike was erroneous.

135. Consequently, the Subcommittee unjustly dismissed the concept of the property rights guaranty because of a lack of submitted evidence arising out of the Committee's unjust Order on the Applicant's Motions to Strike. The Opposing Intervenors respectfully request that the Subcommittee grant rehearing on this issue so that they may be afforded the opportunity to

present a proposal on the property value guaranty and to have that proposal fully vetted and considered.

136. It is only fair that the Opposing Intervenors be given this chance — after all, if it was not for second opportunities, this Application would not be before the Subcommittee.

VII. CONCLUSION

137. The Subcommittee's decision granting a Certificate of Site and Facility is unreasonable and unlawful. The Subcommittee should have ruled that the Project is substantially similar to that raised in Antrim I and denied the Certificate on the grounds that the Project would have an unreasonable effect on aesthetics. The Subcommittee's decision is further unlawful and unreasonable because the procedure in this case was plagued with irregularities, most notably the absence of a public member throughout the virtual entirety of the proceedings, that materially impacted the presentation of the evidence, the full development of the record, and the Subcommittee's deliberations. Lastly, the Subcommittee's decision is unlawful and unreasonable because the Subcommittee made factual determinations that were unsupported by the evidence, relied upon unreliable evidence, or impermissibly allowed the Applicant a reprieve from the Committee's own rules. The Subcommittee must, in the nature of equity and justice, grant a rehearing in this matter.

WHEREFORE, the Opposing Intervenors respectfully request that the Subcommittee:

A. Grant this Motion for Rehearing;

B. Schedule this Matter for Rehearing;

C. Deny the Applicant's Application for a Certificate of Site and Facility; and

D. Grant such further relief as is just and equitable.

Dated this 14th day of April, 2017.

Respectfully submitted,

The Abutting Landowners Group, the Non-Abutting Landowners Group, the Levesque-Allen Group, the Stoddard Conservation Commission, and the Windaction Group,

By and through their attorneys,

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Certificate of Service

I hereby certify that I served a copy of this Joint Motion for Rehearing pursuant to Site 202.07 to the current service list in this Docket this 14th day of April, 2017.

Eric A. Maher, Esq.