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April 24, 2017

VIA ELECTRONIC MAIL & HAND-DELIVERY

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

Re: NH Site Evaluation Committee Docket No. 2015-02:
Application of Antrim Wind Energy, LLC – Objection to Joint Motion for Rehearing

Dear Ms. Monroe:

Please find enclosed for filing in the above-captioned matter, an original and one copy of Applicant's Objection to the Joint Motion for Rehearing.

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

Please contact me directly should you have any questions.

Sincerely,

Barry Needleman

BN:rs3

Enclosure

cc: Distribution List

THE STATE OF NEW HAMPSHIRE
SITE EVALUATION SUBCOMMITTEE

Docket No. 2015–02

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

APPLICANT ANTRIM WIND ENERGY, LLC'S OBJECTION TO THE JOINT MOTION FOR REHEARING

Antrim Wind Energy, LLC ("AWE" or the "Applicant") by and through its attorneys, McLane Middleton, Professional Association, respectfully submits this Objection to the Joint Motion for Rehearing (the "Motion") filed on behalf of the Abutting Landowners Group, Non-Abutting Landowners Group, the Levesque-Allen Group, the Stoddard Conservation Commission, and the Windaction Group (the "Intervenors"). Applicant respectfully requests that the Subcommittee deny the Motion because it fails to set forth good cause for a rehearing. Specifically, it does not raise any issue that was overlooked or mistakenly conceived by the Subcommittee in its Decision and Order Granting Application for Certificate of Site and Facility nor does the Motion present any new evidence that was not before the Subcommittee or could not have been previously presented during the adjudicative hearing.

I. Background

On October 2, 2015, the Applicant filed an application with the New Hampshire Site Evaluation Subcommittee ("SEC" or the "Subcommittee") for a Certificate of Site and Facility to construct and operate a 28.8 MW electric generation facility consisting of nine Siemens SWT-3.2-113 direct drive wind turbines in Antrim, New Hampshire (the "Project"). The Subcommittee accepted the application on December 1, 2015.

The Subcommittee presided over thirteen days of adjudicative hearings, during which time the Subcommittee heard from fifteen witnesses proffered by the Applicant as well as nine

intervenor groups, and Counsel for the Public's visual expert. In total the Subcommittee received 220 exhibits, oral and written statements from interested members of the public, and written post-hearing briefs from seventeen parties. Upon completion of the adjudicative hearing, and after closing the record pursuant to Site 202.26, the Subcommittee began deliberations.

The Subcommittee deliberated on December 7, 9, and 12, 2016. During the deliberations, as the transcripts illustrate, the Subcommittee reviewed the complete record including affirmative testimony provided by the Applicant as well as rebuttal or opposing testimony provided by all the other parties. On March 17, 2017 the Subcommittee issued its Decision and Order Granting Application for a Certificate of Site and Facility and Order and Certificate of Site and Facility with Conditions (the "Decision"). The Subcommittee's Decision, which addressed each and every concern raised during the Adjudicative hearing and again in the Motion, was well-reasoned and thoroughly supported by the comprehensive record. The Motion fails to meet the standard required to grant a motion for rehearing and ignores the extensive record in this docket and thorough deliberations undertaken by the Subcommittee.

II. Legal Standard

The purpose of a rehearing "is to direct attention to matters said to have been overlooked or mistakenly conceived in the original decision, and thus invites reconsideration upon the record upon which that decision rested." *Dumais v. State of New Hampshire Pers. Comm.*, 118 N.H. 309, 311 (1978). RSA 541:3 provides that the commission "may grant such rehearing if in its opinion good reason therefor is stated in said motion." The Subcommittee may grant rehearing or reconsideration for "good reason" if the moving party shows that an order is unlawful or unreasonable. RSA 541:3, RSA 541:4; *Rural Telephone Companies,* N.H. PUC Order No. 25,291 (Nov. 21, 2011). A successful motion must establish "good reason" by showing that

there are matters the Commission "overlooked or mistakenly conceived in the original decision," *Dumais*, 118. N.H. at 311; or by presenting new evidence that was "unavailable prior to the issuance of the underlying decision." *Hollis Telephone Inc.*, N.H. PUC Order No. 25,088 at 14 (April 2, 2010). A "good reason" for rehearing is not established where, as here, the movant merely restates prior arguments and asks for a different outcome. *Public Service Co. of N.H.*, N.H. PUC Order No. 25,676 at 3 (June 12, 2014). A motion for rehearing must be denied where no "good reason" or "good cause" had been demonstrated. *O'Loughlin v. State of New Hampshire Pers. Comm.*, 117 N.H. 999, 1004 (1977); *Order on Pending Motions*, Docket 2012-01, Application of Antrim Wind, at 3 (Sept. 10, 2013).

The Motion should be denied because it fails to identify how any finding made by the Subcommittee is unlawful or unreasonable, it fails to identify any issue that was overlooked or mistakenly conceived by the Subcommittee, and it fails to identify any new evidence that was not available and could not have been introduced during the adjudicative hearing. The Motion almost exclusively rehashes the arguments previously made in pre-filed testimony and during the adjudicative hearing. The Subcommittee correctly determined that the Applicants met their burden of proof pursuant to Site 202.19, and established by a preponderance of the evidence that it satisfied all of the requirements of RSA 162-H:16 to receive a Certificate of Site and Facility.

III. The Motion Fails to Identify Any Procedural Issue That Was Overlooked or Mistakenly Conceived by the Subcommittee and It Does Not Introduce Any New Evidence That Was Not Before the Subcommittee During the Adjudicative Hearings.

A. Res Judicata

The doctrine of res judicata has been raised several times in this docket and the Subcommittee has thoroughly evaluated it. None of the arguments presented in the Motion provide sufficient basis to grant a motion for rehearing.

Counsel for the Public first raised the issue of res judicata in the jurisdictional docket. *See Jurisdictional Decision and Order*, Docket No. 2014-05, at p. 34 (Holding that "[n]either the doctrine of collateral estoppel nor res judicata, relate to the issue of jurisdiction in this case…these issues will be determined in the context of that application not as an issue pertaining to jurisdiction."). On November 21, 2016, Counsel for the Public filed her Post-Hearing Memoranda, which contained an argument that the doctrine of res judicata should apply in this case. The Applicant filed its Post Hearing Memoranda on November 30, 2016, and specifically responded to Counsel for the Public's argument regarding res judicata. The Subcommittee considered these positions during deliberations, *see Deliberations, Tr. Day 1 Morning Session*, p. 9 - 17, and concluded that the doctrine did not apply. *Decision and Order Granting Certificate of Site and Facility,* Docket No. 2015-02, p. 49. As noted in the Order, the Subcommittee specifically considered "whether the Project is substantially or materially different from the project proposed in Antrim I (Docket No. 2012-01)." *Decision and Order Granting Certificate of Site and Facility,* Docket No. 2015-02, p. 49. The unanimous decision of the Subcommittee was that the changes made to the application are "so numerous that there had been a substantial change precluding the application of res judicata and collateral estoppel." *Decision and Order Granting Certificate of Site and Facility,* Docket No. 2015-02, p. 50.

As a preliminary matter, Dr. Boisvert, the only member of the Subcommittee in the current docket also to sit on the Subcommittee of the prior 2012 docket explained that "we were unanimous that this would have been an entirely new application…We said it would be a wholly new application, we would have to start over." *Deliberations, Tr. Day 1 Morning Session*, p. 13. Moreover, the Subcommittee concluded that the "Application contains substantive and material changes from the initial Application." *Deliberations, Tr. Day 1 Morning Session*, p. 16. The

arguments raised in the Motion are the same arguments Counsel for the Public previously raised in her Post-Hearing Memorandum. The Intervenors disagreement with the Subcommittee's final conclusion does not change the fact that it was thoroughly considered and correctly decided.

The Motion improperly concludes that the Subcommittee's decision was based on "the mitigation measures proposed." *Motion*, at p. 5. This assertion is inconsistent with the Subcommittee's deliberations and Decision. The changes considered and addressed by the Subcommittee include both physical changes as well as modifications to the mitigation package proposed.[1] In addition to the physical changes, the mitigation package now includes: (1) an additional 100 acres of conservation land that will conserve the entire ridgeline, (2) the donation of $100,000 to New England Forestry Foundation to acquire new permanent conservation lands in the general region of the Project, and (3) the Applicant has further entered into an agreement with the Town to provide additional public benefits. Many of the changes made to the current application were directly in response to the list of mitigation measures proposed by Jean Vissering, Counsel for the Public's expert in Antrim I.

The findings required for this docket involve issues that could not have been brought and were not brought during the prior proceeding. For example, in the prior docket, the Subcommittee declined to consider the Applicant's modifications to the project as part of the Applicant's request for rehearing and to reopen the record, which included only a portion of the changes now included in the current Application. This was because the Subcommittee determined consideration of these material changes "would require re-evaluation of the entire Application." *Order on Pending Motions*, Docket No. 2012-01, p. 11 (September 10, 2013).

[1] These changes include: the elimination of Turbine 10, the reduction in height of Turbine 9 so that the tower and nacelle are below the tree line when viewed from Willard Pond, and the use of Siemens turbines, which are quieter and smaller in other dimensions.

The Intervenors rely on the decision in Antrim I regarding the use of "non-aesthetic related mitigation measures." *Motion* at ¶17. The Subcommittee addressed this, however, and noted that they "do not need to be bound by [the prior] decision...it is a different project on a variety of topics...we are a different Subcommittee and we have our own responsibilities. We need to make our own decisions based upon the evidence in front of us." *Deliberations, Tr. Day 1 Afternoon Session*, p. 70. The Applicant was not seeking to have the Subcommittee reconsider its decision regarding the mitigation package in the prior docket or "call the Antrim I Decision into question," as the Motion suggests. *Motion*, at ¶19. Rather, the Applicant expected that the Subcommittee would evaluate the present application on its own merits in light of the significant changes made to the Project as well as changes made to the statute and SEC Rules. The transcript of the Subcommittee's deliberations and the Decision reflect this approach.

The Intervenors are also incorrect in their assertion that the changes to the SEC Rules do not provide an additional basis for restricting the applicability of res judicata. An exception to res judicata exists "where between the time of the first judgment and the second . . . there has been an intervening . . . change in the law creating an altered situation." *Fontes v. Gonzales*, 498 F.3d 1, 3 (1st Cir. 2007) (citing *State Farm Mut. Auto. Ins. Co.* v. *Duel*, 324 U.S. 154, 162 (1945) (holding that res judicata is no defense where between the time of the first judgment and the second there has been an intervening decision or a change in the law creating an altered situation). The New Hampshire Legislature and the SEC spent significant time developing and revising the statute and the SEC's Rules to ensure that projects are evaluated under the appropriate criteria. Key aspects of the framework the Subcommittee must use to assess the Project, including many entirely new criteria related to aesthetics, are different and new findings are now required under the SEC's newly adopted rules.

In addition to not satisfying the elements necessary for res judicata to apply, the policy rationale for the doctrine is also not served in this case. Judicial economy can only be promoted if res judicata and collateral estoppel claims are raised in a timely manner – something the Intervenors have failed to do. By waiting to raise these claims until after vast resources have already been expended litigating this case, the Intervenors not only undercut the very purpose of these doctrines, but also arguably waived the claims. The New Hampshire Supreme Court's decision in *CBDA Dev. v. Town of Thornton*, is consistent with the assertion that the appropriate time to raise the applicability of res judicata is early in the process – in this case after the Application was accepted. In *CBDA,* the Supreme Court held "[a]ccordingly, before accepting a subsequent application under the *Fisher* doctrine, a board must be satisfied that the subsequent application has been modified so as to meaningfully resolve the board's initial concerns…An administrative board 'should not be required to reconsider an application based on the occurrence of an inconsequential change, when the board inevitably will reject the application for the same reasons as the initial denial.'" *CBDA Dev. v. Town of Thornton*, 168 N.H. 715, 725 (N.H. 2016); *citing Brandt Dev. Co. v. City of Somersworth*, 162 N.H. 553, 556 (2011). This holding supports the proposition that res judicata and collateral estoppel should have been raised at the time of acceptance and before the administrative agency considers the merits of the Application. The Intervenor's argument, filed at the last possible moment of the proceeding, is inconsistent with the law and completely undercuts the clear policy goal of preserving judicial economy that is the foundation of these doctrines.

B. The Subcommittee Was Properly Constituted

Fourteen months after the Intervenors and Counsel for the Public were aware that the alternate public member had been appointed to the Subcommittee, and seven months after they

were aware that the alternate public member was not sitting for the hearings before the Subcommittee, the Intervenors now challenge the Subcommittee's composition. As a remedy for this alleged failure, the Intervenors suggest that a new public member must be appointed by the Governor and Council and must "consider the evidence and testimony and participate in deliberations anew." *Motion* at ¶ 31. It is unclear whether the Intervenors' are seeking to have an entirely new hearing conducted, effectively a "mulligan," or rather, to have the new public member participate in entirely new deliberations after reading the transcripts. Whatever the proposed remedy, it is unnecessary and a waste of time. The composition of the Subcommittee was consistent with RSA 162-H:4-a and any claim that more than a quorum of the Subcommittee was required has been effectively waived.

First, the Intervenors have confused the requirement for appointment to a Subcommittee with the quorum requirements in the statute. The Subcommittee was properly constituted. RSA 162-H:4-a, II provides as follows:

> When 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 state agency members of the Subcommittee. . . . Five members of the Subcommittee shall constitute a quorum for the purpose of conducting the Subcommittee's business.

As is evident from this language, although seven members must be appointed, of whom two must be public members, only five members are required to carry out the duties of the Subcommittee. It would be illogical to require seven members to be present to satisfy a five member quorum requirement. Moreover, the statute includes no requirement that the quorum must specifically include any of the public members.

In this case, Chairman Honigberg appointed Roger Hawk and Patricia Weathersby as the two public members of the Subcommittee on October 20, 2015. In January 2016, Mr. Hawk

died, and on January 11, 2016, the Chairman, acting pursuant to RSA 162-H:3, XI, appointed Rachel Whitaker, the alternate public member, to serve on the Subcommittee. Member Whitaker attended an informational session on February 22, 2016, but thereafter did not participate in the hearings relating to this docket. Hearings began on September 13, 2016 and continued over 13 hearing days, with the written Decision being rendered on March 17, 2017.

The Intervenors concede that Ms. Whitaker was appointed to the Subcommittee but then "did not preside over any proceedings." *Motion* at ¶ 24. As a result, the Intervenors acknowledge that the Subcommittee consisted of seven members. Their complaint is that Ms. Whitaker simply did not serve. Nothing in the law required her to do so. And nothing in her failure to do so voids the Subcommittee's Decision.

As long as a quorum is present, as it was here, the Subcommittee has the authority to act. *See e.g. Appeal of Plymouth*, 125 N.H. 141, 147 (1984) ("[T]here is no authority for the proposition that the presence of only two of the three members appointed to the board constituted an insufficient quorum."); *Appeal of Net Realty Holding Trust*, 127 N.H. 276, 278 (1985) ("Other states that have addressed this issue appear uniformly to hold that the action of a public body *lacking the authority of a quorum* is void.") (emphasis added).

The Intervenors argue that because the statute requires two public members, those members must sit to hear every case, even though there is no requirement for the public members to be part of the quorum. The New Hampshire Supreme Court has squarely rejected this argument. In *Appeal of Keene State College Education Association, NHEA/NEA*, 120 N.H. 32 (1980), the Court considered a challenge to the Public Employee Labor Relations Board's decision based on the composition of a panel. *Id.* at 34. The statute in question required that two of the five members of the board come from organized labor. *Id.* at 34-35. The statute also

provided that "[t]hree members of the board shall constitute a quorum" without any requirement that labor representatives be a part of the quorum. *Id.* at 35 quoting RSA 273-A:2, III. When a panel of three members, none of whom came from labor issued a decision, the court upheld a challenge to the composition of the panel on the same grounds the Intervenors make here, stating: "There is no ambiguity in RSA 273-A:2; the board's total membership must be balanced between management and labor, but no such balance is required of a quorum. We therefore hold that the PELRB was properly constituted in the present case and that its decision was valid." *Id.* The labor members in *Keene State* are directly analogous to the public members here. The statute provides that two public members must sit on the Subcommittee, but not that two public members must be part of the quorum that decides the case. The Subcommittee's decision is therefore valid.

In attempting to write the quorum requirement out of RSA 162-H:4-a, the Intervenors assert that mere appointment to the Subcommittee is not enough since the statute requires that vacancies be filled. *Motion* at ¶ 26, Fn. 2. The failure of Ms. Whitaker to be present for the hearing, however, is not sufficient as to constitute a vacancy and, as a practical matter, is a case of "no harm, no foul." Once appointed, Ms. Whitaker could have decided to decline to participate for any reason or no reason, so long as her absence did not prevent a quorum.

Second, the Intervenors have waived any complaint about the failure of the Subcommittee to have seven members present. Since the hearings started in September 2016, the Intervenors were well aware that Ms. Whitaker was not attending the hearings and thus that the Subcommittee hearing the matter consisted of six members. And if they were not aware of that fact at the first day of hearings, they certainly were aware of it as the hearings proceeded. While they did not have a right to a Subcommittee of seven members to actually hear the matter

(*i.e.* a quorum of seven), absolutely nothing prevented them from asking for one, or asking whether Ms. Whitaker was available to participate. This was never done.

The Intervenors argue that the Subcommittee erred by proceeding with six members, and they point to a 3 to 3 vote on whether to provide a property value guarantee as evidence that they were harmed by the absence of alternate public member Whitaker. However, as their motion makes clear, the vote on the property value guarantee occurred on December 12, 2016. *Motion* at ¶ 27. The Intervenors provide no explanation as to why they declined to challenge the absence of an odd number of members on the Subcommittee beginning in September, or why they did not raise the issue on December 12th when the specific issue raised in the Motion arose. Arguably, if the Chairman had wanted to postpone proceedings to address that issue, he could have done so. The failure to raise the issue then is fatal and effectively constitutes a waiver.

"Interested parties are entitled to object to any error they perceive in governmental proceedings, but they are not entitled to take later advantage of error they could have discovered or chose to ignore at the very moment when it could have been corrected." *Appeal of Cheney*, 130 N.H. 589, 594 (1988). "[T]rial forums should have a full opportunity to come to sound conclusions and to correct errors in the first instance." *Sanderson v. Town of Candia*, 146 N.H. 598, 602 (2001). In *Fox v. Town of Greenland*, 151 N.H. 600 (2004), the Plaintiffs objected to the participation of a member of the zoning board of adjustment because he had missed two of the hearings. *Id.* at 602. In *Fox,* the member's absence was announced at a January 15 meeting, but the petitioners did not object to his participation until they filed a motion for rehearing on May 22. *Id.* at 604-05. The Supreme Court ruled that the petitions had failed to seek the members disqualification "at the earliest possible time" and thus could not raise his participation as grounds for error on appeal. *Id.* at 605.

The same reasoning applies here. If the Intervenors thought it was critical to have seven members, or to break the deadlock, they could have raised it at an earlier time. And *if* the Chairman had found their arguments convincing, he could have delayed the proceedings until the Governor and Council appointed a new member sufficient to address that issue (or others) *even though he was not required to do so.* It is now too late to raise this argument for the first time. What the Intervenors are asking for in their request for a complete "do over" is a significant and unreasonable waste of Subcommittee resources and inconsistent with the requirements of RSA 162-H "that undue delay in the construction of new energy facilities be avoided".

C. The Subcommittee Thoroughly Considered and Properly Determined that the Rules Permit them to Grant a Waiver Relating to Participating Landowners.

The Intervenors assert that the Subcommittee's decision to waive the rules relating to noise and shadow flicker as they pertain to participating landowners was unlawful and unreasonable. *Motion* at ¶32. This same issue was raised several times throughout the adjudicatory hearings. The Subcommittee fully assessed it both in their review of submitted pre-filed testimony as well as during cross examination at the adjudicatory hearing. *See Tr. Day 2/Morning Session*, at p. 103-105; *see also Tr. Day 4/Morning Session*, at p. 130-131; *see als Tr. Day 4/Afternoon Session*, at p. 44 (noting that "even for the participating landowners they are below the 40 nighttime limit of the SEC."). Further, during the course of the proceeding, Presiding Officer Scott expressly asked "[d]o I understand correctly that [the participating landowners] are waiving health and safety regulations in some respect with regard to shadow flicker and noise?" *Tr. Day 7/Morning Session*, at p. 129. In response, Mr. Kenworthy noted that "if we were unable to reach agreements with private landowners that allowed us to do things on their property, then we could never have a wind project." *Id.* at 130.

The Subcommittee also discussed this issue at length during deliberations. *Deliberation Tr. Day 2 Afternoon Session*, at p. 24-38; 43-45. Ultimately, based on the Order and conditions set out in the Certificate, the Subcommittee interpreted the rules to permit the Subcommittee to grant such a waiver. *See Order and Certificate of Site and Facility with Conditions*, at p. 11 ¶13.1-13.2. After discussion regarding the applicability of the rule to participating property owners, the Subcommittee concluded that landowners should be permitted "to do what they will voluntarily." *Deliberation Tr. Day 2 Afternoon Session*, at p. 44.

This decision is consistent with the Subcommittee's authority under Site 202.15. Simply because the Subcommittee did not use the express words noted in the Motion for a finding that such a waiver would be "in the public interest," does not suggest that such a finding was not properly made. It is clear from the deliberations that such a condition would be inapplicable in this context because it would limit the ability of a private property owner to use their land as they deem appropriate, contrary to their legal right. The Subcommittee's Decision codifies this determination and expressly states that "to the extent it is necessary, the Subcommittee waives noise and shadow flicker restriction set forth in N.H. Code Admin. Rules, Site 301.14 (f)(2)a and b, as applied to participating landowners." *Decision and Order Granting Application for Certificate of Site and Facility*, at p. 168-69 (March 17, 2017); *see also Deliberations Tr. Day 3 Afternoon*, at p. 65-66. The conditions in the Certificate expressly note that "[a] Participating Landowner or Non-Participating Landowner may waive the noise provisions…by signing a waiver of their rights, or by signing an agreement that contains provisions providing for a waiver of their rights." *Order and Certificate of Site and Facility with Conditions*, at p. 11 ¶13.1.

Further, the Motion argues that the Intervenors were not given opportunity to comment on this waiver. The transcripts demonstrate otherwise. Numerous intervenors did raise this

issue throughout the hearings and were able to introduce testimony concerning this matter. The Subcommittee was able to consider this testimony and ultimately concluded that the waiver of these requirements for participating landowners was consistent with the public interest.

D. The Subcommittee's Procedures with Respect to the Use of Friendly Cross Examination and Deadlines for Filing Supplemental Testimony Were Conducted Consistent with the SEC Rules and Ensured the Fair and Orderly Conduct of the Proceeding.

The Intervenors assert that the Subcommittee's, allegedly, disproportionate limitation on the use of friendly cross examination by opposing intervenors was unfair. *Motion* at ¶40. Further, the Motion alleges that the requirement by the Subcommittee that all supplemental testimony be filed on the same day created a procedural unfairness to opposing parties and prevented a "full and true disclosure of the facts." *Motion* at ¶40. As a preliminary matter, the record does not support the assertions made. Moreover, the issues raised do not satisfy the requirements necessary to seek rehearing. The Motion asserts that the Subcommittee relied on an "undeveloped record." *Motion*, at ¶43. The thirteen days of adjudicatory hearings and extensive testimony given by both the Applicant's experts and the intervening parties do not in any way support the assertion that the record in this docket was undeveloped.

The Intervenors claim that "friendly cross-examination" was limited in this case. That is expressly contrary to the record. During the final pre-hearing conference, Attorney Richardson raised the issue of friendly cross and sought to have it limited as part of a stipulation for the hearing. *See Tr. Final Structuring Conference*, at p. 106. The presiding officer rejected this request and noted that a request to limit such cross would likely be rejected "because of due process concerns." *Tr. Final Structuring Conference*, at p. 109. Without providing any

examples from the transcript, the Motion asserts that intervenors were not permitted to engage in friendly cross examination. In fact, the record squarely undercuts this claim.[2]

The Motion further asserts that the requirement that all supplemental testimony be submitted on the same day limited the ability of intervenors to respond in the same manner to testimony provided by the Applicant. As a preliminary matter, the Applicant is the party that bears the burden of proof. *See* Site 202.19. Therefore, it is appropriate and necessary to allow the Applicant to respond to any testimony put into the record. In addition, the intervenors were not disadvantaged as they had a full and fair opportunity to respond to any supplemental testimony sponsored by the Applicant during the course of cross-examination of witnesses at the final adjudicatory hearings. This testimony and cross-examination was considered at length by the Subcommittee in reaching its decision.

The argument raised in the Motion that Counsel for the Public was prejudiced by this procedure was raised during the course of the hearing and during post-hearing motion practice. The Subcommittee adequately reviewed the same evidence presented in the Motion and determined that a reopening of the record was not required for a full consideration of the relevant issues in this proceeding. *Order Denying Motion to Reconsider and Re-Open the Record*, at p. 10 (December 2, 2016). The Subcommittee was not prevented from meaningfully weighing and considering Ms. Connelly's testimony because Counsel for the Public had an opportunity to cross-examine Mr. Raphael on the issues raised. Counsel for the Public could have also have sought leave to elicit the same testimony as part of her direct examination of Ms. Connelly

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[2] For example, Ms. Linowes was permitted to question the Audubon panel for an extended period, *Tr. Day 8/Afternoon Session*, at p. 8-47; Mr. Block was permitted to ask extensive questions of the abutting property group despite having very similar interests, *Tr. Day 9/Morning Session*, p.148-175; and the Audubon Society was permitted to question Geoffrey Jones from the Stoddard Conservation Commission at length, despite the fact that both parties sought to address and protect the same general interests, *Tr. Day 10/Morning Session*, at p. 8-22. These examples are not exhaustive and many other examples of friendly cross examination are present throughout the record.

(something she chose not to do). Finally, Counsel for the Public was permitted to submit an offer of proof, which outlined the key points she wished to place into the record.

In the context of all of the procedural issues raised, the Motion fails to satisfy the statutory requirements for rehearing. The Intervenors have re-stated their prior arguments without providing any information indicating that good cause exists for rehearing. The Motion does not identify any error of fact, reasoning, or law. Rather, the Motion simply outlines a disagreement with the conclusion reached by the Subcommittee and therefore the Motion should be denied.

IV. The Motion Fails to Identify Any Substantive Issue That Was Overlooked or Mistakenly Conceived by the Subcommittee and Does Not Introduce Any New Evidence That Was Not Before the Subcommittee During the Adjudicative Hearings.

A. Aesthetics

The Subcommittee heard several days of testimony from the Applicant's expert, David Raphael, Counsel for the Public's expert, Kellie Connelly, and from numerous intervenors on the issue of aesthetics. The deliberations were thorough and comprehensive, and took into consideration the specific criteria outlined in the newly-adopted SEC rules. *See* Site 301.14(a)(1)-(7). The Intervenors have not provided any basis in the Motion to suggest that the Subcommittee failed to adequately consider the evidence presented and reach a well-reasoned determination. All of the arguments raised in the Motion simply reiterate arguments raised throughout the adjudicatory proceeding and do not meet the threshold requirements to succeed on rehearing.

1. *Viewshed Analysis and Identification of Scenic Resources*

The Motion asserts that the doctrine of collateral estoppel should apply when determining the "scenic resources" that may be affected by the Project. *Motion* at ¶51. The critical issue that

the Intervenors ignore is that in order for collateral estoppel to apply "the issue subject to estoppel must be identical." *Farm Family Mut. Ins. Co. v. Peck, 143 N.H. 603, 605* (1999) (citing *Appeal of Hooker*, 142 N.H. 40, 43-44 (1997)). As explained previously, as a factual matter, this is fundamentally a new Application and consequently, the essential predicate for claim preclusion is absent. *See supra* Section III.A (summarizing changes to the Project design). All of the essential findings are therefore fundamentally not identical. The substantial modifications made to the proposed Project require the Subcommittee to evaluate the Project in its totality under the newly revised statute and under the Site Evaluation Subcommittee's newly adopted rules and criteria.

While changes made to the Project may not have changed the importance of scenic resources that were identified in Antrim I, the Motion fails to take into consideration the changes in visibility at the sensitive resources based on the changes made to the proposed Project.[3] The issue is not the value of the resources; the issue is the effect of the revised Project on those resources, and the evidence shows that these effects are dramatically different. This issue is not the same as the one litigated in the prior docket. Moreover, since the last docket, the adoption of new SEC rules, which contain new evaluative criteria, also precludes application of collateral estoppel. *See Brandt Dev. Co. v. City of Somersworth*, 162 N.H. 553, 558-60 (2011)(holding that ""doctrinal changes, taking place in the fifteen-year period between Brandt's applications, create a reasonable possibility — not absolute certainty — of a different outcome" and therefore "constitute[s] a material change in circumstances with respect to [a prior] application.")

[3] For example, the Motion asserts that the Subcommittee did not consider the impact to such resources as Highland Lake or Lake Nubanusit. In fact, these resources were both considered by Mr. Raphael and included in his VA. *See LandWorks Visual Assessment*, p. 56-57. Due to the changes to the Project, however, Mr. Raphael concluded there would be no visibility of the Project from either of these resources. If the Intervenors wished to raise additional concerns regarding these resources they had the opportunity to do so. The Subcommittee also heard testimony from Ms. Connelly regarding visibility of the Project from Highland Lake. *See Tr. Day 13/Morning Session*, at p. 96.

In addition, as referenced above with respect to the applicability of res judicata, one of the purposes for the doctrine is "promoting judicial economy by preventing needless litigation." *State of Pugliese*, 122 N.H. 1141, 1144 (1982). The Intervenor's argument, filed after the close of the record and conclusion of the adjudicative proceedings, is inconsistent with the law and completely undercuts the clear policy goal of preserving judicial economy that is the foundation of this doctrine.

The Intervenors assert that LandWorks improperly relied on hub heights to determine visibility. This is incorrect and contrary to the transcribed record. *See Tr. Day 4/Afternoon Session*, at p. 96-97. Mr. Raphael expressly testified when asked whether he determined visibility based on hub height that "[n]o. We didn't use hub heights only to determine visibility. We have four visibility maps to determine visibility. So we state and in terms of understanding overall visibility, we find that the hub height and hub visibility is an important consideration because of the scale of the hub itself…but it's not the means by which or the only criterion by which we evaluate visual effect." *Id.* The four maps noted by Mr. Raphael are described on page 10 of the Visual Assessment ("VA"), which the Motion specifically cites to in support of its assertion that Mr. Raphael relied solely on hub height in determining visibility. This is clearly not the methodology that was used. Mr. Raphael again reiterated later in his testimony "we don't just base our analysis on the hub…we're really looking at the whole structure, the whole project and not making the differentiation between hub height and blade height or blade tip height." *Tr. Day 4/Afternoon Session*, at p. 99. In addition, the Motion fails to provide any new information regarding this issue that was not already raised, discussed, and considered by the Subcommittee. *See Deliberation Tr. Day 1 Afternoon Session*, at p. 10, 14, and 17.

The Motion further critiques Mr. Raphael's methodology for evaluating scenic resources and reaching his overall conclusion. *Motion* at ¶55. The Intervenors raised similar, if not identical, issues during the adjudicatory hearings -- the Subcommittee heard a lengthy critique of Mr. Raphael's VA from Ms. Connelly as well as other intervening parties. The Motion also mischaracterizes the methodology employed by Mr. Raphael. With regard to Gregg Lake, for example, Mr. Raphael acknowledged that the resource was identified as having local importance. *See LandWorks Visual Assessment*, at p. 69, Table 5. As Mr. Raphael explained, however, his assessment also took into consideration the purpose for the designation and whether the primary purpose was for the resources aesthetic value versus some other importance, such as for its recreational value or its ability to provide habitat. *See Tr. Day 6/Morning Session*, at p. 11-16. This is reflected in the VA, which specifically notes "no scenic designation" for Gregg Lake. Similarly, Mr. Raphael did not evaluate the Meeting House Hill Town Cemetery noted in the Motion, at p. 20, Fn. 7, because the primary significance of that resource is not for its scenic quality, but for its historical value. *Tr. Day 6/Morning Session*, at p. 72 (discussing his exclusion of White Birch Point Historic District, Mr. Raphael identified a distinction between historic resources noting that he did not believe that resource was a "historical resource primarily because of its scenic values. I understand it's perhaps a resource, because it represents an historic, you know, private summer camp development.") This distinction between resources that are significant for the aesthetic value versus other values such as historical or natural was discussed and accepted by the Subcommittee during deliberations.[4] The critiques of Mr. Raphael's systematic methodology were raised repeatedly during the hearings and the

[4] *Tr. Day 1 Morning Session*, at p. 99-101 (Dr. Boisvert noting that a "particular archeological site might be within 200 feet of a turbine. But the characteristics that make that property important are not damaged in any way by the presence of the turbine." Dr. Boisvert then provides an alternate example of Canterbury Shaker Village "where the setting, the landscape, the feeling is integral to the history of the Shakers.")

Intervenors have failed to provide any new evidence that was not already considered by the Subcommittee.

2. *Viewer Effects*

The intervenors claim that Mr. Raphael's methodology is based upon a "specious analysis predicated on faulty assumptions." *Motion* at ¶59. The Intervenors conducted lengthy cross examination of Mr. Raphael, however, specifically relating to his evaluation of the number of turbines visible from particular scenic resources. The argument raised in the Motion asserting that the methodology used by Mr. Raphael is flawed, simply revisits the same points raised by the Intervenors during the hearing. *Tr. Day 5/Afternoon Session*, at p. 118-120; *see also Tr. Day 4/Afternoon Session*, at p. 155-160 (comparing the 12 projects in Maine for purposes of scaling as opposed to the 3 projects in New Hampshire). Moreover, the Subcommittee asked additional questions about Mr. Raphael's consideration of this criteria. *Tr. Day 6/Morning Session*, at p. 119-120. Mr. Raphael explained that this was only one of many of the criteria he considered for both visual and viewer effect. This issue has been fully evaluated by the Subcommittee.

With regard to viewer effect, the Motion criticizes Mr. Raphael's assessment of extent of use and remoteness. *Motion* at ¶62. Again, this exact argument was raised by the intervenors during the course of the proceeding and Mr. Raphael explained his methodology, even giving examples of instances in which both of these criteria could be met. *Tr. Day 4/Afternoon Session*, at p. 162 (noting that "one is dealing with activity and the other is dealing with the quality of the landscape and its position in the overall landscape.") The Intervenors' further criticism of Mr. Raphael's application of percent of visibility does not provide any new information or assert any error of law in the Subcommittee's evaluation of Mr. Raphael or his methodology. The fact that the Subcommittee chose to apply many of the same methods used by Mr. Raphael, as noted in

the Motion, does not create sufficient grounds to grant rehearing. The Subcommittee is entitled to evaluate the evidence presented and give it the weight it feels is appropriate. The deliberations were thorough and comprehensive and took into consideration the specific criteria outlined in the newly adopted SEC rules, contrary to the assertion stated in the Motion. *See Motion* at ¶80; *see also* Site 301.14(a)(1)-(7). The Subcommittee's final Order reflects this thorough review of the record. *See Deliberations Day 1 Afternoon*, at p. 4-141. The Intervenor's characterization of the Subcommittee's deliberations, *see Motion* at ¶80, fails to take into consideration the Subcommittee's thorough review of the existing character of the area, *Deliberations Day 1 Afternoon*, at p. 26-30, 32, the significance of scenic resources, p. 63-64, the public's use of those resources, *Deliberations Day 1 Afternoon*, at p. 30-31, 38-39, 43, the overall daytime and nighttime visual effect, *Deliberations Day 1 Afternoon*, at p.53-54, 61-62, as well as consideration of the proposed mitigation, p. 69-72 and 132-141. In contrast to the Intervenor's assertions, it is unclear what criteria the Subcommittee failed to consider under the SEC Rules.

3. *Photosimulations*

The Intervenors claim that the photosimulations developed by LandWorks are "unreliable, un-credible, and underserving of any weight." *Motion* at ¶64. These arguments relating to the photosimulations presented by LandWorks were all raised during the course of the proceeding and extensively evaluated. For example, the same argument regarding haze (see *Motion* at ¶65) was also raised by Mr. Block in the proceeding when asked Mr. Raphael "can you honestly state that absolutely no haze or fog effect has been applied to any of these simulations?" *Tr. Day 4/Afternoon Session*, at p. 134. Mr. Raphael explained his method and his interpretation of the SEC Rules noting that "a clear day [is] a day in which you can clearly

see the project. It doesn't, the rules do not say cloudless. The rule says clear view. And these are all clear views." *Tr. Day 4/Afternoon Session*, at p. 119-20. The Motion mischaracterizes Mr. Raphael's approach in asserting that he took photographs under "anticipated weather conditions." *Motion*, at ¶65. While Mr. Raphael did note that he felt the conditions reflected weather in New England, he also believed that the simulations were in compliance with the rule requirements. *Tr. Day 4/Afternoon Session*, at p. 120 ("I believe we conform with those regulations, with those rules.")

Similarly, the argument asserting that the simulations improperly include objects in the foreground was also raised during the hearing and evaluated during the deliberations. *Tr. Day 4/Afternoon Session*, at p. 127-129. Mr. Raphael explained that, when feasible, LandWorks did avoid objects in the foreground, which is consistent with the language in the SEC Rule. *See* Site 301.05(b)(8)(a). As the Motion notes, over sixty pages of the deliberation transcripts are devoted to the Subcommittee's evaluation of the photosimulations – both those produced by LandWorks and by Terraink. Additionally, the Subcommittee conducted two site visits; one as required by statute, but the second pursuant to the Subcommittee's discretion to ensure the Subcommittee had a full and complete understanding of the resources at issue as well as the surrounding area. The same issues and concerns raised again in the Motion were also raised and considered by the Subcommittee in their deliberations. It is unclear in what way the Intervenors believe the Subcommittee's thorough, documented, assessment of the aesthetic impact of the Project was in any way unlawful or unreasonable.

4. *Mitigation Measures*

As a preliminary matter, the premise of the Motion as it relates to mitigation is incorrect. While the Motion asserts that many of the mitigation measures will not be realized for at least

half of a century, *see Motion* at ¶71, in fact, the 908 acres of conservation land proposed by the Project will be placed in conservation within 180 days of the commercial operation date of the Project. *Tr. Day 7/Morning Session*, at p. 21. All of the other mitigation measures listed in the Motion, *see Motion* at ¶71, will also go into effect after commencement of commercial operations. In addition, the Motion fails to cite several additional mitigation measures the Subcommittee considered in determining that any potential aesthetic effect would not be unreasonable. The Subcommittee also considered the use of radar activated lighting, the elimination of turbine 10 and lowering of turbine 9. *Decision and Order Granting Application for Certificate of Site and Facility*, at p. 121 (March 17, 2017). The Subcommittee further acknowledged that the use of conservation land is an indirect form of mitigation. *Id.* The fact that the Intervenors disagree with the Subcommittee's determination that these proposed mitigation measures are relevant and effectively mitigate aesthetic effect, does not mean the decision is unlawful or unreasonable.

The Intervenors rely on the decision from Antrim I to support their errant assertion that conservation land cannot be used to mitigate aesthetic effects. *Motion* at ¶73. The Subcommittee was presented with that same argument and evaluated it during deliberations. The Subcommittee concluded that the finding from Antrim I was specific to that Application as noted by the use of the phrase "in this case" in the final Antrim I Order. *See Deliberation Tr. Day 1 Morning Session*, p. 20. Ms. Weathersby noted that the use of that phrase demonstrated that "it's not applicable to every single subsequent case." *Id.*

Moreover, the Intervenors' assertion that the prior determination in Antrim I should collaterally estop the Applicant here is, again, an improper application of the doctrine. As noted previously, this is a new project and the mitigation package in this docket is not the same as the

one proposed in the prior proceeding. All of the changes made to the Project must be taken into account collectively, consistent with the findings required by the Rules. Additionally, unlike the issue outlined in the Motion, *see Motion* at ¶74, the question that must be considered here is whether indirect mitigation measures relating to the aesthetics of *the* Project can be considered by the Subcommittee. The Subcommittee has concluded that this consideration must be evaluated on a case-by-case basis taking into consideration the specifics of a proposed project. A blanket rule cannot be applied.

With respect to the assessment of the radar activated lighting system, there is extensive evidence in the record relating to the use of this system. Attorney Reimers sought to make a similar assertion that "there is no evidence in the record as to what visual impact this system will have." *Motion*, at ¶77; *see Tr. Day 5/Afternoon Session*, at p. 59. As noted during the hearing, however, Mr. Raphael did evaluate project lighting. *Tr. Day 5/Afternoon Session*, at p. 57-58. Ms. Von Mertens also raised nearly an identical argument that "there's been no visual analysis, impact analysis of night lights." *Tr. Day 13/Afternoon Session*, at p. 51. The VA contains details regarding which turbines will be lit, the type of light that will be used, and reaches a conclusion based on professional judgement that the use of a radar activated system will essentially eliminate the impact. *LandWorks Visual Simulation*, at p. 37. Counsel for the Public's visual expert, Kellie Connelly, shared a similar view regarding mitigation of effect on nighttime lighting if a radar activated system was installed. *See Terraink Visual Impact Assessment*, at p. 10. The Subcommittee considered all of this evidence and concluded that, subject to certain conditions, "[t]he radar activated system will minimize the impact of the Project on aesthetics." *Decision and Order Granting Application for Certificate of Site and Facility*, at p. 121 (March 17, 2017). In order to address concerns about the timing for the

installation of this system the Certificate includes a condition that, prior to construction, the Applicant receive approval of the Aircraft Detection Lighting System. *Decision and Order Granting Application for Certificate of Site and Facility*, at p. 156 (March 17, 2017)(Noting that "the ADLS shall be installed prior to the operation of the Project.") Since the conclusion of the hearings, AWE has in fact received approval from the FAA to implement the system. *See Letter from Antrim Wind to the SEC – FAA Approval of Night Time Lighting* (December 14, 2016). The Subcommittee further noted in its Decision that it received no reports, or scientific evidence that would suggest that the Project's lighting will have unreasonable adverse effects on health. *Id.* at 156. The Motion does not provide any evidence that was not already considered and evaluated by the Subcommittee in reaching its conclusion.

B. Public Health and Safety

With regard to public health and safety, the Motion fails to identify any findings made by the Subcommittee that are unlawful or unreasonable. None of the issues raised identify any issue that was overlooked or mistakenly conceived by the Subcommittee, and it fails to identify any new evidence that was not available during the adjudicative hearing. The arguments presented by the Intervenors simply rehash all of the arguments previously made by the Intervenors in their pre-filed testimony, post hearing briefs, and during the adjudicative hearings.

1. *Noise*

The Motion asserts that the Subcommittee's determination with respect to public health and safety and particularly noise is "essentially based on the Applicant's promise that the Project will not exceed sound levels." *Motion* at ¶83. This is incorrect. This claim fails to take into account the extensive work completed by the Applicant's experts, the reports submitted, the days of testimony relating to noise, and the lengthy cross-examination that was completed. The

Applicant submitted a comprehensive Sound Level Assessment Report that evaluated both existing sound levels and the predicted noise levels associated with this Project, consistent with the rules. *See Application*, App. Exh. 33, Appendix 13A; *see also Supplement to Application re: New Rules*, App. Exh. 34, Attachment 9. The Applicant also submitted extensive expert testimony from Robert O'Neal demonstrating that Epsilon complied with and followed all requirements and standards set out in the SEC rules.

The Intervenors focus on the use of Noise Reduction Operations ("NRO") to support their contention that the Subcommittee is solely relying on promised mitigation to reach its conclusion of no unreasonable adverse effect is misplaced. First and foremost, the Applicant performed extensive monitoring and assessment of the site and existing sound levels, collecting wind speed data that exceeds the level of data typically collected for a project, and performed all necessary modeling to determine predicted sound levels. Based on Mr. O'Neal's extensive experience as an acoustical expert, he has found that the conservative set of modeling assumptions implemented by Epsilon for this Project yield accurate results. Mr. O'Neal concluded that because the predicted worst-case sound levels for this Project will be well below 45dBA during the day and 40dBA at night, at all occupied buildings, the Project will easily meet the required noise levels established by the SEC rules. Regardless of NRO, or any other form of mitigation, Mr. O'Neal opined that he had a high degree of confidence in his findings. He noted several times that "the modeling is conservative. We are several decibels under the standard to begin with. And there's several conservative assumptions that we use in the modeling that we've done according to the rules. And our experience in the past has shown that to be true. Those model results do hold. So we're confident of them." *Tr. Day 3/Afternoon Session*, at p. 47-48.

In addition, the assertion that the Subcommittee's determination "impermissibly shifts the burden to abutting property owners" is incorrect. *Motion* at ¶84. The SEC rules require the Applicant to complete post-construction compliance testing. Site 301.18(e). Based on the conservative modeling assumptions employed, the Applicant believes it is highly unlikely that the Project will exceed the maximum sound levels. The Subcommittee considered the use of post construction modeling and felt "comfortable with what Mr. O'Neal did." *Deliberations Tr. Day 2 Morning Session*, at p. 104. In part, this comfort was predicated on the completion of post-construction monitoring. *Id.*

The assertions made in the Motion that NRO will reduce the Project's production capabilities was raised during the course of the hearings and evaluated by the Subcommittee. *See Tr. Day 1/Morning Session*, at p. 99-100 (Dr. Ward asked whether curtailment for noise was factored into the financial analysis and Mr. Weitzner responded "[w]e're very confident that we will comfortably meet the SEC requirements for noise." Mr. Weitzner further noted that with respect to curtailments for shadow flicker, "we have a very good idea of what that's going to cost, and it is absolutely irrelevant, in terms of the revenue of the Project."); *see also Tr. Day 1/Afternoon Session*, at p. 92-93 (Attorney Iacopino specifically asked whether curtailments for noise and shadow flicker were calculated into net capacity factor. Mr. Weitzner responded that "[t]here is no curtailment for sound because we're very confident we will comfortably meet the regulations.")

The discussion of the use of NRO is completely distinct from the proposed mitigation in the Antrim I docket. As Mr. O'Neal noted during the hearing, NRO is an option "that everybody has." *Tr. Day 4/Afternoon Session*, at p. 38. Contrary to the characterization of the NRO mode by the Intervenor's as a "half-baked proposal," *Motion* at ¶88, this feature is in fact readily

available for the equipment being proposed by the Applicant. The use of NRO would be considered a standard procedure the Applicant would choose to take, should such action be necessary to meet the requirements under the SEC Rules. In Antrim I, Counsel for the Public proposed modifications to the project's design. The Intervenor's comparison in this case is not accurate and fails to properly take into account and characterize the type of "mitigation" being proposed. Unlike in Antrim I, there is testimony in the record demonstrating that the Applicant has considered the use of this technology and concluded that this type of mitigation poses no risk to the financial viability of the Project. *Tr. Day 1/Morning Session*, at p. 99-100. Further, it requires no alteration to the design or any other aspect of the Project.

The assertion that the sound report prepared by the Applicant's expert is "unreliable and not entitled to any weight" is not supported by the record in this case. Further, the same criticisms raised in the Motion were fully vetted during the course of the proceedings. There is no dispute that Mr. O'Neal employed the ISO 9613-2 standard as required by the SEC Rules in his evaluation of the Project. The Intervenors have raised concern with the ISO 9613-2 standard – such as the fact that the model assumes a facility operating on flat ground or that certain atmospheric conditions are not accounted for – however, these concerns with the model do not create a basis for rehearing. The model requires certain limited inputs to be determined and applied by the expert. The specification of how these inputs should be determined are not expressly defined by the SEC Rules and instead are left to professional judgment. Mr. O'Neal used several inputs and assumptions that he felt, in his professional judgement, were conservative. The Subcommittee properly found, based on the evidence presented, that the sound report was prepared in accordance with professional standards and with the administrative

rules. *Decision and Order Granting Application for Certificate of Site and Facility*,, at p. 153 (March 17, 2017).

There is lengthy testimony in the record with regard to the applicability of the +/- 3 dBA accuracy factor. Mr. O'Neal testified to the fact that this accuracy factor is not a "buffer" that needs to be applied and in any event does not apply to this Project as the conditions related to the accuracy factor as set out in the standard are not present here. S*ee Robert O'Neal Supplemental Testimony,* App. Exh. 13, p. 3-4. While Mr. James did provide testimony that this factor should have been applied, Mr. James also testified that he would have "thrown in another 5 dBA" but could not point to any place in the SEC rules or ISO standard that requires or even talks about including this additional assumption. *Tr. Day 11/Morning Session*, at p. 32-33. Instead, Mr. James appears to base his assessment on his own extreme and unscientific views, which have no basis in any standard, agreeing that "some would say 10 or 15 as an adder." *Tr. Day 11/Morning Session*, at p. 70. Mr. James methodology does not appear to be aimed at evaluating worst case, but rather would result in an unrealistic, unjustifiable evaluation. Moreover, Mr. O'Neal has noted that post-construction monitoring has demonstrated, for example at the Stetson Mountain I project, that the methodology employed by Epsilon in this docket, using the same assumptions, yields accurate results. The additional +/- 3 dBA results in over-predicted noise levels. S*ee Robert O'Neal Supplemental Testimony,* App. Exh. 13, p. 5. The Subcommittee heard the same evidence reiterated in the Motion and chose to give each piece of testimony the weight it felt it was due. The Intervenors' disagreement with that decision does not in and of itself provide any basis for rehearing.

Throughout the proceeding, several parties cross-examined Mr. O'Neal regarding his use of a 0.5 ground attenuation factor or G-factor. The Motion again rehashes these same arguments

without providing any new evidence that was not presented to, and considered by the Subcommittee during the hearing. The NARUC report noted in the Motion as well as testimony provided by Mr. James were all presented and considered. Mr. O'Neal, based on his professional judgment and substantial experience, chose to use a conservative assumption in using a G-factor of 0.5, which reflects an assumption that the ground surface within the project area is partly reflective and partly porous. S*ee Robert O'Neal Supplemental Testimony,* App. Exh. 13, p. 6-7. The Subcommittee reached its conclusion based on a careful review of the full record and ultimately agreed with Mr. O'Neal that "the G factor of .5 seemed to be reasonable." *Deliberations Day 2/Morning Session*, at p. 98-99. The Subcommittee discussed the testimony provided in opposition to Mr. O'Neal's use of a G-factor of 0.5, but ultimately concluded that this professional decision made sense given the circumstances in this docket.

The Motion fails to satisfy the statutory requirements for rehearing. The Intervenors simply re-state their prior arguments without pointing the Subcommittee to any information indicating that good cause exists for rehearing. The Motion does not identify any error of fact, reasoning or law. Rather, the Motion simply identifies disagreement with the conclusion reached by the Subcommittee.

2. *Shadow Flicker*

The Subcommittee considered a thorough and complete record with respect to shadow flicker and concluded, subject to certain conditions,[5] that the shadow flicker associated with the Project will not produce an unreasonable adverse effect on public health and safety. Notwithstanding the Subcommittee's exhaustive evaluation of this issue, the Intervenors reiterate

[5] The Subcommittee required the Applicant, on a semi-annual basis, to submit to the SEC and the Town a copy of the report generated from the SCADA System that shows the amount of shadow flicker experienced at specified locations within one mile. *Decision and Order Granting Application for Certificate of Site and Facility*, at p. 162-63 (March 17, 2017).

the same argument raised multiple times in testimony, post-hearing briefs, and at the adjudicative hearings – that the Applicant should have assessed shadow flicker beyond one mile. *Motion* at ¶102. Evaluating shadow flicker beyond one mile is simply not required under the SEC Rules. Moreover, this issue was thoroughly addressed by Mr. O'Neal during his testimony. *Tr. Day 4/Afternoon Session*, at p. 12-15. Mr. O'Neal testified that, in his professional opinion, if the SEC wanted an assessment of shadow flicker beyond one mile, it would have been indicated in the Rules. *Tr. Day 4/Afternoon Session*, at p. 15. In addition, it his highly unlikely, as the Motion suggests (*Motion* at ¶102), that shadow flicker will exceed the modeled values at any receptor as the modeling is based on a "bare earth scenario…So it's just a possibility that these locations could experience that. It doesn't mean they will." *Tr. Day 4/Afternoon Session*, at p. 13. Mr. O'Neal testified that in his experience he has not "seen [flicker] out to a mile before. It's diffuse enough at that point, you don't recognize it." *Tr. Day 3/Afternoon Session*, at p. 50.

The Motion illustrates a lack of understanding as to how shadow flicker modeling is completed and what the results actually mean. As described in Mr. O'Neal's supplemental testimony, the model essentially maps "line of sight between a receptor and the turbine/sun" under bare earth conditions. *Robert O'Neal Supplemental Testimony,* App. Exh. 13, p. 16-17. It does not mean that actual shadow flicker will occur, but rather the conditions are present, i.e. a sight line, to allow for the potential for shadow flicker. Increasing the distance beyond a mile, will result in potential changes in the hours of shadow flicker to locations located within a mile, not because in fact additional shadow flicker will occur, as the Motion suggests, but because of this "artifact" of the model. *Robert O'Neal Supplemental Testimony,* App. Exh. 13, p. 17. Testimony relating to this issue was provided and considered by the Subcommittee in reaching its conclusions regarding shadow flicker. *Tr. Day 4/Afternoon Session*, at p. 8-14.

The SEC Rules require 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." Site 301.14(f)(2)(b) (emphasis added). The Applicant has provided substantial testimony establishing that during operation of the facility, the shadow flicker requirement will not be exceeded due to the use of a shadow flicker control technology. The Subcommittee heard significant cross-examination on this issue and thoroughly reviewed this during deliberations. *Deliberation Tr. Day 2 Afternoon Session*, at p. 8-18; *Deliberation Tr. Day 3 Afternoon Session*, at p. 40-57. To the extent issues were raised during the proceeding, which are now reiterated in the Motion, relating to the efficacy of the shadow control technology, the Subcommittee's condition requiring the Applicant to provide a report with the SCADA data effectively eliminates this concern. In addition, as stated above, the effect of this control technology on the financial viability of the Project was raised during the course of deliberations and addressed by Mr. Weitzner.

The Intervenors had a full and complete opportunity to make their case. The positions articulated in the Motion have already been presented to the Subcommittee for their consideration. The Subcommittee is entitled to evaluate the evidence presented and give it the weight it feels is appropriate. The Intervenor's disagreement with the Subcommittee's conclusions does not provide sufficient grounds to grant a rehearing.

3. *Ice Throw*

The Subcommittee considered an extensive record related to ice throw. The Intervenors do not identify any errors of fact or reasoning of law that resulted in an unlawful or unjust decision. Rather, the Intervenors again simply disagree with the conclusions the Subcommittee

drew based on its assessment of the totality of the record. This does not satisfy the standard to grant a motion for rehearing.

The "self-serving assertions" and "off-the-cuff remarks" noted in the Motion were provided by experts in the field and individuals with extensive experience constructing and operating wind turbines. *Motion* at ¶107, ¶110. Mr. Stovall is employed by DNV GL, which has been recognized as the world's leading technical authority in wind power generation for the past three decades. *Darrel Stovall Pre-Filed Testimony*, App. Ex. 2, p. 2. Mr. Stovall testified to the fact that "the maximum ice throw distance is 250 meters, plus or minus." *Tr. Day 2/Morning Session*, at p. 144. Mr. Stovall further testified that this was "somewhat of an industry-accepted number." *Id.* Mr. Stovall further noted that there are approximately 67,000 turbines that are located in conditions where icing may occur and there have been no reported or documented injuries. The Subcommittee also received testimony from intervenors on this issue. The Subcommittee has discretion to weigh the evidence provided and give it the weight it feels is appropriate. To the extent the Intervenors disagree with the Subcommittee's reliance on Mr. Stovall's expert opinion, that does not create a basis for rehearing.

The Intervenors further rely on the Bredesen Report, Abutters Exhibit 52 (see *Motion* at ¶109); however, the Subcommittee heard extensive testimony about this report specifically. *Tr. Day 13/Evening Session*, at p. 5-10 (Attorney Richardson pointed out that based on this report "at 175 meters, [ice throw] would be once every 10,000 years."); *see also Deliberations Tr. Day 2 Afternoon Session*, at p. 72 (Director Rose noting "I recall a conversation with Ms. Linowes. The likelihood of having an ice throw even equal 650 feet in the winter heavy conditions was once every thousand years." Further noting, "the system and the technology is in place that – and the backup systems are in place…the risk is very minimal.") The fact that the Subcommittee

did not reach the same conclusion as the Intervenors in connection with this report does create a basis to grant rehearing.

4. *Decommissioning*

The Intervenor's argument that the Subcommittee misapplied its rules as they relate to decommissioning is simply an attempt to again pursue arguments that were already raised and addressed during the hearing. *Motion* at ¶112. Several parties, including Counsel for the Public in her closing brief, providing the Subcommittee with testimony regarding the treatment of on-site, inert, concrete rubble. Mr. Kenworthy testified that the rules do not require benign, concrete rubble to be removed and notes that once it is processed and used for fill, there will be no infrastructure remaining at the site, which is consistent with the rules. *Tr. Day 2/Morning Session*, at p. 63-64. Mr. Cavanaugh provided additional testimony that his company has been "disposing concrete on all of our projects, whether the state projects here in New Hampshire, wind projects that we built that's inert material that's just standard practice in construction." *Tr. Day 2/Afternoon Session*, at p. 17. The Subcommittee noted the "considerable back and forth" on this issue during deliberations. *Deliberations Day 2 Afternoon Session*, at p. 112. After considering the evidence provided and applying the Rules, the Subcommittee determined that reuse of the material as fill was not inconsistent with the Rules and will not cause an unreasonable adverse effect on human health and safety. *Decision and Order Granting Application for Certificate of Site and Facility*, at p. 176 (March 17, 2017).

C. Natural Environment

The Intervenors' assert that the Subcommittee's determination that the Project will not have an unreasonable adverse effect on the natural environment is unjust and unreasonable. *Motion* at ¶115. The Subcommittee heard several days of testimony both from the Applicant's

experts and from intervening parties associated with the Project's potential effect on the natural environment. The Subcommittee considered this thorough and complete record in reaching its ultimate conclusion that there would be no unreasonable adverse effect. The arguments raised in the Motion are the same arguments the Intervenors raised during the course of the proceedings and no new information has been provided which the Subcommittee failed to consider.

The Motion reiterates the same inaccurate argument raised during the course of the proceeding – that the Applicant's evaluation of impacts to large mammals was somehow deficient. *Motion* at ¶115; *see Tr. Day 2/Afternoon Session*, at p. 95. In fact, the Applicant did prepare a wildlife habitat assessment, which was discussed during the adjudicative hearing. *Tr. Day 2 Afternoon Session*, at p. 153. Additionally, the Subcommittee heard substantial testimony evidencing the fact that there will be no significant impact to bears or other large mammals. *Tr. Day 2/Afternoon Session*, at p. 116-119. As the Applicant's experts testified, consistent with standard practice, after consulting with the agencies, the Applicant completed all the studies the State and federal agencies requested with respect to potential effects on wildlife and habitat. *Tr. Day 2/Afternoon Session*, p. 95 ("We followed the guidance of the agencies on what surveys they're interested in."); *see also Tr. Day 2/Afternoon Session*, p. 146-47. In addition, contrary to the assertion that the Subcommittee did not consider potential effects on large mammals, the deliberation transcripts illustrate that the Subcommittee did discuss impacts on mammals. *See Deliberation Tr. Day 2 Morning Session*, at p. 30; *Deliberation Tr. Day 2 Morning Session*, at p. 70 (Commissioner Rose noting "I think there will be impacts as a result of the road in particular, but there was, as it pertained to mammals, there was no concerns.")

The Subcommittee was provided with substantial evidence on the issues raised in the Motion relating to natural environment – including the testimony by Mr. Jones and the Audubon

Society noted in the Motion. The Subcommittee is free to weigh the testimony provided as it deems appropriate in reaching its final decision. The Subcommittee received sufficient testimony from the Applicant to demonstrate that the Applicant's process in its review of wildlife species within the Project area was consistent with standard practice, and complete. To the extent the Intervenors raise concerns that the Applicant did not provide evidence relating to the Project's potential impacts on bears, this is inconsistent with the transcribed record, which includes substantial testimony from the Applicant's experts regarding the minimal effect of the project on mammals including bears, bobcats, and moose. *Tr. Day 2/Afternoon Session*, at p. 96, 116, 146. In addition to the evaluation of large mammals, the Subcommittee also received significant testimony on the issues associated with the boulder formations on the ridge. This issue was discussed at length during deliberations and the Subcommittee made a determination, after a thorough review of the record, that the condition language imposed was sufficient to address any concerns raised. *Deliberation Tr. Day 2 Morning Session*, at p. 65-68; *Deliberation Tr. Day 3 Afternoon Session*, at p. 25-27; *Decision and Order Granting Application for Certificate of Site and Facility*, at p. 143 (March 17, 2017).

D. Orderly Development

The Intervenors assert that the Subcommittee's determination with respect to orderly regional development was "predicated upon erroneous considerations of municipal land use regulations." *Motion* at ¶121. The Subcommittee received substantial testimony from the local community, including direct testimony from the Town of Antrim Selectmen, and a former member of the Lempster Board of Selectmen. In addition, many of the Intervenors are residents of the town of Antrim. The Subcommittee also received a letter from the Town of Deering expressing concern with the Project. *Deliberation Tr. Day 3 Morning Session*, at p. 43-44.

While the Subcommittee has discretion as to how much weight to give testimony received, all of these views were considered – in addition to the Subcommittee's consideration of numerous public comments. *Deliberations Tr. Day 3 Morning Session*, at p. 45-47.

The assertion that the Subcommittee failed to consider the Antrim Zoning Ordinance does not reflect an understanding of the SEC process. *Motion* at ¶123. As an initial matter, the SEC process preempts local authority. RSA 162-H:1. Despite this preemption, the Subcommittee did hear testimony on the issue of local regulation. *Tr. Day 6 Afternoon Session*, at p. 154 (Mr. Kenworthy noted "you typically don't see something like major industrial development listed as a principal permitted use. So if you're asking me if large scale wind projects like Antrim Wind is a principal permitted use in the Rural Conservation District, no, it is not. However, it's not required to be in order for this project to be consistent with the orderly development of the region.") In addition, the Subcommittee acknowledged during deliberations that such a use, under local regulations, is not permitted. *Deliberation Tr. Day 3 Morning Session*, at p. 15-16.

The Intervenors further assert that the Subcommittee failed to adequately consider proposed zoning articles. *Motion* at ¶124. The Subcommittee heard lengthy testimony and received extensive pre-filed testimony, both from Mr. Kenworthy, Mr. Levesque, and the Antrim Board of Selectmen, on the issue of the town votes that took place relating to wind projects in the rural conservation district. *Tr. Day 6 Afternoon Session*, at p. 155-156; *Tr. Day 7/Morning Session*, at p. 26-32; *Tr. Day 7/Morning Session*, at p. 133-135; *Tr. Day 9 Morning Session*, at p. 32-35. The Intervenors have not provided any information that was not already presented to the Subcommittee during the proceedings and evaluated by the Subcommittee during deliberations. *Deliberation Tr. Day 3 Morning Session*, at p. 16-17. In that same discussion, the Subcommittee

also acknowledges, and did not "ignore," as asserted in the Motion, (*Motion* at ¶125) the fact that portions of the Master Plan speak to preservation of open space. Unlike the Intervenors, however, the Subcommittee concluded that the conservation efforts associated with the Project promoted this goal and were not contrary to its purpose.

The Motion also incorrectly notes that the easements will not go into effect until decommissioning. *Motion* at ¶125. Rather, the Town of Antrim will enjoy the benefit of this conservation within 180 days of commencement of commercial operation of the Project. *Tr. Day 7/Morning Session*, at p. 21. In addition, the Subcommittee received testimony from Mr. Kenworthy and Mr. Levesque specifically addressing the impact of the Project on surrounding communities and the ConVal School District. *Tr. Day 11 Afternoon Session*, at p. 41-44, 141-144, 153, 155-157. All of the information included in the Motion regarding views of local municipalities was provided during the hearing and thoroughly considered by the Subcommittee in reaching its conclusion. The Intervenors have failed to establish sufficient basis for rehearing.

Finally, the Subcommittee deliberated at length on the issue of potential impacts to property values and thoroughly considered options for implementing a property value assurance program. The fact that ultimately the Subcommittee chose not to adopt such a program does not present an error of fact or law and does not provide sufficient basis to grant rehearing. There is no need to reopen the record or grant rehearing on this point since the Subcommittee has already fully considered the issues presented.

The Subcommittee acknowledged that they received testimony contrary to the testimony provided by Mr. Magnusson from several intervenors. *Decision and Order Granting Application for Certificate of Site and Facility*, at p. 86 (March 17, 2017). In the context of orderly regional development, property value is just one consideration. The Subcommittee's decision reflects

their conclusion that even assuming there are some impacts to property values, these limited impacts will not result in "unreasonable adverse effect on the orderly development of the entire region." *Decision and Order Granting Application for Certificate of Site and Facility*, at p. 86 (March 17, 2017).

The assertion that the Subcommittee's decision with regard to the property value guarantee was unlawful has no basis. *Motion* at ¶128. The SEC Rules in no way require the Subcommittee to develop a guarantee program. In fact, such a program has never been implemented by the SEC.[6] Further, while the Subcommittee ruled that the McCann report was not relevant to the proceeding and therefore could not be considered, the Subcommittee did consider the letter some of the Intervenors submitted to the Antrim Board of Selectmen requesting a guarantee. *Tr. Day 7/Afternoon Session*, at p. 104-105. In addition, the Subcommittee considered the testimony given by Justin Lindholm, also noted in the Motion. *Deliberation Tr. Day 3 Afternoon Session*, at p. 103. The record in this docket reflects the fact that the Subcommittee did not dismiss the concept of the property value guarantee, but rather gave it significant consideration. *Deliberation Tr. Day 2 Afternoon Session*, at p. 155-171; *Deliberation Tr. Day 3 Afternoon Session*, at p. 67-142. The Intervenors had the opportunity to introduce relevant evidence into the record relating to property value guarantee, and to some extent, did provide such evidence. This evidence was thoroughly considered by the Subcommittee in reaching its conclusion. The Intervenors have not satisfied the standard sufficient to grant a motion for rehearing on this issue or any other issue presented.

[6] *Deliberation Tr. Day 2 Afternoon Session*, at p. 166 (Counsel for the Committee noted that in no other docket has there been a property value guarantee, but in the Londonderry docket there was a buyout provision.)

V. Conclusion

Based on the foregoing, the Intervenors have not met the standard for a rehearing pursuant to RSA 541:3. The record in this docket is extensive and the Subcommittee's deliberations and final Order reflect an intense, thorough review. The Intervenors have failed to present any issue that the Subcommittee has overlooked or mistakenly conceived. Moreover, the Motion fails to articulate any new evidence that was not before the Subcommittee during the adjudicative hearings. The Motion merely asks that the Subcommittee reach a different conclusion on the same evidence and therefore it should be denied.

WHEREFORE, the Applicants respectfully request that the Subcommittee:

A. Deny the motion for rehearing; and

B. Grant such further relief as requested herein and as deemed appropriate.

Respectfully submitted,

McLANE MIDDLETON,
PROFESSIONAL ASSOCIATION

Dated: April 24, 2017

By: _____

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Certificate of Service

I hereby certify that on the 24th of April 2016, an original and one copy of the foregoing Objection to Motion for Rehearing were hand-delivered to the New Hampshire Site Evaluation Subcommittee and an electronic copy was served upon the SEC Distribution List.

Barry Needleman