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April 25, 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 Counsel for the Public's 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 Counsel for the Public's 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 COUNSEL FOR THE PUBLIC'S MOTION FOR REHEARING OR RECONSIDERATION

Antrim Wind Energy, LLC ("AWE" or the "Applicant") by and through its attorneys, McLane Middleton, Professional Association, respectfully submits this Objection to Counsel for the Public's Motion for Rehearing or Reconsideration (the "Motion"). The 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, 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 Subcommittee Completed a Thorough Review of the Record Regarding the Issue of Aesthetics and the Motion Fails to Identify Any Issue That Was Overlooked or Mistakenly Conceived by the Subcommittee.

Counsel for the Public asserts that the Committee's findings regarding aesthetics were unreasonable and unlawful and failed to comply with the SEC Rules. *Motion* at ¶3. Counsel for the Public has 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 necessary to grant rehearing.

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. Counsel for the Public relies solely on the conclusions in the final Decision to support her assertion that the Subcommittee's review was "cursory." *Motion* at ¶4. The deliberation transcripts in this docket, however, illustrate that the Subcommittee's deliberations were thorough and comprehensive, and, contrary to Counsel for the Public's assertion, took into consideration the specific criteria outlined in the newly-adopted SEC rules. *See* Site 301.14(a)(1)-(7). Counsel for the Public's characterization of the Subcommittee's deliberations, without any citation to the deliberation transcripts, 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, *Deliberations Day 1 Afternoon*, at p. 69-72 and 132-141.

A. Scenic Resource Assessment

Counsel for the Public fails to accurately characterize the Subcommittee's evaluation of the two private property locations included in Ms. Connelly's visual assessment. Counsel for the Public asserts that the Subcommittee made a determination that Gregg Lake and Black Pond should not be considered scenic resources because they are private property. *Motion* at ¶4. This is incorrect. The Subcommittee did not make a finding that Ms. Connelly's assessment of Gregg

Lake was improper, but rather her assessment of White Birch Point Historic District was improper. *Deliberation Tr. Day 1 Afternoon Session*, at p. 90-91 (Dr. Boisvert noting that the "[p]ublic does not have access to White Birch Point. They do have access to the lake.") Counsel for the Public's own expert admitted during the hearing that the public does not have access to the historic district.[1]

Due to Ms. Connelly's professional decision to produce a simulation for Gregg Lake from a private property location, White Birch Point, the Subcommittee determined it was necessary to "discount" Ms. Connelly's simulation of Gregg Lake. *Deliberation Tr. Day 1 Afternoon Session*, at p. 90. In contrast, Mr. Raphael provided a simulation for Gregg Lake from a public resource – Gregg Lake Beach, consistent with the Rule requirements, which the Committee also considered. *Deliberation Tr. Day 1 Afternoon Session*, at p. 90-92.

In addition, the Subcommittee did not take issue with Ms. Connelly's assessment of Black Pond as a scenic resource. In fact, LandWorks also performed an evaluation of Black Pond. *See LandWorks Visual Assessment*, at p. 60, 67, 69, 70, 71, and Exhibit 22 at p.7. Rather, the Subcommittee felt it was improper for Ms. Connelly to have prepared a visual simulation, which the members of her rating panel relied on to come up with their ratings regarding visual effect, from a private amphitheater that is not open to the public.[2]

In fact, the Subcommittee acknowledged during deliberations that both Gregg Lake and Black Pond are public resources. *Deliberation Tr. Day 1 Afternoon Session*, at p. 43 and 91

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[1] *Tr. Day 13/Morning Session*, p. 137; *see also Tr. Day 12/Morning Session*, p. 141 (Discussing Ms. Connelly's simulation from White Birch Point, Ms. Connelly was asked "why was it from a water view? Why didn't you do it from inside the historic district?" Ms. Connelly responded "I was not able to contact the property owners in a timely enough fashion to get access to the land." In response, Ms. Connelly was asked, "In other words, you didn't have a legal right of access…is that right?" To which Ms. Connelly responded, "Correct.")

[2] *Tr. Day 12/Morning Session*, p. 149-50 (Ms. Connelly first agreed with the statement made by Mr. Cleland earlier in the proceeding that the summer camp is private property. Ms. Connelly was then asked "If I go set up my beach chair by the amphitheater, doesn't somebody who owns that property have a right to come and tell me to leave?" Ms. Connelly responded "If you're there without permission, yes."

(noting "as to Black Pond…that does have a public boat launch…so you can go out there without paying a fee" and that the "Public does not have access to White Birch Point. They do have access to the lake."). The Subcommittee deliberated extensively over whether the amphitheater, which is available to the public for a fee, should be considered a scenic resource and ultimately concluded it should not.[3] In contrast to the argument raised by Counsel for the Public, the Subcommittee's concern was not with the assessment of Black Pond and Gregg Lake, but the methodology and vantage points used to evaluate those resources.[4]

Counsel for the Public attempts to resurrect the same arguments regarding these two resources, which were already thoroughly evaluated by the Subcommittee, by asserting that the Rules require photosimulations from private property vantage points. However, the Rules do not require the same assessment of private properties as is required for scenic resources, which by definition are only publicly accessible resources. The development of photosimulations from private property locations is not something the Committee must consider in reaching its ultimate decision.[5] Additionally, this after-the-fact explanation does not accurately reflect the purpose for which these photosimulations were included in Ms. Connelly's report, which was clearly to represent public scenic resources.[6]

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[3] *Deliberation Tr. Day 1 Afternoon Session*, at p. 40-43 (Commissioner Scott noting "that's private property you have to pay somebody to get on. That's kind of the – one of the definitions of 'private property' in my opinion.")
[4] *Deliberation Tr. Day 2 Afternoon Session*, at p. 45 (Mr. Clifford noting that "[s]o while the pond's under consideration, I don't think we ought to be talking about viewpoints from private areas, even those for which you might pay a fee.").
[5] Under the SEC Rules for "Criteria Relative to Findings of Unreasonable Adverse Effect," the Subcommittee is required to consider seven criteria. These criteria are focused on the evaluation of impacts from scenic resources. Site 301.14 (a)(2), (3), (4), (6). None of the criteria require the Committee to evaluate the effects of the project from private property.
[6] Terraink's own Visual Impact Assessment asserts that "it is our practice to include views from the study area that are publicly accessible lands and/or public right-of-ways in order to offer the largest number of potential public viewers with in the study area from sensitive resources." *Terraink Visual Impact Assessment*, at p. 39. Further, White Birch Point is included as a "resource with potential visibility" further demonstrating that its inclusion was intended to depict a scenic resource and not a view from a private property. *Terraink Visual Impact Assessment*, at p. 55.

In addition, the Subcommittee did not "outright dismiss" the resources identified as Counsel for the Public suggests. *Motion*, at ¶4. In fact, despite its status as a private resource, the record illustrates that the Subcommittee did consider the visual simulation taken from White Birch Point.[7]

B. Nature and Duration of Use

Counsel for the Public asserts that the Subcommittee improperly considered the nature and duration of use by characterizing activities as "transient." *Motion* at ¶5. Counsel for the Public does not reference the deliberations at all to support this assertion and relies solely on the language in the final Decision. In fact, the Subcommittee extensively considered the types of uses by the public and did not dismiss so-called transient uses, as suggested in the Motion. *Motion* at ¶5.[8] Dr. Boisvert further noted that the Subcommittee should consider whether individuals would go to a resource and "be very disappointed, and maybe [they] don't go back at all." *Deliberation Tr. Day 2 Afternoon Session*, at p. 49. Given the Subcommittee's extensive review of all of the scenic resources identified, it is unclear what findings Counsel for the Public believes the Subcommittee failed to make.

C. Scope and Scale Assessment

Counsel for the Public's characterization of the Subcommittee's review and conclusions regarding scope and scale do not accurately reflect the deliberations in this docket. Counsel for the Public begins by asserting that the Subcommittee did not directly address the scope and scale

[7] *Deliberation Tr. Day 1 Afternoon*, at p. 90 (Director Forbes comparing the two visual simulations taken of Gregg Lake notes "when I look at the view from Birch Pond – I mean White Birch Point is so different, I find it striking." Commissioner Scott then clarified "when you say White Birch Point, you're looking at the Terraink picture.").

[8] While Director Forbes initially noted the "transient nature of an individual enjoyment of any of these resources is transient," he further noted that "because of the nature of these resources, it can be year-round. I think we should look at it in the context of duration that is continual. *Deliberation Tr. Day 2 Afternoon Session*, at p. 42-43. Director Forbes, and other members of the Subcommittee, even went so far as to say "I would not agree with the characterization of a 'transient' duration on these, or temporary impact." *Deliberation Tr. Day 2 Afternoon Session*, at p. 43.

of the change in the landscape visible from affected scenic resources. *Motion* at ¶6. However, as Counsel for the Public then goes on to note, the Subcommittee went through each photosimulation one at a time and evaluated whether the change was dominant or prominent, which directly relates to the issue of scope and scale. Counsel for the Public asserts that at five of the resources, the Subcommittee "found issues related to 'dominance' and/or 'prominence." *Motion* at ¶6. Counsel for the Public misses the real issue: the Subcommittee's goal in reviewing each of the photosimulations was to reach a conclusion as to whether the impacts to any scenic resource would be *unreasonably adverse*. Counsel for the Public's assessment that there were "issues" related to dominance and prominence fails to draw a distinction between an impact to a resource as opposed to an unreasonable adverse effect. The Subcommittee's assessment of each of these resources was much more comprehensive and nuanced than the summary provided by Counsel for the Public.[9] The Subcommittee closely examined each simulation while considering all of the factors set out in the SEC Rules in order to evaluate the change in the landscape from those scenic resources.

Before going through each of the photosimulations, the Subcommittee spent significant time discussing other aspects of the region and the resources, as noted above. Taking into consideration all of these factors, the Subcommittee then reviewed both the existing condition photographs and the photosimulations for prominence and dominance in order to reach an ultimate conclusion regarding whether the effect was unreasonably adverse. In so doing they also necessarily evaluated the scope and scale of the change in the landscape visible from the

[9] For example, in reviewing the simulation from Bald Mountain, Ms. Weathersby noted that she saw "the turbines as being a prominent feature in the landscape but not a dominate feature in the landscape…But I don't think it makes it rise to the level of being unreasonable." *Deliberation Tr. Day 1 Afternoon Session*, at p. 81-82. Commissioner Rose expressed a similar view in evaluating the simulation of Gregg Lake noting "the turbines are more prominent in this photo and more dominant than in previous photos. I'm not sure that they rise to the level of undue." *Deliberation Tr. Day 1 Afternoon Session*, at p.94.

affected scenic resources precisely as the Rules require. Counsel for the Public mistakenly relies on the Committee's determination in Antrim I as a comparison to the present docket. However, in Antrim I, the Committee did not have the same defined criteria for evaluation. The Subcommittee's review in this docket reflects a methodical evaluation of each of the criteria required and then an ultimate conclusion based on all of these individual considerations. Just because some members of the Subcommittee may have considered the turbines to be dominant or prominent in a particular photosimulation, does not mean that the totality of considerations rise to the level of an unreasonable adverse effect. In fact, to the contrary. After considering all of the elements required under the Rules and the facts presented, the Subcommittee found that there were no unreasonable adverse effects. This consideration of various requirements is reflected in the deliberations and consistent with the procedure defined in the Rules.

D. Nighttime Lighting

Counsel for the Public again raises the argument that nighttime lighting was not adequately considered by the Subcommittee and that the Applicant's expert failed to assess nighttime lighting. *Motion* at ¶7. This issue was thoroughly evaluated by the Subcommittee and, to the extent there was any issue with the use of the radar activated system, the Subcommittee included a condition requiring the installation of the 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."). During the hearing, 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. 57-58. As noted during the hearing, however, this is incorrect: Mr. Raphael did evaluate project

lighting.[10] Ms. Von Mertens also raised nearly an identical argument asserting 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 Assessment*, at p. 37.

Counsel for the Public's own 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). The Subcommittee 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.

E. Offsite Conservation Land as Mitigation

Counsel for the Public further asserts that the Subcommittee was "bound by the SEC's decision in Antrim I as to the use of off-site conservation land as mitigation." *Motion* at ¶8. The Subcommittee has heard substantial testimony on this topic and Counsel for the Public raised this issue during the hearing and in post hearing briefing. *Tr. Day 6/Afternoon Session*, at p. 145-148 (Mr. Kenworthy reading the 2012 Decision and noting that "[m]y read of this language is it applies specifically to this case. The 2015 docket is not the same as the 2012 docket."). In addition, Counsel for the Public's expert, Ms. Connelly, submitted pre-filed testimony on the use

[10] *Tr. Day 5/Morning Session*, at p. 59 (Attorney Needleman objecting to a question from Audubon Society alleging a failure to comply with the rules regarding assessment of lighting and noting that "there is a portion in the VIA entitled Project Lighting." Mr. Raphael went on to explain the section noting "I think we addressed the lighting and then we represented the fact that it was expected that the radar assisted lighting system would be employed and that the intent has been to do so all along, and, therefore, that was incorporated into our approach.")

of conservation land as mitigation for aesthetic impact and provided testimony at the final hearing relating to this issue. *Tr. Day 12/Morning Session*, at p. 41.

The Subcommittee expressly addressed this point 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 Motion does not contain any new evidence or information the Subcommittee failed to consider or overlooked. Counsel for the Public's disagreement with the Subcommittee's decision on this matter does not satisfy the criteria necessary to grant a motion for rehearing.

Counsel for the Public's vague argument that the Subcommittee impermissibly permitted the Applicant to submit a visual impact study that was not consistent with the rules is unsupported by the record. While Counsel for the Public does not cite any specific examples, this issue was thoroughly reviewed by the Subcommittee and addressed. Similar claims were raised in a *Joint Motion for Rehearing* filed with the Committee on April 14, 2017, critiquing Mr. Raphael's Visual Assessment. The Applicant filed an Objection to that Motion for Rehearing on April 24, 2017 and herein incorporates by reference the arguments made in connection with the issue raised by Counsel for the Public regarding the Applicant's visual assessment.

Similarly, Counsel for the Public asserts that the Subcommittee "made inconsistent and arbitrary evidentiary rulings that prevented Counsel for the Public's aesthetic expert from rebutting AWE's expert's critique of her report." *Motion* at ¶9. This same argument was raised previously by Counsel for the Public, as noted in the Motion, and thoroughly considered and rejected in the *Order Denying Motion to Reconsider and Re-Open the Record* (December 2,

2016). In addition, this same argument was raised in the *Joint Motion for Rehearing* and the Applicant herein incorporates by reference the response to this argument included in the Applicant's Objection.

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 (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. Counsel for the Public further asserts that the Subcommittee should have considered the views of Jean Vissering in reaching its conclusion. Ms. Vissering was not a witness who filed testimony and was not subject to cross examination in this docket. Nevertheless, the Subcommittee did in fact give some consideration to Ms. Vissering's views.[11]

The record in this docket illustrates that the Subcommittee performed a thorough review of all the information presented. In contrast to Counsel for the Public's assertion, the Subcommittee did not dismiss any of the reports, testimony, or opinions provided. *Motion* at ¶10. The Subcommittee is entitled to evaluate the evidence presented and give it the weight it feels is appropriate. To the extent Counsel for the Public disagrees with the Subcommittee's assessment of the evidence presented, that does not create sufficient basis for rehearing.

[11] *Deliberation Tr. Day 1 Morning Session*, at p. 18 (Interestingly, noting that "it was even suggested by Jean Vissering that some mitigation – conservation land as mitigation might be reasonable."); *Deliberation Tr. Day 1 Afternoon Session*, at p. 61-62 (referring to a table in the Terraink Visual Impact Assessment, which included findings from Raphael, Connelly, and Vissering.); *Deliberation Tr. Day 1 Afternoon Session*, at p. 103-104; *Deliberation Tr. Day 1 Afternoon Session*, at p. 136 (Noting that "Ms. Vissering said 9 should be removed, not shortened. So there's obviously some large differences.").

IV. The Motion Fails to Identify Any Issue That Was Overlooked or Mistakenly Conceived by the Subcommittee Regarding the Applicability of Res Judicata and Collateral Estoppel.

As noted by Counsel for the Public, the applicability of the doctrines of collateral estoppel and res judicata have been raised several times in this docket and the Subcommittee has thoroughly evaluated them. None of the arguments presented in the Motion provide sufficient basis to grant a motion for rehearing.

A. Res Judicata

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 Memorandum, which contained an argument that the doctrine of res judicata should apply in this case. The Applicant filed its Post Hearing Memorandum 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.

Counsel for the Public states that the Subcommittee improperly applied the applicable law by failing to make an independent finding as to how the changes to the project relate specifically to aesthetic impacts. *Motion* at ¶14. The applicable case law does not require such an assessment.[12] Counsel for the Public's effort to draw a distinction between material change to the entire application versus to impacts on aesthetics, *Motion* at ¶17, is irrelevant. There is no requirement under the applicable law that an administrative body must make a determination that, as a preliminary matter, the material changes made will materially change the impacts on certain criteria. The question for the Subcommittee is whether the application is "materially different." It would be backwards to require the Subcommittee to effectively make a final determination regarding the ultimate impact on aesthetics in order to decide whether or not they should take up a new application.

The Subcommittee heard substantial testimony regarding the changes made to the Application. It was noted several times throughout the proceeding that many of the changes were made in direct response to concerns raised by the Committee in the prior docket.[13] This satisfies the threshold requirement established in *Morgenstern* that the new Application "allegedly addressed [the] concerns." *Morgenstern v. Town of Rye*, 147 N.H. 558, 565 (2002).

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[12] The procedural fact pattern in *Morgenstern* is nearly identical to the present case. In *Morgenstern*, an application for a variance was denied primarily due to concerns the structure would impact wetlands. The Court notes that the ZBA decision did not suggest that the ZBA would never grant a variance for the lot. *Morgenstern v. Town of Rye*, 147 N.H. 558, 566 (2002). In response, the plaintiff submitted a new application "in an effort to meet the town's concerns." *Id.* The Court in *Morgenstern* did not require the ZBA or the lower court to determine, as a preliminary matter, if in fact the new proposal would have no effect on wetlands. Rather, the critical consideration was that the plaintiff submitted a new application that "allegedly addressed these concerns." *Id.* at 565.

[13] *Tr. Day 7/Morning Session*, at p. 120; *Deliberation Tr. Day 1 Afternoon Session*, at p. 134-135 ("Ms. Vissering suggested certain mitigation measures. And by and large, this Application seems to have incorporated those.").

The Subcommittee already considered the effect of the Antrim I decision on the present docket at length. None of the arguments offered by Counsel for the Public are new. The Subcommittee carefully evaluated whether or not the Antrim I decision effectively served as an invitation to file a new application and the Subcommittee concluded that it did.[14] Regardless of this conclusion, and contrary to the assertion made by Counsel for the Public (*Motion* at ¶21), the Subcommittee noted that "even absent the invitation to file a subsequent application, I think that the changes are so numerous that you can't help but find that there has been a change…eliminating the collateral estoppel and res judicata effects." *Deliberation Tr. Day 1 Morning Session*, at p. 16. The fact that Counsel for the Public again disagrees with the conclusion reached by the Subcommittee regarding the applicability of res judicata does not result in an unjust or unlawful decision. Counsel for the Public's arguments were rejected by the Subcommittee after careful review and the current Motion simply serves as a reiteration of effectively the same claims.

In sum, the critical fact for purposes of applying the doctrine of res judicata is whether the same law applies. Counsel for the Public does not deny that the statute and the SEC Rules have changed since the 2012 docket. Therefore, the Motion does not provide sufficient basis to grant rehearing.

B. Collateral Estoppel

The critical issue that Counsel for the Public ignores when raising collateral estoppel, or claim preclusion, (*Motion* at ¶22) is that in order for the doctrine 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, this Application

[14] *Deliberation Tr. Day 1 Morning Session*, at p. 15, 24 ("I do think I agree with Dr. Boisvert and Mr. Forbes that the prior docket really did invite submission of the new application, calling it 'materially different.'").

is fundamentally new and consequently, the essential predicate for claim preclusion is absent. All of the essential findings are not identical, which, in turn eliminates any collateral estoppel argument.

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. The fact that Counsel for the Public disagrees with the Subcommittee's determination that this is a new Project (*Motion* at ¶26) does not change the fact that the Subcommittee was presented with significant pre-filed testimony, direct testimony, and additional memoranda addressing this exact issue.

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. 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.[15] While Counsel for the Public suggests that the appropriate remedy would have been for the Applicant to file an appeal of the earlier decision, it is clear that this would not have resolved the issue because significant changes needed to be made to the Project design and overall proposal, not just an increase in conservation land, as noted in the Motion (*Motion* at

[15] The New Hampshire Supreme Court held in *Brandt Dev. Co. v. City of Somersworth*, 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." 162 N.H. 553, 560 (2011). While the ultimate outcome may not change, the New Hampshire Supreme Court's holding in *Brandt* suggests, at a minimum, that changes in the law require a reevaluation of an application. Based on the SEC's adoption of new rules alone, the current Application before the Subcommittee must be reviewed de novo.

¶23). A new application was necessary and the Committee invited such an application. *Deliberation Tr. Day 1 Morning Session*, at p. 23-24.

Counsel for the Public further asserts that a review of the language from the prior order does not support a finding that the decision was case-specific. *Motion* at ¶25. This issue was addressed by the Subcommittee during deliberations. Quoting the same language cited by Counsel for the Public, 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.* This interpretation of the decision is consistent with other SEC orders that have held that the Committee is not bound by any previous decision. Additionally, the Subcommittee further noted that the other key phrase was "suitably mitigate the impact." Ms. Weathersby explained that "when the impact changes, because of reduced turbines, etcetera, that will change it, and also just subsequent cases that the conservation easement as mitigation doesn't necessarily—isn't necessarily barred forever." *Deliberation Tr. Day 1 Morning Session*, at p. 20-21. Again, Counsel for the Public has failed to take into consideration the Subcommittee's broader decision that this is an entirely new project. The mitigation of potential impacts is only one aspect of the overall Project.

V. The Subcommittee Properly Applied its Rules with Respect to Decommissioning and Public Health and Safety and the Motion Fails to Identify Any Issue That Was Overlooked or Mistakenly Conceived by the Subcommittee.

A. Decommissioning

Counsel for the Public reiterates her earlier argument, raised both during the hearings and in her post-hearing memorandum, that the Subcommittee's determination that the Applicant's

decommissioning plan complied with the SEC Rules was unreasonable and unlawful. *Motion* at ¶28. This same argument regarding the treatment of inert, concrete rubble was also raised in Counsel for the Public's post-hearing memorandum.

Mr. Kenworthy testified that the rules do not require benign, concrete rubble to be removed and noted 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).

Counsel for the Public alleges that the Subcommittee decision fails to comply with SEC Rules as well as the DES Solid Waste rules. *Motion* at ¶31. However, Director Forbes, the DES representative on the Committee, noted that "[i]t's fairly common practice to pulverize and leave concrete in a place like that without a permit. *We do not require that, DES.*" *Deliberation Tr. Day 2 Afternoon Session*, at p. 114 (emphasis added). Commissioner Rose then separately referred to the DES Best Management Practices document introduced during the hearing. *Deliberation Tr. Day 2 Afternoon Session*, at p. 115. The Subcommittee's decision was based not only on the DES document, but also on the expertise of Director Forbes. Counsel for the

Public's disagreement with this determination does not in and of itself result in an unreasonable or unlawful decision and does not provide a basis for rehearing.

B. Public Health and Safety

As a preliminary matter, the law cited by Counsel for the Public is inapplicable in this context.[16] In *Barnes* the fact pattern involves a go-kart participation waiver, which is clearly distinct from the situation presented here between a willing property owner and the Applicant. Even if the case were applicable, the New Hampshire Supreme Court in fact held that the exculpatory contract was permissible. 128 N.H. 102, 108 (1986). Further, the Court noted that "parties may bargain for various levels of risk and benefit as they see fit." *Id.* at 106. Moreover, the applicable law for purposes of the SEC decision is RSA 162-H and the SEC Rules. The SEC was required to make findings consistent with the statute and the SEC Rules, which they did.

Counsel for the Public asserts that the Subcommittee's waiver of the noise and shadow flicker requirements for participating landowners was unreasonable and unlawful. *Motion* at ¶34. 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.[17] 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*, p. 129. In response, Mr. Kenworthy

[16] *Motion* at ¶34-35 (Relying on *Barnes v. N.H. Karting Assn.*, 128 N.H. 102 (1986) to assert that exculpatory contracts in New Hampshire are generally not favored and therefore the agreements negotiated in this case should similarly be considered against public policy.)

[17] *See Tr. Day 2/Morning Session*, at p. 103-105; *see also Tr. Day 4/Morning Session*, p. 130-131; *see als Tr. Day 4/Afternoon Session* (noting that "even for the participating landowners they are below the 40 nighttime limit of the SEC.").

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, as asserted by Counsel for the Public. *Motion* at ¶38. 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, which would be 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*, at p. 168-69; *see also Deliberations Tr. Day 3 Afternoon*, 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."

VI. The Subcommittee was Properly Constituted and the Motion Fails to Identify a Mistake of Law or Fact Sufficient to Support Rehearing.

Counsel for the Public joins the Intervenor Group in their argument that the Subcommittee was not authorized to adjudicate the case because it was statutory required to consist of seven members. *Motion* at ¶40. This argument confuses 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.

The Applicant has provided a detailed response to this argument in its Objection to the Joint Motion for Rehearing filed on April 24, 2017. The Applicant herein incorporates by references the arguments previously asserted. Further, to the extent Counsel for the Public asserts that she was "not aware that the public member was on maternity leave until the close of the proceedings," this argument is irrelevant. *Motion* at ¶41. Assuming this is true, Counsel for the Public cannot claim that she was unaware that only six members were present at the first day of hearings and every day thereafter. While Counsel for the Public 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 her from asking for one, or asking whether Ms. Whitaker was available to participate. This was never done.

VII. Conclusion

Based on the foregoing, Counsel for the Public has 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. Counsel for the Public 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 25, 2017

By: _____

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Certificate of Service

I hereby certify that on the 25th of April 2017, 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