THE STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

Docket No. 2015-02

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

JOINT MOTION TO REOPEN THE RECORD

NOW COME Janice Longgood, Bruce and Barbara Berwick, and Mark and Brenda Schaefer on behalf of the Abutting Landowners Group, Richard and Loranne Block, Annie Law, Robert Cleland, Jill Fish, and Kenneth Henninger on behalf of the Non-Abutting Landowners Group, Mary Allen on behalf of the Levesque-Allen Group, Geoffrey Jones on behalf of the Stoddard Conservation Commission, and Lisa Linowes on behalf of the Windaction Group, (collectively "the Opposing Intervenors") and hereby move this Honorable Subcommittee of the Site Evaluation Committee to reopen the record to allow for the submission and consideration of relevant evidence. In support thereof the Opposing Intervenors state as follows:

I. FACTUAL AND PROCEDURAL BACKGROUND

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

2. On April 25, 2013, the Committee denied the 2012 Application in a 71 page decision, following 11 days of hearings on the merits and 3 days of deliberations, wherein it that the proposed project would have an adverse aesthetic impact upon the area, including

"significant qualitative impacts upon Willard Pond, Bald Mountain, Goodhue Hill, and Gregg Lake." See Antrim I, Decision and Order Denying Application for Certificate of Site and Facility at *50 (issued April 25, 2013) (hereinafter "Antrim I Decision").

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

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

5. The Project also proposes a mitigation plan, a portion of which involves the deeding of 100+/- acres of conservation land owned by Antrim Limited Partnership, as reflected in a June 27, 2013 Conservation Easement Letter of Intent between the Antrim Board of Selectmen, the Applicant, and Charles S. Bean (hereinafter "the Bean Easement"). See Appd'x. 10 to Application at *5.

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

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

8. As part of that decision, the Subcommittee made frequent note of the difference between the 2011 application and the present application, particularly the Applicant's stated intent to deed an additional 100 acres of conservation land as part of its mitigation package.

9. For the reasons stated below, the Subcommittee should reopen the record because subsequent events have arisen which call the feasibility and viability of the Applicant's mitigation package into question, specifically, the Bean Easement.

II. STANDARD FOR REOPENING THE RECORD

10. Pursuant to Rule Site 202.27, "[a] party may request by written motion that the record in any proceeding be re-opened to receive relevant, material and non-duplicative testimony, evidence or argument." The record shall be reopened to accept the offered testimony evidence or argument, "[i]f the presiding officer determines that additional testimony, evidence or argument is necessary for a full consideration of the issues presented in the proceeding." N.H. CODE OF ADMIN. R. Site 202.27(b).

III. ARGUMENT

11. The Subcommittee should reopen the record because events have occurred subsequent to the hearing on the merits and deliberations in this matter, which impact the feasibility and viability of the Applicant's mitigation plan.

12. Here, three pieces of evidence came into existence after the adjudicatory hearing and after the deliberations in this matter. The first is a decision of the Antrim Conservation Commission in which it stated, in a 3-0 vote, that the Antrim Conservation Commission would

not support the Town's acquisition of the Bean Easement. See Kessler, Abby, Antrim Conservation Commission rejects role in wind project, MONADNOCK LEDGER-TRANSCRIPT (February 2, 2017), attached hereto as Exhibit A. The second is that the Town of Antrim cannot find any organization that is willing to assume the management of the Bean Easement as it is currently proposed. See id. The third is the vote of the Antrim Town Meeting from March 16, 2017, during which the people of Antrim voted against a warrant article stating the following:

> To see if the Town will vote to authorize the Antrim Board of Selectmen to acquire a conservation easement on 100+/- acres of land owned by Antrim Limited Partnership (Map-Lot 235-014) as provided in the June 27, 2013 Conservation Easement Letter of Intent between the Antrim Board of Selectmen, Antrim Wind Energy, LLC and Charles S. Bean, III; and to authorize the Board of Selectmen to amend, change or modify any terms, conditions, financial consideration between the proposed Grantee and Grantor as may be in the best interest of the Town in the sole opinion of the Board of Selectmen and to assign said Conservation Easement Agreement and/or the Conservation Letter of Intent to a qualified conservation organization as defined by Section 170 (h) of the United States Internal Revenue Code.
> The LOI provides that the Conservation Easement to be acquired at no cost to the Town and that Antrim Wind Energy, LLC will make a one-time payment of $10,000 for future monitoring.

Copies the Voting Results from the 2017 Antrim Town Meeting are attached hereto as Exhibit B.

13. These events create considerable doubt as to whether the Applicant will be capable of executing its mitigation plan. The Subcommittee found the Applicant's promise to grant an additional 100+/- acres of conservation land significant in its determinations on various issues, including, but not limited to, res judicata, collateral estoppel, and aesthetics. However, it now appears that these additional 100 +/- acres of conservation land may not come into fruition because the Town and the Applicant have been incapable of finding a third-party entity willing to manage the Bean Easement land, at the center of which are nine wind turbines.

14. Moreover, the people of the Town of Antrim have expressly denied the Board of Selectmen the authority to acquire the Bean Easement, again calling into question the viability of the Applicant's mitigation plan, and further casting doubt on the Applicant and the Board of Selectmen's prior statements that the Project has widespread support in the Town. Yet, again, another attempt by the Applicant and the Board of Selectmen to obtain the blessing of the people of Antrim has failed, and this Subcommittee should take note of that fact.

15. The Subcommittee should reopen the record to consider these recent developments, particularly with regard to the implications that these events will have on the Applicant's mitigation plan and the Subcommittee's determinations that relied, in whole or in part, upon the Applicant's promises to place an additional 100 acres in conservation easement.

WHEREFORE, the Opposing Intervenors respectfully request that the Subcommittee:

A. Grant this Joint Motion to Reopen the Record;

B. Reopen the Record in this matter to consider the above-stated facts and evidence; and

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

Dated this 2nd day of May, 2017.

Respectfully submitted,

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

By and through their attorneys,
DONAHUE, TUCKER & CIANDELLA, PLLC

/s/ **Eric A. Maher**

Eric A. Maher
NHBA # 21185
225 Water Street
Exeter, NH 03833
(603)778-0686
emaher@dtclawyers.com

Certificate of Service

I hereby certify that I served a copy of this Joint Motion to Reopen the Record pursuant to Site 202.07 to the current service list in this Docket this 2nd day of May, 2017.

/s/ Eric A. Maher
Eric A. Maher, Esq.

News (/News/)

Antrim Conservation Commission rejects role in wind project

By ABBY KESSLER
Monadnock Ledger-Transcript

Thursday, February 02, 2017

The Antrim Conservation Commission said it does not want to be included in a copy of a proposed warrant article regarding the acquisition of the Charles S. Bean property easement as part of the Antrim Wind Energy project agreement.

"The Antrim Conservation Commission does not want to be mentioned in the warrant article because we have always been against the town taking, or being a part, of this easement," ACC Chair Peter Beblowski said while reading a letter to select board members during a regular Monday night meeting.

Beblowski said the ACC declined involvement in the easement in a 3-0 vote during a meeting it held on Wednesday, Jan. 25. He said the chair did not vote as is policy unless the body is tied.

The 100-acre easement was included in the Antrim Wind Energy's package after the state's Site Evaluation Committee struck down its original 10-turbine proposal. When the company resubmitted an amended application that scaled the project back to nine turbines, it also included the Charles S. Bean conservation easement as a way to enhance the package.

The total amount of conservation acres associated with the project stands at around 800 acres, not including the Charles S. Bean property, which would push conservation acreage to about 900 acres as a result the project's construction.

The company has offered $10,000 for monitoring purposes to the party who acquires the 100-acre parcel. The land hasn't been clearly delineated yet although it's along the ridgeline on Tuttle Hill and surrounds turbines 3, 4, 5 and 6.

ACC's decision to not take part in the acquisition was the result of several factors, Beblowski said. He said the easement will be potentially difficult to administer over the life of the project and beyond.

"The conservation commission does not have the resources to administer this particular easement," Beblowski said.

Beblowski said while the town has the legal ability to accept the easement, the commission feels it's not appropriate to take it.

It's the ACC's belief that it should be AWE's responsibility to find a viable third party land trust to acquire and administer the easement.

"It's my view that this is going to be a very complex easement to monitor," Frank Gorga said during the meeting. "It's not a wood lot that they're promising not to do much on, it's got a commercial operation in the middle of it. So that's going to cost some money."

He asked if anyone had any idea how much the piece of property was going to cost to monitor annually. No one at the meeting knew what those costs looked like, but Beblowski estimated it would be at least $200 every year. Multiply that over the project's 50-year life and already the $10,000 offer has dried up, he said.

"Right there, you know it's not enough," Beblowski said, reminding the board that the easement continues in perpetuity.

Select board Chair John Robertson said various land trusts have been asked to take on the easement, but said that none have expressed interest in the plot.

"We are kind of in a hard place," Robertson said in an interview after the meeting.

Beblowski speculated that the reason no land trust is interested in the easement is due to the potential financial constraint the acquisition could pose.

"They would need to have a fairly substantial stewardship fund to monitor it at least during the life of the project," Beblowski said.

But Jeremy Wilson, executive director at Harris Center for Conservation Education, said the center has been approached about potentially acquiring the Charles S. Bean easement and said the center would be interested in taking on the easement if additional conservation land was associated with it.

He said the center isn't necessarily interested in obtaining more funds to monitor the piece of land in perpetuity, but would rather have more conservation acreage added to the package.

"We want to ensure that the easement really does provide conservation value," Wilson said.

He said the center is involved with other easements that came as a condition of the wind project's approval.

NH Audubon, which holds about 1,650 acres near Willard Pond, was contacted for this article but was not available for comment before Wednesday's deadline.

The group has long spoke out in opposition of AWE's project proposal.

"We feel strongly that this proposed project fails the 'proper siting' criteria," it said in a 2012 press release, meaning it's possible they would not be offered the easement.

The warrant article will now proceed to Town Meeting, where taxpayers will decide whether or not they should take responsibility for the easement or not. If the town votes to assume responsibility, it will have to figure out a way to proceed without ACC. If townspeople don't want to assume responsibility for the easement, it will be up to AWE to find a third party.

Abby Kessler can be reached at 924-7172, ext. 234 or akessler@ledgertranscript.com.

Additionally, pursuant to RSA 39:2-a and the vote of the Town at the March 1981 Annual Meeting, you are hereby notified to meet at the Antrim Memorial Town Gymnasium in said Town of Antrim on Thursday evening the Sixteenth (16th) day of March 2017 at 7:00 o'clock in the evening to act upon the following:

Article 3. To see if the town will vote to raise and appropriate the sum of twelve thousand dollars ($12,000.00) to support the Teen/Community Center. These funds will be contributed to the Grapevine Family & Community Resource Center - a nonprofit service organization - which is responsible for the operation of the Teen Center.
(Majority vote required) **Recommended by the Board of Selectmen (2/0)**

Article moved by John Robertson
Article seconded by Bob Edwards
John Robertson spoke on Article 3
PASSED

Article 4. To see if the Town will vote to authorize the Antrim Board of Selectmen to acquire a conservation easement on 100+/- acres of land owned by the Antrim Limited Partnership (Map-Lot 235-014) as provided in the June 27, 2013 Conservation Easement Letter of Intent between the Antrim Board of Selectmen, Antrim Wind Energy, LLC and Charles S. Bean, III; and to authorize the Board of Selectmen to amend, change or modify any terms, conditions, financial consideration between the proposed Grantee and Grantor as may be in the best interests of the Town in the sole opinion of the Board of Selectmen and to assign said Conservation Easement Agreement and /or the Conservation Letter of Intent to a qualified conservation organization as defined by Section 170 (h) of the United States Internal Revenue Code.
The LOI provides that the Conservation Easement to be acquired at no cost to the Town and that Antrim Wind Energy, LLC will make a one-time payment of $10,000 for future monitoring.

Article moved by Mike Genest
Article seconded by John Robertson
Mike Genest spoke on Article 4
DID NOT PASS

Article 5. To see if the Town will vote to discontinue the Capital Reserve Fund set up as the Open Space Reserve Fund created in 2008. Said funds, with accumulated interest to date of withdrawal are to be transferred to the Town's General Fund.
(Majority vote required) **Recommended by the Board of Selectmen (2/0)**

Article moved by Mike Genest
Article seconded by Bob Edwards
Mike Genest spoke on Article 5
PASSED

Article 6. To see if the Town will vote to discontinue the Capital Reserve Fund set up as the Revaluation Reserve Fund. Said funds, with accumulated interest to date of withdrawal are to be transferred to the Town's General Fund.

(Majority vote required) **Recommended by the Board of Selectmen (2/0)**

Article moved by Mike Genest
Article seconded by John Robertson
Mike Genest spoke on Article 6
PASSED

Article 7. To see if the Town will vote to raise and appropriate the sum of Two Hundred and Fifty Two thousand Three Hundred and Seventy Five dollars ($252,375.00) to be added to the present Capital Reserve Funds in the following manner:

Bridge	$212,375.00
Highway	$ 10,000.00
Recreational Fields	$ 15,000.00
Fire Department	$ 15,000.00

(Majority vote required) **Recommended by the Board of Selectmen (2/0)**

Article moved by John Robertson
Article seconded by Bob Edwards
John Robertson spoke on Article 7
PASSED

Article 8. Shall the town vote to raise and appropriate the sum of One Million Two Hundred Eight Thousand Four Hundred Fifty Nine Dollars ($1,208,459) for the purpose of municipally managing a NH Department of Transportation State Aid Bridge grant for the design engineering, permitting, and replacement of the West Street Bridge. Of the appropriation, up to Nine Hundred and Forty Two Thousand Five Hundred Ninety Two Dollars ($942,592) will come from NHDOT State Bridge Aid, Two Hundred Sixty Five Thousand Eight Hundred Sixty Eight ($265,868) will come from the existing Bridge Capital Reserve fund.
This is a non-lapsing Article and will not lapse until 12/31/2021 or until the project is completed whichever comes first.

(Majority vote required) **Recommended by the Board of Selectmen (2/0)**

Article moved by Mike Genest
Article seconded by John Robertson
Mike Genest will spoke on Article 8
PASSED

Article 9. To see if the town will vote to raise and appropriate the sum of One Hundred and Twelve Thousand Dollars ($112,000.00) for the replacement of the Grove Street Bridge and authorize the withdrawal of Forty One Thousand One Hundred Ninety Dollars ($41,190.00) from

the Bridge Capital Reserve Fund created for that purpose. The balance of Seventy Thousand Eight Hundred Ten Dollars ($70,810.00) is to come from Unassigned Fund Balance.
This is a non-lapsing Article and will not lapse until 12/31/2020 or until the project is completed whichever comes first.
(Majority vote required) **Recommended by the Board of Selectmen (2/0)**

Article moved by Bob Edwards
Article seconded by Mike Genest
Bob Edwards spoke on Article 9
PASSED

Article 10. To see if the town will vote to establish a Dam Capital Reserve Fund under the provisions of RSA 35:1 for maintenance and upkeep and to raise and appropriate the sum of Sixteen Thousand ($16,000.00) to be placed in this fund. Further, to name the Selectmen as agents to expend from said fund.
(Majority vote required) **Recommended by the Board of Selectmen (2/0)**

Article moved by John Robertson
Article seconded by Bob Edwards
John Robertson spoke on Article 10
PASSED

Article 11. To see if the town will vote to raise and appropriate the sum of Thirty Three Thousand Seven Hundred Fifty Dollars ($33,750) for the purpose of purchasing and outfitting a Police Cruiser and to authorize the sale or trade-in of the current 2011 Chevy Caprice that will be replaced and to apply those proceeds towards this purchase. This sum to come from unassigned fund balance and no amount to be raised by taxation.

(Majority vote required) **Recommended by the Board of Selectmen (2/0)**

Article moved by Bob Edwards
Article seconded by John Robertson
Bob Edwards spoke on Article 11
PASSED

Article 12. To see if the town will vote to raise and appropriate the sum of Twenty Seven Thousand Nine Hundred Four Dollars ($27,904.00) for the purpose of converting streetlights in Antrim to Light Emitting Diode (LED) lights. $10,900 will be reimbursed by Eversource as part of their Incentive program.
This is a non-lapsing Article and will not lapse until 12/31/2020 or until the project is completed whichever comes first.
(Majority vote required) **Recommended by the Board of Selectmen (2/0)**

Article moved by Mike Genest
Article seconded by Bob Edwards

Mike Genest spoke on Article 12
PASSED

Article 13. . To see if the town will vote to raise and appropriate the sum of Forty Thousand Dollars ($40,000.00) for modernizing the Town Hall Elevator and authorize the withdrawal of Forty Thousand Dollars ($40,000.00) from the Town Building Capital Reserve Fund created for that purpose.
This is a non-lapsing Article and will not lapse until 12/31/2020 or until the project is completed whichever comes first.
(Majority vote required) **Recommended by the Board of Selectmen (2/0)**

Article moved by Bob Edwards
Article seconded by Mike Genest
Bob Edwards spoke on Article 13
PASSED

Article 14. To see if the Town will vote to raise and appropriate the sum of Four million, Ninety Five Thousand, Two hundred and Seventy Four dollars ($4,095,274) for general operating costs of the Town (this appropriation includes $469,250.00 for the Water & Sewer Departments as set forth in the town budget) This article does not include appropriations contained in special or individual articles addressed separately.
(Majority vote required) **Recommended by the Board of Selectmen (2/0)**

Article moved by Bob Edwards
Article seconded by John Robertson
Bob/Mike/John spoke on Article 14
PASSED

Article 15. Shall the Town of Antrim vote to adopt the provisions of RSA 72:28-b, All Veterans' Tax Credit? If adopted, the credit will be available to any resident, or the spouse or surviving spouse of any resident, who (1) served not less than 90 days on active service in the armed forces of the United States and was honorably discharged or an officer honorably separated from services and is not eligible for or receiving a credit under RSA 72:28 or RSA 72:35. If adopted, the credit granted will be $500.00, the same amount as the standard or optional veterans' tax credit voted by the Town of Antrim under RSA 72:28.
(Majority vote required) **Recommended by the Board of Selectmen (2/0)**

Article moved by John Robertson
John Robertson spoke on Article 15
PASSED

Article 16. By Petition of 25 or more voters of Antrim, We, the registered voters of Antrim, New Hampshire proudly proclaim that We Stand With Standing Rock because:
The builders of the Dakota Access Pipeline (DAPL) on Standing Rock Dakota Sioux tribal land (Fort Laramie Treaties of 1851 and 1868) have desecrated ancestral burial grounds and

threatened the drinking water of the Dakota people and the drinking water of everyone downstream on the Missouri River.
Reminiscent of the brutality of Bull Connor against the 1960s civil rights movement, peaceful, unarmed, prayerful Water Protectors have been attacked with rubber bullets, dogs, mace, percussion grenades, and water cannon in below-freezing weather by highly-militarized police forces.
Therefore, we demand our state and federal elected officials stop disregarding the laws of our country, honor all First Nations treaties, and remember that water is life for all of us.

Dave Kirkpatrick, Ray Ledgerwood, & Rod Zwirner spoke on Article 16
PASSED

Article 17. To hear any reports of committees and act thereon.

No reports to be heard or acted upon

Article 18. To transact any other business that may legally come before this meeting.

Bob Edward wished to thank the Police, Fire, and Highway Departments to be recognized for their efforts.

THE STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

Docket No. 2015-02

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

JOINT RESPONSE TO ANTRIM WIND ENERGY, LLC'S OBJECTION TO OPPOSING INTERVENOR'S MOTION FOR REHEARING

NOW COME, Janice Longgood, Bruce and Barbara Berwick, and Mark and Brenda Schaefer on behalf of the Abutting Landowners Group, Richard and Loranne Block, Annie Law, Robert Cleland, Jill Fish, and Kenneth Henninger on behalf of the Non-Abutting Landowners Group, Mary Allen on behalf of the Levesque-Allen Group, Geoffrey Jones on behalf of the Stoddard Conservation Commission, and Lisa Linowes on behalf of the Windaction Group, (collectively "the Opposing Intervenors") and hereby file this Response to Antrim Wind Energy, LLC's Objection to the Opposing Intervenors' Motion for Rehearing. In support thereof the Opposing Intervenors state as follows:

I. FACTUAL AND PROCEDURAL BACKGROUND

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

2. On April 25, 2013, the Committee denied the 2012 Application in a 71 page decision, following 11 days of hearings on the merits and 3 days of deliberations, wherein it that the proposed project would have an adverse aesthetic impact upon the area, including

"significant qualitative impacts upon Willard Pond, Bald Mountain, Goodhue Hill, and Gregg Lake." See Antrim I, Decision and Order Denying Application for Certificate of Site and Facility at *50 (issued April 25, 2013) (hereinafter "Antrim I Decision").

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

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

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

6. On March 17, 2017, the Subcommittee granted the Applicant a Certificate of Site and Facility. See Re: Application of Antrim Wind Energy, LLC for a Certificate of Site and Facility, Docket No. 2015-02, Decision and Order Granting Application for Certificate of Site and Facility (dated March 17, 2017) (hereinafter "Antrim II Decision").

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

Wind Energy, LLC for a Certificate of Site and Facility, Docket No. 2015-02, Order Suspending Decision and Order Granting Certificate of Site and Facility with Conditions (dated April 3, 2017).

8. On April 14, 2017, the Opposing Intervenors filed a Joint Motion for Rehearing, and Counsel for the Public filed a Motion for Rehearing on April 17, 2017.

9. On April 24, 2017, the Applicant filed its Objection to the Opposing Intervenors' Motion for Rehearing, in which it contested the various arguments raised in the Opposing Intervenors' Motion for Rehearing.

10. While the Opposing Intervenors dispute all of the arguments raised by the Applicant in its Objection, the Opposing Intervenors wish to rebut certain arguments raised by the Applicant.

II. DISCUSSION

a. *Make-up of the Subcommittee*

11. The Opposing Intervenors wish to rebut two arguments raised by the Applicant with regard to the Opposing Intervenors' arguments that the Subcommittee acted contrary to RSA 162-H:4-a when proceeded in this matter without a second public members: a) that this argument was waived because it was not waived earlier; and b) that the case of Appeal of Keene State College Education Association, NHEA/NEA, 120 N.H. 32 (1980) permitted the Subcommittee to move forward without a second public member in this matter. See Applicant's Objection to Joint Motion for Rehearing at *7-12.

12. First, with regard to the Applicant's argument that this matter should have been raised earlier, as Counsel for the Public noted in its Motion for Rehearing, the absence of a

public member could not have been known until deliberations. See Motion of Counsel for the Public for Rehearing at *17. Indeed, up and until the close of deliberations, a public member could have reviewed the record and participated in deliberations with the other members of the Subcommittee. It was not until the close of deliberations that the absence of the second public member was realized and the claim of error could have been raised. For that reason, the Opposing Intervenors did not waive this argument.

13. Moreover, the requirement that all subcommittees of the Site Evaluation Committee have two public members is a measure to ensure that the general public's interests are represented on the Subcommittee and thereby protected. The Opposing Intervenors cannot waive a right that exists for the protection of the entire public, and, therefore, the Applicant's arguments regarding waiver lack merit.

14. Additionally, the Applicant's reliance upon Appeal of Keene is unpersuasive and should be rejected by this Subcommittee because the administrative body in that case, the PELRB, is subject to a different statutory and procedural regime than the SEC. The statute at issue in Appeal of Keene was RSA 273-A:5. See id. at 35. That statute provided that the PELRB shall consist of five members, two of which shall represent organized labor, two that represent management interest, and one to represent the public at large, with three members of the Board constituting a quorum. Id.

15. Unlike RSA chapter 162-H, there is no statutory authority for the creation of subcommittees under RSA 273-A, nor is there an analogous provision of RSA 273-A which requires the Chairman of the PELRB to seek to fill vacancies when a public member is absent. Compare RSA 162-H:3 with RSA chapter 273-A; see also Schiavi v. City of Rochester, 152

N.H. 487, 489-90 (2005) (use of the word "shall" in a statutory provision is a command). RSA 162-H:3 was enacted as part of a statutory overhaul of the SEC, a fundamental purpose of which was the protection of the public's interest in matters that can impact the public health, safety, and welfare in a fundamental manner. See RSA 162-H:1. Appeal of Keene, therefore, is distinguishable in this instance, and, contrary to the Applicant's assertiosn, the SEC had an obligation to fill the vacancy which existed on the Subcommittee due to Member Whitaker's unavailability.

16. Lastly, while a quorum of five members may be sufficient for a subcommittee to meet on a particular day, this should not in any way be construed as sanctioning the failure to fill a vacancy when a public member has not attended a single day of hearings or deliberations due to a major life event. It would be one thing for a public member to be absent from one day of proceedings or deliberations, but for a public member to be absent from all hearing days and deliberations (with good reason) and for that vacancy to remain unfilled throughout the proceedings, that is a violation of RSA 162-H:3 and is expressly contrary to intent of the Legislature, see RSA 162-H:1.

b. *Res Judicata and Collateral Estoppel*

17. The Applicant argued with respect to the Opposing Intervenors' res judicata and collateral estoppel arguments are that a) the application was substantially and materially different from the application presented in Antrim I; b) the amendment to RSA chapter 162-H precludes the application of res judicata and collateral estoppel; and c) res judicata was not sufficiently raised early in the proceedings and was, thus, waived. See Applicant's Objection to Joint Motion for Rehearing at *3-7.

18. The Applicant's claims that the present application is substantially and materially different from the application in Antrim I is without merit. While the applicant removed one turbine, reduced other turbines by approximately 3 feet and in one case by approximately 45 feet, and included more money and more conservation land in its mitigation package, these changes are not material such that the application of res judicata should be foreclosed. The SEC was clear in its 2011 decision:

> the dedication of lands to a conservation easement in this case would not suitably mitigate the impact. While additional conserved lands would be of value to wildlife and habitat, they would not mitigate the imposing visual impact that the Facility would have on valuable viewsheds.

See Antrim I Decision at *53 (April 25, 2013). It strains credibility that additional monetary compensation and a 10% increase in conservation land are material or sufficient to offset aesthetic impacts, when the SEC already stated that additional conservation lands would not mitigate the aesthetic impacts in Antrim I. Antrim I Decision at *53. The Applicant has not submitted an application materially different from that presented in Antrim I to preclude the application of res judicata or collateral estoppel in this instance.

19. Moreover, the amendments to RSA 162-H are not sufficient to preclude the application of res judicata or collateral estoppel because the change in the law is not such that it would have altered the SEC's analysis in Antrim I. As reflected in the SEC's decision in Antrim I, the analysis employed by the SEC followed the analysis that is now required by Rule Site 301.14(a). Compare Antrim I Decision at *48-55 with N.H. CODE OF ADMIN. R. Site 301.14(1); see also Monarch Life. Ins. Co. v. Ropes & Gray, 65 F.3d 973, 981 (1st. Cir. 1995) (noting that "changed circumstances will preclude the application of collateral estoppel only if they might have altered the decision the court made in the first proceeding") (emphasis added).

20. Contrary to the Applicant's assertions, the Opposing Intervenors did not waive res judicata or collateral estoppel because Counsel for the Public raised the issue of res judicata in Petitioner for Jurisdiction Over Renewable Energy Facility Proposed by Antrim Wind Energy, LLC, Docket No. 2014-05 (dated Sept. 29, 2015). Counsel for the Public was told that the record would need to be developed prior to the Subcommittee deciding such issue. See Petitioner for Jurisdiction Over Renewable Energy Facility Proposed by Antrim Wind Energy, LLC, Jurisdictional Decision and Order at *38 (decided Sept. 29, 105). Many of the Opposing Intervenors were parties to the jurisdictional docket and were aware of the SEC's position that res judicata would only be addressed after the record was developed. The Opposing Intervenors could not waive res judicata or collateral estoppel if they were under the reasonable impression that the SEC would not consider it until a later time.[1]

c. *Aesthetics*

21. The Applicant addressed three points in its Objection to the Opposing Intervenors' Motion for Rehearing to which the Opposing Intervenors wish to respond with regard to aesthetics. See Applicant's Objection to Joint Motion for Rehearing at *16-25.

22. The Applicant claims that Mr. Raphael relied upon viewshed maps based on blade and hub heights, with and without vegetation. See Applicant's Objection to Joint Motion for Rehearing at *16-18. While it is true that maps reflecting various scenarios appear in the appendices to Mr. Raphael's report, Mr. Raphael's report is clear that he only considered hub

[1] The Applicant is further incorrect that the Opposing Intervenors waited until the "latest possible moment" to raise res judicata and collateral estoppel. For example, the issue features prominently in the Richard and Loranne Block's Final Brief, not to mention the Post Hearing Memorandum of Counsel for the Public.

Notwithstanding, there is no provision in the law which precludes raising res judicata even after deliberations. See Tsiatsios v. Tsiatsios, 140 N.H. 173, 177 (1995)

heights when determining impacted scenic resources and percent of visibility. See Appd'x. 9a to Application at 10. Indeed, when discussing his hub height map, Mr. Raphael stated in his report that the map "represents the most reasonable approach to potential visibility" and further stating that "the number of turbines visible and percent of visibility represented in this analysis are taken from this viewshed map." Id. (emphasis added.) That Mr. Raphael testified in a manner completely contrary to his report, as suggested by the Applicant, is certainly a basis for this Subcommittee to question Mr. Raphael's credibility and the reliability of Mr. Raphael's overall methodology, and further supports granting rehearing on the issue of aesthetics. The Applicant, however, cannot credibly state that Mr. Raphael relied upon blade heights when determining impacted scenic resources.

23. With regard to photosimulations, the Applicant contends that Mr. Raphael's photosimulations complied with Site Rule 301.05(b)(7), citing to Mr. Raphael's own testimony that he believed that he conformed to the SEC's rules. See Applicant's Objection to Joint Motion for Rehearing at *21-22. Aside from the fact that Mr. Raphael's commentary on his own work is self-serving, Mr. Raphael is not responsible for interpreting and applying the SEC's rules, and, therefore, his commentary should have no weight on this matter. Moreover, the comments of members of the Subcommittee regarding Mr. Raphael's photosimulations suggest that the photos were not taken under "clear weather conditions" at times to provide "optimal clarity and contrast" and without objects in the foreground. See e.g. 12/7/16 PM Transcript at 82; 12/7/16 PM Transcript at 92; 12/7/16 PM Transcript at 80; 12/7/16 PM Transcript at 125-26. The photosimulations prepared by Mr. Raphael tainted the adjudicative process, and the

Subcommittee should grant hearing on the issue of aesthetics to properly consider compliant photosimulations.

24. Finally, with regard to the Applicant's reliance upon Mr. Raphael's statements in his report that the radar-assisted lighting system "will essentially eliminate the impacts of nighttime lighting on potential users of the Project area resources," see Applicant's Objection to Joint Motion for Rehearing at *22-25; see also Appd'x 9a of Application at 37, this evidence was insufficient to support the SEC's finding that the Project's lighting will not have unreasonable aesthetic impacts or adversely impact public health. The fact remains that Mr. Raphael's conclusory statements could not be vetted or tested by the Subcommittee or the parties. The Subcommittee had no evidence by which to scrutinize Mr. Raphael's assertion: there was no evidence as to what would trigger the radar assisted lighting, how often it would be triggered, or how often and for how long lights would be anticipated to be illuminated using this system. Without this scrutiny, the Subcommittee's findings lack an evidentiary basis and the Applicant did not carry its burden.[2]

d. *Shadow Flicker and Noise Mitigation*

25. The Applicant argues that the Subcommittee's decision was lawful and reasonable despite the Applicant supplying no evidence or information by which the parties or the Subcommittee could analyze, scrutinize, or vet the feasibility of Noise Reduction Operations ("NRO") or Siemens' shadow control protocol. Indeed, there is no discussion of NRO in Mr. O'Neal's Sound Level Assessment Reports or his pre-filed testimony. See Sound Level

[2] The Applicant suggests that the Opposing Intervenors should have produced evidence challenging Mr. Raphael's assertions. However, considering that only minimal details were disclosed regarding the radar-assisting lighting, it would have been impossible to scrutinize or challenge these assertions. The Applicant had the burden to demonstrate that the project would not have adverse impacts to public health or aesthetics, and the Applicant did not submit sufficient evidence with regard to radar-assisted lighting.

Assessment Report, prepared by Epsolon Assocs. (dated February 17, 2016); Prefiled Direct Testimony of Robert D. O'Neal. Mr. O'Neal only addresses Siemens' shadow control protocols in a general manner, providing no details or corroborating information regarding the protocols and what impacts those protocols may have. See Pre-filed Testimony of Robert O'Neal at 13-14.

26. The Applicant cites to Mr. Weitzner's testimony to support its claims that sufficient information was submitted such that the Subcommittee could reasonable and lawfully find that NRO and shadow control protocols would not impact the Project's financial capabilities or other factors relevant to the Subcommittee's determinations. See Applicant's Objection to Joint Motion for Rehearing at *27, *32. However, Mr. Weitzner's statements are self-serving and are, at best, conclusory. With regard to Shadow Flicker, Mr. Weitzner stated that he did "some analysis" and that the shadow control protocols would "have a very, very, very small effect on capacity factor" without any corroboration or data to support that statement. 9/13/16 AM Transcript at 99-100. This statement is wholly insufficient to allow the Subcommittee to reach any conclusion as to the potential operational and financial impacts associated with the shadow control protocols.[3] Mr. Weitzner's statements with regard to NRO are limited to "[w]e're very confident that we will comfortably meet the SEC requirements for noise." 9/13/16 AM Transcript at 100. This statement did not answer the question and, again, did not provide the Subcommittee with any information sufficient for the Subcommittee to properly analyze the

[3] Further, at the time when Mr, Weitzner made his claims, he was relying on Mr. O'Neal's 2015 shadow flicker report that identified 24 locations as experiencing shadow flicker in excess of 8 hours per year with a total cumulative impact of approximately 60 hours per year. In reality, many more hours of shadow flicker may be experienced that were not considered by Mr. Weitzner's statement. See Antrim II Decision at *164. The Committee took specific note of inaccuracies in the modeling due to a failure to account for various meteorological conditions. See Antrim II Decision at *164.

feasibility of these mitigation measures.[4] On the contrary, Mr. Weitzner's statements appear to suggest that no analysis was done under any scenario where NRO was used.

27. In Antrim I, the SEC acknowledged the impact mitigation measures could play on a Project's financial feasibility, and effectively precluded consideration of mitigation measures raised during the adjudicative hearing due to the need to study the impacts of those mitigation measures on the Project's financial projects. See Antrim I Decision at *54. The Applicant did not provide the requisite level of information for the Subcommittee to study the impacts of these mitigation measures, and the Subcommittee's decision to find no adverse public health and safety impacts based upon these un-vetted mitigation measures was unlawful and unreasonable.

e. *Ice Throw*

28. The Applicant dismisses the Opposing Intervenor's arguments regarding ice throw, citing the testimony of Mr. Stovall. While Mr. Stovall did testify to his understanding of the industry standard, the Opposing Intervenors remind this Subcommittee that Mr. Stovall expressly stated that he is "not an expert on ice throw." See 9/15/16 AM Transcript at 144. The Subcommittee should not give Mr. Stovall's uncorroborated testimony any weight and should reject the Applicant's arguments.

[4] This statement is also erroneous in light of Mr. O'Neal numerous methodological flaws, which drastically understate sound impacts to various properties. The Applicant claims that Mr. O'Neal exercised proper professional judgment in declining to make various adjustments to his analysis, notwithstanding the fact that many industry publications and studies (some of which Mr. O'Neal cites) state that such adjustments should have been done. Further, since the ISO 9613-2 standard for predicting noise is explicitly incorporated into the Committee's rule, the Applicant's argument that Mr. O'Neal's professional judgement takes precedence over the plain language of the standard is contrary to Site 301.18(c)(1). For example, Section 7.3.1 of the ISO 9613-2 standard clearly states that a ground factor other than 0.0 is not supported under the ISO 9613-2 unless the terrain is "approximately flat either horizontally or with a constant slope." The Project site is at elevation and will above surrounding residences.

III. CONCLUSION

29. The Applicant's arguments in its Objection to the Opposing Intervenors' Motion for Rehearing are unpersuasive. The Applicant has relied upon distinguishable cases, self-serving statements, and conclusory assertions, none of which withstand scrutiny. While the Opposing Intervenors' Motion for Rehearing sufficient addresses many of the arguments raised by the Applicant in its Objection, the discussion provided in this Brief Response is submitted to highlight just some of the inaccuracies and flaws in the Applicant's Objection.

30. The Subcommittee should grant the Opposing Intervenor's Motion for Rehearing.

WHEREFORE, the Opposing Intervenors respectfully request that the Subcommittee:

A. Grant this Motion for Rehearing;

B. Schedule this Matter for Rehearing;

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

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

Dated this 2nd day of May, 2017.

Respectfully submitted,

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

By and through their attorneys,

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Certificate of Service

I hereby certify that I served a copy of this Joint Motion for Rehearing pursuant to Site 202.07 to the current service list in this Docket this 2nd day of May, 2017.

/s/ Eric A. Maher
Eric A. Maher, Esq.