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May 4, 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 – Motion for Leave to Reply and Reply
to Joint Intervenor’s Objection to Motion to Lift Suspension**

Dear Ms. Monroe:

Please find enclosed for filing in the above-captioned matter, an original and one copy of Applicant’s Motion for Leave to Reply and Reply to Joint Intervenor’s Objection to the Motion to Lift Suspension.

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

Please contact me directly should you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Barry Needleman".

Barry Needleman

BN:rs3

Enclosure

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 MOTION FOR LEAVE TO REPLY
AND REPLY TO JOINT INTERVENORS OBJECTION TO MOTION TO LIFT
SUSPENSION**

Antrim Wind Energy, LLC (“AWE” or the “Applicant”) by and through its attorneys, McLane Middleton, Professional Association, respectfully requests leave to reply¹ to the April 26, 2017 Objection made by the Joint Intervenors to the Applicant’s Motion to Schedule Meeting for Further Consideration of Rehearing and Lift Suspension. As explained below, the Joint Intervenors fail to fully describe the basis for suspensions in prior dockets and incorrectly identify the purpose for suspension of a certificate pursuant to RSA 541:5.

I. BACKGROUND

1. 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 Meteorological Intervenor Group filed a Motion for Rehearing on March 25, 2017. The Presiding Officer issued an Order Suspending Decision and Order Granting Certificate of Site and Facility with Conditions on April 3, 2017.

2. On April 14, 2017 a Joint Motion for Rehearing of the Abutting Landowners Group, Non-Abutting Landowners Group, the Levesque-Allen Group, the Stoddard Conservation Commission, and the Windaction Group was filed. On April 17, 2017, Counsel for the Public

¹ The SEC Rules do not permit a party as of right to reply to an objection. In a separate docket, the Chairman addressed the procedure applicable when there is no right to reply, noting the appropriate practice is to file for leave to reply at the time the reply is filed. *Tr. Hearing on Pending Motions*, Docket No. 2015-06, at p. 319 (April 12, 2016).

also filed a Motion for Rehearing. The Applicant filed an Objection to the Meteorological Group's Motion for Rehearing on April 5, 2017, an Objection to the Joint Motion on April 24, 2017, and an Objection to Counsel for the Public's Motion on April 25, 2017.

3. RSA 541:5 requires that after a Motion for Rehearing is filed "the commission shall within ten days either grant or deny the same, or suspend the order or decision complained of pending further consideration." The pertinent SEC Rule generally tracks RSA 541:5. *See* Site 202.29(e).

4. On April 17, 2017 the Applicant filed a Motion to Schedule Meeting for Further Consideration of Rehearing and Lift Suspension.

II. DISCUSSION

5. There are two types of suspensions relative to energy facilities subject to the jurisdiction of the SEC under RSA Chapter 162-H; one is procedural in nature and the other is substantive. Pursuant to RSA 162-H:11 Judicial Review, the SEC may suspend an order or decision as a procedural device in accord with RSA 541:5 pending consideration of a motion for rehearing. Pursuant to RSA 162-H:12, the SEC may suspend a certificate as a substantive enforcement matter when a term or condition of a certificate is violated, after having given written notice and providing the opportunity for a hearing.

6. The Joint Intervenors conflate the two types of suspensions and fail to properly articulate the basis for the suspension of the certificate in these circumstances pursuant to RSA 541:5. The suspension pursuant to this statute is purely a procedural device that may be triggered in the event of a motion for rehearing, which occurred here. There is no substantive basis for suspending the Decision. Substantive suspension would require action by the

Subcommittee pursuant to RSA 162-H:12, in the event that AWE had violated a term or condition of the Certificate, which has not occurred here.

7. The Joint Intervenors rely on two prior SEC dockets² to support their assertion that the SEC has previously suspended certificates pending a hearing on motions for rehearing. The Applicant does not dispute this point. However, the Applicant notes that these two prior dockets support the Applicant's position that suspension pursuant to RSA 541:5 is employed purely for procedural reasons.

8. In both the Granite Wind and Groton Wind dockets, it is evident that the suspension of the respective certificates was predicated solely on the Committee's ability to schedule and convene a public meeting in order to consider the pending motions for rehearing.³ Upon review of the procedural record in both dockets, it appears no affirmative action was taken by the Committee to lift the suspensions and none was required. The suspensions satisfied a procedural requirement and once the SEC had considered the motions for rehearing, the suspensions no longer had any force or effect.

9. To further illustrate the procedural nature of the suspension, in other dockets, where the Committee has been able to convene within the 10-day time period required pursuant to RSA 541:5, no suspension was ordered.⁴ The assertion that the suspension in this docket or

² The Joint Intervenors further rely on the SEC's decision in Antrim Wind 1 to suspend the Order pending resolution of motions for rehearing. However, in that docket the Application for Certificate was denied. Therefore, the suspension of the Order did not create any hardship for the Applicant. Regardless, it is similarly clear from the Order to Suspend from Antrim Wind 1 that the suspension was again based solely on procedural grounds.

³ In Granite Reliable, in the same procedural order setting the date for the hearings on motion for rehearing, the Chairman also suspended the certificate "pending consideration of the pending motions for rehearing." *Procedural Order and Notice of Public Meeting*, Docket No. 2008-04, at p. 2 (September 11, 2009). Similarly, in Groton Wind, in the same procedural order setting the date for the hearings on motion for rehearing, the Chairman also suspended the certificate "pending consideration of the outstanding motions." *Procedural Order and Notice of Public Meeting*, Docket No. 2010-01, at p. 2 (June 24, 2011).

⁴ *Eversource – Merrimack Valley*, Docket No. 2015-05 (An intervenor filed a Motion for Rehearing on October 19, 2016 and on October 31, 2016 the Subcommittee met and deliberated on the Motion. The certificate was never suspending during the rehearing process.).

any other docket cited in the Objection was for anything other than to satisfy a procedural requirement is inconsistent with the procedural history and clear language of the statute.

10. The Joint Intervenors improperly imply that suspension “comports with the public interest.” *Objection* at ¶10. There is no language in the statute or the SEC Rules that supports the position that suspension pursuant to RSA 541:5 relates to the public interest in any way. The statute is clear that a suspension pursuant to RSA 541:5 is merely procedural. This conclusion is reinforced by *Appeal of Concord Natural Gas Corp*, 121 NH 685, 690 (1981) in which the Court concluded that the Public Utilities Commission’s failure to take action under 541:5 amounted to a “procedural irregularity.” Therefore, the Joint Intervenor’s public interest argument is misplaced.

11. Moreover, the argument that the suspension is similar to a stay of a municipal planning board decision, fails to adequately consider the statutory language and clear purpose of RSA 541:5. The language is intended to set out a procedure. It does not provide a merit-based or public policy-based foundation for suspension. The Objection fails to recognize that pursuant to RSA 541:18, an order of the commission may be suspended by a court “whenever, in the opinion of the court, justice may require such suspension.” This is not what the Subcommittee did in this case.

12. Similarly, RSA 162-H:12 permits the Committee to suspend a certificate “if the committee determines that the person has made a material misrepresentation in the application or...that the person has violated the provisions of this chapter.” Again, this is not the procedure the Subcommittee employed in this case. The Subcommittee’s *Order Suspending Decision and Order Granting Certificate of Site and Facility with Conditions* solely references and relies on RSA 541:5 as the basis for the suspension.

13. Regardless of how the Subcommittee rules on the motions for rehearing, the suspension should have no force and effect following the Committee's meeting on May 5, 2017.⁵ There is no other legitimate basis for the suspension remaining in place once the Subcommittee has had the opportunity to consider the motion for rehearing. If the Subcommittee subsequently believes that there is a basis for suspension on the merits, the Subcommittee must follow the procedure set out in RSA 162-H:12, giving written notice of its consideration of suspension and providing an opportunity for a hearing. However, pursuant to RSA 541:5, the basis for suspension on procedural grounds will no longer exist following the May 5, 2017 hearing.

14. Contrary to the assertion in the Objection, the Applicant does not need to provide an "argument for this Subcommittee to lift its Suspension." Rather, as recognized by the procedural nature of the statute relied on as the basis for the suspension, and the past practice of the Committee, the suspension arguably expires by operation of law/should be lifted at the time the Committee considers motions for rehearing.

WHEREFORE, the Applicant respectfully requests that the Site Evaluation Committee:

- A. Clarify that the suspension of the Applicant's Certificate has no force and effect following the Subcommittee's consideration of the motions for rehearing scheduled for May 5, 2017, or in the alternative, lift the suspension at that time; and
- B. Grant such further relief as is deemed just and appropriate.


⁵ In Granite Reliable, the Subcommittee granted one of the motions for rehearing. *Tr. Motions to Rehear*, at p. 36-37. Despite this outcome, the suspension was implicitly lifted following the Subcommittee's hearing on the motions for rehearing.

Respectfully submitted,

McLANE MIDDLETON,
PROFESSIONAL ASSOCIATION

Dated: May 4, 2017

By: _____


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Certificate of Service

I hereby certify that on the 4th of May 2017, an original and one copy of the foregoing Motion was hand-delivered to the New Hampshire Site Evaluation Committee and an electronic copy was served upon the SEC Distribution List for this docket.



Barry Needleman