The Law Offices of
Kelly E. Dowd, PLLC
P.O. Box 188
29 Center Street, Suite 12
Keene NH 03431
(603) 499-8261
(603) 499-8262 (FAX)



July 6, 2017

Eileen Fox, Clerk of Court
New Hampshire Supreme Court
One Charles Doe Drive
Concord, New Hampshire 03301

Re: Antrim Wind Opponents Group v. New Hampshire Site Evaluation Committee
New Hampshire Supreme Court No. 2017-0313
Petition of Fred Ward, Co-Appellant.

Dear Clerk Fox:

Enclosed please find an Original and Seven copies of Co-Appellant's Objection to Motion of Antrim Wind Energy for Summary Affirmance of the Order of the Site Evaluation Committee Dated March 17, 2017 and Co-Appellant's Memorandum of Law in Support of Appellants' and Co-Appellant's Objection to Motion of Antrim Wind Energy for Summary Affirmance of the Order of the Site Evaluation Committee Dated March 17, 2017.

I hereby certify that copies of this letter and the enclosed documents have this day been forwarded to all counsel and parties of record, and the NH Site Evaluation Committee.

Sincerely,

Kelly E. Dowd, Esq.

KED/jel
Enclosure
cc: Eric A. Maher, Esq.
Barry Needleman, Esq.
Bill Glahn, Esq.
Rebecca Walkley, Esq.
NH Site Evaluation Committeee

# THE STATE OF NEW HAMPSHIRE

SUPREME COURT

NO. 2017-0313

APPEAL OF ANTRIM WIND OPPONENTS GROUP, APPELLANT

and

FRED WARD, CO-APPELLANT

v.

NEW HAMPSHIRE SITE EVALUATION COMMITTEE

**CO-APPELLANT'S OBJECTION TO MOTION OF ANTRIM WIND ENERGY FOR SUMMARY AFFIRMANCE OF THE ORDER OF THE SITE EVALUATION COMMITTEE DATED MARCH 17, 2017**

**NOW COMES** the Co-Appellant, Fred Ward, and hereby objects to the Motion of Antrim Wind Energy ("AWE") for Summary Affirmance of the Order of the Site Evaluation Committee dated March 17, 2017. In support thereof, the Co-Appellant states as follows:

1. This Court should deny AWE's Motion and should accept this appeal as it raises substantial issues of law and because the SEC Subcommittee's decision was unjust and unreasonable.
2. Co-Appellant's Memorandum of Law is submitted in support of this Objection.

**WHEREFORE**, the Co-Appellant respectfully requests that this Honorable Court:

A. Deny AWE's Motion;

B. Accept the Co-Appellant's Appeal from the Administrative Decision of the Site Evaluation Committee pursuant to NH RSA 541:6 and Supreme Court Rule 10;

C. Suspend the SEC's decision granting certificate of site and facility dated March 17, 2017; and

D. Grant such further relief as may be just and equitable.

Respectfully submitted,

Fred Ward

By his attorneys:

The Law Offices of Kelly E. Dowd, Esq., PLLC

Dated: July 6, 2017

By: _____

Kelly E. Dowd, Esq.
NH Bar ID # 14890
29 Center St., Suite 12
P.O. Box 188
Keene NH 03431
603-499-8261
kelly@kdowdlaw.com

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Motion was sent on July 6, 2017 via U.S. first-class mail, postage prepaid, to Eric A. Maher, Esq. at Donahue, Tucker, and Ciandella, PLLC, 16 Windsor Lane, Exeter, NH 03833 and Wilbur A. Glahn, III, at McLane Middleton, P.A., 900 Elm Street, P.O. Box 326, Manchester NH 03105.

_____

Kelly E. Dowd, Esq.

# THE STATE OF NEW HAMPSHIRE

SUPREME COURT

NO. 2017-0313

APPEAL OF ANTRIM WIND OPPONENTS GROUP, APPELLANT

and

FRED WARD, CO-APPELLANT

v.

NEW HAMPSHIRE SITE EVALUATION COMMITTEE

**CO-APPELLANT'S MEMORANDUM OF LAW IN SUPPORT OF APPELLANT'S AND CO-APPELLANT'S OBJECTION TO MOTION OF ANTRIM WIND ENERGY FOR SUMMARY AFFIRMANCE OF THE ORDER OF THE SITE EVALUATION COMMITTEE DATED MARCH 17, 2017**

**NOW COMES** the Co-Appellant, Fred Ward, and hereby submits this Memorandum of Law in support of the Appellants' and Co-Appellant's Objection to Motion of Antrim Wind Energy for Summary Affirmance of the Order of the Site Evaluation Committee dated March 17, 2017. In support thereof, the Co-Appellant states as follows:

The Appeals should be accepted because both the Appeal and the Co-Appeal raise substantial questions of law and because the decision of the SEC Subcommittee is unjust and unreasonable. In the first instance, the SEC Subcommittee was not properly constituted, and conducted its business in the *de facto* absence of a public member. Accordingly, the SEC Subcommittee lacked subject matter jurisdiction to adjudicate the dispute. Further, while the SEC Subcommittee is entitled to exercise discretion, and its decisions are prima facie reasonable, said discretion does not apply to ignoring the express requirements of the SEC's own administrative rules. In the Memorandum, the Co-Appellant does not intend to recapitulate the subject matter of the Co-Appellant's Appeal, but rather highlight some of the flagrant and clear instances whereby the SEC Subcommittee ran afoul of existing the statutory framework and administrative rules.

Within the framework of the administrative rules governing approval of a massive project such as AWE's unprecedented wind energy system, there are three main concerns to the public interest: i.) the level of noise generated by the facility, ii.) the level of shadow flicker both pre- and post-construction, and iii.) the visual impact of the project. In considering the reasonableness or unreasonableness of the SEC Subcommittee's Decision, it is primarily important to consider whether these three main concerns of the general public were met. The only conclusion possible is that they were not.

## I. SUBCOMMITTEE FAILED TO REQUIRE WORST CASE NOISE ASSESSMENT IN VIOLATION OF SEC SITE 301.18(c)(3).

SEC Site 301.18 (c) (3) requires that AWE determine "the worst case wind turbine sound". SEC Site 301.18(c)(1) requires the Applicant to utilize the standards of ISO 9613-2 1996-12-15, but Site 301.18(c)(4) requires adjustments for other model algorithm error. The ISO 9613-2 standard is predicated upon a wind turbine constructed on ground that is "approximately flat either horizontally or with a constant slope" and that are no more than thirty meters in height. See ISO 9613-2 1996-12-15 at § 9 (titled "Accuracy and limitations of the method"). The turbines in this instance are located on a prominent ridge that does not have a constant slope and exceed ninety meters in height. Notwithstanding, the Applicant did not make appropriate adjustments to its model to account for express limitations in the ISO 9613-2 standard. It is clear that the Applicant did not present the "worst case", nor did the Subcommittee require compliance with SEC Site 301.18.

The worst cases will only occur when the turbines are generating their maximum noise, and there is little or no absorption of the noise sent out to its neighbors. The Applicant failed to properly calculate the turbine noise levels under such circumstances. The Applicant further

assumed highly absorbing ground, when in fact, during winter in Antrim, the sight-line to the turbines will be almost completely unobstructed, and there will often be a highly reflective icy ground, both being the opposite of the highly absorbing ground assumed by AWE. Whatever the "worst case" might be, it is not determined by ignoring the acknowledged theoretical limitations of the model contrary to SEC Site 301.18(c)(4), nor in making rosy assumptions about ground absorption, when icy and reflective ground covering is a fact of life for many months of the year.

## II. SUBCOMMITTEE FAILED TO REQUIRE SHADOW FLICKER ASSEMENT IN VIOLATION OF SEC SITE 301.18(a)(2) AND SEC SITE 301.14 (f)(2).

SEC Site 301.18(a)(2) requires:

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

SEC Site 301.14(f)(2) defines unacceptable shadow flicker as "shadow flicker created by the applicant's *energy facility* during operations shall not occur more than 8 hours per year. . ." [Emphasis supplied.] The Applicant failed to produce a model of expected shadow flicker for the proposed *wind energy system*, looking only at individual turbines. The Applicant's model only considered cumulative effects if an individual turbine would result in more than 8 hours of shadow flicker. Further, the Applicant's model only examined the relationship between residences/turbine dyads within one mile of each other. In the event a particular dyad indicated more that 8 hours of shadow flicker (in violation of Site 301.14(f)(2)(b)) from that turbine, the Applicant's model took into account the aggregate impact of all turbines. However, this analysis neglected the cumulative effects of shadow flicker, e.g. a turbine creating 6 hours of shadow flicker and another turbine

creating 3 hours of shadow flicker successively would not be subject to analysis. Rather than analyze the shadow flicker from the "wind energy project", the Applicant looked only at shadow flicker from an individual wind energy turbine, and only looked at the aggregate if the individual turbine would result in a violation of Site 301.14(f)(2)(b). Leaving aside flawed assumptions in the Applicant's shadow flicker models, the model does not minimally meet the requirements of the administrative rules.

The Applicant additionally manipulated the proceedings in order to avoid public attention to the adequacy and effectiveness of its post-construction and mitigation measures. No such plans were introduced into the proceedings until the afternoon of the last day of the public hearing, on November 7, 2016, despite questions raised by Ward on September 29, 2016. Because the measures were introduced at the eleventh hour, there was no opportunity for public discussion of the measures (let alone study or comment), nor did the SEC Subcommittee deliberate with respect to their adequacy or appropriateness, notwithstanding the fact that the Applicant's model—albeit flawed—demonstrated shadow flicker levels exceeding the requirements of the administrative rules. While this Court may provide deference to an administrative body, it is unclear why that presumption is justified when that body has failed to assess or deliberate over the adequacy of mitigation measures which are intended to resolve a clear violation of the legal thresholds for a wind energy project.

## III. SUBCOMMITTEE FAILED TO APPLY SITE 301.05(b)(6)(f.) AND PROPERLY CONSIDER VISUAL IMPACT OF DEVELOPMENT

Site 301.05 requires both the Applicant to address, and the SEC Subcommittee to deliberate on visual impacts of the project. Specifically, Site 301.05 (b)(6)(f.) requires "a characterization of the potential visual impacts of the proposed facility, and of any visible plume that would emanate

from the proposed facility. . . the scale, elevation, and nature of the proposed facility relative to the surrounding topography and existing structures". The opportunity to consider the impacts of the project consistent with Site 301.05 (b)(6)(f.) was offered to the Subcommittee through the testimony of Fred Ward, and accompanying materials relating to the assessment, based on visual impact, of billboards. The value of a billboard is based on its visual impact, and its visual impact is affected by its size, elevation and aural condition. Likewise, the visual impact of an elevated and massive wind energy complex at high altitude spanning two miles and emitting sounds and lights, would be similarly significant, and not easily represented in a static picture. This testimony was ignored, and the Subcommittee relied on static and small pictures in making its deliberations, without considering the "scale, elevation and nature of the proposed facility relative to the surrounding topography".

## IV. SUBCOMMITTEE NOT PROPERLY CONSTITUTED BY STATUE

The SEC Subcommittee was improperly constituted and lacked subject matter jurisdiction to render its decision. Administrative agencies lack any inherent powers to exercise subject matter jurisdiction or otherwise adjudicate disputes. Administrative agencies "are granted only limited and special subject matter jurisdiction." In re Campaign for Ratepayer's Rights, 162 N.H. 245, 250 (2011). The composition of the Site Evaluation Committee ("SEC") is governed by RSA 162-H:3, which specifically pursuant to RSA 162-H:3 requires two members of the public be appointed to the committee. The statute further prescribes in RSA 162-H:3 XI.:

> If at any time a member must recuse himself or herself on a matter or is not otherwise available for good reason. . . [I]n the case of a public member, the chairperson shall appoint the alternate public member, or is such member is not available, the governor and council shall appoint a replacement upon petition of the chairperson. The replacement process under this paragraph shall also be applicable to subcommittee member under RSA 162-H:4-a.

Note that RSA 162-H:3 defines what is necessary for a properly constituted SEC Committee and SEC Subcommittee. It is uncontested that Member Whitaker of the SEC Subcommittee was not available for any public proceedings related to the application other than a public presentation on February 22, 2016, creating a *de facto* vacancy on the Subcommittee for 10 months duration, rendering the Committee improperly constituted.

Antrim Wind Energy misconstrues the question of whether the Subcommittee was properly constituted with the question of whether the Subcommittee possessed a quorum. In the first instance, there must be a properly constituted Subcommittee in order for the SEC to exercise subject matter jurisdiction. "'Committee' means the site evaluation committee established by this chapter." RSA 162-H:2 V. This legal question precedes, and supersedes, the question of whether there was a quorum. If the SEC Subcommittee was improperly constituted contrary to statute, then it lacked subject matter jurisdiction to adjudicate the application, regardless of whether it possessed a quorum.

Antrim Wind Energy cites the case of Appeal of Keene State College Educ. Ass'n. NHEA/NEA, 120 N.H. 32 (1980) which held that a quorum of the PELRB did not require the presence of the labor representatives at the time of the issuance of a decision or during rehearing. However, Appeal of Keene dealt with the absence of the labor representatives at the time the PELRB issued a decision, not the absence of labor representatives during the entire adjudication of the complaint. In this matter, it is not the case that the public representative absented herself from the issuance of the decision, she was unavailable due to a medical condition during the months of proceedings.

As a secondary matter, Antrim Wind Energy raises the point that the subject matter jurisdiction of the SEC Subcommittee was never directly raised during the proceedings, and is

therefore waived. "A party may challenge subject matter jurisdiction at any time during the proceeding, including on appeal, and may not waive subject matter jurisdiction." Gordon v. Town of Rye, 162 N.H. 144, 149 (2011); State v. Demesmin, 159 N.H. 595, 597 (2010)("Subject matter jurisdiction may be raised at any time in the proceedings, including on appeal, by the parties, or by the court *sua sponte.*"). The SEC Subcommittee was not properly constituted, and consequently lacked subject matter jurisdiction, and its decision is void *ab initio*.

In sum, the SEC Subcommittee was improperly constituted and lacked subject matter jurisdiction, and ignored the express requirements of the administrative regulations in approving Antrim Wind Energy's Application. The decision should be declared void *ab initio*. In terms of the three most important issues for the general public, noise, shadow flicker and visual impact, the SEC Subcommittee failed to follow and correctly apply its own administrative rules, and approved the facility with inadequate deliberation and inadequate data, threatening the public interest. For these reasons, the decision is manifestly unjust and unreasonable.

Respectfully submitted,

Fred Ward

By his attorneys:

The Law Offices of Kelly E. Dowd, Esq., PLLC

Dated: July 6, 2017

By: _____

Kelly E. Dowd, Esq.
NH Bar ID # 14890
29 Center St., Suite 12
P.O. Box 188
Keene NH 03431
603-499-8261
kelly@kdowdlaw.com

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum was sent on July 6, 2017 via U.S. first-class mail, postage prepaid, to Eric A. Maher, Esq. at Donahue, Tucker, and Ciandella, PLLC, 16 Windsor Lane, Exeter, NH 03833 and Wilbur A. Glahn, III, at McLane Middleton, P.A., 900 Elm Street, P.O. Box 326, Manchester NH 03105.

Kelly E. Dowd, Esq.