

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

Docket No. 2015-02

**Re: Application of Antrim Wind Energy, LLC
For a Certificate of Site and Facility**

September 19, 2016

ORDER ON MOTIONS TO STRIKE

I. BACKGROUND

On October 2, 2015, Antrim Wind Energy, LLC (Antrim Wind or Applicant), filed an Application for a Certificate of Site and Facility (Application) with the Site Evaluation Committee (Committee). Antrim Wind proposes to site, construct, and operate 9 Siemens SWT-3.2-113 direct drive wind turbines capable of generating 3.2 MW for a total nameplate capacity of 28.8 MW and associated civil and electrical infrastructure (Project). *See* Application, at 19, 27. The Project is proposed to be located in the Town of Antrim on the Tuttle Hill ridgeline spanning southwestward to the northeastern slope of Willard Mountain (Site). *Id.* at 5. The Project will be constructed primarily on the ridgeline that starts approximately 0.75 miles south of NH Route 9 and runs south-west, for approximately 2 miles. *Id.* The Project will be located in the rural conservation zoning district on private lands owned by six landowners and leased by Antrim Wind. *Id.* at 5-6. Antrim Wind seeks the issuance of a Certificate of Site and Facility approving the siting, construction, and operation of the Project.

An Order accepting the Application was issued on December 1, 2015.

On March 25, 2016, a Procedural Schedule was issued. By Order dated August 18, 2016, the Presiding Officer modified the Procedural Schedule and allowed the parties to file their supplemental pre-filed testimony on or before August 18, 2016.

On or before August 18, 2016, among others, the Subcommittee received supplemental pre-filed testimony from the following parties:

- Richard Block;
- Annie Law and Robert Cleland;
- Barbara Berwick; and
- Geoffrey Jones.

On August 15, 2016, the Applicant filed a Motion to Strike the foregoing supplemental pre-field testimony.

On September 1, 2016, the Subcommittee received the Allen/Levesque Group of Intervenors' request to strike supplemental pre-filed testimony of the Town of Antrim.¹

The Subcommittee received Objections to the Applicant's Motion to Strike from the following parties:

- Barbara Berwick; and
- Richard Block

This Order denies in part and grants in part the Applicant's Motion to Strike and denies the Allen/Levesque Group of Intervenors' request to strike the supplemental pre-filed testimony of the Town of Antrim.

II. POSITIONS OF THE PARTIES

The Applicant argues that the supplemental pre-filed testimony of Mr. Block, Ms. Law, Mr. Cleland, Ms. Berwick, and Mr. Jones should be stricken because they do not supplement

¹ The Allen/Levesque Group of Intervenors titled its pleading as "Intervenor's Objection to Applicant's Motion to Strike Certain Supplemental Pre-Filed Testimony." The Objection, however, contains a request to strike the Town of Antrim's supplemental pre-filed testimony. Therefore, the Objection is treated, and is addressed, as an independent Motion to Strike in this docket.

previously introduced testimony, but rather, provide new information that was available to the parties at the time of filing the original pre-filed testimony.

The Allen/Levesque Group of Intervenors argues that the Town of Antrim's supplemental pre-filed testimony contains information that was available to the Town of Antrim at the time of filing of original pre-filed testimony. The Allen/Levesque Group of Intervenors requests that the Subcommittee strike the Town of Antrim's supplemental pre-filed testimony if it decides to strike the supplemental pre-filed testimony of Richard Block, Annie Law and Robert Cleland, Barbara Berwick, and Geoffrey Jones.

Ms. Berwick argues that she timely filed supplemental pre-filed testimony and that allowing her pre-filed testimony in this proceeding does not create the "risk of unfairness" contemplated by the Applicant wherein parties may save key arguments and important documents for their supplemental testimony and evade the discovery process. Ms. Berwick further asserts that the intent of her supplemental pre-filed testimony was to respond to questions raised during technical sessions.

Mr. Block, Intervenor and spokesperson for the Non-Abutting Intervenors Group, argues that his supplemental pre-filed testimony addresses matters raised during the technical sessions. Further, Mr. Block notes that it would be unjust to strike the supplemental pre-filed testimony of those intervenors who oppose the Applicant, while allowing supplemental pre-filed testimony of those intervenors who support the Applicant, such as the Town of Antrim.

III. ANALYSIS

The Applicant's description of the purpose of supplemental testimony is correct. The practice before the Site Evaluation Committee has been to allow the filing of supplemental testimony after the discovery process has terminated. Supplemental testimony usually addresses

matters that were not known before the filing of direct testimony or to address evidence, issues and arguments that arise during the discovery phase of the matter. However, there is no statute or rule that specifically defines or specifies the requirements for supplemental testimony. On the other hand, RSA 541-A: 33, II provides the foundation for the admissibility of evidence in administrative proceedings:

The rules of evidence shall not apply in adjudicative proceedings. Any oral or documentary evidence may be received; but the presiding officer may exclude irrelevant, immaterial or unduly repetitious evidence. Agencies shall give effect to the rules of privilege recognized by law. Objections to evidence offered may be made and shall be noted in the record. Subject to the foregoing requirements, any part of the evidence may be received in written form if the interests of the parties will not thereby be prejudiced substantially.

RSA 541-A: 33, II. The touchstone for admissibility in administrative proceedings is relevance and the avoidance of immaterial or unduly repetitious evidence. The motion to strike must be considered in the light of RSA 541-A: 33, II.

Supplemental Testimony of Richard Block. The supplemental testimony of Richard Block may be relevant to the issues before the Subcommittee. In his objection to the motion Mr. Block acknowledges that his supplemental testimony could have been clearer in its references to the matters he intended to address. Mr. Block makes a plausible argument that his supplemental testimony is in response to matters raised during the discovery phase of this docket after the filing of his original testimony. The request to strike the supplemental testimony of Richard Block is denied.

Supplemental Testimony of Barbara Berwick. The supplemental testimony of Barbara Berwick included certain attachments that may be relevant to the issues before the Subcommittee. Ms. Berwick acknowledges that as a *pro-se* party with little experience in administrative proceedings she might have mistitled her filing. Ms. Berwick makes a plausible

argument that her filing is responsive to some very broad questions asked of her and other intervenors during the technical sessions. The request to strike the supplemental testimony of Barbara Berwick is denied.

Supplemental Testimony of the Stoddard Conservation Commission (SCC). The SCC filed an 82 page PowerPoint presentation and a wildlife conservation article as the supplemental testimony of Geoffrey Jones and also as exhibits. It appears that these filings are more in the nature of exhibits that tend to highlight portions of Mr. Jones's original pre-filed testimony. They are included on the SCC Exhibit List. It will be incumbent upon the SCC to move the admission of these items as exhibits in accordance with Site Evaluation Committee rules and practice. The Applicant's motion to strike the exhibits is denied.

Town of Antrim. The Town of Antrim filed supplemental testimony. For the most part each of the questions contained within the Town's supplemental testimony made specific reference to issues raised in the pre-filed direct testimony of other parties and is both relevant and consistent with the prior practice of the Committee. The motion filed by the Levesque-Allen intervenors is denied.

Testimony of Annie Law and Robert Cleland. The supplemental testimony of Anne Law and Robert Cleland included a letter dated January 6, 2011, from Michael McCann of McCann Appraisals to Attorney Christopher Senie of Westborough, Massachusetts (McCann Letter). The letter includes Mr. McCann's opinion regarding the impact of a proposed wind turbine project in Brewster Massachusetts on property values in that town. Mr. McCann's opinion largely focuses on the Brewster Zoning Code. The McCann letter is not relevant or material to the issues before the Subcommittee. The McCann Letter concerns a dated opinion about property that is located in a different geographic region. The letter contains expert

turbine project in Brewster Massachusetts on property values in that town. Mr. McCann's opinion largely focuses on the Brewster Zoning Code. The McCann letter is not relevant or material to the issues before the Subcommittee. The McCann Letter concerns a dated opinion about property that is located in a different geographic region. The letter contains expert opinions and the author is not available for cross-examination by other parties. Therefore the motion to strike the supplemental testimony of Annie Law and Robert Cleland is granted.

IV. ORDERS

It is hereby ordered, that the Applicant's Motion to Strike Certain Supplemental Testimony is denied in part and granted in part as set forth in this Order.

It is hereby further ordered, that the Allen/Levesque Group of Intervenors' request to strike supplemental pre-filed testimony of the Town of Antrim is denied.

SO ORDERED this nineteenth day of September, 2016.



Robert R. Scott, Presiding Officer
NH Site Evaluation Committee