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

June 21, 2017

ORDER DENYING MOTIONS FOR REHEARING

I. BACKGROUND

On October 2, 2015, Antrim Wind Energy, LLC (Antrim Wind or Applicant), applied for a Certificate of Site and Facility (Application) with the Site Evaluation Committee (Committee). Antrim Wind proposes to site, construct, and operate nine (9) wind turbines and associated civil and electrical infrastructure in Antrim (Project.) *See* Application, at 19, 27. The Project is proposed to be on the Tuttle Hill ridgeline spanning southwestward to the northeastern slope of Willard Mountain (Site). *Id.* at 5.

A subcommittee consisting of seven members, including two public members, (Subcommittee) was assigned to this docket. *See* RSA 162-H:4-a, II. The adjudicative hearings in this docket lasted thirteen days.[1] During the adjudicative hearings, the Applicant presented testimony of expert witnesses who were cross-examined by members of the Subcommittee, Counsel for the Public and the Intervenors. Counsel for the Public presented expert testimony. The Intervenors and their witnesses also presented testimony and were cross-examined. In total, the Subcommittee received 220 exhibits. The Subcommittee also received numerous public comments, oral and written, from interested members of the public.

The Subcommittee deliberated over three days on December 7, 9 and 12, 2016.

[1] Hearings were held on September 13, 15, 20, 22, 23, 28, 29, October 3, 18, 19, 20 and November 1 and 7, 2016.

A Decision and Order granting a Certificate was issued on March 17, 2017.

On March 27, 2017, the Meteorologists Intervenor Group (Meteorologists) moved for Rehearing. The Applicant objected to Meteorologist Motion for Rehearing on April 5, 2017.

On April 14, 2017, the Abutting Residents Group of Intervenors, the Non-Abutting Residents Group of Intervenors, the Levesque/Allen Group of Intervenors, the Stoddard Conservation Commission and the Windaction Group (Intervenors) filed a Joint Motion for Rehearing. The Applicant objected to the Joint Motion on April 24, 2017. The Intervenors replied to the Applicant's Objection on May 2, 2017.

On April 17, 2017, Counsel for the Public moved for Rehearing or Reconsideration. The Applicant objected to Counsel for the Public's Motion on April 25, 2017.

On May 5, 2017, at a public meeting the Subcommittee deliberated on the three motions for rehearing and voted to deny each motion. This order memorializes the deliberations and decision of the Subcommittee.

II. STANDARD OF REVIEW

Under RSA 541:2, any order or decision of the Committee may be the subject of a Motion for Rehearing or of an appeal in the manner prescribed by the statute. *See* RSA 541:2. A request for rehearing may be made by "any party to the action or proceeding before the commission, or any person directly affected thereby." RSA. 541:3. The Motion for Rehearing must specify "all grounds for rehearing, and the commission may grant such rehearing if, in its opinion, good reason for the rehearing is stated in the motion." *Id*. Any such motion for rehearing "shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." RSA 541:4.

"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 invite reconsideration upon the record

to which that decision rested." *Dumais v. State of New Hampshire Pers. Comm.*, 118 N.H. 309, 311 (1978) (internal quotations omitted). A rehearing may be granted if the Committee finds "good reason." *See* RSA 541:3. A motion for rehearing must be denied where no "good reason" or "good cause" has been demonstrated. *See O'Loughlin v. NH Pers. Comm.*, 117 N.H. 999, 1004 (1977); *see also In re Gas Service, Inc.*, 121 N.H. 797, 801 (1981).

A motion for rehearing shall:

> (1) Identify each error of fact, error of reasoning, or error of law which the moving party wishes to have reconsidered;
>
> (2) Describe how each error causes the committee's order or decision to be unlawful, unjust or unreasonable;
>
> (3) State concisely the factual findings, reasoning or legal conclusion proposed by the moving party; and
>
> (4) Include any argument or memorandum of law the moving party wishes to file.

N.H. CODE ADMIN. RULES Site 202.29. A motion for rehearing is generally required in order to appeal a decision of the Subcommittee to the Supreme Court. *See* RSA 541: 4.

III. GENERAL DENIAL

The Intervenors, Counsel for the Public and the Meteorologists have filed motions for rehearing alleging dozens of perceived errors. With one exception[2] all issues raised in the motions were initially raised, argued and decided during the adjudicative hearing process. At the public meeting on the motions for rehearing the Subcommittee determined that each issue raised had been properly decided. In each instance the Subcommittee found that the motions did not present good reason or good cause for rehearing or reconsideration. No new evidence was

[2] The Intervenors and Counsel for the Public raised one new claim in the motions for rehearing. They allege that a quorum of the Subcommittee was not properly constituted when only one public member assigned to the docket actually attended and deliberated on the matter. The Subcommittee rejected this argument finding that a duly constituted quorum of a subcommittee did not require the attendance of both public members. See Section ___, below.

presented and the arguments made by the parties were no more persuasive than they were during the course of the adjudicative proceeding.

In each case there was no good cause or reason for rehearing. The balance of this order explains in more detail the Subcommittee's reasons for denying the motions.

IV. ANALYSIS AND FINDINGS

A. *Res Judicata*[3]

The Intervenors claim that the Project is substantially similar to a prior project considered by the Subcommittee in the Docket No. 2012-01 (Antrim I). They argue that the Subcommittee should have declined to consider the Project under the doctrine of *res judicata*. They claim that the only differences between the two projects is the removal of one turbine, a reduction of the remaining turbine heights by approximately 38 inches and additional off-site mitigation measures. The Intervenors assert that the change to the physical characteristics of the Project is *de minimus*. The Intervenors assert that it is unreasonable to determine that the Project is substantially different from the Antrim I project simply because of the proposed additional mitigation measures. They assert that the Subcommittee in the Antrim I docket specifically determined that mitigation measures proposed by the Applicant did not change the Project's actual impact on aesthetics. The Intervenors conclude that there are no material differences between the projects. Therefore they argue that the Application should be denied under the doctrine of *res judicata.*

Counsel for the Public argues that the Subcommittee failed to identify material changes to the Project and findings of how these changes materially altered the impact of the Project on

[3] Counsel for the Public joined the arguments addressing the following issues raised by the Intervenors in their Joint Motion: (i) res judicata; (ii) quorum; (iii) waiver of requirements; (iv) procedural fairness; (v) effect on aesthetics; (vi) decommissioning. Counsel for the Public's Motion addressed and supplemented arguments raised by the Intervenors. Therefore, issues addressed by Counsel for the Public and the Intervenors are addressed under the same section of this Order.

aesthetics. Counsel for the Public concludes that, without identifying these changes and their effect on aesthetics, the Subcommittee could not reasonably find that doctrine of *res judicata* did not apply to the Project.

Counsel for the Public also claims that the Subcommittee erroneously concluded that the Antrim I subcommittee invited the submission of an amended application. In Antrim I the applicant filed a motion to reopen the record to offer a number of changes to that project. The Antrim I subcommittee found that the proposed changes would render the project to be materially different. Counsel for the Public argues that the Antrim I statements were made to express the Antrim I subcommittee's concerns about re-opening the record and the effect additional changes proposed after the closing of the record may have on the Applicant's financial ability and other aspects of the application. In addition, Counsel for the Public argues that the Subcommittee's finding that the Antrim I subcommittee invited the refiling of an amended Application was erroneous because it was contrary to a determination made by the subcommittee that asserted jurisdiction over the Project. Counsel for the Public concludes that the Subcommittee's decision that the doctrine of *res judicata* does not bar the Application in this docket is unlawful because it is based on an erroneous finding that the subcommittee in the Antrim I docket invited the resubmittal of an amended Application.

The Intervenors and Counsel for the Public also argue that changes in the Committee's rules did not render the Project materially different from the Antrim I project because the Subcommittee in the Antrim I docket considered many issues recently codified in Site 301.14(a), *i.e.* the character of the area; the significance of an affected resource; the extent, nature and duration of public use; the scope and scale in the change in landscape; the extent to which the Project would be a dominant and prominent feature within a natural or cultural landscape of high scenic quality; and the effectiveness of mitigation measures.

Counsel for the Public also asserts that the Subcommittee's decision is unlawful because the Subcommittee failed to make specific findings stating how the changes in the law or rules affected the outcome such that they would be an intervening force negating the doctrine of *res judicata* and collateral estoppel.

The Applicant argues that the Intervenors failed to identify issues of fact or law that the Subcommittee overlooked or misapprehended. The Applicant claims that the Intervenors incorrectly characterized the Subcommittee's finding of differences between the projects. The Applicant points out that the Subcommittee's findings were not based solely on changes to mitigation measures. The Applicant argues that the Subcommittee considered all the changes to the Project in determining that the Application is not barred by the doctrine of *res judicata*. In evaluating the applicability of the doctrine of *res judicata*, the Applicant argues that the Subcommittee specifically addressed differences between Antrim I and the current Project, including, but not limited to, the proposed additional mitigation and found that the "Application contains substantive and material changes from the initial Application." Deliberation, Day 1, Morning Session, at 16.

The Applicant disagrees with Counsel for the Public's argument that the Subcommittee could only determine that the Project is substantially different from the Antrim I project after a comparison and determination of differences between the impacts on aesthetics of each scenic resource in each project. The Applicant asserts that the Subcommittee correctly considered all differences between the projects as opposed to solely considering the different impacts on aesthetics in applying the doctrine of *res judicata.*

The Applicant also argues that there has been a change in the law, *i.e.* the enactment of the Committee's rules that preclude application of the doctrine of *res judicata*. The Applicant concludes that the Intervenors' and Counsel for the Public's requests for rehearing are based on

misapplication of the doctrine of *res judicata*. Applicants argue that the same arguments already made by Counsel for the Public in her Post-Hearing Memorandum were considered and denied by the Subcommittee.

The Intervenors and Counsel for the Public had a fair opportunity to argue that the denial of a certificate of site and facility in the Antrim I docket precluded consideration of the Application in this docket. However, that argument failed to persuade the Subcommittee. In the motions for rehearing neither Counsel for the Public nor the Intervenors offer any new evidence or arguments to support their claim for rehearing. They merely argue that the Subcommittee made a mistake.

The Subcommittee conducted a thorough and painstaking review of the similarities and the differences between Antrim I and the present Application. Specifically the Subcommittee cited the elimination of one turbine near Willard Pond, a substantial reduction in height of a second turbine near Willard Pond, a reduction in overall height and size of the remaining turbines, a change in turbine manufacturer, the addition of 100 acres of conservation land and additional mitigation measures. The substantial differences between the applications preclude a finding that the two applications represent the same cause of action. Based on the substantial factual differences between the two Applications the doctrine of *res judicata* does not apply. *See Morgenstern v. Town of Rye,* 147 N.H. 558, 565 (2002).

The Subcommittee also notes that the Antrim I subcommittee, when presented with a motion to re-open the record, declined to consider changes proposed by the applicant. In Antrim I the subcommittee wrote: "the Applicant seeks to introduce evidence which would materially change the original Application and would require extensive de novo review as opposed to 'a full consideration of the issues presented at the hearing.'" N.H. CODE OF ADMIN. RULES Site 202.27 (b) (emphasis added)." Application of Antrim Wind Energy, LLC, No, 2012-01, Order on

Pending Motions, September 10, 2013, p. 11. The Application in this docket includes those changes which the Antrim I subcommittee found to be material changes. Those material changes preclude the application of the doctrine of *res judicata*.

The Subcommittee also recognizes that the Order on Pending Motions in Antrim I can be read so as to invite the filing of a new application. *See Hill-Grant Living Trust v. Kearsarge Lighting*, 159 N.H. 529 (2009). The differences between the project in the Antrim I application and the Project in this docket are not inconsequential. The changes were in response to concerns raised by the Antrim I subcommittee and were designed to meaningfully resolve those concerns. Under these circumstances the doctrine of *res judicata* does not bar the granting of a Certificate in this docket. *See Hill-Grant Living Trust* at p. 536.

A substantial change in the law also occurred between the denial of the certificate in the Antrim I docket and this Application. In 2013 and 2014, RSA 162-H:10, VII, was amended and required the Committee to promulgate substantive administrative rules including "specific criteria to be applied in determining if the requirements of RSA 162-H:16, IV have been met by the applicant for a certificate of site and facility." See, 2013 N.H. Laws, c. 134:2, 2014 N.H. Laws, c. 217:16. In response, the Committee promulgated administrative rules defining the criteria that a subcommittee must apply when considering the statutory factors set forth in RSA 162-H:16. *See* N.H. CODE ADMIN. RULES Site 301.13 - 301.16. The administrative rules also set substantive limits for operational noise emitted from a wind energy facility, N.H. CODE ADMIN. RULES Site 301.14(f)(2) and for shadow flicker, N.H. CODE ADMIN. RULES, Site 301.14(f)(3). With regard to aesthetics the administrative rules now require a subcommittee to consider seven (7) distinct categories of impacts. *See* N.H. CODE ADMIN. RULES Site 301.14 (a)(1-7).

The changes in the substantive administrative rules altered the situation for the Applicant and provided "fixed targets" in the form of substantive limitations on impacts to be met in any new application. The Subcommittee considers those changes in the law to be material changes that alter the situation and preclude application of the doctrine of *res judicata.*

B. Collateral Estoppel

The Intervenors and Counsel for the Public argue that, while determining which scenic resources will be affected by the Project, the Subcommittee should have applied the doctrine of collateral estoppel and adopted the findings regarding the visual impact of the Project on scenic resources identified in the Antrim I docket, *i.e.* Highland Lake, Lake Nubanusit and the dePierrefeu Wildlife Sanctuary (in its entirety as opposed to parts of it).

The Intervenors and Counsel for the Public assert that the doctrine of collateral estoppel required the Subcommittee to consider the effect of the Project on these resources because: (i) the same parties are involved in this docket and the Antrim I docket; (ii) the Project's effect on aesthetics was adjudicated to a final decision on the merits in the Antrim I docket; and (iii) the criteria to be employed to determine scenic resources in this docket is identical to the criteria used for identification of scenic resources in the Antrim I docket. The Intervenors and Counsel for the Public conclude that the Subcommittee's decision was unreasonable and unlawful because the Subcommittee failed to evaluate the Project's impact on scenic resources identified in the Antrim I docket.

The Intervenors and Counsel for the Public also argue that the Subcommittee should not have considered additional land conservation easements as a mitigation measure under the doctrine of collateral estoppel because the Subcommittee in the Antrim I docket determined that such placement would not mitigate the project's effect on aesthetics. Counsel for the Public further argues that the Subcommittee's determination in the Antrim I docket that conservation of

land does not adequately mitigate the Project's effect on aesthetics was not limited to the Antrim I project and applies to the current Project because: (i) the Decision issued in the Antrim I docket does not specifically state this findings applies only to Antrim I docket; and (ii) the term "in this case" used by the subcommittee in Antrim I docket referring to mitigation measures did not mean that the Subcommittee intended to make a case-specific finding.

The Applicant argues that the Intervenors reiterate arguments raised during the adjudicatory hearings and assert no facts or arguments that warrant rehearing.

Specifically, the Applicant asserts that the Subcommittee did not have to consider the Project's impact of the same scenic resources as identified in the Antrim I docket because the Project and its effect on aesthetics, including affected scenic resources, has changed.

The Applicant also argues that adoption of the Committee's rules containing a new definition of scenic resources and new criteria for evaluating the effect on aesthetics precluded application of the doctrine of collateral estoppel in this docket.

As to the proposed mitigation measures, the Applicant argues that the Subcommittee was not required to find that placement of conservation land in easements represents no effective mitigation measure under the doctrine of collateral estoppel. In support, the Applicant asserts that the Subcommittee in the Antrim I docket was specifically limited to the project considered in the Antrim I docket and the Project in this docket, including proposed mitigation measures, is substantially different from the Antrim I docket.

Collateral estoppel is a doctrine the New Hampshire Supreme Court has described as "an extension of res judicata which prevents the same parties, or their privies, from contesting in a subsequent proceeding on a different cause of action any question or fact actually litigated in a prior suit." *In re Hooker*, 142 N.H. at 43 (*citing Scheele v. Village Dist.*, 122 N.H. 1015, 1019

(1982)). Collateral estoppel "bars re-litigation of factual issues which have already been determined[.]" *State v. Pugliese*, 122 N.H. 1141, 1144 (1982).

In order for collateral estoppel to apply, the following elements must be satisfied: (1) the issue subject to estoppel must be identical in each action; (2) the first action must have resolved the issue finally on the merits; (3) the party to be estopped must have appeared in the first action or have been in privity with someone who did; (4) the party to be estopped must have had a full and fair opportunity to litigate the issue; and (5) the finding must have been essential to the first judgment. *See In re Hooker*, 142 N.H. 40, 43-44 (1997).

As noted above, the Application in this docket is independent of the Application filed in Antrim I and presents a substantially different Project than that proposed in Antrim I. The current Project includes the elimination of one turbine near Willard Pond, a substantial reduction in height of a second turbine near Willard Pond, a reduction in overall height and size of the remaining turbines, a change in turbine manufacturer, the addition of 100 acres of conservation land and additional mitigation measures. Given these differences between the projects it cannot reasonably be claimed that the issue in each action is identical. The differences in the size and configuration of the Project necessarily affect its visual impact as well as other impacts. Additionally the finding sought by the Applicant in this docket could not have been essential to the finding in the prior docket because the Project is materially different than the one proposed in 2012. The doctrine of collateral estoppel does not apply under these circumstances.

C. Quorum

The Intervenors and Counsel for the Public argue that the Subcommittee's decision was unreasonable and unlawful because it was made without two public members. In support, the Intervenors and Counsel for the Public assert that RSA 162-H:4, II requires two public members to serve on each subcommittee and, under RSA 162-H:3, XI, if one of the public members is not

available for good reason, the governor and counsel shall appoint a replacement upon petition of the chairperson. They further argue that, considering the special role of public members as representatives of the public, two public members are required for a quorum of the Subcommittee.

Counsel for the Public further asserts that the Intervenors did not waive their quorum argument as they were not advised that a public member will not participate in this docket and were not aware of the public member's non-participation until the record was closed and deliberations were conducted.

The Applicant asserts that RSA 162-H:4-a, II requires the Subcommittee to consist of seven members, including two public members. It further states that "[f]ive members of the Subcommittee shall constitute a quorum for the purposes of conducting the Subcommittee's business." RSA 162-H:4-a, II. The Applicant claims that nothing in the statutory language requires two of the five quorum members to be public members. The Applicant concludes that a quorum consists of any five members of the Subcommittee. The presence of public members is not a quorum requirement.

The Applicant also claims that the Intervenors waived their right to argue that the Subcommittee's decision is void because they had never raised this argument during adjudicatory hearings and failed to preserve it.

Neither Counsel for the Public nor the Intervenors complained at any point during the adjudicative process about the lack of a public member or the lack of a quorum. RSA 162-H: 4-a, II, requires a subcommittee considering a wind project to consist of seven members including two public members. The Subcommittee did consist of seven members including two public

members[4]. However, the statute contains the further proviso that five members of the subcommittee shall constitute a quorum for the purposes of conducting subcommittee business. *See* RSA 162-H:4-a, II. The statute does not require public members to be members of the quorum. The makeup of the Subcommittee and its quorum during the adjudicative process was consistent with the statute. The Subcommittee's actions were neither unlawful nor unreasonable. Moreover, due process does not require that all members of an administrative board take part in every decision. *See e.g. Auger v. Town of Strafford*, 156 N.H. 64, 68 (2007). The Subcommittee acted in full compliance with the statute. The motions for rehearing must be denied[5].

D. Waiver of Noise and Flicker Restrictions for Participating Landowners

The Intervenors and Counsel for the Public argue that the Subcommittee's decision was unreasonable because it waived the noise and shadow flicker restrictions in N.H. CODE OF ADMIN. RULES Site 301.14(f)(2) a and b as applied to participating landowners:(i) without making a determination that such waiver is in the public interest; and (ii) without allowing the Intervenors to address the request for waiver. See N.H. CODE OF ADMIN. RULES Site 202.15.

The Intervenors claim that the Subcommittee's decision was unreasonable because the Subcommittee failed to make a specific finding indicating that the waiver will serve the public interest.

The Intervenors also claim that, under N.H. CODE OF ADMIN. RULES Site 202.15(f), the Subcommittee may grant a waiver only upon providing the opportunity to comment on any waiver request before the Subcommittee. They conclude that the Subcommittee's decision was

[4] Public members Roger Hawk and Patricia Weathersby were originally assigned to the Subcommittee. Mr. Hawk passed away. On January 11, 2017, the alternate public member, Rachel Whitaker, was appointed to the Subcommittee.

[5] The Intervenors suggest that Ms. Whitaker took "maternity leave." The Site Evaluation Committee does not formally recognize "maternity leave" or any type of "leave."

unreasonable because the Subcommittee failed to provide an opportunity for the Intervenors to address a waiver request.

Counsel for the Public further asserts that the Subcommittee's waiver was erroneous because it indirectly approved exculpatory agreements between the Applicant and participating property owners: (i) without finding that such agreements do not violate public policy; (ii) without determining that the releasing party understood the import of the agreement or a reasonable person in his or her position would have understood the import of the agreement; and (iii) without determining that the releasing party's claim would have been within the contemplations of the parties during execution and the releasing party would not be responsible for consequences of its negligence. *See Barnes v. N.H. Karting Assn.*, 128 N.H. 201 (1986).

The Intervenors and Counsel for the Public argue that the Subcommittee should reconsider its decision to waive the noise and shadow flicker restrictions in N.H. CODE OF ADMIN. RULES Site 301.14(f)(2) a and b, as applied to participating landowners, and should find that the Project exceeds these requirements as applied to the participating landowners.

The Applicant asserts that the Subcommittee received ample evidence that certain property owners voluntarily waived noise and shadow flicker restrictions set forth by the rules. The Applicant also asserts that the Intervenors addressed the legitimacy of such waivers during adjudicative hearings. The Subcommittee also considered waivers during its deliberations and concluded that the landowners should be permitted to voluntarily forego the restrictions. Deliberation Tr. Day 2, Afternoon Session, at 44. The Decision and Order accurately reflects the Subcommittee's findings. *See* Decision and Order Granting Application for Certificate of Site and Facility, at 168-69; Order and Certificate of Site and Facility with Conditions, at 11. The Applicant argues that, although the Subcommittee did not make a specific finding that a waiver

will be in the public interest, such finding is implicitly made by the Subcommittee by waiving requirements of the rules.

Counsel for the Public and Intervenors, in their motions for rehearing, make no new arguments regarding the waiver of noise and shadow flicker requirements as to participating landowners. There is no good reason to grant a rehearing.

It is important to note that the Subcommittee made an overall determination that the granting of a Certificate to the Applicant based upon the Project as presented in the Application, including the waivers, was in the public interest. Therefore, as a public interest determination regarding the waivers for participating landowners is included in the overall public interest determination made by the Subcommittee. There is no reason to grant a rehearing on this issue.

E. Procedural Unfairness

The Intervenors and Counsel for the Public claim that the Subcommittee should grant rehearing because the proceedings in this matter were unfair to the prejudice of Counsel for the Public and the Intervenors. According to them the alleged unfairness resulted in a chilling effect on the Intervenors' involvement and their ability to fully develop the factual record.

Specifically, the Intervenors argue that, under RSA 541-A:33, they were entitled to conduct cross-examination required for a full and true disclosure of the facts. They further argue that under N.H. CODE OF ADMIN. RULES Site 202.02, the Presiding Officer must conduct a hearing in a fair, impartial and efficient manner, admitting relevant evidence, excluding irrelevant, immaterial, or unduly repetitious evidence, and providing the parties with the opportunity to question any witness.

The Intervenors assert that, by requiring all parties to provide supplemental pre-filed testimony at the same time, the Presiding Officer provided the Applicant with the opportunity to address the Intervenors' critique and effectively deprived the Intervenors of the opportunity to

address arguments in the Applicant's pre-filed testimony. They assert this procedure was contrary to the spirit of RSA 541-A:33 because it prevented a full and true disclosure of the facts. They also claim it was contrary to N.H. CODE OF ADMIN. RULES Site 202.02 because it benefited the Applicant and did not allow for admission of relevant evidence.

The Intervenors also assert that, unlike the Applicant, they were not allowed to rehabilitate their witnesses and conduct friendly examinations. They claim that the record was under-developed and the decision, based on the record, was unlawful and unreasonable.

Counsel for the Public argues that the Presiding Officer's decision precluding her from asking additional rebuttal questions of her expert was arbitrary and unsustainable.[6]

The Intervenors and Counsel for the Public request the Subcommittee to re-open the record and to allow the Intervenors to rehabilitate their witnesses.

The Applicant asserts that the Intervenors identified no error of fact, reasoning or law and establishing the Subcommittee's decision to be unreasonable or based on an "under-developed" record.

The Applicant states that the Intervenors' claim that they could not conduct friendly cross-examination directly contradicts the record. They argue that the Presiding Officer, during structuring conferences, directly and unambiguously indicated that friendly examination would not be precluded as a rule and will be addressed case by case. The Presiding Officer allowed several Intervenors, including Ms. Linowes on behalf of Windaction, Mr. Block and the Audubon Society to conduct friendly cross-examination of various witnesses.

The Applicant also asserts that the Intervenors were not prejudiced by the requirement to file their supplemental pre-filed testimony at the same time as the Applicant because they had an

[6] Counsel for the Public incorporates, by reference, any and all arguments made in her Motion to Reconsider Evidentiary Ruling and Request to Reopen the Record dated November 14, 2016.

opportunity to address any issues raised in the Applicant's testimony during cross-examination of the Applicant's witnesses.

Neither Counsel for the Public nor the Intervenors were treated unfairly during the adjudicative process. All parties including Counsel for the Public and the Intervenors had the opportunity to file testimony that was responsive to the pre-filed testimony of the Applicant's witnesses. In addition, Counsel for the Public the Intervenors and the Applicant were permitted to file supplemental testimony shortly before the commencement of the Adjudicative hearings. There is nothing inherently unfair about the process. Counsel for the Public and Intervenors were given full rein to cross-examine each of the Applicants witnesses. In fact, Counsel for the Public and the Intervenors did conduct comprehensive cross-examination of each witness. The filing of contemporaneous supplemental testimony by all parties did not inhibit the ability to cross-examine any witness. The request for rehearing must be denied.

In addition, Counsel for the Public and Intervenors are simply wrong when they allege that they were not permitted to conduct "friendly cross-examination." In fact, all parties were afforded an extensive opportunity to question witnesses regardless which party presented the witness. Although the Presiding Officer has the authority to limit "friendly cross-examination" that was not the case. Rehearing on this issue is denied.

F. Effect on Aesthetics - Consideration of Requirements of N.H. CODE OF ADMIN. RULES Site 301.14

The Intervenors and Counsel for the Public argue that, contrary to N.H. CODE OF ADMIN. RULES Site 301.14, the Subcommittee failed to analyze the scope and scale of the change in the landscape in determining the effect of the Project on aesthetics.

Counsel for the Public admits that the Subcommittee discussed the Project's dominance and prominence and such findings relate to the determination of scale of the Project in relation to

its surroundings. Counsel for the Public opines, however, that the Subcommittee's decision is unreasonable because the Subcommittee determined that the Project will be a dominant and/or prominent feature as viewed from identified scenic resources and determined that the Project's effect on aesthetics will be reasonable without addressing the Project's scale and scope and without stating why it was determined that they are reasonable.

Counsel for the Public also asserts that the Subcommittee failed to consider the character of the region as required by N.H. CODE OF ADMIN. RULES Site 301.14 (a)(1) and made a "cursory" finding that the affected area was in the Town of Antrim's rural conservation zone which includes a great deal of conservation land.

Counsel for the Public further argues that the Subcommittee failed to determine the significance of the affected resources and mistakenly concluded that Gregg Lake and Black Pond were private resources.

Counsel for the Public further argues that the Subcommittee underestimated the extent, nature and duration of public use of identified scenic resources and made no findings that would support the conclusion that considered uses would not result in an adverse impact.

The Applicant asserts that, while addressing the impact of the Project on aesthetics, the Subcommittee considered: (i) the existing character of the area – Deliberation Tr. Day 1, Afternoon Session, at 26-30, 32; (ii) the significance of scenic resources - Deliberation Tr. Day 1, Afternoon Session, at 63-64; (iii) public use of the resources - Deliberation Tr. Day 1, Afternoon Session, at 30-31, 38-39, 43; (iv) daytime and nighttime visual effects - Deliberation Tr. Day 1, Afternoon Session, at 53-54, 61-62; and (v) proposed mitigation measures - Deliberation Tr. Day 1, Afternoon Session, at 69-72, 132-141.

The Applicant also argues that the Subcommittee considered the scope and scale of the Project when it evaluated each and every photosimulation, assessed prominence and dominance

of the Project and ultimately determined whether the Project will have an unreasonable adverse effect on each evaluated scenic resource.

The Applicant disputes Counsel for the Public's statement that the Subcommittee determined that Gregg Lake and Block Pond were private scenic resources. The Applicant asserts that, during deliberations, the Subcommittee did not determine these resources were private. The Applicant asserts that the Subcommittee did not consider Counsel for the Public's simulations demonstrating the effect of the Project because it found that the photosimulations were prepared from private property and reflected the effect of the Project on the private property.

The Applicant also asserts that the Subcommittee specifically considered and addressed the nature and duration of the use of the resources and stated that consideration should be provided on whether the user will be considering returning to the resources. Deliberation Tr. Day 2, Afternoon Session, at 49.

The Subcommittee conducted an extensive review of the aesthetic impacts of the Project. As indicated in the Applicant's objection, the Subcommittee comprehensively considered each criteria related to aesthetics under N.H. CODE ADMIN. RULES Site 301.14. Neither Counsel for the Public nor the Intervenors offer any new or different arguments. The request for rehearing repeats the same arguments that failed to persuade the Subcommittee during the adjudicative proceeding. Neither Counsel for the Public nor the Intervenors offer good reason or cause to require a rehearing concerning aesthetics.

G. Effects on Aesthetics - Viewshed Analysis, Identification of Scenic Resources, Viewer Effects and Photosimulations

Intervenors and Counsel for the Public argue that the Subcommittee unreasonably relied on the visual impact assessment and testimony of the Applicant's expert, David Raphael.

Intervenors allege a litany of complaints about Mr. Raphael's testimony and visual impact assessment. Intervenors and Counsel for the Public also argue that Mr. Raphael's visual impact assessment (VIA) did not comply with our administrative rules, failed to properly consider viewer effects, and was supported by improper photosimulations.

The Meteorologists also claim that the Subcommittee's decision that the Project will not have an unreasonable adverse effect on aesthetics was erroneous because it was subjective and was based on visual simulations without considering, in totality, the size, height, direction and speed of motion, flashing light, noise, rapidity of change, brightness and color of the Project.

The Applicant responds that the record does not support Intervenors' complaints. Citing to various portions of the transcripts of the adjudicative proceedings, the Applicant points out that each and every issue raised by the Intervenors, Counsel for the Public, and the Meteorologists was specifically considered and rejected by the subcommittee. The Applicant argues that the Subcommittee performed a comprehensive analysis of the testimony of Mr. Raphael and the testimony provided by Kellie Connelly, Counsel for the Public's aesthetics expert. The Applicant also argues that the Subcommittee conducted a photo by photo review of the photosimulations provided by all of the parties. Given the comprehensive review conducted by the Subcommittee, the Applicant asserts that the Motions for Rehearing simply seek to reiterate arguments that were not persuasive to the Subcommittee at the time of the hearings.

The Applicant also argues that the Meteorologists failed to identify a single fact that the Subcommittee overlooked or mistakenly conceived while addressing the effect of the Project on aesthetics. The Applicant further claims that the Decision was not erroneous because the Subcommittee comprehensively reviewed the VIA prepared by the Applicant's expert, a VIA prepared by Counsel for the Public's expert and the testimony of other witnesses in this docket including a video simulation demonstrating the effect of blade movement on the viewshed.

During the course of its deliberations, the Subcommittee examined the testimony, the opinions, and the VIAs submitted by all parties including the expert testimony assessments and opinions. The Subcommittee considered the strengths and weaknesses of the testimony and each VIA. The Subcommittee also reviewed each and every photosimulation submitted. In addition, during the course of the adjudicative proceeding, the Subcommittee conducted two on-site visits to various scenic resources and other areas aesthetically impacted the project. The Subcommittee also benefited from a review of the video simulation demonstrating the movement of the turbine blades in the viewshed. Based on this comprehensive review the Subcommittee was persuaded by a preponderance of the evidence that the project would not have an unreasonable adverse impact on aesthetics in the region. The motion for rehearing seeks to reargue issues that were completely and comprehensively considered by the Subcommittee. There is no good cause for rehearing.

H. Effects on Aesthetics – "Testimony" of Jean Vissering

Counsel for the Public claims that the Subcommittee's decision that the Project will not have an unreasonable adverse effect on aesthetics was unreasonable because the Subcommittee failed to consider the opinion of Counsel for the Public's "other expert," Jean Vissering, who purportedly determined that changes to the Project did not sufficiently mitigate the unreasonable adverse effect of the Project on aesthetics.

The Applicant responds that the Subcommittee was not required to consider Ms. Vissering' s opinions because Ms. Vissering was not a witness in this proceeding, did not file testimony and was not subject to cross-examination. The Applicant further asserts that, nonetheless, the Subcommittee considered some statements made by Ms. Vissering and Counsel for the Public's statement to the contrary is not supported by the record.

Ms. Vissering was not a witness in this docket. She was not identified as a witness, provided no prefiled testimony, and was not available for technical sessions or cross-examination. Counsel for the public's visual expert relied on a prior of VIA authored by Ms. Vissering in 2012. The Subcommittee did consider the recommendations of Ms. Vissering in the prior docket and, in fact, recognize that the Applicant had adopted many of Ms. Vissering's recommendations.

However, Ms. Vissering's opinions from the 2012 docket were not the only opinions considered by the Subcommittee. The Subcommittee considered the testimony and the VIAs offered by Kellie Connelly and David Raphael. Noting that there was a significant difference of opinion, the Subcommittee, itself, reviewed each and every photosimulation in the record. After conducting that review, the Subcommittee determined that the Project would not have an unreasonable effect on aesthetics. As indicated above, the Subcommittee was also aided by two days of on-site visits. There is no good cause or reason for rehearing after such a review.

I. Effects on Aesthetics – "Rebuttal Testimony"

Counsel for the Public claims that the Presiding Officer improperly precluded her from conducting rebuttal examination of her visual expert at the time of her redirect testimony.

The Applicant asserts that this procedural issue was briefed and addressed by the order denying Counsel for the Public's Motion for Reconsideration and to Re-Open the Record filed on November 14, 2016.

The Presiding Officer issued an eleven (11) page order denying Counsel for the Public's Motion for Reconsideration and to Re-Open the Record. The Presiding Officer found that Counsel for the Public improperly attempted to introduce new testimony during redirect examination. If allowed, the Applicant would have been deprived the opportunity to conduct a full cross-examination of Ms. Connelly. In addition, the Presiding Officer correctly explained

that Counsel for the Public's written offer of proof, explaining the information she wished to elicit from her expert, was replete with information that was already part of the record.

The Presiding Officer correctly assessed and properly ruled on the issue. There is no good reason or cause for rehearing.

J. Mitigation

Intervenors and Counsel for the Public argue that the Subcommittee's decision was unreasonable because it allowed mitigation measures that did not directly protect the viewshed from any scenic resource. They argue that N.H. CODE OF ADMIN. RULES Site 301.14 requires the Subcommittee to consider the "effectiveness of the measures proposed by the applicant to avoid, minimize, or mitigate unreasonable adverse effects on aesthetics." They claim that payment of $40,000.00 to the Town of Antrim for the enhancement of Gregg Lake, payment of $100,000.00 to the New England Forestry Foundation and placement of over 900 acres of land into conservation easements will not mitigate the visual effects of the Project on aesthetics.

The Intervenors and Counsel for the Public also dispute the Subcommittee's finding that implementation of a radar detection lighting system will effectively mitigate the night-time impact of the Project.

The Applicant argues that the parties extensively litigated and the Subcommittee considered the effectiveness of proposed mitigation measures as measures for addressing the impact on aesthetics. The Applicant states that the Intervenors and Counsel for the Public reiterate arguments already presented and addressed and fail to identify any facts or law warranting rehearing.

As to the effect of Project's radar activated lighting system on aesthetics, the Applicant asserts that the Subcommittee considered this issue during adjudicatory hearings where: (i) Attorney Reimers and Ms. Von Mertens specifically raised their concerns that there is no record

of visual impact of this system; (ii) Mr. Raphael specifically identified the turbines to be lit, the type of lighting to be used and opined that a radar activated system will essentially eliminate the Project's impact on aesthetics at night; and (iii) Counsel for the Public's expert opined that the radar activated lighting system provided a proper form of mitigation of the Project's impact on aesthetics. The Applicant argues that the Subcommittee considered this evidence and testimony and properly determined that the "radar activated system will minimize the impact of the Project on aesthetics." Decision and Order Granting Application for Certificate of Site and Facility, at 121.

The Applicant concludes that the Intervenors provided no evidence or arguments not already considered and evaluated by the Subcommittee.

The Subcommittee conducted an extensive analysis of the mitigation measures during its deliberations and in its final decision. The Subcommittee recognized that wind projects are not susceptible to typical visual screening mitigation due to their height. In considering mitigation of the visual effects the Subcommittee noted that the visual effects on the Willard Pond are mitigated by the elimination of Turbine 10 and a reduction in the height of Turbine 9 as compared to the Antrim I project. The Subcommittee also determined that the additional conservation easement of 989 acres will provide effective visual mitigation in some rural and forested areas in addition to sparing the conserved land from future development.

The arguments for rehearing simply disagree with the Subcommittee's conclusions and do not meet the standard for granting rehearing.

K. Decommissioning

Intervenors and Counsel for the Public argue that N.H. CODE OF ADMIN. RULES Site 301.08(a)(7) requires the Applicant to submit a decommissioning plan demonstrating that all underground infrastructure at a depth less than four feet below grade will be removed from the

site. The Intervenors and Counsel for the Public assert that the decommissioning plan submitted by the Applicant does not comply with the rule. The plan requires the decommissioning contractor to excavate a trench, remove and pulverize the concrete, and then bury the concrete on-site. The Intervenors and Counsel for the Public argue that the approval of the decommissioning plan was in violation of the rule.

The Applicant argues that the Subcommittee's determination that the reuse of the concrete as fill was consistent with the Committee's rules. The Applicant further argues that the Subcommittee's decision was supported by the record where the Subcommittee received evidence that the practice is consistent with the Department of Environmental Services guidance and there will be no infrastructure remaining on the site because benign concrete does not qualify as infrastructure within the definition of the rule.

In its Decision the Subcommittee noted that the re-use of pulverized concrete as fill is a best management practice approved by the Department of Environmental Services. The concrete infrastructure is removed as part of the process, pulverized on site and used for fill. This process avoids the need to import foreign fill which may cause environmental problems. There is no evidence that the re-use of the pulverized concrete presents a health or public safety issue and it is the preferred environmental method of decommissioning. Once pulverized it is unreasonable to consider the material used as fill to be "infrastructure." The process does not violate N.H. CODE OF ADMIN. RULES Site 301.08(a)(7) as the infrastructure is removed. Rehearing on this issue is denied.

L. Effect on Public Health and Safety – Noise

The Intervenors claim that the Subcommittee's finding that the Project's noise will not have an unreasonable adverse effect on health and safety was erroneous because it was based on unreliable sound assessments that did not model the worst case scenario for noise associated with

the Project. Specifically, the Intervenors argue that the sound assessments prepared by Mr. O'Neal were not reliable because Mr. O'Neal used a ground factor (G Factor) of 0.5 and failed to include tolerance to the ISA 9613-2 model for variability of sound propagation as atmospheric conditions change at the Project site.

Finally, on noise, the Intervenors assert that the decision that the Project will not have an unreasonable adverse effect on health and safety was erroneous because it failed to consider that the Project's noise will be above 40 dBA at a hunting cabin that the Subcommittee erroneously found to be dilapidated.

The Meteorologists argue that the Subcommittee acted unlawfully or unreasonably with regard to noise issues. They assert that the Applicant failed to sustain its burden of proof on noise issues. They also claim that the modeling used by the Applicant's expert was unreliable, failed to model a worst case scenario, employed the wrong G-Factor and failed to consider meteorological ducting of sound.

The Applicant argues that Mr. O'Neal provided extensive testimony about the reasoning for using a 0.5 ground factor and decision not to include tolerance to the ISA 9613-2 model for variability of sound propagation as atmospheric conditions change at the Project site. The Applicant also asserts that Mr. O'Neal's sound modeling complies with the Subcommittee's rules where Mr. O'Neal used the ISA 9613-2 model and his professional judgment on which factors apply to the estimation of the Project's sound. The Applicant asserts that the Subcommittee has considered the critique of Mr. O'Neal's judgment in using certain factors and found his report and testimony sufficiently credible to determine that the Project will comply with the Committee's rules and will not have an unreasonable adverse effect on public health and safety.

With respect to the noise claims raised by the Meteorologists the Applicant responds that the Sound Level Assessment Report was prepared in compliance with the Subcommittee's rules. The report used Cadna/A noise calculation software that employs the ISA 9613-2 international standard for sound propagation (Site 301.18(c)(1)), considering the effects of topography, ground attenuation, multiple building reflections, drop-off with distance and atmospheric absorption, assuming favorable conditions for sound propagation with corresponding moderate well-developed ground-based temperature inversion. The model assumes that each receptor is always located directly downwind from every turbine simultaneously. The Applicant argues this modeling provided the theoretical "worst case." On the G-factor, the Applicant asserts that the Subcommittee considered the Meteorologists' testimony and correctly found that the G Factor of .5 was reasonable for this Project.

The Subcommittee reviewed the Sound Assessment report prepared by Mr. O'Neal and heard his testimony. Mr. O' Neal was vigorously cross-examined. In addition his opinions were challenged by the testimony of the Intervenors expert, Mr. James. After consideration and deliberation the Subcommittee found Mr. Neal's opinions to be more credible and his Sound Assessment to comport with professional standards and our administrative rules. The motions for rehearing filed by the Intervenors and by the Meteorologists disagree with the Subcommittee's findings and conclusion but do not offer any new or more persuasive arguments or evidence that would require rehearing. Similarly the claims raised by the meteorologists merely repeat the unpersuasive arguments that were presented during the hearings. There is no cause for rehearing.

The Subcommittee also noted in its decision that even if the modeling contains some errors the Applicant will be constrained by the absolute noise limits set out in N.H. CODE ADMIN. RULES Site 301.14 (f)(2)(a), i.e. the greater of 45 dBA or 5 dBA above background levels,

measured at the L-90 sound level, between the hours of 8:00 a.m. and 8:00 p.m. each day, and the greater of 40 dBA or 5 dBA above background levels, measured at the L-90 sound level, at all other times during each day. *See* N.H. CODE ADMIN. RULES Site 301.14 (f)(2)(a). The turbines will be equipped with equipment to curtail sound emissions to the limits allowed by the rule. Under these circumstances there is no good cause or reason for rehearing.

M. Public Health & Safety - Shadow Flicker

The Intervenors argue that the Subcommittee's failed to consider the effect of shadow flicker outside 1 mile of the zone of potential impact. Specifically, they assert that N.H. CODE OF ADMIN. RULES Site 301.08(a)(2) require the Applicant to analyze shadow flicker "within a minimum of 1 mile of any turbine." They argue that the rule assumes that the properties outside a 1 mile zone of potential impact will be affected and requires the Applicant to analyze the impact of shadow flicker on all structures that may be affected. They concluded that the Applicant's assessment of the Project's shadow flicker and the Subcommittee's determination of the impact of shadow flicker associated with the Project was erroneous and unjust because the Applicant failed to analyze the impact of shadow flicker on all properties that may be affected including properties located outside of the 1 mile evaluation zone.

The Intervenors also argue that the Applicant's assessment of the Project's shadow flicker was unreliable because it used a historical data set for Concord, New Hampshire from the National Climatic Data Center.

The Intervenors also assert that the Subcommittee's decision was unjust and unreasonable because it determined that the Applicant can control shadow flicker within required standards by implementing control protocols not tested in the United States.

The Meteorologists also seek rehearing based on shadow flicker issues. The Meteorologists claim that the shadow flicker modeling performed by Mr. O'Neal was unreliable

because it failed to account for solar enlargement and other meteorological factors such as wind speed and direction. The Meteorologists claim that the modeling failed to account for reflection of flicker from ice and snow. The Meteorologists also complain that the Subcommittee failed to address certain disagreements between Mr. O'Neal and the Meteorologists representative Fred Ward, Ph.D.

In response to the claims of error, the Applicant argues that the Committee's rules do not require the Applicant to conduct shadow flicker analyses beyond a 1 mile zone of potential impact. The Applicant explains that the shadow flicker analyses assumed bare earth conditions and, considering the real life conditions, the Project's shadow flicker likely will not have an unreasonable adverse effect 1 mile beyond the Project. The Applicant also states that the Intervenors' argument that the Applicant should have analyzed the Project's shadow flicker impact beyond 1 mile was raised by the Intervenors and considered and rejected by the Subcommittee during the adjudicative hearings.

Similarly, the Applicant asserts that concerns associated with the Applicant's ability to control and limit shadow flicker are ameliorated by the condition of the Certificate which requires semi-annual reporting of shadow flicker data. The condition will assure that the absolute limitations on shadow flicker are observed.

The Applicant also responds that the Meteorologists raised no claim not already presented to and evaluated by the Subcommittee during the adjudicative hearings. The Applicant argues that the shadow flicker study prepared by Mr. O'Neal presented: (i) the worst-case calculations if the sun is always shining during the day and the turbines are always operating; and (ii) the expected shadow flicker that reflected the data obtained from the National Climatic Data Center and expected wind turbine operational data. The Applicant asserts that the Meteorologists raised all the issues addressed in their motion during the adjudicative hearings,

during cross-examination of Mr. O'Neal, and their motion articulates arguments already considered and rejected by the Subcommittee.

In its Decision the Subcommittee found that the Applicant's shadow flicker analysis replicated the "worst case scenario." Under that scenario there were 24 locations where shadow flicker was likely to exceed the maximum limit allowed by our rules. *See* N.H. CODE ADMIN. RULES Site 301.14 (f)(2)(b). Therefore, the Subcommittee applied additional conditions on the project requiring semi-annual reporting of shadow flicker data to the Site Evaluation Committee. With such conditions the Subcommittee found that shadow flicker from the Project would not cause an unreasonable adverse effect. The Subcommittee also notes that there are absolute limitations on shadow flicker that may be enforced by the Committee. *See* N.H. CODE ADMIN. RULES Site 301.14(f)(2)(b).

The motions for rehearing filed by the Intervenors and the Meteorologists do not provide new or more persuasive arguments. The turbines will be equipped with equipment to calculate, record and curtail shadow flicker to the limits allowed by the rule. Under these circumstances there is no good cause or reason for rehearing. The Subcommittee believes that the conditions along with the absolute maximum shadow flicker limits contained in N.H. CODE ADMIN. RULES, SITE 301.14 (f)(2)(b) will protect the public and assure that there will not be an unreasonable adverse impact on health and public safety from shadow flicker.

N. Ice Throw

The Intervenors argue that the possibility of ice throws caused by the Project will have an unreasonable adverse effect on public health and safety. They argue that the Subcommittee unreasonably ruled otherwise, finding no unreasonable adverse effect on the health and safety of the public. They claim that the Subcommittee failed to consider evidence and testimony presented by the Intervenors.

The Intervenors assert that the only evidence on the Project's distance of ice throw from the Applicant was the testimony of Darrell Stovall of DNV GL who testified that 250 meters is a general assessment and industry accepted number. The Intervenors argue that to contradict Mr. Stovall's statement, they filed a report entitled "Methods for Evaluating Risk Caused by Ice Thrown and Ice Fall from Wind Turbines and Other Tall Structures." They assert that, based on this report, the Subcommittee could have calculated that the Project's ice throw distance could reach 300 meters. They claim that the Subcommittee erroneously disregarded "objective evidence from disinterested third-parties" and erroneously determined, based on Mr. Stovall's testimony, that the Project will not have an unreasonable adverse effect on public health and safety.

The Meteorologists also seek rehearing based on the ice throw issue. They claim that the Subcommittee accepted the representations of the Applicant and disregarded the opinions of Dr. Ward. Therefore they argue that the decision is unlawful and unreasonable.

The Applicant responds that the Intervenors identified no errors of fact or reasoning of law that resulted in an unlawful or unjust decision, but simply stated their disagreement with the Subcommittee's determination.

In granting the Certificate the Subcommittee considered the testimony and exhibits about ice shedding submitted by all parties. The Subcommittee found the testimony of the Applicant's witness, Darrell Stovall, to be the most credible. Mr. Stovall is a principal engineer with one of the worldwide leading technical consultancies on wind power. Mr. Stovall testified about the experiences of his company and the industry in general with respect ice throw. t is not unlawful or unreasonable for the Subcommittee to rely on the expertise of Mr. Stovall and his company to determine that ice throw will not cause an unreasonable adverse impact on public health and safety. But that is not all that the Subcommittee considered. The Subcommittee also considered

the fact that the turbines will be equipped a turbine condition monitoring system that detects increases in vibration levels due to ice buildup and automatically shuts down the turbine to avoid ice throw. The Subcommittee also approved the certificate based on the establishment of certain setback and signage criteria contained within the agreement with the Town of Antrim.

The motions for rehearing filed by the intervenors and by the meteorologists merely restate arguments that were made during the course of the proceeding. They do not provide any new material or more persuasive arguments. Rehearing is unnecessary.

O. Effect on Natural Environment

The Intervenors argue that the Applicant failed to assess the impact of the Project on large mammals, *i.e.* bears and bobcats. They assert that Mr. Block specifically testified about the signs of bears and bobcats in and around the Project and opined this area presented a core habitat for these species. The Intervenors believe that the Subcommittee should have concluded that the Site represents a "significant habitat resource" for these species as defined by N.H. CODE OF ADMIN. RULES Site 102.49, and should have required the Applicant to assess the impact of the Project on these species under N.H. CODE OF ADMIN. RULES Site 301.07(c). They conclude that determination that the Project will not have an unreasonable adverse effect on the natural environment without evaluation of the Project's effect on bears and bobcats is unjust and erroneous.

The Intervenors also argue that the Subcommittee erroneously allowed the Applicant to determine when identified boulders cannot be avoided.

The Applicant states that the arguments raised in the Intervenors' Motion are the same arguments the Intervenors raised during adjudicative hearings and no information was provided that the Subcommittee failed to consider. The Applicant asserts that it filed a wildlife habitat assessment discussed during adjudicative hearings (Tr. Day 2, Afternoon Session, at 153),

provided testimony indicating that state and federal agencies raised no concerns about the impact of the Project on large mammals (Tr. Day 2, Afternoon Session, at 95, 146-147), and provided additional testimony that the effect on the mammals, including bears, bobcats and moose will be minimal (Tr. Day 2, Afternoon Session, at 96, 116, 146).

This argument like other proffered by the Intervenors merely rehashes claims made during the hearings and rejected by the Subcommittee. Rehearing is unnecessary.

P. Orderly Development of the Region - Views of Municipal and Regional Planning Agencies

The Intervenors claim that the Subcommittee's decision that the Project will not have an unreasonable adverse effect on the orderly development of the region was erroneous and unjust because the Subcommittee failed to consider that the proposed land use is contrary to priorities expressed in the Master Plan, is not permitted in the Rural Conservation Zone under the Zoning Ordinance of the Town of Antrim, and the people of Antrim indicated their opposition to the Project by voting against an amendment to the Ordinance that would allow construction and operation of the Project.

The Intervenors also argue that the Subcommittee's decision was unjust because it failed to consider the views of other municipalities affected by the Project and the effect of the Project on other communities, including the ConVal School District.

The Applicant asserts that the Intervenors claim that the Subcommittee failed to consider the Town of Antrim's Zoning Ordinance and Master Plan is contrary to the record. The Applicant also asserts that the argument that the Project is not zoning consistent with the Town and Antrim's Master Plan and Zoning Ordinance were fully litigated by the parties during the adjudicative hearings was specifically addressed by the Subcommittee during deliberations. Tr. Day 3, Morning Session, 15-16. Similarly, the record indicates that the issue of public support in

Antrim was considered and adjudicated by the Subcommittee. Tr. Day 6, Afternoon Session, at 155-156; Tr. Day 7, Morning Session, t 26-32; Tr. Day 7, Morning Session, at 133-135; Tr. Day 9, Morning Session, at 32-35. The Applicant also asserts that the Subcommittee addressed concerns raised by the municipalities that participated and specifically mentioned a letter from the Town of Deering stating its concerns during deliberation. Deliberation Tr., Day 3, Morning Session, at 43-44. Finally, the Applicant states that the Subcommittee received testimony that specifically addressed the impact of the Project on surrounding communities and the ConVal School District.

The Subcommittee devoted extensive consideration to the issue of whether the project would interfere with the orderly development of the region giving due consideration to views of municipal and regional planning commissions and municipal governing bodies. After consideration of those views and other relevant evidence the Subcommittee determined that the granting of a Certificate would not interfere with the orderly development of the region. The motions for rehearing do not present good cause for reconsideration of that finding.

Q. Real Estate Values

The Intervenors assert that the Subcommittee's decision that the Project will not have an unreasonable adverse effect on property values is unsupported and contradicted by the record. Specifically, they argue that the Subcommittee determined that it was not persuaded that the Project will have no adverse effect on real estate values. They conclude that the Subcommittee should have decided that the Project will have an unreasonable adverse effect on property values and should have denied the Application. They opine that the finding of no unreasonable adverse effect is contrary to the record and arbitrary.

The Intervenors argue that the Subcommittee mistakenly concluded that there was insufficient evidence identifying and justifying a property value guarantee. The Intervenors

assert that they attempted to submit evidence of property value guarantees used in an unrelated Massachusetts Project, but this evidence was stricken by the Presiding Officer. They also assert that they filed a letter addressed to the Antrim Board of Selectmen requesting inclusion of property value guarantees into the agreement between the Town of Antrim and the Applicant. They assert that the record should be re-opened so they can submit evidence required for establishment of property value guarantees.

The Applicant responds that the Subcommittee's finding is consistent with the determination that the Project will not have an unreasonable adverse effect on property values. The Applicant argues that the decision not to require a property value guarantee was reasonable. The Applicant concludes that the Intervenors failed to state issues of fact and law warranting a rehearing in this docket.

The Subcommittee recognized that construction and operation of the Project might have an effect on the value of some properties in the area. However, the Subcommittee found that the effect, if any, would be small and was not unreasonable. This finding was based on the evidence in the record. The Subcommittee also considered the application of a property value guarantee condition but found that condition to be impractical. The motions for rehearing on this issue do not offer an evidence or argument that has not already been fully considered by the Subcommittee. Rehearing based on this issue is denied.

R. Financial Capacity

The Intervenors and the Meteorologists argue that the Subcommittee failed to consider the effect of implementing ice throw, shadow flicker and noise mitigation measures will have on the Project's capacity and ability to generate sufficient cash flow required for its operation. The Intervenors and Meteorologists suggest that the mitigation measures will decrease electrical production by the turbines to a degree that will render the project to be financially inefficient.

The Applicant asserts that the Intervenors argument is not supported by the record. The Applicant's witness, Mr. Weitzner, specifically testified that the Applicant knows of the constraints associated with implementation of ice throw, noise and shadow flicker mitigation. He testified that those mitigation procedures are irrelevant to the revenue of the Project Tr. Day 1, Morning Session, at 99-100; Tr. Day 1, Afternoon Session, at 92-93.

The Applicant has appropriately employed methods to mitigate ice throw, noise and shadow flicker. These methods are commonly used throughout the industry and are common sense responses to potential problems. The suggestions by the Intervenors and the Meteorologists that curtailment and other mitigation measures will render the project unprofitable are mere conjecture. They do not amount to good cause or reason for rehearing.

S. Flashing Lights at Night

The Meteorologists argue that the Subcommittee improperly concluded that the aviation safety lighting system will not have an unreasonable adverse effect on public health and safety. They claim that the Subcommittee did not consider the time the lights will be on, the pattern of the light and its effect on residents. The Meteorologists claim the Subcommittee did not consider the Project's night lights and its appearance during bright winter nights.

The Applicant asserts that the Meteorologists presented no new arguments or evidence and are simply attempting to re-litigate matters already resolved.

The Applicant also argues that the Meteorologists have no basis for their claims that the radar activated aviation safety lighting will cause an unreasonable impact. The Applicant points out that Dr. Ward had an ample opportunity to cross-examine all of the witnesses and did not elicit any concern that aviation safety lighting would have any adverse effect on the region.

In his motion for rehearing Dr. Ward provides a scenario suggesting that the radar activated aviation safety lighting causing sleeping residents to awake because of "reverse shadow

flicker." There is simply no evidence in the record supporting that assertion. Having considered the evidence in the record the Subcommittee determined that the aviation safety lighting is a requirement for public safety. The radar detection activation system will mitigate the minor impact of the aviation safety lighting. There is no good cause or reason for rehearing.

T. "Tipping the Scales of Justice"

The Meteorologists final complaint is that the Subcommittee overlooked the Meteorologists' testimony and evidence in favor of testimony submitted by the Applicant and Mr. O'Neal. Dr. Ward asserts that the lack of acknowledgement of his (Ward's) testimony and allegedly superior qualifications constitutes acceptance of his opinions by the Subcommittee and therefore the Subcommittee should have denied the Certificate. He claims that the scales of justice were unfairly "tipped" because the Subcommittee did not sufficiently credit his opinions and authority.

The Subcommittee as the trier of fact may accept or reject the testimony of any witness. *See In re Aube*, 158 N.H. 459, 466 (2009.) Where there is a dispute in the testimony an agency is not required to explain the reasons for rejecting expert testimony. *See In Re Blake*, 137 N.H. 43, 49-50 (1993.) In assessing which witnesses to believe it was not necessary for the Subcommittee to explain away the criticisms and opinions offered by Dr. Ward. It was sufficient for the Subcommittee to explain that it found the Applicant's experts and testimony to be credible and persuasive. The motions for rehearing present no cogent reasons to upset that finding and must be denied.

V. CONCLUSION

In granting the Certificate the Subcommittee undertook a thorough and careful review of the Application, the evidence and the arguments presented by all parties. The Subcommittee thoughtfully applied the statutory criteria to the evidence presented and determined that the

issuance of a Certificate was in the public interest. The motions for rehearing present no good cause or reason to upset that determination.

The motions for rehearing and/or reconsideration filed by Counsel for the Public, the Intervenors and the Meteorologists are denied.

SO ORDERED this twenty-first day of June, 2017.

Robert R. Scott, Presiding Officer
Site Evaluation Committee
Commissioner
Public Utilities Commission

Eugene Forbes, Designee
Director, Dept. of Environmental Services,
Water Division

John Clifford, Designee
Hearings Examiner
Public Utilities Commission

Richard A. Boisvert
Deputy State Historic Preservation Officer
State Archaeologist
Div. of Historical Resources

Patricia M. Weathersby
Public Member