

April 27, 2018

VIA HAND DELIVERY & ELECTRONIC MAIL

New Hampshire Site Evaluation Committee
Pamela G. Monroe, Administrator
21 South Fruit Street, Suite 10
Concord, NH 03301

**Re: Docket No. 2018-01: Petition for Declaratory Ruling – Antrim Wind Energy,
LLC Motion to Dismiss**

Dear Ms. Monroe:

Please find enclosed for filing with the Site Evaluation Committee, Antrim Wind Energy's Motion to Dismiss the Petition for Declaratory Ruling.

An electronic copy has been sent to the distribution list in this docket and a paper copy will be delivered to the SEC. Please contact me directly should you have any questions.

Sincerely,



Barry Needleman

BN:rs3

cc: SEC Distribution List

Enclosure

THE STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

Docket No. 2018-01

**PETITION OF THE ANTRIM WIND OPPONENTS
FOR DECLARATORY RULING**

**ANTRIM WIND ENERGY'S MOTION TO DISMISS
PETITION FOR DECLARATORY RULING**

Antrim Wind Energy, LLC (“AWE”) by and through its attorneys, McLane Middleton, Professional Association, submits this Motion to Dismiss Petition for Declaratory Ruling of the Antrim Wind Opponents (the “Petition”). The Petition includes signatures from 104 individuals from around the State, commissioners, and anti-wind organizations (collectively referred to as the “Petitioners”).

I. INTRODUCTION

1. On March 17, 2017 the Site Evaluation Committee (the “SEC” or the “Committee) granted a certificate with conditions to Antrim Wind Energy to construct and operate a wind facility on Tuttle Ridge in Antrim, New Hampshire (the “Certificate”).
2. On June 21, 2017 the Committee issued a final order denying all motions for rehearing. The Committee’s final order on motions for rehearing constituted the conclusion of the administrative process before the SEC for docket number 2015-02. *See Order on Joint Motion Filed in Docket No. 2015-02, p. 2* (March 27, 2018) (Noting that at this time “[a] certificate was granted, motions for rehearing were denied, and the matter is on appeal at the New Hampshire Supreme Court. This is not an open docket.”)
3. Prior to issuance of the final order, on June 2, 2017, the Opponents filed an appeal with the New Hampshire Supreme Court. They asked the Court to suspend the Certificate. The

Court denied that request. *Order on Motion for Summary Affirmance*, Docket No. 2017-0313 (July 31, 2017). The Certificate thus remains in force and effect during the pendency of the appeal. *Id.*; *see also* RSA 541:18 (stating, “[n]o appeal or other proceedings taken from an order of the commission shall suspend the operation of such order.”)

4. The Certificate requires that AWE, prior to commencing construction of the Project, “provide documentation demonstrating that debt **and/or** equity financing required for the construction of the Project is in place to the Committee’s administrator.” *Order and Certificate of Site and Facility with Conditions*, Docket No. 2015-02, p. 5 (March 17, 2017) (emphasis added).

5. On December 21, 2017, for the purpose of satisfying this condition, AWE submitted letters from Henry Weitzner (on behalf of Walden Green Energy) and Stephen O’Reilly (on behalf of RWE) demonstrating that construction financing was in place and that, consistent with the testimony provided by AWE and RWE, the financing would be in the form of equity provided by RWE.

6. The Opponents filed a letter on January 24, 2018 asserting that AWE failed to satisfy the Certificate condition relating to construction financing. On January 30, 2018 Counsel for the Public also submitted a filing regarding the construction financing. AWE submitted a Response on January 31, 2018.

7. On February 8, 2018 Administrator Monroe issued a letter indicating that AWE had satisfied the construction financing condition in the Certificate.

8. On March 7, 2018 the Opponents filed a Joint Motion to Reconsider the Decision of the Administrator.

9. The Committee issued an order on March 27, 2018 denying the Motion to Reconsider and concluding that the request was procedurally improper under the SEC rules. The Order further stated that the Opponents could file a petition for declaratory ruling pursuant to Site 203.01, and if the Opponents wanted their March 7, 2018 filing to be treated as a petition for declaratory ruling they should notify the Committee in writing within 10 days.

10. The Opponents subsequently filed the Petition on April 6, 2018.

II. STANDARD OF REVIEW

11. In ruling on a motion to dismiss, the Committee must determine “whether the [petitioner’s] allegations are reasonably susceptible of a construction that would permit recovery.” *Hobin v. Coldwell Banker Residential Affiliates, Inc.*, 144 N.H. 626, 628 (2000). In making such a determination, the court will “normally accept all facts pleaded by the petitioners as true and view those facts in the light most favorable to them.” *Dembiec v. Town of Holderness*, 167 N.H. 130, 133 (2014). Dismissal is appropriate “[i]f the facts as pled cannot constitute a basis for legal relief.” *Hobin*, 144 N.H. at 628. It is appropriate for the Committee to grant a motion to dismiss where, as in this case, the petitioner has failed to allege sufficient facts to establish a legitimate basis for legal relief.

III. ARGUMENT

12. The Petitioners’ Motion should be dismissed for five principal reasons: (A) the petition is procedurally defective because Petitioners failed to pay the statutory filing fee and such fees cannot be waived; (B) Petitioners have waived the key issues raised; (C) the Petitioners rely on a fundamentally inaccurate reading of the Certificate condition; (D) the relief Petitioners seek is not properly addressed through a petition for declaratory ruling; and (E) the Petitioners do

not have any particular legal right here as required by the rules.. In each case these Petitioners have failed to establish a basis for legal relief.

A. The Petition Must Be Dismissed Because The Petitioners Failed to Pay the Mandatory Filing Fee¹

13. The statute requires that a filing fee be included with a petition for declaratory ruling. RSA 162-H:8-a, II(d)(2).² The statute provides only limited circumstances where the fee shall not apply. RSA 162-H:8-a, IV. This situation is not one of those circumstances.

14. The filing fee is mandatory under the statute in this case and cannot be waived. While Site Rule 202.15 permits the Committee to waive its rules, it would be contrary to law to allow an administrative agency to waive a statutory requirement. An administrative agency may only exercise its authority to the extent permitted by statute. *Appeal of Cover*, 168 N.H. 614, 622023 (2016)(holding that “administrative rules may not add to, detract from, or modify the statute which they are intended to implement.”). RSA 162-H is silent on the issue of waiver in this context and allowing such a waiver would detract from the statutory framework. Since the Petitioners have not paid the required fee, the Petition should be dismissed.

15. Petitioners cannot evade this statutory requirement by simply alleging that their ongoing participation in a closed docket serves the public good. *Motion to Waive*, Docket No. 2018-01, p. 2 (April 6, 2018). The Petitioners rely on *State v. Cushing*, 119 N.H. 147 (1979) to support their position that the fee should be waived. *Cushing*, however, is a criminal case and the New Hampshire Supreme Court held that because felons are entitled to a trial by jury, they should not be made to “purchase a jury trial.” *Id.* at 148. The Petitioner’s reliance on *Cushing* is

¹ In addition to seeking a fee waiver, the Petitioners have sought a waiver of Site 202.22, which they allege requires the filing of pre-filed testimony with the Petition. It is unclear how Petitioners believe this rule applies at all in the context of a petition for declaratory ruling. Nevertheless, the rules do not provide Petitioners the right to file testimony and Petitioners should not be permitted to do so here.

² The Petitioners were specifically instructed to pay the filing fee. *Order on Joint Motion Filed in Docket No. 2015-02 Application of Antrim Wind Energy, LLC for a Certificate of Site and Facility*, Docket No 2015-02, p. 3 (March 27, 2018)(“and also pay the filing fee specified in RSA 162-H:8-a.”).

misplaced. The legislature has already made a determination that requiring the payment of such a fee is proper. Unless Petitioners intend to assert that RSA 162-H is on its face unconstitutional, their argument is unsupported and such a waiver would open the door for an unjust and unworkable process.

16. The Petitioners further assert that the applicant (AWE) is “the party most properly suited to bear [the] costs” associated with its petition for declaratory ruling. *Petition*, Docket No. 2018-01, p. 15 (April 6, 2018). Petitioners cite no authority for this proposition either and, in fact, it is not supported by the law. As the sole initiators of this new docket, the petitioners are the party responsible for paying any fees associated with it. RSA 162-H:8-a, I (“a person filing with the committee...any other petition or request for the committee to take action, *shall pay to the committee at the time of filing* a fee determined in accordance with the fee schedule described in paragraph II”).³ There is no law authorizing the imposition of fees or costs on any respondent in a case such as this.

B. The Petitioners Waived the Argument Regarding Delegation to the Administrator

17. The Petitioners assert that in drafting the Certificate, the Subcommittee improperly delegated to the Administrator authority for determining compliance with the “financing contingency” provided in the Certificate. *Petition*, Docket No. 2018-01, p. 8 (April 6, 2018). As a matter of law, the Petitioners have waived the argument regarding the structure of the Certificate by failing to raise it in a timely motion for rehearing. Therefore, the Petition should be dismissed.

³ RSA 162-H expressly provides a provision requiring the payment of filing fees by the party filing and not only an applicant. The issue of payment of costs and fees in an SEC declaratory ruling process was discussed by the New Hampshire Supreme Court in *Appeal of Campaign for Ratepayers’ Rights*, 162 N.H. 245, 253-254 (2011)(holding that the statute at the time only provided that “the cost of which shall be borne by the applicant” and the applicant was specifically defined by statute as “any person seeking to construct and operate any energy, renewable energy or bulk power supply facility within this state.”). Since that case was decided, RSA 162-H has been amended to require any person seeking relief to pay the associated filing fee.

18. The Petitioners argument involves an issue pertaining to how the Subcommittee crafted the Certificate. It is a challenge to the structure of the Certificate itself. As such, the Petitioners were required to seek rehearing within 30 days of the issuance of the Certificate. RSA 541:3 (“Within 30 days after any order or decision has been made by the commission, any part to the action or proceeding before the commission, *or any person directly affected thereby*, may apply for a rehearing.”).⁴

19. The failure to raise this issue at the proper time is fatal to the petitioners. RSA 541:3 (Expressly limiting rehearing motions to within 30 days of the issuance of an order); *see also* RSA 541:4 (“No appeal from any order or decision of the commission shall be taken unless the appellant shall have made application for rehearing as herein provided...no ground not set forth therein shall be urged.”).⁵ As such, they cannot now make claims that there are procedural defects in the Certificate. They waived such arguments and therefore the Petition should be dismissed as a matter of law.

C. The Petitioners’ Argument Regarding the Authority of the Administrator is Premised on a Misreading of the Financing Condition

20. The Petitioners argue that the SEC has a “non-delegable duty to ensure compliance with the conditions of a certificate,” *Petition*, Docket No. 2018-01, p. 9 (April 6, 2018), and that the Certificate impermissibly delegates to the Administrator the authority to make determinations with respect to the “financing contingency.” *Id.* This argument raises both legal and factual issues. The legal flaw with this argument is addressed in Section B above. The

⁴ While some of the Petitioners were not interveners in the original docket, they still had an opportunity to seek rehearing of the final order and chose not to. The fact that they did not participate below does not change the fact that they waived their right to raise any argument that could have and should have been raised in a motion for rehearing.

⁵ Moreover, multiple Petitioners are also Appellants in the New Hampshire Supreme Court. By raising this issue now, when it should have been raised earlier and then pursued as part of their Supreme Court case, the Petitioners are essentially creating improper parallel appeal paths.

factual flaw is addressed below. Specifically, the Petitioner's argument is rooted in a fundamental misreading of the Certificate.

21. The Petitioners argue "that the protocol employed by the SEC to determine AWE's compliance with the Certificate (which has to date involved ex parte communications between AWE and the SEC administrator and administrative determinations rendered outside of public hearings) is insufficient." *Petition*, Docket No. 2018-01, p. 2 (April 6, 2018).⁶ The specific Certificate condition at issue states that "the Applicant shall provide documentation demonstrating that debt and/or equity financing required for the construction of the Project is in place to the Committee's Administrator." *Order and Certificate of Site and Facility*, p. 5 (March 17, 2017). This condition involves an administrative matter subject to a simple inquiry: has AWE provided the requisite documentation, yes or no? AWE provided the documentation as required and the Administrator acknowledged that fact.

22. The Petitioners argue that "the administrator unilaterally made a determination as to AWE's satisfaction of conditions set forth in the Certificate." *Petition*, Docket No. 2018-01, p. 8 (April 6, 2018). Petitioners further argue that, based on the Certificate condition, the SEC must "issue a finding that AWE has [or has not] met that financing contingency." *Petition*, Docket No. 2018-01, p. 9 (April 6, 2018). That is not what the Certificate requires. The Petitioners are reading a requirement into the Certificate that is not present and then basing their entire argument on that mistaken interpretation. In fact, the Certificate is clear on this issue and

⁶ Communications with the SEC administrator are not ex parte communications. The SEC rules require that Committee members not communicate directly or indirectly with parties. Site 202.30. The Administrator is not a Committee member and so this rule does not pertain to her. Moreover, the ex parte rules are designed to ensure that improper communications are not made with Committee members, or alternatively with employees of an agency assigned to render a decision, regarding the substance of matters before them. *See* RSA 541-A:36. The communication in question did not involve a substantive matter before the Committee. If a future sale of the project were to occur, it would require SEC approval prior to closing and would not be a decision made by the Administrator. AWE acknowledged that point with the Administrator. Thus, the notion that there was anything legally or factually improper about this communication is nonsensical.

it does not require any actual finding or decision by the Administrator or the SEC. In fact, the Petitioner seemed to actually acknowledge this point, noting that the administrator “is to act as the recipient of financing documentation. At no place in the Certificate has the SEC actually delegated to the administrator the role of determining the sufficiency of the documentation.” *Petition*, Docket No. 2018-01, p. 8 (April 6, 2018).

23. If the Committee wanted this process to be more detailed or elaborate (such as requiring some sort of affirmative analysis and determination regarding the sufficiency of the information submitted), the Committee would have written the condition in a different manner. For example, the Certificate requires the Applicant to “immediately notify the Site Evaluation Committee of any change in ownership...and *shall seek approval of the Subcommittee,*” Certificate of Site and Facility, p. 3 (March 17, 2017). The Certificate further provides that the Applicant shall “submit the plans for the fire suppression system in the nacelles...to the State Fire Marshal and the Town of Antrim Fire Department for review *and approval.*” Certificate of Site and Facility, p. 4 (March 17, 2017). It did not provide similar language here with respect to project finance.

24. On its face, the Petitioners’ construction of this Certificate provision is wrong. Therefore, as a matter of law the Petition should be dismissed. *Dembiec v. Town of Holderness*, 167 N.H. 130, 133 (2014).

D. The Petitioners Seek Relief Which is Not Available Through Declaratory Ruling

25. The Petition should be dismissed because virtually all of the issues raised by the Petitioners cannot be appropriately addressed through a declaratory ruling. The SEC acknowledged that the Rules permit Petitioners to file a petition for declaratory ruling. However,

it is reasonable to assume such a filing would comport with the rules and statutory provisions governing such petitions and seek appropriate relief. This Petition does not.

26. Black's Law Dictionary defines declaratory relief as "a unilateral request to a court to determine the legal status or ownership of a thing." Black's Law Dictionary, 1482 (10th ed. 2014). The purpose for such relief is clear – to establish legal rights. A request for declaratory ruling to an administrative agency can be made in order to "obtain the agency's commitment to [a] policy." Gordon J. MacDonald, *Wiebusch on New Hampshire Civil Practice and Procedure* §62.13 (4th Ed. Matthew Bender & Co.) Again, the clear purpose is to seek guidance from the agency regarding the application of a certain rule or procedure. It is not intended as an alternative method for seeking adjudication of a dispute between parties.

27. The Petitioners confuse the administrative process of declaratory ruling, which is governed by the Administrative Procedures Act, RSA 541-A:16, I(d), and a declaratory judgment proceeding, which is governed by the Declaratory Judgment Act, RSA 491:22. While a declaratory judgment may be brought for the broader purpose of determining "the question as between the parties," a declaratory ruling is simply "an agency ruling as to the specific applicability of any statutory provision or of any rule or order of the agency." RSA 541-A:1, V. The question properly before an agency in a declaratory ruling proceeding relates to whether a specific rule provision applies in a particular case. If the Petitioners wish to raise claims regarding their legal rights and the implication of an agency decision on those rights, they should have sought a declaratory judgment in the Superior Court. Gordon J. MacDonald, *Wiebusch on New Hampshire Civil Practice and Procedure* §62.11 (4th Ed. Matthew Bender & Co.). The relief sought in this proceeding is not properly before the SEC and cannot and should not be addressed through a declaratory ruling.

28. Throughout the Petition, there is an underlying proposition suggesting that requiring members of the public to file declaratory ruling petitions somehow deprives the public of “fundamental procedural rights to be heard and present evidence.” *Petition*, Docket No. 2018-01, p. 12 (April 6, 2018). Not only were the Petitioners not required to file a petition for declaratory ruling in order to raise their concerns, the premise of the argument is simply not correct. In addition to a declaratory ruling proceeding, Site 302.01 provides that “[w]henver the committee or the administrator as designee determines, on its own *or in response to a complaint*, that any term or condition of an issued certificate is being violated, it shall give written notice to the person holding the certificate of the specific violation and order the person to immediately terminate the violation.”

29. Any member of the public can file a complaint with the SEC regarding Certificate compliance under Site 302.01. That process is explicitly designed to address the issue Petitioner raise here: giving interested individuals an opportunity to be heard. While a complaining party may not necessarily agree with how the SEC resolves its complaint, that does not mean the established process is procedurally defective.⁷

a. The Issue of Whether the Docket Remains Open Cannot Be Properly Decided Through a Declaratory Ruling

30. Petitioners request that the SEC “declare that the Antrim II docket is not closed, as the SEC’s chair stated in the SEC’s March 27, 2018 Order.” *Petition*, Docket No. 2018-01, p.

⁷ The Petitioners reference the Groton Wind docket to support the position that the SEC has routinely kept dockets open to allow for ongoing public involvement. It is common SEC practice that once a Certificate has been issued and motions for rehearing have been denied, the docket is considered administratively closed. The Petitioners fail to acknowledge that in the Groton Wind docket the initial filing made by a member of the public, which began the subsequent compliance proceedings, was a motion to reopen the record. *Request to Reopen the Record*, Docket No. 2010-01 (January 14, 2013). In the Groton proceeding, there was an acknowledgement and understanding that once the Committee issued a certificate and ruled on motions for rehearing the docket for administrative purposes was closed. As in Groton, any member of the public may raise similar complaints with the SEC regarding compliance. That does not, however, mean that the SEC has any obligation to take up and adjudicate every complaint that comes before it.

12 (April 6, 2018). Such a request cannot be properly decided by declaratory ruling. RSA 541-A:1, V. Further, that issue has already been resolved.

31. In its March 27, 2018 Order, the Committee expressly held that the SEC had completed its exercise of authority in Docket No. 2015-02 and that “[t]his is not an open docket.” *Order on Joint Motion Filed in Docket No. 2015-02, Application of Antrim Wind Energy, LLC for a Certificate of Site and Facility*, p. 2 (March 27, 2018).

32. The Petitioners confuse the distinction between the subcommittee that sat for docket number 2015-02 and the Site Evaluation Committee established pursuant to RSA 162-H:3. The SEC, not any particular subcommittee appointed for a particular docket, has ongoing jurisdiction over any Certificate and is required to ensure continued compliance. RSA 162-H:4, I(c) and (d). However, those routine compliance determinations are not made in the context of an ongoing adjudicative proceeding and so the statutes and rules governing such proceedings are not applicable.

33. There is no need to keep the underlying docket open in order to allow the SEC to perform this function. Requiring adjudication of each and every compliance determination by the Committee or a delegated entity is unnecessary given the underlying findings already made. Additionally, requiring such a process would invariably result in unreasonable delay for certificate holders and would hinder the ability of the Committee to function in an efficient manner.⁸

⁸ The Petitioners refer to *Sklar Realty v. Merrimack*, 125 N.H. 321 (1984) to support their position that the docket should remain open. The issue in *Sklar*, however, involves an interim planning board determination. As the Court noted, “[c]onditional approval is therefore only an interim step in the process of the board’s consideration.” *Id.* at 327. Unlike in *Antrim*, the applicant in *Sklar* “claims to have fulfilled a condition attached to an application, that condition has become a part of the application itself.” *Id.* at 328. AWE does not dispute that during an ongoing application approval process, intervenors have a right to file motions and seek a hearing to address concerns. This is not, however, the same as the situation currently at issue in *Antrim*. The SEC’s approval and issuance of a certificate is not an interim step. It is a final determination. The rights afforded to members of the public once a record is closed, as it is here, are distinct from the rights available to intervenors during an ongoing adjudicative

E. The Petitioners Have Not Identified Any Particularized Legal Rights That Entitle Them To The Requested Relief

34. The Committee may choose to dismiss a petition for declaratory ruling when such a petition “does not implicate the legal rights or responsibilities of the petitioner.” Site 203.02(c)(3). Implicit in the rule language is that a petitioner must identify a particularized legal right. Asserting broad public interest concerns is not sufficient and such a petition should be dismissed.⁹

35. The Petitioners attempt to allege a right or interest, which is required in order to seek declaratory ruling, by articulating generalized concerns common to the entire public: “Abutters to energy facilities, and those impacted by energy facilities, have not asked to have these facilities thrust upon them.” The Petitioners further note that these individuals “do not have the resources to continually file rounds of petitions for declaratory ruling...every time they have a good faith belief that AWE has not satisfied a condition.” *Petition*, Docket No. 2018-01, p. 14-15 (April 6, 2018).

proceeding for an application. Further, unlike in *Sklar*, the SEC does provide a mechanism for individuals to raise concerns even after a final decision has been rendered. Complaints may be filed with the SEC at any time by members of the public and the SEC may take up such issues either in a formal adjudicated process or informal matter to evaluate and address certificate compliance. Site 302.01(a); RSA 162-H:12. The SEC does not need to hold a hearing on every complaint raised. Additionally, unlike in *Sklar*, an SEC Certificate does not only have conditions involving pre-construction activity. Many of these conditions continue throughout the life of the project. Therefore, the Court’s reasoning in *Sklar* that “[t]here need be no such string of hearings [because] the board may wait until the applicant claims to have fulfilled all conditions” cannot be applied here. *Id.* at 329. Requiring such a string of hearings to address every alleged compliance concern raised by any member of the public would be unduly onerous and would render the SEC process unworkable.

⁹ The Petitioners in this case consist of several different categories of individuals. There are individuals from Massachusetts; there are many individuals that live significant distances from the proposed project; and then there are individual that reside within the town of Antrim and surrounding communities. The only category of individuals that could conceivably raise a particularized right sufficient to bring such a petition, are individuals living in or near the town of Antrim. Even with respect to these individuals, it is difficult to discern what particularized legal right these individuals have in a determination with respect to the sufficiency of project finance. Such a concern is more appropriately raised as a generalized public concern and has no bearing on any individual rights. In turn, assertions of such generalized rights are not a sufficient basis to confer standing. *Avery v. New Hampshire Dep't of Educ.*, 162 N.H. 604, 608 (2011)(holding that in the context of a petition for declaratory judgement, such a claim will not be heard “unless he shows that *some right of his* is impaired or prejudiced thereby.”)

36. The Petitioners attempt to elevate these general due process arguments to support their position that they should have a right to raise any future compliance concerns. Nowhere in the petition have the Petitioners alleged that any action taken by AWE at this time has implicated their individual legal rights. Nor can a condition that merely requires the exchange of documents ever meaningfully impact Petitioners' rights.

37. The Petitioners have failed to raise any particularized legal interests and instead have asserted interests that all members of the public would share. Such an assertion does not satisfy the requirement set out in Site 203.02(c)(3).

38. To the extent the Petitioners have raised more particularized concerns, it is with respect to hypothetical issues relating to "other conditions such as those that address noise and shadow flicker." *Petition*, Docket No. 2018-01, p. 10 (April 6, 2018). Generalized concerns about future hypothetical compliance concerns cannot form the basis for a declaratory ruling. Site 203.02(c)(2).

39. The discussion of the noise and shadow flicker conditions,¹⁰ and conditions generally, have no connection to the financing of the project and simply interject hypothetical concerns for future action that have not been taken. *Petition*, Docket No. 2018-01, p. 10 (April 6, 2018)(noting concern "that such a process *will again* be employed for the purposes of other conditions such as those that address noise and shadow flicker conditions.").

F. The Decision to Finance the Project with Full Equity is Not a Material Change and is Consistent with All Certificate Conditions

40. Because the present Petition is improper, and for the other reasons addressed in this Motion, AWE does not address fully the merits of the project financing issue. The

¹⁰ In addition, the noise and shadow flicker conditions are part of the subject of the pending appeal at the New Hampshire Supreme Court. If Petitioners wished to raise a concern regarding these conditions, they should have done so as part of their appeal. A petition for declaratory ruling cannot cure such a pleading defect.

Petitioners repeat the arguments previously raised by Opponents that financing for the project with full equity is a material change from the financing presented and approved by the SEC. The Opponents have already raised this in a prior complaint and AWE has now responded to this argument in both its January 31, 2018 and March 14, 2018 filing. If the Subcommittee does not dismiss the Petition on procedural grounds, AWE incorporates by reference the substantive arguments raised in its prior filings and requests the right to file an additional pleading addressing the substantive arguments raised.

G. Suspension of the Certificate Would be Improper

41. The Opponents and now the Petitioners have on several occasions asked both the SEC and the New Hampshire Supreme Court to suspend the Certificate pending resolution of a perceived issue of compliance. *Petition to Appeal to NH Supreme Court*, Docket No. 2015-02, p. 34 (June 2, 2017); *Joint Motion to Reconsider Decision of the Administrator*, Docket 2015-02, p. 11 (March 7, 2018)

42. The New Hampshire Supreme Court has already declined to suspend the Certificate during the ongoing appeal process. *Order on Motion for Summary Affirmance*, Docket No. 2017-0313 (July 31, 2017). This is consistent with state law. RSA 541:18 (stating, “[n]o appeal or other proceedings taken from an order of the commission shall suspend the operation of such order.”). Similarly, the SEC also declined to suspend the Certificate in response to the Opponents initial Joint Motion to Reconsider. *Order on Joint Motion Filed in Docket No. 2015-02 Application of Antrim Wind Energy, LLC for a Certificate of Site and Facility*, Docket No 2015-02 (March 27, 2018).

43. The SEC rules provide a path to seek suspension of a Certificate. In all cases it requires that the Committee first reach a finding that there has been a permit violation. Site

302.01(c) and (f). Suspending a validly issued certificate based solely on unfounded, procedurally defective assertions is contrary to law and would raise substantial due process issues.

WHEREFORE, Antrim Wind Energy, LLC respectfully requests that the Subcommittee enter an order:

- A. Denying the request for waiver of the statutory filing fee;
- B. Dismissing the Petition; and
- C. Granting such further relief as may be just, equitable, and appropriate.

Respectfully Submitted,

Antrim Wind Energy, LLC

By its attorneys,

McLANE MIDDLETON,
PROFESSIONAL ASSOCIATION


Dated: April 27, 2018

By: 

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Certificate of Service

I hereby certify that on the 27th day of April, 2018, an original and one copy of the foregoing Motion to Dismiss was hand-delivered to the New Hampshire Site Evaluation Subcommittee and sent to counsel of record for the opponents.


Barry Needleman