

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

Docket No. 2018-01

Re: Petition for Declaratory Ruling of the Antrim Wind Opponents

ORDER ON PENDING MOTIONS

July 26, 2018

This Order denies the Petitioners' request to suspend the Certificate of Site and Facility issued to Antrim Wind Energy, LLC (AWE).

I. PROCEDURAL HISTORY

On March 17, 2017, the subcommittee established in Docket No. 2015-02 (Antrim II), issued a Decision and Order Granting the Application for a Certificate of Site and Facility (Decision) and a Certificate for Site and Facility (Certificate) to AWE. *See* Application of Antrim Wind Energy, LLC, Docket No. 2015-02. The project in question has not yet been built. This matter arises from post-Certificate, pre-construction activity.

The Certificate and the Decision state, in relevant part, that “[t]o ensure that the Applicant has a sufficient financial capability to construct and operate the Project, prior to the construction of the Project, 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.” *See* Certificate, at 5; Decision, at 76. The Decision and the Certificate also require the Applicant to “immediately notify the Committee of any change in ownership or ownership structure of the Applicant or its affiliated entities and [to] seek approval of the Committee for such a change.” *See* Certificate, at 5, Decision, at 69.

On December 27, 2017, the Applicant submitted a letter to the Administrator, dated December 21, 2017, advising the Committee that the Applicant’s parent, RWE Supply and

Trading GmbH (RWEST), will finance construction of the Project by providing 100% equity to Walden Green Energy, and a letter from RWEST confirming its commitment to provide the funds required for constructing the Project.

On January 24, 2018, Richard Block, Annie Law, Mary Allen, and Windaction Group, filed a document claiming that the submittal did not satisfy the requirements of the Certificate. On January 29, 2018, Counsel for the Public filed a similar document. The Applicant responded to both filings on January 31, 2018.

On February 8, 2018, the Administrator issued a letter stating that the information provided by the Applicant satisfied the requirements of the Decision and the Certificate. The Administrator also stated that the Committee would not hold a hearing and that complaining parties should file a petition for a declaratory ruling with the Committee to address their concerns.

On March 7, 2018, the Abutting Property Owners Group of Intervenors;¹ the Non-Abutting Residents Group of Intervenors;² the Levesque-Allen Group of Intervenors; the Stoddard Conservation Commission; and Windaction filed a “Joint Motion to Reconsider of Decision of Administrator for Adjudicative Hearing to Determine Satisfaction of Condition of Certificate of Site and Facility and to Suspend Certificate of Site and Facility.” AWE objected. Counsel for the Public replied to AWE’s Objection.

On March 27, 2018, the Chair of the Committee issued an order stating, in relevant part, that a rehearing of the Administrator’s decision was procedurally improper and that the administrative avenue to seek the relief requested was to file a petition for declaratory ruling in accordance with Site 203.01.

¹ Janice Longgood, Bruce and Barbara Berwick, and Brenda and Mark Schaefer.

² Richard Block, Annie Law, Robert Cleland, Jill Fish, and Kenneth Henninger.

On April 6, 2018, one hundred four (104) individuals, entities, and commissions (Petitioners) jointly filed a “Petition for Declaratory Ruling of the Antrim Wind Opponents” (Petition). Contemporaneously with the Petition, the Petitioners filed a Motion to Waive requesting a waiver of the filing fee established in RSA 162-H:8-a.

On April 12, 2018, the Chair of the Committee appointed a 3-person subcommittee (Subcommittee) and the Administrator sent a letter to the Attorney General informing him that the Petition had been filed and requesting notification if he intended to appoint Counsel for the Public in this docket. Counsel for the Public was not appointed and did not participate in these proceedings.

On April 27, 2018, AWE filed a Motion to Dismiss Petition for Declaratory Ruling. The Petitioners objected.

At an adjudicative hearing on May 31, 2018, the Subcommittee voted to deny the Petitioner’s request to waive the filing fee. An Order on Motion to Waive Filing Fee and Notice of Public Hearing memorializing the Subcommittee’s decision was issued on June 8, 2018.

The Petitioners paid the filing fee on June 11, 2018.

An adjudicative hearing on the issues raised in the Petition was held on June 18, 2018. After considering the filings and hearing the arguments made by the parties, the Subcommittee voted unanimously to deny the Petitioners’ request to suspend the Certificate. This Order memorializes the Subcommittee’s decision.

II. PETITION FOR DECLARATORY RULING

A. Adequacy of the Applicant's Financing Arrangement

1. Positions of Parties

The Petitioners argue that AWE violated the terms of the Certificate and request that the Subcommittee suspend the Certificate. The Petitioners claim the Certificate required financing through a combination of equity and debt. They rely on testimony by Henry Weitzner and Eric Shaw provided in Antrim II. The Petitioners claim that the testimony provided by Messrs. Weitzner and Shaw contemplated some combination of equity investment and a construction loan. They claim the witnesses specified that financing would involve approximately \$11 million in equity and \$52-54 million through a construction loan. AWE was required to provide documentation to the Administrator demonstrating that that debt and/or equity financing required for construction of the Project is in place prior to construction. Decision at 5. The Petitioners conclude that AWE violated the Certificate by providing documentation that the Project is funded through 100% owner equity as opposed to a combination of equity and debt.

The Petitioners assert that AWE's submission is inadequate because it cannot be legally enforced in case of RWEST's failure to provide the required financing. During the hearing, the Petitioners also argued that AWE's submission is not sufficient because it does not contain information allowing for a determination of RWEST's financial ability to finance the construction.

AWE asserts that the information provided complies with the Certificate which required a showing that the debt and/or equity financing required for construction of the Project be in place prior to construction. It argues that the Certificate does not contemplate a review and compliance determination by the Administrator. AWE further asserts that RWEST has sufficient

funds required for construction of the Project. AWE also relies on the testimony provided by Messrs. Weitzner and Shaw in Antrim II that there may be changes in the debt/equity financing.

2. Analysis

The Subcommittee has authority to review AWE's filing and determine compliance with the Certificate. RSA 162-H:12, I, authorizes the Committee, after issuing a notice and providing the opportunity to terminate the violation, to suspend the Certificate whenever it determines that any term or condition of the Certificate is being violated. In this case we find no violation.

The Certificate and the Decision require AWE, prior to the construction of the Project, to "provide documentation demonstrating that debt **and/or** equity financing required for the construction of the Project is in place to the Committee's Administrator." Certificate, at 5 (emphasis added); Decision, at 76 (emphasis added). AWE is required to provide documentation demonstrating that: (i) debt and equity financing; (ii) debt financing; or (iii) equity financing is in place. *See Merrill v. Great Bay Disposal Serv.*, 125 N.H. 540, 543 (1984) (stating that the word "or" is defined as "a function word to indicate an alternative between different or unlike things") (citations and quotation omitted). AWE filed correspondence stating that construction of the Project will be financed through 100% equity contributions, consistent with the condition in the Certificate that requires the Applicant to provide, as one of the alternatives, a confirmation of equity financing.

The Petitioners' argument that AWE failed to provide sufficient information allowing the Subcommittee to determine RWEST's ability to comply with its commitments is not supported by the record. According to the confirmation of financing filed by AWE, RWEST is funded by RWE AG. According to the Decision, RWE AG is a principal of RWE Supply & Trading. Decision at 70. RWE Supply & Trading and Walden Founders own Walden Green Energy,

LLC. *Id.* AWE is owned by Walden Green Energy, LLC through two wholly owned subsidiaries: (i) Walden Green Energy Northeast Wind, LLC; and (ii) Walden Antrim, LLC. *Id.* at 16. The Antrim II subcommittee referred to RWE Supply & Trading and RWE AG collectively as “RWE” and found that it had a market capitalization of \$12.9 billion, assets of \$104.4 billion, and operating revenues of \$63.3 billion. *Id.* at 70-71. It also determined that RWE and its affiliates had 49,064 MW of electric generation capacity in Europe and had developed, financed, and constructed 3,112 MW of renewable generation assets, including 2,530 MW of wind assets. *Id.* The Antrim II subcommittee found that the testimony demonstrated that RWE remains financially sound, continues to maintain above average credit ratings and continues to be able to raise financing on favorable conditions.” *Id.* at 75-76.

According to the record, RWE AG’s current market capitalization is \$14.1 billion. It generated \$36.3 billion of revenue in 2017, had \$80 billion in assets, and \$6.4 billion in cash as of September 30, 2017.

The Petitioners provided no information to establish that RWE AG is not capable of providing the equity required for construction of the Project. The Petitioners also provided no information to demonstrate that RWE AG will not honor its commitment.

Considering the evidence presented in Antrim II and the information and evidence presented during the hearing in this docket, the Subcommittee finds that RWE AG and RWEST, as its subsidiary, have the financial ability to provide the equity required for construction of the Project.

The argument that the financing is inadequate because it is not in the form of an enforceable contract is unpersuasive. The Petitioners’ main concern is that the commitment cannot be enforced and allows RWEST to discontinue financing and leave the Project

unfinished. The Petitioners failed to provide any information indicating that RWEST does not intend to honor its commitment. The Petitioners also questioned the irrevocable letter of credit from the Canadian Imperial Bank of Commerce in the amount of \$3,158,000 in favor of the Town of Antrim for decommissioning, but only as to the source of the funds used to establish the letter of credit. They did not provide any information that would call into question the value of the letter itself.

The evidence and testimony demonstrate that RWEST is financially capable of providing 100% equity required for the construction of the Project, it intends to honor its commitment and provide the required equity, and if the Project is not fully financed and is not constructed, \$3,518,000 will be provided to the Town of Antrim for decommissioning the Project. The Applicant's confirmation of financing is adequate and is in compliance with the Certificate. The Petitioners' request to suspend the Certificate is denied.

B. Contract for the Sale of the Project

1. Positions of Parties

The Petitioners assert that on February 20, 2018, TransAlta Renewables, Inc., announced that it had entered into an arrangement to purchase the Project. The Petitioners also assert that AWE advised the Administrator of the proposed sale. The Certificate requires AWE to immediately notify and seek approval from the Committee of any change in the ownership or ownership structure of the Project. To date, AWE has not sought such approval. The Petitioners request that the Subcommittee suspend the Certificate pending AWE's request for approval of the transfer of ownership.

AWE argues that the Certificate can be suspended only upon a finding of a violation. *See* Site 302.01(c) and (f). The Applicant asserts that there was no finding of a violation so

suspension of the Certificate would be improper. The Applicant also claims that it is in compliance with the Certificate because no transfer of ownership has taken place.

2. Analysis

The Certificate requires AWE to “immediately notify the Site Evaluation Committee of any change in ownership or ownership structure of the Applicant or its affiliated entities and shall seek approval of the Committee of such change.” Certificate at 3 and 5. There is no evidence indicating that a change in ownership or ownership structure has taken place. An agreement to purchase the Project is not the same as actually purchasing the Project. AWE is in compliance with the terms and conditions of the Certificate. The Petitioners’ request to suspend the Certificate is denied.

C. Other Arguments Raised by the Petitioners

The Petitioners also raised arguments related to the meaning of RSA 162-H and the Committee’s administrative rules. They seek an order determining whether the Subcommittee has authority to delegate the duty to enforce the Certificate to the Administrator; and whether Site 301.17(d) and Site 302.01(a) are consistent with RSA 162-H:4. Both of the arguments are made on an assumption that the Administrator determined the sufficiency of the Applicant’s filing without having the authority to do so. The purpose of these arguments is to invalidate the Administrator’s purported decision and to make the Subcommittee conduct a compliance review of the Applicant’s submission. Considering the Subcommittee’s review of AWE’s filing and the determination that it is in compliance with the Certificate, the Petitioners’ arguments are moot and require no further ruling.

III. MOTION TO WAIVE SITE 202.22

The Petitioners' request to waive Site 202.22 related to the filing of pre-filed testimony is moot and requires no further ruling.


IV. MOTION TO DISMISS

The Applicant's request to dismiss the Petition is moot and requires no further ruling.

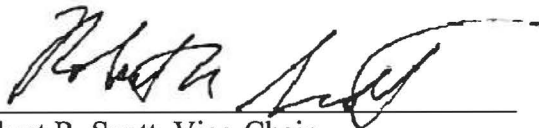
V. CONCLUSION

The Petition for Declaratory Ruling is denied.

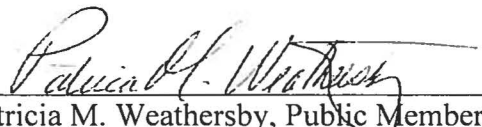
SO ORDERED this twenty-sixth day of July, 2018.



Martin P. Honigberg, Presiding Officer
Site Evaluation Committee
Commissioner and Chair
Public Utilities Commission



Robert R. Scott, Vice-Chair
Site Evaluation Committee
Commissioner
Department of Environmental Services



Patricia M. Weathersby, Public Member