THE STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

Docket No. _____

PETITION FOR DECLARATORY RULING OF THE ANTRIM WIND OPPONENTS

NOW COME, the 104 individuals, commissions, and entities listed and identified in Exhibit 1 to this Petition ("the Petitioners"), by and through their attorneys, Donahue, Tucker, & Ciandella, PLLC, and, pursuant to New Hampshire Administrative Rule 203.01, respectfully petition the New Hampshire Site Evaluation Committee ("SEC") to issue a declaratory ruling stating that: (1) pursuant to RSA 162-H:4, the SEC is not authorized to delegate the responsibility for ensuring Antrim Wind Energy, LLC's ("AWE") compliance with the Order and Certificate of Site and Facility with Conditions granted on March 17, 2017 ("the Certificate") to the SEC's administrator; (2) Rule Site 301.17(d) and Rule Site 302.01(a) are inconsistent with RSA 162-H:4 and exceed the authorization contained in the SEC's enabling legislation, RSA 162-H:4; (3) the docket captioned "Application of Antrim Wind Energy, LLC for a Certificate of Site and Facility," having SEC docket number 2015-02 ("Antrim II") remains an open docket; and (4) AWE has proposed a financing arrangement inconsistent with the Certificate and has contracted for the sale of the Project to an unrelated third party, both of which merit the suspension of the Certificate and the scheduling of an administrative hearing to review AWE's compliance with the Certificate. In support thereof the Petitioners state as follows:

I. THE PETITIONERS

1. The Petitioners include 104 individuals, State representatives, commissions, and entities that are going to be directly impacted by the Project and who have considerable concerns as to the impact the Project will have on their, health, safety, welfare, and property values, as well as advocacy groups and others committed to ensuring public participation throughout the SEC administrative process.

2. The Petitioners include several direct abutters of the Project, residents of Gregg Lake Road and White Birch Point whose views will be directly impacted by the Project, wind advocacy groups dedicated to monitoring commercial wind projects, a municipal conservation commission, and numerous others concerned with the Project and the procedures employed by the SEC in the Antrim II docket.

3. The Petitioners are concerned 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 to properly ensure AWE's compliance with the Certificate and safeguard the public interest. Specifically, the Petitioners are concerned that such a protocol will not allow the Petitioners a practical means by which to present their concerns to the SEC and effectively shields compliance related matters from public review and scrutiny. Due to the purported safeguards set forth in the Certificate related to sound and shadow flicker mitigation,

compliance protocols are of paramount importance to ensuring that this Project does not adversely impact the public health and safety.[1]

4. The Petitioners are also concerned that the Project, particularly in light of recent developments, will not provide the benefits that were touted by AWE during the adjudicative hearings.

II. FACTUAL AND PROCEDURAL BACKGROUND

5. AWE filed an Application for a Certificate of Site and Facility to construct a nine turbine wind farm ("the Project") on Tuttle Hill in the Town of Antrim on October 2, 2015 ("the Application").

6. In support of the Application, AWE, both through pre-filed testimony and at the adjudicative hearings, stated that AWE intended to finance the Project's $63 to $65 million cost through a mixture of debt and equity — approximately $11 million in equity from RWE, the parent of AWE's parent entity Walden Green Energy, LLC ("WGE"), and $52 to $54 million through a construction loan. AWE asserted throughout the Antrim II docket that numerous lenders exhibited interest in providing the construction loan for the Project. See e.g. Exhibit 2, Appendix 18A through 18C of Application. This mixture of debt and equity was considered by AWE's witnesses to be a "very reasonable number" and that the amount of the equity from RWE could be "a little more" or a "little less." See Exhibit 3, excerpts from Antrim II Adjudicative Hearings, September 13, 2016 PM Transcript at 32.

7. In the SEC's March 17, 2017 Decision and Order Granting Application for Certificate of Site and Facility ("the Decision"), the SEC noted AWE's plans to finance the

[1] This is not to say that any of the Petitioners agree that the safeguards in the Certificate were satisfactory or allowed the Project to satisfy the criteria set forth in RSA 162-H:16 and the SEC's administrative rules. Such matters are currently being deliberated at the New Hampshire Supreme Court.

project, stating that AWE "testified that it plans to finance the construction phase through combination of a construction loan that eventually will convert into a permanent term loan and equity investment." Decision at 75-76. The SEC further stated that AWE "agreed to provide loan documentation demonstrating sufficient funds were raised for construction of the Project prior to the commencement of construction of the Project." Decision at 76 (emphasis added). The SEC's findings and determinations are considered incorporated into the Certificate. Certificate at 2.

8. The Certificate contains two conditions meant to address the financial capability criteria set forth in RSA 162-H:16. Specifically, (1) AWE "shall immediately notify the Committee of any change in ownership or ownership structure of [AWE] or its affiliated entities and shall seek approval of the Committee for such a change"; and (2) "prior to construction of the Project, [AWE] 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." Certificate at 5.

9. Several opposing intervenors, who are Petitioners in this matter, timely filed a motion for rehearing of the SEC's decision issuing a Certificate, and, following this SEC's denial of that motion for rehearing, timely appealed that denial to the New Hampshire Supreme Court.

10. On December 21, 2017, WGE submitted a letter to Pamela Monroe, the SEC's Administrator, stating:

> Construction equity for the Project will be provided by [WGE], AWE's parent, by RWE Supply and Trading GmbH . . . Walden Green Energy's majority investor. RWEST is funded by RWE, AG. The ownership, control and flow of equity capital to construct the Project remain entirely consistent with the capitalization program represented during hearings in Docket 2015-02.

See Exhibit 4, Letter from Henry Weitzner to Pamela Monroe dated December 21, 2017.

11. That same day, RWE PI Walden Holding, LLC submitted a letter to Ms. Monroe, echoing WGE's statements that the Project could be funded by 100% equity and that RWE was willing and able to finance the entirety of the Project through equity. See Exhibit 5, Letter from Stephen O'Reilly to RWE PI Walden Holding, LLC to Pamela Monroe dated December 21, 2017.

12. Intervenors in the Antrim II docket were not notified of these letters until January 8, 2017, eighteen days after the letters' submission.

13. On January 24, 2018, Petitioners, Mary Allen, Richard Block, and Windaction, LLC ("Intervenors"), filed a response to the above-referenced letters, arguing that AWE's letters were inconsistent with AWE's prior representations to the SEC and were inconsistent with the conditions contained in the Certificate. See Exhibit 6, Response to Antrim Wind, LLC December 21, 2017 Compliance Filing at 1-5 ("Response of Intervenors"). The Intervenors argued that "the Committee should find the Project is out of compliance with the Certificate," or, in the alternative, "if the only method of financing the Project today is through a 100% equity strategy with the German parent, AWE should seek an amendment to the Certificate at which time it would provide formal confirmation of RWE's irrevocable commitment to fully fund the construction." Exhibit 6, Response of Intervenors at 5.

14. On January 29, 2018, Counsel for the Public ("CFP") filed a Response to Walden Green Energy, LLC's Notice of Financial Documentation ("CFP's Response"), raising similar arguments. See Exhibit 7, CFP's Response at 1-7. CFP also requested that the SEC suspend the

Certificate until such time as AWE/WGE has complied with the requirements of the Certificate, and the Supreme Court has issued a decision on the appeal. See Exhibit 7, CFP's Response at 7.

15. AWE filed a response to the responses of the Opposing Intervenors and Counsel for the Public on January 31, 2018.

16. On February 8, 2018, Ms. Monroe sent a letter to the Intervenors and Counsel for the Public in which she, and not the SEC, determined that the letters from Mr. Weitzer and O'Reilly satisfied the conditions in the Certificate. Ms. Monroe concluded, "[a]ccordingly, the Site Evaluation Committee will not hold a hearing on either the Weitzner and O'Reilly correspondence or your responses." See Exhibit 9, Letter from Pamela Monroe to Opposing Intervenors and Counsel for the Public dated February 8, 2018.

17. On February 20, 2018, TransAlta Renewables, Inc. announced that it had entered into an arrangement to purchase a "29 MW [wind development] projected [sic] located in New Hampshire with two 20-year PPAs." See Exhibit 10, "TransAlta Renewables Announces Acquisition of Two U.S. Wind Projects," TRANSALTA (February 20, 2018). The Project is the only wind project in New Hampshire that meets these characterizations.

18. Upon information and belief, AWE has informed the SEC, through the SEC's administrator, of the proposed sale; however, such information has not been disseminated to the public, nor have any further hearings been scheduled to determine whether the proposed buyer, TransAlta, meets the qualifications set forth in RSA 162-H:16.

19. On March 7, 2018, the Intervenors in Antrim II 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 ("Intervenor's Motion").

20. AWE objected on March 14, 2018.

21. Counsel for the Public filed a Reply to Objection to Joint Motion to Reconsider on March 27, 2018, in which it joined in the arguments raised by the Intervenors and similarly sought the suspension of the Certificate.

22. On March 27, 2018, the SEC denied the Intervenor's Motion, stating that (1) the Antrim II docket was closed; (2) the Committee's rules establish a process for responding to complaint and determining whether there is a violation of a condition; and (3) that the procedural avenue through which the intervenors should seek relief is through the filing of a petition for declaratory ruling in accordance with Site 203.01.

23. Under protest, the Petitioners now avail themselves of that suggested procedural mechanism.

III. DISCUSSION

24. The Petitioners request that the SEC declare that: (1) pursuant to RSA 162-H:4, the SEC is not authorized to delegate the responsibility for ensuring AWE's compliance with the Certificate to the SEC's administrator; (2) Rule Site 301.17(d) and Rule Site 302.01(a) are inconsistent with RSA 162-H:4 and exceed the authorization contained in the SEC's enabling legislation, RSA 162-H: 4; (3) the Antrim II docket remains an open docket; and (4) AWE has proposed a financing arrangement inconsistent with the Certificate and has contracted for the sale of the Project to an unrelated third party, both of which merit the suspension of the

Certificate and the scheduling of an administrative hearing to review AWE's compliance with the Certificate.

a. The SEC is not authorized to delegate the responsibility for ensuring AWE's compliance with the Certificate to the SEC's administrator.

25. The Petitioners request that the SEC issue a finding that the SEC administrator is not authorized to make determinations that AWE has satisfied and/or complied with a condition set forth in the Certificate. The SEC's administrator does not have such authority for two primary reasons: (1) the Certificate does not delegate such authority to the SEC administrator and (2) the delegation of such authority to the SEC's administrator exceeds the permissible delegation powers of the SEC under RSA 162-H:4.

26. In the administrator's response to the Intervenors and Counsel for the Public, the administrator unilaterally made a determination as to AWE's satisfaction of conditions set forth in the Certificate. See Exhibit 9. However, the condition in the Certificate only states that AWE is 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). The administrator, therefore, 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 provided by AWE, particularly when the sufficiency of that documentation is in dispute based on representations made and relied upon at the adjudicatory hearings. See id.

27. Even if the condition could be interpreted to grant the administrator that authority, RSA 162-H:4 clearly prohibit such a delegation of authority. The SEC, as an administrative body established by statute, can only exercise such authority as that enabling statute authorizes.

See Appeal of Cover, 168 N.H. 614, 622-23 (2016) (labor regulation that stripped employees of right of reinstatement was contrary to statute and, therefore, invalid); see also Appeal of Mays, 161 N.H. 470 (2011). RSA 162-H:4 provides, in pertinent part, that: "[t]he committee may delegate the authority to monitor the construction or operation of any energy facility granted a certificate under this chapter to the administrator or such state agency or official as it deems appropriate, but shall ensure that the terms and conditions of the certificate are met." RSA 162-H:4 (Supp. 2015) (emphases added). The SEC "may not delegate its authority or duties, except as provided under [RSA chapter 162-H]." RSA 162-H:4, III-b. By the clear terms of the statute the SEC is solely responsible for determining that a condition of approval associated with a certificate is met, and that responsibility cannot be delegated. RSA 162-H:4. The SEC has yet to make that determination with regard to the financing contingency, and, as is stated below, the Petitioners respectfully request that the SEC issue a finding that AWE has not met that financing contingency.

28. Indeed, the SEC's non-delegable duty to ensure compliance with the conditions of a certificate is analogous to other land use statutes. For example, under RSA 676:4, I(i) only allows municipal planning boards to delegate compliance review in very limited instances, i.e. conditions pertaining to administrative changes "which does not involve discretionary judgment" and conditions as to acquisition of permits and approvals granted by other boards or agencies. All other conditions which are not specified as "minor, administrative, or relating to the issuance of other approvals shall require a hearing[] and notice." RSA 676:4, I(i); see also Hobbs v. City of Dover, 2008 N.H. Super. LEXIS 115 at *6-7 (finding that condition exceeded authority under RSA 676:4). RSA 162-H:4 operates in a similar manner: an administrator can be authorized to

monitor a project and to specify minor changes in route alignment (in the context of transmission and pipeline projects); however, the SEC cannot delegate its obligation to ensure compliance with the certificate. RSA 162-H:4.

29. The SEC should declare that the SEC administrator is not authorized to determine AWE's compliance with the conditions set forth in the Certificate. Absent such declaration, the Petitioners are at risk of having the purported safeguards in the Certificate that are intended to protect their interest subject to a process that lacks transparency, the ability to appeal, and which substantially curtails (if not eliminates) the Petitioners' input. Such matters have already come to fruition in the context of the Certificate's financing condition; the Petitioners are concerned that such a process will again be employed for the purposes of other conditions such as those that address noise and shadow flicker conditions which directly pertain to the Project's health and safety impacts.

b. Rule Site 301.17(d) and Rule Site 302.01(a) are inconsistent with RSA 162-H:4 and exceed the authorization contained in the SEC's enabling legislation, RSA chapter 162-H.

30. The SEC should further find that Rule Site 301.17(d) and Rule Site 302.01(a) are unlawful to the extent that those rules authorizes the SEC to delegate ensuring an applicant's compliance with a certificate to the SEC administrator. In the Antrim II docket, the SEC and AWE asserted that the SEC's administrative rules authorize the SEC administrator to determine whether AWE complied with the conditions set forth in the Certificate. Such statements, however, ignores that Rule Site 301.17(d) and Rule Site 302.01(a) are inconsistent with RSA 162-H:4 and, therefore, are invalid to the extent they purport to delegate such authority.

31. "It is well settled that the legislature may delegate to administrative agencies the power to promulgate rules necessary for the proper execution of the laws." Appeal of Mays, 161 N.H. at 473. "The authority to promulgate rules and regulations is designed only to permit the board to fill in the details to effectuate the purpose of the statute." Id. (quotation omitted). "Thus, administrative rules may not add to, detract from, or modify the statute which they are intended to implement." Id. (quotation omitted).

32. As is discussed above, RSA 162-H:4 does not authorize the SEC to delegate the SEC's responsibility of ensuring an applicant's compliance with a certificate of site and facility to the SEC administrator. However, Rule Site 301.17(d) authorizes the SEC to delegate "to the administrator or another state agency or official . . . the authority to . . . ensure that related terms and conditions of the certificate are met." Rule Site 301.17(d) impermissibly adds to RSA 162-H:4 by expressly authorizing the delegation of a non-delegable function: making determinations of compliance with the terms of a condition. In doing so, the SEC exceeds the authority given to the SEC in the enabling statute and, therefore, Rule Site 301.17(d) is invalid to the extent the rule authorizes such a delegation of authority. RSA 162-H:4, III-b (limiting SEC's ability to delegate); see also Appeal of Cover, 168 N.H. at 622-23 (invaliding rule that exceeds enabling statute).

33. Additionally, in the SEC's March 27, 2018 Order, the SEC alluded that Rule Site 302.01(a) gives the SEC administrator authority to determine AWE's compliance with the Certificate. For the same reasons stated above, to the extent Rule Site 302.01(a) delegates such authority to the SEC administrator, such a delegation is in violation of RSA 162-H:4 and, therefore, is invalid.

34. The Petitioners respectfully request that the SEC declare that Rule Site 301.17(d) and Rule Site 302.01(a) are invalid to the extent that the Rule authorizes the SEC to delegate authority to the SEC administrator to make determinations as to AWE's compliance with the Certificate.

c. The Antrim II Docket remains an open docket.

The Petitioners respectfully ask 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. Both the law in this state and sound policy demand that matters of compliance with the conditions of a certificate of site and facility, particularly as those conditions relate to construction, remain the subject of an open administrative docket. To declare otherwise and require affected individuals to resort to a declaratory ruling procedure — at a cost of at least $3,000.00 — is unjust, inefficient, and deprives impacted individuals of fundamental procedural rights to be heard and present evidence.

As Counsel for the Public previously noted in its reply to AWE's Objection to the Intervenor's Motion, neither AWE nor the SEC have cited to any authority – whether it be case law, statutory, or regulatory – to support the proposition that a docket closes upon the issuance of a certificate of site and facility, even when that certificate is subject to conditions (nine pages of conditions in this instance).

In the analogous circumstance of municipal site plan review, the exact opposite is true; matters of compliance with a condition of approval remains the subject of an open docket, and the satisfaction of those conditions is a matter to be resolved at an adjudicative hearing conducted in public. Sk0lar Realty v. Merrimack, 125 N.H. 321 (1984) is directly on point in this regard. In Sklar, the Merrimack Planning Board issued a site plan approval for the

construction and operation of a pet food manufacturing facility subject to eight conditions. Sklar, 125 N.H. at 324-25. This approval was over the objection of an abutter to the property. Id. Thereafter, the applicant submitted information to the Planning Board purporting to satisfy the various conditions of approval. Id. at 325. Neither the applicant, nor the Planning Board, informed the abutter of the applicant's filings, and the Planning Board determined, without a hearing or notice, that the conditions had been satisfied. Id. The abutter then filed a petition for certiorari, at which time a master denied the abutter's request for relief. Id. at 325-26.

On appeal, the abutter argued that the abutter had a right to heard on the question whether the applicant complied with the conditions of approval. Id. at 326. The Supreme Court agreed. Id. at 328. The Court held that the right to testify as to the fulfillment of a condition is, in reality, the opportunity to testify as to the factual basis for the application itself and, absent that opportunity, the statutory right for an abutter to testify would be unduly limited. Id. The Court further held that the inability to testify effectively deprived boards and courts of a fundamental tenet of judicial review: giving tribunals the opportunity to correct their own mistakes before appeal. Id.

Sklar is directly on point. Like in Sklar, the SEC granted the Certificate subject to conditions over the strenuous objection of various intervenors and CFP. Like in Sklar, AWE submitted documentation to the SEC's administrator, and the SEC's administrator acted upon such documentation, without public notice or opportunity for interested individuals to be heard. Like in Sklar, Petitioners have been unable to testify or be heard by the SEC as to the sufficiency of the information supplied by AWE. And, like in Sklar, in doing so, the Petitioners have been

deprived of a meaningful opportunity to participate, a right which is conveyed by statute and the SEC's administrative rules, based on the determination that the Antrim II docket is closed.

In fact, the circumstances in this case are even more compelling than Sklar. In Sklar, it was a planning board that made the ultimate decision, which made that decision appealable under RSA chapter 677 to the Superior Court and then the Supreme Court. In this case, because the determination was made not by the SEC but by an administrator, the Petitioners do not even have an expedient avenue for appeal. See RSA 541:3 -:6 (allowing for appeals from any decision of administrative bodies). Moreover, unlike Sklar, which involved a pet food manufacturing facility that would have impacted a small segment of the community, the Certificate in this case allows for the construction of 489 foot tall wind turbines on a 1,500 to 1,900 foot hill, the construction and operation of which will impact the entire region, not to mention innumerable individuals, businesses, municipalities, and entities. The public import of the conditions in the Certificate necessitate continuing public involvement and participation far more than that in the context of a municipal planning board, and yet, an abutter before a municipal planning board has far greater and more protective rights than those appearing before the SEC.

Further, sound policy necessitates the SEC keeping dockets open to publically adjudicate compliance with conditions set forth in a certificate of site and facility. Abutters to energy facilities, and those impacted by energy facilities, have not asked to have these facilities thrust upon them. By way of example, many of the Petitioners are couples and families. They are individuals that do not have the resources to continually file rounds of petitions for declaratory ruling – with the associated $3,000.00 filing fee – every time they have a good faith belief that

AWE has not satisfied a condition. It is fundamentally unfair to force these individuals to pay such a fee – a fee that is over ten times more expensive than filing an action in Superior Court – just to obtain access to justice. However, that is the practical effect that an administrative closure of a docket has on the Petitioners: the closure effectively deprives them of a right to seek any form of redress and, in doing so, violates their constitutional rights. See N.H. CONST. Part I, Article 14; see also State v. Cushing, 119 N.H. 147 (1979).[2]

By keeping the docket open, the SEC imposes the costs and burdens upon the party most properly suited to bear those costs: the applicant. It is the applicant that seeks to construct the project in a certain location and it is the applicant that has the opportunity to recoup its costs once, or if, the facility becomes operational.

Moreover, treating Antrim II as an open docket for the purpose of compliance with the Certificate is consistent with how the SEC has treated other compliance related matters associated with other projects. For example, in SEC Docket No. 2010-01, pertaining to Groton Wind, LLC, the SEC accepted pleadings and correspondence from other parties as to Groton Wind's compliance, took extensive testimony, and scheduled an adjudicative hearing. See Application of Groton Wind, LLC for a Certificate of Site and Facility of a Renewable Energy Facility in Groton, N.H., Docket No. 2010-01 ("Groton Wind"). The SEC's position that Antrim II is a closed docket and that the Intervenors' filings were procedurally improper is contradicted by the SEC's handling of Groton Wind.

[2] Part I, Article 14 provides:

> Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

The law, policy, and fundamental fairness necessitate a declaration that dockets remain open to determine matters of compliance with the conditions set forth in a certificate of site and facility. The SEC should declare that the Antrim II docket remains open, schedule an adjudicative hearing to determine AWE's compliance with the Certificate, and, for the reasons explained below, find that AWE has not satisfied the financing condition of approval in the Certificate.

d. AWE's proposed construction financing violates the Certificate.

35. The SEC should declare that AWE has not satisfied the financing conditions set forth in the Certificate because AWE's proposed financing arrangement significantly differs from AWE's representations to the SEC in Antrim II. In the context of land use, the scope of a condition of approval is dependent upon the representations of the applicant and the intent of the condition at the time it is issued. Cf. 1808 Corp. v. Town of New Ipswich, 161 N.H. 772, 775 (2011) (stating that "the scope of a variance is dependent upon the representations of the applicant and the intent of the language in the variance at the time it is issued"); Rye v. Ciborowski, 111 N.H. 77, 81 (1971).

36. Here, the financing contingency set forth in the Certificate must be interpreted and informed by AWE's representations at the adjudicative hearings. Cf. 1808 Corp., 161 N.H. at 775. In AWE's application, AWE stated that construction financing will consist of "a construction loan and construction equity to complete the turnkey construction process." See Exhibit 10, Pre-Filed Direct Testimony of Henry D. Weitzner and Eric Shaw, dated March 3, 2016, at 7. AWE also stated that "the Project will be funded with a $50-$55 million construction loan converting to a term loan, and $10-$13 million of equity." Id. at 8. In support of that

testimony, AWE provided a series of letters from various lending institutions that reflected those institutions interest in providing construction loan financing for the Project. See Exhibit 2, Appendices 18A to 18C of the Application. During the adjudicative hearings, AWE's witnesses did not testify as to any circumstances in which AWE envisioned having to provide 100% of the equity for the Project. Although AWE's witnesses testified that the equity for the Project could increase depending on the amount of debt available to AWE to finance the Project, the responses from AWE's witnesses clearly envisioned that the Project would be financed through a mixture of debt and equity, not 100% equity. See Exhibit 3, excerpts from September 13, 2016 PM Transcript at 22-23, 29-33, 41, 88-89.

37. The SEC relied upon these statements in both its deliberations and the Decision. The SEC made express reference to AWE's representations that financing will "use what seems to be the standard in the United States for wind industry development . . . with the construction financing [being] a combination of a construction loan and then the construction equity." Exhibit 12, excerpt from December 7, 2016 AM Transcript at 66, 71. The SEC further referenced AWE's testimony in its decision, stating that "AWE agreed to provide loan documentation demonstrating sufficient funds were raised for construction of the Project prior to the commencement of construction of the Project." Decision at 76.

38. In short, the Applicant's current financial proposal differs substantially from that proposed both in the Application and the adjudicative hearings. The SEC relied on these representations in finding that AWE had the financial capability to construct the Project. The SEC should declare that AWE's current construction financing proposal does not reflect the required financial capability to move forward with construction. In turn, the SEC should

suspend the Certificate. See N.H. CODE OF ADMIN. R. Site 302.01 (allowing for SEC, upon receipt of a complaint, to determine if condition of approval is being violated); N.H. CODE OF ADMIN. R. Site 302.02 (allowing for suspension of certificate in light of material misrepresentation in the application or additional statements of fact or studies required of the applicant).[3]

39. While AWE has provided a corporate resolution from WGE as to a protocol for requesting equity infusions from RWE to fund the Project's construction, there have been no documents, agreements, resolutions, or any other firm commitments from RWE Supply and Trading GmbH which would compel the providing of these funds. Absent such commitment, the Project's construction could be cancelled midway due to RWE's refusal to provide further funding, and the public may be without recourse as to the partially constructed Project.[4] Indeed, such a situation is occurring currently in South Carolina where the construction of the V.C. Summer Nuclear Stations in Jenkinsville was cancelled midway, leaving the State of South Carolina and the Town of Jenkinsville to deal with what is to happen with the empty hulk. See Exhibit 13, Stelloh, Tim, "Construction Halted at South Carolina Nuclear Power Plant," NBC NEWS (July 31, 2017). Considering that these wind turbines are being located in an ecologically and environmentally sensitive area and will have adverse aesthetic impacts on scenic resources, see Decision at 121, the SEC should not allow AWE to proceed with construction due to the inherent risks associated with a 100% equity proposal.

[3] AWE is likely to argue that the language of the Certificate, namely the use of the phrase "debt and/or equity" permits a 100% equity structure. However, as argued above, the condition must be read and interpreted in light of the testimony offered and the Subcommittee's findings in its decision, all of which clearly envision a significant component of debt financing. Cf. 1808 Corp., 161 N.H. at 775.

[4] At this time, it is unclear whether any decommissioning letter of credit would apply to reclamation activities that occur prior to the Project becoming operational.

40. Additionally, and perhaps most importantly, the recent announcement of the acquisition of the Project by TransAlta merits an adjudicatory hearing as to how the potential sale of the Project impacts AWE's proposed financing arrangement. AWE has stated that AWE intends on funding the Project using the financial strength of AWE's parent, RWE. However, based on the press release issued by TransAlta, AWE is not going to remain associated with the Project through construction, TransAlta is. See Exhibit 9. The time for considering the introduction of TransAlta is now, before construction progresses further, and prior to any further alteration of the landscape. The vetting and consideration of TransAlta as a viable successor to AWE under RSA 162-H:16 must be done in a public hearing and is a matter that needs to be determined by the SEC, as the SEC has required in prior instances where a new entity sought to operate an energy facility subject to the SEC's jurisdiction. See Decision and Order Approving Transfer of Ownership Interest in Granite Reliable Power, LLC, SEC Docket No. 2010-03, at 3-5 (Issued February 8, 2011).

IV. CONCLUSION

41. For the reasons set forth herein, the SEC should declare that: (a) the SEC administrator does not have the authority to determine AWE's compliance with the conditions set forth in the Certificate; (b) Rule Site 301.17(d) and Rule 302.01(a) are invalid to the extent those rules authorize the SEC to delegate determinations of an applicant's compliance with a certificate to the SEC administrator; (c) the Antrim II docket remains open and subject to further hearings with regard to AWE's compliance with the conditions set forth in the Certificate; and (d) AWE has not satisfied the condition in the Certificate as to the financing of the Project and, therefore, the Certificate needs to be suspended until such time as AWE provides adequate

evidence of such funding, the sufficiency of which is to be reviewed and adjudicated during an open hearing.

42. In closing, the Petitioners are troubled by the lack of transparency and public involvement associated with ensuring that AWE satisfies the conditions set forth in the Certificate. In this instance, AWE provided the above-referenced letters associated with financing to the SEC's administrator on December 21, 2017. The SEC did not inform the Intervenors or CFP of these developments until January 8, 2017. Despite the Intervenors and CFP raising concerns associated with the satisfaction of the financing conditions, the SEC's administrator unilaterally determined that the condition had been met, without a hearing or public deliberation. To compound matters, it has come to the Intervenors' attention that AWE has, and continues to have, ex parte communications with the SEC, through its administrator, as to the proposed sale of the Project to TransAlta and that AWE has provided documentation to the SEC administrator related to the proposed sale. The substance of these ex parte communications and the materials provided to the SEC have not been made available for public consideration, even though such communications and materials pertain to a substantial change in the Certificate, namely the entity that will construct and operate the Project. In short, the Petitioners are concerned that determinations as to the satisfaction of conditions of the Certificate will be made without an opportunity for public involvement and without the public process mandated by RSA chapter 162-H and RSA 541-A. The Petitioners file this Petition for Declaratory Ruling to impose a proper and fair process.

WHEREFORE, the Petitioners respectfully request that the SEC:

A. Issue Orders of Notice regarding this Petition for Declaratory Ruling;

B. Declare that the SEC administrator does not have the authority to determine AWE's compliance with the conditions set forth in the Certificate;

C. Declare that Rule Site 301.17(d) and Rule Site 302.01(a) are invalid to the extent those rules authorize the SEC to delegate determinations of an applicant's compliance with a certificate of site and facility to the SEC administrator;

D. Declare that the Antrim II docket remains open and subject to further hearings with regard to AWE's compliance with the conditions set forth in the Certificate;

E. Declare that AWE has not satisfied the condition in the Certificate as to the financing of the Project;

F. Schedule an adjudicatory hearing, at which time (1) AWE will be required to prove that AWE and the Project continue to satisfy the criteria set forth in RSA 162-H:14, and (2) AWE will be required to prove that the transfer of the Project to TransAlta does not impact the validity of the Certificate;

G. Suspend the Certificate pending such an adjudicatory hearing; and

H. Grant such further relief as is just and equitable.

Dated this 6th day of April, 2018

Respectfully submitted,

The Petitioners identified in Exhibit A
By and through their attorneys,

DONAHUE, TUCKER & CIANDELLA, PLLC

/s/ **Eric A. Maher**

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