

**STATE OF NEW HAMPSHIRE  
SITE EVALUATION COMMITTEE**

**Docket No. 2019-03**

**Antrim Level, LLC  
Petition for Declaratory Ruling or, in the Alternative,  
Motion for Expedited Approval of Change in Ownership Structure**

**DECISION AND ORDER ON PETITION AND MOTION**

**November 27, 2019**

**I. INTRODUCTION**

On March 17, 2017, the Site Evaluation Committee (Committee) issued an Order and Certificate of Site and Facility with Conditions (Certificate) to Antrim Wind Energy, LLC (AWE) to site, construct, and operate nine Siemens SWT-3.2-113 direct drive turbines each with a nameplate generating capacity of 3.2 MW and a total nameplate capacity of 28.8 MW (Project). The Certificate is not transferable to any other person or entity without prior approval of the Committee. The Certificate also requires that the Committee approve any change in ownership structure. *See* Certificate, Docket No. 2015-02, at 3 (March 17, 2017). At the time that the Certificate was issued, AWE was wholly owned by Walden Green Energy Northeast Wind, LLC through two subsidiary entities (Walden).

On February 15, 2019, the Committee issued an order authorizing the transfer of the ownership interests in AWE from Walden to Antrim Level, LLC (Antrim Level). The Committee found that there was sufficient evidence to show that after the transfer of the ownership interests from Walden to Antrim Level, that Antrim Level and its affiliates would ensure that the facility remained in compliance with the terms and conditions of the Certificate. *See* Order, Docket No. 2018-03 at 15 (February 15, 2019).

On September 17, 2019, Antrim Level filed the subject petition for declaratory ruling requesting that the Committee rule that a tax equity financing arrangement between Antrim Level and Citicorp North America, Inc. and Citigroup Global Markets Inc., (together referred to as Citi) does not require the Committee's approval. In the alternative, Antrim Level requests that the Committee approve the change in ownership structure in support of the tax equity financing.

## **II. PROCEDURAL HISTORY**

On September 20, 2019, Senior Assistant Attorney General K. Allen Brooks was appointed to serve as Counsel for the Public. On September 23, 2019, pursuant to RSA 162-H:4-a, the Chair of the Committee appointed a 3-person Subcommittee. On September 25, 2019, an Order and Notice of Prehearing Conference and Petitions to Intervene was issued. An adjudicative hearing took place on November 12, 2019.

The following parties were granted intervenor status in this docket:

- Town of Antrim Board of Selectmen (Town); and
- Richard Block and Shelley Nelkens (Antrim Residents)

## **III. THE PROPOSED TRANSACTION**

Antrim Level is a subsidiary of TransAlta Holdings U.S., Inc. (TransAlta U.S.) and owns 100% of the membership interests in AWE. TransAlta U.S. is a subsidiary of TransAlta. In order to implement the tax equity financing for the Project, TransAlta U.S. will form a new entity, Bobcat Equity Holdings, LLC (Bobcat Equity) that will be wholly owned by TransAlta U.S. Bobcat Equity will form a new wholly owned entity, Bobcat Holdco, LLC (Bobcat Holdco). TransAlta will transfer 100% of the membership interests in Antrim Level to Bobcat Equity. Thereafter, Citi will make capital contributions to Bobcat Holdco. Bobcat Equity will transfer 100% of membership interests in Antrim Level to Bobcat Holdco. Bobcat Holdco will

issue, or will have issued, passive non-controlling Class A membership interests to Citi and will convert Bobcat Equity's existing membership interests to Class B membership interests. Citi and Bobcat Equity will enter into an amended and restated operating agreement for Bobcat Holdco. That will allow Citi to receive a substantial portion of the federal tax benefits available to renewable energy projects. *See* Petition at 3-4; Exh. 1 at 2; Exh. 3 at 2.

The Certificate contains the following condition:

Further Ordered that, the Applicant shall 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 Subcommittee of such change  
.....

Antrim Level argues that the proposed transfer constitutes a tax equity investment that does not require the Committee's approval. In the alternative, if the Committee determines that the proposed transfer constitutes a change in ownership or ownership structure, Antrim Level requests that the Committee approve the transaction. Petition at 1.

#### **IV. PETITION FOR DECLARATORY RULING**

##### **A. Positions of the Parties**

###### **1. Antrim Level**

Antrim Level argues that the proposed transaction does not constitute a change in ownership or ownership structure requiring Committee approval and that the tax equity financing arrangement is nothing more than a financing arrangement to obtain the full value of the Project. Citi will invest in Bobcat Holdco, which will be operated pursuant to an amended and restated agreement. TransAlta U.S., through Bobcat Equity, will be the managing member of Bobcat Holdco and will retain the authority to manage, direct, and control the day-to-day activities of Bobcat Holdco, Antrim Level, and AWE. Citi's Class A membership interests in Bobcat Holdco will be non-controlling and will be limited to voting/consent rights over the actions of Bobcat

Holdco with respect to AWE, including, but not limited to, incurring certain types of indebtedness, selling or transferring assets, making capital expenditures above a certain threshold, and changing the purpose of Bobcat Holdco, Antrim Level, or AWE. The Class A membership interests will retain their non-controlling nature if they are fully or partially transferred by Citi to a third-party investor. Antrim Level asserts that the transaction will not change the role of TransAlta U.S. or TransAlta in managing, directing, controlling, and retaining responsibility for Antrim Level.

Antrim Level argues that this transaction does not require the Committee's approval because it does not change the ownership structure. AWE will continue to be owned by Antrim Level and TransAlta will remain the ultimate parent of the managing member of Bobcat Holdco. Antrim Level also argues that when a prior Subcommittee approved the transfer of AWE to Antrim Level, it was aware that the Project "would be funded through a combination of equity and tax equity." Antrim Level argues that the prior Subcommittee knew that tax equity financing in the form outlined in the Petition would take place and intentionally did not require Antrim Level to seek approval of such financing. Antrim Level concludes that this Subcommittee should declare that the proposed tax equity financing arrangement does not require approval.

#### **B. Standard of Review**

A declaratory ruling is "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. N.H. CODE ADMIN. RULES, Site 203.01 provides that "[a]ny person may submit a petition for declaratory ruling from the committee on matters within its jurisdiction." Site 203.02 provides that the Committee may dismiss a petition for declaratory ruling that: (i) fails to set forth factual allegations that are definite and concrete; (ii) involves a hypothetical situation or otherwise seeks advice as to how

the Committee would decide a future case; (iii) does not implicate the legal rights or responsibilities of the petitioner; or (iv) is not within the Committee's jurisdiction.

### **C. Analysis**

The Certificate requires the Applicant 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 Subcommittee of such change." Certificate, at 3. Here, the Subcommittee must determine whether the corporate restructuring in support of the tax equity financing arrangement is a "change of ownership or ownership structure" requiring approval by the Committee.

The proposed restructuring involves the creation of two intermediate companies in the ownership structure of Antrim Level: Bobcat Equity and Bobcat Holdco. An equity interest in Bobcat Holdco will be transferred to Citi. Citi's interest in the new intermediate company is not a controlling interest. Citi will have an interest, necessary to protect its investment, that includes, but is not limited to, "incurring certain types of indebtedness, selling or transferring assets, making capital expenditures above a certain threshold, and changing the purpose of Bobcat Holdco, Antrim Level, or AWE." Petition at 5; Exh. 3 at 2. The Subcommittee finds that the addition of two intermediate companies constitutes a change in ownership structure requiring approval pursuant to the Certificate. Therefore, that portion of the Petition seeking a declaratory ruling is denied.

## **V. MOTION FOR EXPEDITED APPROVAL OF TRANSFER**

### **A. Position of the Parties**

#### **1. Petitioner**

Antrim Level argues that the tax equity investment will not affect the Committee's finding in Docket No. 2015-02, when it issued the Certificate, or in Docket No. 2018-03, when it authorized the transfer of ownership interests to Antrim Level. Petition at 9. The Certificate will be held by AWE. Antrim Level will hold 100% of the membership interests in AWE. Two new subsidiary entities, Bobcat Equity and Bobcat Holdco, will be created to hold membership interests in Antrim Level. Citi's non-controlling Class A membership interests and TransAlta's managing Class B membership interests will be established at Bobcat Holdco to facilitate the tax equity financing. Citi may further transfer its interest in Bobcat Holdco to third party investors. The transfer will not change the consent rights granted to the holder of the Class A shares or the non-managing nature of the shares. Bobcat Equity will serve as the Manager of Antrim Level before the tax equity investment is made. Bobcat Holdco will serve as a Manager of Antrim Level after the tax equity investment is made. Bobcat Equity and Bobcat Holdco will delegate the operation and management of the Project to TransAlta and TransAlta will enter into a management, operation, and maintenance agreement with Antrim Level. Thus, Antrim Level concludes that the transaction will not affect its financial capability to operate and maintain AWE in accordance with the Certificate.

## **2. Antrim Residents**

The Antrim Residents prefiled direct testimony from Shelley Nelkens and Richard Block. Exhs. 4 and 5.

In their testimony, Ms. Nelkens and Mr. Block argue that the Petitioner violated the terms and conditions of the Certificate by failing to adhere to requirements of the Federal Aviation Administration (FAA) pertaining to temporary lighting of the turbines. Ms. Nelkens and Mr. Block assert that the turbines remained unilluminated for a period of three months in violation of the Certificate. They claim that the alleged violation of the Certificate demonstrates that the Petitioner cannot continuously operate the Project in compliance with the Certificate. Therefore, they assert that the Subcommittee should deny the change in ownership.

### **B. Standard of Review**

Under RSA 162-H:5, I, the Committee must approve the transfer or assignment of a Certificate to any other person or entity. In addition, under the terms of the Certificate issued to AWE in Docket No. 2015-02, AWE must notify the Committee of any change in ownership or ownership structure and must seek approval of the Committee of such a change.

To approve a transfer in ownership, the proposed owner should demonstrate by a preponderance of the evidence that it possesses the adequate financial, managerial, and technical capabilities to assure operation of the facility in continuing compliance with the conditions of the Certificate. The Committee will review the financial, technical, and managerial experience of the proposed new owner to make its determination. The same standards apply in a case where ownership of a project is restructured. *See* RSA 162-H:16, IV (a); *see also* Decision and Order Approving Transfer of Ownership Interest in Granite Reliable Power LLC, Docket No. 2010-03 (Feb. 8, 2011); Decision and Order Approving Transfer, Newington Energy, LLC and North

American Energy Alliance, LLC, Docket No. 2008-01 (Apr. 18, 2008). “Ongoing environmental compliance and the safe operation of the facility are of the utmost concern to the Committee and the State of New Hampshire.” *See* Decision and Order Approving Transfer, Newington Energy, LLC and North American Energy Alliance, LLC, Docket No. 2008-01 (April 18, 2008).

### **C. Analysis and Findings**

The Subcommittee finds that Antrim Level has demonstrated by a preponderance of evidence that the proposed corporate restructuring will not diminish the financial, managerial, and technical capabilities of Antrim Level. After restructuring, Antrim Level will continue to have adequate financial, managerial, and technical capability to construct and operate the Antrim Wind Project in a manner consistent with the terms and conditions of the Certificate issued to AWE.

The lighting malfunction referenced by the Antrim Residents does not affect our decision. The matter was reviewed by the Administrator and it was determined that the malfunction was remedied, and the matter was resolved. The remedied malfunction does not have an impact on the financial, technical, or managerial capabilities of Antrim Level under the proposed corporate restructuring in support of the tax equity financing.

#### **1. Financial Capability**

Site 301.13, provides that when determining whether an applicant for a certificate of site and facility has the financial capability to construct and operate the facility, the Committee must consider:

- (1) The applicant’s experience in securing funding to construct and operate energy facilities similar to the proposed facility;
- (2) The experience and expertise of the applicant and its advisors, to the extent the applicant is relying on advisors;



- (3) The applicant's statements of current and pro forma assets and liabilities; and
- (4) Financial commitments the applicant has obtained or made in support of the construction and operation of the proposed facility.

Site 301.13, (a)(1)-(4) (2018)<sup>1</sup>.

The purpose of the corporate restructuring is to take advantage of tax attributes associated with the Project. The production tax credit and tax depreciation have value but are often unavailable to developers of renewable energy projects. Transcript at 19. The restructuring allows the Petitioner to monetize the tax attributes by bringing in a tax equity partner through the new intermediate entities that can then monetize those attributes. Transcript at 20. The tax attributes are monetized by restructuring so that the tax equity partner, in this case Citi, can attract investment by selling shares or other interests in the intermediate company, in this case Bobcat Holdco, in the new corporate structure. By monetizing the tax attributes, Antrim Level increases the value of the project to the developer and ultimately reduces the cost of the renewable energy to the end consumer. *Id.*

After deliberation, the Subcommittee finds that the proposed change in ownership structure does not affect the Committee's determination in Docket No. 2018-03, that Antrim Level has the adequate financial capability to construct and operate the Antrim Wind Project in accordance with the terms and conditions of the Certificate issued to AWE. In coming to this conclusion, the Subcommittee considered the factors set forth in Site 301.13(a). In attracting tax

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<sup>1</sup>Although the rules address requirements that apply specifically to the applicants seeking a Certificate of Site and Facility, the rules provide valuable guidance for determining Antrim Level's financial, managerial, and technical capacity to continue operation of the Facility in accordance with the Certificate.

equity financing, Antrim Level, which will continue to own 100% of the membership interests in AWE, is in a better financial position than if the tax attributes were never monetized.

Therefore, the Subcommittee finds that the proposed corporate restructuring will not cause financial harm to AWE, the certificate holder, but will likely increase its financial capability. Transcript at 82.

## **2. Technical Capability**

When determining whether an applicant for a certificate of site and facility has the technical capability to construct and operate the facility, the Committee must consider:

- (1) The applicant's experience in designing, constructing, and operating energy facilities similar to the proposed facility; and
- (2) The experience and expertise of any contractors or consultants engaged or to be engaged by the applicant to provide technical support for the construction and operation of the proposed facility, if known at the time.

Site 301.13 (b)(1)-(2).

After deliberation, the Subcommittee finds that Antrim Level retains adequate technical capability to ensure that the Antrim Wind Project is constructed and operated in accordance with the terms and conditions of the Certificate issued to AWE. In coming to this conclusion, the Subcommittee considered the factors set-forth in Site 301.13 (b)(1) and (2).

Under the Equity Capital Contribution Agreement, Antrim Level continues to manage and control the operation of AWE on a day-to-day basis. *See* Exh. 2. Citi, as the tax equity partner retains certain rights that pertain to limiting certain types of indebtedness, selling or transferring assets, making capital expenditures that exceed certain thresholds, and changing the purpose of the restructured company. However, in general, Citi plays no role in operation of the facility and does not require technical expertise. Transcript at 84. There is no indication that the

restructuring will diminish the technical expertise of Antrim Level. Antrim Level will retain the technical expertise to ensure AWE operates the project in compliance with the Certificate.

### **3. Managerial Capability**

When determining whether an applicant for a certificate of site and facility, has the managerial capability to construct and operate the facility, the Committee must consider:

- (1) The applicant's experience in managing the construction and operation of energy facilities similar to the proposed facility;  
and
- (2) The experience and expertise of any contractors or consultants engaged or to be engaged by the applicant to provide managerial support for the construction and operation of the proposed facility, if known at the time.

Site 301.13 (c)(1)-(2).

After deliberation, the Subcommittee finds that Antrim Level maintains adequate managerial capability to ensure that the Antrim Wind Project is constructed and operated in accordance with the terms and conditions of the Certificate issued to AWE. In coming to this conclusion, the Subcommittee considered the factors in Site 301.13(c)(1) and (2).

Our analysis of Antrim Level's managerial capabilities is similar to our consideration of its technical capabilities. Antrim Level will maintain control over the day-to-day operation of AWE. Citi will play a passive role with limited rights with respect to issues that rarely pertain to operation of the Project. Exh. 3 at 2-3, and Transcript at 41. Nothing in the Equity Capital Contribution Agreement will diminish Antrim Level's managerial capability. Therefore, the Subcommittee finds that Antrim Level will maintain adequate managerial capability to ensure AWE operates the Project in accordance with the terms and conditions of the Certificate.

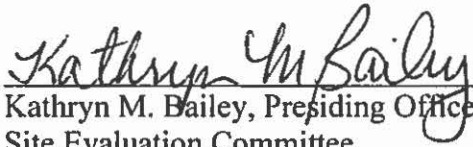
**VII. ORDER**

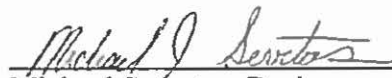
For the reasons stated, the Petition is denied in part and granted in part:

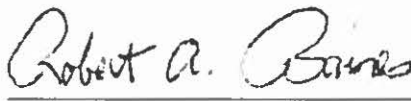
A. Prayer B of the Petition requesting a declaratory ruling is denied.

B. Prayers C and D of the Petition are granted and the corporate restructuring in support of the tax equity financing is approved. The transfer of non-controlling Class A membership interests in Bobcat Holdco to third party investors does not require further approval of the Committee.

SO ORDERED this twenty-seventh day of November, 2019.

  
Kathryn M. Bailey, Presiding Officer  
Site Evaluation Committee  
Commissioner  
Public Utilities Commissioner

  
Michael Servetas, Designee  
Assistant Director of Operations  
Department of Transportation

  
Robert A. Baines, Public Member  
Site Evaluation Committee

**ATTACHMENT 1**

**Exhibits  
Docket No. 2019-03**

<b>Exhibit Number</b>	<b>Description</b>
<b>Exhibit 1</b>	<b>Pre-Filed Direct Testimony of Brent Ward on Behalf of Antrim Level LLC and TransAlta Corporation</b>
<b>Exhibit 2</b>	<b>Equity Capital Contribution Agreement **Confidential**</b>
<b>Exhibit 3</b>	<b>Pre-Filed Direct Testimony of Anu Yadav on Behalf of Citigroup</b>
<b>Exhibit 4</b>	<b>Pre-Filed Direct Testimony of Shelley Nelkens</b>
<b>Exhibit 5</b>	<b>Pre-Filed Direct Testimony of Richard Block</b>