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November 20, 2023

Hon. K. Allen Brooks (*via email and regular mail*)  
Senior Assistant Attorney General  
Chief, Environmental Protection Bureau  
New Hampshire Department of Justice  
33 Capitol Street  
Concord, N.H. 03301-6397

Hon. Daniel C Goldner (*via email and regular mail*)  
Chairman, NH Public Utilities Commission and Site Evaluation Committee  
21 S. Fruit St, Suite 10  
Concord, N.H. 03301-2429

**Re: Docket No. 2021-02, Response to Brooks Letter**

Dear Attorney Brooks and Chairman Goldner:

As you know, I represent the investigatory Subcommittee in the above-captioned matter. I write to respond to Attorney Brooks' October 6, 2023 letter to Chairman Goldner and Presiding Officer Evans.

## **Questions About Posting of Materials and Notice**

First, there is confusion over Administrator's Biemer's "Summary of Investigation." Administrator Biemer authored a single "Summary of Investigation" document which was published on the Subcommittee docket website on August 31, 2023. There is no separate "investigative finding and report." When the Subcommittee voted to accept the Administrator's "investigative findings," it accepted the "Summary of Investigation." That Summary includes Administrator Biemer's factual findings, including calculations about median and average time of illumination during 2022-23, periods of constant illumination necessitated by maintenance and repairs, as well as the results of Administrator Biemer's physical inspection of the facility. The Subcommittee adopted those findings as its own at its September 1, 2023 public meeting.

Second, Counsel for the Public notes in his letter that several documents were posted publicly on the Subcommittee's docket on August 31, 2023 but that he was unaware of them prior to the September 1, 2023 Subcommittee meeting. It is unclear why this communication breakdown happened. The Subcommittee and Administrator Biemer followed their longstanding practice of updating the Subcommittee docket and notifying the distribution list. During the pendency of this matter, Attorney Brooks' paralegal has been on the distribution list and has been the point of contact for correspondence from the Subcommittee and Administrator Biemer. She previously received all correspondence and updates to the dockets, so it is not clear why the August 31, 2023 updates did not make it to Attorney Brooks.

Third, Attorney Brooks' colleague from the Department of Justice, Joshua Harrington, did appear as Counsel for the Public at the September 1, 2023 meeting. The Subcommittee invited comments from the public. Attorney Harrington did not submit any comment, did not make any statement, nor offer any position at the meeting.

### **The Subcommittee's Recommendation Is Correct**

Counsel for the Public substantive position is that the a "finding of no further action be taken is patently incorrect." He bases that on three pieces of data. First, he points out that the lights regulated by the ADLS were illuminated during nighttime hours 43.22% of the time from June 2021 through mid-August 2023. Second, he posits that "complete failures constitute a normal, predictable, and seemingly long-term operating condition at the facility." Third, he states that the ADLS' operation "during periods other than complete failure is also poor" because the "ADLS still triggers illumination more than 20% of the time [and] appears to be trending upward."

From these data points, Counsel for the Public recommends that the Committee find the facility is not complying with its certificate. He is wrong for several reasons.

#### *The Mean and the Median Are Poor Gauges of the System's Effectiveness Because of Extended Maintenance and Repair Periods*

It is a mistake to focus on the average (arithmetic mean) as Counsel for the Public does. While it is true the ADLS illuminated on average 43.22% of the time from June 2021 through mid-August 2023 that ignores the substantially lower median time for illumination at 29.38%. Counsel for the Public states with no explanation that a "median time for illumination does not seem useful under these circumstances." That is incorrect. In assessing a large data set, the arithmetic mean is heavily influenced by individual results that are very high or very low. The median, which is the result in the middle of a data distribution, is not as affected by such extreme results. This case perfectly illustrates the difference, with a substantially higher mean caused by three periods of 100% illumination in September 2021, mid-June 2022 to mid-August 2022, and mid-January 2023 to mid-June 2023.

Because of the long down periods, especially in the first half of 2023, even the median is an overstatement of the how often the ADLS illuminates when functioning. The Committee should review the chart provided by the facility and distributed on August 31, 2023 to the Subcommittee's distribution list. It shows:

- Illumination percentages primarily in the 30s and 40s, prior to a two-week 100% period in September 2021.
- Illumination percentages primarily in the 10s and 20s, from October 2021 to June 2022.
- Illumination percentages primarily in the 10s and 20s, from September 2022 to December 2022.
- Illumination percentages primarily in the very low 20s, during the summer of 2023.

The Chart also shows the three extended periods of 100% illumination and the dramatic effect on the average illumination time, quickly increasing from the stable percentages cited above to 100% as the system remained down for repairs and maintenance.

*The Certificate Does Not Impose a Maximum Illumination Percentage*

Counsel for the Public contends that even ignoring the down periods, the operational ADLS' illumination percentage of approximately 20% is too high and violates the facility's Certificate. This is an incorrect reading of the Certificate, which does not impose any limit or metric on how often the ADLS may illuminate.

Counsel for the Public had previously opined in his May 21, 2021 letter that the ADLS system was governed by provisions of the Order granting the Certificate in Docket No. 2015-02. He explained that the Order required the facility to “**operate** the Radar System” and to “**utilize** a radar activated lighting control system imposed a requirement that ADLS lighting be “functional.” According to Counsel, these provisions and others imposed an obligation to operate “functional ADLS lighting.” The Subcommittee agreed with that determination in its recommendation. See Subcommittee Recommendation ¶36. The Subcommittee decided the ADLS as currently operating is “functional” because it was reducing illumination on a median basis to only 20-30% of the nighttime hours. See id. The actual illumination percentages based on the facility's chart appear to be even lower.

Counsel for the Public seems to take the position in his October 6, 2023 letter that the compliance standard is much stricter than a “functional” ADLS. He contends the ADLS system must be “operating in a manner that at least approximates what was promised by the applicant.” Based on witness testimony during the Certificate proceeding in Docket No.

2015-02, Counsel says the facility promised “for the most part there will be no lighting at night of the facility.”

This is a problematic standard that the Committee should not adopt. First, it would inject a subjective element into compliance determinations. It is difficult to determine what level of “approximation” of the applicant’s “promises” would suffice. It is even harder to determine compliance when the promise is also nebulous: “**for the most part**, there will be no lighting at night.” It is unclear what “approximating no lighting for the most part” means or how that should be measured.

Second, Counsel’s proffered standard is unmoored from the language of the Order and Certificate. As Counsel noted in his earlier letter, the Order requires the facility to “**operate** the Radar System” and “**utilize** a radar activated lighting system.” Under Counsel’s interpretation, therefore, the radar system is not “operating” and the facility is not “utilizing” a radar activated lighting system, because the system illuminates approximately 20% of the time on average.<sup>1</sup> This interpretation is at odds with the plain meaning of “operating” and “utilizing.” The facility is still “operating” and “utilizing” the ADLS even if the ADLS is not perfectly accurate or has some false positives (i.e., illuminates when no aircraft is nearby).

In summary, Counsel for the Public’s interpretation imposes a performance requirement on the ADLS system that is absent from the Certificate. If the Order imposed that requirement, it would obviously bind the facility. In this matter, however, the Order does not create any performance requirement for the ADLS but simply requires that it be functional.

*There Is No Factual Basis to Conclude the System Has “Failed”*

Counsel for the Public also asserts that “complete failures constitute a normal, predictable, and seemingly long-term operating condition at the facility.” This assertion has no basis in the evidence reviewed by the Subcommittee. The evidence before the Subcommittee shows the facility has had two substantial down periods following the repair and upgrade work that was completed in June 2021 and the subject of the Vose complaint that was previously decided by the Committee. The Administrator’s investigation on behalf of the Subcommittee confirmed the repair and upgrade work that were completed during the downtime. He also confirmed that the “components and parts necessary for repair come from a single manufacturer that is also responsible for conducting installation/repair work.” The Administrator testified at the Subcommittee’s September 1, 2023 Public Meeting that “the delay was attributed to a supply chain issue” and the specialized work needed from the manufacturer.

Rather than be a “normal, predictable and long-term operating condition,” the ADLS’s down periods were caused by unexpected failures such as a June 2022 incident in which a power transformer and lighting control server failed, and the February 2023 failure of a

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<sup>1</sup> Because that is average, there are nights when the ADLS illuminates more often and nights when the ADLS illuminates for a very small percentage of the night.

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specialized air conditioning unit inside the radar enclosure. The Subcommittee did not review any evidence that these two failures, exacerbated by supply chain and specialty installation work were “normal,” that they could have been predicted, or that they represent long-term operating conditions at the facility.

Thank you for the opportunity to respond to Counsel for the Public’s letter.

Very truly yours,

*/s/ John-Mark Turner*

John-Mark Turner

cc: Jonathan Evans  
Andrew Biemer  
Mark Dell’Orfano