



THOMAS B. GETZ
Direct Dial: 603.230.4403
Email: thomas.getz@mcclane.com
Admitted in NH
11 South Main Street, Suite 500
Concord, NH 03301
T 603.226.0400
F 603.230.4448

February 11, 2021

Ms. Dianne Martin
Chairwoman
New Hampshire Site Evaluation Committee
21 South Fruit Street, Suite 10
Concord, NH 03301-2429

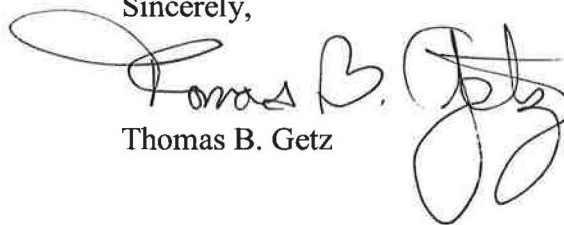
**Re: SEC Docket No. 2015-02
Application of Antrim Wind Energy, LLC
Post-Certificate Filings
Objection to Motion for Rehearing**

Dear Chairwoman Martin:

Enclosed is Antrim Wind Energy, LLC's ("Antrim Wind") objection to the motion for rehearing filed by Lisa Linowes, Janice Longgood and Barbara Berwick in the above-captioned docket on February 4, 2021.

If you have any questions, please do not hesitate to contact me.

Sincerely,


Thomas B. Getz

TBG:sm
Enclosures

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

SEC DOCKET NO. 2015-02

**APPLICATION OF ANTRIM WIND ENERGY, LLC
FOR A CERTIFICATE OF SITE AND FACILITY
POST-CERTIFICATE FILINGS**

OBJECTION TO MOTION FOR REHEARING

Antrim Wind Energy, LLC (“Antrim Wind”), by and through its attorneys, McLane Middleton, Professional Association, hereby objects to the motion for rehearing filed by Lisa Linowes, Janice Longgood and Barbara Berwick (“Linowes *et al.*”) on February 4, 2021. They ask the Site Evaluation Committee (“SEC”) to reconsider its January 5, 2021 Order on Pending Matters Including the Request for Waiver of Portions of N.H. Administrative Rule Site 301.18 (“Order”). As explained below, Linowes *et al.* fail to demonstrate good cause for rehearing.

I. BACKGROUND

1. On November 17, 2020, the SEC Chairwoman issued a Notice of Public Meeting and Agenda (“Notice”) concerning the review and discussion of certain sound-related post-certificate matters. On November 23, 2020, the SEC held its Public Meeting pursuant to RSA 91-A:2, which requires a public meeting when a quorum of the membership of a public body convenes for the purpose of discussing or acting upon matters over which it has supervision, control, jurisdiction or advisory power.

2. By its January 5, 2021 Order, the SEC granted Antrim Wind’s request to waive, in part, the requirement of Site 301.18 (e) (5) that noise measurements for post-construction monitoring surveys be taken at the same locations at which predictive sound modeling study measurements were taken, because a landowner (Ms. Berwick) refused access to one of five locations, viz., Location 4. The SEC also granted Antrim Wind’s request to defer or reschedule

the Spring 2020 Sound Monitoring Report until Spring 2021, because Antrim Wind did not have access to Location 4 and Turbine 3 was shut down for maintenance from May through June 2020. In addition, the SEC accepted Antrim Wind's Winter 2020 Sound Monitoring Report ("Winter Report"), pointing out that the peer review conducted by Cavanaugh and Tocci Associates confirmed that the Winter Report conformed to SEC rules.

3. In their motion for rehearing, Linowes *et al.*, repeatedly, and incorrectly, refer to the November 23, 2020 Public Meeting as a "hearing." From that mischaracterization, they proceed to argue that the SEC failed to follow its procedural rules and they argue as well that the Winter Report did not comply with SEC rules. In particular, Linowes *et al.* contend that the SEC was required to notify them pursuant to Site 202.07, as would be the case for a hearing in an adjudicative proceeding, and that the Winter Report did not properly represent sound measurements in .125 second intervals.

II. STANDARD

4. The purpose of rehearing "is to direct attention to matters said to have been overlooked or mistakenly conceived in the original decision." *Dumais v. State Pers. Comm'n*, 118 N.H. 309, 311 (1978) (internal quotations omitted). A rehearing may be granted when the Committee finds "good reason" or "good cause" has been demonstrated. *O'Loughlin v. New Hampshire Pers. Comm'n*, 117 N.H. 999, 1004 (1977); *Appeal of Gas Service, Inc.*, 121 N.H. 797, 801 (1981). "A successful motion for rehearing must do more than merely restate prior arguments and ask for a different outcome." *Public Service Co. of N.H.*, Order No. 25,676 at 3 (June 12, 2014); *see also Freedom Energy Logistics*, Order No. 25,810 at 4 (Sept. 8, 2015).

III. DISCUSSION

5. Linowes *et al.*'s procedural argument flows from the mistaken premise that the resolution of post-certificate matters effectively requires an adjudicative proceeding whenever there is a dispute or complaint about anything. They assert that the SEC "acted unlawfully and unreasonably when it did not determine that these proceedings constitute a contested case requiring an adjudicative proceeding." Motion for Rehearing, ¶ 27. Linowes *et al.* appear to believe that if they contest, i.e., disagree with any action of Antrim Wind or the SEC that an adjudicative proceeding automatically ensues and that the SEC's Part Site 202 rules for adjudicative proceedings must be applied.

6. Linowes *et al.* misunderstand RSA 541-A:1, IV, which defines a contested case as "a proceeding in which the legal rights, duties, or privileges of a party *are required by law* to be determined by an agency after notice and an opportunity for hearing." (Emphasis added.) They also ignore RSA 162-H:12, I and Site 302.01, which clearly provide that the opportunity for a hearing in an enforcement matter only arises after the SEC or the Administrator determines that a term or condition of the Certificate has been violated, which has not occurred here.

7. RSA 162-H:12, Enforcement, I. states:

Whenever the committee, or the administrator as designee, determines that any term or condition of any certificate issued under this chapter is being violated, it shall, in writing, notify the person holding the certificate of the specific violation and order the person to immediately terminate the violation. If, 15 days after receipt of the order, the person has failed or neglected to terminate the violation, the committee may suspend the person's certificate. Except for emergencies, *prior to any suspension, the committee shall give written notice of its consideration of suspension and of its reasons therefor and shall provide opportunity for a prompt hearing.* (Emphasis supplied.)

8. Pursuant to the SEC's enforcement powers, notice and an opportunity for a hearing, viz., an adjudicative proceeding, does not come into play until after, first, the SEC or its Administrator has determined that a term or condition of the Certificate has been violated and,

second, the Certificate holder has failed to terminate the violation. The matters considered by the SEC at its Public Meeting and memorialized in its Order comprise the initial phase of the SEC's enforcement action, i.e., determining whether there is, in the first instance, a violation of the Certificate, which determination does not, by law, require an adjudicative proceeding. Inasmuch as the SEC granted the waiver, deferred the Spring Report, and accepted the Winter Report, no term or condition of the Certificate was determined to have been violated. Thus, there was no need for an adjudicative proceeding.

9. Among other things, *Linowes et al.* confuse matters by conflating the SEC's two separate rules governing waivers, Site 202.15, which applies to adjudicative proceedings, and Site 302.05, which applies to Certificates of Site and Facility. Antrim Wind's July 24, 2020 request for a waiver concerned the SEC's Chapter 300 rules, not its Chapter 200 Practice and Procedure Rules.¹ Consequently, the arguments that *Linowes et al.* make in ¶ 32 of their motion for rehearing, in particular, that Site 202.15 (f) would entitle them the opportunity to comment on Antrim Wind's waiver request is misplaced. Antrim Wind's waiver request was made, and decided, under Site Chapter 300, specifically, Site 302.05, which permits the SEC to act exactly as it did. Moreover, Site 302.05 does not include a subsection (f) comparable to Site 202.15.

10. *Linowes et al.*'s substantive argument is a rehash of previous filings promoting an extreme interpretation of the rules that could conceivably lead to the closing of every wind facility in New Hampshire based on even a momentary spike in sound levels. They reiterate arguments made in numerous prior filings, which include a letter on May 21, 2020, comments on July 29, 2020, a letter on August 18, 2020, and, a report on September 23, 2020. Most important in terms of evaluating the request for rehearing, *Linowes et al.* acknowledge in their motion for

¹ Antrim Level's request contains a typo in that it refers to Site 302.15, not 302.05, but the context makes clear that it was seeking a waiver of a Chapter 300 rule, not a procedural rule.

rehearing that the SEC was aware of and considered Ms. Linowes' various arguments when it conducted its deliberations at the November 23, 2020 Public Meeting. See, for example, Motion for Rehearing ¶ 20 and ¶ 34.

11. As a further example of Linowes *et al.*'s failure to demonstrate good cause for rehearing, a particularly notable statement was made in the context of explaining the landowner's refusal to grant Antrim Wind access to Location 4 to conduct its post-construction monitoring surveys. ¶ 70 states:

It is worth noting that Ms. Berwick has not definitively refused access to the use of her property. Rather, Ms. Berwick has refused to allow AWE to perform sound monitoring that involves the "averaging" out of sound fluctuations and, thus, minimizes and/or ignores the various complaints that she has submitted to the NHSEC. She respectfully declines to allow herself or her property to put forth a narrative of compliance that she does not believe exists.

Ms. Berwick's position is patently unreasonable inasmuch as she seeks to hold Antrim Wind hostage to Ms. Linowes' misinterpretation of the rules, which Antrim Wind cannot and need not accept as a condition to access.

12. Finally, Linowes *et al.* append to their motion for rehearing arguments and additional requests about raw data and a technical session, which are beyond the scope of the motion for rehearing. Antrim Wind disputes the accuracy of the statements about raw data and is prepared to address the issues if and when appropriate. As for the technical session, consistent with its position that this is not an adjudicative proceeding, Antrim Wind contends that a technical session is neither necessary nor proper.

IV. CONCLUSION

13. Linowes *et al.*'s motion for rehearing should be denied because the SEC did not overlook or mistakenly conceive anything. As to procedure, the November 17, 2020 Notice issued by Chairwoman Martin was not required to be served on the service list for SEC Docket

No. 2015-02 pursuant to Site 202.07 (b) because the Public Meeting concerned enforcement matters that did not by law require an adjudicative proceeding. As to substance, the SEC considered the arguments made by Ms. Linowes and Antrim Wind, as well as the peer review conducted by Mr. Tocci, and found in favor of Antrim Wind. On rehearing, Linowes *et al.* merely restate their prior arguments and ask for a different outcome.


14. Accordingly, Linowes *et al.* have not demonstrated good cause for rehearing. The SEC long ago closed the adjudicative proceeding pursuant to which, on March 17, 2017, it issued the Certificate held by Antrim Wind. Thus, the matters brought to the SEC after issuance of the Certificate fall under its clearly delineated enforcement powers. Contrary to law and good sense, Linowes *et al.* would transform every dispute, no matter how ill-founded or inconsequential, into a costly and time-consuming adjudicative proceeding in the unceasing effort to, as a practical matter, nullify the Certificate issued by the SEC nearly four years ago.

WHEREFORE, Antrim Wind respectfully requests that the SEC:

- A. Deny the Motion for Rehearing; and
- B. Grant such further relief as is deemed just and appropriate.

Respectfully submitted,
ANTRIM WIND ENERGY, LLC
By Its Attorneys,
McLANE MIDDLETON,
PROFESSIONAL ASSOCIATION

Dated: February 11, 2021

By: 
Barry Needleman, Bar No. 9446
Thomas Getz, Bar No. 923
11 South Main Street, Suite 500
Concord, NH 03301
(603) 226-0400
barry.needleman@mclane.com
thomas.getz@mclane.com

Certificate of Service

I hereby certify that on the 11th of February, 2021, an original and one copy of the foregoing Objection was hand-delivered to the New Hampshire Site Evaluation Committee and an electronic copy was served upon the SEC Distribution List.



Thomas B. Getz