91. Rule Site 301.14(f)(2)(a) provides that a wind project shall comply with the following sound standard:

> the A-weighted equivalent sound levels produced by the applicant's energy facility during operations shall not exceed the greater of 45 dBA or 5 dBA above background levels, measured at the L-90 sound level, between the hours of 8:00 a.m. and 8:00 p.m. each day, and the greater of 40 dBA or 5 dBA above background levels, measured at the L-90 sound level, at all other times during each day, as measured using microphone placement at least 7.5 meters from any surface where reflections may influence measured sound pressure levels, on property is used in whole or in part for permanent or temporary residential purposes, at a location between the nearest building on the property used for such purposes and the closest wind turbine.

92. The predictive sound study to be supplied by the Applicant must be "conducted in accordance with the standards and specifications of ISO 9613-2 1996-12-15." N.H. CODE OF ADMIN. R. Site 301.18(c). The modeling shall also include an adjustment to the Leq sound level produced by the model applied in order to adjust for turbine manufacturer uncertainty factor ("k-factor") per the standard covering such data IEC 61400-11. Id. The modeling must also include predictions made "at all properties within 2 miles from the project for the wind speed and operating mode that would result in the worst case wind turbine sound emissions during the hours before 8:00 a.m. and after 8:00 p.m. each day." Id. Additionally, the model must incorporate other corrections for model algorithm error to be disclosed and accounted for in the model. Id. The ISO 9613-2 standard specifies a tolerance of ±3 decibels which was not included in the model assumptions. See ISO 9613-2 1996-12-15 at §9 (titled "Accuracy and limitations of the method") appended as Appendix B to N.H. CODE OF ADMIN. R. Site 300, et seq.

93. In a nutshell, the predictive modeling performed by Mr. O'Neal understates sound levels at all properties by at least 6 decibels because Mr. O'Neal used a completely erroneous

ground factor of 0.5 representing sound propagation over unfrozen ground and because Mr. O'Neal failed to include tolerances to the ISO 9613-2 model for variability of sound propagation as atmospheric conditions change at the Project site.

94. First, Mr. O'Neal utilized a ground factor of 0.5 to his predictive modeling, meaning that he anticipated that the ground was going to absorb a portion of the sound. However, due to the Project's height, Mr. O'Neal should have used a ground factor of 0.0. See Pre-filed Testimony of Richard James at 17. The use of a 0.0 ground factor would have been appropriate because the height of the turbines meant that the likelihood of the sound coming from the Project would not interact or be absorbed by the ground prior to reaching a structure. Id. This is especially true during winter periods with frozen ground and snow cover. Id. In fact, using a ground factor other than 0.0 is not supported under the ISO 9613-2 standard which states that "the method of calculating ground effect is applicable only to ground which is approximately flat either horizontally or with a constant slope. See ISO 9613-2 1996-12-15 at § 7.3.1 (titled "Ground effect: General method of calculation") appended as Appendix B to N.H. CODE OF ADMIN. R. Site 300, et seq. (emphasis added). Such terrain is not characteristic of the Antrim site. Therefore, the appropriate g-factor is that of "hard ground" or "reflective surfaces." See 10/19/16 PM Transcript at 32. Using a ground factor of 0, Mr. O'Neal's predictive modeling should have been 3 decibels higher based on ground factor alone. See Pre-filed Testimony of Richard James at 17-18; see also 9/22/16 AM Transcript at 72; Wind Action Exhibit 8 at 10.

95. The use of a ground factor of 0.0 was supported by the evidence. The National Association of Regulatory Utility Commissioners ("NARUC") notes that the use of a 0.5 ground

factor is appropriate for flat topography, such as farmlands in the Great Plans. See Wind Action Exhibit 28 at *3. Richard James, expert for Abutting Intervenors further opined that the use of a ground factor of 0.5 would be inappropriate due to the few opportunities for sound from elevated noise sources on the ridge top to interact with the ground prior to reaching a structure. See Pre-filed Testimony of Richard James at 17-18.

96. Second, Mr. O'Neal's predictive modeling is inaccurate because it does not fully account for atmospheric impacts that are not represented in the ISO 9613-2 model. As stated above, the predictive modeling is to anticipate "worst case wind turbine sound emissions" during the hours of 8:00 p.m. to 8:00 a.m. The ISO 9613-2 model, however, is predicated upon facilities operating on flat ground where the noise sources are below 30 meters above grade and then only for receptors that are within 1,000 meters. See ISO 9613-2 1996-12-15 at § 9 (titled "Accuracy and limitations of the method"). It does not factor in atmospheric effects associated with wind turbines that exceed 30 meters in height and are not situated on flat land. See id. Uncertainties are more than ± 3 decibels for projects that exceed 30 meters in height above the receptor, which is assured when locating wind turbines on towers over 90 meters tall on top of a ridge. See id. The ISO 9613-2 standard cautions that sound levels can exceed the tolerances of 3 decibels for projects that are more than 30 meters in height above the receptor or during weather conditions that more strongly favor sound propagation. See id. This assertion is supported by NARUC which stated that under such weather conditions, operational turbine projects commonly produced sound levels that fluctuated by ± 5 decibels above the mean trend line and that, on some occasions, noise spikes of 15 to 20 decibels were observed. See Wind Action Exhibit 28 at *12. The study titled, "Wind turbine noise modeling and verification: two case studies – Mars

Hill and Stetson Mountain I, Maine," which was cited by Mr. O'Neal, reflects that the experts in those case studies accounted for atmospheric impacts to the ISO 9613-2 model, adding 3 decibels for "published limitations inherent in ISO Standard 9613-2." See Wind Action Exhibit 6, Wallace, J. et. al, "Wind Turbine noise modeling and verification: two case studies—Mars Hill and Stetson Mountain I, Maine" at *2, 7, 17 (July 25-27, 2011). Finally, Mr. James opined that the ISO 9613-2 model needed to be adjusted to account for model limitations, which involved an adder of approximately 3 decibels to predictive sound levels. See Pre-filed Testimony of Richard James at 10-11.

97. Mr. O'Neal cited a document titled "Massachusetts Study on Wind Turbine Acoustics," to which Mr. O'Neal's company was a contributor to support his contention that ISO 9613-2 did not need to be adjusted for the model's published limitations. In fact, the Massachusetts Study experienced numerous exceedances when ISO 9613-2's modeling limitations were not taken into consideration.[12] Mr. O'Neal ignored that pursuant to Rule 301.18, the sound study is to be a worst case scenario and the Massachusetts Study experienced exceedances when ISO 9613-2's modeling limitations were not taken into consideration. See WindAction Exhibit 12, Resource Systems Group, Inc., "Massachusetts Study on Wind Turbine Acoustics" at *65.

[12] Mr. O'Neal opined that some of the exceedances were due to turning the turbines on and off during the tests, which, assuming for the sake of argument is correct, is a phenomenon that would not account for all of the exceedances. See 9/22/16 AM Transcript at 114. Mr. O'Neal acknowledged that the purpose of the Massachusetts study was, in part, to assess how well predictive modeling matched actual measurements taken at an operating wind project. See 9/22/16 AM Transcript at 102-103.

Notwithstanding, Mr. James testified that it would be unreasonable to expect competent researchers to allow their data to be contaminated with artifacts from the test, i.e. not accounting for turning the turbines on and off. See 10/19/16 PM Transcript at 62-63. Doing so "throws into doubt the entire study." See 10/19/16 PM Transcript at 61-62. Even if the data were contaminated by the test, Mr. James testified that measurements during the much quieter 'turbine-off' condition would have resulted in lower and not higher measurements. See 10/19/16 PM Transcript at 62-63.

98. As reflected above, the overwhelming weight of the evidence reflects that the ISO 9613-2 model needs to be adjusted to account for atmospheric conditions that are not captured by the basic model. Mr. O'Neal's predictive sound levels, therefore, should have been increased by three (3) decibels to account for the improper use of a 0.5 ground factor and, at least an additional three decibels to account for ISO 9613-2's limitations — a total of six (6) decibels. Adding six (6) decibels to the predictive sound levels, results in numerous properties predicted to experience sound levels that exceed 40 dBA.[13]

99. As such, the Project exceeds the maximum threshold allowed for sound from a wind energy project. See N.H. CODE OF ADMIN. R. Site 301.14(f)(2)(a). The Subcommittee made an erroneous finding of fact when it determined that the Project would not have an adverse effect on public health and safety due to sound when the evidence clearly demonstrates that the maximum sound thresholds would be surpassed and when the Subcommittee approved the Project based upon an un-vetted and unanalyzed mitigation proposal.[14]

2. Shadow Flicker

100. The Subcommittee's determination that the Project will not have an adverse effect on public health and safety with regard to shadow flicker is unlawful and unreasonable because the Shadow Flicker Analysis prepared by Mr. O'Neal of Epsilon Associates, Inc. found that properties within a mile of the Project would experience shadow flicker in excess of 8 hours during a year. The Subcommittee's decision to grant a Certificate of Site and Facility, despite

[13] The standard is 40 dBA, as Mr. O'Neal's ambient background sound levels reflect an average L90 sound level of between 27 and 36 decibels. See Sound Level Assessment Report, prepared by Epsilon Associates, Inc. at 5-8.

[14] Regardless of the inclusion of the 6 decibels, one property – a hunting cabin – had a rounded sound level of 40 dba. The Committee erroneously excluded this hunting cabin from consideration on the basis of Mr. O'Neal's unilateral conclusion that the hunting cabin was "dilapidated." The hunting cabin is, in fact, in use, and would qualify as "temporary residence" under Rule Site 301.14(f)(2)(a).

acknowledging this finding, is contrary to the rules of the Committee and is predicated upon the Applicant implementing an untested "shadow control protocol" that has not been used in the United States.

101. Rule Site 301.14(f)(2)(b) states that "the shadow flicker created by the applicant's energy facility during operations shall not occur more than 8 hours per year at or within any residence, learning space, workplace, health care setting, outdoor or indoor public gathering area, or other occupied building." To allow the Subcommittee to analyze shadow flicker, the Applicant must provide:

> [a]n assessment that identifies the astronomical maximum as well as the anticipated hours per year of shadow flicker expected to be perceived at each residence, learning space, workplace, health care setting, outdoor or indoor public gathering area, other occupied building, and roadway, within a minimum of 1 mile of any turbine, based on shadow flicker modeling that assumes an impact distance of at least 1 mile from each of the turbines.

N.H. CODE OF ADMIN. R. Site 301.08(a)(2).

102. While the Shadow Flicker Analysis expressly acknowledges that 24 properties within 1-mile of the project site will experience more than 8 hours of shadow flicker per year, the fact remains that this estimate was calculated based upon a methodology that does not comport with Rule Site. 301.08(a)(2). The Applicant's Shadow Flicker Analysis does not comport with Rule Site 301.08(a)(2) because the analysis only calculated shadow flicker impacts out to 1-mile despite the rule assuming an impact distance of "at least 1 mile from each of the turbines." See id. Mr. O'Neal agreed that structures outside of one mile would experience shadow flicker, however, the Shadow Flicker Analysis shows these properties experiencing zero (0) hours of shadow flicker per year. See Antrim II Decision at 161; see also Shadow Flicker Analysis at Figure 4-2. Mr. O'Neal opined that Rule Site 301.08(a)(2) did not require a shadow flicker

analysis beyond one mile. See id. However, the consequences of assuming a shortened impact distance is more pervasive and also extends to properties within the 1-mile distance by failing to fully assess the contribution of multiple wind turbines casting shadows on those properties. Running the model using larger impact distances could result in more hours per year of shadow flicker at any property, and consequently could shift the determination that the Project would not have an adverse effect on public health and safety. See 9/22/16 PM Transcript at 8-9 (testimony of Mr. O'Neal stating "as you change the distance ...a location such as a residence could now be potentially experiencing shadow flicker from another turbine that wasn't in the analysis before. Now it is included, in not all cases of course, but in some cases it could potentially be in line to cause some additional hours or minutes of shadow flicker").

103. Moreover, the Shadow Flicker Analysis appears to be predicated upon historic, average meteorological conditions as evidenced by the fact that Epsilon Associates, Inc. relied upon the "historical dataset for Concord New Hampshire from the National Climatic Data Center." See Shadow Flicker Analysis at 4-2; see also 9/20/16 PM Transcript at 60-61. The result of using an impact distance of just one mile and relying on historic, average weather data is that the anticipated hours of shadow flicker is underestimated.[15]

104. Notwithstanding the understated hours of shadow flicker, the Shadow Flicker Analysis concluded, and the Subcommittee ultimately found, that the Project will exceed the maximum shadow flicker threshold set forth in Rule Site 301.14(f)(2)(b). The Subcommittee issued the Certificate of Site and Facility based upon the Applicant's promise to implement "shadow control protocols." These protocols, however, are untested in the United States and

[15] Additionally, the Shadow Flicker analysis, like the Sound Report, excludes "participating properties," the error of which is discussed in Section II (c) infra.

have only been deployed in Europe. See 9/28/16 PM Transcript at 160-61 (testimony of Mr. Kenworthy). Much like the implementation of NRO, these "shadow control protocols," which appear to involve suspension of turbine operations during certain times may have impacts on the energy to be produced by the Project and may impact the Project's financial feasibility in a manner that has not been discussed or analyzed during these proceedings.

105. As a result of this decision, residents falling under the shadow of the Project will be forced to endure shadow flicker that may exceed 8 hours in a given year. Their only recourse would be to either trust the Applicant to implement an untested technology to mitigate this shadow flicker (the extent of which remains uncertain due to the Shadow Flicker Analysis' underestimated hours of sunlight), or to resort to further proceedings before this Committee for relief after the Project has been built, the money spent, and the impacts felt.

106. Respectfully, the Committee's determination with regard to shadow flicker is unlawful and unreasonable. The Committee should grant a rehearing on this matter and find that the Project will not comport with Rule Site 301.14(f)(2).

3. Ice Throw

107. The Subcommittee acted unlawfully and unreasonably when it determined that the Project did not present an unreasonable adverse effect to public health and safety based with regard to ice throws. The Subcommittee acted unlawfully and unreasonably because its determination that the Applicant provided more credible evidence of the potential distance of ice throw ignores the uncontroverted and credible evidence presented by the Opposing Intervenors for conclusory and self-serving assertions from the Applicant. The Subcommittee should grant rehearing on this issue.

108. Rule 301.08(a)(4) requires that the applicant provide an "assessment of the risk of ice throw, blade shear, and tower collapse on public safety, including a description of the measures taken or planned to avoid or minimize the occurrence of such events, if necessary, and the alternative measures considered but rejected by the applicant."

109. The Applicant presented, and the Subcommittee specifically found, that the maximum ice thrown distance is 250 meters. See 9/15/16 AM Transcript at 144. This evidence was presented by Darrell Stovall of DNV GL during the hearing on the merits in this matter and by the Applicant. See id. Mr. Stovall presented no evidence to corroborate this figure, other than to state the 250 meters is "a general assessment and it is somewhat of an industry-accepted number," even though Mr. Stovall's admission that he "is not an expert on ice throw." See id. Utilizing this figure alone, the risk of ice throw would intrude upon individual's property lines. See at 9/29/16 AM Transcript at 88-89. However, the evidence clearly reflects that ice thrown from the project turbines can be thrown over 300 meters. See at Abutters Exhibit 52, Bredesen, et. al, "Methods for evaluating risk caused by ice thrown and ice fall from wind turbines and other tall structures" at *4. The Bredesen Report reflects that that the calculated ice throw zone "is dependent on local wind conditions and may in the worst cases with modern turbines exceed the general rule of 1.5 * (H + D), where H is hub height and D is the rotor diameter". Id. Turbines situated at elevations above surrounding properties would also add the 'overheight' to the H. Id. Applying this documented and published industry standard to the Antrim turbines, where (H is equal to 92.5 meters and D is equal to 113 meters) and assuming flat ground, ice throw would exceed 300 meters at the project site.

110. Unlike the Applicant's off-the-cuff remarks, the Opposing Intervenors submitted objective evidence from disinterested third-parties as to the potential "zone of danger" for ice throws. Using the 300 meter figure, these ice throws will extend well into individual's properties and pose a danger to the individuals that may be enjoying their property. It is fundamentally unreasonable and unfair to expect residents to incur these risks.

111. For this reason, the Subcommittee erred in its determination of the adverse effect to public health and safety resulting from ice throw and, consequently, its decision on said issue is unjust and unlawful.

4. Decommissioning

112. The Subcommittee misapplied its rules and, in doing so, effectively granted the Applicant a waiver from Rule Site 301.08(7) when it approved the Applicant's decommissioning plan to excavate a trench and pulverize and bury on-site the concrete comprising the turbine foundations. Rule Site 301.08(7) states that "[a]ll underground infrastructure at depths less than four feet below grade shall be removed from the site." The Subcommittee's decision is clearly at odds with this rule. Although the Department of Environmental Services permits pulverization and burying of concrete as a best management practice, such practice is not authorized by the rules of the Committee.

113. Had the Subcommittee intended to adopt a rule similar to the Department of Environmental Services best management practice and limit Rule 301.08(a)(7) applicability with regard to on-site concrete, it could have done so. Cf. Grafton County Attorney's Office v. Canner, 169 N.H. 319, 327 (2016) (noting that "if the legislature desired to limit the application of a statute it could have done so explicitly").

114. The Subcommittee should grant rehearing on the matter of decommissioning.

iv. The Subcommittee's finding that the Project will not have unreasonable adverse impacts on the natural environment is unjust and unreasonable.

115. The Subcommittee's finding that the Project will not have unreasonable adverse impacts on the natural environment is unjust and unreasonable because the Applicant did not submit any evidence with regard to the Project's impact on mammals, other than bats. The Subcommittee's decision makes no mention of the potential impact to large mammals, specifically bears, as a result of the Project. See Antrim II at 129-44. In this regard, the Application, and consequently the Subcommittee's determination is incomplete, unjust, and unlawful.

116. Rule Site 301.07(c) requires the Applicant to provide information relating to "[t]he identification of critical wildlife habitat and significant habitat resources potentially affected by construction and operation of the proposed facility" and an "assessment of potential impacts of construction and operation of the proposed facility on . . . critical wildlife habitat and significant habitat resources." "Significant habitat resource" is defined as a "habitat used by a wildlife specific for critical life cycle functions." N.H. CODE OF ADMIN. R. Site 102.49.

117. Here, the Subcommittee heard evidence of the existence of bear and bobcat in and around the Project area. See e.g. 10/18/16 PM Transcript at 118, 121 (testimony of Mr. Block); 10/19/16 AM Transcript at 27-31 (noting that area in and around Project was "core habitat for black bear, bobcats, coyotes, moose, deer, and other big game species"). Specifically, the Subcommittee heard from Geoffrey Jones of the Stoddard Conservation Commission regarding the quality of the habitat with regard to the boulder fields, which the Applicant initially proposed to destroy to construct access roads to the Project ridge. See 10/19/16 AM Transcript at 34, 94.

In light of this analysis, there appear to be areas of the Project site which would constitute "significant habitat resources," i.e. areas used by bears and other animals for "critical life cycle functions." Indeed, Mr. Jones stated that blasting associated with the Project could impact denning bears, particularly newborn cubs, who may be placed at risk if they (understandably) flee the blasting to occur at the Project. See 10/19/16 AM Transcript at 59-60.

118. While other intervenors submitted evidence regarding the presence of bears and the existence of "significant habitat resources," the Applicant has not submitted any evidence or analysis to satisfy the Committee's rules.

119. Notwithstanding the deviation from the Committee's rules, the Subcommittee granted the Applicant a Certificate of Site and Facility, without the opportunity or ability to adequately analyze the Project's impacts on large mammals and the possibility of habitat fragmentation associated with the Project. Moreover, while it is commendable that the Subcommittee restricted the blasting and destruction of the aforementioned boulder fields, the Subcommittee did not go far enough with regard to restricting the Applicant. See Antrim II Decision at 143. The Subcommittee's decision leaves too much discretion to the Applicant with regard to the decision to blast boulders in these sensitive and ecologically important areas. See Antrim II Decision at 143 (stating that "the Applicant shall, to the extent possible, use all reasonable efforts to avoid, rather than demolish, any boulders identified during" the proceedings). The Subcommittee has identified the boulder field as a sensitive resource, and intervenors have testified that the boulder field is a potential habitat for large mammals; the Applicant should not be afforded the considerable discretion to decide which aspects of this

habitat it will be able to destroy, especially when the Applicant has put forth no analysis of the Project's impacts on large animals.

120. Therefore, the Subcommittee should grant rehearing on this matter because the Applicant has not submitted the requisite information to allow this Subcommittee to make a sufficient finding regarding the Project's impacts on large mammals.

v. The Subcommittee's finding that the Project will not have unreasonable adverse impacts on the orderly development of the region is unjust and unreasonable.

1. *Consideration of municipal views regarding the Project.*

121. The Subcommittee's determination that the Project would not have an unreasonable adverse impact on the orderly development of the region is predicated upon erroneous considerations of municipal land use regulations and priorities.

122. Pursuant to Rule Site 301.09, the Applicant, and by extension the Subcommittee, must give due consideration to municipal and regional planning commissioners and municipal governing bodies, including consideration of master plans and zoning ordinances of the proposed facility host municipalities. The Applicant must further provide analysis and consideration of the Project's impacts upon "prevailing land uses in affected communities" and "how the proposed facility is inconsistent with such land uses." See N.H. CODE OF ADMIN. R. Site 301.09.

123. Here, the Subcommittee did not properly consider various provisions of the Antrim Zoning Ordinance or the Master Plan. Primarily, the Subcommittee did not adequately weigh that the proposed use is not permitted in the Rural Conservation Zone under the Zoning Ordinance. The Subcommittee further did not sufficiently weigh that the Town of Antrim was

faced with proposals to amend the Zoning Ordinance on three separate occasions to allow for the Project, and each time, the Town declined to adopt the proposed ordinance.

124. Moreover, the Subcommittee's determination that the people of Antrim want the Project based on their re-election of various Selectboard members reads too much into the election. The re-election of a Selectboard member can be predicated upon numerous considerations that do not relate in any way to that member's support of the Project. To extrapolate public support of the Project based on the citizen's re-election of a Selectboard member that supports the Project is specious reasoning. The more telling indication of public support is the Town Meeting's rejection of proposed zoning articles that would have allowed the Project in its proposed location – when faced with the specific decision of allowing the Project, the citizens of the Town voiced their opposition through their vote. The Subcommittee's determination does not give adequate weight to this consideration.

125. Moreover, the Subcommittee's consideration of conservation easements as a means to make the Project consistent with the Town of Antrim's Master Plan ignores that the Master Plan prioritizes the preservation of sensitive areas and watersheds. See Antrim Master Plan, Water Resources at V-5, submitted as Exhibit Cal-B. The Project will be an industrial use in these scenic areas, which remain for half of a century. The Project will involve placing the tallest free-standing structures in the State in an area which does not permit basic commercial uses. See Article IX of the Antrim Zoning Ordinance, submitted as an exhibit to the Pre-filed Testimony of Charles Levesque. The much-touted conservation easements will not diminish the impact of this industrial use and will not go into effect until after the Project is decommissioned — a date presently undetermined. As previously indicated, the nature of the terrain begs the

question as to the level of risk the subject areas are to development, particularly given the varying and steep slopes and various wetlands, and calls into question the value of the conservation easements proposed as part of the Applicant's mitigation package.

126. Moreover, the Subcommittee does not appear to give any consideration to any neighboring municipalities. Indeed, even small-scale wind projects require reviews of regional impacts, notification of abutting municipalities, and consideration of the input of affected municipalities. See RSA 36:57; RSA 674:66. Notwithstanding that these structures will impact the viewsheds of surrounding communities such as Deering, Bennington, Windsor, Stoddard, Hancock, Washington, and Hillsborough, the Applicant did not submit, and the Subcommittee did not consider, the land use considerations and planning goals of those affected communities. In that regard, the Subcommittee's determination is fundamentally insufficient. Further, no information was submitted by the Applicant or considered by the Subcommittee pursuant to Rule Site 301.09(b)(1) which requires an assessment of the "economic effect of the facility on the affected communities." The PILOT agreement negotiated between the Town of Antrim and the Applicant, particularly its reliance on an understated agreed-upon assessed value, will have an economic impact on the ConVal Cooperative School District which includes Antrim and nine other New Hampshire communities. 10/20/16 PM Transcript at 41-42.

127. The Subcommittee should grant rehearing on the issue of views of municipal boards and officials and give due consideration to the master plans and zoning ordinances of all impacted municipalities.

2. *Impact of proposed facility on real estate values.*

128. As reflected above in Section II(a), the Subcommittee acknowledged that the Project may have adverse effects on property values but still granted the Applicant a Certificate of Site and Facility and declined to adopt a property value guaranty to protect the residents of Antrim. The Subcommittee's decision on this matter is unlawful and unreasonable.

129. The Subcommittee stated that it was "not convinced that the Project will not have any effect on value of some properties, the Subcommittee received no evidence indicating that this impact, if any, will have unreasonable adverse effects on the orderly development of the entire region." Antrim II Decision at 86. The Subcommittee's decision to grant a Certificate of Site and Facility in light of being "unconvinced" of adverse effects to property values was unlawful and unreasonable because it impermissibly shifted the burden of proof as to adverse effects from the Applicant to the Opposing Intervenors.

130. The burden of proof with regard to establishing no adverse effects is on the Applicant. See N.H. CODE OF ADMIN. R. Site 202.20 (noting that Applicant typically bears the overall burden of proof). The Subcommittee, as the trier of fact, "may accept or reject, in whole or in part, the testimony of any witness or party." See Brent v. Paquette, 132 N.H. 415, 418 (1989). The Subcommittee was "not required to believe even uncontroverted testimony." See id.

131. The Subcommittee's determination ignores this principle and indicates that the Subcommittee held the erroneous belief that, because Mr. Magnusson's real estate analysis was not rebutted, the Subcommittee was compelled to adopt his conclusion that there would be no adverse effects to real estate values. See id. That is simply not the case, if the Subcommittee

was not convinced, the Subcommittee should not have granted the Certificate of Site and Facility or, at the least, reopened the record to consider further evidence to satisfy its concerns. See N.H. CODE OF ADMIN. R Site 202.27(b)("[i]f the presiding officer determines that additional testimony, evidence or argument is necessary for full consideration of the issues presented in the proceeding, the record shall be reopened to accept the offered testimony, evidence, or argument").

132. This analysis, however, assumes that there was no contrary evidence of real estate impacts. The Subcommittee heard comments from interested individuals that wind projects have an impact on real estate values. See 10/3/16 AM Transcript at 108-11 (comment of Justin Lindholm regarding flaws in Mr. Magnusson's analysis and the reality of the real estate market surrounding the Lempster Wind project); see also Comment of Justin Lindholm dated October 3, 2016. Mr. Lindholm's comments, and the submitted map reflecting properties that are still for sale around the Lempster Wind Project, struck at a fundamental and documented flaw in Mr. Magnusson's analysis: Mr. Magnusson did not analyze properties that were still for sale or had been taken off of the market. The deficiencies in Mr. Magnusson's analysis should have led this Subcommittee to reject that analysis and rule that the Applicant did not submit sufficient evidence to carry its burden that there would be no adverse effects on orderly development in the region. See N.H. CODE OF ADMIN. R. Site 301.09(b)(4). At the least, it should have compelled the Subcommittee to reopen the record for the submission of additional evidence as to the impact to real estate markets.

133. Even assuming, without conceding, that the Subcommittee had sufficient evidence to find that the project would not have an adverse effect on the orderly development of

the region, the Subcommittee acted unlawfully and unreasonably with regard to its determination of the property value guaranty. Throughout the Subcommittee's deliberations, the Subcommittee frequently noted that intervenors did not submit any evidence or proposals with regard to property value guaranties. However, in making those comments, the Subcommittee completely ignored that the intervenors did try to introduce evidence of a property value guaranty related to a Massachusetts project, and the Subcommittee excluded the evidence. See Letter from McCann Appraisal, LLC attached to Supplemental Pre-filed Testimony of Annie Law and Robert Cleland; Order on Motions to Strike at 5-6 (dated September 19, 2016). The Subcommittee noted the McCann letter was "not relevant or material to the issues before the Subcommittee." See Order on Motions to Strike at 5-6. Additionally, Mr. Block, during his cross-examination of the members of the Antrim Board of Selectmen, submitted a letter previously delivered to the Selectmen from ten intervening property owners requesting support in the establishment of a Property Value Guaranty as a condition to be added to the agreement between the Town of Antrim and the Applicant. See 9/29/16 PM Transcript at 104-21; see also Exhibit NA-18.

134. The Subcommittee's deliberations regarding the property rights guaranty, and the Subcommittee's ultimate rejection of such a guaranty in light of the fact that no evidence was presented regarding the guaranty and no testimony was elicited regarding the guaranty, reflects that the Subcommittee's order on the Motion to Strike was erroneous.

135. Consequently, the Subcommittee unjustly dismissed the concept of the property rights guaranty because of a lack of submitted evidence arising out of the Committee's unjust Order on the Applicant's Motions to Strike. The Opposing Intervenors respectfully request that the Subcommittee grant rehearing on this issue so that they may be afforded the opportunity to

present a proposal on the property value guaranty and to have that proposal fully vetted and considered.

136. It is only fair that the Opposing Intervenors be given this chance — after all, if it was not for second opportunities, this Application would not be before the Subcommittee.

VII. CONCLUSION

137. The Subcommittee's decision granting a Certificate of Site and Facility is unreasonable and unlawful. The Subcommittee should have ruled that the Project is substantially similar to that raised in Antrim I and denied the Certificate on the grounds that the Project would have an unreasonable effect on aesthetics. The Subcommittee's decision is further unlawful and unreasonable because the procedure in this case was plagued with irregularities, most notably the absence of a public member throughout the virtual entirety of the proceedings, that materially impacted the presentation of the evidence, the full development of the record, and the Subcommittee's deliberations. Lastly, the Subcommittee's decision is unlawful and unreasonable because the Subcommittee made factual determinations that were unsupported by the evidence, relied upon unreliable evidence, or impermissibly allowed the Applicant a reprieve from the Committee's own rules. The Subcommittee must, in the nature of equity and justice, grant a rehearing in this matter.

WHEREFORE, the Opposing Intervenors respectfully request that the Subcommittee:

A. Grant this Motion for Rehearing;

B. Schedule this Matter for Rehearing;

C. Deny the Applicant's Application for a Certificate of Site and Facility; and

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

Dated this 14th day of April, 2017.

Respectfully submitted,

The Abutting Landowners Group, the Non-Abutting Landowners Group, the Levesque-Allen Group, the Stoddard Conservation Commission, and the Windaction Group,

By and through their attorneys,

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Certificate of Service

I hereby certify that I served a copy of this Joint Motion for Rehearing pursuant to Site 202.07 to the current service list in this Docket this 14th day of April, 2017.

Eric A. Maher, Esq.

THE STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

In the matter of the Application for Certification Pursuant to RSA 162-H of Antrim Wind Energy, LLC	)	**Docket No. 2015-02**

MOTION OF COUNSEL FOR THE PUBLIC FOR REHEARING OR RECONSIDERATION

NOW COMES Counsel for the Public, pursuant to RSA 162-H:11, N.H. CODE OF ADMIN. RULES SITE 202.29 and RSA 541:3 and hereby moves, for rehearing or reconsideration of the March 17, 2017 Site Evaluation Committee Decision and Order Granting a Certificate of Site and Facility with Conditions ("Decision") on behalf of the Applicant Antrim Wind Energy, LLC ("AWE"). As grounds the following is set forth:

1. In its decision, the Site Evaluation Committee Subcommittee ("Subcommittee") made a number of rulings including: that proposed project would not have an unreasonable adverse impact on aesthetics;[1] and that the Decommissioning Plan submitted by AWE was acceptable.[2] The Subcommittee also waived the health and safety requirements in N.H. CODE OF ADMIN. RULES SITE 301.14 (f) as they affect the cooperating landowners.[3]

2. The Decision was unreasonable and unlawful because:

   a. The Subcommittee failed to follow its rules related to adverse effects concerning the impact of the project on aesthetics;

   b. The Subcommittee misapplied the doctrines of res judicata and collateral estoppel as applied to the issue of aesthetics;

[1] See, *Application of Antrim Wind Energy, LLC for a Certificate of Site and Facility*, N.H. Site Eval. Comm., # 2015-02 ("Decision"); Order on Certificate of Site and Facility, 3/17/17, p. 121.
[2] *Id.* at p. 175-176.
[3] *Id.* at p. 168-169.

c. The Subcommittee failed to follow its rules related to the requirements for the decommissioning plan submitted by AWE;

d. The Subcommittee failed to follow its rules and improperly granted a waiver of health and safety regulations concerning sound, shadow flicker and setbacks for cooperating landowners; and

e. The Subcommittee failed to follow the statutory requirement of having a seven member panel including 2 public members to adjudicate this matter.

A. THE SUBCOMMITTEE FAILED TO FOLLOW ITS RULES RELATED TO THE CRITERIA UNDER WHICH IT WAS REQUIRED TO CONSIDER THE PROJECT'S UNREASONABLE ADVERSE EFFECTS ON AESTHETICS[4]

3. The Subcommittee's ruling on aesthetics was unreasonable and unlawful because it failed to follow its rules establishing the criteria under which the Subcommittee was required to consider in making a determination as to whether the proposed project caused unreasonable adverse effects on the aesthetics of the region. N.H. CODE OF ADMIN. RULES SITE 301.14 (a)(1) – (7), *eff.* 12/8/17. Under N.H. CODE OF ADMIN. RULES SITE 301.14(a) the Subcommittee was required to consider: 1) the existing character of the area of potential visual impact; 2) the significance of the affected scenic resource and their distance from the proposed facility; 3) the extent nature and duration of public uses of affected scenic resources; 4) the scope and scale of the change in the landscape visible from the affected resources; 5) the evaluation of overall daytime and nighttime visual impacts of the facility in the visual impact assessment submitted by the applicant and other relevant evidence submitted pursuant to N.H. CODE OF ADMIN. RULES SITE 202.24; 6) the extent to which the proposed facility would be a dominant and prominent

[4] Counsel for the Public joins in the arguments made in the Joint Motion for Rehearing of the Abutting Landowners Group, the Non-Abutting Landowners Group, the Levesque-Allen Group, The Stoddard Conservation Commission, and The Windaction Group, ("Intervenor Groups") filed on 4/14/17 with respect to the following issues: IV. Res Judicata, and V. Procedural Issues, a. The Subcommittee was not Lawfully Constituted; b. Waiver of Requirements; c. Procedural Fairness; VI. Substantive Issues, ii. The Subcommittee's finding that the Project will not have unreasonable adverse impacts on aesthetics is unlawful and unreasonable; and VI, iii, 4. Decommissioning. The instant Motion for Re-Hearing will contain additional arguments related to these issues raised by the afore-identified Intervenor groups.

feature within a natural or cultural landscape of high scenic quality or as viewed from a scenic resource of high value or sensitivity; and 7) the effectiveness of mitigation measures proposed by the applicant to avoid, minimize or mitigate unreasonable adverse effects on aesthetics and the extent to which such measures represent best practical measures. *Id.*

4. The record reflects that Subcommittee's analysis of that character of the region under N.H. CODE OF ADMIN. RULES SITE 301.14 (a)(1) consists of a cursory finding that the affected area was located in the Town of Antrim's rural conservation zone and contained a great deal of conservation land.[5] Under N.H. CODE OF ADMIN. RULES SITE 301.14 (a)(2), the Subcommittee made no determination as to the significance of the affected scenic resources except to note that there was disagreement between the two experts on the subject.[6] However, the Subcommittee determined that two of the resources identified by Counsel for the Public's aesthetics expert as having unreasonable adverse impacts were private resources, and therefore should not have been considered. The two resources the Subcommittee addressed were Gregg Lake and Black Pond – both of which are public resources. So the Subcommittee's dismissal of the visual impact analysis for these two resources was error. Moreover, even if the photo-simulations from these resources were taken from a private property vantage point,[7] visual impact studies are also required by regulation to include visual simulations from a sample of private property observation points to illustrate the potential change in the landscape. N.H. CODE OF ADMIN. RULES SITE 301.05(b)(7). As such, the Subcommittee's outright dismissal of these resources from any kind of consideration was error.

5. Under N.H. CODE OF ADMIN. RULES SITE 301.14 (a)(3), the Subcommittee's

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[5] Decision at p. 117.
[6] *Id.* at p. 118.
[7] Only one simulation - the photo-simulation taken for Black Pond – was taken from a private property vantage point.

discussion as to the extent, nature and duration of public uses of affected scenic resources noted that the resources were used for activities such as hiking, fishing and canoeing.[8] The Subcommittee described these as activities as limited in time or transient uses and therefore less likely to be impacted by the proposed project.[9] However, the Subcommittee's dismissal of so-called transient uses is unreasonable given that under Site 301.14, it is authorized to analyze only public resources[10] for aesthetic impact, and most public uses are likely to be transient. Further, the Subcommittee failed to consider evidence that visits by local users of these resources were far more frequent and regular and therefore far more likely to be impacted by the proposed project. The Subcommittee made no further findings regarding this criterion to support its finding that such uses would not result in an unreasonable adverse impact.

6. Under N.H. CODE OF ADMIN. RULES SITE 301.14 (a)(4), the Subcommittee did not directly address the scope and scale of the change in the landscape visible from the affected resources. However, under N.H. CODE OF ADMIN. RULES SITE 301.14 (a)(6) - the extent to which the proposed facility would be a dominant and prominent feature within a natural or cultural landscape, the Subcommittee looked at all of the visual simulations and stated whether it thought the impact was dominant, prominent and/or unreasonable.[11] These qualities address "scale" because "dominance" and "prominence" are terms of art used by aesthetics experts to indicate the "scale" of a project in relation to its surroundings.[12] Therefore, a finding that a project is dominant or prominent in a visual simulation equates to there being a scale issue. This criterion is significant because the primary finding of the SEC in Antrim I was that the project

[8] *Id.* at p. 118.
[9] *Id.*
[10] N.H. Code of Admin. Rules Site 102.45.
[11] *Id.*
[12] App. Ex. 33, Appendices 9a, p 24. Tr. Day 6 AM, 9/28/16, p. 21.

was out of scale with the regional resources.[13] The Subcommittee looked at visual simulations for nine scenic resources and found issues related to "dominance" and/or "prominence" with regard to five of the resources (Willard Pond, Franklin Pierce Lake (prominent), Gregg Lake (dominant and prominent), Meadow Marsh (dominant and prominent), Goodhue Hill (prominent and industrial but not dominant) and Bald Mountain (clustering).[14] [15] Even though the Subcommittee made findings that were nearly the same as the SEC in Antrim I as to the scale of the project, it found the effects on these resources were not unreasonable.[16] In this regard, neither the deliberations, nor the Decision contain any rationale as to why the Subcommittee found these scale issues reasonable in this docket.[17]

7. With regard to N.H. CODE OF ADMIN. RULES SITE 301.14 (a)(6), the Subcommittee did not address nighttime visual impacts except to state that AWE was seeking FAA approval of radar activated lighting AWE's visual impact expert did not conduct any analysis of nighttime lighting except to indicate that is was seeking FAA approval of radar activated lightling.

8. Under N.H. CODE OF ADMIN. RULES SITE 301.14 (a)(7) the Subcommittee determined that the mitigation package offered by the applicant was sufficient to mitigate the adverse impacts of the project.[18] The mitigation proposed did not significantly differ from the mitigation project in Antrim I. The major items of difference are as follows: approximately 100 additional conservation acres added to a package that included 800+ acres of off-site

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[13] 5/12/13 *Decision and Order Denying Application for Certificate of Site and Facility*, Site Eval. Comm. No. 2012-01, pp. 51- 53.
[14] Decision at pp. 118-120.
[15] The Subcommittee did not conduct a similar analysis of Black Pond because the point at which the simulation was taken was not a "public" resource.
[16] *Id.* at p. 21.
[17] *Id.*
[18] The Subcommittee actually took up mitigation before it had done any analysis as to whether there were any unreasonable adverse impacts on aesthetics. Typically this type of analysis is conducted after determinations are made as to adverse impacts.

conservation; a one-time donation from Antrim Wind to the New England Forestry Foundation of $100,000 for off-site conservation to be determined at a later date; a $40,000 payment to the Town of Antrim to offset the aesthetic impacts on Gregg Lake, and a $5000 scholarship to the Town of Antrim for some worthy students. The Subcommittee's acceptance of this mitigation package was unreasonable and unlawful because as indicated, *infra*., it was bound by the SEC's decision in Antrim I as to the use of off-site conservation land as mitigation for aesthetics.

9. In addition to failing to follow its rules under which the Subcommittee was to determine whether the project posed an unreasonable adverse impact on aesthetics, the Subcommittee also permitted AWE to submit a visual impact study that did not comport with its rules. N.H. CODE OF ADMIN. RULES SITE 301.05 (b)(8)e, 1 - 3 & (9). Further, the Subcommittee made inconsistent and arbitrary evidentiary rulings that prevented Counsel for the Public's aesthetic expert from rebutting AWE's expert's critique of her report.[19] Finally the Subcommittee erred in failing to consider the opinion of Counsel for the Public's other aesthetic expert, Jean Vissering who also determined that the changes made to current project did not sufficiently mitigate the unreasonable adverse impacts posed by the project to the surrounding region.

10. Dismissal of these two experts reports while permitting the Applicant's expert to submit a visual impact report that did not comply with the SEC rules was also unreasonable and unlawful.

B. THE SUBCOMMITTEE MISAPPLIED THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL AS APPLIED TO THE ISSUE OF AESTHETICS.

11. Counsel for the Public first raised the doctrines of *collateral estoppel* and *res*

[19] See Counsel for the Public's Motion to Reconsider Evidentiary Ruling and Request to Reopen the Record, 11/14/16, and hereby incorporated by reference within.

judicata during the jurisdictional phase of this application.[20] Even though the parties conducted discovery and their respective aesthetics experts submitted testimony relative to the issue of the materiality of the changes between proposed project in Antrim I and the current docket, the Site Evaluation Committee ("SEC") ultimately determined that the question of whether the differences between the were material enough to require a different result or even survive claims of issue preclusion or *res judicata* "cannot be determined on this record because [the Committee] does not have a complete application before [it]."[21]

12. In the current docket, Counsel for the Public again raised the issues of *res judicata* and/or issue preclusion with regard to the prior ruling of the SEC on aesthetics,[22] the identification of scenic resources being impacted by the proposed project and the ruling of the SEC concerning the value of off-site conservation land as appropriate mitigation for aesthetics.[23]

13. The Subcommittee's analysis of the applicability of *res judicata* in this docket is flawed for several reasons. First, the Subcommittee relied on the decisions of the New Hampshire Supreme Court in *Fisher v. Dover,* (holding that the Zoning Board of Adjustment ("ZBA") erred in granting an application for a second variance without considering whether the second application contained a material change of circumstances affecting the merits of the application, or the application is for a use that is materially different in nature and degree from its predecessor)[24] and *Morgenstern v Town of Rye*, (holding that the ZBA erred in refusing to consider a second application on the merits where the changes to the application no longer

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[20] See, Counsel for the Public's Memorandum in Support of Objection to Petition for Jurisdiction, *Petition for Jurisdiction*, Dkt. #2014-05, pp. 15 – 19, July 7, 2015.
[21] *Id.*, 9/29/15 Jurisdictional Decision and Order, p. 38.
[22] Counsel for the Public raised claim preclusion with regard to the Subcommittee's determination on aesthetics because in Antrim I the SEC denied the certificate to AWE on the basis of its finding that the project posed an unreasonable adverse impact on the aesthetics of the regions. However, the doctrine of issue preclusion is also fully applicable to findings of the SEC on aesthetics issues as well. *Daigle v. City of Portsmouth*, 129 N.H. 561, 570 (1987).
[23] See, Post hearing Memorandum of Counsel for the Public, 11/21/16, pp. 3 – 13.
[24] *Fisher v. Dover*, 120 N.H. 187, 190 (1980).

required a retaining wall to protect the wetlands).[25]

14. The Subcommittee stated that a third case clarified the holding in *Fisher* and *Morgenstern* wherein the Court held that if the Board "invites submission of a subsequent modification to meet its concerns, it would find an application so modified to be materially different from its predecessor, thus satisfying *Fisher*." [26] *Hill-Grant Living Trust v. Kearsarge Lighting*, 159 N.H. 529 (2009). Based upon this legal framework, the Subcommittee identified certain differences between this docket and the project proposed in Antrim I, and noted that there had been changes to the controlling law and SEC rules.[27]

15. Regarding the changes to the project, the Subcommittee made no independent finding as to how the changes to the project related to the aesthetics impacts on the region. Further it is difficult to conclude that the changes were actually responsive to the SEC's concerns in Antrim I because, for example, the SEC ruled in Antrim I that off-site conservation land was not suitable mitigation for aesthetics impacts and a significant part of the changes in the current docket included off-site conservation land.

16. Further, the Subcommittee relied on the finding of the SEC in Antrim I that the changes proposed by AWE (after a decision had issued) "were material differences such that they could not be considered under the auspices of that Application." [28] Based upon this statement by the SEC in Antrim I, the Subcommittee concluded that this statement was akin to an invitation for submission of a new application.[29]

17. The Subcommittee's determination that this finding by the SEC in Antrim I was an invitation to file a new application is flawed for several reasons. The deliberations in Antrim

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[25] *Morgenstern v. Town of Rye*, 147 N.H. 558, 565 (2002).
[26] *Id.* at 41- 42, 49.
[27] *Id.* at 49.
[28] *Id.*
[29] *Id.*

I reflect that SEC members expressed concern that re-opening the record at that late stage may set a precedent for applicants to try a case under one set of facts and substitute facts after they didn't prevail.[30] There was also concern expressed that about how the changes would impact the financial capability of the AWE.[31] Further, the SEC did not find that the changes proposed amounted to material changes that would impact aesthetics, but rather the entire application.[32]

18. Moreover, the SEC addressed the issue of whether or not its prior ruling in Antrim I constituted an invitation to file a subsequent application in the jurisdictional phase of this proceeding and it concluded that the SEC in Antrim I did not invite the second application.[33]

19. The Subcommittee has identified no evidence in the record or any other rationale for making a finding contrary to the SEC's finding in its Jurisdictional Decision and Order. The rationale discussed by the SEC in its deliberations in Antrim I, as well as the late stage at which the changes were proposed provided sufficient grounds for the SEC to deny AWE's Motion for Re-hearing and to Re-open the Record, and they provide no basis to conclude that the SEC was "inviting" AWE to re-file it application.

20. Because the Subcommittee relied upon this finding to support its finding that the changes between the projects were material and responsive to the comments by the SEC in Antrim I, the Subcommittee's finding that *res judicata* does not apply to these proceedings is unreasonable and unlawful.

21. Similarly the Subcommittee made no finding as to how the changes in the law or rules affected the outcome such that they would be an intervening force negating the doctrine of

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[30] *Id.* See, Counsel for the Public's Memorandum in Support of Objection to Petition for Jurisdiction, *Petition for Jurisdiction*, Dkt. #2014-05, p. 10.
[31] *Id.*
[32] *Id.*
[33] *Jurisdictional Decision and Order*, Docket 2014-05, 9/29/15, p. 34

res judicata or *collateral estoppel*.[34] To the contrary, the new rules appear consistent with the rulings of the SEC in Antrim I. For example, in Antrim I, the SEC disagreed with AWE's aesthetics expert as to his identification of important scenic resources because AWE's expert had an overly restrictive definition of scenic resources that demonstrated a bias to federal and State resources; whereas the SEC identified a number or local and regional resources as important scenic resources and also found that were unreasonably adversely impacted by the project.[35] In furtherance of the SEC finding in that regard is a rule defining "scenic resources" that include a variety of federal, State and municipal resources. N.H. CODE OF ADMIN. RULES SITE 102.45.

22. The Subcommittee's ruling that the doctrine that *collateral estoppel* did not apply to the SEC's ruling in Antrim I regarding the identification of sensitive sites and the value of off-site conservation land in mitigation of aesthetic impacts, is unreasonable and unlawful because the matter was fully and fairly litigated in Antrim I, and there is insufficient basis to conclude that was a case-specific holding.

23. In this regard, as noted in paragraph 20, both parties submitted visual impact assessments that included a determination of sensitive sites and the impact of the project on those sites. AWE submitted a mitigation package for aesthetics in Antrim I that included over 800 acres of conservation land. The record contains nothing indicating that AWE was prevented from submitting evidence in support of its proposition that its proposal was suitable to mitigate aesthetic impacts. After the Decision and Order issued, again, AWE was afforded the opportunity to address the suitably of this proposed mitigation for aesthetics and it did not do that. Instead, AWE offered an additional 100 acres of conservation land. Finally, the record reflects that AWE was aware of its right to appeal the decision of the SEC the New Hampshire

[34] See, Post hearing Memorandum of Counsel for the Public, 11/21/16, pp. 14

[35] 5/12/13 *Decision and Order Denying Application for Certificate of Site and Facility*, Site Eval. Comm. No. 2012-01, pp. 51- 53.

Supreme Court and it did not file an appeal. Thus, it is unreasonable to conclude that the matter was not fully litigated.

24. Regarding the Subcommittee's finding that this ruling by the SEC in Antrim I was case specific, Counsel for the Public submits there is insufficient basis to make such an interpretation of the SEC's ruling. In its ruling, the SEC stated as follows:

> In addition to physical mitigation, the Applicant submits that its overall environmental mitigation for the project consists of dedicating in excess of 800 acres of land in and around the Facility to conservation easements. Applicant's Post-Hearing Brief at 12. After consideration and deliberation, a majority of the Subcommittee found that the proffered mitigation does not appropriately mitigate the unreasonable adverse aesthetic impacts of the Facility. The physical mitigation efforts as described by the Applicant, while appreciated, are comparable to what is the standard design of any wind turbine facility in the region. The Applicant refers to the standard features of a modern wind turbine facility as mitigation. These features were considered by the Subcommittee in its review of this Application. A majority of the Subcommittee finds that the physical mitigation program cited by the Applicant is insufficient to mitigate the visual effects of this Facility on the regional setting and on the Willard Pond – dePierrefeu Wildlife Sanctuary area.
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> Similarly, the Subcommittee finds that the offer of more than 800 acres of conservation easements in and around the proposed Facility is a generous offer by the Applicant. However, the dedication of lands to a conservation easement in this case would not suitably mitigate the impact. While additional conserved lands would be of value to wildlife and habitat, they would not mitigate the imposing visual impact that the Facility would have on valuable viewsheds.[36]

25. A review of the SEC's finding on off-site mitigation does not support the conclusion that this finding was case specific. There is no such statement in the SEC's Decision and Order. Further the Subcommittee's identification of three words "in this case" does not

[36] 5/12/13 *Decision and Order Denying Application for Certificate of Site and Facility*, Site Eval. Comm. No. 2012-01, pp. 51- 53.

warrant the conclusion that the SEC intended these words to mean that was a case specific context, and there is no rule of statutory or literary construction that would warrant such a conclusion. Those same three words have been used is hundreds, if not thousands of New Hampshire Supreme Court cases, without such an interpretation. The Subcommittee's ruling in this regard is unreasonable.

26. Finally the Decision references its deliberations citing "numerous changes" from the project that was proposed in Antrim I.[37] But the cited-to pages contain almost no discussion as to what the changes are and how they affect aesthetics. There is one sentence in the 15 pages cited that makes the conclusory statement that there are numerous changes from the "number of towers to lighting issues to conservation issues to differences in the amount of land impacted." [38] The number of towers is one less tower. The lighting issues referred to above presumably refer to the radar activated lighting for which there was no aesthetic analysis, (and which was required by the SEC in Antrim I). The conservation issues and amount of land impacted presumably refers to the additional 100 acres of conservation land. However, there is no articulation or findings as to how these changes materially impacted the aesthetics issues such that the doctrines of *res judicata* or *collateral estoppel* might not apply. See *Hill-Grant Living Trust*, 159 N.H. at 536 (allowing submission of modifications that meet [the SEC's] concerns)

27. Based upon the foregoing arguments, the Subcommittee's determination that *res judicata* and *collateral estoppel* are not applicable to this case is unreasonable and unlawful.

C. THE SUBCOMMITTEE FAILED TO FOLLOW ITS RULES ON THE REQUIREMENTS FOR THE DECOMMISSIONING PLAN SUBMITTED BY AWE

28. The Subcommittee also approved the Decommissioning Plan proposed by AWE, which did not comply with the SEC's rules requiring removal of all infrastructure at depths of

[37] Decision at p. 50.
[38] Tr. 12/7/25, AM, p. 24.

less than four feet. This determination was unreasonable and unlawful.

29. The Subcommittee's (and AWE's) rationale for this divergence from the requirements of the rule was based on AWE's testimony that described this practice as typical in the industry, and documentary evidence of a Department of Environmental Services("DES") "Fact Sheet" issued by the DES Solid Waste Division describing burying concrete at a construction work site as a "best management practice."

30. As noted in Counsel for the Public's Post Hearing Memorandum[39] the SEC enacted new rules governing decommissioning that became effective in December 2016, and as noted above, these rules require removal of all infrastructure at depths of less than four feet. There is no exemption for concrete infrastructure. This rule is specific to decommissioning of energy facilities as opposed to DES general solid waste rules. Under the cannons of statutory construction, the SEC's rules apply to decommissioning – not the DES Solid Waste rules.

31. Moreover, the DES Fact Sheets relied upon by the Subcommittee are for information purposes only; they are not authority. Under the Solid Waste laws and regulations, this spent concrete infrastructure would fall within the definition of solid waste, and burying on site would constitute activities that would qualify as disposal for which a Solid Waste facility permit would be necessary. There is an exemption to the permitting requirement under the solid waste rules for concrete under certain conditions, those being that there is an assurance that there are no constituents of the concrete that would pose a threat to groundwater, and that the buried concrete be actively managed. From a practical standpoint this solid waste permit exemption may apply to a general construction site, but that is not to say that it should apply to a ridge top. Of concern is that the area of Tuttle Ridge is part of a valuable watershed. There was no

[39] See, Counsel for the Public's Post-Hearing Memorandum, 11/21/16, pp. 44-50 and hereby incorporated by reference.

consideration of whether the constituents of the crushed concrete would leach out and contaminate the groundwater. The Subcommittee did not undertake any analysis related to these conditions under the Solid Waste rules. So the Subcommittee disregarded both its own rules and the DES' Solid Waste rules. As such, the approval the Decommissioning Plan submitted by AWE was unreasonable and unlawful.

D. THE SUBCOMMITTEE FAILED TO FOLLOW ITS RULES AND IMPROPERLY GRANTED A WAIVER OF HEALTH AND SAFETY REGULATIONS CONCERNING SOUND, SHADOW FLICKER AND SETBACKS FOR COOPERATING LANDOWNERS

32. In the course of its deliberations, the Subcommittee waived its public health and safety rules related to sound, shadow flicker impacts and setbacks to avoid injury from ice throw, blade shear, and tower collapse as these health and safety regulations impact cooperating landowners.[40] N.H. CODE OF ADMIN. RULES SITE 301.14(f).

33. The Subcommittee found that its rules do not differentiate between participating and non-participating landowners.[41] But it determined that landowners have a right to voluntarily agree to subject themselves to "different environments." [42] As to the "different environments," the Subcommittee was presumably referring to exculpatory agreements between AWE and the cooperating landowners that purport to waive liability for possible health and safety impacts related to sound, shadow flicker and setbacks.

34. The Subcommittee's waiver of this rule was unreasonable and unlawful for several reasons. First, these types of agreements are generally not favored in New Hampshire. The New Hampshire Supreme Court has held that New Hampshire law generally prohibits exculpatory contracts. In an injury case, a party seeking to avoid liability must show that the exculpatory contract: 1) does not violate public policy. *Barnes v. N.H. Karting Assn.*, 128 N.H.

[40] Decision at pp. 168-169.
[41] *Id.* at 168.
[42] *Id.*

201, 106 (1986). In turn, the Court defined the public policy as indicating that no special relationship existed between the parties and that there was no other disparity in bargaining power. *Id.* In *Barnes* the Court held that "[w]here a defendant is a common carrier, innkeeper or public utility or is otherwise charged with a duty of public service, a defendant cannot rid itself of its obligation of reasonable care." *Id.* (emphasis added). These agreements can also be found to contravene public policy when they could be injurious to the interests of the public; violate a statute; or tend to interfere with public welfare and safety. *Serna v. Lafayette Nordic Village*, 2015 US. Dist. LEXIS 92669, 2015 DNH 138, p 4-5, citing *Barnes*, 128 N.H. 201, 106. Based upon the factors the Court outlined in *Barnes*, the exculpatory agreements AWE entered into with the cooperating landowners violate public policy because, at a minimum, one of the parties is a public utility. Further, among the liabilities being waived are the health and safety standards established by the SEC regulations.

35. However, under the holding in *Barnes*,[43] once the agreement is found to be objectionable as a matter of public policy, it can be upheld only if it appears: 1) that the releasing party understood the import of the agreement or a reasonable person in his or her position would have understood the import of the agreement; and 2) that the releasing party's claims would have been within the contemplation of the parties at the time of execution. *Id.* at 108. Also, the exculpatory contract must clearly state that the released party is not responsible for the consequences of its negligence. *Id.*; See also, *McGrath v. SNH Dev. Inc.* 158 NH 540, 542-543 (2009).

36. The Subcommittee did not undertake any part of the above-described analysis

[43] The *Serna* case implies that once an agreement is found to contravene public policy it is not enforceable, but there was no holding in either *Barnes* or *Serna* that the exculpatory agreements contravened public policy, so that appears unclear at this time.

with respect to the exculpatory contracts.[44] It also does not appear that the Subcommittee reviewed or examined the exculpatory contracts. The Committee simply waived its rules on its own motion under N.H. CODE OF ADMIN. RULES SITE 302.05 (waiver) *sue sponte* during deliberations.

37. Moreover, the SEC did not follow its rules for waivers. The Committee may waive its own rules under N.H. CODE OF ADMIN. RULES SITE 302.05 upon a motion or its own motion if it finds that: it serves the public interest; and (2) the waiver will not disrupt the orderly and efficient resolution of matters before the committee or subcommittee. N.H. CODE OF ADMIN. RULES SITE 302.05 (a)(1) & (2). In determining the public interest the committee shall waive the rule if compliance with the rule would be onerous or inapplicable given the circumstances of the affected person; or (2) the purpose of the rule would be satisfied by an alternative proposed method. N.H. CODE OF ADMIN. RULES SITE 302.05(b)(1) & (2). The Subcommittee made no such analysis.

38. As noted, in the Decision, the Subcommittee dismissed the noise and shadow flicker standards as "different environments." Under the SEC's regulations, those standards fall under the category of not simply "different environments" but "public health and safety." N.H. CODE OF ADMIN. RULES SITE 301.14(f) (unreasonable adverse effects on public health and safety). The Subcommittee did not make a finding that this waiver was in the public interest and it did not consider alternatives. It is difficult to reconcile the Subcommittee waiver under circumstances where they have made no determination such agreements are in the public interest particularly in light of the fact that these types of agreements are generally disfavored under New Hampshire Law as being against public policy. *Serna*, 2015 US. Dist. LEXIS 92669, 2015 DNH 138, p 4-5, citing *Barnes*., 128 N.H. at 206.

[44] Tr. 12/09/16, PM, pp. 21- 25, 44-45.

39. Because the Subcommittee did not undertake any such analysis of the agreements, alternatives or the public interests involved the waiver of the public health and safety requirements for cooperating landowners is unlawful and unreasonable. *Id.*; N.H. CODE OF ADMIN. RULES SITE 302.05(a) & (b).

D. THE SUBCOMMITTEE FAILED TO FOLLOW THE STATUTORY REQUIREMENT OF HAVING A SEVEN MEMBER PANEL INCLUDING 2 PUBLIC MEMBERS TO ADJUDICATE THIS MATTER.

40. Further as noted *supra.*, Counsel for the Public joins the Intervenor Groups in their argument in their Motion for Re-hearing, to wit: the Subcommittee was not authorized to adjudicate this case or issue a decision because it was statutorily required to consist of seven members, two of whom are public members, and one of the public members was absent from thirteen days of hearing and the deliberations. RSA 162-H:4-a.

41. In addition to the arguments made by the Intervenor Group, Counsel for the Public submits that it cannot be said that the parties acquiesced to proceeding with a depleted panel because the Subcommittee made no mention of the absence of the public member from this panel or the reason therefor,[45] and the parties could not have known that the public member was not being provided with transcripts of the proceedings and would not be participating in the deliberations until the record was closed and deliberations were concluded.

42. For this reason as well, the Decision by the Subcommittee granting the certificate of site in facility is unreasonable and unlawful.

WHEREFORE, Counsel for the Public requests that the Subcommittee:

a. Grant this Motion for Re-hearing and Reconsideration

b. Deny AWE's Applications for Certificate of Site and Facility; and

[45] Counsel for the Public was not aware that the public member was on maternity leave until the close of the proceedings.

c. Grant such other relief as may be just.

Respectfully submitted this 17th day of April, 2017.

COUNSEL TO THE PUBLIC

By his attorneys

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Certificate of Service

I, Mary E. Maloney, do hereby certify that I caused the foregoing to be served upon each of the parties named in the Service List of this Docket.

Dated: April 17, 2017

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April 24, 2017

VIA ELECTRONIC MAIL & HAND-DELIVERY

New Hampshire Site Evaluation Committee
Pamela G. Monroe, Administrator
21 South Fruit Street, Suite 10
Concord, NH 03301

Re: NH Site Evaluation Committee Docket No. 2015-02:
Application of Antrim Wind Energy, LLC – Objection to Joint Motion for Rehearing

Dear Ms. Monroe:

Please find enclosed for filing in the above-captioned matter, an original and one copy of Applicant's Objection to the Joint Motion for Rehearing.

We have provided members of the distribution list with electronic copies of this Objection, pending addition of the document to the Committee's website.

Please contact me directly should you have any questions.

Sincerely,

Barry Needleman

BN:rs3

Enclosure

cc: Distribution List

THE STATE OF NEW HAMPSHIRE
SITE EVALUATION SUBCOMMITTEE

Docket No. 2015–02

APPLICATION OF ANTRIM WIND ENERGY, LLC
FOR A CERTIFICATE OF SITE AND FACILITY

APPLICANT ANTRIM WIND ENERGY, LLC'S OBJECTION TO THE JOINT MOTION FOR REHEARING

Antrim Wind Energy, LLC ("AWE" or the "Applicant") by and through its attorneys, McLane Middleton, Professional Association, respectfully submits this Objection to the Joint Motion for Rehearing (the "Motion") filed on behalf of the Abutting Landowners Group, Non-Abutting Landowners Group, the Levesque-Allen Group, the Stoddard Conservation Commission, and the Windaction Group (the "Intervenors"). Applicant respectfully requests that the Subcommittee deny the Motion because it fails to set forth good cause for a rehearing. Specifically, it does not raise any issue that was overlooked or mistakenly conceived by the Subcommittee in its Decision and Order Granting Application for Certificate of Site and Facility nor does the Motion present any new evidence that was not before the Subcommittee or could not have been previously presented during the adjudicative hearing.

I. Background

On October 2, 2015, the Applicant filed an application with the New Hampshire Site Evaluation Subcommittee ("SEC" or the "Subcommittee") for a Certificate of Site and Facility to construct and operate a 28.8 MW electric generation facility consisting of nine Siemens SWT-3.2-113 direct drive wind turbines in Antrim, New Hampshire (the "Project"). The Subcommittee accepted the application on December 1, 2015.

The Subcommittee presided over thirteen days of adjudicative hearings, during which time the Subcommittee heard from fifteen witnesses proffered by the Applicant as well as nine

intervenor groups, and Counsel for the Public's visual expert. In total the Subcommittee received 220 exhibits, oral and written statements from interested members of the public, and written post-hearing briefs from seventeen parties. Upon completion of the adjudicative hearing, and after closing the record pursuant to Site 202.26, the Subcommittee began deliberations.

The Subcommittee deliberated on December 7, 9, and 12, 2016. During the deliberations, as the transcripts illustrate, the Subcommittee reviewed the complete record including affirmative testimony provided by the Applicant as well as rebuttal or opposing testimony provided by all the other parties. On March 17, 2017 the Subcommittee issued its Decision and Order Granting Application for a Certificate of Site and Facility and Order and Certificate of Site and Facility with Conditions (the "Decision"). The Subcommittee's Decision, which addressed each and every concern raised during the Adjudicative hearing and again in the Motion, was well-reasoned and thoroughly supported by the comprehensive record. The Motion fails to meet the standard required to grant a motion for rehearing and ignores the extensive record in this docket and thorough deliberations undertaken by the Subcommittee.

II. Legal Standard

The purpose of a rehearing "is to direct attention to matters said to have been overlooked or mistakenly conceived in the original decision, and thus invites reconsideration upon the record upon which that decision rested." *Dumais v. State of New Hampshire Pers. Comm.*, 118 N.H. 309, 311 (1978). RSA 541:3 provides that the commission "may grant such rehearing if in its opinion good reason therefor is stated in said motion." The Subcommittee may grant rehearing or reconsideration for "good reason" if the moving party shows that an order is unlawful or unreasonable. RSA 541:3, RSA 541:4; *Rural Telephone Companies,* N.H. PUC Order No. 25,291 (Nov. 21, 2011). A successful motion must establish "good reason" by showing that

there are matters the Commission "overlooked or mistakenly conceived in the original decision," *Dumais*, 118. N.H. at 311; or by presenting new evidence that was "unavailable prior to the issuance of the underlying decision." *Hollis Telephone Inc.*, N.H. PUC Order No. 25,088 at 14 (April 2, 2010). A "good reason" for rehearing is not established where, as here, the movant merely restates prior arguments and asks for a different outcome. *Public Service Co. of N.H.*, N.H. PUC Order No. 25,676 at 3 (June 12, 2014). A motion for rehearing must be denied where no "good reason" or "good cause" had been demonstrated. *O'Loughlin v. State of New Hampshire Pers. Comm.*, 117 N.H. 999, 1004 (1977); *Order on Pending Motions*, Docket 2012-01, Application of Antrim Wind, at 3 (Sept. 10, 2013).

The Motion should be denied because it fails to identify how any finding made by the Subcommittee is unlawful or unreasonable, it fails to identify any issue that was overlooked or mistakenly conceived by the Subcommittee, and it fails to identify any new evidence that was not available and could not have been introduced during the adjudicative hearing. The Motion almost exclusively rehashes the arguments previously made in pre-filed testimony and during the adjudicative hearing. The Subcommittee correctly determined that the Applicants met their burden of proof pursuant to Site 202.19, and established by a preponderance of the evidence that it satisfied all of the requirements of RSA 162-H:16 to receive a Certificate of Site and Facility.

III. The Motion Fails to Identify Any Procedural Issue That Was Overlooked or Mistakenly Conceived by the Subcommittee and It Does Not Introduce Any New Evidence That Was Not Before the Subcommittee During the Adjudicative Hearings.

A. Res Judicata

The doctrine of res judicata has been raised several times in this docket and the Subcommittee has thoroughly evaluated it. None of the arguments presented in the Motion provide sufficient basis to grant a motion for rehearing.

Counsel for the Public first raised the issue of res judicata in the jurisdictional docket. *See Jurisdictional Decision and Order*, Docket No. 2014-05, at p. 34 (Holding that "[n]either the doctrine of collateral estoppel nor res judicata, relate to the issue of jurisdiction in this case...these issues will be determined in the context of that application not as an issue pertaining to jurisdiction."). On November 21, 2016, Counsel for the Public filed her Post-Hearing Memoranda, which contained an argument that the doctrine of res judicata should apply in this case. The Applicant filed its Post Hearing Memoranda on November 30, 2016, and specifically responded to Counsel for the Public's argument regarding res judicata. The Subcommittee considered these positions during deliberations, *see Deliberations, Tr. Day 1 Morning Session*, p. 9 - 17, and concluded that the doctrine did not apply. *Decision and Order Granting Certificate of Site and Facility,* Docket No. 2015-02, p. 49. As noted in the Order, the Subcommittee specifically considered "whether the Project is substantially or materially different from the project proposed in Antrim I (Docket No. 2012-01)." *Decision and Order Granting Certificate of Site and Facility,* Docket No. 2015-02, p. 49. The unanimous decision of the Subcommittee was that the changes made to the application are "so numerous that there had been a substantial change precluding the application of res judicata and collateral estoppel." *Decision and Order Granting Certificate of Site and Facility,* Docket No. 2015-02, p. 50.

As a preliminary matter, Dr. Boisvert, the only member of the Subcommittee in the current docket also to sit on the Subcommittee of the prior 2012 docket explained that "we were unanimous that this would have been an entirely new application...We said it would be a wholly new application, we would have to start over." *Deliberations, Tr. Day 1 Morning Session*, p. 13. Moreover, the Subcommittee concluded that the "Application contains substantive and material changes from the initial Application." *Deliberations, Tr. Day 1 Morning Session*, p. 16. The

arguments raised in the Motion are the same arguments Counsel for the Public previously raised in her Post-Hearing Memorandum. The Intervenors disagreement with the Subcommittee's final conclusion does not change the fact that it was thoroughly considered and correctly decided.

The Motion improperly concludes that the Subcommittee's decision was based on "the mitigation measures proposed." *Motion*, at p. 5. This assertion is inconsistent with the Subcommittee's deliberations and Decision. The changes considered and addressed by the Subcommittee include both physical changes as well as modifications to the mitigation package proposed.[1] In addition to the physical changes, the mitigation package now includes: (1) an additional 100 acres of conservation land that will conserve the entire ridgeline, (2) the donation of $100,000 to New England Forestry Foundation to acquire new permanent conservation lands in the general region of the Project, and (3) the Applicant has further entered into an agreement with the Town to provide additional public benefits. Many of the changes made to the current application were directly in response to the list of mitigation measures proposed by Jean Vissering, Counsel for the Public's expert in Antrim I.

The findings required for this docket involve issues that could not have been brought and were not brought during the prior proceeding. For example, in the prior docket, the Subcommittee declined to consider the Applicant's modifications to the project as part of the Applicant's request for rehearing and to reopen the record, which included only a portion of the changes now included in the current Application. This was because the Subcommittee determined consideration of these material changes "would require re-evaluation of the entire Application." *Order on Pending Motions*, Docket No. 2012-01, p. 11 (September 10, 2013).

[1] These changes include: the elimination of Turbine 10, the reduction in height of Turbine 9 so that the tower and nacelle are below the tree line when viewed from Willard Pond, and the use of Siemens turbines, which are quieter and smaller in other dimensions.

The Intervenors rely on the decision in Antrim I regarding the use of "non-aesthetic related mitigation measures." *Motion* at ¶17. The Subcommittee addressed this, however, and noted that they "do not need to be bound by [the prior] decision...it is a different project on a variety of topics...we are a different Subcommittee and we have our own responsibilities. We need to make our own decisions based upon the evidence in front of us." *Deliberations, Tr. Day 1 Afternoon Session*, p. 70. The Applicant was not seeking to have the Subcommittee reconsider its decision regarding the mitigation package in the prior docket or "call the Antrim I Decision into question," as the Motion suggests. *Motion*, at ¶19. Rather, the Applicant expected that the Subcommittee would evaluate the present application on its own merits in light of the significant changes made to the Project as well as changes made to the statute and SEC Rules. The transcript of the Subcommittee's deliberations and the Decision reflect this approach.

The Intervenors are also incorrect in their assertion that the changes to the SEC Rules do not provide an additional basis for restricting the applicability of res judicata. An exception to res judicata exists "where between the time of the first judgment and the second . . . there has been an intervening . . . change in the law creating an altered situation." *Fontes v. Gonzales*, 498 F.3d 1, 3 (1st Cir. 2007) (citing *State Farm Mut. Auto. Ins. Co.* v. *Duel*, 324 U.S. 154, 162 (1945) (holding that res judicata is no defense where between the time of the first judgment and the second there has been an intervening decision or a change in the law creating an altered situation). The New Hampshire Legislature and the SEC spent significant time developing and revising the statute and the SEC's Rules to ensure that projects are evaluated under the appropriate criteria. Key aspects of the framework the Subcommittee must use to assess the Project, including many entirely new criteria related to aesthetics, are different and new findings are now required under the SEC's newly adopted rules.

In addition to not satisfying the elements necessary for res judicata to apply, the policy rationale for the doctrine is also not served in this case. Judicial economy can only be promoted if res judicata and collateral estoppel claims are raised in a timely manner – something the Intervenors have failed to do. By waiting to raise these claims until after vast resources have already been expended litigating this case, the Intervenors not only undercut the very purpose of these doctrines, but also arguably waived the claims. The New Hampshire Supreme Court's decision in *CBDA Dev. v. Town of Thornton*, is consistent with the assertion that the appropriate time to raise the applicability of res judicata is early in the process – in this case after the Application was accepted. In *CBDA,* the Supreme Court held "[a]ccordingly, before accepting a subsequent application under the *Fisher* doctrine, a board must be satisfied that the subsequent application has been modified so as to meaningfully resolve the board's initial concerns…An administrative board 'should not be required to reconsider an application based on the occurrence of an inconsequential change, when the board inevitably will reject the application for the same reasons as the initial denial.'" *CBDA Dev. v. Town of Thornton*, 168 N.H. 715, 725 (N.H. 2016); *citing Brandt Dev. Co. v. City of Somersworth*, 162 N.H. 553, 556 (2011). This holding supports the proposition that res judicata and collateral estoppel should have been raised at the time of acceptance and before the administrative agency considers the merits of the Application. The Intervenor's argument, filed at the last possible moment of the proceeding, is inconsistent with the law and completely undercuts the clear policy goal of preserving judicial economy that is the foundation of these doctrines.

B. <u>The Subcommittee Was Properly Constituted</u>

Fourteen months after the Intervenors and Counsel for the Public were aware that the alternate public member had been appointed to the Subcommittee, and seven months after they

were aware that the alternate public member was not sitting for the hearings before the Subcommittee, the Intervenors now challenge the Subcommittee's composition. As a remedy for this alleged failure, the Intervenors suggest that a new public member must be appointed by the Governor and Council and must "consider the evidence and testimony and participate in deliberations anew." *Motion* at ¶ 31. It is unclear whether the Intervenors' are seeking to have an entirely new hearing conducted, effectively a "mulligan," or rather, to have the new public member participate in entirely new deliberations after reading the transcripts. Whatever the proposed remedy, it is unnecessary and a waste of time. The composition of the Subcommittee was consistent with RSA 162-H:4-a and any claim that more than a quorum of the Subcommittee was required has been effectively waived.

First, the Intervenors have confused the requirement for appointment to a Subcommittee with the quorum requirements in the statute. The Subcommittee was properly constituted. RSA 162-H:4-a, II provides as follows:

> When considering the issuance of a certificate or a petition of jurisdiction, a Subcommittee shall have no fewer than 7 members. The 2 public members shall serve on each Subcommittee with the remaining 5 or more members selected by the chairperson from among the state agency members of the state agency members of the Subcommittee. . . . Five members of the Subcommittee shall constitute a quorum for the purpose of conducting the Subcommittee's business.

As is evident from this language, although seven members must be appointed, of whom two must be public members, only five members are required to carry out the duties of the Subcommittee. It would be illogical to require seven members to be present to satisfy a five member quorum requirement. Moreover, the statute includes no requirement that the quorum must specifically include any of the public members.

In this case, Chairman Honigberg appointed Roger Hawk and Patricia Weathersby as the two public members of the Subcommittee on October 20, 2015. In January 2016, Mr. Hawk

died, and on January 11, 2016, the Chairman, acting pursuant to RSA 162-H:3, XI, appointed Rachel Whitaker, the alternate public member, to serve on the Subcommittee. Member Whitaker attended an informational session on February 22, 2016, but thereafter did not participate in the hearings relating to this docket. Hearings began on September 13, 2016 and continued over 13 hearing days, with the written Decision being rendered on March 17, 2017.

The Intervenors concede that Ms. Whitaker was appointed to the Subcommittee but then "did not preside over any proceedings." *Motion* at ¶ 24. As a result, the Intervenors acknowledge that the Subcommittee consisted of seven members. Their complaint is that Ms. Whitaker simply did not serve. Nothing in the law required her to do so. And nothing in her failure to do so voids the Subcommittee's Decision.

As long as a quorum is present, as it was here, the Subcommittee has the authority to act. *See e.g. Appeal of Plymouth*, 125 N.H. 141, 147 (1984) ("[T]here is no authority for the proposition that the presence of only two of the three members appointed to the board constituted an insufficient quorum."); *Appeal of Net Realty Holding Trust*, 127 N.H. 276, 278 (1985) ("Other states that have addressed this issue appear uniformly to hold that the action of a public body *lacking the authority of a quorum* is void.") (emphasis added).

The Intervenors argue that because the statute requires two public members, those members must sit to hear every case, even though there is no requirement for the public members to be part of the quorum. The New Hampshire Supreme Court has squarely rejected this argument. In *Appeal of Keene State College Education Association, NHEA/NEA*, 120 N.H. 32 (1980), the Court considered a challenge to the Public Employee Labor Relations Board's decision based on the composition of a panel. *Id.* at 34. The statute in question required that two of the five members of the board come from organized labor. *Id.* at 34-35. The statute also

provided that "[t]hree members of the board shall constitute a quorum" without any requirement that labor representatives be a part of the quorum. *Id.* at 35 quoting RSA 273-A:2, III. When a panel of three members, none of whom came from labor issued a decision, the court upheld a challenge to the composition of the panel on the same grounds the Intervenors make here, stating: "There is no ambiguity in RSA 273-A:2; the board's total membership must be balanced between management and labor, but no such balance is required of a quorum. We therefore hold that the PELRB was properly constituted in the present case and that its decision was valid." *Id.* The labor members in *Keene State* are directly analogous to the public members here. The statute provides that two public members must sit on the Subcommittee, but not that two public members must be part of the quorum that decides the case. The Subcommittee's decision is therefore valid.

In attempting to write the quorum requirement out of RSA 162-H:4-a, the Intervenors assert that mere appointment to the Subcommittee is not enough since the statute requires that vacancies be filled. *Motion* at ¶ 26, Fn. 2. The failure of Ms. Whitaker to be present for the hearing, however, is not sufficient as to constitute a vacancy and, as a practical matter, is a case of "no harm, no foul." Once appointed, Ms. Whitaker could have decided to decline to participate for any reason or no reason, so long as her absence did not prevent a quorum.

Second, the Intervenors have waived any complaint about the failure of the Subcommittee to have seven members present. Since the hearings started in September 2016, the Intervenors were well aware that Ms. Whitaker was not attending the hearings and thus that the Subcommittee hearing the matter consisted of six members. And if they were not aware of that fact at the first day of hearings, they certainly were aware of it as the hearings proceeded. While they did not have a right to a Subcommittee of seven members to actually hear the matter

(*i.e.* a quorum of seven), absolutely nothing prevented them from asking for one, or asking whether Ms. Whitaker was available to participate. This was never done.

The Intervenors argue that the Subcommittee erred by proceeding with six members, and they point to a 3 to 3 vote on whether to provide a property value guarantee as evidence that they were harmed by the absence of alternate public member Whitaker. However, as their motion makes clear, the vote on the property value guarantee occurred on December 12, 2016. *Motion* at ¶ 27. The Intervenors provide no explanation as to why they declined to challenge the absence of an odd number of members on the Subcommittee beginning in September, or why they did not raise the issue on December 12th when the specific issue raised in the Motion arose. Arguably, if the Chairman had wanted to postpone proceedings to address that issue, he could have done so. The failure to raise the issue then is fatal and effectively constitutes a waiver.

"Interested parties are entitled to object to any error they perceive in governmental proceedings, but they are not entitled to take later advantage of error they could have discovered or chose to ignore at the very moment when it could have been corrected." *Appeal of Cheney*, 130 N.H. 589, 594 (1988). "[T]rial forums should have a full opportunity to come to sound conclusions and to correct errors in the first instance." *Sanderson v. Town of Candia*, 146 N.H. 598, 602 (2001). In *Fox v. Town of Greenland*, 151 N.H. 600 (2004), the Plaintiffs objected to the participation of a member of the zoning board of adjustment because he had missed two of the hearings. *Id.* at 602. In *Fox,* the member's absence was announced at a January 15 meeting, but the petitioners did not object to his participation until they filed a motion for rehearing on May 22. *Id.* at 604-05. The Supreme Court ruled that the petitions had failed to seek the members disqualification "at the earliest possible time" and thus could not raise his participation as grounds for error on appeal. *Id.* at 605.

The same reasoning applies here. If the Intervenors thought it was critical to have seven members, or to break the deadlock, they could have raised it at an earlier time. And *if* the Chairman had found their arguments convincing, he could have delayed the proceedings until the Governor and Council appointed a new member sufficient to address that issue (or others) *even though he was not required to do so.* It is now too late to raise this argument for the first time. What the Intervenors are asking for in their request for a complete "do over" is a significant and unreasonable waste of Subcommittee resources and inconsistent with the requirements of RSA 162-H "that undue delay in the construction of new energy facilities be avoided".

C. The Subcommittee Thoroughly Considered and Properly Determined that the Rules Permit them to Grant a Waiver Relating to Participating Landowners.

The Intervenors assert that the Subcommittee's decision to waive the rules relating to noise and shadow flicker as they pertain to participating landowners was unlawful and unreasonable. *Motion* at ¶32. This same issue was raised several times throughout the adjudicatory hearings. The Subcommittee fully assessed it both in their review of submitted pre-filed testimony as well as during cross examination at the adjudicatory hearing. *See Tr. Day 2/Morning Session*, at p. 103-105; *see also Tr. Day 4/Morning Session*, at p. 130-131; *see als Tr. Day 4/Afternoon Session*, at p. 44 (noting that "even for the participating landowners they are below the 40 nighttime limit of the SEC."). Further, during the course of the proceeding, Presiding Officer Scott expressly asked "[d]o I understand correctly that [the participating landowners] are waiving health and safety regulations in some respect with regard to shadow flicker and noise?" *Tr. Day 7/Morning Session*, at p. 129. In response, Mr. Kenworthy noted that "if we were unable to reach agreements with private landowners that allowed us to do things on their property, then we could never have a wind project." *Id.* at 130.

The Subcommittee also discussed this issue at length during deliberations. *Deliberation Tr. Day 2 Afternoon Session*, at p. 24-38; 43-45. Ultimately, based on the Order and conditions set out in the Certificate, the Subcommittee interpreted the rules to permit the Subcommittee to grant such a waiver. *See Order and Certificate of Site and Facility with Conditions*, at p. 11 ¶13.1-13.2. After discussion regarding the applicability of the rule to participating property owners, the Subcommittee concluded that landowners should be permitted "to do what they will voluntarily." *Deliberation Tr. Day 2 Afternoon Session*, at p. 44.

This decision is consistent with the Subcommittee's authority under Site 202.15. Simply because the Subcommittee did not use the express words noted in the Motion for a finding that such a waiver would be "in the public interest," does not suggest that such a finding was not properly made. It is clear from the deliberations that such a condition would be inapplicable in this context because it would limit the ability of a private property owner to use their land as they deem appropriate, contrary to their legal right. The Subcommittee's Decision codifies this determination and expressly states that "to the extent it is necessary, the Subcommittee waives noise and shadow flicker restriction set forth in N.H. Code Admin. Rules, Site 301.14 (f)(2)a and b, as applied to participating landowners." *Decision and Order Granting Application for Certificate of Site and Facility*, at p. 168-69 (March 17, 2017); *see also Deliberations Tr. Day 3 Afternoon*, at p. 65-66. The conditions in the Certificate expressly note that "[a] Participating Landowner or Non-Participating Landowner may waive the noise provisions…by signing a waiver of their rights, or by signing an agreement that contains provisions providing for a waiver of their rights." *Order and Certificate of Site and Facility with Conditions*, at p. 11 ¶13.1.

Further, the Motion argues that the Intervenors were not given opportunity to comment on this waiver. The transcripts demonstrate otherwise. Numerous intervenors did raise this

issue throughout the hearings and were able to introduce testimony concerning this matter. The Subcommittee was able to consider this testimony and ultimately concluded that the waiver of these requirements for participating landowners was consistent with the public interest.

D. The Subcommittee's Procedures with Respect to the Use of Friendly Cross Examination and Deadlines for Filing Supplemental Testimony Were Conducted Consistent with the SEC Rules and Ensured the Fair and Orderly Conduct of the Proceeding.

The Intervenors assert that the Subcommittee's, allegedly, disproportionate limitation on the use of friendly cross examination by opposing intervenors was unfair. *Motion* at ¶40. Further, the Motion alleges that the requirement by the Subcommittee that all supplemental testimony be filed on the same day created a procedural unfairness to opposing parties and prevented a "full and true disclosure of the facts." *Motion* at ¶40. As a preliminary matter, the record does not support the assertions made. Moreover, the issues raised do not satisfy the requirements necessary to seek rehearing. The Motion asserts that the Subcommittee relied on an "undeveloped record." *Motion*, at ¶43. The thirteen days of adjudicatory hearings and extensive testimony given by both the Applicant's experts and the intervening parties do not in any way support the assertion that the record in this docket was undeveloped.

The Intervenors claim that "friendly cross-examination" was limited in this case. That is expressly contrary to the record. During the final pre-hearing conference, Attorney Richardson raised the issue of friendly cross and sought to have it limited as part of a stipulation for the hearing. *See Tr. Final Structuring Conference*, at p. 106. The presiding officer rejected this request and noted that a request to limit such cross would likely be rejected "because of due process concerns." *Tr. Final Structuring Conference*, at p. 109. Without providing any

examples from the transcript, the Motion asserts that intervenors were not permitted to engage in friendly cross examination. In fact, the record squarely undercuts this claim.[2]

The Motion further asserts that the requirement that all supplemental testimony be submitted on the same day limited the ability of intervenors to respond in the same manner to testimony provided by the Applicant. As a preliminary matter, the Applicant is the party that bears the burden of proof. *See* Site 202.19. Therefore, it is appropriate and necessary to allow the Applicant to respond to any testimony put into the record. In addition, the intervenors were not disadvantaged as they had a full and fair opportunity to respond to any supplemental testimony sponsored by the Applicant during the course of cross-examination of witnesses at the final adjudicatory hearings. This testimony and cross-examination was considered at length by the Subcommittee in reaching its decision.

The argument raised in the Motion that Counsel for the Public was prejudiced by this procedure was raised during the course of the hearing and during post-hearing motion practice. The Subcommittee adequately reviewed the same evidence presented in the Motion and determined that a reopening of the record was not required for a full consideration of the relevant issues in this proceeding. *Order Denying Motion to Reconsider and Re-Open the Record*, at p. 10 (December 2, 2016). The Subcommittee was not prevented from meaningfully weighing and considering Ms. Connelly's testimony because Counsel for the Public had an opportunity to cross-examine Mr. Raphael on the issues raised. Counsel for the Public could have also have sought leave to elicit the same testimony as part of her direct examination of Ms. Connelly

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[2] For example, Ms. Linowes was permitted to question the Audubon panel for an extended period, *Tr. Day 8/Afternoon Session*, at p. 8-47; Mr. Block was permitted to ask extensive questions of the abutting property group despite having very similar interests, *Tr. Day 9/Morning Session*, p.148-175; and the Audubon Society was permitted to question Geoffrey Jones from the Stoddard Conservation Commission at length, despite the fact that both parties sought to address and protect the same general interests, *Tr. Day 10/Morning Session*, at p. 8-22. These examples are not exhaustive and many other examples of friendly cross examination are present throughout the record.

(something she chose not to do). Finally, Counsel for the Public was permitted to submit an offer of proof, which outlined the key points she wished to place into the record.

In the context of all of the procedural issues raised, the Motion fails to satisfy the statutory requirements for rehearing. The Intervenors have re-stated their prior arguments without providing any information indicating that good cause exists for rehearing. The Motion does not identify any error of fact, reasoning, or law. Rather, the Motion simply outlines a disagreement with the conclusion reached by the Subcommittee and therefore the Motion should be denied.

IV. The Motion Fails to Identify Any Substantive Issue That Was Overlooked or Mistakenly Conceived by the Subcommittee and Does Not Introduce Any New Evidence That Was Not Before the Subcommittee During the Adjudicative Hearings.

A. Aesthetics

The Subcommittee heard several days of testimony from the Applicant's expert, David Raphael, Counsel for the Public's expert, Kellie Connelly, and from numerous intervenors on the issue of aesthetics. The deliberations were thorough and comprehensive, and took into consideration the specific criteria outlined in the newly-adopted SEC rules. *See* Site 301.14(a)(1)-(7). The Intervenors have not provided any basis in the Motion to suggest that the Subcommittee failed to adequately consider the evidence presented and reach a well-reasoned determination. All of the arguments raised in the Motion simply reiterate arguments raised throughout the adjudicatory proceeding and do not meet the threshold requirements to succeed on rehearing.

1. *Viewshed Analysis and Identification of Scenic Resources*

The Motion asserts that the doctrine of collateral estoppel should apply when determining the "scenic resources" that may be affected by the Project. *Motion* at ¶51. The critical issue that

the Intervenors ignore is that in order for collateral estoppel to apply "the issue subject to estoppel must be identical." *Farm Family Mut. Ins. Co. v. Peck, 143 N.H. 603, 605* (1999) (citing *Appeal of Hooker*, 142 N.H. 40, 43-44 (1997)). As explained previously, as a factual matter, this is fundamentally a new Application and consequently, the essential predicate for claim preclusion is absent. *See supra* Section III.A (summarizing changes to the Project design). All of the essential findings are therefore fundamentally not identical. The substantial modifications made to the proposed Project require the Subcommittee to evaluate the Project in its totality under the newly revised statute and under the Site Evaluation Subcommittee's newly adopted rules and criteria.

While changes made to the Project may not have changed the importance of scenic resources that were identified in Antrim I, the Motion fails to take into consideration the changes in visibility at the sensitive resources based on the changes made to the proposed Project.[3] The issue is not the value of the resources; the issue is the effect of the revised Project on those resources, and the evidence shows that these effects are dramatically different. This issue is not the same as the one litigated in the prior docket. Moreover, since the last docket, the adoption of new SEC rules, which contain new evaluative criteria, also precludes application of collateral estoppel. *See Brandt Dev. Co. v. City of Somersworth*, 162 N.H. 553, 558-60 (2011)(holding that ""doctrinal changes, taking place in the fifteen-year period between Brandt's applications, create a reasonable possibility — not absolute certainty — of a different outcome" and therefore "constitute[s] a material change in circumstances with respect to [a prior] application.")

[3] For example, the Motion asserts that the Subcommittee did not consider the impact to such resources as Highland Lake or Lake Nubanusit. In fact, these resources were both considered by Mr. Raphael and included in his VA. *See LandWorks Visual Assessment*, p. 56-57. Due to the changes to the Project, however, Mr. Raphael concluded there would be no visibility of the Project from either of these resources. If the Intervenors wished to raise additional concerns regarding these resources they had the opportunity to do so. The Subcommittee also heard testimony from Ms. Connelly regarding visibility of the Project from Highland Lake. *See Tr. Day 13/Morning Session*, at p. 96.

In addition, as referenced above with respect to the applicability of res judicata, one of the purposes for the doctrine is "promoting judicial economy by preventing needless litigation." *State of Pugliese*, 122 N.H. 1141, 1144 (1982). The Intervenor's argument, filed after the close of the record and conclusion of the adjudicative proceedings, is inconsistent with the law and completely undercuts the clear policy goal of preserving judicial economy that is the foundation of this doctrine.

The Intervenors assert that LandWorks improperly relied on hub heights to determine visibility. This is incorrect and contrary to the transcribed record. *See Tr. Day 4/Afternoon Session*, at p. 96-97. Mr. Raphael expressly testified when asked whether he determined visibility based on hub height that "[n]o. We didn't use hub heights only to determine visibility. We have four visibility maps to determine visibility. So we state and in terms of understanding overall visibility, we find that the hub height and hub visibility is an important consideration because of the scale of the hub itself...but it's not the means by which or the only criterion by which we evaluate visual effect." *Id.* The four maps noted by Mr. Raphael are described on page 10 of the Visual Assessment ("VA"), which the Motion specifically cites to in support of its assertion that Mr. Raphael relied solely on hub height in determining visibility. This is clearly not the methodology that was used. Mr. Raphael again reiterated later in his testimony "we don't just base our analysis on the hub...we're really looking at the whole structure, the whole project and not making the differentiation between hub height and blade height or blade tip height." *Tr. Day 4/Afternoon Session*, at p. 99. In addition, the Motion fails to provide any new information regarding this issue that was not already raised, discussed, and considered by the Subcommittee. *See Deliberation Tr. Day 1 Afternoon Session*, at p. 10, 14, and 17.

The Motion further critiques Mr. Raphael's methodology for evaluating scenic resources and reaching his overall conclusion. *Motion* at ¶55. The Intervenors raised similar, if not identical, issues during the adjudicatory hearings -- the Subcommittee heard a lengthy critique of Mr. Raphael's VA from Ms. Connelly as well as other intervening parties. The Motion also mischaracterizes the methodology employed by Mr. Raphael. With regard to Gregg Lake, for example, Mr. Raphael acknowledged that the resource was identified as having local importance. *See LandWorks Visual Assessment*, at p. 69, Table 5. As Mr. Raphael explained, however, his assessment also took into consideration the purpose for the designation and whether the primary purpose was for the resources aesthetic value versus some other importance, such as for its recreational value or its ability to provide habitat. *See Tr. Day 6/Morning Session*, at p. 11-16. This is reflected in the VA, which specifically notes "no scenic designation" for Gregg Lake. Similarly, Mr. Raphael did not evaluate the Meeting House Hill Town Cemetery noted in the Motion, at p. 20, Fn. 7, because the primary significance of that resource is not for its scenic quality, but for its historical value. *Tr. Day 6/Morning Session*, at p. 72 (discussing his exclusion of White Birch Point Historic District, Mr. Raphael identified a distinction between historic resources noting that he did not believe that resource was a "historical resource primarily because of its scenic values. I understand it's perhaps a resource, because it represents an historic, you know, private summer camp development.") This distinction between resources that are significant for the aesthetic value versus other values such as historical or natural was discussed and accepted by the Subcommittee during deliberations.[4] The critiques of Mr. Raphael's systematic methodology were raised repeatedly during the hearings and the

[4] *Tr. Day 1 Morning Session*, at p. 99-101 (Dr. Boisvert noting that a "particular archeological site might be within 200 feet of a turbine. But the characteristics that make that property important are not damaged in any way by the presence of the turbine." Dr. Boisvert then provides an alternate example of Canterbury Shaker Village "where the setting, the landscape, the feeling is integral to the history of the Shakers.")

Intervenors have failed to provide any new evidence that was not already considered by the Subcommittee.

2. *Viewer Effects*

The intervenors claim that Mr. Raphael's methodology is based upon a "specious analysis predicated on faulty assumptions." *Motion* at ¶59. The Intervenors conducted lengthy cross examination of Mr. Raphael, however, specifically relating to his evaluation of the number of turbines visible from particular scenic resources. The argument raised in the Motion asserting that the methodology used by Mr. Raphael is flawed, simply revisits the same points raised by the Intervenors during the hearing. *Tr. Day 5/Afternoon Session*, at p. 118-120; *see also Tr. Day 4/Afternoon Session*, at p. 155-160 (comparing the 12 projects in Maine for purposes of scaling as opposed to the 3 projects in New Hampshire). Moreover, the Subcommittee asked additional questions about Mr. Raphael's consideration of this criteria. *Tr. Day 6/Morning Session*, at p. 119-120. Mr. Raphael explained that this was only one of many of the criteria he considered for both visual and viewer effect. This issue has been fully evaluated by the Subcommittee.

With regard to viewer effect, the Motion criticizes Mr. Raphael's assessment of extent of use and remoteness. *Motion* at ¶62. Again, this exact argument was raised by the intervenors during the course of the proceeding and Mr. Raphael explained his methodology, even giving examples of instances in which both of these criteria could be met. *Tr. Day 4/Afternoon Session*, at p. 162 (noting that "one is dealing with activity and the other is dealing with the quality of the landscape and its position in the overall landscape.") The Intervenors' further criticism of Mr. Raphael's application of percent of visibility does not provide any new information or assert any error of law in the Subcommittee's evaluation of Mr. Raphael or his methodology. The fact that the Subcommittee chose to apply many of the same methods used by Mr. Raphael, as noted in

the Motion, does not create sufficient grounds to grant rehearing. The Subcommittee is entitled to evaluate the evidence presented and give it the weight it feels is appropriate. The deliberations were thorough and comprehensive and took into consideration the specific criteria outlined in the newly adopted SEC rules, contrary to the assertion stated in the Motion. *See Motion* at ¶80; *see also* Site 301.14(a)(1)-(7). The Subcommittee's final Order reflects this thorough review of the record. *See Deliberations Day 1 Afternoon*, at p. 4-141. The Intervenor's characterization of the Subcommittee's deliberations, *see Motion* at ¶80, fails to take into consideration the Subcommittee's thorough review of the existing character of the area, *Deliberations Day 1 Afternoon*, at p. 26-30, 32, the significance of scenic resources, p. 63-64, the public's use of those resources, *Deliberations Day 1 Afternoon*, at p. 30-31, 38-39, 43, the overall daytime and nighttime visual effect, *Deliberations Day 1 Afternoon*, at p.53-54, 61-62, as well as consideration of the proposed mitigation, p. 69-72 and 132-141. In contrast to the Intervenor's assertions, it is unclear what criteria the Subcommittee failed to consider under the SEC Rules.

3. *Photosimulations*

The Intervenors claim that the photosimulations developed by LandWorks are "unreliable, un-credible, and underserving of any weight." *Motion* at ¶64. These arguments relating to the photosimulations presented by LandWorks were all raised during the course of the proceeding and extensively evaluated. For example, the same argument regarding haze (see *Motion* at ¶65) was also raised by Mr. Block in the proceeding when asked Mr. Raphael "can you honestly state that absolutely no haze or fog effect has been applied to any of these simulations?" *Tr. Day 4/Afternoon Session*, at p. 134. Mr. Raphael explained his method and his interpretation of the SEC Rules noting that "a clear day [is] a day in which you can clearly

see the project. It doesn't, the rules do not say cloudless. The rule says clear view. And these are all clear views." *Tr. Day 4/Afternoon Session*, at p. 119-20. The Motion mischaracterizes Mr. Raphael's approach in asserting that he took photographs under "anticipated weather conditions." *Motion*, at ¶65. While Mr. Raphael did note that he felt the conditions reflected weather in New England, he also believed that the simulations were in compliance with the rule requirements. *Tr. Day 4/Afternoon Session*, at p. 120 ("I believe we conform with those regulations, with those rules.")

Similarly, the argument asserting that the simulations improperly include objects in the foreground was also raised during the hearing and evaluated during the deliberations. *Tr. Day 4/Afternoon Session*, at p. 127-129. Mr. Raphael explained that, when feasible, LandWorks did avoid objects in the foreground, which is consistent with the language in the SEC Rule. *See* Site 301.05(b)(8)(a). As the Motion notes, over sixty pages of the deliberation transcripts are devoted to the Subcommittee's evaluation of the photosimulations – both those produced by LandWorks and by Terraink. Additionally, the Subcommittee conducted two site visits; one as required by statute, but the second pursuant to the Subcommittee's discretion to ensure the Subcommittee had a full and complete understanding of the resources at issue as well as the surrounding area. The same issues and concerns raised again in the Motion were also raised and considered by the Subcommittee in their deliberations. It is unclear in what way the Intervenors believe the Subcommittee's thorough, documented, assessment of the aesthetic impact of the Project was in any way unlawful or unreasonable.

4. *Mitigation Measures*

As a preliminary matter, the premise of the Motion as it relates to mitigation is incorrect. While the Motion asserts that many of the mitigation measures will not be realized for at least

half of a century, *see Motion* at ¶71, in fact, the 908 acres of conservation land proposed by the Project will be placed in conservation within 180 days of the commercial operation date of the Project. *Tr. Day 7/Morning Session*, at p. 21. All of the other mitigation measures listed in the Motion, *see Motion* at ¶71, will also go into effect after commencement of commercial operations. In addition, the Motion fails to cite several additional mitigation measures the Subcommittee considered in determining that any potential aesthetic effect would not be unreasonable. The Subcommittee also considered the use of radar activated lighting, the elimination of turbine 10 and lowering of turbine 9. *Decision and Order Granting Application for Certificate of Site and Facility*, at p. 121 (March 17, 2017). The Subcommittee further acknowledged that the use of conservation land is an indirect form of mitigation. *Id.* The fact that the Intervenors disagree with the Subcommittee's determination that these proposed mitigation measures are relevant and effectively mitigate aesthetic effect, does not mean the decision is unlawful or unreasonable.

The Intervenors rely on the decision from Antrim I to support their errant assertion that conservation land cannot be used to mitigate aesthetic effects. *Motion* at ¶73. The Subcommittee was presented with that same argument and evaluated it during deliberations. The Subcommittee concluded that the finding from Antrim I was specific to that Application as noted by the use of the phrase "in this case" in the final Antrim I Order. *See Deliberation Tr. Day 1 Morning Session*, p. 20. Ms. Weathersby noted that the use of that phrase demonstrated that "it's not applicable to every single subsequent case." *Id.*

Moreover, the Intervenors' assertion that the prior determination in Antrim I should collaterally estop the Applicant here is, again, an improper application of the doctrine. As noted previously, this is a new project and the mitigation package in this docket is not the same as the

one proposed in the prior proceeding. All of the changes made to the Project must be taken into account collectively, consistent with the findings required by the Rules. Additionally, unlike the issue outlined in the Motion, *see Motion* at ¶74, the question that must be considered here is whether indirect mitigation measures relating to the aesthetics of *the* Project can be considered by the Subcommittee. The Subcommittee has concluded that this consideration must be evaluated on a case-by-case basis taking into consideration the specifics of a proposed project. A blanket rule cannot be applied.

With respect to the assessment of the radar activated lighting system, there is extensive evidence in the record relating to the use of this system. Attorney Reimers sought to make a similar assertion that "there is no evidence in the record as to what visual impact this system will have." *Motion*, at ¶77; *see Tr. Day 5/Afternoon Session*, at p. 59. As noted during the hearing, however, Mr. Raphael did evaluate project lighting. *Tr. Day 5/Afternoon Session*, at p. 57-58. Ms. Von Mertens also raised nearly an identical argument that "there's been no visual analysis, impact analysis of night lights." *Tr. Day 13/Afternoon Session*, at p. 51. The VA contains details regarding which turbines will be lit, the type of light that will be used, and reaches a conclusion based on professional judgement that the use of a radar activated system will essentially eliminate the impact. *LandWorks Visual Simulation*, at p. 37. Counsel for the Public's visual expert, Kellie Connelly, shared a similar view regarding mitigation of effect on nighttime lighting if a radar activated system was installed. *See Terraink Visual Impact Assessment*, at p. 10. The Subcommittee considered all of this evidence and concluded that, subject to certain conditions, "[t]he radar activated system will minimize the impact of the Project on aesthetics." *Decision and Order Granting Application for Certificate of Site and Facility*, at p. 121 (March 17, 2017). In order to address concerns about the timing for the

installation of this system the Certificate includes a condition that, prior to construction, the Applicant receive approval of the Aircraft Detection Lighting System. *Decision and Order Granting Application for Certificate of Site and Facility*, at p. 156 (March 17, 2017)(Noting that "the ADLS shall be installed prior to the operation of the Project.") Since the conclusion of the hearings, AWE has in fact received approval from the FAA to implement the system. *See Letter from Antrim Wind to the SEC – FAA Approval of Night Time Lighting* (December 14, 2016). The Subcommittee further noted in its Decision that it received no reports, or scientific evidence that would suggest that the Project's lighting will have unreasonable adverse effects on health. *Id.* at 156. The Motion does not provide any evidence that was not already considered and evaluated by the Subcommittee in reaching its conclusion.

B. Public Health and Safety

With regard to public health and safety, the Motion fails to identify any findings made by the Subcommittee that are unlawful or unreasonable. None of the issues raised identify any issue that was overlooked or mistakenly conceived by the Subcommittee, and it fails to identify any new evidence that was not available during the adjudicative hearing. The arguments presented by the Intervenors simply rehash all of the arguments previously made by the Intervenors in their pre-filed testimony, post hearing briefs, and during the adjudicative hearings.

1. *Noise*

The Motion asserts that the Subcommittee's determination with respect to public health and safety and particularly noise is "essentially based on the Applicant's promise that the Project will not exceed sound levels." *Motion* at ¶83. This is incorrect. This claim fails to take into account the extensive work completed by the Applicant's experts, the reports submitted, the days of testimony relating to noise, and the lengthy cross-examination that was completed. The

Applicant submitted a comprehensive Sound Level Assessment Report that evaluated both existing sound levels and the predicted noise levels associated with this Project, consistent with the rules. *See Application*, App. Exh. 33, Appendix 13A; *see also Supplement to Application re: New Rules*, App. Exh. 34, Attachment 9. The Applicant also submitted extensive expert testimony from Robert O'Neal demonstrating that Epsilon complied with and followed all requirements and standards set out in the SEC rules.

The Intervenors focus on the use of Noise Reduction Operations ("NRO") to support their contention that the Subcommittee is solely relying on promised mitigation to reach its conclusion of no unreasonable adverse effect is misplaced. First and foremost, the Applicant performed extensive monitoring and assessment of the site and existing sound levels, collecting wind speed data that exceeds the level of data typically collected for a project, and performed all necessary modeling to determine predicted sound levels. Based on Mr. O'Neal's extensive experience as an acoustical expert, he has found that the conservative set of modeling assumptions implemented by Epsilon for this Project yield accurate results. Mr. O'Neal concluded that because the predicted worst-case sound levels for this Project will be well below 45dBA during the day and 40dBA at night, at all occupied buildings, the Project will easily meet the required noise levels established by the SEC rules. Regardless of NRO, or any other form of mitigation, Mr. O'Neal opined that he had a high degree of confidence in his findings. He noted several times that "the modeling is conservative. We are several decibels under the standard to begin with. And there's several conservative assumptions that we use in the modeling that we've done according to the rules. And our experience in the past has shown that to be true. Those model results do hold. So we're confident of them." *Tr. Day 3/Afternoon Session*, at p. 47-48.

In addition, the assertion that the Subcommittee's determination "impermissibly shifts the burden to abutting property owners" is incorrect. *Motion* at ¶84. The SEC rules require the Applicant to complete post-construction compliance testing. Site 301.18(e). Based on the conservative modeling assumptions employed, the Applicant believes it is highly unlikely that the Project will exceed the maximum sound levels. The Subcommittee considered the use of post construction modeling and felt "comfortable with what Mr. O'Neal did." *Deliberations Tr. Day 2 Morning Session*, at p. 104. In part, this comfort was predicated on the completion of post-construction monitoring. *Id.*

The assertions made in the Motion that NRO will reduce the Project's production capabilities was raised during the course of the hearings and evaluated by the Subcommittee. *See Tr. Day 1/Morning Session*, at p. 99-100 (Dr. Ward asked whether curtailment for noise was factored into the financial analysis and Mr. Weitzner responded "[w]e're very confident that we will comfortably meet the SEC requirements for noise." Mr. Weitzner further noted that with respect to curtailments for shadow flicker, "we have a very good idea of what that's going to cost, and it is absolutely irrelevant, in terms of the revenue of the Project."); *see also Tr. Day 1/Afternoon Session*, at p. 92-93 (Attorney Iacopino specifically asked whether curtailments for noise and shadow flicker were calculated into net capacity factor. Mr. Weitzner responded that "[t]here is no curtailment for sound because we're very confident we will comfortably meet the regulations.")

The discussion of the use of NRO is completely distinct from the proposed mitigation in the Antrim I docket. As Mr. O'Neal noted during the hearing, NRO is an option "that everybody has." *Tr. Day 4/Afternoon Session*, at p. 38. Contrary to the characterization of the NRO mode by the Intervenor's as a "half-baked proposal," *Motion* at ¶88, this feature is in fact readily

available for the equipment being proposed by the Applicant. The use of NRO would be considered a standard procedure the Applicant would choose to take, should such action be necessary to meet the requirements under the SEC Rules. In Antrim I, Counsel for the Public proposed modifications to the project's design. The Intervenor's comparison in this case is not accurate and fails to properly take into account and characterize the type of "mitigation" being proposed. Unlike in Antrim I, there is testimony in the record demonstrating that the Applicant has considered the use of this technology and concluded that this type of mitigation poses no risk to the financial viability of the Project. *Tr. Day 1/Morning Session*, at p. 99-100. Further, it requires no alteration to the design or any other aspect of the Project.

The assertion that the sound report prepared by the Applicant's expert is "unreliable and not entitled to any weight" is not supported by the record in this case. Further, the same criticisms raised in the Motion were fully vetted during the course of the proceedings. There is no dispute that Mr. O'Neal employed the ISO 9613-2 standard as required by the SEC Rules in his evaluation of the Project. The Intervenors have raised concern with the ISO 9613-2 standard – such as the fact that the model assumes a facility operating on flat ground or that certain atmospheric conditions are not accounted for – however, these concerns with the model do not create a basis for rehearing. The model requires certain limited inputs to be determined and applied by the expert. The specification of how these inputs should be determined are not expressly defined by the SEC Rules and instead are left to professional judgment. Mr. O'Neal used several inputs and assumptions that he felt, in his professional judgement, were conservative. The Subcommittee properly found, based on the evidence presented, that the sound report was prepared in accordance with professional standards and with the administrative

rules. *Decision and Order Granting Application for Certificate of Site and Facility*,, at p. 153 (March 17, 2017).

There is lengthy testimony in the record with regard to the applicability of the +/- 3 dBA accuracy factor. Mr. O'Neal testified to the fact that this accuracy factor is not a "buffer" that needs to be applied and in any event does not apply to this Project as the conditions related to the accuracy factor as set out in the standard are not present here. S*ee Robert O'Neal Supplemental Testimony,* App. Exh. 13, p. 3-4. While Mr. James did provide testimony that this factor should have been applied, Mr. James also testified that he would have "thrown in another 5 dBA" but could not point to any place in the SEC rules or ISO standard that requires or even talks about including this additional assumption. *Tr. Day 11/Morning Session*, at p. 32-33. Instead, Mr. James appears to base his assessment on his own extreme and unscientific views, which have no basis in any standard, agreeing that "some would say 10 or 15 as an adder." *Tr. Day 11/Morning Session*, at p. 70. Mr. James methodology does not appear to be aimed at evaluating worst case, but rather would result in an unrealistic, unjustifiable evaluation. Moreover, Mr. O'Neal has noted that post-construction monitoring has demonstrated, for example at the Stetson Mountain I project, that the methodology employed by Epsilon in this docket, using the same assumptions, yields accurate results. The additional +/- 3 dBA results in over-predicted noise levels. S*ee Robert O'Neal Supplemental Testimony,* App. Exh. 13, p. 5. The Subcommittee heard the same evidence reiterated in the Motion and chose to give each piece of testimony the weight it felt it was due. The Intervenors' disagreement with that decision does not in and of itself provide any basis for rehearing.

Throughout the proceeding, several parties cross-examined Mr. O'Neal regarding his use of a 0.5 ground attenuation factor or G-factor. The Motion again rehashes these same arguments

without providing any new evidence that was not presented to, and considered by the Subcommittee during the hearing. The NARUC report noted in the Motion as well as testimony provided by Mr. James were all presented and considered. Mr. O'Neal, based on his professional judgment and substantial experience, chose to use a conservative assumption in using a G-factor of 0.5, which reflects an assumption that the ground surface within the project area is partly reflective and partly porous. S*ee Robert O'Neal Supplemental Testimony,* App. Exh. 13, p. 6-7. The Subcommittee reached its conclusion based on a careful review of the full record and ultimately agreed with Mr. O'Neal that "the G factor of .5 seemed to be reasonable." *Deliberations Day 2/Morning Session*, at p. 98-99. The Subcommittee discussed the testimony provided in opposition to Mr. O'Neal's use of a G-factor of 0.5, but ultimately concluded that this professional decision made sense given the circumstances in this docket.

The Motion fails to satisfy the statutory requirements for rehearing. The Intervenors simply re-state their prior arguments without pointing the Subcommittee to any information indicating that good cause exists for rehearing. The Motion does not identify any error of fact, reasoning or law. Rather, the Motion simply identifies disagreement with the conclusion reached by the Subcommittee.

2. *Shadow Flicker*

The Subcommittee considered a thorough and complete record with respect to shadow flicker and concluded, subject to certain conditions,[5] that the shadow flicker associated with the Project will not produce an unreasonable adverse effect on public health and safety. Notwithstanding the Subcommittee's exhaustive evaluation of this issue, the Intervenors reiterate

[5] The Subcommittee required the Applicant, on a semi-annual basis, to submit to the SEC and the Town a copy of the report generated from the SCADA System that shows the amount of shadow flicker experienced at specified locations within one mile. *Decision and Order Granting Application for Certificate of Site and Facility*, at p. 162-63 (March 17, 2017).

the same argument raised multiple times in testimony, post-hearing briefs, and at the adjudicative hearings – that the Applicant should have assessed shadow flicker beyond one mile. *Motion* at ¶102. Evaluating shadow flicker beyond one mile is simply not required under the SEC Rules. Moreover, this issue was thoroughly addressed by Mr. O'Neal during his testimony. *Tr. Day 4/Afternoon Session*, at p. 12-15. Mr. O'Neal testified that, in his professional opinion, if the SEC wanted an assessment of shadow flicker beyond one mile, it would have been indicated in the Rules. *Tr. Day 4/Afternoon Session*, at p. 15. In addition, it his highly unlikely, as the Motion suggests (*Motion* at ¶102), that shadow flicker will exceed the modeled values at any receptor as the modeling is based on a "bare earth scenario…So it's just a possibility that these locations could experience that. It doesn't mean they will." *Tr. Day 4/Afternoon Session*, at p. 13. Mr. O'Neal testified that in his experience he has not "seen [flicker] out to a mile before. It's diffuse enough at that point, you don't recognize it." *Tr. Day 3/Afternoon Session*, at p. 50.

The Motion illustrates a lack of understanding as to how shadow flicker modeling is completed and what the results actually mean. As described in Mr. O'Neal's supplemental testimony, the model essentially maps "line of sight between a receptor and the turbine/sun" under bare earth conditions. *Robert O'Neal Supplemental Testimony,* App. Exh. 13, p. 16-17. It does not mean that actual shadow flicker will occur, but rather the conditions are present, i.e. a sight line, to allow for the potential for shadow flicker. Increasing the distance beyond a mile, will result in potential changes in the hours of shadow flicker to locations located within a mile, not because in fact additional shadow flicker will occur, as the Motion suggests, but because of this "artifact" of the model. *Robert O'Neal Supplemental Testimony,* App. Exh. 13, p. 17. Testimony relating to this issue was provided and considered by the Subcommittee in reaching its conclusions regarding shadow flicker. *Tr. Day 4/Afternoon Session*, at p. 8-14.

The SEC Rules require that "the shadow flicker created by the applicant's energy facility *during operations* shall not occur more than 8 hours per year at or within any residence, learning space, workplace, health care setting, outdoor or indoor public gathering area, or other occupied building." Site 301.14(f)(2)(b) (emphasis added). The Applicant has provided substantial testimony establishing that during operation of the facility, the shadow flicker requirement will not be exceeded due to the use of a shadow flicker control technology. The Subcommittee heard significant cross-examination on this issue and thoroughly reviewed this during deliberations. *Deliberation Tr. Day 2 Afternoon Session*, at p. 8-18; *Deliberation Tr. Day 3 Afternoon Session*, at p. 40-57. To the extent issues were raised during the proceeding, which are now reiterated in the Motion, relating to the efficacy of the shadow control technology, the Subcommittee's condition requiring the Applicant to provide a report with the SCADA data effectively eliminates this concern. In addition, as stated above, the effect of this control technology on the financial viability of the Project was raised during the course of deliberations and addressed by Mr. Weitzner.

The Intervenors had a full and complete opportunity to make their case. The positions articulated in the Motion have already been presented to the Subcommittee for their consideration. The Subcommittee is entitled to evaluate the evidence presented and give it the weight it feels is appropriate. The Intervenor's disagreement with the Subcommittee's conclusions does not provide sufficient grounds to grant a rehearing.

3. *Ice Throw*

The Subcommittee considered an extensive record related to ice throw. The Intervenors do not identify any errors of fact or reasoning of law that resulted in an unlawful or unjust decision. Rather, the Intervenors again simply disagree with the conclusions the Subcommittee

drew based on its assessment of the totality of the record. This does not satisfy the standard to grant a motion for rehearing.

The "self-serving assertions" and "off-the-cuff remarks" noted in the Motion were provided by experts in the field and individuals with extensive experience constructing and operating wind turbines. *Motion* at ¶107, ¶110. Mr. Stovall is employed by DNV GL, which has been recognized as the world's leading technical authority in wind power generation for the past three decades. *Darrel Stovall Pre-Filed Testimony*, App. Ex. 2, p. 2. Mr. Stovall testified to the fact that "the maximum ice throw distance is 250 meters, plus or minus." *Tr. Day 2/Morning Session*, at p. 144. Mr. Stovall further testified that this was "somewhat of an industry-accepted number." *Id.* Mr. Stovall further noted that there are approximately 67,000 turbines that are located in conditions where icing may occur and there have been no reported or documented injuries. The Subcommittee also received testimony from intervenors on this issue. The Subcommittee has discretion to weigh the evidence provided and give it the weight it feels is appropriate. To the extent the Intervenors disagree with the Subcommittee's reliance on Mr. Stovall's expert opinion, that does not create a basis for rehearing.

The Intervenors further rely on the Bredesen Report, Abutters Exhibit 52 (see *Motion* at ¶109); however, the Subcommittee heard extensive testimony about this report specifically. *Tr. Day 13/Evening Session*, at p. 5-10 (Attorney Richardson pointed out that based on this report "at 175 meters, [ice throw] would be once every 10,000 years."); *see also Deliberations Tr. Day 2 Afternoon Session*, at p. 72 (Director Rose noting "I recall a conversation with Ms. Linowes. The likelihood of having an ice throw even equal 650 feet in the winter heavy conditions was once every thousand years." Further noting, "the system and the technology is in place that – and the backup systems are in place…the risk is very minimal.") The fact that the Subcommittee

did not reach the same conclusion as the Intervenors in connection with this report does create a basis to grant rehearing.

4. *Decommissioning*

The Intervenor's argument that the Subcommittee misapplied its rules as they relate to decommissioning is simply an attempt to again pursue arguments that were already raised and addressed during the hearing. *Motion* at ¶112. Several parties, including Counsel for the Public in her closing brief, providing the Subcommittee with testimony regarding the treatment of on-site, inert, concrete rubble. Mr. Kenworthy testified that the rules do not require benign, concrete rubble to be removed and notes that once it is processed and used for fill, there will be no infrastructure remaining at the site, which is consistent with the rules. *Tr. Day 2/Morning Session*, at p. 63-64. Mr. Cavanaugh provided additional testimony that his company has been "disposing concrete on all of our projects, whether the state projects here in New Hampshire, wind projects that we built that's inert material that's just standard practice in construction." *Tr. Day 2/Afternoon Session*, at p. 17. The Subcommittee noted the "considerable back and forth" on this issue during deliberations. *Deliberations Day 2 Afternoon Session*, at p. 112. After considering the evidence provided and applying the Rules, the Subcommittee determined that reuse of the material as fill was not inconsistent with the Rules and will not cause an unreasonable adverse effect on human health and safety. *Decision and Order Granting Application for Certificate of Site and Facility*, at p. 176 (March 17, 2017).

C. Natural Environment

The Intervenors' assert that the Subcommittee's determination that the Project will not have an unreasonable adverse effect on the natural environment is unjust and unreasonable. *Motion* at ¶115. The Subcommittee heard several days of testimony both from the Applicant's

experts and from intervening parties associated with the Project's potential effect on the natural environment. The Subcommittee considered this thorough and complete record in reaching its ultimate conclusion that there would be no unreasonable adverse effect. The arguments raised in the Motion are the same arguments the Intervenors raised during the course of the proceedings and no new information has been provided which the Subcommittee failed to consider.

The Motion reiterates the same inaccurate argument raised during the course of the proceeding – that the Applicant's evaluation of impacts to large mammals was somehow deficient. *Motion* at ¶115; *see Tr. Day 2/Afternoon Session*, at p. 95. In fact, the Applicant did prepare a wildlife habitat assessment, which was discussed during the adjudicative hearing. *Tr. Day 2 Afternoon Session*, at p. 153. Additionally, the Subcommittee heard substantial testimony evidencing the fact that there will be no significant impact to bears or other large mammals. *Tr. Day 2/Afternoon Session*, at p. 116-119. As the Applicant's experts testified, consistent with standard practice, after consulting with the agencies, the Applicant completed all the studies the State and federal agencies requested with respect to potential effects on wildlife and habitat. *Tr. Day 2/Afternoon Session*, p. 95 ("We followed the guidance of the agencies on what surveys they're interested in."); *see also Tr. Day 2/Afternoon Session*, p. 146-47. In addition, contrary to the assertion that the Subcommittee did not consider potential effects on large mammals, the deliberation transcripts illustrate that the Subcommittee did discuss impacts on mammals. *See Deliberation Tr. Day 2 Morning Session*, at p. 30; *Deliberation Tr. Day 2 Morning Session*, at p. 70 (Commissioner Rose noting "I think there will be impacts as a result of the road in particular, but there was, as it pertained to mammals, there was no concerns.")

The Subcommittee was provided with substantial evidence on the issues raised in the Motion relating to natural environment – including the testimony by Mr. Jones and the Audubon

Society noted in the Motion. The Subcommittee is free to weigh the testimony provided as it deems appropriate in reaching its final decision. The Subcommittee received sufficient testimony from the Applicant to demonstrate that the Applicant's process in its review of wildlife species within the Project area was consistent with standard practice, and complete. To the extent the Intervenors raise concerns that the Applicant did not provide evidence relating to the Project's potential impacts on bears, this is inconsistent with the transcribed record, which includes substantial testimony from the Applicant's experts regarding the minimal effect of the project on mammals including bears, bobcats, and moose. *Tr. Day 2/Afternoon Session*, at p. 96, 116, 146. In addition to the evaluation of large mammals, the Subcommittee also received significant testimony on the issues associated with the boulder formations on the ridge. This issue was discussed at length during deliberations and the Subcommittee made a determination, after a thorough review of the record, that the condition language imposed was sufficient to address any concerns raised. *Deliberation Tr. Day 2 Morning Session*, at p. 65-68; *Deliberation Tr. Day 3 Afternoon Session*, at p. 25-27; *Decision and Order Granting Application for Certificate of Site and Facility*, at p. 143 (March 17, 2017).

D. Orderly Development

The Intervenors assert that the Subcommittee's determination with respect to orderly regional development was "predicated upon erroneous considerations of municipal land use regulations." *Motion* at ¶121. The Subcommittee received substantial testimony from the local community, including direct testimony from the Town of Antrim Selectmen, and a former member of the Lempster Board of Selectmen. In addition, many of the Intervenors are residents of the town of Antrim. The Subcommittee also received a letter from the Town of Deering expressing concern with the Project. *Deliberation Tr. Day 3 Morning Session*, at p. 43-44.

While the Subcommittee has discretion as to how much weight to give testimony received, all of these views were considered – in addition to the Subcommittee's consideration of numerous public comments. *Deliberations Tr. Day 3 Morning Session*, at p. 45-47.

The assertion that the Subcommittee failed to consider the Antrim Zoning Ordinance does not reflect an understanding of the SEC process. *Motion* at ¶123. As an initial matter, the SEC process preempts local authority. RSA 162-H:1. Despite this preemption, the Subcommittee did hear testimony on the issue of local regulation. *Tr. Day 6 Afternoon Session*, at p. 154 (Mr. Kenworthy noted "you typically don't see something like major industrial development listed as a principal permitted use. So if you're asking me if large scale wind projects like Antrim Wind is a principal permitted use in the Rural Conservation District, no, it is not. However, it's not required to be in order for this project to be consistent with the orderly development of the region.") In addition, the Subcommittee acknowledged during deliberations that such a use, under local regulations, is not permitted. *Deliberation Tr. Day 3 Morning Session*, at p. 15-16.

The Intervenors further assert that the Subcommittee failed to adequately consider proposed zoning articles. *Motion* at ¶124. The Subcommittee heard lengthy testimony and received extensive pre-filed testimony, both from Mr. Kenworthy, Mr. Levesque, and the Antrim Board of Selectmen, on the issue of the town votes that took place relating to wind projects in the rural conservation district. *Tr. Day 6 Afternoon Session*, at p. 155-156; *Tr. Day 7/Morning Session*, at p. 26-32; *Tr. Day 7/Morning Session*, at p. 133-135; *Tr. Day 9 Morning Session*, at p. 32-35. The Intervenors have not provided any information that was not already presented to the Subcommittee during the proceedings and evaluated by the Subcommittee during deliberations. *Deliberation Tr. Day 3 Morning Session*, at p. 16-17. In that same discussion, the Subcommittee

also acknowledges, and did not "ignore," as asserted in the Motion, (*Motion* at ¶125) the fact that portions of the Master Plan speak to preservation of open space. Unlike the Intervenors, however, the Subcommittee concluded that the conservation efforts associated with the Project promoted this goal and were not contrary to its purpose.

The Motion also incorrectly notes that the easements will not go into effect until decommissioning. *Motion* at ¶125. Rather, the Town of Antrim will enjoy the benefit of this conservation within 180 days of commencement of commercial operation of the Project. *Tr. Day 7/Morning Session*, at p. 21. In addition, the Subcommittee received testimony from Mr. Kenworthy and Mr. Levesque specifically addressing the impact of the Project on surrounding communities and the ConVal School District. *Tr. Day 11 Afternoon Session*, at p. 41-44, 141-144, 153, 155-157. All of the information included in the Motion regarding views of local municipalities was provided during the hearing and thoroughly considered by the Subcommittee in reaching its conclusion. The Intervenors have failed to establish sufficient basis for rehearing.

Finally, the Subcommittee deliberated at length on the issue of potential impacts to property values and thoroughly considered options for implementing a property value assurance program. The fact that ultimately the Subcommittee chose not to adopt such a program does not present an error of fact or law and does not provide sufficient basis to grant rehearing. There is no need to reopen the record or grant rehearing on this point since the Subcommittee has already fully considered the issues presented.

The Subcommittee acknowledged that they received testimony contrary to the testimony provided by Mr. Magnusson from several intervenors. *Decision and Order Granting Application for Certificate of Site and Facility*, at p. 86 (March 17, 2017). In the context of orderly regional development, property value is just one consideration. The Subcommittee's decision reflects

their conclusion that even assuming there are some impacts to property values, these limited impacts will not result in "unreasonable adverse effect on the orderly development of the entire region." *Decision and Order Granting Application for Certificate of Site and Facility*, at p. 86 (March 17, 2017).

The assertion that the Subcommittee's decision with regard to the property value guarantee was unlawful has no basis. *Motion* at ¶128. The SEC Rules in no way require the Subcommittee to develop a guarantee program. In fact, such a program has never been implemented by the SEC.[6] Further, while the Subcommittee ruled that the McCann report was not relevant to the proceeding and therefore could not be considered, the Subcommittee did consider the letter some of the Intervenors submitted to the Antrim Board of Selectmen requesting a guarantee. *Tr. Day 7/Afternoon Session*, at p. 104-105. In addition, the Subcommittee considered the testimony given by Justin Lindholm, also noted in the Motion. *Deliberation Tr. Day 3 Afternoon Session*, at p. 103. The record in this docket reflects the fact that the Subcommittee did not dismiss the concept of the property value guarantee, but rather gave it significant consideration. *Deliberation Tr. Day 2 Afternoon Session*, at p. 155-171; *Deliberation Tr. Day 3 Afternoon Session*, at p. 67-142. The Intervenors had the opportunity to introduce relevant evidence into the record relating to property value guarantee, and to some extent, did provide such evidence. This evidence was thoroughly considered by the Subcommittee in reaching its conclusion. The Intervenors have not satisfied the standard sufficient to grant a motion for rehearing on this issue or any other issue presented.

[6] *Deliberation Tr. Day 2 Afternoon Session*, at p. 166 (Counsel for the Committee noted that in no other docket has there been a property value guarantee, but in the Londonderry docket there was a buyout provision.)

V. Conclusion

Based on the foregoing, the Intervenors have not met the standard for a rehearing pursuant to RSA 541:3. The record in this docket is extensive and the Subcommittee's deliberations and final Order reflect an intense, thorough review. The Intervenors have failed to present any issue that the Subcommittee has overlooked or mistakenly conceived. Moreover, the Motion fails to articulate any new evidence that was not before the Subcommittee during the adjudicative hearings. The Motion merely asks that the Subcommittee reach a different conclusion on the same evidence and therefore it should be denied.

WHEREFORE, the Applicants respectfully request that the Subcommittee:

A. Deny the motion for rehearing; and

B. Grant such further relief as requested herein and as deemed appropriate.

Respectfully submitted,

McLANE MIDDLETON,
PROFESSIONAL ASSOCIATION

Dated: April 24, 2017

By: _____

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Certificate of Service

I hereby certify that on the 24th of April 2016, an original and one copy of the foregoing Objection to Motion for Rehearing were hand-delivered to the New Hampshire Site Evaluation Subcommittee and an electronic copy was served upon the SEC Distribution List.

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April 25, 2017

VIA ELECTRONIC MAIL & HAND-DELIVERY

New Hampshire Site Evaluation Committee
Pamela G. Monroe, Administrator
21 South Fruit Street, Suite 10
Concord, NH 03301

Re: NH Site Evaluation Committee Docket No. 2015-02:
Application of Antrim Wind Energy, LLC – Objection to Counsel for the Public's Motion for Rehearing

Dear Ms. Monroe:

Please find enclosed for filing in the above-captioned matter, an original and one copy of Applicant's Objection to Counsel for the Public's Motion for Rehearing.

We have provided members of the distribution list with electronic copies of this Objection, pending addition of the document to the Committee's website.

Please contact me directly should you have any questions.

Sincerely,

Barry Needleman

BN:rs3

Enclosure

cc: Distribution List

THE STATE OF NEW HAMPSHIRE

SITE EVALUATION SUBCOMMITTEE

Docket No. 2015–02

APPLICATION OF ANTRIM WIND ENERGY, LLC FOR A CERTIFICATE OF SITE AND FACILITY

APPLICANT ANTRIM WIND ENERGY, LLC'S OBJECTION TO COUNSEL FOR THE PUBLIC'S MOTION FOR REHEARING OR RECONSIDERATION

Antrim Wind Energy, LLC ("AWE" or the "Applicant") by and through its attorneys, McLane Middleton, Professional Association, respectfully submits this Objection to Counsel for the Public's Motion for Rehearing or Reconsideration (the "Motion"). The Applicant respectfully requests that the Subcommittee deny the Motion because it fails to set forth good cause for a rehearing. Specifically, it does not raise any issue that was overlooked or mistakenly conceived by the Subcommittee in its Decision and Order Granting Application for Certificate of Site and Facility nor does the Motion present any new evidence that was not before the Subcommittee or could not have been previously presented during the adjudicative hearing.

I. Background

On October 2, 2015, the Applicant filed an application with the New Hampshire Site Evaluation Subcommittee ("SEC" or the "Subcommittee") for a Certificate of Site and Facility to construct and operate a 28.8 MW electric generation facility consisting of nine Siemens SWT-3.2-113 direct drive wind turbines in Antrim, New Hampshire (the "Project"). The Subcommittee accepted the application on December 1, 2015.

The Subcommittee presided over thirteen days of adjudicative hearings, during which time the Subcommittee heard from fifteen witnesses proffered by the Applicant as well as nine intervenor groups, and Counsel for the Public's visual expert. In total the Subcommittee

received 220 exhibits, oral and written statements from interested members of the public, and written post-hearing briefs from seventeen parties. Upon completion of the adjudicative hearing, and after closing the record pursuant to Site 202.26, the Subcommittee began deliberations.

The Subcommittee deliberated on December 7, 9, and 12, 2016. During the deliberations, the transcripts illustrate, the Subcommittee reviewed the complete record including affirmative testimony provided by the Applicant as well as rebuttal or opposing testimony provided by all the other parties. On March 17, 2017 the Subcommittee issued its Decision and Order Granting Application for a Certificate of Site and Facility and Order and Certificate of Site and Facility with Conditions (the "Decision"). The Subcommittee's Decision, which addressed each and every concern raised during the Adjudicative hearing and again in the Motion, was well-reasoned and thoroughly supported by the comprehensive record. The Motion fails to meet the standard required to grant a motion for rehearing and ignores the extensive record in this docket and thorough deliberations undertaken by the Subcommittee.

II. Legal Standard

The purpose of a rehearing "is to direct attention to matters said to have been overlooked or mistakenly conceived in the original decision, and thus invites reconsideration upon the record upon which that decision rested." *Dumais v. State of New Hampshire Pers. Comm.*, 118 N.H. 309, 311 (1978). RSA 541:3 provides that the commission "may grant such rehearing if in its opinion good reason therefor is stated in said motion." The Subcommittee may grant rehearing or reconsideration for "good reason" if the moving party shows that an order is unlawful or unreasonable. RSA 541:3, RSA 541:4; *Rural Telephone Companies,* N.H. PUC Order No. 25,291 (Nov. 21, 2011). A successful motion must establish "good reason" by showing that there are matters the Commission "overlooked or mistakenly conceived in the original decision,"

Dumais, 118. N.H. at 311; or by presenting new evidence that was "unavailable prior to the issuance of the underlying decision." *Hollis Telephone Inc.*, N.H. PUC Order No. 25,088 at 14 (April 2, 2010). A "good reason" for rehearing is not established where, as here, the movant merely restates prior arguments and asks for a different outcome. *Public Service Co. of N.H.*, N.H. PUC Order No. 25,676 at 3 (June 12, 2014). A motion for rehearing must be denied where no "good reason" or "good cause" had been demonstrated. *O'Loughlin v. State of New Hampshire Pers. Comm.*, 117 N.H. 999, 1004 (1977); *Order on Pending Motions*, Docket 2012-01, Application of Antrim Wind, at 3 (Sept. 10, 2013).

The Motion should be denied because it fails to identify how any finding made by the Subcommittee is unlawful or unreasonable, it fails to identify any issue that was overlooked or mistakenly conceived by the Subcommittee, and it fails to identify any new evidence that was not available and could not have been introduced during the adjudicative hearing. The Motion almost exclusively rehashes the arguments previously made in pre-filed testimony and during the adjudicative hearing. The Subcommittee correctly determined that the Applicants met their burden of proof pursuant to Site 202.19, and established by a preponderance of the evidence that it satisfied all of the requirements of RSA 162-H:16 to receive a Certificate of Site and Facility.

III. The Subcommittee Completed a Thorough Review of the Record Regarding the Issue of Aesthetics and the Motion Fails to Identify Any Issue That Was Overlooked or Mistakenly Conceived by the Subcommittee.

Counsel for the Public asserts that the Committee's findings regarding aesthetics were unreasonable and unlawful and failed to comply with the SEC Rules. *Motion* at ¶3. Counsel for the Public has not provided any basis in the Motion to suggest that the Subcommittee failed to adequately consider the evidence presented and reach a well-reasoned determination. All of the

arguments raised in the Motion simply reiterate arguments raised throughout the adjudicatory proceeding and do not meet the threshold requirements necessary to grant rehearing.

The Subcommittee heard several days of testimony from the Applicant's expert, David Raphael, Counsel for the Public's expert, Kellie Connelly, and from numerous intervenors on the issue of aesthetics. Counsel for the Public relies solely on the conclusions in the final Decision to support her assertion that the Subcommittee's review was "cursory." *Motion* at ¶4. The deliberation transcripts in this docket, however, illustrate that the Subcommittee's deliberations were thorough and comprehensive, and, contrary to Counsel for the Public's assertion, took into consideration the specific criteria outlined in the newly-adopted SEC rules. *See* Site 301.14(a)(1)-(7). Counsel for the Public's characterization of the Subcommittee's deliberations, without any citation to the deliberation transcripts, fails to take into consideration the Subcommittee's thorough review of the existing character of the area, *Deliberations Day 1 Afternoon*, at p. 26-30, 32, the significance of scenic resources, p. 63-64, the public's use of those resources, *Deliberations Day 1 Afternoon*, at p. 30-31, 38-39, 43, the overall daytime and nighttime visual effect, *Deliberations Day 1 Afternoon*, at p.53-54, 61-62, as well as consideration of the proposed mitigation, *Deliberations Day 1 Afternoon*, at p. 69-72 and 132-141.

A. Scenic Resource Assessment

Counsel for the Public fails to accurately characterize the Subcommittee's evaluation of the two private property locations included in Ms. Connelly's visual assessment. Counsel for the Public asserts that the Subcommittee made a determination that Gregg Lake and Black Pond should not be considered scenic resources because they are private property. *Motion* at ¶4. This is incorrect. The Subcommittee did not make a finding that Ms. Connelly's assessment of Gregg

Lake was improper, but rather her assessment of White Birch Point Historic District was improper. *Deliberation Tr. Day 1 Afternoon Session*, at p. 90-91 (Dr. Boisvert noting that the "[p]ublic does not have access to White Birch Point. They do have access to the lake.") Counsel for the Public's own expert admitted during the hearing that the public does not have access to the historic district.[1]

Due to Ms. Connelly's professional decision to produce a simulation for Gregg Lake from a private property location, White Birch Point, the Subcommittee determined it was necessary to "discount" Ms. Connelly's simulation of Gregg Lake. *Deliberation Tr. Day 1 Afternoon Session*, at p. 90. In contrast, Mr. Raphael provided a simulation for Gregg Lake from a public resource – Gregg Lake Beach, consistent with the Rule requirements, which the Committee also considered. *Deliberation Tr. Day 1 Afternoon Session*, at p. 90-92.

In addition, the Subcommittee did not take issue with Ms. Connelly's assessment of Black Pond as a scenic resource. In fact, LandWorks also performed an evaluation of Black Pond. *See LandWorks Visual Assessment*, at p. 60, 67, 69, 70, 71, and Exhibit 22 at p.7. Rather, the Subcommittee felt it was improper for Ms. Connelly to have prepared a visual simulation, which the members of her rating panel relied on to come up with their ratings regarding visual effect, from a private amphitheater that is not open to the public.[2]

In fact, the Subcommittee acknowledged during deliberations that both Gregg Lake and Black Pond are public resources. *Deliberation Tr. Day 1 Afternoon Session*, at p. 43 and 91

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[1] *Tr. Day 13/Morning Session*, p. 137; *see also Tr. Day 12/Morning Session*, p. 141 (Discussing Ms. Connelly's simulation from White Birch Point, Ms. Connelly was asked "why was it from a water view? Why didn't you do it from inside the historic district?" Ms. Connelly responded "I was not able to contact the property owners in a timely enough fashion to get access to the land." In response, Ms. Connelly was asked, "In other words, you didn't have a legal right of access…is that right?" To which Ms. Connelly responded, "Correct.")

[2] *Tr. Day 12/Morning Session*, p. 149-50 (Ms. Connelly first agreed with the statement made by Mr. Cleland earlier in the proceeding that the summer camp is private property. Ms. Connelly was then asked "If I go set up my beach chair by the amphitheater, doesn't somebody who owns that property have a right to come and tell me to leave?" Ms. Connelly responded "If you're there without permission, yes."

(noting "as to Black Pond…that does have a public boat launch…so you can go out there without paying a fee" and that the "Public does not have access to White Birch Point. They do have access to the lake."). The Subcommittee deliberated extensively over whether the amphitheater, which is available to the public for a fee, should be considered a scenic resource and ultimately concluded it should not.[3] In contrast to the argument raised by Counsel for the Public, the Subcommittee's concern was not with the assessment of Black Pond and Gregg Lake, but the methodology and vantage points used to evaluate those resources.[4]

Counsel for the Public attempts to resurrect the same arguments regarding these two resources, which were already thoroughly evaluated by the Subcommittee, by asserting that the Rules require photosimulations from private property vantage points. However, the Rules do not require the same assessment of private properties as is required for scenic resources, which by definition are only publicly accessible resources. The development of photosimulations from private property locations is not something the Committee must consider in reaching its ultimate decision.[5] Additionally, this after-the-fact explanation does not accurately reflect the purpose for which these photosimulations were included in Ms. Connelly's report, which was clearly to represent public scenic resources.[6]

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[3] *Deliberation Tr. Day 1 Afternoon Session*, at p. 40-43 (Commissioner Scott noting "that's private property you have to pay somebody to get on. That's kind of the – one of the definitions of 'private property' in my opinion.")

[4] *Deliberation Tr. Day 2 Afternoon Session*, at p. 45 (Mr. Clifford noting that "[s]o while the pond's under consideration, I don't think we ought to be talking about viewpoints from private areas, even those for which you might pay a fee.").

[5] Under the SEC Rules for "Criteria Relative to Findings of Unreasonable Adverse Effect," the Subcommittee is required to consider seven criteria. These criteria are focused on the evaluation of impacts from scenic resources. Site 301.14 (a)(2), (3), (4), (6). None of the criteria require the Committee to evaluate the effects of the project from private property.

[6] Terraink's own Visual Impact Assessment asserts that "it is our practice to include views from the study area that are publicly accessible lands and/or public right-of-ways in order to offer the largest number of potential public viewers with in the study area from sensitive resources." *Terraink Visual Impact Assessment*, at p. 39. Further, White Birch Point is included as a "resource with potential visibility" further demonstrating that its inclusion was intended to depict a scenic resource and not a view from a private property. *Terraink Visual Impact Assessment*, at p. 55.

In addition, the Subcommittee did not "outright dismiss" the resources identified as Counsel for the Public suggests. *Motion*, at ¶4. In fact, despite its status as a private resource, the record illustrates that the Subcommittee did consider the visual simulation taken from White Birch Point.[7]

B. Nature and Duration of Use

Counsel for the Public asserts that the Subcommittee improperly considered the nature and duration of use by characterizing activities as "transient." *Motion* at ¶5. Counsel for the Public does not reference the deliberations at all to support this assertion and relies solely on the language in the final Decision. In fact, the Subcommittee extensively considered the types of uses by the public and did not dismiss so-called transient uses, as suggested in the Motion. *Motion* at ¶5.[8] Dr. Boisvert further noted that the Subcommittee should consider whether individuals would go to a resource and "be very disappointed, and maybe [they] don't go back at all." *Deliberation Tr. Day 2 Afternoon Session*, at p. 49. Given the Subcommittee's extensive review of all of the scenic resources identified, it is unclear what findings Counsel for the Public believes the Subcommittee failed to make.

C. Scope and Scale Assessment

Counsel for the Public's characterization of the Subcommittee's review and conclusions regarding scope and scale do not accurately reflect the deliberations in this docket. Counsel for the Public begins by asserting that the Subcommittee did not directly address the scope and scale

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[7] *Deliberation Tr. Day 1 Afternoon*, at p. 90 (Director Forbes comparing the two visual simulations taken of Gregg Lake notes "when I look at the view from Birch Pond – I mean White Birch Point is so different, I find it striking." Commissioner Scott then clarified "when you say White Birch Point, you're looking at the Terraink picture.").

[8] While Director Forbes initially noted the "transient nature of an individual enjoyment of any of these resources is transient," he further noted that "because of the nature of these resources, it can be year-round. I think we should look at it in the context of duration that is continual. *Deliberation Tr. Day 2 Afternoon Session*, at p. 42-43. Director Forbes, and other members of the Subcommittee, even went so far as to say "I would not agree with the characterization of a 'transient' duration on these, or temporary impact." *Deliberation Tr. Day 2 Afternoon Session*, at p. 43.

of the change in the landscape visible from affected scenic resources. *Motion* at ¶6. However, as Counsel for the Public then goes on to note, the Subcommittee went through each photosimulation one at a time and evaluated whether the change was dominant or prominent, which directly relates to the issue of scope and scale. Counsel for the Public asserts that at five of the resources, the Subcommittee "found issues related to 'dominance' and/or 'prominence." *Motion* at ¶6. Counsel for the Public misses the real issue: the Subcommittee's goal in reviewing each of the photosimulations was to reach a conclusion as to whether the impacts to any scenic resource would be *unreasonably adverse*. Counsel for the Public's assessment that there were "issues" related to dominance and prominence fails to draw a distinction between an impact to a resource as opposed to an unreasonable adverse effect. The Subcommittee's assessment of each of these resources was much more comprehensive and nuanced than the summary provided by Counsel for the Public.[9] The Subcommittee closely examined each simulation while considering all of the factors set out in the SEC Rules in order to evaluate the change in the landscape from those scenic resources.

Before going through each of the photosimulations, the Subcommittee spent significant time discussing other aspects of the region and the resources, as noted above. Taking into consideration all of these factors, the Subcommittee then reviewed both the existing condition photographs and the photosimulations for prominence and dominance in order to reach an ultimate conclusion regarding whether the effect was unreasonably adverse. In so doing they also necessarily evaluated the scope and scale of the change in the landscape visible from the

[9] For example, in reviewing the simulation from Bald Mountain, Ms. Weathersby noted that she saw "the turbines as being a prominent feature in the landscape but not a dominate feature in the landscape...But I don't think it makes it rise to the level of being unreasonable." *Deliberation Tr. Day 1 Afternoon Session*, at p. 81-82. Commissioner Rose expressed a similar view in evaluating the simulation of Gregg Lake noting "the turbines are more prominent in this photo and more dominant than in previous photos. I'm not sure that they rise to the level of undue." *Deliberation Tr. Day 1 Afternoon Session*, at p.94.

affected scenic resources precisely as the Rules require. Counsel for the Public mistakenly relies on the Committee's determination in Antrim I as a comparison to the present docket. However, in Antrim I, the Committee did not have the same defined criteria for evaluation. The Subcommittee's review in this docket reflects a methodical evaluation of each of the criteria required and then an ultimate conclusion based on all of these individual considerations. Just because some members of the Subcommittee may have considered the turbines to be dominant or prominent in a particular photosimulation, does not mean that the totality of considerations rise to the level of an unreasonable adverse effect. In fact, to the contrary. After considering all of the elements required under the Rules and the facts presented, the Subcommittee found that there were no unreasonable adverse effects. This consideration of various requirements is reflected in the deliberations and consistent with the procedure defined in the Rules.

D. Nighttime Lighting

Counsel for the Public again raises the argument that nighttime lighting was not adequately considered by the Subcommittee and that the Applicant's expert failed to assess nighttime lighting. *Motion* at ¶7. This issue was thoroughly evaluated by the Subcommittee and, to the extent there was any issue with the use of the radar activated system, the Subcommittee included a condition requiring the installation of the system. *Decision and Order Granting Application for Certificate of Site and Facility*, at p. 156 (March 17, 2017)(noting that "the ADLS shall be installed prior to the operation of the Project."). During the hearing, Attorney Reimers sought to make a similar assertion that "there is no evidence in the record as to what visual impact this system will have." *Motion*, at ¶77; *see Tr. Day 5/Afternoon Session*, at p. 57-58. As noted during the hearing, however, this is incorrect: Mr. Raphael did evaluate project

lighting.[10] Ms. Von Mertens also raised nearly an identical argument asserting that "there's been no visual analysis, impact analysis of night lights." *Tr. Day 13/Afternoon Session*, at p. 51. The VA contains details regarding which turbines will be lit, the type of light that will be used, and reaches a conclusion based on professional judgement that the use of a radar activated system will essentially eliminate the impact. *LandWorks Visual Assessment*, at p. 37.

Counsel for the Public's own visual expert, Kellie Connelly, shared a similar view regarding mitigation of effect on nighttime lighting if a radar activated system was installed. *See Terraink Visual Impact Assessment*, at p. 10. The Subcommittee considered all of this evidence and concluded that, subject to certain conditions, "[t]he radar activated system will minimize the impact of the Project on aesthetics." *Decision and Order Granting Application for Certificate of Site and Facility*, at p. 121 (March 17, 2017). The Subcommittee noted in its Decision that it received no reports, or scientific evidence that would suggest that the Project's lighting will have unreasonable adverse effects on health. *Id.* at 156.

E. Offsite Conservation Land as Mitigation

Counsel for the Public further asserts that the Subcommittee was "bound by the SEC's decision in Antrim I as to the use of off-site conservation land as mitigation." *Motion* at ¶8. The Subcommittee has heard substantial testimony on this topic and Counsel for the Public raised this issue during the hearing and in post hearing briefing. *Tr. Day 6/Afternoon Session*, at p. 145-148 (Mr. Kenworthy reading the 2012 Decision and noting that "[m]y read of this language is it applies specifically to this case. The 2015 docket is not the same as the 2012 docket."). In addition, Counsel for the Public's expert, Ms. Connelly, submitted pre-filed testimony on the use

[10] *Tr. Day 5/Morning Session*, at p. 59 (Attorney Needleman objecting to a question from Audubon Society alleging a failure to comply with the rules regarding assessment of lighting and noting that "there is a portion in the VIA entitled Project Lighting." Mr. Raphael went on to explain the section noting "I think we addressed the lighting and then we represented the fact that it was expected that the radar assisted lighting system would be employed and that the intent has been to do so all along, and, therefore, that was incorporated into our approach.")

of conservation land as mitigation for aesthetic impact and provided testimony at the final hearing relating to this issue. *Tr. Day 12/Morning Session*, at p. 41.

The Subcommittee expressly addressed this point and noted that they "do not need to be bound by [the prior] decision…it is a different project on a variety of topics…we are a different Subcommittee and we have our own responsibilities. We need to make our own decisions based upon the evidence in front of us." *Deliberations, Tr. Day 1 Afternoon Session*, p. 70. The Motion does not contain any new evidence or information the Subcommittee failed to consider or overlooked. Counsel for the Public's disagreement with the Subcommittee's decision on this matter does not satisfy the criteria necessary to grant a motion for rehearing.

Counsel for the Public's vague argument that the Subcommittee impermissibly permitted the Applicant to submit a visual impact study that was not consistent with the rules is unsupported by the record. While Counsel for the Public does not cite any specific examples, this issue was thoroughly reviewed by the Subcommittee and addressed. Similar claims were raised in a *Joint Motion for Rehearing* filed with the Committee on April 14, 2017, critiquing Mr. Raphael's Visual Assessment. The Applicant filed an Objection to that Motion for Rehearing on April 24, 2017 and herein incorporates by reference the arguments made in connection with the issue raised by Counsel for the Public regarding the Applicant's visual assessment.

Similarly, Counsel for the Public asserts that the Subcommittee "made inconsistent and arbitrary evidentiary rulings that prevented Counsel for the Public's aesthetic expert from rebutting AWE's expert's critique of her report." *Motion* at ¶9. This same argument was raised previously by Counsel for the Public, as noted in the Motion, and thoroughly considered and rejected in the *Order Denying Motion to Reconsider and Re-Open the Record* (December 2,

2016). In addition, this same argument was raised in the *Joint Motion for Rehearing* and the Applicant herein incorporates by reference the response to this argument included in the Applicant's Objection.

The Subcommittee was not prevented from meaningfully weighing and considering Ms. Connelly's testimony because Counsel for the Public had an opportunity to cross-examine Mr. Raphael on the issues raised. Counsel for the Public could have also have sought leave to elicit the same testimony as part of her direct examination of Ms. Connelly (something she chose not to do). Finally, Counsel for the Public was permitted to submit an offer of proof, which outlined the key points she wished to place into the record. Counsel for the Public further asserts that the Subcommittee should have considered the views of Jean Vissering in reaching its conclusion. Ms. Vissering was not a witness who filed testimony and was not subject to cross examination in this docket. Nevertheless, the Subcommittee did in fact give some consideration to Ms. Vissering's views.[11]

The record in this docket illustrates that the Subcommittee performed a thorough review of all the information presented. In contrast to Counsel for the Public's assertion, the Subcommittee did not dismiss any of the reports, testimony, or opinions provided. *Motion* at ¶10. The Subcommittee is entitled to evaluate the evidence presented and give it the weight it feels is appropriate. To the extent Counsel for the Public disagrees with the Subcommittee's assessment of the evidence presented, that does not create sufficient basis for rehearing.

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[11] *Deliberation Tr. Day 1 Morning Session*, at p. 18 (Interestingly, noting that "it was even suggested by Jean Vissering that some mitigation – conservation land as mitigation might be reasonable."); *Deliberation Tr. Day 1 Afternoon Session*, at p. 61-62 (referring to a table in the Terraink Visual Impact Assessment, which included findings from Raphael, Connelly, and Vissering.); *Deliberation Tr. Day 1 Afternoon Session*, at p. 103-104; *Deliberation Tr. Day 1 Afternoon Session*, at p. 136 (Noting that "Ms. Vissering said 9 should be removed, not shortened. So there's obviously some large differences.").

IV. The Motion Fails to Identify Any Issue That Was Overlooked or Mistakenly Conceived by the Subcommittee Regarding the Applicability of Res Judicata and Collateral Estoppel.

As noted by Counsel for the Public, the applicability of the doctrines of collateral estoppel and res judicata have been raised several times in this docket and the Subcommittee has thoroughly evaluated them. None of the arguments presented in the Motion provide sufficient basis to grant a motion for rehearing.

A. Res Judicata

Counsel for the Public first raised the issue of res judicata in the jurisdictional docket. *See Jurisdictional Decision and Order*, Docket No. 2014-05, at p. 34 (Holding that "[n]either the doctrine of collateral estoppel nor res judicata, relate to the issue of jurisdiction in this case...these issues will be determined in the context of that application not as an issue pertaining to jurisdiction."). On November 21, 2016, Counsel for the Public filed her Post-Hearing Memorandum, which contained an argument that the doctrine of res judicata should apply in this case. The Applicant filed its Post Hearing Memorandum on November 30, 2016, and specifically responded to Counsel for the Public's argument regarding res judicata. The Subcommittee considered these positions during deliberations, *see Deliberations, Tr. Day 1 Morning Session*, p. 9 - 17, and concluded that the doctrine did not apply. *Decision and Order Granting Certificate of Site and Facility,* Docket No. 2015-02, p. 49. As noted in the Order, the Subcommittee specifically considered "whether the Project is substantially or materially different from the project proposed in Antrim I (Docket No. 2012-01)." *Decision and Order Granting Certificate of Site and Facility,* Docket No. 2015-02, p. 49. The unanimous decision of the Subcommittee was that the changes made to the application are "so numerous that there had been

a substantial change precluding the application of res judicata and collateral estoppel." *Decision and Order Granting Certificate of Site and Facility,* Docket No. 2015-02, p. 50.

Counsel for the Public states that the Subcommittee improperly applied the applicable law by failing to make an independent finding as to how the changes to the project relate specifically to aesthetic impacts. *Motion* at ¶14. The applicable case law does not require such an assessment.[12] Counsel for the Public's effort to draw a distinction between material change to the entire application versus to impacts on aesthetics, *Motion* at ¶17, is irrelevant. There is no requirement under the applicable law that an administrative body must make a determination that, as a preliminary matter, the material changes made will materially change the impacts on certain criteria. The question for the Subcommittee is whether the application is "materially different." It would be backwards to require the Subcommittee to effectively make a final determination regarding the ultimate impact on aesthetics in order to decide whether or not they should take up a new application.

The Subcommittee heard substantial testimony regarding the changes made to the Application. It was noted several times throughout the proceeding that many of the changes were made in direct response to concerns raised by the Committee in the prior docket.[13] This satisfies the threshold requirement established in *Morgenstern* that the new Application "allegedly addressed [the] concerns." *Morgenstern v. Town of Rye*, 147 N.H. 558, 565 (2002).

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[12] The procedural fact pattern in *Morgenstern* is nearly identical to the present case. In *Morgenstern*, an application for a variance was denied primarily due to concerns the structure would impact wetlands. The Court notes that the ZBA decision did not suggest that the ZBA would never grant a variance for the lot. *Morgenstern v. Town of Rye*, 147 N.H. 558, 566 (2002). In response, the plaintiff submitted a new application "in an effort to meet the town's concerns." *Id.* The Court in *Morgenstern* did not require the ZBA or the lower court to determine, as a preliminary matter, if in fact the new proposal would have no effect on wetlands. Rather, the critical consideration was that the plaintiff submitted a new application that "allegedly addressed these concerns." *Id.* at 565.

[13] *Tr. Day 7/Morning Session*, at p. 120; *Deliberation Tr. Day 1 Afternoon Session*, at p. 134-135 ("Ms. Vissering suggested certain mitigation measures. And by and large, this Application seems to have incorporated those.").

The Subcommittee already considered the effect of the Antrim I decision on the present docket at length. None of the arguments offered by Counsel for the Public are new. The Subcommittee carefully evaluated whether or not the Antrim I decision effectively served as an invitation to file a new application and the Subcommittee concluded that it did.[14] Regardless of this conclusion, and contrary to the assertion made by Counsel for the Public (*Motion* at ¶21), the Subcommittee noted that "even absent the invitation to file a subsequent application, I think that the changes are so numerous that you can't help but find that there has been a change...eliminating the collateral estoppel and res judicata effects." *Deliberation Tr. Day 1 Morning Session*, at p. 16. The fact that Counsel for the Public again disagrees with the conclusion reached by the Subcommittee regarding the applicability of res judicata does not result in an unjust or unlawful decision. Counsel for the Public's arguments were rejected by the Subcommittee after careful review and the current Motion simply serves as a reiteration of effectively the same claims.

In sum, the critical fact for purposes of applying the doctrine of res judicata is whether the same law applies. Counsel for the Public does not deny that the statute and the SEC Rules have changed since the 2012 docket. Therefore, the Motion does not provide sufficient basis to grant rehearing.

B. Collateral Estoppel

The critical issue that Counsel for the Public ignores when raising collateral estoppel, or claim preclusion, (*Motion* at ¶22) is that in order for the doctrine to apply "the issue subject to estoppel must be identical." *Farm Family Mut. Ins. Co. v. Peck, 143 N.H. 603, 605* (1999) (citing *Appeal of Hooker*, 142 N.H. 40, 43-44 (1997)). As explained previously, this Application

[14] *Deliberation Tr. Day 1 Morning Session*, at p. 15, 24 ("I do think I agree with Dr. Boisvert and Mr. Forbes that the prior docket really did invite submission of the new application, calling it 'materially different.'").

is fundamentally new and consequently, the essential predicate for claim preclusion is absent. All of the essential findings are not identical, which, in turn eliminates any collateral estoppel argument.

The substantial modifications made to the proposed Project require the Subcommittee to evaluate the Project in its totality under the newly revised statute and under the Site Evaluation Subcommittee's newly adopted rules and criteria. The fact that Counsel for the Public disagrees with the Subcommittee's determination that this is a new Project (*Motion* at ¶26) does not change the fact that the Subcommittee was presented with significant pre-filed testimony, direct testimony, and additional memoranda addressing this exact issue.

While changes made to the Project may not have changed the importance of scenic resources that were identified in Antrim I, the Motion fails to take into consideration the changes in visibility at the sensitive resources based on the changes made to the proposed Project. The issue is not the value of the resources; the issue is the effect of the revised Project on those resources, and the evidence shows that these effects are dramatically different. This issue is not the same as the one litigated in the prior docket. Moreover, since the last docket, the adoption of new SEC rules, which contain new evaluative criteria, also precludes application of collateral estoppel.[15] While Counsel for the Public suggests that the appropriate remedy would have been for the Applicant to file an appeal of the earlier decision, it is clear that this would not have resolved the issue because significant changes needed to be made to the Project design and overall proposal, not just an increase in conservation land, as noted in the Motion (*Motion* at

[15] The New Hampshire Supreme Court held in *Brandt Dev. Co. v. City of Somersworth*, that "doctrinal changes, taking place in the fifteen-year period between Brandt's applications, create a reasonable possibility — not absolute certainty — of a different outcome." 162 N.H. 553, 560 (2011). While the ultimate outcome may not change, the New Hampshire Supreme Court's holding in *Brandt* suggests, at a minimum, that changes in the law require a reevaluation of an application. Based on the SEC's adoption of new rules alone, the current Application before the Subcommittee must be reviewed de novo.

¶23). A new application was necessary and the Committee invited such an application. *Deliberation Tr. Day 1 Morning Session*, at p. 23-24.

Counsel for the Public further asserts that a review of the language from the prior order does not support a finding that the decision was case-specific. *Motion* at ¶25. This issue was addressed by the Subcommittee during deliberations. Quoting the same language cited by Counsel for the Public, the Subcommittee concluded that the finding from Antrim I was specific to that Application as noted by the use of the phrase "in this case" in the final Antrim I Order. *See Deliberation Tr. Day 1 Morning Session*, p. 20. Ms. Weathersby noted that the use of that phrase demonstrated that "it's not applicable to every single subsequent case." *Id.* This interpretation of the decision is consistent with other SEC orders that have held that the Committee is not bound by any previous decision. Additionally, the Subcommittee further noted that the other key phrase was "suitably mitigate the impact." Ms. Weathersby explained that "when the impact changes, because of reduced turbines, etcetera, that will change it, and also just subsequent cases that the conservation easement as mitigation doesn't necessarily—isn't necessarily barred forever." *Deliberation Tr. Day 1 Morning Session*, at p. 20-21. Again, Counsel for the Public has failed to take into consideration the Subcommittee's broader decision that this is an entirely new project. The mitigation of potential impacts is only one aspect of the overall Project.

V. The Subcommittee Properly Applied its Rules with Respect to Decommissioning and Public Health and Safety and the Motion Fails to Identify Any Issue That Was Overlooked or Mistakenly Conceived by the Subcommittee.

A. Decommissioning

Counsel for the Public reiterates her earlier argument, raised both during the hearings and in her post-hearing memorandum, that the Subcommittee's determination that the Applicant's

decommissioning plan complied with the SEC Rules was unreasonable and unlawful. *Motion* at ¶28. This same argument regarding the treatment of inert, concrete rubble was also raised in Counsel for the Public's post-hearing memorandum.

Mr. Kenworthy testified that the rules do not require benign, concrete rubble to be removed and noted that once it is processed and used for fill, there will be no infrastructure remaining at the site, which is consistent with the rules. *Tr. Day 2/Morning Session*, at p. 63-64. Mr. Cavanaugh provided additional testimony that his company has been "disposing concrete on all of our projects, whether the state projects here in New Hampshire, wind projects that we built that's inert material that's just standard practice in construction." *Tr. Day 2/Afternoon Session*, at p. 17. The Subcommittee noted the "considerable back and forth" on this issue during deliberations. *Deliberations Day 2 Afternoon Session*, at p. 112. After considering the evidence provided and applying the Rules, the Subcommittee determined that reuse of the material as fill was not inconsistent with the Rules and will not cause an unreasonable adverse effect on human health and safety. *Decision and Order Granting Application for Certificate of Site and Facility*, at p. 176 (March 17, 2017).

Counsel for the Public alleges that the Subcommittee decision fails to comply with SEC Rules as well as the DES Solid Waste rules. *Motion* at ¶31. However, Director Forbes, the DES representative on the Committee, noted that "[i]t's fairly common practice to pulverize and leave concrete in a place like that without a permit. *We do not require that, DES.*" *Deliberation Tr. Day 2 Afternoon Session*, at p. 114 (emphasis added). Commissioner Rose then separately referred to the DES Best Management Practices document introduced during the hearing. *Deliberation Tr. Day 2 Afternoon Session*, at p. 115. The Subcommittee's decision was based not only on the DES document, but also on the expertise of Director Forbes. Counsel for the

VI. The Subcommittee was Properly Constituted and the Motion Fails to Identify a Mistake of Law or Fact Sufficient to Support Rehearing.

Counsel for the Public joins the Intervenor Group in their argument that the Subcommittee was not authorized to adjudicate the case because it was statutory required to consist of seven members. *Motion* at ¶40. This argument confuses the requirement for appointment to a Subcommittee with the quorum requirements in the statute. The Subcommittee was properly constituted. RSA 162-H:4-a, II provides as follows:

> When considering the issuance of a certificate or a petition of jurisdiction, a Subcommittee shall have no fewer than 7 members. The 2 public members shall serve on each Subcommittee with the remaining 5 or more members selected by the chairperson from among the state agency members of the state agency members of the Subcommittee. . . . Five members of the Subcommittee shall constitute a quorum for the purpose of conducting the Subcommittee's business.

As is evident from this language, although seven members must be appointed, of whom two must be public members, only five members are required to carry out the duties of the Subcommittee. It would be illogical to require seven members to be present to satisfy a five member quorum requirement. Moreover, the statute includes no requirement that the quorum must specifically include any of the public members.

The Applicant has provided a detailed response to this argument in its Objection to the Joint Motion for Rehearing filed on April 24, 2017. The Applicant herein incorporates by references the arguments previously asserted. Further, to the extent Counsel for the Public asserts that she was "not aware that the public member was on maternity leave until the close of the proceedings," this argument is irrelevant. *Motion* at ¶41. Assuming this is true, Counsel for the Public cannot claim that she was unaware that only six members were present at the first day of hearings and every day thereafter. While Counsel for the Public did not have a right to a Subcommittee of seven members to actually hear the matter (*i.e.* a quorum of seven), absolutely

nothing prevented her from asking for one, or asking whether Ms. Whitaker was available to participate. This was never done.

VII. Conclusion

Based on the foregoing, Counsel for the Public has not met the standard for a rehearing pursuant to RSA 541:3. The record in this docket is extensive and the Subcommittee's deliberations and final Order reflect an intense, thorough review. Counsel for the Public failed to present any issue that the Subcommittee has overlooked or mistakenly conceived. Moreover, the Motion fails to articulate any new evidence that was not before the Subcommittee during the adjudicative hearings. The Motion merely asks that the Subcommittee reach a different conclusion on the same evidence and therefore it should be denied.

WHEREFORE, the Applicants respectfully request that the Subcommittee:

A. Deny the motion for rehearing; and

B. Grant such further relief as requested herein and as deemed appropriate.

Respectfully submitted,

McLANE MIDDLETON,
PROFESSIONAL ASSOCIATION

Dated: April 25, 2017

By: _____

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Public's disagreement with this determination does not in and of itself result in an unreasonable or unlawful decision and does not provide a basis for rehearing.

B. Public Health and Safety

As a preliminary matter, the law cited by Counsel for the Public is inapplicable in this context.[16] In *Barnes* the fact pattern involves a go-kart participation waiver, which is clearly distinct from the situation presented here between a willing property owner and the Applicant. Even if the case were applicable, the New Hampshire Supreme Court in fact held that the exculpatory contract was permissible. 128 N.H. 102, 108 (1986). Further, the Court noted that "parties may bargain for various levels of risk and benefit as they see fit." *Id.* at 106. Moreover, the applicable law for purposes of the SEC decision is RSA 162-H and the SEC Rules. The SEC was required to make findings consistent with the statute and the SEC Rules, which they did.

Counsel for the Public asserts that the Subcommittee's waiver of the noise and shadow flicker requirements for participating landowners was unreasonable and unlawful. *Motion* at ¶34. This same issue was raised several times throughout the adjudicatory hearings. The Subcommittee fully assessed it both in their review of submitted pre-filed testimony as well as during cross examination at the adjudicatory hearing.[17] Further, during the course of the proceeding, Presiding Officer Scott expressly asked "[d]o I understand correctly that [the participating landowners] are waiving health and safety regulations in some respect with regard to shadow flicker and noise?" *Tr. Day 7/Morning Session*, p. 129. In response, Mr. Kenworthy

[16] *Motion* at ¶34-35 (Relying on *Barnes v. N.H. Karting Assn.*, 128 N.H. 102 (1986) to assert that exculpatory contracts in New Hampshire are generally not favored and therefore the agreements negotiated in this case should similarly be considered against public policy.)

[17] *See Tr. Day 2/Morning Session*, at p. 103-105; *see also Tr. Day 4/Morning Session*, p. 130-131; *see als Tr. Day 4/Afternoon Session* (noting that "even for the participating landowners they are below the 40 nighttime limit of the SEC.").

noted that "if we were unable to reach agreements with private landowners that allowed us to do things on their property, then we could never have a wind project." *Id.* at 130.

The Subcommittee also discussed this issue at length during deliberations. *Deliberation Tr. Day 2 Afternoon Session*, at p. 24-38; 43-45. Ultimately, based on the Order and Conditions set out in the Certificate, the Subcommittee interpreted the rules to permit the Subcommittee to grant such a waiver. *See Order and Certificate of Site and Facility with Conditions*, at p. 11 ¶13.1-13.2. After discussion regarding the applicability of the rule to participating property owners, the Subcommittee concluded that landowners should be permitted "to do what they will voluntarily." *Deliberation Tr. Day 2 Afternoon Session*, at p. 44.

This decision is consistent with the Subcommittee's authority under Site 202.15. Simply because the Subcommittee did not use the express words noted in the Motion for a finding that such a waiver would be "in the public interest," does not suggest that such a finding was not properly made, as asserted by Counsel for the Public. *Motion* at ¶38. It is clear from the deliberations that such a condition would be inapplicable in this context because it would limit the ability of a private property owner to use their land as they deem appropriate, which would be contrary to their legal right. The Subcommittee's Decision codifies this determination and expressly states that "to the extent it is necessary, the Subcommittee waives noise and shadow flicker restriction set forth in N.H. Code Admin. Rules, Site 301.14 (f)(2)a and b, as applied to participating landowners." *Decision*, at p. 168-69; *see also Deliberations Tr. Day 3 Afternoon*, p. 65-66. The conditions in the Certificate expressly note that "[a] Participating Landowner or Non-Participating Landowner may waive the noise provisions...by signing a waiver of their rights, or by signing an agreement that contains provisions providing for a waiver of their rights."

Certificate of Service

I hereby certify that on the 25th of April 2017, an original and one copy of the foregoing Objection to Motion for Rehearing were hand-delivered to the New Hampshire Site Evaluation Subcommittee and an electronic copy was served upon the SEC Distribution List.

Barry Needleman

THE STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

Docket No. 2015-02

APPLICATION OF ANTRIM WIND ENERGY, LLC
FOR A CERTIFICATE OF SITE AND FACILITY

JOINT RESPONSE TO ANTRIM WIND ENERGY, LLC'S OBJECTION TO OPPOSING INTERVENOR'S MOTION FOR REHEARING

NOW COME, Janice Longgood, Bruce and Barbara Berwick, and Mark and Brenda Schaefer on behalf of the Abutting Landowners Group, Richard and Loranne Block, Annie Law, Robert Cleland, Jill Fish, and Kenneth Henninger on behalf of the Non-Abutting Landowners Group, Mary Allen on behalf of the Levesque-Allen Group, Geoffrey Jones on behalf of the Stoddard Conservation Commission, and Lisa Linowes on behalf of the Windaction Group, (collectively "the Opposing Intervenors") and hereby file this Response to Antrim Wind Energy, LLC's Objection to the Opposing Intervenors' Motion for Rehearing. In support thereof the Opposing Intervenors state as follows:

I. FACTUAL AND PROCEDURAL BACKGROUND

1. On January 31, 2012, Antrim Wind Energy, LLC (hereinafter "the Applicant") filed an Application for Site and Facility with the Site Evaluation Committee ("the Committee"), seeking authorization to construct ten wind turbines along the ridgeline of Tuttle Hill in the Town of Antrim, New Hampshire (hereinafter "the 2012 Application"), said case having Docket No. 2012-01 (hereinafter "Antrim I").

2. On April 25, 2013, the Committee denied the 2012 Application in a 71 page decision, following 11 days of hearings on the merits and 3 days of deliberations, wherein it that the proposed project would have an adverse aesthetic impact upon the area, including

"significant qualitative impacts upon Willard Pond, Bald Mountain, Goodhue Hill, and Gregg Lake." See Antrim I, Decision and Order Denying Application for Certificate of Site and Facility at *50 (issued April 25, 2013) (hereinafter "Antrim I Decision").

3. On October 2, 2015, the Applicant filed another Application for a Certificate of Site and Facility (hereinafter "the Application"), in which it sought to install nine wind turbines and a meteorology tower along the ridgeline of Tuttle Hill in the Town of Antrim, New Hampshire (hereinafter "the Project").

4. As set forth in the Application, the Applicant seeks to construct nine Siemens SWT-3-2-113 direct drive turbines each with a nameplate generating capacity of 3.2 MW. The turbines would run approximately 2 miles along the ridgeline toward nearby Willard Mountain. Excluding turbine blades, 8 of the turbines would be 92.5 meters tall (303.5 feet) and 1 turbine would be 79.5 meters tall (260.9 feet); including turbine blades, 8 of the turbines would be 488.8 feet tall and turbine 9 would be 446.2 feet tall. The 9 turbines are to be placed on the Tuttle Hill ridgeline, the elevation of which ranges between 1760 feet and 1830 feet, a rise of 610 to 680 feet above the valley floor.

5. On December 1, 2015, the Subcommittee accepted the Application.

6. On March 17, 2017, the Subcommittee granted the Applicant a Certificate of Site and Facility. See Re: Application of Antrim Wind Energy, LLC for a Certificate of Site and Facility, Docket No. 2015-02, Decision and Order Granting Application for Certificate of Site and Facility (dated March 17, 2017) (hereinafter "Antrim II Decision").

7. On April 3, 2017, the Subcommittee suspended the Antrim II Decision in light of a Motion for Rehearing filed by Meteorological Intervenors. See Re: Application of Antrim

Wind Energy, LLC for a Certificate of Site and Facility, Docket No. 2015-02, Order Suspending Decision and Order Granting Certificate of Site and Facility with Conditions (dated April 3, 2017).

8. On April 14, 2017, the Opposing Intervenors filed a Joint Motion for Rehearing, and Counsel for the Public filed a Motion for Rehearing on April 17, 2017.

9. On April 24, 2017, the Applicant filed its Objection to the Opposing Intervenors' Motion for Rehearing, in which it contested the various arguments raised in the Opposing Intervenors' Motion for Rehearing.

10. While the Opposing Intervenors dispute all of the arguments raised by the Applicant in its Objection, the Opposing Intervenors wish to rebut certain arguments raised by the Applicant.

II. DISCUSSION

a. *Make-up of the Subcommittee*

11. The Opposing Intervenors wish to rebut two arguments raised by the Applicant with regard to the Opposing Intervenors' arguments that the Subcommittee acted contrary to RSA 162-H:4-a when proceeded in this matter without a second public members: a) that this argument was waived because it was not waived earlier; and b) that the case of Appeal of Keene State College Education Association, NHEA/NEA, 120 N.H. 32 (1980) permitted the Subcommittee to move forward without a second public member in this matter. See Applicant's Objection to Joint Motion for Rehearing at *7-12.

12. First, with regard to the Applicant's argument that this matter should have been raised earlier, as Counsel for the Public noted in its Motion for Rehearing, the absence of a

public member could not have been known until deliberations. See Motion of Counsel for the Public for Rehearing at *17. Indeed, up and until the close of deliberations, a public member could have reviewed the record and participated in deliberations with the other members of the Subcommittee. It was not until the close of deliberations that the absence of the second public member was realized and the claim of error could have been raised. For that reason, the Opposing Intervenors did not waive this argument.

13. Moreover, the requirement that all subcommittees of the Site Evaluation Committee have two public members is a measure to ensure that the general public's interests are represented on the Subcommittee and thereby protected. The Opposing Intervenors cannot waive a right that exists for the protection of the entire public, and, therefore, the Applicant's arguments regarding waiver lack merit.

14. Additionally, the Applicant's reliance upon Appeal of Keene is unpersuasive and should be rejected by this Subcommittee because the administrative body in that case, the PELRB, is subject to a different statutory and procedural regime than the SEC. The statute at issue in Appeal of Keene was RSA 273-A:5. See id. at 35. That statute provided that the PELRB shall consist of five members, two of which shall represent organized labor, two that represent management interest, and one to represent the public at large, with three members of the Board constituting a quorum. Id.

15. Unlike RSA chapter 162-H, there is no statutory authority for the creation of subcommittees under RSA 273-A, nor is there an analogous provision of RSA 273-A which requires the Chairman of the PELRB to seek to fill vacancies when a public member is absent. Compare RSA 162-H:3 with RSA chapter 273-A; see also Schiavi v. City of Rochester, 152

N.H. 487, 489-90 (2005) (use of the word "shall" in a statutory provision is a command). RSA 162-H:3 was enacted as part of a statutory overhaul of the SEC, a fundamental purpose of which was the protection of the public's interest in matters that can impact the public health, safety, and welfare in a fundamental manner. See RSA 162-H:1. Appeal of Keene, therefore, is distinguishable in this instance, and, contrary to the Applicant's assertiosn, the SEC had an obligation to fill the vacancy which existed on the Subcommittee due to Member Whitaker's unavailability.

16. Lastly, while a quorum of five members may be sufficient for a subcommittee to meet on a particular day, this should not in any way be construed as sanctioning the failure to fill a vacancy when a public member has not attended a single day of hearings or deliberations due to a major life event. It would be one thing for a public member to be absent from one day of proceedings or deliberations, but for a public member to be absent from all hearing days and deliberations (with good reason) and for that vacancy to remain unfilled throughout the proceedings, that is a violation of RSA 162-H:3 and is expressly contrary to intent of the Legislature, see RSA 162-H:1.

b. *Res Judicata and Collateral Estoppel*

17. The Applicant argued with respect to the Opposing Intervenors' res judicata and collateral estoppel arguments are that a) the application was substantially and materially different from the application presented in Antrim I; b) the amendment to RSA chapter 162-H precludes the application of res judicata and collateral estoppel; and c) res judicata was not sufficiently raised early in the proceedings and was, thus, waived. See Applicant's Objection to Joint Motion for Rehearing at *3-7.

18. The Applicant's claims that the present application is substantially and materially different from the application in Antrim I is without merit. While the applicant removed one turbine, reduced other turbines by approximately 3 feet and in one case by approximately 45 feet, and included more money and more conservation land in its mitigation package, these changes are not material such that the application of res judicata should be foreclosed. The SEC was clear in its 2011 decision:

> the dedication of lands to a conservation easement in this case would not suitably mitigate the impact. While additional conserved lands would be of value to wildlife and habitat, they would not mitigate the imposing visual impact that the Facility would have on valuable viewsheds.

See Antrim I Decision at *53 (April 25, 2013). It strains credibility that additional monetary compensation and a 10% increase in conservation land are material or sufficient to offset aesthetic impacts, when the SEC already stated that additional conservation lands would not mitigate the aesthetic impacts in Antrim I. Antrim I Decision at *53. The Applicant has not submitted an application materially different from that presented in Antrim I to preclude the application of res judicata or collateral estoppel in this instance.

19. Moreover, the amendments to RSA 162-H are not sufficient to preclude the application of res judicata or collateral estoppel because the change in the law is not such that it would have altered the SEC's analysis in Antrim I. As reflected in the SEC's decision in Antrim I, the analysis employed by the SEC followed the analysis that is now required by Rule Site 301.14(a). Compare Antrim I Decision at *48-55 with N.H. CODE OF ADMIN. R. Site 301.14(1); see also Monarch Life. Ins. Co. v. Ropes & Gray, 65 F.3d 973, 981 (1st. Cir. 1995) (noting that "changed circumstances will preclude the application of collateral estoppel only if they might have altered the decision the court made in the first proceeding") (emphasis added).

20. Contrary to the Applicant's assertions, the Opposing Intervenors did not waive res judicata or collateral estoppel because Counsel for the Public raised the issue of res judicata in Petitioner for Jurisdiction Over Renewable Energy Facility Proposed by Antrim Wind Energy, LLC, Docket No. 2014-05 (dated Sept. 29, 2015). Counsel for the Public was told that the record would need to be developed prior to the Subcommittee deciding such issue. See Petitioner for Jurisdiction Over Renewable Energy Facility Proposed by Antrim Wind Energy, LLC, Jurisdictional Decision and Order at *38 (decided Sept. 29, 105). Many of the Opposing Intervenors were parties to the jurisdictional docket and were aware of the SEC's position that res judicata would only be addressed after the record was developed. The Opposing Intervenors could not waive res judicata or collateral estoppel if they were under the reasonable impression that the SEC would not consider it until a later time.[1]

c. *Aesthetics*

21. The Applicant addressed three points in its Objection to the Opposing Intervenors' Motion for Rehearing to which the Opposing Intervenors wish to respond with regard to aesthetics. See Applicant's Objection to Joint Motion for Rehearing at *16-25.

22. The Applicant claims that Mr. Raphael relied upon viewshed maps based on blade and hub heights, with and without vegetation. See Applicant's Objection to Joint Motion for Rehearing at *16-18. While it is true that maps reflecting various scenarios appear in the appendices to Mr. Raphael's report, Mr. Raphael's report is clear that he only considered hub

[1] The Applicant is further incorrect that the Opposing Intervenors waited until the "latest possible moment" to raise res judicata and collateral estoppel. For example, the issue features prominently in the Richard and Loranne Block's Final Brief, not to mention the Post Hearing Memorandum of Counsel for the Public.

Notwithstanding, there is no provision in the law which precludes raising res judicata even after deliberations. See Tsiatsios v. Tsiatsios, 140 N.H. 173, 177 (1995)

heights when determining impacted scenic resources and percent of visibility. See Appd'x. 9a to Application at 10. Indeed, when discussing his hub height map, Mr. Raphael stated in his report that the map "represents the most reasonable approach to potential visibility" and further stating that "the number of turbines visible and percent of visibility represented in this analysis are taken from this viewshed map." Id. (emphasis added.) That Mr. Raphael testified in a manner completely contrary to his report, as suggested by the Applicant, is certainly a basis for this Subcommittee to question Mr. Raphael's credibility and the reliability of Mr. Raphael's overall methodology, and further supports granting rehearing on the issue of aesthetics. The Applicant, however, cannot credibly state that Mr. Raphael relied upon blade heights when determining impacted scenic resources.

23. With regard to photosimulations, the Applicant contends that Mr. Raphael's photosimulations complied with Site Rule 301.05(b)(7), citing to Mr. Raphael's own testimony that he believed that he conformed to the SEC's rules. See Applicant's Objection to Joint Motion for Rehearing at *21-22. Aside from the fact that Mr. Raphael's commentary on his own work is self-serving, Mr. Raphael is not responsible for interpreting and applying the SEC's rules, and, therefore, his commentary should have no weight on this matter. Moreover, the comments of members of the Subcommittee regarding Mr. Raphael's photosimulations suggest that the photos were not taken under "clear weather conditions" at times to provide "optimal clarity and contrast" and without objects in the foreground. See e.g. 12/7/16 PM Transcript at 82; 12/7/16 PM Transcript at 92; 12/7/16 PM Transcript at 80; 12/7/16 PM Transcript at 125-26. The photosimulations prepared by Mr. Raphael tainted the adjudicative process, and the

Subcommittee should grant hearing on the issue of aesthetics to properly consider compliant photosimulations.

24. Finally, with regard to the Applicant's reliance upon Mr. Raphael's statements in his report that the radar-assisted lighting system "will essentially eliminate the impacts of nighttime lighting on potential users of the Project area resources," see Applicant's Objection to Joint Motion for Rehearing at *22-25; see also Appd'x 9a of Application at 37, this evidence was insufficient to support the SEC's finding that the Project's lighting will not have unreasonable aesthetic impacts or adversely impact public health. The fact remains that Mr. Raphael's conclusory statements could not be vetted or tested by the Subcommittee or the parties. The Subcommittee had no evidence by which to scrutinize Mr. Raphael's assertion: there was no evidence as to what would trigger the radar assisted lighting, how often it would be triggered, or how often and for how long lights would be anticipated to be illuminated using this system. Without this scrutiny, the Subcommittee's findings lack an evidentiary basis and the Applicant did not carry its burden.[2]

d. *Shadow Flicker and Noise Mitigation*

25. The Applicant argues that the Subcommittee's decision was lawful and reasonable despite the Applicant supplying no evidence or information by which the parties or the Subcommittee could analyze, scrutinize, or vet the feasibility of Noise Reduction Operations ("NRO") or Siemens' shadow control protocol. Indeed, there is no discussion of NRO in Mr. O'Neal's Sound Level Assessment Reports or his pre-filed testimony. See Sound Level

[2] The Applicant suggests that the Opposing Intervenors should have produced evidence challenging Mr. Raphael's assertions. However, considering that only minimal details were disclosed regarding the radar-assisting lighting, it would have been impossible to scrutinize or challenge these assertions. The Applicant had the burden to demonstrate that the project would not have adverse impacts to public health or aesthetics, and the Applicant did not submit sufficient evidence with regard to radar-assisted lighting.

Assessment Report, prepared by Epsolon Assocs. (dated February 17, 2016); Prefiled Direct Testimony of Robert D. O'Neal. Mr. O'Neal only addresses Siemens' shadow control protocols in a general manner, providing no details or corroborating information regarding the protocols and what impacts those protocols may have. See Pre-filed Testimony of Robert O'Neal at 13-14.

26. The Applicant cites to Mr. Weitzner's testimony to support its claims that sufficient information was submitted such that the Subcommittee could reasonable and lawfully find that NRO and shadow control protocols would not impact the Project's financial capabilities or other factors relevant to the Subcommittee's determinations. See Applicant's Objection to Joint Motion for Rehearing at *27, *32. However, Mr. Weitzner's statements are self-serving and are, at best, conclusory. With regard to Shadow Flicker, Mr. Weitzner stated that he did "some analysis" and that the shadow control protocols would "have a very, very, very small effect on capacity factor" without any corroboration or data to support that statement. 9/13/16 AM Transcript at 99-100. This statement is wholly insufficient to allow the Subcommittee to reach any conclusion as to the potential operational and financial impacts associated with the shadow control protocols.[3] Mr. Weitzner's statements with regard to NRO are limited to "[w]e're very confident that we will comfortably meet the SEC requirements for noise." 9/13/16 AM Transcript at 100. This statement did not answer the question and, again, did not provide the Subcommittee with any information sufficient for the Subcommittee to properly analyze the

[3] Further, at the time when Mr, Weitzner made his claims, he was relying on Mr. O'Neal's 2015 shadow flicker report that identified 24 locations as experiencing shadow flicker in excess of 8 hours per year with a total cumulative impact of approximately 60 hours per year. In reality, many more hours of shadow flicker may be experienced that were not considered by Mr. Weitzner's statement. See Antrim II Decision at *164. The Committee took specific note of inaccuracies in the modeling due to a failure to account for various meteorological conditions. See Antrim II Decision at *164.

feasibility of these mitigation measures.[4] On the contrary, Mr. Weitzner's statements appear to suggest that no analysis was done under any scenario where NRO was used.

27. In Antrim I, the SEC acknowledged the impact mitigation measures could play on a Project's financial feasibility, and effectively precluded consideration of mitigation measures raised during the adjudicative hearing due to the need to study the impacts of those mitigation measures on the Project's financial projects. See Antrim I Decision at *54. The Applicant did not provide the requisite level of information for the Subcommittee to study the impacts of these mitigation measures, and the Subcommittee's decision to find no adverse public health and safety impacts based upon these un-vetted mitigation measures was unlawful and unreasonable.

e. *Ice Throw*

28. The Applicant dismisses the Opposing Intervenor's arguments regarding ice throw, citing the testimony of Mr. Stovall. While Mr. Stovall did testify to his understanding of the industry standard, the Opposing Intervenors remind this Subcommittee that Mr. Stovall expressly stated that he is "not an expert on ice throw." See 9/15/16 AM Transcript at 144. The Subcommittee should not give Mr. Stovall's uncorroborated testimony any weight and should reject the Applicant's arguments.

[4] This statement is also erroneous in light of Mr. O'Neal numerous methodological flaws, which drastically understate sound impacts to various properties. The Applicant claims that Mr. O'Neal exercised proper professional judgment in declining to make various adjustments to his analysis, notwithstanding the fact that many industry publications and studies (some of which Mr. O'Neal cites) state that such adjustments should have been done. Further, since the ISO 9613-2 standard for predicting noise is explicitly incorporated into the Committee's rule, the Applicant's argument that Mr. O'Neal's professional judgement takes precedence over the plain language of the standard is contrary to Site 301.18(c)(1). For example, Section 7.3.1 of the ISO 9613-2 standard clearly states that a ground factor other than 0.0 is not supported under the ISO 9613-2 unless the terrain is "approximately flat either horizontally or with a constant slope." The Project site is at elevation and will above surrounding residences.

STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

May 5, 2017 - 9:25 a.m.
Public Utilities Commission
21 South Fruit Street - Suite 10
Concord, New Hampshire

(Delivered via e-mail 5/24/17)

IN RE: SEC DOCKET NO. 2015-02
ANTRIM WIND ENERGY, LLC:
Application of Antrim Wind, Energy, LLC for a Certificate of Site and Facility.
(Joint Motions for Rehearing)

PRESENT FOR SITE EVALUATION SUBCOMMITTEE:

Cmsr. Robert R. Scott (Presiding as Presiding Officer)	Public Utilities Commission
Dr. Richard Boisvert (Designee)	Dept. of Cultural Resources Div. of Historical Resources
John S. Clifford (Designee)	Public Utilities Commission/ Legal Division
Dir. Eugene Forbes (Designee)	Dept. of Environ. Services/ Water Division
Patricia Weathersby	Public Member

Also Present for the SEC:

Michael J. Iacopino, Esq. (Brennan...)
Pamela Monroe, SEC Administrator

COURT REPORTER: SUSAN J. ROBIDAS, NH LCR NO. 44

I N D E X

I N D E X

I N D E X

PROCEEDINGS

PRESIDING OFFICER SCOTT: Good morning, everybody. Welcome. Thank you for coming. And again, this is a public meeting of the Subcommittee for the New Hampshire Site Evaluation Committee specifically regarding the Application of the Antrim Wind Energy for a Certificate of Site and Facility, which is SEC Docket 2015-02. The primary purpose for our meeting today is to discuss pending requests for rehearing. Before turning to the agenda, I'll ask the Subcommittee members to introduce themselves, starting with Mr. Forbes.

DIR. FORBES: Yes, I'm Eugene Forbes, representing the Department of Environmental Services.

MS. WEATHERSBY: Good morning. Patricia Weathersby, public member.

DR. BOISVERT: Good morning. Richard Boisvert, New Hampshire Division of Historical Resources.

MR. CLIFFORD: Good morning. John Clifford, Staff attorney for the New Hampshire Public Utilities Commission.

PRESIDING OFFICER SCOTT: And I'm Bob Scott with the New Hampshire Public Utilities Commission and Presiding Officer for this docket.

I'd like to also introduce our attorney, Mr. Iacopino, and the Administrator for the SEC, which hopefully you all know by now, Attorney Monroe.

So, just for clarity, this may not be as fulfilling for everybody watching us, but this is again another case where we will be deliberating amongst ourselves. So I will not be asking for appearances or taking statements from the audience.

To give a little bit of background since it's been a while since we met -- obviously, most of you are very familiar with the docket. But for the record, and anybody new, I'll give a little bit of the background.

On October 2nd, 2015, Antrim Wind Energy, LLC filed an Application for Certificate of Site and Facility with the Site Evaluation Committee. And again, as

you're aware hopefully, they proposed to site and construct nine wind turbines capable of generating roughly 3.2 megawatts each. The Project is proposed to be located in Antrim, on Tuttle Hill ridge line expanding southwest towards the northern slope of Willard Mountain. The Project has requested to be constructed primarily on the ridge line that starts approximately three quarters of a mile south at Route 9 and runs southwest for approximately 2 miles. The Project is to be located in a rural conservation zoning district on private lands owned by six landowners and leased by Antrim Wind. Antrim sought a Certificate of Site and Facility approving site and construction and operation of the Project.

On October 20th, 2015, pursuant to RSA 162:4, the Chair of the Committee appointed the Subcommittee in this docket.

On November 18th, 2015, the Subcommittee reviewed the Application and determined it was sufficient for the Subcommittee to carry out the purposes of the

statute. Adjudicative hearings were held on September 13, 15, 20, 22, 23rd, 28, 29, October 3rd, 18th, 19th, 20th, and November 1st and 7th of 2016. During the hearings, the Applicants presented testimony through witnesses who were cross-examined by members of the Subcommittee, Counsel for the Public and other related -- excuse me -- and the Intervenors, of course. Counsel for the Public presented testimony of their expert witness and other related exhibits in this docket. The Intervenors and witnesses also presented testimony and were cross-examined. In total, the Subcommittee received 220 exhibits. The Subcommittee also received a number of public comments, oral and written, from interested members of the public.

The Subcommittee also deliberated for three days in December: December 7th, 9th and 13th of 2016. A decision and Order granting the Certificate was finally issued on March 17th, 2017. Following the issuance of the decision and Order, the Subcommittee received Motions for Rehearing and

III. CONCLUSION

29. The Applicant's arguments in its Objection to the Opposing Intervenors' Motion for Rehearing are unpersuasive. The Applicant has relied upon distinguishable cases, self-serving statements, and conclusory assertions, none of which withstand scrutiny. While the Opposing Intervenors' Motion for Rehearing sufficient addresses many of the arguments raised by the Applicant in its Objection, the discussion provided in this Brief Response is submitted to highlight just some of the inaccuracies and flaws in the Applicant's Objection.

30. The Subcommittee should grant the Opposing Intervenor's Motion for Rehearing.

WHEREFORE, the Opposing Intervenors respectfully request that the Subcommittee:

A. Grant this Motion for Rehearing;

B. Schedule this Matter for Rehearing;

C. Deny the Applicant's Application for a Certificate of Site and Facility; and

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

Dated this 2nd day of May, 2017.

Respectfully submitted,

The Abutting Landowners Group, the Non-Abutting Landowners Group, the Levesque-Allen Group, the Stoddard Conservation Commission, and the Windaction Group,

By and through their attorneys,

DONAHUE, TUCKER & CIANDELLA, PLLC

/s/ Eric A. Maher

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Certificate of Service

I hereby certify that I served a copy of this Joint Motion for Rehearing pursuant to Site 202.07 to the current service list in this Docket this 2nd day of May, 2017.

/s/ Eric A. Maher
Eric A. Maher, Esq.

Reconsideration from the meteorologist group of Intervenors, the Joint Group of Abutting resident Intervenors, the Non-Abutting resident Group of Intervenors, the Levesque-Allen Group of Intervenors, the Stoddard Conservation Commission, and the Windaction Group for rehearing. In addition, last, but not least, certainly, Counsel for the Public also filed a Motion for Rehearing and Reconsideration.

It appears that the Motions for Rehearing have been -- both for the Intervenors and Counsel for the Public are substantially similar, so I suggest that we work through, starting with some of the major legal issues that were raised, looking at those two groups first, the Joint Intervenors and Counsel for the Public's Motions for Rehearing and Reconsideration.

So at this point I think what I'd like to do is start again with some of the larger legal issues and then kind of work our way down. I think what we want to do is address the meteorologist group -- Mr. Ward's

here, I see -- at the end. And depending on how we rule, then there's some other administrative things that we need to address.

So, first and foremost -- not foremost, but certainly first, again, some of the larger legal issues. The issue of res judicata was raised again in these motions. And I'm going to broadly summarize. Obviously you've all read the submissions.

So, again, to start on that, I'm going to ask -- and maybe I'll back up a little bit. I'm going to ask our counsel, Attorney Iacopino, to broadly give us the standard by which we would look at the motions generally, what are the standards before we start with the res judicata, but generally what we'd be looking at if we decide to take up these motions.

MR. IACOPINO: Yes, Mr. Chairman. Each of the three Motions for Rehearing are governed by the same standard under RSA 541, and that is that the Movants, the people making the motions to you, must demonstrate that your

decision was unlawful, unjust or unreasonable. In considering these motions, it's incumbent upon the Subcommittee to consider whether or not the motions state good reasoning or good cause to rehear the matter. The Supreme Court has ruled that the purpose of the rehearing process is for the parties to be able to direct your attention to matters which they believe have been overlooked or mistakenly conceived in your original decision and invite reconsideration on this. You are authorized to grant reconsideration if you find that there is good reason or good cause to do so. If you find that there is no good reason or good cause to do so, then the motions should be denied. So that's basically the standard that you are to adhere to when considering these three motions.

PRESIDING OFFICER SCOTT: Thank you for that. So now I'll start with res judicata issues.

The Intervenors and Counsel for the Public have asserted that the Project's materially similar or the same as Antrim 1,

the first project that was heard and denied, in that the physical characteristics of the Project -- any changes were di minimus. And they assert that it's unreasonable to determine that the Project is substantially different simply because the Applicant proposed additional mitigation measures and that those measures did not change the impacts of the aesthetics. Again, I'm just summarizing. I'm not making all the points for all the parties.

Counsel for the Public argues that the Subcommittee failed to identify, again, material changes to the Project and how these changes materially altered the impact of the Project on aesthetics. She claims that the Subcommittee erroneously concluded that the Subcommittee in Antrim 1 invited the submission of an amended Application.

The Intervenors argue that a change to the Committee's rules did not render the Project materially different. So, again, the law and the rules had changed in the meantime, or other rules were created from

the Antrim Project, and therefore, effectively, they were the same.

The Applicant argued that the Intervenors failed to identify any issues of fact or law that we overlooked or misapprehended. They further state that we considered the changes to the Project, while determined that it's not far from the Doctrine of res judicata, and we specifically addressed the differences between Antrim I and the current project. They also -- this is the Applicant -- claim that Counsel for the Public erroneously concluded that the Subcommittee could determine that the Project is substantially different from Antrim I project only after comparison between impacts on aesthetics. So they took issue with that. And they reminded us again that there was a change in law between Antrim I and Antrim II.

So, again, I'm not intending to fully outline, though certainly you can and we can, all the arguments made on this issue. But I guess what I'd like to do is kind of go through these broad issues, stop here for res

judicata, and basically get people's thoughts, to the extent you have any.

And first of all, before I give you my thoughts, does anybody want to talk first? Or I can -- Dr. Boisvert.

DR. BOISVERT: Yes. It happens that I sat on the Antrim I Subcommittee. And we reviewed that in some detail. It happens that I voted in the majority, that the permit should not be approved on the basis of aesthetics. It was brought forward again to us with changes, and I view that the changes that were offered in Antrim II were indeed substantial. This was not the same project. And I'm basing that upon my experience sitting through the first Antrim hearing and then sitting -- and then called to this one, looking at the nature of what was proposed. And in my opinion, it was not the same project.

PRESIDING OFFICER SCOTT: Mr. Forbes.

DIR. FORBES: I would just comment that I don't see any anything in the motions that was new information here. I think that we considered all of the arguments that were

brought to us in the hearing, and I don't see anything here to change that decision.

PRESIDING OFFICER SCOTT: Attorney Clifford.

MR. CLIFFORD: Likewise, I think we painstakingly went through the differences between Antrim I and Antrim II. And we noted, I thought, the significant differences in terms of the number of turbines, the height, the conservation easement. It was a totally different animal we were considering here, in my understanding.

PRESIDING OFFICER SCOTT: I concur. My recollection is we talked about the changes physically to the Project. The law changed; we discussed that. You know, there's a different project owner; we talked about that. Different mitigation. So I feel we've discussed this fairly well on the record and in the transcript.

I'll also note that on the original deliberation to take jurisdiction, we also had very similar conversations also, in that the full Committee voted to take

jurisdiction. They were very similar arguments made on that end.

So let me ask: Does anybody feel there's a reason to reconsider based on this topic?

MS. WEATHERSBY: No.

PRESIDING OFFICER SCOTT: I'm seeing unanimous head nods "No," for the record.

All right. Then I'll move on to collateral estoppel. Again, my intention here is just to broadly outline the issues, not to raise every point that was in the record -- in the motions. Again, I'm kind of grouping the Intervenors and Counsel for the Public together here. Those parties argue that, while determining which scenic resources would be affected by the Project, we should have applied the Doctrine of Collateral Estoppel and analyzed the visual impacts of the Project on scenic resources that were identified in Antrim I. They argue that the same parties are involved in this docket as in Antrim I. The issue for the Project's effect on aesthetics was fully

adjudicated in that final decision on Antrim I 1, and the criteria employed to determine scenic resources in this docket is identical to the criteria for identification of scenic resources in the Antrim I docket. They also argue that we should not have considered placement of land in the conservation easements as a mitigation measure under the Doctrine of Collateral Estoppel because the Subcommittee in Antrim I determined that such placement would not mitigate the Project's effects on aesthetics.

The Applicant argues that the Intervenors reiterate arguments already raised during the adjudicative hearings and did not assert any facts that would warrant rehearing. And they further assert that the Subcommittee was not required to consider the Project's impact on the same scenic resources as identified in the first Antrim Project because the Project and its effects on aesthetics, including impacts on scenic resources, has changed. They also argue that the Committee's adoption of new rules

regarding the definition of "scenic resources" and new criteria for evaluating the effects on aesthetics is an important consideration. As for mitigation measures, they argue that the Committee was not required to find that the placement of conservation land and easements was not -- does not represent an effective mitigation under this doctrine and that we're not bound again by the Antrim I docket specifically.

So let me ask again. A lot of these issues are very similar to what we just discussed. Does anybody wish to offer some comment?

[No verbal response]

PRESIDING OFFICER SCOTT: I guess I will start. I'm sorry, Patty.

I'll note that when I looked at the -- in fact, it was in the Counsel for the Public's -- she pulled a quote out of the original Antrim I Certificate denying -- excuse me -- it wasn't a certificate. It was a denial of certificate. I read it personally a little bit different.

So they talk about the language about the dedication of lands to conserva easements would not suitably impact -- suitably mitigate the aesthatic impact. They say the dedication -- and this is a quote -- "The dedication of lands to a conservation easement in this case" -- so they're talking about that particular docket -- "would not suitably mitigate the impact." My view of the reading of the arguments are that in no case could conservation easements basically be used as mitigation. The language of that order said it would "suitably." So that to me is very specific. You know, whether you believe we were bound by that first order or not, I'm even reading the order itself a little bit different perhaps than the other parties.

Ms. Weatherby, I started talking when you were ready. So you're next.

MS. WEATHERBY: So I thought I'd chime in because I didn't for the other concerning the res judicata.

Concerning collateral estoppel, I

have the same conclusion. I think that we thoroughly considered this issue during our deliberations and that there are different issues in Antrim II due to changes in the rules and changes in the Application. I think the effects of this Project are different than the effects of the Antrim I Project, even if it's basically the same scenic resources that are affected. And I don't think we're bound by a possible decision in Antrim I that we can't use conservation easements as mitigation. I think we had a lengthy discussion about the suitability of that. And given that it's hard to screen -- mitigation for a wind project is different than mitigation for, say a stand-alone generating facility, where you can put up fences and bushes and that type of thing. You have to be able to be a little more creative. I think we had full discussion on that issue and that whatever the decision was in Antrim I concerning conservation easements, we're not bound by that, given the changes in this Application.

PRESIDING OFFICER SCOTT: Dr. Boisvert.

DR. BOISVERT: Again, falling on my previous comment, your interpretation of the wording in the denial is my understanding when I voted in that manner, which is to say, it was not a black-and-white situation; it was a matter of suitability: Was it enough? And in that instance, my opinion on that, which was in the majority it happens, was not that conservation lands weren't as a category suitable, but that particular confirmation was not suitable for that instance.

PRESIDING OFFICER SCOTT: Any other comments?

You know, again I'll note I think we certainly did discuss this rather thoroughly I think in the transcripts. Obviously, reasonable people can disagree with our decision. But as far as meeting the criteria that Attorney Iacopino mentioned, I don't personally see, myself, that the motions hit that threshold. Does anybody feel the need to further explore this issue

or...

[No verbal response]

PRESIDING OFFICER SCOTT: Based on that, we will move to the larger issue. Another legal issue that was raised is did we have an appropriate quorum to legally convene.

The Intervenors and Counsel for the Public argue that, effectively, RSA 162-H requires, which it does, two public members serve on each subcommittee. But I think where we differ perhaps is they also view that the quorum requirement of five -- in this case we had six -- also requires two public members to be required on the Subcommittee.

And then in the rebuttal, of sorts, the Applicant reminds us that the law for the quorum says, "Five members shall constitute a quorum for the purposes of conducting state business," with nothing in the statute requiring public members on that Subcommittee.

So I guess I would ask if anybody has any comments on that. To me, this is

more how do you read the law. I think paraphrasing some of the arguments, I think there's some discussion of the spirit or intent of the law. Anybody have comments on quorum? Attorney Clifford.

MR. CLIFFORD: I just read the briefs and I read the statute -- excuse me -- the rules, and I think that we satisfied the quorum requirement and that we were lawfully a lawful body that acted properly in the scope of our jurisdiction. I didn't see anything to give me any pause otherwise.

PRESIDING OFFICER SCOTT: Another fact that was brought up by the Applicant was when was this issue brought up. So there's also a suggestion that it's late to bring this issue up, and it shouldn't be considered because of that also. So I don't know if that factors into anybody's discussion.

MS. WEATHERSBY: I would just say, regardless of when it was brought up, I think the statute and the rules have certain requirements, and we've met those requirements. You know, would it have been nice to have more

voices? Yes, I always welcome more input and more discussion. But I think that legally we met the requirements of the law in the rule.

PRESIDING OFFICER SCOTT: Any other discussion of this issue? Anybody feel we have reason to reconsider on this basis?

[No verbal response]

PRESIDING OFFICER SCOTT: I'm seeing head nods, so I'll move on.

Another broad topic I'll try to parse out a little bit. There was much discussion over our ability to waive our own rules and how that was or was not done. The Intervenors and Counsel for the Public argue that our decisions were unreasonable because we waived noise and shadow flicker restrictions, particularly as they applied to participating landowners, without making a determination that the waiver was in the public interest and without giving Intervenors the opportunity to address the request for a waiver, as required in SEC Rule 302.15. They make -- they claim the decision was unreasonable because we failed to make

specific findings indicating that the waiver will 'serve the public interest.' So I think some of that is did we use those words in our deliberations and did we appropriately consider them.

They further argue that we should have explicitly provided an opportunity to comment on any waiver request before the Subcommittee.

The Applicant asserts that there's ample evidence in the record where the Intervenors addressed the legitimacy of such waivers, and they argue that there was appropriate and considerable discussion on our end. So I'll -- based on that, again, just so everybody understands, I'm not trying to articulate everyone's argument in fine detail.

Any discussion on that end, on waivers of our rules as they apply to participating landowners?

MS. WEATHERSBY: Sure, I'll chime in. We concluded that the participating landowners can contract away their rights. Just because

we didn't specifically say that allowing them to do so was in the public interest in the context of our discussion doesn't negate the waiver. I think inherent in our decision to grant the certification, where we made a finding that granting a certificate was in the public interest, that that larger finding that the Project as a whole was in the public interest incorporates the issue concerning participating landowners.

PRESIDING OFFICER SCOTT: Mr. Clifford.

MR. CLIFFORD: I would have to agree we made an overall finding that the Application on the whole at the end of the day met the public interest standard. And to do so, I don't think we could have done that without allowing the participating landowners to waive certain rights; otherwise, how would any facility, whether it's wind or other generating facility, ever get built? I just don't see it. So I think we addressed it overall, and that particular issue was subsumed by the overall finding. That's where I come out.

PRESIDING OFFICER SCOTT: So, to paraphrase, we made a general finding of public interest when we issued the Certificate. And I agree with that.

The second part of this is the ability for, in granting a waiver, for the opportunity to comment on the waiver before being granted. Does anybody have any feelings on that?

[No verbal response]

PRESIDING OFFICER SCOTT: Mr. Clifford.

MR. CLIFFORD: Well, I would just say the issue was between the participating landowners and the waiver. So I don't -- I'm not getting the nexus between the discussion about that in the context of the Intervenors having raised the issue to inject themselves into what amounts to be, what seems to be a private contract between the participating landowner and the person looking for the site and facility agreement. I mean, that's the kick starter that gets the Application kind of rolling in the first instance, anyway, is that

a contract between a participating landowner with an entity or a person that wishes to or desires to install a generating facility on that person's property. So I don't see -- I don't see where there really is any standing, for example, for another party to involve themselves in that specific relationship. Now, overall, we have a set of rules that address the site and facility, you know, the Application itself. But as to that point, I don't see the connection.

PRESIDING OFFICER SCOTT: Let me ask you this: Even with your opinion you just expressed, would you agree that -- do you feel that we did hear comment from the Intervenors on this topic?

MR. CLIFFORD: Yeah, I think we did. I don't have any specific recollection. I can't point to the record. But I think all the parties were heard. So I don't see any basis to overturn, at least in my opinion, our decision.

PRESIDING OFFICER SCOTT: Attorney Weatherby.

MS. WEATHERBY: I know our rules require for participating landowners to be -- for all landowners within certain zones, all affected landowners, to be treated the same as far as safety issues. And when we were drafting those rules, I believe I was one of the proponents that argued for that, in that if they wanted to waive their safety, it was still our jurisdiction to make sure that they were not too unsafe. And that said, I was the one -- I certainly voted finding that allowing the participating landowners in this instance to be subject to different standards was appropriate and in the public interest. And I think that it was known early on who the participating landowners were, which properties, and that we had many discussions concerning those properties and how the Project affected them and, of course, how the Project affected others. So I think that everyone, all Intervenors, all parties, had an opportunity to explore the issue concerning the applicability of standards for the participating landowners.

PRESIDING OFFICER SCOTT: Any other

comments? Does anybody feel the need to reconsider our certificate based on this issue?

Seeing head nods again, if that's the case, I'll move on. Again, this is a broad topic, the issue of procedural and fairness.

The Intervenors and Counsel for the Public argue that there were procedural unfairnesses to the prejudice of the Counsel for Public and Intervenors that resulted in a chilling effect on the Intervenors' involvement and their inability to fully develop the factual record. More specifically, there was concern about the requirement to have written prefiled testimony submitted at the same time. They assert that procedure was contrary to the spirit of 541-A, and it was contrary to the Administrative Rules, our Site 202.02, because it benefitted the Applicant and did not allow for admission of relevant evidence.

They further claim that they were not allowed to rehabilitate their witness and conduct friendly cross-examination. And,

again, specifically, Counsel for the Public argued that the Presiding Officer's decision to preclude her from asking additional rebuttal questions for her expert was arbitrary and unwarranted. Both the Intervenors and Counsel for the Public request that we reopen the record and allow the Intervenors to rehabilitate their witness.

The Applicant asserts that the Intervenors failed to identify any error of fact, reasoning or law, and establish that the Committee's decision was unreasonable because it relied on an underdeveloped record. They further assert that the Intervenors were not prejudiced by the requirement to file their supplemental prefiled testimony at the same time as the Applicant because they had the opportunity to address any and all issues raised in the Applicant's testimony during cross-examination of the Applicant's witness.

So, any discussion on this issue?

[No verbal response]

PRESIDING OFFICER SCOTT: Because I will note on the -- obviously, as you'll remember, on the issue of Counsel for the Public's request to provide additional rebuttal questions, I did ask her to provide an offer of proof for the record. My opinion in reading that, pretty much all the issues raised in that offer of proof were in the record. So I guess that would be one question for you to consider, you know, was that effectively an issue.

So, again, anybody have any comments?

MR. CLIFFORD: My recollection of the proceedings was that there was a full and fair opportunity for everyone to cross witnesses. And I don't see -- or didn't feel like anyone didn't get an opportunity to be heard during the proceedings, from my standpoint. I thought it was a fairly fair and robust discussion by all parties, as well as cross-examination. I think I'm comfortable with what we've done.

PRESIDING OFFICER SCOTT: While waiting for somebody else, I'll note also that it's in our rules,too, explicitly, that the

burden of proof is on the Applicant. And that argues effectively for the Applicant, in proving their own burden of proof, basically having the last word.

Any comments on that? Mr. Forbes.

DIR. FORBES: I'll make two points. I agree that everyone had fair and ample opportunity to bring forth whatever arguments they chose to make, and I don't see or hear any new concerns that would be things that we didn't -- or failed to consider. I do think that there's no argument here that in my opinion is cause for a rehearing.

PRESIDING OFFICER SCOTT: Does anybody feel there's cause for reconsideration?

[No verbal response]

PRESIDING OFFICER SCOTT: All right. With that, I'll move on to the broad topic of, again, the effects on aesthetics.

The Intervenors and again Counsel for the Public -- I'm relatively grouping them in these topics -- argue that contrary to our Rule 301.14, while determining the effect of the Project on aesthetics, the

Subcommittee failed to analyze the scope and scale of the changes in the landscape. They assert that the decision was unreasonable because the Subcommittee determined that the Project to some degree will be a dominant and/or prominent feature as viewed from the identified scenic resources and determined that the Project's effects on aesthetics will be reasonable without addressing the Project's scale and scope and without stating why it was determined that they are reasonable. They state that we made a cursory finding only and that we mistakenly concluded that Gregg Lake and Black Pond were private resources.

Counsel for the Public further argued that we underestimated the extent, nature and duration of the public use of identified scenic resources and made no findings that would support the conclusion that considered uses would not result in an adverse impact.

The Applicant asserts that while addressing the impacts of the Project's

aesthetics, we did appropriately consider the existing character of the area, the significance of the scenic resources, public use of resources, day and nighttime visual effects, and the proposed mitigation measures, citing our deliberation transcripts and the three days of deliberations. The Applicant also argued that the Subcommittee considered the scope and scale of the Project when it evaluated each and every photo simulation, assessed the prominence and dominance of the Project in our deliberations.

They further assert that the Subcommittee never determined that the resources were private and that they did not consider the Counsel for the Public's simulations demonstrating the effect of the Project because it found that the photo simulations were prepared from private property and reflected the effect of the property on -- the Project, rather, on the private property.

So, again, I'm not trying to

outline in detail every particular argument. We can do that if you feel the need. That was broad brush the positions of the parties. Any discussion on this issue? Dr. Boisvert.

DR. BOISVERT: I guess I feel obligated to speak to this because I was -- I voted that the Project did have an unreasonable adverse effect on aesthetics. In coming to that conclusion, I will concede that I had to think about it very carefully, and I was on the cusp for some time. I eventually came to the conclusion that it did go over the line. As I stated in my opinion verbally, it was an improvement, but I did not feel it was enough of an improvement to say there was no unreasonable adverse effect. I think embedded in that is my recognition there was improvement. This was not -- my opinion was not held by the others here. I can understand that. I think that the information provided was fair and just. I will admit that a number of the photo simulations presented by the Applicant's consultant did appear to not meet the standards in the regulations.

And I'd like to take this opportunity to comment that for all the other categories that need to be reviewed before this Subcommittee, there is a state agency that looks at it and renders an opinion. It might be Fish & Game, Cultural Resources, Health and Human Services and so forth. However, for aesthetics, there is no state agency that handles aesthetics exclusively. There's a little bit of DOT looking at scenic highways. We have a Council for the Arts, but that's quite different. So we receive this information with no prior vetting, and it's left on our doorstep to judge from the beginning. There is no archeologist or cultural resources manager who has looked at the effects and the identification of historic resources or archeological sites. The Committee would be hard-pressed to come to a knowledgeable conclusion on that without some vetting by that agency -- it happens to be mine.

We're presented with a difficult situation on aesthetics. There is no review.

We look at an application to decide is it complete. Have all the cultural resources been identified? There's no review of the studies on aesthetics to say yes, they did indeed have all the photo simulations done accurately. We have that kind of review in historical resources.

So we're left to make a decision very late in the game. I believe we made good decisions in this and other committees. We have honest differences of opinion, which is why we have more than one person on a subcommittee. It is a judgment made by a group and the majority prevails. But I'd just like to point out this difficulty for the subcommittees. And it puts everyone at risk because there is no pre-vetting. And I guess I'm taking some of your time just to express this frustration having been on the only subcommittee that denied the permit for aesthetics and then having been the only person on this subcommittee who voted to deny it on aesthetics. I have seen this and thought about it, and this is what rises to

the surface. I don't know that there's anything we can do about it. It would take legislation. But it means that we have to make a decision late in the game. And it may be that future subcommittees may look at someone's submission and say it really doesn't meet the standards. You need to go back and start over. That would be a late-in-the-game decision which would have all sorts of repercussions. But it's possible. So those are my thoughts.

PRESIDING OFFICER SCOTT: So we'll put in the record that DES would like to get legislative authority on aesthetics?

DR. BOISVERT: No. No. No. No.

PRESIDING OFFICER SCOTT: Joking aside, based on your statements, again, I think the criteria we needed to see here is do you feel that we've overlooked or mistakenly conceived checkcheck anything on aesthetics in our original decision? I'll press you a little bit.

DR. BOISVERT: I was on the losing side, but I don't think it was unfair.

PRESIDING OFFICER SCOTT: Okay. Any other discussion on this issue? Attorney Clifford.

MR. CLIFFORD: Thanks. I hear what Dr. Boisvert's saying, and I agree. And for better or worse, the rules have laid aesthetics on our doorstep. And as you can see, that is one of the terms that is not defined. So I think that the intent was to leave it up to the Committee to determine whether that standard, that quality aesthetics was met. And in this case, I think we did do a thorough job. And it just happens to be a difference of opinion at the end of the day. But I thought that one of the key things we did do was to painstake -- when the first issue -- the first time that issue came up, I can't remember the exact location of the photo simulation, but the idea was let's go through all of them, all the photo sims filed by both the Applicant -- excuse me -- yeah, the Applicant's visual expert, as well as Counsel for the Public's.

So I thought that, given what we had, we did a pretty thorough review. And I

don't think what we did was unreasonable, in my view. We had a pretty -- we really kind of ran through that pretty well, for better or worse.

PRESIDING OFFICER SCOTT: Attorney Weathersby.

MS. WEATHERSBY: I would agree with what's been said. I think that our examination with aesthetics was comprehensive. In addition to going through all of the photo simulations, we also had site visits. We carefully heard testimony and examined experts about their visual analysis and reports, neither of which I found perfect, by any means. But having the two visual impact assessments and the difference of opinions I think helped us to form our own opinions concerning the impact on aesthetics.

We had good discussions concerning lighting and insisting on the nighttime lighting. We discussed dominant and prominent, and private resources and public resources. And I think that we did a good job analyzing all of that in coming to what I

believe was the correct conclusion that there were no unreasonable adverse impacts. There certainly are adverse impacts. And I think we all acknowledge that. I certainly feel badly about that. But I think that that's not the standard. The standard is are the impacts "unreasonable." And I think that our review and deliberations concerning that issue were thorough and comprehensive and we reached the correct conclusion.

PRESIDING OFFICER SCOTT: Director Forbes.

DIR. FORBES: Yeah, I would agree. I think the fact that there is no state agency that is the authority on this is an important consideration. But it is pointing to the fact that this is a very subjective issue. You know, what we heard here over the course of the hearings was very comprehensive. For me, the standard of, you know, today's deliberation to consider whether or not we need to rehear this issue on aesthetics is founded in whether or not there's something new. I think that the analyses were very comprehensive. They were

thorough. What I've seen in the motions here is just basically disagreement with our decision, not that we forgot or failed to consider a resource that should have been considered or an impact that was not adequately reviewed. It was a very comprehensive review. And I think that the subjective nature of aesthetics is one where there will be disagreement. And I think it is appropriate for a group such as this board to make that decision after hearing all of the arguments. And we heard all those arguments. I would not think there's any cause for rehearing.

PRESIDING OFFICER SCOTT: Anybody else? So, again, the standard is we have to find there would be good reason for a rehearing and/or that we overlooked or mistakenly conceived information in our original decision.

So, maybe head nods again if you don't want to say anything. So it sounds like we're not feeling a need to reconsider based on this issue?

MR. CLIFFORD: Correct.

PRESIDING OFFICER SCOTT: So I'll

take that and move to the next topic.

The next broader issue regards viewshed analysis and the identification of scenic resources. And again a brief summary here.

The Intervenors argue that the Subcommittee's decision is unlawful and unreasonable because it is based on basically a flawed visual assessment. And testimony from the Applicant's expert, Mr. Raphael, they claim he erroneously eliminated a number of scenic resources and take issue with the way he conducted his analysis.

Counsel for the Public concurs with that and asserts that they did not -- the analysis from Mr. Raphael for the Applicant did not comport with the Subcommittee's rules.

The Applicant disagrees, stating that Mr. Raphael testified during the hearing -- in particular, as an example, there was controversy in the motions on the analysis based on hub or blade tip. They suggest that he specifically testified during

the hearings that he did not base his analysis on the hub but rather looked at the whole project and the whole structure.

The Applicant further asserts that the Intervenors merely reiterated the same arguments that they've already raised during the hearings and in their prefiled testimony.

Any discussion on that issue, again, on viewshed analysis, how the analysis was conducted and the identification of scenic resources? A little bit overlap from the last discussion I think. Attorney Weathersby.

MS. WEATHERSBY: Sure. I'll start. I think that our decision that the Project will not have an unreasonable adverse impact on aesthetics was not based solely, by any means, on Dr. Raphael's report or testimony. I think the parties as a whole did an excellent job of presenting this information. And we heard a lot of testimony concerning scenic resources and aesthetics. I think we -- I think Counsel for the Public did a good job of pointing out problems with Dr. Raphael's report, his

classification system, the photo simulations with less than ideal skies and foreground objects. And I think all of that was taken into account when we based our decision -- we made our decision concerning aesthetics.

PRESIDING OFFICER SCOTT: Director Forbes.

DIR. FORBES: I like the way you put it before, that it's a reiteration of the arguments. I feel that's what we've heard in these motions here on this issue.

PRESIDING OFFICER SCOTT: Attorney Clifford.

MR. CLIFFORD: I'd just like to -- I've reread all the briefs again last night, and I come to the same conclusion, that essentially we're -- they're just the same arguments. The motions kind of disagree with the result. But I thought that we did do a complete vetting of the Application on an aesthetics basis and we looked at -- we looked at the record that was put before us, and we did a very thorough job of that. So I'm comfortable with what we did to reach the

conclusion that we reached. I didn't see anything new.

PRESIDING OFFICER SCOTT: Anybody want to discuss this issue further?

[No verbal response]

PRESIDING OFFICER SCOTT: Seeing head nods, we'll move on. Again, these are related issues.

The next broad topic in my mind was viewer effects.

The Intervenors claim that the Project's impact on 10 identified resources was erroneous because it was based on a determination of the number of turbines that would be visible and assumes the Project will have a high impact only on resources from which a number of turbines will be visible. The percent of visibility for the trails in the area is based on the entire footage of the trail rather than a particular view they assert. They failed -- they cite the Applicant failed to consider the existing projects within the viewshed of Pitcher Mountain. The analysis of the extent of view

and the remoteness contradict each other they claim. And they claim the analysis ignored the contributory impact of the scenic views and the role of scenic impacts upon outdoor activities.

And Counsel for the Public, in her brief, further asserted more explicitly that the Applicant's visual assessment again did not comport with the rules.

The Applicant's rebuttal is that each and every critique of the determination of the view affect by Mr. Raphael was addressed and adjudicated, citing the transcripts. They further state that, again, the Intervenors failed to provide any new information or assert any error of law in our evaluation of Mr. Raphael's methodology.

So, again, these are very related topics I think. Anybody have any desire to pick this up, or do we want to say "ditto," I guess? Again, it's an important issue, so I don't want to minimize any of this.

MS. WEATHERSBY: I think it's the same analysis. We didn't accept Mr. Raphael's

analysis whole hog. We heard all kinds of information from dueling experts. And we looked at sites and we looked at photos. We heard the pros and cons and faults of each report, and we came to a conclusion based on our analysis of all of that information. So I think that our decision was the appropriate one and took into account what was there and what was said.

MR. CLIFFORD: I just want to agree. I thought we did a full and fair analysis. We poked both visual experts and probed pretty well. I remember that was a keen area of consideration. So I don't think there's any one thing that jumps out at me that says, oh, you missed that and that gives me pause to say, well, let's reopen the record. I'm comfortable with what was done and how we did it.

PRESIDING OFFICER SCOTT: Anybody else? Director Boisvert.

DR. BOISVERT: A comment. Our ability to look at the aesthetics depended a great deal upon technology, which is to say the ability to accurately pose simulations of the

towers on the landscape and know that they were the right proportion on the horizon line, the right spacing, et cetera, et cetera. It's only possible through some sophisticated software. It's an attempt to bring into this hearing room the experience that can only be fully understood in the future by being there after it's built. Obviously, we can't do that. In that line, the video simulations I thought were a real step forward, and if I were on a Subcommittee in the future for a wind farm, I would be pleased to see good video simulations taking the next step after the photo simulations which are static. Now we're moving up to moving. And I felt that gave me a much better understanding. I have seen wind farms that are already constructed and I can see the blades turning and so forth and that is quite different than simulations that I saw before they were built. Not worse, not better, but different because they were animated. I would look forward to seeing that kind of information being presented to the subcommittees in the future, and then, of course, maybe subject to

revisions in the rules or standards and so forth. But I think that was a positive step. I think that we need to have some good quality control.

Having said all that, we did go through a photograph-by-photograph assessment of each one. We looked at it. And in a certain sense, we're all qualified to judge aesthetics. That is the human condition. And I think we did a good job. It wasn't a slam dunk. We had to think about it. Thank you.

PRESIDING OFFICER SCOTT: And I'll just note that at least my opinion on the issue of the video you were discussing for the future, even that, of course, at least in this case, I didn't find perfect. We had moving blades, if I remember, but not moving water and not moving trees. So I think if, as you say, if we're going to change the rules in the future, just like everything else, we need to provide some guidance as to what we want to see.

MS. WEATHERSBY: Virtual reality

headsets.

PRESIDING OFFICER SCOTT: Any other discussion on this issue? Sounds like it's -- my sense of the Committee is that there's no desire to reconsider based on that.

Now about -- and Director Boisvert, you kind of went there already, the photo simulations themselves. We have in the motions that there's cause for reconsideration because the photo simulations were not prepared under clear weather conditions, at a time of day that provides optimal clarity and contrast and did not avoid all utility poles, fences, walls, shrubs, sailboats, and were taken, some of them, during cloudy and hazy conditions. So that was the assertion. And therefore, the assertion is they don't comport with our rules.

The Applicant asserted to the contrary, that they did indeed meet our rule requirements and the intent.

Any discussion on the photo simulations themselves?

[No verbal response]

PRESIDING OFFICER SCOTT: I guess I would echo Dr. Boisvert. I don't think any of them were, you know, perfection. I think, you know -- but there's a lot of subjectivity in all this issue, I think. Any discussion?

MR. CLIFFORD: Sure. I don't know if they were perfect. But then, again, the rule isn't perfect either. I mean, it was clear. I don't know how clear "clear" needs to be. But we could see the turbines. In my view, we could see them in conditions that we would probably find if we went out there on that particular day. If we wanted to see them in different conditions, then I think the rules should so state, that we would, for example, have them provided on a cloudy day, a bright sunny day, a clear day. But what we got was fairly representative of what we would have seen. And I think they met the requirements of the rule, in my opinion, and I don't see a need to reopen.

PRESIDING OFFICER SCOTT: I do think it's important that we remind ourselves that,

yes, we looked at Mr. Raphael's photo simulations. But we also looked at Counsel for the Public's expert's photo simulations also. So I would argue it's not like we were -- I'm not saying I agree with the statement. But it's not like we were only looking at "one side of the coin," if you will, on this issue.

Any other discussion?

MS. WEATHERSBY: Just that it was pointed out during testimony that the problems that different parties found with those pictures -- so we heard, you know, discussion of why is the mast in the picture, why is the sky cloudy, why aren't you showing the hub? You know, we heard discussion concerning all the perceived faults with those photos and took that into account in our analysis.

PRESIDING OFFICER SCOTT: Any other discussion on photo simulations?

[No verbal response]

PRESIDING OFFICER SCOTT: Seeing head nods, people would like to move on I'm hearing.

Another larger issue was mitigation. The assertion from Counsel for

the Public and Intervenors again is that the mitigation measures will not mitigate the Project's effects on aesthetics. And they cite that Rule 301.14 requires us to consider the effectiveness of the measures proposed by the Applicant to "avoid, minimize or mitigate unreasonable and adverse effects on aesthetics." They claim that the payments to the town and the easements as part of the mitigation package will not mitigate the effect of the Project on aesthetics. They further claim that the radar-detection lighting system, the fact that -- claims that that would mitigate aesthetics were unfounded.

The Applicant argues this was extensively discussed and litigated and that it was -- we spent a fair amount of time discussing this issue. So they take issue with those assertions. And the Applicant further suggests that there's no new evidence here that we haven't already considered and evaluated.

So, any discussion on mitigation?

Anybody?

[No verbal response]

PRESIDING OFFICER SCOTT: I guess I'll start. I think mitigation is somewhat like aesthetics. It's related. It's all in the eye of the beholder I think. That's one of the issues we're seeing here, I think. Attorney Clifford.

MR. CLIFFORD: Well, I just wanted to -- I think as a threshold matter, we first found that there were no unreasonable adverse effects. We talked about would the wind farm have an effect. Yes, it would, and is it unreasonable, which was our charge under the rules. And then after finding that, we then looked at the mitigation package, you know, separately. And that satisfied our concerns that these effects were taken into account through different forms of mitigation: The payments, for example, to the town; the additional conservation areas; the conservation areas themselves. So I think when you look at it as a whole, it seemed to me there was nothing -- they aren't, in my mind, a reason to

reopen and rehear. I think all those factors were considered by us.

PRESIDING OFFICER SCOTT: Any discussion on mitigation?

[No verbal response]

PRESIDING OFFICER SCOTT: Hearing none, I'll take that as nobody wants to reconsider based on mitigation.

Another broader topic raised was decommissioning. The Intervenors and Counsel for the Public argue that our Rule SHC 301.08 requires the Applicant's Decommissioning Plan demonstrated that all underground infrastructure at a depth less than 4 feet below grade will be removed. They refer to our discussion about Department of Environment Services rules, and they assert that we've acted contrary to the clear language of our rule and committed a mistake of law.

The Applicant argues that we -- that our decision was fully supported in the record, and we did receive evidence from the Department of Environmental Services that

were consistent with their requirements and with our own rules.

So, any discussion on decommissioning? Again, this is about the 4 feet, whether we allow the unearthed concrete to be broken up, and does that meet our rule.

DIR. FORBES: Speaking for the Department of Environmental Services, I will say this is a standard procedure for us to allow that type of burial of inner concrete. As far as whether that approval is unlawful, I'll leave that to the lawyers to decide. But I do feel it was considered and certainly taken into account. Whether it's considered a waiver of the language of the rule or not, it's certainly, I think, something that is indisputably an area that we did consider and gave thoughtful time to that issue.

PRESIDING OFFICER SCOTT: Any other discussion? Attorney Weatherasby.

MS. WEATHERSBY: I think they complied with the rule. I think they are proposing to remove all underground

infrastructure at a depth of less than 4 feet below grade. They take the concrete out. It's gone. They pulverize it and put it back in. At that point it's not infrastructure; it's clean fill. And I don't think that -- so I think by leaving the pulverized concrete in the trench that that satisfies the rule.

MR. CLIFFORD: Again, we had a pretty thorough discussion on this. I think they're in compliance with the rule. When it's taken out and pulverized down below, and even -- in my opinion, if there were something left below 4 feet -- talking about the concrete footings, I suppose -- I don't know if that any longer meets the definition of "infrastructure." So I think we talked about this. They complied with the rules. I don't see anything to be gained by reopening to discuss this issue any further. We had a fair and robust conversation about what was happening, what the rule meant.

PRESIDING OFFICER SCOTT: Any other discussion on this issue?

[No verbal response]

PRESIDING OFFICER SCOTT: Seeing

none, I'd like to move on to public health and safety, particularly noise.

The Intervenors asserted that we erred because our decision was based on unreliable sound assessments that did not model worst-case scenarios for noise that will be associated with the Project, and that we erred by accepting Mr. O'Neal's ground factor of .5, and that his analysis was flawed, in that it failed to include the tolerance required by ISO 9613-2 model for the variability of sound propagation as atmospheric conditions change at the Project site. And further as to noise, they assert that we failed to consider the Project's noise will be above 40 dBA at the hunting cabin that the Site Committee erroneously, in their words, found to be dilapidated.

The Applicant's response to that is that Mr. O'Neal provided extensive testimony regarding the reasoning for using the .5 ground factor and the decision not to include tolerance to the ISA [sic] model.

So, any discussion on noise as it

relates to Mr. O'Neal's testimony and where it should be impacted? Director Forbes.

DIR. FORBES: Yeah, I would say with respect to any kind of model, and particularly in this noise model, there are going to be variables that need to be estimated based on professional judgment. The experts can agree or disagree on what the assumptions might be that go into a model. But I think, you know, the rules require this particular model to be used and allow for, I think, the professional judgment of those who put the model together. And I think that in this case, the arguments or flaws in the model were not compelling to us. We talked about them a lot. We heard the arguments on both sides about these various variables that enter the model. We also heard testimony about historical accuracy of some of the modeling that had been done by the Applicant's expert and whether or not they were accurate. And I found it compelling to vote the way we did. And I think that, again, disagreements over any individual part of that model was overwhelmed by the arguments that

supported the professional judgment of those doing the modeling.

PRESIDING OFFICER SCOTT: Anybody else?

[No verbal response]

PRESIDING OFFICER SCOTT: I have a similar sense. And I'll get to Ms. Weathersby next. You know, I agree that reasonable people would disagree. But I think these issues were pretty well discussed. And you know, when we're done with the Intervenors and Counsel for the Public, we'll talk about Mr. Ward's motion also.

But, you know, I feel we certainly -- all of us were very aware of what the G Factor is, for instance, and the pros and cons of what should and how it should be used. So I feel -- I feel -- that we very well vetted this. So it's not that we certainly, in my opinion, that we didn't consider this. To me, it seems more of you didn't consider it in the way I would like you to consider it, in my opinion.

So, Attorney Weathersby.

MS. WEATHERSBY: I'd simply concur with what's been said. The only thing I have to add is that we also heard testimony that if the modeling, which I consider rather conservative, if it proved to be inaccurate under certain conditions, the technology was available to curtail the noise and that they would comply with the sound assessment -- sound-level requirements.

PRESIDING OFFICER SCOTT: And I think that's a good point. There was a lot of discussion in the motions about the noise-reduction technology also. And we certainly vetted that I think also. We had discussions in our deliberations.

Attorney Clifford.

MR. CLIFFORD: I was just going to say we spent a lot of time on this and we heard two experts. We asked a lot of questions. We heard a lot of questions and answers by the parties in this proceeding. And I think at the end of the day I felt that they were in compliance with the rule. And as Ms. Weathersby just noted, there is this additional

sort of level of comfort that the sound level can be -- that there's some adjustment factor built into this particular model of turbine. So that gave me at least a little bit more comfort that they were in compliance, and that if there was a question about that, there's still room for further adjustment down the road. So I thought of it as it was also a backstop kind of built into this thing, too, which gave me more comfort than just saying, well, here is the sound assessment. We can't do anything about it if we're wrong, other than not use them, for example, you know, turn them off. So that gave me some comfort. And I don't think there's anything here again that warrants reopening anything that we should rehear in this matter, I think. That's my opinion.

PRESIDING OFFICER SCOTT: Director Forbes.

DIR. FORBES: I'm glad you brought up the idea of solving the problem. But I would also remind the Committee that we heard testimony about how the Applicant and the Town

might address complaints. And I think that not only is there a solution to excessive noise, I think there's mechanisms in place to hear concerns and to bring them forth so that those solutions are, you know, taken action on. So I was very comfortable with the final decision in this area.

PRESIDING OFFICER SCOTT: Again, any other discussion?

[No verbal response]

PRESIDING OFFICER SCOTT: All right. I'm going to -- I see the sense of the Committee here is we move on.

The next issue I'd like us to discuss is shadow flicker. Obviously, we heard significant testimony on this issue.

The assertion is that we erred, in that the analysis did not consider the effect of shadow flicker outside one mile from the zone of impact, and they asserted that our Rule 301:08 requires that. They further cite that we've erred in determining that the Applicant will be able to control shadow flicker within our required standards because

the controls being proposed were not tested in the United States.

The Applicant asserts that the rules don't require an analysis beyond one mile, and they again assert that these issues were raised and considered during the adjudicative hearings and that we've already -- basically, there's nothing new here, to paraphrase.

Is there any discussion on this issue of shadow flicker? And again, obviously Dr. Ward has a motion on shadow flicker. Shadow flicker is also addressed in his motion, but we'll talk about that separately. Anybody?

MS. WEATHERSBY: All right. I think, like noise, this issue was thoroughly investigated with expert testimony questioning. And I think our decision was correct concerning the flicker. I think, like noise, there was also technology in place where you could -- I think it was the SCADA system that they could adjust the amount of flicker and reduce the amount of flicker.

Concerning the one mile, it would have been nice to have information as to whether there was any flicker on properties beyond one mile. But I don't think the rule required that, and I think to have a rehearing on that issue would be inappropriate.

PRESIDING OFFICER SCOTT: Attorney Clifford.

MR. CLIFFORD: Again, like Ms. Weatherseby noted, like noise, we addressed the shadow flicker issue thoroughly. I think we vetted it and met the requirement under the rules. And again, as with the noise situation, there's again also the benefit of that system, that SCADA system in place that could curtail the shadow flicker. So I think we acknowledged there will be shadow flicker. And the requirement was what do you do if it's over eight hours. And they had a plan and a program that is going to, I think, at least they presented evidence as such, is going to solve that. And we shall see.

PRESIDING OFFICER SCOTT: I'd like to

note for shadow flicker and noise that we're not waiving anything in our rules for non-participating members. Our rules have maximums, and I think it's understood that we expect the Applicant to meet those. So we're not -- you know, that's the expectation. So it's a matter of how the analysis is done, what you believe out of that, I suppose. But I take some comfort that we do have hard and fast rules, and I did at the time when we made the decision.

MR. CLIFFORD: I just wanted to say, yeah, nothing in our discussions were -- or I, think, the opinion as a whole represents any waiver of the rule. They're still required to comply with our rules. And what we've done is analyzed and taken that framework when we reviewed the Application. And we think they will be -- compliance has been met or will be met.

PRESIDING OFFICER SCOTT: Any other discussion?

[No verbal response]

PRESIDING OFFICER SCOTT: All right.

Let's move on to ice throw.

Again, there's an assertion in the motion that we incorrectly considered the issues regarding the distance of ice throw and failed to consider evidence presented by the Intervenors. And in particular, there was some discussion in the motions regarding how many feet away and the veracity that ice throws are realistic at and the veracity of the statements made and our consideration of them.

The Applicant argues that the motion failed to identify any errors of fact or reasoning of law and are simply just, again, a disagreement with our decision.

So, any discussion on ice throws? Attorney Clifford.

MR. CLIFFORD: I'll volunteer. I think this was discussed and vetted. I don't think there's anything new here to warrant reopening. I thought that we thoroughly discussed the issue and found that it -- we weren't concerned -- we didn't have any concerns in this particular area.

PRESIDING OFFICER SCOTT: Any other discussion on ice throw? Attorney Weathersby.

MS. WEATHERSBY: I would concur. I think we had a thorough discussion concerning ice throw and blade shear and tower collapse. You know, all those issues we thoroughly investigated and found that the standards in the -- that the standards would be met.

PRESIDING OFFICER SCOTT: I concur. And I see the sense of the Committee is that we'll move on to the next issue.

On the larger topic of effect on natural environment, the motions also contained concerns raised about the impact of the Project on large animals, particularly bears and bobcats.

The Applicant again suggests that there's no new arguments here and that we've already considered this.

Any discussion on this issue? Attorney Clifford.

MR. CLIFFORD: This was discussed. I mean, I'm comfortable with what we reviewed and analyzed in connection with impacts on

wildlife. And for lack of a better term, we did "poke the bear" on this one. We specifically talked about them. And I recall that. We've also talked about the impact on humans, which are the other, you know, forms of life here. And I'm comfortable with where -- with what we did, and I see no reason to reopen based on this particular area. I didn't see anything new that has been brought to our attention now that gives me a good reason to reopen.

PRESIDING OFFICER SCOTT: Dr. Boisvert.

DR. BOISVERT: I'd just like to comment that out of all the objections, this one seems to me to be the one that they didn't like our finding and didn't bring forward any new evidence aside from "you're wrong." I would have expected more support for this. It seems to me a shotgun approach on this one.

It was reviewed. The information was provided. We made our decision. And it's just a matter of no new information or please change your mind. I don't see that

there's any reason to do that.

PRESIDING OFFICER SCOTT: Attorney Weathersby.

MS. WEATHERSBY: I would also just point out that the report from Fish & Game had no issues concerning bears or bobcats. And I think that this Committee tried very hard -- we did address bears, denning sites, et cetera, and we worked very hard to help preserve the boulders. So I think we thoroughly looked at the issue.

PRESIDING OFFICER SCOTT: Attorney Clifford.

MR. CLIFFORD: Just my recollection is that we actually addressed one of the issues was the initial site off the road had laydown mats and there was a monitoring plan put in place. I can't recall exactly right now what animal it was. But there was some level of monitoring that was supposed to occur at the initial site where you're going to -- at the staging area.

So I didn't see anything new here at all. I agree with Dr. Boisvert. It just

seemed like a scatter shot approach on this one.

PRESIDING OFFICER SCOTT: Any other discussion?

[No verbal response]

PRESIDING OFFICER SCOTT: Okay. Now I'll bring us to the large topic, overarching topic of orderly development of the region, particularly regarding the views of the municipalities. And again, I'm paraphrasing. So I apologize.

The assertion is that we failed to consider the proposed land use, that it's contrary to the priorities expressed in the master plan for the town. It's not permitted in the Rural Conservation Zone under the zoning ordinance of the town, and the people of Antrim indicated their opposition to the Project by voting against an amendment to the ordinance that would allow construction and operation of the Project.

My recollection also is there was some discussion that we didn't consider other municipalities in the broader region, their

views.

The Applicant asserts that we have done this and cites the deliberations and the transcripts of our deliberations, and that we did specifically receive testimony that specifically addressed the impact of the Project on the surrounding communities and the ConVal School District which was brought up.

Any discussion on our taking up of the views of municipalities?

MS. WEATHERSBY: I'll take this one because I think I led off this discussion.

I think we heard extensive testimony, read numerous documents and during our deliberations thoroughly vetted what we could determine were the views of the people of Antrim and of those in the surrounding communities. We considered all of the testimony and the evidence in a comprehensive manner. There was conflicting information that was from the various proposed ordinances, votes, polls, postcards, et ceteras. And I think this board did a good

job trying to ascertain what the voters of Antrim wanted. And my personal conclusion was that the town of Antrim was split and there was no clear direction being offered by them. I think we also considered the views of neighboring communities, particularly Stoddard. I think there was a letter from Deering. We talked about tax implications with regard to school districts. So I think that our analysis of this was comprehensive and there's certainly not a reason to have a rehearing.

PRESIDING OFFICER SCOTT: Any other discussion? Dr. Boisvert.

DR. BOISVERT: My observation is that there were so many moving targets, so many variables to be considered comparing property values, that it was very difficult to identify where there would be an unreasonable adverse effect for any individual. I came away with the interpretation that with the public there would be some, but it would not be possible to identify given the available resources that we have. Consequently, I couldn't be opposed to

issuing the permit on that basis. At the same time, I think there may be better ways to look at this issue. I am not a real estate expert, but it seemed to me there are some ways to better study it. I have some concerns about looking at the issues in terms of a large sampling which would then dampen down the affects on the individual property. But my --

PRESIDING OFFICER SCOTT: To interrupt, we're talking about the views of municipalities right now; right?

DR. BOISVERT: Oh, I thought we were on real estate values.

PRESIDING OFFICER SCOTT: I'll get to that.

DR. BOISVERT: Oh, my apologies.

PRESIDING OFFICER SCOTT: That's an important discussion.

DR. BOISVERT: I'm sorry. I turned the page too quickly.

PRESIDING OFFICER SCOTT: Any other discussion?

[No verbal response]

PRESIDING OFFICER SCOTT: I will say

that obviously we've had some dissenting views clearly in the testimony. I don't think it's contested that the Board of Selectmen for the Town of Antrim support the Project. I think that's uncontested, as far as that they're here in the room. Obviously, people can disagree that that represents the will of the whole town, and that's another discussion.

So, any other discussion on this issue before we move on to -- Director Boisvert would really like to talk about real estate values.

DR. BOISVERT: My apologies. I was confused.

So let's just take my previous statement and apply it here. I think that there is an issue at hand. I do not see that we have the ability to identify it properly. Consequently, I would not -- I would say that we addressed this as best we could. We could not find other solutions. We were thorough in looking at it. And it is a very, very complex problem, and I think we did our very best to consider it fairly, and I think we

can stand by our decision.

PRESIDING OFFICER SCOTT: So, to frame the property, real estate value issue a little bit, I think there's a disagreement between the Intervenors and Counsel for the Public and the Applicant over "here's my opinion on the standards." So, you know, we've ruled that it will have an unreasonable adverse affect on property values generally. I think some are taking the fact that we discussed that there could be "an effect on some properties" as being contrary to that. So I'm not viewing the two as incompatible. We were trying to make a broad statement under the law that there's no unreasonable impact. "Unreasonable," in my opinion, doesn't mean there's no impact. But, you know, I think that's a good discussion to be having now also, you know, 'cause did we err in that I think is really the crux of the issue here.

Director Forbes.

DIR. FORBES: Yeah, I think relating to that, of course, is our long discussions about property guarantees, valuation

guarantees. And I think we all did agree that there could be some impact on real estate values and a guaranty might, you know, have some merit. We thoroughly discussed that and how we may or may not be able to accomplish a real estate guaranty. And we concluded it was impractical, as I recall, for various reasons expressed at the time.

The motions in front of us I think fail to really explain why that was an error, but did point to that as an error in our judgment, that we should have, you know, applied some kind of guaranty. I just didn't see any argument of law here or a rational discussion as to why that would be required. We did consider it, and I think that we fell on the right side of that decision. But I'm sure that concern of reduced property values is out there for those property owners.

PRESIDING OFFICER SCOTT: Any other discussion on real estate value?

[No verbal response]

PRESIDING OFFICER SCOTT: Seeing none, another issue that was brought up in the

context of mitigation, potential mitigation, you know, technical mitigation for shadow and noise flicker was an impact on, potential impact on financial capability.

So the assertion is that we erred because we failed to consider the effect of the implementation of those issues on the required generation of cash flow for the operation.

The Applicant responded by pointing to their witness, Mr. Weimer, and his testimony that stated that that would not be an issue. And further, again, they say -- the Applicant asserts that there's no legal or factual issue that would warrant rehearing in this docket.

Any discussion on that issue? So this would be the impacts of the ERO, or the shadow flicker technology.

Attorney Clifford.

MR. CLIFFORD: I recall that we asked that question, and I think it was answered. Did we do our job? Yes. And I don't know what would be gained to reopen. They've stated that

they could comply and still have their financial capability. I didn't hear any -- they were challenged on it. But I don't see anything new to offer a good reason here. I just I don't see it, but others may disagree.

PRESIDING OFFICER SCOTT: Any opinions, comments? Is there a sense that we should reconsider based on this issue?

[No verbal response]

PRESIDING OFFICER SCOTT: Seeing none, okay. I believe that covers the -- hold on a second.

(Discussion between Presiding Officer Scott and Attorney Iacopino)

PRESIDING OFFICER SCOTT: In an attempt to be thorough, our counsel reminds me that I didn't cover Counsel for the Public brought up the issue of our consideration of Ms. Vissering's testimony and whether we can properly consider that or not. She was not a witness in this proceeding and did not file testimony, as the Applicant reminds us. But nevertheless, we did consider some of her statements in our -- in the testimony and in

our discussions.

Anybody want to talk about that a little bit?

[No verbal response]

PRESIDING OFFICER SCOTT: I know I'm going to need a nature break soon. I'm sure Sue needs a break.

MS. WEATHERSBY: So, Ms. Vissering wasn't a witness in this Antrim II, we'll call it. But that said, we heard a lot about her conclusions and findings in the previous docket, particularly with regard to mitigation measures and how many of them were incorporated into Antrim II. So I think that, you know, we did, to the extent she wasn't here and we didn't have a full analysis of her report, I think we did incorporate some of her thought process into our analysis.

PRESIDING OFFICER SCOTT: Dr. Boisvert wants to speak, I can tell.

DR. BOISVERT: No.

PRESIDING OFFICER SCOTT: Attorney Iacopino, is there anything that we're not covering that you can think of on the Counsel

for the Public's or the Intervenors' statements that we should probably address?

MR. IACOPINO: I think you've addressed approximately 18 different claims of error, and I think you've got them all. But if you are going to take a break --

MR. WARD: Can't hear you, Mike.

MR. IACOPINO: Mr. Chairman, if you are going to take a break, I will look through the motions over the break and make sure.

PRESIDING OFFICER SCOTT: Okay, We'll take a five-minute break. And we'll attempt to do five minutes and be back. Thank you.

(Whereupon a recess was taken at 11:07 a.m., and the hearing resumed at 11:31 a.m.)

PRESIDING OFFICER SCOTT: Back on the record. We will next entertain the Motion for Rehearing for the meteorologist group of Intervenors. What I will attempt to do is somewhat group the motions -- the issues raised in that motion. And again, we've all read it, so -- particularly for Dr. Ward, hopefully you

understand I'm not reiterating your whole motion. I'm trying to paraphase.

So, again, the meteorologist group suggests that the Committee failed to consider the validity of meteorological evidence relevent --

MR. WARD: Relevant.

PRESIDING OFFICER SCOTT: Thank you. I appreciate that.

MR. WARD: No charge.

PRESIDING OFFICER SCOTT: -- relevant to the assessment of shadow flicker and noise. In particular, there's discussions about pre-construction noise, G Factor, use of G Factor and modeling, post-construction noise, meteorological issues related to ducting. There's also, on the noise topic, still discussion of a worst-case analysis for turbine noise. There's discussion regarding -- which is I think the last topic we left for the other motions, on the impact of the Project's efficiency on the -- caused by mitigation measures, both for noise and shadow flicker. There's discussion of concerns raised about our

treatment of shadow flicker, both pre-construction and post-construction. There's discussion about the solar enlargements and shadow flicker impacts. There's discussion of errors in responses for Mr. O'Neal regarding shadow flicker.

Under a broad topic there's discussion about failure to consider appropriately wind direction, wind speed, clouds and other meteorological factors and their effect on sunshine and the appearance of the sun and how these were considered. There's discussion about accounting for the reflection in shadow flicker. There's discussion regarding the impact of shadow flicker on traffic and associated hazards related. There's discussion about ice throws in the meteorologists' motion. There's discussion of visual impacts and impacts on aesthetics, nighttime impacts as we've discussed, and the impact of flashing lights and their effects.

In response, again paraphrasing, from the Applicant, the Applicant asserts

that the meteorologist group failed to establish, again, one of the criteria here of good reason that warrants a rehearing. And they suggest that the assessments were done in compliance with our Committee rules.

So those are broad topics. I think I started with, if I remember what I just did myself, with noise. So, perhaps we could start with the discussion over the different noise components of the meteorological group's motion. Any discussion?

Director Forbes.

DIR. FORBES: I guess I'll start. Sounding a little bit like a broken record. I don't know that I have seen anything in here that's new evidence or new arguments. We have heard about, you know, G Factors influencing noise. We've heard the limitations and failures of, you know, precise accuracy of the modeling, the ISO 969613-2 modeling. You know, we've heard all these, and the preponderance of the evidence that has been presented. You know, it leaves us with a different conclusion. So I struggle to see a good reason in here why

we would, you know, reconsider this issue. I do feel like this is in many respects some of these items -- all of these items are, in effect, rehashing testimony that we have heard already.

PRESIDING OFFICER SCOTT: Any other discussion on the noise issues discussed in the motion? No one's making a noise.

Attorney Weatherby.

MS. WEATHERSBY: I just disagree with Dr. Ward's assertion that we failed to consider evidence that he presented during his -- that he elicited during his rather lengthy, if I recall, cross-examination of Mr. O'Neal. We heard a lot of information. We heard Dr. Ward's assessment of the problems with Mr. O'Neal's testimony and modeling. And I think that we considered that in our analysis.

PRESIDING OFFICER SCOTT: Any other discussion regarding the noise issues raised in the meteorologists' group motion? I'll give my -- Director Forbes again.

DIR. FORBES: I was just going to raise one other point. I see in the first

argument about the preponderance of evidence claims, if you will, that we should specifically consider and identify in comparison to the evidence from the Applicant. And I think that, while we considered all these issues, the responsibility, as I understand it, is not ours to counter one or the other or make judgments on each of these different issues, whether it's ducting or G Factor or whatever. And I think that the argument that was made that we must make a determination on all those individual items is not valid. I think in context of all of the arguments we've heard, we made our conclusion on these issues. So I don't know if there's an argument in support of that point. But, you know, is it our job to rule on whether a G Factor should be .5 or zero? I don't think it is.

PRESIDING OFFICER SCOTT: At least from my point of view, I'm hard-pressed to see where we didn't consider all these issues. Again, as we're well aware, there's a difference between did we err legally and do we have good cause to reopen and is there

agreement. And again, I think in many of these issues we end up being somewhat subjective, and I think reasonable people disagree. But that's not the basis for reconsideration. My opinion.

And on noise, again, much of the testimony regarding meteorologists -- meteorology was about the modeling, among other things. I do take, I did and still do, that that wasn't the end-all in our decision, in my opinion, on these things. We have rules. We had some post-construction modeling -- monitoring requirements. So there was an overall package here. So, not to re-litigate the issue, but I'm not seeing anything new here that was brought up in the motion regarding noise.

Any other opinions? Anybody else want to discuss this? Director Boisvert?

DR. BOISVERT: I'm waiting for shadow flicker.

PRESIDING OFFICER SCOTT: So, seeing none, I'd like to go on to, again in the same meteorologist group motion, the issue of shadow flicker. You know, again, I'm not going to

reiterate what I did in introducing these topics. Does anybody find anything that we've erred on or provides good cause for us to want to reconsider? Any discussion on that issue?

DR. BOISVERT: I don't think that we erred on shadow flicker. Dr. Ward brought forward a number of conditions or phenomena that exist and then proceeded to try to make a claim that, having not considered them, that that is sufficient reason to say there's an unreasonable adverse effect. I don't follow the logic. He never, in my mind, indicated that there was an error in the analysis that basically did not properly portray the effects of solar enlargement and shadow flicker and so forth. I'm just picking that out of the list.

And we did spend a good deal of time considering the issues that he brought forward and I believe that we took them into account and I could find no reason that there was an unreasonable adverse effect related to the conditions that he mentioned. So I feel that we have properly considered it and come to a correct judgment that there was no

unreasonable adverse effect there.

PRESIDING OFFICER SCOTT: Again I tried to parse this out under shadow flicker, the broad category for now. Any other discussion on this?

[No verbal response]

PRESIDING OFFICER SCOTT: All right. Thank you. Then I'll move on to -- again, these are broad categories -- discussion on ice throws and that motion. Any -- well, anything we haven't already said I guess would be the question?

[No verbal response]

PRESIDING OFFICER SCOTT: All right. Seeing none, I'll move on to the discussions regarding visual impacts. Again, nighttime visual impacts are one of the components. The impacts of flashing lights and their effects was also mentioned.

Any concern that those weren't properly considered or we've erred in our consideration in what we've taken up?

MR. CLIFFORD: I don't think we erred in that area because we -- again, we addressed

that through the radar lighting system that was -- the activated lighting system that was ultimately approved. We were waiting on that information and we looked at it. I mean, these things do have to be lit at night for reasons of aircraft. And it seems to me that that new technology avoids the issue of having them on from, you know, sunset to sunrise. So, to that extent, I believe that we covered they were only going to light up when radar -- excuse me -- when jet aircraft approached, and for a limited period of time. So I think we discussed that, and so I see nothing new here.

PRESIDING OFFICER SCOTT: Any other discussion on visual impacts or lighting concerns?

[No verbal response]

PRESIDING OFFICER SCOTT: Again, from my view, I do believe obviously there is a difference between whether these issues were fully discussed and whether we've erred in our determination. To Dr. Ward's credit, I will say it's not obvious to me that we would have gone into the detail that we would have in

deliberations and in the hearings but for him bringing up some of these issues. So I do think there was a benefit on that. But again, overall, my opinion is that we've not seen anything new here in this filing.

Does anybody disagree with that? Does anybody have any other issues with the meteorologists' group motion that we wish to address? Attorney Weatherbsy.

MS. WEATHERSBY: Dr. Ward and others wish that we had been more specific and made more specific findings on each issue that was important to them, but that's not what we're charged to do. We'd probably still be in deliberations if that was the case. So I understand that they're searching for a concrete answer and a lengthy discussion on every issue that was important to them, but that's not the nature of these deliberations. We heard extensive testimony from experts from cross-examination, various reports, et cetera, and I think we incorporated all of that into the findings that we made.

PRESIDING OFFICER SCOTT: Any other

discussion on the meteorologist group's motion?

[No verbal response]

PRESIDING OFFICER SCOTT: Okay. Seeing none, what I'd like to do now procedurally is do a formal vote on the motions. So I will start.

Do I need a motion to --

MR. IACOPINO: You do need a motion, yeah.

PRESIDING OFFICER SCOTT: So, does anybody --

MR. IACOPINO: Which motion are you going to --

PRESIDING OFFICER SCOTT: So I'll start with the -- where we left off, the meteorologist group motion. Do we have a motion regarding that?

MR. CLIFFORD: I guess you're looking for a motion. I think that we should deny the meteorological group's motion for a rehearing and propose that we bring that to a vote.

PRESIDING OFFICER SCOTT: Do we have a second?

DR. BOISVERT: Second.

PRESIDING OFFICER SCOTT: Second from Dr. Boisvert.

MR. CLIFFORD: And my basis is we find no -- I conclude that there's no good reason to reopen the hearing -- excuse me -- to reopen this for consideration on the basis of what was filed in the motion.

PRESIDING OFFICER SCOTT: Any further discussion?

[No verbal response]

PRESIDING OFFICER SCOTT: Ready for a vote? I'm seeing head nods.

All in favor of the motion, please say "aye."

[Multiple members indicating "aye".]

PRESIDING OFFICER SCOTT: Anybody opposed?

[No verbal response]

PRESIDING OFFICER SCOTT: So that's unanimous.

Next, do we have a motion regarding the Joint Motion for Rehearing from the Abutting Landowners Group, the Non-Abutting Landowners Group, the Lovesque-Allen Group,

the Stoddard Commission, and Windaction Group? Do we have a motion? Director Forbes.

DIR. FORBES: I would make a motion to deny the motion for rehearing -- for reconsideration.

PRESIDING OFFICER SCOTT: Do we have a second?

MS. WEATHERSBY: Second.

PRESIDING OFFICER SCOTT: Any discussion?

[No verbal response]

PRESIDING OFFICER SCOTT: Hearing none, all in favor, please say "aye."

[Multiple members indicating "aye".]

PRESIDING OFFICER SCOTT: Any opposed?

[No verbal response]

PRESIDING OFFICER SCOTT: Seeing none, that's unanimous.

Finally, do we have a motion regarding Counsel for the Public's Motion for Rehearing? Director Boisvert.

DR. BOISVERT: I move that we reject

the motion for rehearing on res judicata, or should I just do it for -- how would I properly phrase this? We have res judicata and collateral estoppel. Do you need me to do them individually?

PRESIDING OFFICER SCOTT: It's up to you. But unless you want to parse out, bifurcate the vote, it's up to you.

DR. BOISVERT: Whatever's the most judicious --

MS. WEATHERSBY: You can just deny the motion.

DR. BOISVERT: Just deny the motion then.

PRESIDING OFFICER SCOTT: Want to rephrase that then?

DR. BOISVERT: I move that we deny the Motion to Reconsider the Hearing.

PRESIDING OFFICER SCOTT: Do we have a second?

MS. WEATHERSBY: Second.

PRESIDING OFFICER SCOTT: Any discussion?

[No verbal response]

PRESIDING OFFICER SCOTT: Seeing none, all in favor please "aye."

[Multiple members indicating "aye".]

PRESIDING OFFICER SCOTT: Any opposed?

[No verbal response]

PRESIDING OFFICER SCOTT: Again, that's unanimous.

So, having dispensed with the motions, there's a couple items to further address for the Committee as a whole Subcommittee.

As you're aware, under 541-A, as Presiding Officer, when we had the original motion from the meteorological group, I suspended the Certificate, again, not because there was anything, any action that the Applicant's done, but basically because of the operation of that law. I guess I would ask: Do we have a motion to lift that suspension? Is that something people would like to do? Director Forbes.

DIR. FORBES: Yes, I would make a motion to lift the order suspending decision

and order granting a Certificate of Site and Facility.

PRESIDING OFFICER SCOTT: Do we have a second?

MR. CLIFFORD: I'll second that.

PRESIDING OFFICER SCOTT: Any discussion?

MS. WEATHERSBY: Just a clarifying question. Would that be effective today? Is your motion to --

DIR. FORBES: Effective today.

PRESIDING OFFICER SCOTT: That's a friendly amendment then.

MS. WEATHERSBY: Just for clarification. I just wasn't sure.

PRESIDING OFFICER SCOTT: Any other discussion on that motion?

[No verbal response]

PRESIDING OFFICER SCOTT: Remind me, we did have a second somewhere.

MR. CLIFFORD: Yes. And I second it with the change as noted by Ms. Weathersby. So it would be effective today should this motion pass.

PRESIDING OFFICER SCOTT: Okay. Any other discussion?

[No verbal response]

PRESIDING OFFICER SCOTT: Okay. All in favor please say "aye."

[Multiple members indicating "aye".]

PRESIDING OFFICER SCOTT: Any opposed?

[No verbal response]

PRESIDING OFFICER SCOTT: None. Let the record just show that's unanimous.

And not for the Committee, but as Presiding Officer, we also have a request to open the record in the context of a letter -- an LOI or an easement with the Town of Town of Antrim. I'll point out that our Certificate as a condition referenced Appendix 10 of the Application which requires an easement with the Town of Antrim. In that context, I don't see any grounds for granting the motion to reopen the record. And I will assume that, just like any other condition in this Certificate, if the Applicant wishes to do something different, they will come in to

amend the Certificate. So, in that context, I'm denying the request to reopen the record.

Members of the Committee and Attorney Iacopino, are there any other issues that we need to resolve and address today? Anybody?

[No verbal response]

PRESIDING OFFICER SCOTT: With that, I think that concludes our business today, and I thank you for coming. And again, as I think I mentioned at the conclusion of the original proceedings, I do appreciate everybody's time. We thoroughly understand these are very weighty issues for everybody involved, so thank you for your time and effort. Have a good day.

(Whereupon the hearing was adjourned at 11:42 a.m.)

TITLE XII
PUBLIC SAFETY AND WELFARE

CHAPTER 162-H
ENERGY FACILITY EVALUATION, SITING, CONSTRUCTION AND OPERATION

Section 162-H:1

162-H:1 Declaration of Purpose. – The legislature recognizes that the selection of sites for energy facilities may have significant impacts on and benefits to the following: the welfare of the population, private property, the location and growth of industry, the overall economic growth of the state, the environment of the state, historic sites, aesthetics, air and water quality, the use of natural resources, and public health and safety. Accordingly, the legislature finds that it is in the public interest to maintain a balance among those potential significant impacts and benefits in decisions about the siting, construction, and operation of energy facilities in New Hampshire; that undue delay in the construction of new energy facilities be avoided; that full and timely consideration of environmental consequences be provided; that all entities planning to construct facilities in the state be required to provide full and complete disclosure to the public of such plans; and that the state ensure that the construction and operation of energy facilities is treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion. In furtherance of these objectives, the legislature hereby establishes a procedure for the review, approval, monitoring, and enforcement of compliance in the planning, siting, construction, and operation of energy facilities.

Source. 1991, 295:1. 1998, 264:1. 2009, 65:1, eff. Aug. 8, 2009. 2014, 217:1, eff. July 1, 2014.

TITLE XII
PUBLIC SAFETY AND WELFARE

CHAPTER 162-H
ENERGY FACILITY EVALUATION, SITING, CONSTRUCTION AND OPERATION

Section 162-H:3

162-H:3 Site Evaluation Committee Established. –

I. There is hereby established a committee to be known as the New Hampshire site evaluation committee consisting of 9 members, as follows:

(a) The commissioners of the public utilities commission, the chairperson of which shall be the chairperson of the committee;

(b) The commissioner of the department of environmental services, who shall be the vice-chairperson of the committee;

(c) The commissioner of the department of resources and economic development;

(d) The commissioner of the department of transportation;

(e) The commissioner of the department of cultural resources or the director of the division of historical resources as designee; and

(f) Two members of the public, appointed by the governor, with the consent of the council, at least one of whom shall be a member in good standing of the New Hampshire Bar Association, and both of whom shall be residents of the state of New Hampshire with expertise or experience in one or more of the following areas: public deliberative or adjudicative proceedings; business management; environmental protection; natural resource protection; energy facility design, construction, operation, or management; or community and regional planning or economic development.

II. The public members shall serve 4-year terms and until their successors are appointed and qualified. The initial term of one member shall be 2 years. Any public member chosen to fill a vacancy occurring other than by expiration of term shall be appointed for the unexpired term of the member who is to be succeeded.

III. No public member nor any member of his or her family shall receive income from energy facilities within the jurisdiction of the committee. The public members shall comply with RSA 15-A and RSA 15-B.

IV. All members shall refrain from ex parte communications regarding any matter pending before the committee.

V. Seven members of the committee shall constitute a quorum for the purpose of conducting the committee's business.

VI. Any public member of the committee may be removed by the governor and council for inefficiency, neglect of duty, or misconduct or malfeasance in office, after being given a written statement of the charges and an opportunity to be heard.

VII. The committee shall be administratively attached to the public utilities commission pursuant to RSA 21-G:10.

VIII. [Repealed.]

IX. The chairperson shall serve as the chief executive of the committee and may:

(a) Delegate to other members the duties of presiding officer, as appropriate.

(b) Perform administrative actions for the committee, as may a presiding officer.

(c) Establish, with the consent of the committee, the budgetary requirements of the committee.

(d) Engage personnel in accordance with this chapter.

(e) Form subcommittees pursuant to RSA 162-H:4-a.

X. An alternate public member who satisfies the qualification requirements of subparagraph I(f), excluding the New Hampshire Bar membership requirement, shall be appointed by the governor, with consent of the council. The alternate public member shall only sit on the committee or a subcommittee as provided for in paragraph XI.

XI. If at any time a member must recuse himself or herself on a matter or is not otherwise available for good reason, such person, if a state employee, may designate a senior administrative employee or a staff attorney from his or her

agency to sit on the committee. In the case of a public member, the chairperson shall appoint the alternate public member, or if such member is not available, the governor and council shall appoint a replacement upon petition of the chairperson. The replacement process under this paragraph shall also be applicable to subcommittee members under RSA 162-H:4-a.

Source. 1991, 295:1. 1995, 310:182. 1996, 228:41. 1997, 298:25. 2002, 247:2. 2003, 319:9. 2004, 257:44. 2007, 364:4. 2009, 65:5, eff. Aug. 8, 2009. 2014, 217:6, eff. July 1, 2014. 2015, 219:2, eff. July 8, 2015.

TITLE XII
PUBLIC SAFETY AND WELFARE

CHAPTER 162-H
ENERGY FACILITY EVALUATION, SITING, CONSTRUCTION AND OPERATION

Section 162-H:4-a

162-H:4-a Subcommittees. –

I. The chairperson may establish subcommittees to consider and make decisions on applications, including the issuance of certificates, or to exercise any other authority or perform any other duty of the committee under this chapter, except that no subcommittee may approve the budgetary requirements of the committee, approve any support staff positions, or adopt initial or final rulemaking proposals. For purposes of statutory interpretation and executing the regulatory functions of this chapter, the subcommittee shall assume the role of and be considered the committee, with all of its associated powers and duties in order to execute the charge given it by the chairperson.

II. When considering the issuance of a certificate or a petition of jurisdiction, a subcommittee shall have no fewer than 7 members. The 2 public members shall serve on each subcommittee with the remaining 5 or more members selected by the chairperson from among the state agency members of the committee. Each selected member may designate a senior administrative employee or staff attorney from his or her respective agency to sit in his or her place on the subcommittee. The chairperson shall designate one member or designee to be the presiding officer who shall be an attorney whenever possible. Five members of the subcommittee shall constitute a quorum for the purpose of conducting the subcommittee's business.

III. In any matter not covered under paragraph II, the chairperson may establish subcommittees of 3 members, consisting of 2 state agency members and one public member. Each state agency member may designate a senior administrative employee or staff attorney from his or her agency to sit in his or her place on the subcommittee. The chairperson shall designate one member or designee to be the presiding officer who shall be an attorney whenever possible. Two members of the subcommittee shall constitute a quorum. Any party whose interests may be affected may object to the matter being assigned to a 3-person subcommittee no less than 14 days before the first hearing. If objection is received, the chairperson shall remove the matter from the 3-person subcommittee and either assign it to a subcommittee formed under paragraph II or have the full committee decide the matter.

Source. 2014, 217:11, eff. July 1, 2014. 2015, 219:9, eff. July 8, 2015.

TITLE XII
PUBLIC SAFETY AND WELFARE

CHAPTER 162-H
ENERGY FACILITY EVALUATION, SITING, CONSTRUCTION AND OPERATION

Section 162-H:11

162-H:11 Judicial Review. – Decisions made pursuant to this chapter shall be reviewable in accordance with RSA 541.

Source. 1991, 295:1, eff. Jan. 1, 1992.

TITLE XII
PUBLIC SAFETY AND WELFARE

CHAPTER 162-H
ENERGY FACILITY EVALUATION, SITING, CONSTRUCTION AND OPERATION

Section 162-H:16

162-H:16 Findings and Certificate Issuance. –

I. The committee shall incorporate in any certificate such terms and conditions as may be specified to the committee by any of the state agencies having permitting or other regulatory authority, under state or federal law, to regulate any aspect of the construction or operation of the proposed facility; provided, however, the committee shall not issue any certificate under this chapter if any of the state agencies denies authorization for the proposed activity over which it has permitting or other regulatory authority. The denial of any such authorization shall be based on the record and explained in reasonable detail by the denying agency.

II. Any certificate issued by the site evaluation committee shall be based on the record. The decision to issue a certificate in its final form or to deny an application once it has been accepted shall be made by a majority of the full membership. A certificate shall be conclusive on all questions of siting, land use, air and water quality.

III. The committee may consult with interested regional agencies and agencies of border states in the consideration of certificates.

IV. After due consideration of all relevant information regarding the potential siting or routes of a proposed energy facility, including potential significant impacts and benefits, the site evaluation committee shall determine if issuance of a certificate will serve the objectives of this chapter. In order to issue a certificate, the committee shall find that:

(a) The applicant has adequate financial, technical, and managerial capability to assure construction and operation of the facility in continuing compliance with the terms and conditions of the certificate.

(b) The site and facility will not unduly interfere with the orderly development of the region with due consideration having been given to the views of municipal and regional planning commissions and municipal governing bodies.

(c) The site and facility will not have an unreasonable adverse effect on aesthetics, historic sites, air and water quality, the natural environment, and public health and safety.

(d) [Repealed.]

(e) Issuance of a certificate will serve the public interest.

V. [Repealed.]

VI. A certificate of site and facility may contain such reasonable terms and conditions, including but not limited to the authority to require bonding, as the committee deems necessary and may provide for such reasonable monitoring procedures as may be necessary. Such certificates, when issued, shall be final and subject only to judicial review.

VII. The committee may condition the certificate upon the results of required federal and state agency studies whose study period exceeds the application period.

Source. 1991, 295:1. 2009, 65:18-21, 24, IX, eff. Aug. 8, 2009. 2014, 217:20-22, eff. July 1, 2014. 2015, 264:2, eff. July 20, 2015.

TITLE LV
PROCEEDINGS IN SPECIAL CASES

CHAPTER 541
REHEARINGS AND APPEALS IN CERTAIN CASES

Section 541:3

541:3 Motion for Rehearing. – Within 30 days after any order or decision has been made by the commission, any party to the action or proceeding before the commission, or any person directly affected thereby, may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion all grounds for rehearing, and the commission may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion.

Source. 1913, 145:18. PL 239:1. 1937, 107:14; 133:75. RL 414:3. RSA 541:3. 1994, 54:1, eff. Jan. 1, 1995.

TITLE LV
PROCEEDINGS IN SPECIAL CASES

CHAPTER 541
REHEARINGS AND APPEALS IN CERTAIN CASES

Section 541:6

541:6 Appeal. – Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the decision on such rehearing, the applicant may appeal by petition to the supreme court.

Source. 1913, 145:18. PL 239:4. 1937, 107:17; 133:78. RL 414:6.

TITLE LV
PROCEEDINGS IN SPECIAL CASES

CHAPTER 541
REHEARINGS AND APPEALS IN CERTAIN CASES

Section 541:7

541:7 Petition. – Such petition shall state briefly the nature of the proceeding before the commission, and shall set forth the order or decision complained of, and the grounds upon which the same is claimed to be unlawful or unreasonable upon which the petitioner will rely in the supreme court.

Source. 1913, 145:18. PL 239:5. 1937, 107:18; 133:79. RL 414:7.

TITLE LV
PROCEEDINGS IN SPECIAL CASES

CHAPTER 541
REHEARINGS AND APPEALS IN CERTAIN CASES

Section 541:13

541:13 Burden of Proof. – Upon the hearing the burden of proof shall be upon the party seeking to set aside any order or decision of the commission to show that the same is clearly unreasonable or unlawful, and all findings of the commission upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable; and the order or decision appealed from shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable.

Source. 1913, 145:18. PL 239:11. 1937, 107:24; 133:85. RL 414:13.

TITLE LV
PROCEEDINGS IN SPECIAL CASES

CHAPTER 541
REHEARINGS AND APPEALS IN CERTAIN CASES

Section 541:18

541:18 Suspension of Order. – No appeal or other proceedings taken from an order of the commission shall suspend the operation of such order; provided, that the supreme court may order a suspension of such order pending the determination of such appeal or other proceeding whenever, in the opinion of the court, justice may require such suspension; but no order of the public utilities commission providing for a reduction of rates, fares, or charges or denying a petition for an increase therein shall be suspended except upon conditions to be imposed by the court providing a means for securing the prompt repayment of all excess rates, fares, and charges over and above the rates, fares, and charges which shall be finally determined to be reasonable and just.

Source. 1913, 145:18. PL 239:18. 1937, 107:31; 133:92. RL 414:20. 1951, 203:16, eff. Sept. 1, 1951.

TITLE LXIV
PLANNING AND ZONING

CHAPTER 674
LOCAL LAND USE PLANNING AND REGULATORY POWERS

Zoning Board of Adjustment and Building Code Board of Appeals

Section 674:33

674:33 Powers of Zoning Board of Adjustment. –

I. The zoning board of adjustment shall have the power to:

(a) Hear and decide appeals if it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of any zoning ordinance adopted pursuant to RSA 674:16; and

(b) Authorize, upon appeal in specific cases, a variance from the terms of the zoning ordinance if:

(1) The variance will not be contrary to the public interest;

(2) The spirit of the ordinance is observed;

(3) Substantial justice is done;

(4) The values of surrounding properties are not diminished; and

(5) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.

(A) For purposes of this subparagraph, "unnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area:

(i) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and

(ii) The proposed use is a reasonable one.

(B) If the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

The definition of "unnecessary hardship" set forth in subparagraph (5) shall apply whether the provision of the ordinance from which a variance is sought is a restriction on use, a dimensional or other limitation on a permitted use, or any other requirement of the ordinance.

I-a. Variances authorized under paragraph I shall be valid if exercised within 2 years from the date of final approval, or as further extended by local ordinance or by the zoning board of adjustment for good cause, provided that no such variance shall expire within 6 months after the resolution of a planning application filed in reliance upon the variance.

II. In exercising its powers under paragraph I, the zoning board of adjustment may reverse or affirm, wholly or in part, or may modify the order, requirement, decision, or determination appealed from and may make such order or decision as ought to be made and, to that end, shall have all the powers of the administrative official from whom the appeal is taken.

III. The concurring vote of 3 members of the board shall be necessary to reverse any action of the administrative official or to decide in favor of the applicant on any matter on which it is required to pass.

IV. A local zoning ordinance may provide that the zoning board of adjustment, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance. All special exceptions shall be made in harmony with the general purpose and intent of the zoning ordinance and shall be in accordance with the general or specific rules contained in the ordinance. Special exceptions authorized under this paragraph shall be valid if exercised within 2 years from the date of final approval, or as further extended by local ordinance or by the zoning board of adjustment for good cause, provided that no such special exception shall expire within 6 months after the resolution of a planning application filed in reliance upon the special exception.

V. Notwithstanding subparagraph I(b), any zoning board of adjustment may grant a variance from the terms of a

zoning ordinance without finding a hardship arising from the condition of a premises subject to the ordinance, when reasonable accommodations are necessary to allow a person or persons with a recognized physical disability to reside in or regularly use the premises, provided that:

(a) Any variance granted under this paragraph shall be in harmony with the general purpose and intent of the zoning ordinance.

(b) In granting any variance pursuant to this paragraph, the zoning board of adjustment may provide, in a finding included in the variance, that the variance shall survive only so long as the particular person has a continuing need to use the premises.

VI. The zoning board of adjustment shall not require submission of an application for or receipt of a permit or permits from other state or federal governmental bodies prior to accepting a submission for its review or rendering its decision.

VII. Neither a special exception nor a variance shall be required for a collocation or a modification of a personal wireless service facility, as defined in RSA 12-K:2.

Source. 1983, 447:1. 1985, 103:20. 1987, 256:1. 1998, 218:1. 2009, 307:6. 2013, 93:1, 2, eff. Aug. 19, 2013; 267:9, eff. Sept. 22, 2013; 270:3, eff. Sept. 22, 2013.

TITLE LXIV
PLANNING AND ZONING

CHAPTER 677
REHEARING AND APPEAL PROCEDURES

Appeal and Court Review of Planning Board Decisions

Section 677:15

677:15 Court Review. –

I. Any persons aggrieved by any decision of the planning board concerning a plat or subdivision may present to the superior court a petition, duly verified, setting forth that such decision is illegal or unreasonable in whole or in part and specifying the grounds upon which the same is claimed to be illegal or unreasonable. Such petition shall be presented to the court within 30 days after the date upon which the board voted to approve or disapprove the application; provided however, that if the petitioner shows that the minutes of the meeting at which such vote was taken, including the written decision, were not filed within 5 business days after the vote pursuant to RSA 676:3, II, the petitioner shall have the right to amend the petition within 30 days after the date on which the written decision was actually filed. This paragraph shall not apply to planning board decisions appealable to the board of adjustment pursuant to RSA 676:5, III. The 30-day time period shall be counted in calendar days beginning with the date following the date upon which the planning board voted to approve or disapprove the application, in accordance with RSA 21:35.

I-a. (a) If an aggrieved party desires to appeal a decision of the planning board, and if any of the matters to be appealed are appealable to the board of adjustment under RSA 676:5, III, such matters shall be appealed to the board of adjustment before any appeal is taken to the superior court under this section. If any party appeals any part of the planning board's decision to the superior court before all matters appealed to the board of adjustment have been resolved, the court shall stay the appeal until resolution of such matters. After the final resolution of all such matters appealed to the board of adjustment, any aggrieved party may appeal to the superior court, by petition, any or all matters concerning the subdivision or site plan decided by the planning board or the board of adjustment. The petition shall be presented to the superior court within 30 days after the board of adjustment's denial of a motion for rehearing under RSA 677:3, subject to the provisions of paragraph I.

(b) If, upon an appeal to the superior court under this section, the court determines, on its own motion within 30 days after delivery of proof of service of process upon the defendants, or on motion of any party made within the same period, that any matters contained in the appeal should have been appealed to the board of adjustment under RSA 676:5, III, the court shall issue an order to that effect, and shall stay proceedings on any remaining matters until final resolution of all matters before the board of adjustment. Upon such a determination by the superior court, the party who brought the appeal shall have 30 days to present such matters to the board of adjustment under RSA 676:5, III. Except as provided in this paragraph, no matter contained in the appeal shall be dismissed on the basis that it should have been appealed to the board of adjustment under RSA 676:5, III.

II. Upon presentation of such petition, the court may allow a certiorari order directed to the planning board to review such decision and shall prescribe therein the time within which return thereto shall be made and served upon the petitioner's attorney, which shall not be less than 10 days and may be extended by the court. The allowance of the order shall stay proceedings upon the decision appealed from. The planning board shall not be required to return the original papers acted upon by it; but it shall be sufficient to return certified or sworn copies thereof, or of such portions thereof as may be called for by such order. The return shall concisely set forth such other facts as may be pertinent and material to show the grounds of the decision appealed from and shall be verified.

III. If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take such evidence as it may direct and report the same to the court with the referee's findings of fact and conclusion of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made.

IV. The court shall give any hearing under this section priority on the court calendar.

V. The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review when there is an error of law or when the court is persuaded by the balance of probabilities, on the evidence before it, that said decision is unreasonable. Costs shall not be allowed against the municipality unless it shall appear to the court that the planning board acted in bad faith or with malice in making the decision appealed from.

Source. 1983, 447:1. 1991, 231:14. 1995, 243:7, 8. 2000, 144:4. 2005, 105:2. 2009, 266:4. 2013, 179:1, eff. Aug. 31, 2013.

(1) A concise statement of the principal reasons for and against the adoption of the rule in its final form; and

(2) An explanation of why the committee overruled the arguments and considerations against the rule.

Source. #9183-B, eff 6-17-08; ss by #10994, eff 12-16-15

CHAPTER Site 300 CERTIFICATES OF SITE AND FACILITY

PART Site 301 REQUIREMENTS FOR APPLICATIONS FOR CERTIFICATES

Site 301.01 Filing.

(a) Each applicant for a certificate for an energy facility shall file with the committee one original and 15 paper copies of its application and an electronic version of its application in PDF format, unless otherwise directed by the chairperson or the administrator, after consultation by the chairperson or administrator with state agencies that are required to be provided a copy of the application under this chapter, in order to permit the timely and efficient review and adjudication of the application.

(b) The committee or the administrator shall:

(1) Acknowledge receipt of an application filed under Site 301.01(a) in writing directed to the applicant;

(2) Forward a copy of the application and acknowledgment to each member of the committee;

(3) Forward a copy of the application to each state agency required to receive a copy under Site 301.10(a) and (b); and

(4) Post a copy of each application on the committee's website.

Source. #9183-B, eff 6-17-08; ss by #10994, eff 12-16-15

Site 301.02 Format of Application.

(a) Paper copies of applications shall be prepared on standard 8 ½ x 11 inch sheets, and plans, maps, photosimulations, and other oversized documents shall be folded to that size or rolled and provided in protective tubes. Electronic copies of applications shall be submitted through electronic mail, on compact discs, or in an electronic file format compatible with the computer system of the commission.

(b) Each application shall contain a table of contents.

(c) All information furnished shall appear in the same order as the requirements to provide that information appear in Site 301.03 through 301.09.

(d) If any numbered item is not applicable or the information is not available, an appropriate comment shall be made so that no numbered item shall remain unanswered.

(e) To the extent practicable, copies of applications shall be double-sided.

Source. #9183-B, eff 6-17-08; ss by #10994, eff 12-16-15

Site 301.03 Contents of Application.

(a) Each application for a certificate of site and facility for an energy facility shall be signed and sworn to by the person, or by an authorized executive officer of the corporation, company, association, or other organization making such application.

(b) Each application shall include the information contained in this paragraph, and in (c) through (h) below, as follows:

(1) The name of the applicant;

(2) The applicant's mailing address, telephone and fax numbers, and e-mail address;

(3) The name and address of the applicant's parent company, association, or corporation, if the applicant is a subsidiary;

(4) If the applicant is a corporation:

a. The state of incorporation;

b. The corporation's principal place of business; and

c. The names and addresses of the corporation's directors, officers, and stockholders;

(5) If the applicant is a limited liability company:

a. The state of the company's organization;

b. The company's principal place of business; and

c. The names and addresses of the company's members, managers, and officers;

(6) If the applicant is an association, the names and addresses of the residences of the members of the association; and

(7) Whether the applicant is or will be the owner or lessee of the proposed facility or has or will have some other legal or business relationship to the proposed facility, including a description of that relationship.

(c) Each application shall contain the following information with respect to the site of the proposed energy facility and alternative locations the applicant considers available for the proposed facility:

(1) The location and address of the site of the proposed facility;

(2) Site acreage, shown on an attached property map and located by scale on a U.S. Geological Survey or GIS map;

(3) The location, shown on a map, of property lines, residences, industrial buildings, and other structures and improvements within the site, on abutting property with respect to the site, and within 100 feet of the site if such distance extends beyond the boundary of any abutting property;

(4) Identification of wetlands and surface waters of the state within the site, on abutting property with respect to the site, and within 100 feet of the site if such distance extends beyond the boundary of any abutting property, except if and to the extent such identification is not possible due to lack of access to the relevant property and lack of other sources of the information to be identified;

(5) Identification of natural, historic, cultural, and other resources at or within the site, on abutting property with respect to the site, and within 100 feet of the site if such distance extends beyond the boundary of any abutting property, except if and to the extent such identification is not possible due to lack of access to the relevant property and lack of other sources of the information to be identified;

(6) Evidence that the applicant has a current right, an option, or other legal basis to acquire the right, to construct, operate, and maintain the facility on, over, or under the site, in the form of:

a. Ownership, ground lease, easement, or other contractual right or interest;

b. A license, permit, easement, or other permission from a federal, state, or local government agency, or an application for such a license, permit, easement, or other permission from a state governmental agency that is included with the application; or

c. The simultaneous filing of a federal regulatory proceeding or taking of other action that would, if successful, provide the applicant with a right of eminent domain to acquire control of the site for the purpose of constructing, operating, and maintaining the facility thereon; and

(7) Evidence that the applicant has a current or conditional right of access to private property within the boundaries of the proposed energy facility site sufficient to accommodate a site visit by the committee, which private property, with respect to energy transmission pipelines under the jurisdiction of the Federal Energy Regulatory Commission, may be limited to the proposed locations of all above-ground structures and a representative sample of the proposed locations of underground structures or facilities.

(d) Each application shall include information about other required applications and permits as follows:

(1) Identification of all other federal and state government agencies having permitting or other regulatory authority,

under federal or state law, to regulate any aspect of the construction or operation of the proposed energy facility;

(2) Documentation that demonstrates compliance with the application requirements of all such agencies;

(3) A copy of the completed application form for each such agency; and

(4) Identification of any requests for waivers from the information requirements of any state agency or department having permitting or other regulatory authority whether or not such agency or department is represented on the committee.

(e) If the application is for an energy facility, including an energy transmission pipeline, that is not an electric generating facility or an electric transmission line, the application shall include:

(1) The type of facility being proposed;

(2) A description of the process to extract, produce, manufacture, transport or refine the source of energy;

(3) The facility's size and configuration;

(4) The ability to increase the capacity of the facility in the future;

(5) Raw materials used or transported, as follows:

a. An inventory, including amounts and specifications;

b. A plan for procurement, describing sources and availability; and

c. A description of the means of transportation;

(6) Production information, as follows:

a. An inventory of products and waste streams, including blowdown emissions from a high pressure gas pipeline;

b. The quantities and specifications of hazardous materials; and

c. Waste management plans;

(7) A map showing the entire energy facility, including, in the case of an energy transmission pipeline, the location of each compressor station, pumping station, storage facility, and other ancillary facilities associated with the energy facility, and the corridor width and length in the case of a proposed new route or widening along an existing route; and

(8) For a high pressure gas pipeline, the following information:

a. Construction information, including a description of the pipe to be used, depth of pipeline placement, type of fuel to be used to power any associated compressor station, and a description of any compressor station emergency shutdown system;

b. Proposed construction schedule, including start date and scheduled completion date;

c. Operation and maintenance information, including a description of measures to be taken to notify adjacent landowners and minimize sound during blowdown events;

d. Copy of any proposed plan application or other documentation required to be submitted to the Federal Energy Regulatory Commission in connection with construction and operation of the proposed facility; and

e. Copy of any environmental report, assessment or impact statement prepared by or on behalf of the Federal Energy Regulatory Commission when it becomes available.

(f) If the application is for an electric generating facility, the application shall include the following information:

(1) Make, model, and manufacturer of each turbine and generator unit;

(2) Capacity in megawatts, as designed and as intended for operation;

(3) Type of turbine and generator unit, including:

a. Fuel utilized;

b. Method of cooling condenser discharge; and

c. Unit efficiency;

(4) Any associated new substations, generator interconnection lines, and electric transmission lines, whether identified by the applicant or through a system impact study conducted by or on behalf of the interconnecting utility or ISO New England, Inc.;

(5) Copy of system impact study report for interconnection of the facility as prepared by or on behalf of ISO New England, Inc. or the interconnecting utility, if available at the time of application;

(6) Construction schedule, including start date and scheduled completion date; and

(7) Description of anticipated mode and frequency of operation of the facility.

(g) If the application is for an electric transmission line or an electric generating facility with an associated electric transmission or distribution line, the application shall include the following information:

(1) Location shown on U.S. Geological Survey Map;

(2) A map showing the entire electric transmission or distribution line project, including the height and location of each pole or tower, the distance between each pole or tower, and the location of each substation, switchyard, converter station, and other ancillary facilities associated with the project;

(3) Corridor width for:

a. New route; or

b. Widening along existing route;

(4) Length of line;

(5) Distance along new route;

(6) Distance along existing route;

(7) Voltage design rating;

(8) Any associated new electric generating unit or units;

(9) Type of construction described in detail;

(10) Construction schedule, including start date and scheduled completion date;

(11) Copy of any proposed plan application or other system study request documentation required to be submitted to ISO New England, Inc. in connection with construction and operation of the proposed facility; and

(12) Copy of system impact study report for the proposed electric transmission facility as prepared by or on behalf of ISO New England, Inc. or the interconnecting utility, if available at the time of application.

(h) Each application for a certificate for an energy facility shall include the following:

(1) A detailed description of the type and size of each major part of the proposed facility;

(2) Identification of the applicant's preferred choice and other alternatives it considers available for the site and configuration of each major part of the proposed facility and the reasons for the preferred choice;

(3) Documentation that the applicant has held at least one public information session in each county where the proposed facility is to be located at least 30 days prior to filing its application, pursuant to RSA 162-H:10, I and Site

201.01;

(4) Documentation that written notification of the proposed facility, including copies of the application, has been given to the governing body of each municipality in which the facility is proposed to be located, and that written notification of the application filing, including information regarding means to obtain an electronic or paper version of the application, has been sent by first class mail to the governing body of each of the other affected communities;

(5) The information described in Sections 301.04 through 301.09;

(6) For a proposed wind energy facility, information regarding the cumulative impacts of the proposed facility on natural, wildlife, habitat, scenic, recreational, historic, and cultural resources, including, with respect to aesthetics, the potential impacts of combined observation, successive observation, and sequential observation of wind energy facilities by the viewer;

(7) Information describing how the proposed facility will be consistent with the public interest, including the specific criteria set forth in Site 301.16(a)-(j); and

(8) Pre-filed testimony and exhibits supporting the application.

Source. #9183-B, eff 6-17-08; ss by #10994, eff 12-16-15; amd by #11156, eff 8-16-16

Site 301.04 Financial, Technical and Managerial Capability. Each application shall include a detailed description of the applicant's financial, technical, and managerial capability to construct and operate the proposed energy facility, as follows:

(a) Financial information shall include:

(1) A description of the applicant's experience financing other energy facilities;

(2) A description of the corporate structure of the applicant, including a chart showing the direct and indirect ownership of the applicant;

(3) A description of the applicant's financing plan for the proposed facility, including the amounts and sources of funds required for the construction and operation of the proposed facility;

(4) An explanation of how the applicant's financing plan compares with financing plans employed by the applicant or its affiliates, or, if no such plans have been employed by the applicant or its affiliates, then by unaffiliated project developers if and to the extent such information is publicly available, for energy facilities that are similar in size and type to the proposed facility, including any increased risks or costs associated with the applicant's financing plan; and

(5) Current and pro forma statements of assets and liabilities of the applicant;

(b) Technical information shall include:

(1) A description of the applicant's qualifications and experience in constructing and operating energy facilities, including projects similar to the proposed facility; and

(2) A description of the experience and qualifications 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 of application;

(c) Managerial information shall include:

(1) A description of the applicant's management structure for the construction and operation of the proposed facility, including an organizational chart for the applicant;

(2) A description of the qualifications of the applicant and its executive personnel to manage the construction and operation of the proposed facility; and

(3) To the extent the applicant plans to rely on contractors or consultants for the construction and operation of the proposed facility, a description of the experience and qualifications of the contractors and consultants, if known at the time of application.

Source. #9183-B, eff 6-17-08; ss by #10994, eff 12-16-15

Site 301.05 Effects on Aesthetics.

(a) Each application shall include a visual impact assessment of the proposed energy facility, prepared in a manner consistent with generally accepted professional standards by a professional trained or having experience in visual impact assessment procedures, regarding the effects of, and plans for avoiding, minimizing, or mitigating potential adverse effects of, the proposed facility on aesthetics.

(b) The visual impact assessment shall contain the following components:

(1) A description and map depicting the locations of the proposed facility and all associated buildings, structures, roads, and other ancillary components, and all areas to be cleared and graded, that would be visible from any scenic resources, based on both bare ground conditions using topographic screening only and with consideration of screening by vegetation or other factors;

(2) A description of how the applicant identified and evaluated the scenic quality of the landscape and potential visual impacts;

(3) A narrative and graphic description, including maps and photographs, of the physiographic, historical and cultural features of the landscape surrounding the proposed facility to provide the context for evaluating any visual impacts;

(4) A computer-based visibility analysis to determine the area of potential visual impact, which, for proposed:

a. Wind energy systems shall extend to a minimum of a 10-mile radius from each wind turbine in the proposed facility;

b. Electric transmission lines longer than 1 mile shall extend to a ½ mile radius if located within any urbanized area;

c. Electric transmission lines longer than 1 mile shall extend to a 2 mile radius if located within any urban cluster;

d. Electric transmission lines longer than 1 mile if located within any rural area shall extend to:

1. A radius of 3 miles if the line would be located within an existing transmission corridor and neither the width of the corridor nor the height of any towers, poles, or other supporting structures would be increased; or

2. A radius of 10 miles if the line would be located in a new transmission corridor or in an existing transmission corridor if either or both the width of the corridor or the height of the towers, poles, or other supporting structures would be increased;

(5) An identification of all scenic resources within the area of potential visual impact and a description of those scenic resources from which the proposed facility would be visible;

(6) A characterization of the potential visual impacts of the proposed facility, and of any visible plume that would emanate from the proposed facility, on identified scenic resources as high, medium, or low, based on consideration of the following factors:

a. The expectations of the typical viewer;

b. The effect on future use and enjoyment of the scenic resource;

c. The extent of the proposed facility, including all structures and disturbed areas, visible from the scenic resource;

d. The distance of the proposed facility from the scenic resource;

e. The horizontal breadth or visual arc of the visible elements of the proposed facility;

f. The scale, elevation, and nature of the proposed facility relative to surrounding topography and existing structures;

g. The duration and direction of the typical view of elements of the proposed facility; and

h. The presence of intervening topography between the scenic resource and elements of the proposed facility;

(7) Photosimulations from representative key observation points, from other scenic resources for which the potential visual impacts are characterized as "high" pursuant to (6) above, and, to the extent feasible, from a sample of private property observation points within the area of potential visual impact, to illustrate the potential change in the landscape that would result from construction of the proposed facility and associated infrastructure, including land clearing and grading and road construction, and from any visible plume that would emanate from the proposed facility;

(8) Photosimulations shall meet the following additional requirements:

a. Photographs used in the simulation shall be taken at high resolution and contrast, using a full frame digital camera with a 50 millimeter fixed focal length lens or digital equivalent that creates an angle of view that closely matches human visual perception, under clear weather conditions and at a time of day that provides optimal clarity and contrast, and shall avoid if feasible showing any utility poles, fences, walls, trees, shrubs, foliage, and other foreground objects and obstructions;

b. Photosimulations shall be printed at high resolution at 15.3 inches by10.2 inches, or 390 millimeters by 260 millimeters;

c. At least one set of photosimulations shall represent winter season conditions without the presence of foliage typical of other seasons;

d. Field conditions in which a viewpoint is photographed shall be recorded including:

1. Global Position System (GPS) location points with an accuracy of at least 3 meters for each simulation viewpoint to ensure repeatability;

2. Camera make and model and lens focal length;

3. All camera settings at the time the photograph is taken; and

4. Date, time and weather conditions at the time the photograph is taken; and

e. When simulating the presence of proposed wind turbines, the following shall apply:

1. Turbines shall be placed with full frontal views and no haze or fog effect applied;

2. Turbines shall reasonably represent the shape of the intended turbines for a project including the correct hub height and rotor diameter;

3. Turbine blades shall be set at random angles with some turbines showing a blade in the 12 o'clock position; and

4. The lighting model used to render wind turbine elements shall correspond to the lighting visible in the base photograph;

(9) If the proposed facility is required by Federal Aviation Administration regulations to install aircraft warning lighting or if the proposed facility would include other nighttime lighting, a description and characterization of the potential visual impacts of this lighting, including the number of lights visible and their distance from key observation points; and

(10) A description of the measures planned to avoid, minimize, or mitigate potential adverse effects of the proposed facility, and of any visible plume that would emanate from the proposed facility, and the alternative measures considered but rejected by the applicant.

Source. #9183-B, eff 6-17-08; ss by #10994, eff 12-16-15

Site 301.06 Effects on Historic Sites. Each application shall include the following information regarding the identification of historic sites and plans for avoiding, minimizing, or mitigating potential adverse effects of, the proposed energy facility on historic sites:

(a) Demonstration that project review of the proposed facility has been initiated for purposes of compliance with Section 106 of the National Historic Preservation Act, 54 U.S.C. §306108, or RSA 227-C:9, as applicable;

(b) Identification of all historic sites and areas of potential archaeological sensitivity located within the area of potential effects, as defined in 36 C.F.R. §800.16(d), available as noted in Appendix B;

(c) Finding or determination by the division of historical resources of the department of cultural resources and, if applicable, the lead federal agency, that no historic properties would be affected, that there would be no adverse effects, or that there would be adverse effects to historic properties, if such a finding or determination has been made prior to the time of application;

(d) Description of the measures planned to avoid, minimize, or mitigate potential adverse effects on historic sites and archaeological resources, and the alternative measures considered but rejected by the applicant; and

(e) Description of the status of the applicant's consultations with the division of historical resources of the department of cultural resources, and, if applicable, with the lead federal agency, and, to the extent known to the applicant, any consulting parties, as defined in 36 C.F.R. §800.2(c), available as noted in Appendix B.

Source. #10994, eff 12-16-15

Site 301.07 Effects on Environment. Each application shall include the following information regarding the effects of, and plans for avoiding, minimizing, or mitigating potential adverse effects of, the proposed energy facility on air quality, water quality, and the natural environment:

(a) Information including the applications and permits filed pursuant to Site 301.03(d) regarding issues of air quality;

(b) Information including the applications and permits filed pursuant to Site 301.03(d) regarding issues of water quality;

(c) Information regarding the natural environment, including the following:

(1) Description of how the applicant identified significant wildlife species, rare plants, rare natural communities, and other exemplary natural communities potentially affected by construction and operation of the proposed facility, including communications with and documentation received from the New Hampshire department of fish and game, the New Hampshire natural heritage bureau, the United States Fish and Wildlife Service, and any other federal or state agencies having permitting or other regulatory authority over fish, wildlife, and other natural resources;

(2) Identification of significant wildlife species, rare plants, rare natural communities, and other exemplary natural communities potentially affected by construction and operation of the proposed facility;

(3) Identification of critical wildlife habitat and significant habitat resources potentially affected by construction and operation of the proposed facility;

(4) Assessment of potential impacts of construction and operation of the proposed facility on significant wildlife species, rare plants, rare natural communities, and other exemplary natural communities, and on critical wildlife habitat and significant habitat resources, including fragmentation or other alteration of terrestrial or aquatic significant habitat resources;

(5) Description of the measures planned to avoid, minimize, or mitigate potential adverse impacts of construction and operation of the proposed facility on wildlife species, rare plants, rare natural communities, and other exemplary natural communities, and on critical wildlife habitat and significant habitat resources, and the alternative measures considered but rejected by the applicant; and

(6) Description of the status of the applicant's discussions with the New Hampshire department of fish and game, the New Hampshire natural heritage bureau, the United States Fish and Wildlife Service, and any other federal or state agencies having permitting or other regulatory authority over fish, wildlife, and other natural resources.

Source. #10994, eff 12-16-15

Site 301.08 Effects on Public Health and Safety. Each application shall include the following information regarding the effects of, and plans for avoiding, minimizing, or mitigating potential adverse effects of, the proposed energy facility on public health and safety:

(a) For proposed wind energy systems:

(1) A sound impact assessment prepared in accordance with professional standards by an expert in the field, which assessment shall include the reports of a preconstruction sound background study and a sound modeling study, as specified in Site 301.18;

(2) An assessment that identifies the astronomical maximum as well as the anticipated hours per year of shadow flicker expected to be perceived at each residence, learning space, workplace, health care setting, outdoor or indoor public gathering area, other occupied building, and roadway, within a minimum of 1 mile of any turbine, based on shadow flicker modeling that assumes an impact distance of at least 1 mile from each of the turbines;

(3) Description of planned setbacks that indicate the distance between each wind turbine and the nearest landowner's existing building and property line, and between each wind turbine and the nearest public road and overhead or underground energy infrastructure or energy transmission pipeline within 2 miles of such wind turbine, and explain why the indicated distances are adequate to protect the public from risks associated with the operation of the proposed wind energy facility;

(4) An assessment of the risks of ice throw, blade shear, and tower collapse on public safety, including a description of the measures taken or planned to avoid or minimize the occurrence of such events, if necessary, and the alternative measures considered but rejected by the applicant;

(5) Description of the lightning protection system planned for the proposed facility;

(6) Description of any determination made by the Federal Aviation Administration regarding whether any hazard to aviation is expected from any of the wind turbines included in the proposed facility, and describe the Federal Aviation Administration's lighting, turbine color, and other requirements for the wind turbines;

(7) A decommissioning plan prepared by an independent, qualified person with demonstrated knowledge and experience in wind generation projects and cost estimates, which plan shall provide for removal of all structures and restoration of the facility site;

(8) The decommissioning plan required under (7) above shall include each of the following:

a. A description of sufficient and secure funding to implement the plan, which shall not account for the anticipated salvage value of facility components or materials;

b. The provision of financial assurance in the form of an irrevocable standby letter of credit, performance bond, surety bond, or unconditional payment guaranty executed by a parent company of the facility owner maintaining at all times an investment grade credit rating;

c. All turbines, including the blades, nacelles and towers, shall be disassembled and transported off-site;

d. All transformers shall be transported off-site;

e. The overhead power collection conductors and the power poles shall be removed from the site;

f. All underground infrastructure at depths less than four feet below grade shall be removed from the site and all underground infrastructure at depths greater than four feet below finished grade shall be abandoned in place; and

g. Areas where subsurface components are removed shall be filled, graded to match adjacent contours, reseeded, stabilized with an appropriate seed and allowed to re-vegetate naturally;

(9) A plan for fire protection for the proposed facility prepared by or in consultation with a fire safety expert; and

(10) An assessment of the risks that the proposed facility will interfere with the weather radars used for severe storm warning or any local weather radars.

(b) For electric transmission facilities, an assessment of electric and magnetic fields generated by the proposed facility and

the potential impacts of such fields on public health and safety, based on established scientific knowledge, and an assessment of the risks of collapse of the towers, poles, or other supporting structures, and the potential adverse effects of any such collapse.

(c) For high pressure gas pipelines:

(1) A comprehensive health impact assessment prepared by an independent health and safety expert in accordance with nationally recognized standards, and specifically designed to identify and evaluate potential short-term and long-term human health impacts by identifying potential pathways for facility-related contaminants to harm human health, quantifying the cumulative risks posed by any contaminants, and recommending necessary avoidance, minimization, or mitigation;

(2) A sound and vibration impact assessment prepared by an independent expert in the field, in accordance with ANSI/ASA S12.9-2013 Part 3 for short-term monitoring and with ANSI S12.9-1992 2013 Part 2 for long-term monitoring, including the reports of a preconstruction sound and vibration background study and a sound and vibration modeling study;

(3) A description of planned setbacks that indicate the distance between:

a. The proposed high pressure gas pipeline and existing buildings on, and the boundaries of, abutting properties;

b. Any associated compressor station and schools, day-care centers, health care facilities, residences, residential neighborhoods, places of worship, elderly care facilities, and farms within a one mile radius; and

c. The proposed high pressure gas pipeline and any overhead or underground electric transmission line within 1/2 mile;

(4) An explanation of why the setbacks described by the applicant in response to (3), above, are adequate to protect the public from risks associated with the operation of the high pressure gas pipeline; and

(5) A description of all permanently installed exterior lighting at compressor stations and how it complies with Site 301.14(f)(5)c.

(d) For all energy facilities:

(1) Except as otherwise provided in (a)(1) above, an assessment of operational sound associated with the proposed facility, if the facility would involve use of equipment that might reasonably be expected to increase sound by 10 decibel A-weighted (dBA) or more over background levels, measured at the L-90 sound level, at the property boundary of the proposed facility site or, in the case of an electric transmission line or an energy transmission pipeline, at the edge of the right-of-way or the edge of the property boundary if the proposed facility, or portion thereof, will be located on land owned, leased or otherwise controlled by the applicant or an affiliate of the applicant;

(2) A facility decommissioning plan prepared by an independent, qualified person with demonstrated knowledge and experience in similar energy facility projects and cost estimates; the decommissioning plan shall include each of the following:

a. A description of sufficient and secure funding to implement the plan, which shall not account for the anticipated salvage value of facility components or materials;

b. The provision of financial assurance in the form of an irrevocable standby letter of credit, performance bond, surety bond, or unconditional payment guaranty executed by a parent company of the facility owner maintaining at all times an investment grade credit rating;

c. All transformers shall be transported off-site; and

d. All underground infrastructure at depths less than four feet below grade shall be removed from the site and all underground infrastructure at depths greater than four feet below finished grade shall be abandoned in place;

(3) A plan for fire safety prepared by or in consultation with a fire safety expert;

(4) A plan for emergency response to the proposed facility site; and

(5) A description of any additional measures taken or planned to avoid, minimize, or mitigate public health and safety

impacts that would result from the construction and operation of the proposed facility, and the alternative measures considered but rejected by the applicant.

Source. #10994, eff 12-16-15; amd by #11156, eff 8-16-16

Site 301.09 Effects on Orderly Development of Region. Each application shall include information regarding the effects of the proposed energy facility on the orderly development of the region, including the views of municipal and regional planning commissions and municipal governing bodies regarding the proposed facility, if such views have been expressed in writing, and master plans of the affected communities and zoning ordinances of the proposed facility host municipalities and unincorporated places, and the applicant's estimate of the effects of the construction and operation of the facility on:

(a) Land use in the region, including the following:

(1) A description of the prevailing land uses in the affected communities; and

(2) A description of how the proposed facility is consistent with such land uses and identification of how the proposed facility is inconsistent with such land uses;

(b) The economy of the region, including an assessment of:

(1) The economic effect of the facility on the affected communities;

(2) The economic effect of the proposed facility on in-state economic activity during construction and operation periods;

(3) The effect of the proposed facility on State tax revenues and the tax revenues of the host and regional communities;

(4) The effect of the proposed facility on real estate values in the affected communities;

(5) The effect of the proposed facility on tourism and recreation; and

(6) The effect of the proposed facility on community services and infrastructure;

(c) Employment in the region, including an assessment of:

(1) The number and types of full-time equivalent local jobs expected to be created, preserved, or otherwise affected by the construction of the proposed facility, including direct construction employment and indirect employment induced by facility-related wages and expenditures; and

(2) The number and types of full-time equivalent jobs expected to be created, preserved, or otherwise affected by the operation of the proposed facility, including direct employment by the applicant and indirect employment induced by facility-related wages and expenditures.

Source. #10994, eff 12-16-15

Site 301.10 Completeness Review and Acceptance of Applications for Energy Facilities.

(a) Upon the filing of an application for an energy facility, the committee shall forward to each of the other state agencies having permitting or other regulatory authority, under state or federal law, to regulate any aspect of the construction or operation of the proposed facility, a copy of the application for the agency's review as described in RSA 162-H:7, IV.

(b) The committee also shall forward a copy of the application to the department of fish and game, the department of health and human services, the division of historical resources of the department of cultural resources, the natural heritage bureau, the governor's office of energy and planning, and the division of fire safety of the department of safety, unless any such agency or office has been forwarded a copy of the application under (a) above.

(c) Upon receiving an application, the committee shall conduct a preliminary review to ascertain if the application contains sufficient information for the committee to review the application under RSA 162-H and these rules.

(d) Each state agency having permitting or other regulatory authority shall have 45 days from the time the committee forwards the application to notify the committee in writing whether the application contains sufficient information for its purposes.

(e) Within 60 days after the filing of the application, the committee shall determine whether the application is administratively complete and has been accepted for review.

(f) If the committee determines that an application is administratively incomplete, it shall notify the applicant in writing, specifying each of the areas in which the application has been deemed incomplete.

(g) If the applicant is notified that its application is administratively incomplete, the applicant may file a new and more complete application or complete the filed application by curing the specified defects within 10 days of the applicant's receipt of notification of incompleteness.

(h) If, within the 10-day time frame, the applicant files a new and more complete application or completes the filed application, in either case curing the defects specified in the notification of incompleteness, the committee shall, no later than 14 days after receipt of the new or completed application, accept the new or completed application.

(i) If the new application is not complete or the specified defects in the filed application remain uncured, the committee shall notify the applicant in writing of its rejection of the application and instruct the applicant to file a new application.

Source. #10994, eff 12-16-15

Site 301.11 Exemption Determination.

(a) Within 60 days of acceptance of an application or the filing of a petition for exemption, the committee shall exempt the applicant from the approval and certificate provisions of RSA 162-H and these rules, if the committee finds that:

(1) Existing state or federal statutes, state or federal agency rules or municipal ordinances provide adequate protection of the objectives set forth in RSA 162-H:1;

(2) Consideration of the proposed energy facility by only selected agencies represented on the committee is required and the objectives of RSA 162-H:1 can be met by those agencies without exercising the provisions of RSA 162-H;

(3) Response to the application or request for exemption from the general public, provided through written submissions or in the adjudicative proceeding provided for in (b) below, indicates that the objectives of RSA 162-H:1 are met through the individual review processes of the participating agencies; and

(4) All environmental impacts or effects are adequately regulated by other federal, state, or local statutes, rules, or ordinances.

(b) The committee shall make the determination described in (a) above after conducting an adjudicative proceeding that includes a public hearing held in a county where the energy facility is proposed to be located.

Source. #10994, eff 12-16-15

Site 301.12 Timeframe for Application Review.

(a) Pursuant to RSA 162-H:7, VI-b, each state agency having permitting or other regulatory authority over the proposed energy facility shall report its progress to the committee within 150 days after application acceptance, outlining draft permit conditions and specifying additional data requirements necessary to make a final decision on the parts of the application that relate to its permitting or other regulatory authority.

(b) Pursuant to RSA 162-H:7, VI-c, each state agency having permitting or other regulatory authority over the proposed energy facility shall make and submit to the committee a final decision on the parts of the application that relate to its permitting and other regulatory authority, no later than 240 days after application acceptance.

(c) Pursuant to RSA 162-H:7, VI-d, the committee shall issue or deny a certificate for an energy facility within 365 days after application acceptance.

(d) Pursuant to RSA 162-H:14, I, the committee shall temporarily suspend its deliberations and the time frames set forth in this section at any time while an application is pending before the committee, if it finds that such suspension is in the public interest.

Source. #10994, eff 12-16-15

Site 301.13 Criteria Relative to Findings of Financial, Technical, and Managerial Capability.

(a) In determining whether an applicant has the financial capability to construct and operate the proposed energy facility, the committee shall 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.

(b) In determining whether an applicant has the technical capability to construct and operate the proposed facility, the committee shall 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.

(c) In determining whether an applicant has the managerial capability to construct and operate the proposed facility, the committee shall 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.

Source. #10994, eff 12-16-15

Site 301.14 Criteria Relative to Findings of Unreasonable Adverse Effects.

(a) In determining whether a proposed energy facility will have an unreasonable adverse effect on aesthetics, the committee shall consider:

(1) The existing character of the area of potential visual impact;

(2) The significance of affected scenic resources and their distance from the proposed facility;

(3) The extent, nature, and duration of public uses of affected scenic resources;

(4) The scope and scale of the change in the landscape visible from affected scenic resources;

(5) The evaluation of the overall daytime and nighttime visual impacts of the facility as described in the visual impact assessment submitted by the applicant and other relevant evidence submitted pursuant to Site 202.24;

(6) The extent to which the proposed facility would be a dominant and prominent feature within a natural or cultural landscape of high scenic quality or as viewed from scenic resources of high value or sensitivity; and

(7) The effectiveness of the measures proposed by the applicant to avoid, minimize, or mitigate unreasonable adverse effects on aesthetics, and the extent to which such measures represent best practical measures.

(b) In determining whether a proposed energy facility will have an unreasonable adverse effect on historic sites, the committee shall consider:

(1) All of the historic sites and archaeological resources potentially affected by the proposed facility and any

anticipated potential adverse effects on such sites and resources;

(2) The number and significance of any adversely affected historic sites and archeological resources, taking into consideration the size, scale, and nature of the proposed facility;

(3) The extent, nature, and duration of the potential adverse effects on historic sites and archeological resources;

(4) Findings and determinations by the New Hampshire division of historical resources of the department of cultural resources and, if applicable, the lead federal agency, of the proposed facility's effects on historic sites as determined under Section 106 of the National Historic Preservation Act, 54 U.S.C. §306108, or RSA 227-C:9; and

(5) The effectiveness of the measures proposed by the applicant to avoid, minimize, or mitigate unreasonable adverse effects on historic sites and archaeological resources, and the extent to which such measures represent best practical measures.

(c) In determining whether a proposed energy facility will have an unreasonable adverse effect on air quality, the committee shall consider the determinations of the New Hampshire department of environmental services with respect to applications or permits identified in Site 301.03(d) and other relevant evidence submitted pursuant to Site 202.24.

(d) In determining whether a proposed energy facility will have an unreasonable adverse effect on water quality, the committee shall consider the determinations of the New Hampshire department of environmental services, the United States Army Corps of Engineers, and other state or federal agencies having permitting or other regulatory authority, under state or federal law, to regulate any aspect of the construction or operation of the proposed facility, with respect to applications and permits identified in Site 301.03(d), and other relevant evidence submitted pursuant to Site 202.24.

(e) In determining whether construction and operation of a proposed energy facility will have an unreasonable adverse effect on the natural environment, including wildlife species, rare plants, rare natural communities, and other exemplary natural communities, the committee shall consider:

(1) The significance of the affected resident and migratory fish and wildlife species, rare plants, rare natural communities, and other exemplary natural communities, including the size, prevalence, dispersal, migration, and viability of the populations in or using the area;

(2) The nature, extent, and duration of the potential effects on the affected resident and migratory fish and wildlife species, rare plants, rare natural communities, and other exemplary natural communities;

(3) The nature, extent, and duration of the potential fragmentation or other alteration of terrestrial or aquatic significant habitat resources or migration corridors;

(4) The analyses and recommendations, if any, of the department of fish and game, the natural heritage bureau, the United States Fish and Wildlife Service, and other agencies authorized to identify and manage significant wildlife species, rare plants, rare natural communities, and other exemplary natural communities;

(5) The effectiveness of measures undertaken or planned to avoid, minimize, or mitigate potential adverse effects on the affected wildlife species, rare plants, rare natural communities, and other exemplary natural communities, and the extent to which such measures represent best practical measures;

(6) The effectiveness of measures undertaken or planned to avoid, minimize, or mitigate potential adverse effects on terrestrial or aquatic significant habitat resources, and the extent to which such measures represent best practical measures; and

(7) Whether conditions should be included in the certificate for post-construction monitoring and reporting and for adaptive management to address potential adverse effects that cannot reliably be predicted at the time of application.

(f) In determining whether a proposed energy facility will have an unreasonable adverse effect on public health and safety, the committee shall:

(1) For all energy facilities, consider the information submitted pursuant to Site 301.08 and other relevant evidence submitted pursuant to Site 202.24, the potential adverse effects of construction and operation of the proposed facility on public health and safety, the effectiveness of measures undertaken or planned to avoid, minimize, or mitigate such potential adverse effects, and the extent to which such measures represent best practical measures;

(2) For wind energy systems, apply the following standards:

a. With respect to sound standards, the A-weighted equivalent sound levels produced by the applicant's energy facility during operations shall not exceed the greater of 45 dBA or 5 dBA above background levels, measured at the L-90 sound level, between the hours of 8:00 a.m. and 8:00 p.m. each day, and the greater of 40 dBA or 5 dBA above background levels, measured at the L-90 sound level, at all other times during each day, as measured using microphone placement at least 7.5 meters from any surface where reflections may influence measured sound pressure levels, on property that is used in whole or in part for permanent or temporary residential purposes, at a location between the nearest building on the property used for such purposes and the closest wind turbine; and

b. With respect to shadow flicker, the shadow flicker created by the applicant's energy facility during operations shall not occur more than 8 hours per year at or within any residence, learning space, workplace, health care setting, outdoor or indoor public gathering area, or other occupied building;

(3) For wind energy systems, consider the proximity and use of buildings, property lines, public roads, and overhead and underground energy infrastructure and energy transmission pipelines, the risks of ice throw, blade shear, tower collapse, and other potential adverse effects of facility operation, and the effectiveness of measures undertaken or planned to avoid, minimize, or mitigate such potential adverse effects, and the extent to which such measures represent best practical measures;

(4) For electric transmission lines, consider the proximity and use of buildings, property lines, and public roads, the risks of collapse of towers, poles, or other supporting structures, the potential impacts on public health and safety of electric and magnetic fields generated by the proposed facility, and the effectiveness of measures undertaken or planned to avoid, minimize, or mitigate such potential adverse effects, and the extent to which such measures represent best practical measures;

(5) For high pressure gas pipelines, apply the following standards:

a. With respect to sound standards for interstate pipelines, the noise attributable to any new compressor station, compression added to an existing station, or any modification, upgrade or update of an existing station, shall not exceed a day-night sound level (Ldn) of 55 dBA at any pre-existing noise-sensitive area, such as schools, hospitals, or residences, as provided in 18 CFR §380.12(k), available as noted in Appendix B;

b. With respect to sound standards for intrastate pipelines, the noise attributable to any new compressor station, compression added to an existing station, or any modification, upgrade or update of an existing station, shall not exceed the standards set forth in (2)a., above, regarding wind energy systems;

c. With respect to vibration, compressor stations or modifications of existing compressor stations shall not result in a perceptible increase in vibration at any pre-existing noise-sensitive area, such as schools, hospitals, or residences, as provided in 18 CFR §380.12(k), available as noted in Appendix B, or a level of 2.0 peak particle velocity, whichever is less;

d. With respect to exterior lighting at compressor stations, no light shall be projected above the horizontal plane or projected beyond the property lines;

e. With respect to pipeline construction and safety, the requirements in Puc 506 and Puc 508 for a class 4 location in a high consequence area, as those terms are defined in 49 CFR §192.5(b)(4) and 49 CFR §192.903, available as noted in Appendix B, respectively; and

(6) For high pressure gas pipelines, consider:

a. The results of the comprehensive health impact assessment;

b. The proximity of electric transmission lines to the high pressure gas pipeline;

c. The proximity of any compressor station to schools, day-care centers, health care facilities, residences, residential neighborhoods, places of worship, elderly care facilities, and farms;

d. The effectiveness of measures undertaken or planned to avoid, minimize, or mitigate such potential adverse effects; and

e. The extent to which the measures in d. represent best practical measures.

Source. #10994, eff 12-16-15; amd by #11156, eff 8-16-16

Site 301.15 Criteria Relative to a Finding of Undue Interference. In determining whether a proposed energy facility will unduly interfere with the orderly development of the region, the committee shall consider:

(a) The extent to which the siting, construction, and operation of the proposed facility will affect land use, employment, and the economy of the region;

(b) The provisions of, and financial assurances for, the proposed decommissioning plan for the proposed facility; and

(c) The views of municipal and regional planning commissions and municipal governing bodies regarding the proposed facility.

Source. #10994, eff 12-16-15

Site 301.16 Criteria Relative to Finding of Public Interest. In determining whether a proposed energy facility will serve the public interest, the committee shall consider:

(a) The welfare of the population;

(b) Private property;

(c) The location and growth of industry;

(d) The overall economic growth of the state;

(e) The environment of the state;

(f) Historic sites;

(g) Aesthetics;

(h) Air and water quality;

(i) The use of natural resources; and

(j) Public health and safety.

Source. #10994, eff 12-16-15

Site 301.17 Conditions of Certificate. In determining whether a certificate shall be issued for a proposed energy facility, the committee shall consider whether the following conditions should be included in the certificate in order to meet the objectives of RSA 162-H:

(a) A requirement that the certificate holder promptly notify the committee of any proposed or actual change in the ownership or ownership structure of the holder or its affiliated entities and request approval of the committee of such change;

(b) A requirement that the certificate holder promptly notify the committee of any proposed or actual material change in the location, configuration, design, specifications, construction, operation, or equipment components of the energy facility subject to the certificate and request approval of the committee of such change;

(c) A requirement that the certificate holder continue consultations with the New Hampshire division of historical resources of the department of cultural resources and, if applicable, the federal lead agency, and comply with any agreement or memorandum of understanding entered into with the New Hampshire division of historical resources of the department of cultural resources and, if applicable, the federal lead agency;

(d) Delegation to the administrator or another state agency or official of the authority to monitor the construction or operation of the energy facility subject to the certificate and to ensure that related terms and conditions of the certificate are met;

(e) Delegation to the administrator or another state agency or official of the authority to specify the use of any technique, methodology, practice, or procedure approved by the committee within the certificate and with respect to any permit, license, or

approval issued by a state agency having permitting or other regulatory authority;

(f) Delegation to the administrator or another state agency or official of the authority to specify minor changes in route alignment to the extent that such changes are authorized by the certificate for those portions of a proposed electric transmission line or energy transmission pipeline for which information was unavailable due to conditions which could not have been reasonably anticipated prior to the issuance of the certificate;

(g) A requirement that the energy facility be sited subject to setbacks or operate with designated safety zones in order to avoid, mitigate, or minimize potential adverse effects on public health and safety;

(h) Other conditions necessary to ensure construction and operation of the energy facility subject to the certificate in conformance with the specifications of the application; and

(i) Any other conditions necessary to serve the objectives of RSA 162-H or to support findings made pursuant to RSA 162-H:16.

Source. #10994, eff 12-16-15

Site 301.18 Sound Study Methodology.

(a) The methodology for conducting a preconstruction sound background study for a wind energy system shall include:

(1) Adherence to the standard of ANSI/ASA S12.9-2013 Part 3, available as noted in Appendix B, a standard that requires short-term attended measurements;

(2) Long-term unattended monitoring shall be conducted in accordance with the standard of ANSI S12.9-1992 2013 Part 2, available as noted in Appendix B, provided that audio recordings are taken in order to clearly identify and remove transient noises from the data, with frequencies above 1250 hertz 1/3 octave band to be filtered out of the data;

(3) Measurements shall be conducted at the nearest properties from the proposed wind turbines that are representative of all residential properties within 2 miles of any turbine; and

(4) Sound measurements shall be omitted when the wind velocity is greater than 4 meters per second at the microphone position, when there is rain, or with temperatures below instrumentation minima; following the protocol of ANSI S12.9-2013 Part 3, available as noted in Appendix B:

a. Microphones shall be placed 1 to 2 meters above ground level, and at least 7.5 meters from any reflective surface;

b. A windscreen of the type recommended by the monitoring instrument's manufacturer must be used for all data collection;

c. Microphones should be field-calibrated before and after measurements; and

d. An anemometer shall be located within close proximity to each microphone.

(b) Pre-construction sound reports shall include a map or diagram clearly showing the following:

(1) Layout of the project area, including topography, project boundary lines, and property lines;

(2) Locations of the sound measurement points;

(3) Distance between any sound measurement point and the nearest wind turbine;

(4) Location of significant local non-turbine sound and vibration sources;

(5) Distance between all sound measurement points and significant local sound sources;

(6) Location of all sensitive receptors including schools, day-care centers, health care facilities, residences, residential neighborhoods, places of worship, and elderly care facilities;

(7) Indication of temperature, weather conditions, sources of ambient sound, and prevailing wind direction and speed for the monitoring period; and

(8) Final report shall provide A-weighted and C-weighted sound levels for L-10, Leq, and L-90.

(c) The predictive sound modeling study shall:

(1) Be conducted in accordance with the standards and specifications of ISO 9613-2 1996-12-15, available as noted in Appendix B;

(2) Include an adjustment to the Leq sound level produced by the model applied in order to adjust for turbine manufacturer uncertainty, such adjustment to be determined in accordance with the most recent release of the IEC 61400 Part 11 standard (Edition 3.0 2012-11), available as noted in Appendix B;

(3) Include predictions to be made at all properties within 2 miles from the project wind turbines for the wind speed and operating mode that would result in the worst case wind turbine sound emissions during the hours before 8:00 a.m. and after 8:00 p.m. each day; and

(4) Incorporate other corrections for model algorithm error to be disclosed and accounted for in the model.

(d) The predictive sound modeling study report shall:

(1) Include the results of the modeling described in (c)(3) above as well as a map with sound contour lines showing dBA sound emitted from the proposed wind energy system at 5 dBA intervals;

(2) Include locations out to 2 miles from any wind turbine included in the proposed facility; and

(3) Show proposed wind turbine locations and the location of all sensitive receptors, including schools, day-care centers, health care facilities, residences, residential neighborhoods, places of worship, and elderly care facilities.

(e) Post-construction noise compliance monitoring shall include:

(1) Adherence to the standard of ANSI/ASA S12.9-2013 Part 3, available as noted in Appendix B, that requires short-term attended measurements to ensure transient noises are removed from the data, and measurements shall include at least one nighttime hour where turbines are operating at full sound power with winds less than 3 meters per second at the microphone;

(2) Unattended long-term monitoring shall also be conducted;

(3) Sound measurements shall be omitted when there is rain, or when temperatures are below instrumentation minima, and shall comply with the following additional specifications:

a. Microphones shall be placed 1 to 2 meters above ground level and at least 7.5 meters from any reflective surface, following the protocols of ANSI/ASA S12.9-2013 Part 3, available as noted in Appendix B;

b. Proper microphone screens shall be required;

c. Microphones shall be field-calibrated before and after measurements; and

d. An anemometer shall be located within close proximity to each microphone;

(4) Monitoring shall involve measurements being made with the turbines in both operating and non-operating modes, and supervisory control and data acquisition system data shall be used to record hub height wind speed and turbine power output;

(5) Locations shall be pre-selected where noise measurements will be taken that shall be the same locations at which predictive sound modeling study measurements were taken pursuant to subsection (c) above, and the measurements shall be performed at night with winds above 4.5 meters per second at hub height and less than 3 meters per second at ground level;

(6) All sound measurements during post-construction monitoring shall be taken at 0.125-second intervals measuring both fast response and Leq metrics; and

(7) Post-construction monitoring surveys shall be conducted once within 3 months of commissioning and once during each season thereafter for the first year, provided that:

a. Additional surveys shall be conducted at the request of the committee or the administrator; and

b. Adjustments to this schedule shall be permitted, subject to review by the committee or the administrator.

(f) Post-construction sound monitoring reports shall include a map or diagram clearly showing the following:

(1) Layout of the project area, including topography, project boundary lines, and property lines;

(2) Locations of the sound measurement points; and

(3) Distance between any sound measurement point and the nearest wind turbine.

(g) For each sound measurement period during post-construction monitoring, reports shall include each of the following measurements:

(1) LAeq, LA-10, and LA-90; and

(2) LCeq, LC-10, and LC-90.

(h) Noise emissions shall be free of audible tones, and if the presence of a pure tone frequency is detected, a 5 dB penalty shall be added to the measured dBA sound level.

(i) Validation of noise complaints submitted to the committee shall require field sound surveys, except as determined by the administrator to be unwarranted, which field studies shall be conducted under the same meteorological conditions as occurred at the time of the alleged exceedance that is the subject of the complaint.

Source. #10994, eff 12-16-15

PART Site 302 ENFORCEMENT OF TERMS AND CONDITIONS

Site 302.01 Determination of Certificate Violation.

(a) Whenever the committee or the administrator as designee determines, on its own or in response to a complaint, that any term or condition of an issued certificate is being violated, it shall give written notice to the person holding the certificate of the specific violation and order the person to immediately terminate the violation.

(b) The administrator or another designated representative of the committee shall have the authority to inspect and monitor the construction and operation of the energy facility subject to the certificate.

(c) If the person holding the certificate has failed or neglected to terminate a specified violation within 15 days after receipt of the notice and order issued pursuant to (a) above, the committee shall commence a proceeding to suspend the person's certificate.

(d) Except in the case of an emergency, the committee shall give written notice of its consideration of suspension and of its reasons for consideration of suspension and shall provide an opportunity for an adjudicative hearing pursuant to Site 201 with respect to the proposed suspension.

(e) Except in the case of an emergency, the committee shall provide 14 days prior written notice of the hearing referred to in (d) above to the holder of the certificate and to the complainant, if any.

(f) If the committee determines following the adjudicative proceeding that a certificate violation has occurred and is continuing, the committee shall issue an order that suspends the holder's certificate until such time as the violation has been corrected if the committee determines, after due consideration of any mitigating circumstances and a determination of whether suspension is in the best interests of the public, or would result in an inability to assure that the state has an adequate and reliable supply of energy in conformance with sound environmental principles, that the following criteria have been met:

(1) The violation will not be terminated within 30 days from the date of the committee's decision; and

(2) The violation will have an unreasonable adverse effect pursuant to Site 301.14 on aesthetics, historic sites, air and water quality, the natural environment, or public health and safety.

Source. #9183-B, eff 6-17-08; ss by #10994, eff 12-16-15; amd by #11156, eff 8-

STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

Docket No. 2012-01

Re: Application of Antrim Wind Energy, LLC for a Certificate of Site and Facility for a Renewable Energy Facility Proposed to be Located in Antrim, Hillsborough County, New Hampshire

DECISION AND ORDER DENYING APPLICATION FOR CERTIFICATE OF SITE AND FACILITY

April 25, 2013

TABLE OF CONTENTS

I. INTRODUCTION

On February 7, 2013, after eleven days of evidentiary hearings and three full days of deliberation, a majority of the Subcommittee of the New Hampshire Site Evaluation Committee ("Subcommittee") appointed in this docket voted to deny the Application of Antrim Wind, LLC for a Certificate of Site and Facility ("Application"). The Application sought a Certificate of Site and Facility ("Certificate") for the authority to site, construct and operate a 30 MW wind powered Facility ("Project" or "Facility") along Tuttle Ridge and Willard Mountain in the Town of Antrim, New Hampshire. This Decision and Order memorializes the deliberations of the Subcommittee and sets forth the reasons for denial of the Application.

II. PROCEDURAL HISTORY

On January 31, 2012, Antrim Wind Energy, LLC ("Applicant" or "AWE") filed an Application for a Certificate of Site and Facility with the New Hampshire Site Evaluation Committee. The Application sought authority to site, construct and operate a 30 megawatt ("MW") wind energy Facility and associated facilities in the Town of Antrim, Hillsborough County, New Hampshire. The Facility ultimately proposed by the Applicant would include ten (10) Acciona AW 3000 wind turbine generators each having a nameplate capacity of three (3) MW. Each wind turbine generator within the Facility would be approximately 500 feet tall. The proposed wind turbines would be among the tallest free standing structures in the state of New Hampshire.

On February 9, 2012, pursuant to RSA 162-H:6-a, II, the Chairman of the Committee designated Vice-Chairman Ignatius to review the Application to determine whether it contained sufficient information to carry out the purposes of RSA 162-H. See, Correspondence from Chairman Burack to Commissioner Ignatius (Feb. 9, 2012). The Chairman of the Committee

also indicated that due to a personal conflict, he would be unable to serve as a member of the Subcommittee assigned to this matter and that, in accordance with RSA 162-H:3, Vice-Chairman Ignatius would serve as Subcommittee Chairman. See, Order Designating Subcommittee Pursuant to RSA 162-H:6-a (March 20, 2012).

On February 9, 2012, Counsel to the Committee forwarded correspondence to all state agencies that appeared to have permitting, licensing or other jurisdictional authority over matters covered in the Application. Counsel to the Committee requested that each state agency review the relevant portions of the Application and advise the Subcommittee if the Application did not contain sufficient information to consider the issuance of any permit, conditions, or licenses under the agencies' jurisdiction. No state agency reported that the Application was incomplete.

On February 9, 2012, Counsel to the Committee also forwarded correspondence to the Town of Antrim and the abutting Towns of Bennington, Deering, Hancock, Hillsborough, Nelson, Stoddard and Windsor notifying each municipality of the filing of the Application consistent with RSA 541-A:39 and the procedures to intervene in the proceeding. A similar letter was sent to the Southwest Regional Planning Commission.

On February 13, 2012, the Subcommittee Chairman issued a letter to the New Hampshire Attorney General requesting the appointment of an Assistant Attorney General as Counsel for the Public pursuant to RSA 162-H:9. On April 30, 2012, the Attorney General formally designated Senior Assistant Attorney General Peter C.L. Roth to serve as Counsel for the Public.

On March 5, 2012, the Subcommittee Chairman issued an Order pursuant to RSA 162-H: 6-a, II finding that the Application contained sufficient information to carry out the purposes of

RSA 162-H pertaining to renewable energy facilities and accepted the Application. Order Accepting Application for Certificate of Site and Facility (March 5, 2012).

On March 20, 2012, the Subcommittee Chairman designated a Subcommittee to consider the Application in accordance with RSA 162-H:6-a, III and RSA 162-H:4, V. Order Designating Subcommittee Pursuant to RSA 162-H:6-a (March 20, 2012).

On March 20, 2012, the Subcommittee Chairman also issued an Order and Notice of Prehearing Conference, Site Visit and Public Information Hearing. The Order and Notice scheduled a site visit and public information hearing for the afternoon and evening of April 30, 2012, in the Town of Antrim, Hillsborough County, pursuant to RSA 162-H:6-a, IV. The Order and Notice also scheduled a prehearing conference to be held in Concord on May 7, 2012. The site visit, public information hearing and prehearing conference all occurred as scheduled.

During the pendency of this docket, the Subcommittee received motions to intervene from: (i) the Town of Antrim, through its Board of Selectmen; (ii) the Antrim Planning Board; (iii) the Antrim Conservation Commission; (iv) the Stoddard Conservation Commission; (v) the Audubon Society of New Hampshire ("Audubon"); (vi) the Harris Center for Conservation Education; (vii) Industrial Wind Action Group ("IWAG"); (viii) the Appalachian Mountain Club ("AMC"); (ix) Brenda, Mark and Nathan Schaefer; (x) Richard and Loranne Carey Block; Robert Cleland and Annie Law; (xii) Katharine Elizabeth Sullivan; (xiii) Elsa Voelcker; (xiv) Janice Duley Longgood; (xv) Clark A. Craig; (xvi) Robert Edwards and Mary Allen; (xvii) James Hankard; (xviii) Samuel and Michelle Apkarian; and (xix) Clifton Burdette. On May 18, 2012, the Presiding Officer granted the intervention Petitions and ordered that the intervenors be consolidated into two groups: "Abutting Landowners" group of intervenors (Brenda, Mark and Nathan Schaefer, Janice Duley Longgood, and Clark Craig Jr.) and "North Branch Residents"

group of intervenors (Richard and Loranne Carey Block, Robert Cleland and Annie Law, Elsa Voelcker, James Hankard, Samuel and Michelle Apkarian, and Clifton Burdette). Order on Motions to Intervene (May 18, 2012). On July 26, 2012, the Gregg Lake Association moved for late intervention. On August 22, 2012, the Presiding Officer permitted the late intervention of the Gregg Lake Association as a limited intervenor with the right to cross-examine the Applicant's witnesses and the witnesses of the other parties, and present arguments on the Application. Order on Outstanding Motions (Aug. 22, 2012.)

During the course of these proceedings, the Applicant submitted four supplements to the Application.

Initially, the Subcommittee scheduled a final pre-hearing conference for Friday, September 7, 2012, and public adjudicative proceedings to begin on Monday, September 10, 2012. Order and Notice of Final Pre-Hearing Conference and Public Adjudicative Proceedings (Aug. 15, 2012). However, on August 30, 2012, in response to motions by IWAG and Counsel for the Public, the Presiding Officer ruled that a pre-hearing conference would be held on September 6, 2012 to determine whether the Motions should be granted and, if so, to discuss a new procedural schedule. Procedural Order and Notice of Additional Pre-hearing Conference (Aug. 30, 2012).

In the Application for Site and Facility, the Applicant requested that the Subcommittee create a subdivided lot for the interconnection facilities associated with the Project. Ex. AWE 1, at 45. After receiving briefing regarding this issue, the Subcommittee met to hear oral argument on September 6, 2012. See, Notice of Public Meeting and Further Procedural Order (Aug. 22, 2012). At the oral argument, the Subcommittee voted to take additional procedural steps to review the Town of Antrim Subdivision regulations to determine whether the Antrim Planning

Board retained residual authority pertaining to the proposed subdivision, and indicated that it would require an additional day of hearings to address those issues. See, Order on Motions to Continue and Further Procedural Schedule (Sept. 13, 2012).

Following the September 6, 2012, hearing, the Subcommittee scheduled a pre-hearing conference for October 25, 2012, with adjudicative proceedings beginning on October 26, 2012 and continuing until November 2, 2012, with public comment scheduled for November 1, 2012 and November 2, 2012. Order and Notice of Re-Scheduled Final Pre-Hearing Conference and Public Adjudicative Proceedings (Sept. 13, 2012). The referenced pre-hearing conference was held as scheduled on October 25, 2012. Subcommittee counsel, Michael Iacopino, presided at this conference and issued a report adopted by the Subcommittee Chairman by Order dated October 25, 2012. Report of Pre-Hearing Conference (Oct. 25, 2012).

The adjudicative proceedings began on October 26, 2012, with further oral argument regarding the Applicant's request to subdivide the lot associated with the interconnection facilities, and the proceedings continued through November 2, 2012. The first few days of the adjudicative hearing were intermittently interrupted. As a result, the Subcommittee extended its normal hearing hours and met on several nights well into the evening. Nevertheless, having exhausted its reserved hearing time the adjudicative proceeding was recessed until November 27, 2012. Order and Notice of Continued Adjudicative Proceeding (Nov. 8, 2012). The evidentiary portions of the proceeding concluded on December 6, 2012. Order and Notice of Public Deliberative Proceedings and Further Procedural Order (Dec. 28, 2012). In lieu of closing arguments, the Subcommittee permitted the parties to file post-hearing briefs.

On February 5, 2013, the Subcommittee commenced public deliberations on the Application. The Subcommittee deliberated for three full days. On February 7, 2013, a majority

of the Subcommittee voted to deny the Application for a Certificate of Site and Facility.[1] This Decision contains the reasons for denial as required by RSA 162-H:16, I.

III. APPLICATION

A. The Application and Supplements

The Application was filed on January 31, 2012. Thereafter, the Applicant submitted four Supplements to the Application. On August 10, 2012, the Applicant filed the First Supplement to the Application that included additional information regarding the laydown yard, the operation and management building and temporary staging area, the proposed meteorological towers, updates regarding environmental impacts and related information provided to state and federal agencies. See, Ex. AWE 6. On August 22, 2012, the Applicant filed a Second Supplement which included, among other things, information regarding the Applicant's technical and managerial capability, aesthetics, and radar activated light control system. See, Ex. AWE 7. The Second Supplement to the Application also contained the First Supplemental Pre-filed Testimony of Sean McCabe and Ellen Crivella and the pre-filed direct testimony of Ruben Segura-Coto, a viewshed analysis that was extended to ten miles, Appendix 9-A-1, and Appendix 20 containing an agreement between the Applicant and AMC with regard to radar activated turbine lighting. See, Ex. AWE 7. The Third Supplement to the Application was filed on September 5, 2012 and included information regarding the wind energy resource at the Project Site. See, Ex. AWE 8. On October 11, 2012, the Applicant filed the Fourth Supplement to the Application which included the following additional information and testimony:

[1] Subcommittee Members Ignatius, Boisvert, Dupee, Bailey, Robinson and Simpkins voting in favor of the Motion to Deny the Application; Subcommittee members Stewart, Lyons, and Green voting against the motion to deny the Application.

(i) additional information regarding the radar activated light system,

(ii) Appendix 2D-1 (Application for Driveway Permit associated with temporary laydown/construction area),

(iii) Appendix 2H (letter to Mr. Rennie regarding revisions to Alternation of Terrain, 401 Water Quality Certification, and Wetlands Permit),

(iv) supplemental pre-filed testimonies of Jack Kenworthy, Joseph Cofelice and Martin Pasqualini, John Guariglia, Richard Will and Russell Stevenson, Colin High, Daniel Butler and Patrick Martin, Dana Valleau and Adam Gravel, Robert O'Neal, Matthew Magnusson,

(v) Second Supplemental Pre-filed Testimony of Sean McCabe,

(vi) First Supplemental Pre-filed Testimony of Ruben Segura-Coto, and

(vii) Pre-filed Direct Testimony of Sally Wright.

The Application as originally filed and as supplemented over the course of the proceedings, contained all of the information that is required by RSA 162-H:7 and NEW HAMPSHIRE CODE OF ADMINISTRATIVE RULES SITE 300.01 AND SITE 300.02.

B. Summary of the Application

The Applicant is a Delaware limited liability company formed for the purposes of development, construction and operation of the Project. Ex. AWE 1 at 2, 53. The Applicant has two members: (i) Eolian Antrim, LLC (50% ownership); and (ii) Westerly Antrim, LLC (50% ownership). Ex. AWE e at 2, 53. Eolian Antrim, LLC, in turn, is owned by Eolian Renewable Energy, LLC. Ex. AWE 1 at 2, 53. Westerly Antrim, LLC is owned by Westerly Wind, LLC. Ex. AWE 1 at 2, 53. Westerly Antrim, LLC is a portfolio company of US Renewables Group, an energy investment firm founded in 2003. Ex. AWE 1 at 2, 53.

The Project is proposed to be located on and adjacent to 354 Keene Road (NH Route 9) and includes approximately 1,850 acres of private lands currently leased by the Applicant from

five landowners. Ex. AWE 1 at 5. These lands occupy the area from Route 9, southward to the east summit of Tuttle Hill, and to the north flank of Willard Mountain to the west. Ex. AWE 1 at 5. As proposed, the Project would be constructed primarily on the ridgeline that starts approximately 0.75 miles south of NH Route 9 and runs south southwest, for approximately 2.5 miles. Ex. AWE 1 at 5.

The Facility is proposed to consist of ten (10) Acciona 3000 wind turbine generators each having a nameplate capacity of three (3) MW. Ex. AWE 1, at 16. Each turbine would rise to 492 feet above ground level when measured from its base to the tip of its blade. Ex. NB 2, at 3. As proposed, each of the turbines would be constructed at the following site elevation: (1) WTG-1 1,431 feet; (2) WTG-2 1,743 feet; (3) WTG-3 1,758 feet; (4) WTG-4 1,682 feet; (5) WTG-5 1,726 feet; (6) WTG-6 1,516 feet; (7) WTG-7 1,676 feet; (8) WTG-8 1,700 feet; (9) WTG-9 1,646 feet; (10) WTG-10 1,896 feet. See, Ex. AWE 2, Appdx. 2E (FAA determinations); see also, Ex. AWE 3, Appdx. 7A (civil design drawings). The ridgeline designated for the location of the turbines has a site elevation fluctuating between 1,042 feet and 1,904 feet. Ex. AWE 1 at 48. Generally, as proposed, each turbine would be between 25% and 35% of the elevation of the ridge line where it would be located. See, Ex. AWE 2, Appdx. 2E (FAA determinations); see also, Ex. AWE 3, Appdx. 7A (civil design drawings).

In addition, the Application indicated that the Project would consist of approximately 4 miles of new gravel surfaced roads within the project area, a joint electrical collector system consisting of both underground and overhead collection lines, an interconnection substation, and an operations and maintenance building of approximately 3,000 square feet. Ex. AWE 1 at 16, 26, 33, 44.

The Applicant stated that it would have to build approximately 4 miles of new gravel surface road for access, construction and maintenance of the wind turbines. Ex. AWE 1 at 16. The main access road would be approximately 3.47 miles long and would be built in two sections: (1) the first section will connect Rte. 9 to wind turbine generator WTG #1; and (2) the second section includes the remainder of the road, from WTG #1 to the ridge and then along the ridgeline. Ex. AWE 1 at 16. The Applicant asserted that there would also be two spur roads installed to access individual turbines. Ex. AWE 1 at 16.

The Applicant proposed to interconnect the Facility to an existing Public Service Company of New Hampshire ("PSNH") 115 kV electric transmission line through the proposed interconnection substation which would be constructed adjacent to the existing PSNH L-163115 kV electric transmission line. Ex. AWE 1 at 26. The Applicant asserted that no new electric transmission lines, other than Project electrical collector system lines, would be required. Ex. AWE 1 at 26. As proposed, an underground electrical collection system would transfer the electricity generated by the turbines to the substation. Ex. AWE 1 at 26. The substation yard, in turn, would be divided into two areas: (1) the collection yard consisting of 100 feet by 111 feet and containing a transformer and a 16-foot by 12-foot control house; and (2) the interconnection yard consisting of 172 feet by 186 feet and containing a three-breaker ring bus and a 20-foot by 24-foot control house. Ex. AWE 1 at 26. The interconnection substation would be a standard three phase 115 kV transmission level substation designed and constructed by PSNH. Ex. AWE 1 at 42. The switchyard and substation would include transformers, switching equipment, protective relay and control equipment, transfer trip equipment, disturbance analyzer equipment, transducers, a Remote Terminal Unit, telemetry equipment and meters. Ex. AWE 1 at 33.

Finally, as proposed, the operation and maintenance building would be a single story structure comprising approximately 3,000 square feet including offices and associated facilities (bathrooms, kitchen, storage) for technicians, a garage for spare parts and supplies, and a computer server room. Ex. AWE 1 at 33, 45, Appdx. 7C.

The Applicant also asserted that it would install a permanent meteorological tower on the ridgeline between turbine #3 and turbine #4 to obtain wind data at the Project Site for wind turbine performance management. Ex. AWE 1 at 46, 62.

The Applicant anticipated that the overall cost of constructing the Project would be approximately $55-65 million. Ex. AWE 1 at 55. The Applicant did not claim that it had the present financial ability to undertake the Project from its own assets, but asserted that it would be able to obtain the capital required for the construction and operation of the Facility through a combination of construction loans, and sponsor or third party equity. Ex. AWE 1 at 55.

IV. POSITIONS OF THE PARTIES

A. Applicant

As a part of its Application, the Applicant submitted the pre-filed testimony of the following individuals:

- Jack Kenworthy, Chief Executive Officer of Eolian Renewable Energy, Ex. AWE 1;
- Joseph Cofelice, founder and Chief Executive Officer of Westerly Wind, LLC and Martin Pasqualini, founding partner and Managing Director of CP Global Partners, LLC, Ex. AWE 1;
- Sean McCabe, Vice President of Development at Westerly Wind, LLC, and Ellen Crivella, Project Manager in the Environmental and Permitting Services Group at GL Harrad Hassan, Ex. AWE 1;
- John W. Guariglia, Associate Principal with Saratoga Associates, Landscape Architects, Architects, Engineers, and Planners, P.C., Ex. AWE 1;

- Richard Will, Manager, Northeast Cultural Division of TRC Companies, and Russell Stevenson, Architectural Historian of A. D. Marble & Company, Ex. AWE 1;
- Colin High, Co-Founder and Principal Consultant with Resource Systems Group, Inc., Ex. AWE 1;
- Daniel T. Butler, Manager, Civil and Transmission Engineering Department with TRC Companies, Inc., Ex. AWE 1;
- Dana Valleau, Environmental Specialist of TRC Environmental Corporation and Adam Gravel, Associate/Project of Stantec Consulting, Ex. AWE 1;
- Robert O'Neal, Principal at Epsilon Associates, Inc., Ex. AWE 1;
- Ross Gittell, James R. Carter Professor of the University of New Hampshire, Whittemore School of Business and Economics, Ex. AWE 1;

The Applicant also submitted supplemental pre-filed testimony of (i) Sean McCabe and Ellen Crivella (Ex. AWE 1); (ii) Jack Kenworthy (Ex. AWE 1); (iii) Joseph Cofelice and Martin Pasqualini (Ex. AWE 1); (iv) John Guariglia (Ex. AWE 1); (v) Richard Will and Russell Stevenson (Ex. AWE 1); (vi) Colin High (Ex. AWE 1); (vii) Daniel Butler and Patrick Martin (Ex. AWE 1); (viii) Dana Valleau (Ex. AWE 1); (ix) Dana Valleau and Adam Gravel (Ex. AWE 1); (x) Robert O'Neal (Ex. AWE 1); (xi) Matthew Magnusson (Ex. AWE 9), (xii) Ruben Segura-Coto and Sally Wright (Ex. AWE 7); and the second supplemental pre-filed testimony of Sean McCabe (Ex. AWE 9).

The Applicant asserted that the information contained in its Application, pre-filed testimony, and exhibits clearly demonstrated that the Applicant had the financial, managerial and technical capacity to construct, manage, and operate the Facility in accordance with the conditions of the Certificate. In addition, the Applicant asserted that the Facility would not unduly interfere with the orderly development of the region and would not have an unreasonable adverse effect on aesthetics, historic sites, air and water quality, natural environment, or public

health and safety. The Applicant asserted that the Subcommittee should grant the Application and issue a Certificate to the Applicant.

B. Counsel for the Public

Counsel for the Public retained the following experts: (i) Jean Vissering, a landscape architect, to provide an independent assessment of the aesthetic impacts of the proposed Project; (ii) Gregory C. Tocci of Cavanaugh Tocci Associates, Inc., to study potential noise impacts of the Project; and (iii) Trevor Lloyd-Evans of the Manomet Center for Conservation Sciences to study the effect of the Facility on birds and flying mammals. Counsel for the Public submitted pre-filed and supplemental pre-filed testimony of these experts. Ex. PC 1-6.

Counsel for the Public asserts that the Subcommittee should deny the Application because the Project will allegedly have unreasonable adverse effects on aesthetics, public health and safety and the natural environment. In general, Counsel for the Public asserts that environmental benefits of the Project are outweighed by the serious and permanent environmental harm that the Project will cause. Specifically, based on the analysis conducted by Ms. Vissering, Counsel for the Public asserts that the Project will have an unreasonable adverse effect on aesthetics because of the Project's visual impact on the area. As to the impact on natural environment, Counsel for the Public asserts that the Applicant did not meet its burden to show that the Project will not have adverse effect on the natural environment and requests the Subcommittee, if it decides to grant the Certificate, to condition it upon requirement to conduct similar environmental studies as were required by the Subcommittee in the Certificate granted to the Groton Wind Project. Counsel for the Public further asserts that the Subcommittee should deny the Certificate because the Applicant failed to demonstrate that the Project's noise will not have adverse effect on aesthetics and public health and safety.

Counsel for the Public further urges the Subcommittee to deny the Certificate because, in his view, the Applicant failed to show that it has financial and managerial capacity to construct and operate the Project. Counsel for the Public retained the consultative services of Deloitte Financial Advisory Services. Deloitte prepared a report analyzing the financial, managerial and technical capability of the Applicant and the Facility. See, PC 7.

C. Town of Antrim

The Town of Antrim supports the issuance of a Certificate. The Applicant entered into an Agreement with the Town of Antrim addressing the Town's concerns including, but not limited to, the issues of noise and decommissioning. Ex. AWE 4, Appdx. 17. The Applicant also entered into a Payment In Lieu of Taxes ("PILOT") Agreement with the Town. Ex. AWE 12-13. In addition, the Antrim Board of Selectmen advised the Subcommittee that the Project was supported by the vast majority of the townspeople. As a result, the Antrim Board of Selectmen urges the Subcommittee to issue the Certificate and to incorporate the agreements negotiated by the Town as conditions to the Certificate.

D. Antrim Planning Board

The Antrim Planning Board neither supports nor opposes the construction of the Project. It asserts, however, that it should have jurisdiction over any subdivision that may be required as a result of construction and operation of the Project.

E. Antrim Conservation Commission

The Antrim Conservation Commission neither supports nor opposes the construction and operation of the Project. In their arguments, however, the Antrim Conservation Commission urged the Subcommittee to consider the Project's impact on aesthetics and natural environment

of the region and to condition the Certificate so that the Project will not have an unreasonable adverse effect on aesthetics and natural environment of the region.

F. Stoddard Conservation Commission

The Stoddard Conservation Commission alleges that the construction and operation of the Project will adversely affect the core wildlife habitat and conservation values of the area and urges the Subcommittee to deny the Certificate. In the alternative, the Stoddard Conservation Commission requests the Subcommittee to condition the Certificate upon the following conditions: (i) remove turbines 9 and 10 from the Project; (ii) expand the acreage under the proposed conservation easements to include all of the landowners on whose land the Project will be sited; and (iii) prohibit any development on conservations easements.

G. Audubon Society of New Hampshire

Audubon urges the Subcommittee to deny the Certificate because the Project, as proposed, will have an unreasonable adverse effect on Willard Pond and on the de Pierrefeu Willard Pond Sanctuary which it manages. Audubon also states that the Certificate should be denied because the Applicant does not have the financial, technical and managerial capacity required for the construction and operation of the Project. Audubon also requests the Subcommittee to incorporate a number of conditions designed to minimize the effect of the Project on Willard Pond and on the dePierrefeu Willard Pond Wildlife Sanctuary if the Subcommittee decides to grant the Certificate.

H. Harris Center for Conservation Education

The Harris Center for Conservation Education neither supports nor opposes the Application.

I. Industrial Wind Action Group

IWAG asserts that the Applicant failed to demonstrate that it has the financial and managerial capacity required for the construction of the Project, that the Project will not unduly interfere with the orderly development of the region and that the Project will have no unreasonable adverse effect on aesthetics, historic sites, air and water quality, the natural environment, and public health and safety. IWAG also argues that the Project will not provide the environmental, economic or regional energy benefits claimed by the Applicant. Therefore, the Industrial Wind Action Group urges the Subcommittee to deny the Application.

J. Appalachian Mountain Club

AMC neither supports nor opposes the Application but it did enter into an agreement with the Applicant designed to reduce nighttime light pollution which may be associated with the Project. AMC requests that the Subcommittee incorporate the requirements of this Agreement into the Certificate if the Committee decides to grant the Certificate. See, Ex. AMC 5.

K. Gregg Lake Association

Although granted intervenor status, the Gregg Lake Association did not participate.

L. Abutting Landowners Group of Intervenors

The Abutting Landowners urge the Subcommittee to deny the Application. They assert that the Project will have unreasonable adverse effect on natural environment and orderly development of the region. Specifically, they state that the sound and visual impact of the Project will have unreasonable adverse effect on the residents of the region in general and on the owners of the residences abutting the Project specifically. The intervenors also expressed their concerns about the impact of the Project on the values of the real estate in the region and,

ultimately, urge the Subcommittee to conclude that the Project will have unreasonable adverse effect on orderly development of the region.

M. North Branch Residents Group of Intervenors

The North Branch Residents assert that the Project will have an unreasonable adverse effect on natural aesthetics, air and water quality, the natural environment, and public health and safety. The North Branch Residents also allege that the Project will unduly interfere with the orderly development of the region and that the Applicant does not have the financial, technical and managerial capacity required for the construction of a Project of such magnitude. The North Branch Residents assert that the turbines, as proposed, will be "far beyond reasonable proportion for the area" and will unreasonably and adversely impact aesthetics, natural environment and orderly development of the region. The North Branch Residents further assert that the construction and operation of the Project in the Rural Conservation Zone of Antrim will result in serious noise disturbance and health risk to many of the residents of the North Branch area of Antrim. As to the Applicant's financial and managerial capacity, the North Branch Residents assert that the Applicant failed to demonstrate that it will be able to obtain sufficient funds to finance the Project on this magnitude and effectively manage its operation. Therefore, the North Branch Residents request the Subcommittee to deny the Application.

N. Edwards/Allen

The Edwards/Allen intervenors argue that the Applicant has failed to demonstrate sufficient technical, managerial and financial capability to build and operate the Facility. They argue that the lack of a fully negotiated PPA and inexperience on the part of the Applicant indicate insufficient financial, technical and managerial expertise. See, Edwards/Allen Closing Memorandum at 1-5. The Edwards/Allen intervenors also complain about the PILOT and

alternative PILOT agreements reached by the Town and the Applicant. Edwards/Allen suggest that under the PILOT agreements, the Town of Antrim will be worse off financially and will not see any economic benefits as a result of the formula used to assess financial liability within the regional cooperative school district. Edwards/Allen Closing Memorandum at 11-18.

Edwards/Allen also joins Counsel for the Public and others in urging the Subcommittee to adopt the finding of Ms. Vissering that the Facility will have an unreasonable adverse impact on the viewshed in the region. Edwards/Allen Closing Memorandum at 8-10.

V. DELIBERATIONS

A. The Subcommittee Deliberation Process

The Subcommittee deliberated over the course of 3 days from February 5 through February 7, 2013. As has been done in previous dockets, the Subcommittee used RSA 162-H:16 to define the contours of its deliberations. In doing so, the Subcommittee first reviewed the status of state permits and then approached its deliberations within the outline set forth at RSA 162-H:16. In this case, a majority of the Subcommittee ultimately determined to deny the Application because of its determination that the siting, construction and operation of the Facility would have an unreasonable adverse effect on the aesthetics of the region. The deliberative process used by the Subcommittee was to engage in a general discussion of each subject area. For the most part, the general discussion was led by one member of the Subcommittee, followed by a discussion by the entire Subcommittee. At the conclusion of the discussion, the Chair would seek to obtain a sense of the Subcommittee's position with respect to that subject area. In some cases, a non-binding "straw vote" of the Subcommittee was taken. In other cases, the sense of the Subcommittee was apparent from the discussion. This section of the Decision and Order summarizes the deliberative process of the Subcommittee.

B. State Agency Permits and Reports

To commence its deliberations, the Subcommittee first reviewed the status of state permits and agency reports.

1. Wetlands Permit – Department of Environmental Services

As part of the Application, the Applicant submitted a standard Dredge and Fill Application commonly referred to as a Wetlands Permit with the Department of Environmental Services under the authority of RSA 458-A:3, and in accordance with administrative regulations promulgated by the New Hampshire Department of Environmental Services ("DES"). See, N.H. CODE OF ADMINISTRATIVE RULES ENV-WT 300 ET SEQ. The Wetlands Permit Application was included with the Application. See, Ex. AWE 2, Appdx. 2A. A Supplement to the Wetlands Permit Application was filed on August 6, 2012. See, Ex. AWE 6, Appdx. 2A. As part of the amended Wetlands Permit review process, the Applicant proposed to dredge and fill 9,755 square feet of palustrine forest and scrub shrub wetlands and to dredge and fill 452 square feet within a perennial and intermittent stream. Ex. AWE 6, Appdx. 2A. On August 31, 2012, DES issued its final decision and recommended approval of the wetlands permit with certain conditions. Ex. Comm. 12. The conditions were outlined in the Wetlands Permit issued by DES on August 31, 2012. Id. DES found that the Project would be a "major project" as defined by N.H. CODE OF ADMINISTRATIVE RULES ENV-WT 303.02. DES appended 15 conditions to the Wetlands Permit. Ex. Comm. 12. In its report to the Subcommittee, the Wetlands Bureau of DES determined that there were not many jurisdictional wetland areas within the Project's vicinity and the Project did not affect wetlands areas considered to be of special value from a local, regional or state perspective under ENV-WT 101.90. Ex. Comm. 12. The 15 conditions

required by the Wetlands Bureau, as set forth in Comm. 12, were relatively routine. Ex. Comm. 12.

2. Alteration of Terrain Permit – Department of Environmental Services Section 401 Water Quality Certificate

Under RSA 458-A:17, the Applicant also filed an Application for an Alteration of Terrain Permit with the Department of Environmental Services Water Division. Ex. AWE 2, Appdx. 2B. The Application for an Alteration of Terrain Permit indicated that construction of the Facility would disturb approximately 2,648,448 square feet or approximately 60.8 acres of land during construction. Ex. AWE 2, App. 2B; AWE 9, Appdx. 2H; Comm. 12. The Application for an Alteration of Terrain Permit was filed with the Water Division at DES on January 26, 2012. A copy was also filed with the Application in this docket. The Applicant revised its Alteration of Terrain Permit Application on August 30, 2012 to include an additional meteorological tower. Ex. AWE 6, Appdx. 2B; AWE 9, Appdx. 2H. The Water Division issued an Alteration of Terrain Permit Decision recommending the approval of the revised application with conditions. Ex. Comm. 12. The conditions included permit conditions from the Water Shed Management Bureau to satisfy Section 401 Water Quality Certification concerns. Ex. Comm. 12. The Water Division's approval of the Applicant's request also included recommendations from the Drinking Water and Ground Water Bureau to satisfy concerns regarding ledge blasting and monitoring through best management practices. Ex. Comm. 12.

The Alteration of Terrain Permit was issued by DES based upon the premise that the New Hampshire Programmatic General Permit issued by the United States Army Corps of Engineers applies to the Project. On March 5, 2012, the Subcommittee received confirmation

that the United States Army Corps of Engineers had determined that the Programmatic General Permit did apply in this matter. Ex. Comm. 4.

The conditions specified by DES with respect to the Alteration of Terrain Permit required the Applicant to employ the services of an environmental monitor to inspect the site during activities that will cause an alteration of terrain. Ex. Comm. 13. Site inspections were required at least once a week and under certain storm conditions. Ex. Comm. 12. As a condition of the Alteration of Terrain Permit, the Applicant was required to develop certain plans for approval by DES including a construction and best management practice inspection and maintenance plan, a turbidity sampling plan, a monitoring plan, a spill prevention control and countermeasures plan, and a water quality violation prevention plan. Ex. Comm. 12.

3. Subsurface Systems Permit - Department of Environmental Services

As part of its deliberations, the Subcommittee also reviewed the Applicant's Application for a Subsurface Systems Permit. Ex. AWE 2, Appdx. 2F. That Application was filed with DES on January 26, 2012. One individual septic system would serve the Facility. The septic system was expected to accommodate 300 gallons per day. A Subsurface Systems Permit was issued by DES on August 31, 2012. Ex. Comm. 12.

4. Driveway Permit – Department of Transportation

In order to obtain ingress and egress to the site of the proposed Facility, the Application required the construction of a driveway off N.H. Route 9. Therefore, the Applicant also filed an Application for a Driveway Permit with the New Hampshire Department of Transportation. Ex. AWE 2, Appdx. 2D. The Application for a Driveway Permit was filed on January 26, 2012. A copy was also provided in the Application for a Certificate of Site and Facility. Ex. AWE 2, Appdx. 2D. On September 4, 2012, the Department of Transportation approved that Permit for

the construction of a driveway off Route 9. Ex. Comm. 14. The Driveway Permit recognizes the heavy loads that the driveway will support during construction and contains conditions that require that the driveway landing be constructed using one foot of gravel, one foot of crushed gravel and 4 inches of bituminous asphalt pavement. Ex. Comm. 14.

5. Aviation Permits - Federal Aviation Administration

Along with the Application, the Applicant also filed a series of Federal Aviation Administration documents determining that the Facility will not cause a danger to aviation safety if operated in compliance with conditions. Ex. AWE 2, Appdx. 2E. The Subcommittee also notes that the Applicant executed a stipulation with AMC that would require the installation of a radar activated lighting system once such a system has been approved by the Federal Aviation Administration. Ex. AMC 5.

6. Historical Resources – NH Division of Historical Resources

In addition to the foregoing state and federal permits, the Applicant also submitted correspondence with the New Hampshire Division of Historical Resources. The review of historical resources is generally governed by Section 106 of the National Historic Preservation Act. The New Hampshire Division of Historical Resources is the state agency entrusted with the obligation to administer Section 106. The process of the review of historical resources is an interactive and ongoing process which often extends beyond the granting of a Certificate of Site and Facility due to the nature of the process. The Subcommittee received several reports from the New Hampshire Division of Historical Resources along with its Application. Ex. Comm. 5, 9, 11 and 15.

7. State Fire Marshal

In addition to the foregoing Permits, there are certain state agencies which provided information to the Subcommittee although they do not technically have a permit, license or certificate to issue. On February 21, 2012, the State Fire Marshal filed a letter with the Subcommittee. The Fire Marshal requested that the Subcommittee condition any Certificate on compliance with the following codes: International Building Code, 2009 Edition; NFPA 1, Fire Code, 2009 Edition; and FPA 101, Life Safety Code, 2009 Edition and NFPA 850, Recommended Practice for Fire Protection for Electric Generating Plants and High Voltage Direct Current Converter Stations, 2010 Edition. The Fire Marshal also asked that any Certificate of Site and Facility be conditioned upon a review of final plans by the Fire Marshal and compliance inspections. The Fire Marshal also sought a condition that would allow him to retain independent third party review at the expense of the Applicant. Ex. Comm. 1.

8. Natural Heritage Bureau – Department of Resources and Economic Development

As part of its Application for a Certificate of Site and Facility, the Applicant maintained a dialogue with the Department of Resources and Economic Development, New Hampshire Natural Heritage Bureau ("NHNHB"). Ex. Comm. 7. On July 2, 2012, NHNHB filed a progress report. Ex. Comm. 7. On August 2, 2012, NHNHB filed a final report with the Subcommittee. Ex. Comm. 10. During the course of its review, NHNHB conducted a data base check, reviewed community mapping surveys, and inspected portions of the site on December 13, 2011 and again during the growing season on July 13, 2012. NHNHB concluded that it is unlikely that the proposed Facility will impact rare plants species or exemplary natural communities. Ex. Comm. 10.

9. New Hampshire Fish and Game Department

The New Hampshire Fish and Game Department was also involved in a review of the Application. Specifically, the New Hampshire Department of Fish and Game evaluated the Avian and Bat Protection Plan ("ABPP") proffered by the Applicant and suggested certain conditions be applied. Ex. Comm. 16. Those conditions are addressed in more detail in the section of this Order dealing with the deliberations of the Subcommittee concerning the natural environment.

Having reviewed the various permit applications and the recommended permits and conditions from the various agencies, the Subcommittee recognizes that the Applicant worked diligently with the various state agencies and provided complete information that permitted the various agencies to report to the Subcommittee in a complete and timely fashion. The Subcommittee also notes that in the event that it chose to issue a Certificate, the conditions required by the agency permits would necessarily become conditions of the Certificate. See, RSA 162-H:16, I. The Subcommittee also acknowledges that it has the authority to delegate to an appropriate state agency the authority to monitor the construction and operation of an energy facility and to delegate the authority to specify the use of any technique, methodology, practice, or procedure approved by the Subcommittee within a certificate to a state agency. See, RSA 162-H:4, III & III-a.

C. Alternatives Analysis

The Subcommittee deliberations next considered the issue of available alternatives. RSA 162-H:16, IV, requires the Subcommittee to consider "available alternatives" in deciding whether the objectives of RSA 162-H would be best served by the issuance of a Certificate. In considering available alternatives, the Subcommittee will consider the evidence of alternatives

presented by the Applicant as well as any other evidence in the record pertaining to alternative sites. See, Decision, Application of Granite Reliable Power, LLC, 2008-04, at 23 (July 15, 2009).

In presenting its evidence with respect to available alternatives, the Applicant described a site selection process consisting of 10 site selection criteria. Ex. AWE 1 at 46–50. The Applicant asserts that the choice of site for the Facility was the result of a southwestern regional prospective site analysis nested within Eolian's statewide model for wind energy suitability in New Hampshire. Ex. AWE 1 at 47. In applying this methodology, the main site selection criteria include an adequate wind resource (based on meso wind models), environmental appropriateness, grid-interconnection, proximity to transportation routes, and distance from residences. Ex. AWE 1 at 47.

As a result of this process, the Applicant considered potential sites in Marlow and in Stoddard. Ex. AWE 1 at 47. The Applicant found the Marlow site to be less suitable than Antrim because of extensive wetlands and considerable distance to transmission resources. Id. The Stoddard site was determined to be less suitable than Antrim due to extensive conservation easements and access issues. Id.

The Application also asserts that the Applicant considered several different on-site turbine configurations, as well as relocation of various components of the Facility including the operations and maintenance building. Ex. AWE 1 at 50. In its Application, the Applicant detailed four on-site alternatives that it considered. The Applicant originally considered construction of 11 turbines. Ultimately, the Applicant eliminated a turbine that would have been located off the south flank of Willard Mountain. This turbine was eliminated in order to create a smaller overall footprint and to limit the visual impact on the Willard Pond Sanctuary. The

Applicant reports that it also considered different access and road solutions. Ultimately, the chosen route for the road was determined to be the shortest in overall length, thus minimizing the effect on the environment. In addition, the Applicant asserts that it considered different turbines and various layouts for the physical components of the Facility. Ex. AWE 1 at 50-52.

In discussing the alternatives analysis supplied by the Applicant, some members of the Subcommittee expressed concern that the Application did not include comparative maps or any tabulation of comparative information between the off-site alternatives in Stoddard and Marlow that had been considered by the Applicant. See, Transcript, Deliberations, Day 1 at 46. Additionally, a member of the Subcommittee expressed concern that the Site selection criteria and alternatives analysis presented by the Applicant failed to address the affect of the Project on aesthetics of the area. See, Transcript, Deliberations, Day 1 at 49.

In discussing alternatives to the proposed Site, the Subcommittee also considered a proposal suggested by Jean Vissering, a witness for Counsel for the Public, and echoed by several intervenors that would have eliminated turbines 9 and 10 due to their proximity to Willard Pond and to employ the use of smaller turbines throughout the remainder of the Facility. See, generally, Ex. PC 1 at 18–19.

In addition, the Subcommittee noted that an available alternative that was not contained in the Application is a project configuration and turbine size that was presented to the SEC in the prior docket dealing with this Project: Docket No. 2011-02, Petition of Antrim Wind for Jurisdiction. That proposal involved the same site along the Tuttle Hill/Willard Mountain ridgeline but called for 10 turbines in the 2 MW size class with heights of less than 475 feet. See, Transcript, Deliberations Day 1 at 51.

D. Applicant's Financial Technical and Managerial Capability

During the course of deliberations, the Subcommittee considered the financial, technical and managerial capability of the Applicant as required by RSA 162-H:16, IV (a). In undertaking its deliberations, the Subcommittee found it more convenient to address the technical and managerial capabilities separately from the financial capability of the Applicant.

1. Technical and Managerial Capability

a. Positions of the Parties.

The Applicant asserts that it has established by a preponderance of the evidence, through the pre-filed and live testimony of Sean McCabe, Ruben Segura-Coto and Sally Wright, that it has the technical and managerial capacity required for operation and construction of the Facility. See, Ex. AWE 1, McCabe and Crivella Pre-Filed Testimony; Ex. AWE 7, McCabe and Crivella First Supplemental Testimony, Ex. AWE 9, McCabe, Wright and Segura-Coto Second Supplemental Testimony; Transcript Day 2 at 131-274. In addition, the Applicant claims that the individual and combined experience in the renewable energy sector of its staff warrants a finding that the Applicant is possessed of sufficient technical and managerial capabilities to construct and operate the Facility.

In particular, the Applicant points to the background and experience of Sean McCabe, Joseph Cofelice and Jack Kenworthy. Ex. AWE 1, Pre-Filed Testimony of Jack Kenworthy and Pre-Filed Testimony of Joseph Cofelice. Mr. McCabe has been employed in the wind power industry since 2004, holding positions of responsibility with both Catamount Energy and Duke Energy Corporation. Mr. Cofelice was employed for 15 years with American National Power where he had responsibility for project development. Ex. AWE 1, Pre-Filed Testimony of Joseph Cofelice. In addition, he is a former president of Catamount Energy where, under his

leadership, the company developed and financed wind energy projects with a total capacity of 585 MW. Id. Mr. Kenworthy submits that he has worked in the renewable energy field for 10 years and is presently leading current development for four projects. Ex. AWE 1, Pre-Filed Testimony of Jack Kenworthy. The Applicant also notes that the Deloitte Report recognized that the development team presented by the Applicant is qualified to develop this project. Ex. PC 7.

In addition to the technical and management skills of its personnel, the Applicant also relies on its intention to execute an operations and management ("O&M") contract with Acciona Wind Power North America ("AWP"). As such, the Applicant relies on AWP to support its claim of adequate technical and managerial capability. The initial term of the O&M contract will be five years and may be renewed with AWP or another provider thereafter. Ex. AWE 7, Transcript Day 2 at 263. AWP is a subsidiary of the multinational Acciona Energy. Ex. AWE First Supplemental Pre-Filed Testimony of McCabe, Crivella and Segura-Coto. AWP operates and maintains 12 wind energy facilities across North America for a total operational capacity of 1,315.5 MW. Transcript Day 2 at 82. In addition, AWP is responsible for an additional 189 MW of wind facilities commissioned before the end of 2012, including the first two Acciona AW 3000/116 turbines located in Iowa. Id. AWP uses a state of the art SCADA system that is monitored seven days per week and twenty-four hours per day. Ex. AWE 7, McCabe, Crivella and Segura-Coto First Supplemental Testimony at 9. The SCADA system contains redundant systems that serve to protect the assets in the event of power failure or other catastrophe. Transcript, Day 2 at 145. AWP boasts a fleet availability factor of 98.2% over the time of its operations in North America, an OSHA lost time rate of 0 and in 2012 had recordable injury rate of 2.8. Ex. AWE 7, McCabe, Crivella and Segura-Coto First Supplemental Testimony at 9. In addition, the Applicant maintains that it will have three to four employees on site to oversee

project operations and attend to matters that are not within the scope of the O&M contract. Id. at 10. Based upon the experience and skills of its team and the expected O&M contract, the Applicant asserts that it has adequate managerial and technical expertise.

An additional issue raised in the docket is the commercial viability of the Acciona AW 3000/116 turbine. The Applicant suggests that the commercial viability of the turbine has been demonstrated in the market because two of the turbines have been developed for installation in Iowa and another 10 have been ordered for a project in Nova Scotia. Transcript Day 2 at 159-163. The willingness of developers to invest in the turbine allegedly demonstrates commercial viability according to the Applicant. Id. The Applicant also reports, through the testimony of Sally Wright, that the turbine has successfully undergone technical design review. Transcript Day 2 at 160-162. The turbine is presently undergoing "type certification" which is a third party validation process. Id. at 162. Type certification is not yet complete. The two turbines developed in Iowa are being used as prototypes for the type certification process.

The Applicant's witness, Sally Wright, testified, however, that the Acciona AW 3000/116 is "not proven." Transcript Day 2 at 166. "Not proven" is a term that is applied to any turbine that has not yet achieved 100 "turbine years" of operation. Id. The Applicant submits that many projects using "not proven" technology still obtain financing and presumably commercial operation. Applicant's Post-Hearing Brief at 24.

Finally, the Applicant notes that Acciona has provided a warranty for the turbine and argues that "type certification" and the Acciona warranty establish the commercial viability of the turbine. Therefore, the Applicant claims that it has established by a preponderance of evidence that the proposed turbine is commercially viable. Id.

Counsel for the Public submitted the Deloitte Report as an exhibit in this proceeding. Ex. PC 7. The Deloitte Report noted that several members of the Applicant's development team have experience in the power industry and, in particular, in the renewable energy field. The Deloitte Report found that the development team was qualified to develop and construct the Project and that there was no evidence to suggest the development team was unqualified or that any specific team members were not capable of performing their duties. Ex. PC 7 at 42. Nonetheless, Counsel for the Public asserts that the Applicant failed to establish sufficient technical, managerial capabilities to construct and operate the Project.

The absence of a firm draft of the O&M Contract and the absence of a balance of plant contract for construction serve as a basis for Counsel for the Public to object to the technical and managerial capability of the Applicant. Post-Hearing Memorandum of Counsel for the Public at 48-49. Counsel for the Public argues that in the Laidlaw docket, the Subcommittee had access to key contracts and knew the identity of key personnel. Counsel for the Public asserts that this Applicant has presented no evidence of contracts for the construction of the Facility and that the O&M contract is not firm despite Ruben Segura-Coto's testimony before the Subcommittee. Id. at 48 (arguing that Segura-Coto could not provide definitive answers about the terms and conditions of an O&M agreement.) Likewise, no potential balance of plant contractor has been identified, nor has a balance of plant draft contract been submitted to the Subcommittee. Counsel argues that conditioning the Certificate on the negotiation of an O&M contract with AWP and a balance of plant contract would be contrary to the statute. Id. at 49. Counsel for the Public argues that these contracts should be presented to the Subcommittee at a hearing before the Certificate is granted so that they are appropriately reviewed. In proceeding without firm contracts in these areas, Counsel for the Public asserts that the Applicant does not have sufficient

technical and managerial capability to construct and operate the Facility in accordance with industry certificate that may be granted. In short, Counsel for the Public argues that the Applicant left too many variables subject to future conditions. See, Post-Hearing Memorandum of Counsel for the Public at 47-50.

The North Branch Residents claim that AWE is a new startup company with no experience. It claims that AWE made errors in its initial filings for variances before the Antrim Zoning Board of Adjustment and that the quality of the Applicant's filings before the Town's boards was poor and incomplete. The North Branch Residents argue that the Project, in its initial stages, was smaller and that the Applicant was incompetent to manage the construction of the Project in its smaller iteration and, therefore, should not be granted a Certificate for this much larger project. See, Final Brief North Branch Residents , at 25.

The North Branch Residents also argue that it does not trust the Applicant's estimated annual net capacity factor of 37.5 to 40.5%. The North Branch Residents argue that the wind resource is "not particularly outstanding" and that AWE has not presented data that conflict with that statement. This argument takes issue with the V-Bar Report summarizing the wind resource at the Facility. Ex. AWE 8, Appdx. 21. The North Branch Residents also claim that the projected net capacity factor assured by the Applicant is far greater than capacity factors experienced at other New England wind energy facility sites. The North Branch Residents argue that because the projected capacity factor cannot be trusted, the Applicant does not have sufficient technical and managerial capability to construct or operate the Project. See, Final Brief North Branch Residents at 26-27.

IWAG argues that the Subcommittee must immediately discount the credibility of Sean McCabe and Sally Wright because they are under contract with and/or employed by the

Applicant. IWAG also claims that Ruben Segura-Coto can only speak to the qualifications of Acciona and not the Applicant. Because no contract yet exists between the Applicant and Acciona, IWAG asserts that there is no basis to evaluate technical or managerial expertise. See, Final Memorandum of IWAG at 24.

IWAG also argues that the Subcommittee has violated the Right to Know law, RSA 91-A, by "refusing to release financial information." It asserts that this action violated IWAG's due process rights and effectively prohibits IWAG from commenting on financial capability. See, Final Memorandum of IWAG at 25.

Audubon, similar to Counsel for the Public and IWAG, argues that the tender of an O&M contract with AWP by the Applicant is insufficient to establish that the Applicant has adequate technical and managerial expertise to construct and operate the Facility. Audubon also argues that the record is devoid of evidence of an O&M contract after the initial 5 year period. According to Audubon, the perceived lack of information is a sufficient basis upon which to deny the Certificate. See, Post-Hearing Memorandum of Law of Audubon at 21–22.

The Edwards/Allen intervenors acknowledge that the Deloitte Report recognized that the Applicant's development team has "direct experience" in wind energy development. However, the Edwards/Allen intervenors argue that, with the exception of Mr. Kenworthy's management of a small wind energy generation facility in the Carribean, the record does not contain evidence of the Applicant's "hands-on" experience with the renewable energy facilities of this magnitude.[2] The Edwards/Allen intervenors go on to argue that sufficient technical capacity has not been demonstrated by the Applicant. See, Closing Memorandum and Proposed Conditions of

[2] The Edwards/Allen statement that the record does not contain evidence of the Applicant's experience is not supported by the resumes and testimony of Messrs. Cofelice, McCable and Kenworthy,

Edwards/Allen at 3-4. Similar to the other parties, the Edwards/Allen intervenors also argue that an O&M contract with Acciona does not presently exit and that its terms are ambiguous.

b. Subcommittee Deliberations

In a non-binding straw vote, the Subcommittee indicated that the Applicant appeared to have sufficient technical and managerial capability to construct and operate the Project. In coming to this conclusion, the Subcommittee recognized that the Applicant's team does bring considerable experience to this Project. The Subcommittee also recognized that the manufacturer of the turbines, Acciona, would be the entity primarily responsible for the initial installation and operation of the turbines for a period of approximately five years. Acciona is a large company and a world-wide leader in the field of wind power generation. While there may be some uncertainty about the terms and conditions of the O&M contract, the Subcommittee recognizes such relationships are routine in the industry. The Subcommittee concludes that the Applicant, through its association with Acciona and the O&M Agreement, demonstrated that it possesses the technical and managerial capacity required for the construction and operation of the Facility. The overall sense of the Subcommittee was that the Applicant provided sufficient evidence that it possesses the technical and managerial capability to construct and operate the Facility, between its internal experience and the employment of Acciona through an O&M Agreement.

2. Financial Capability

a. Positions of the Parties

The Applicant asserts that the record demonstrates that it possesses adequate financial capability to finance, construct and operate the Facility. In support of its claim of adequate financial capability, the Applicant relies on the following: the pre-filed and direct testimony and

cross-examination of Joseph Cofelice and Martin Pasqualini, Ex. AWE 1, Cofelice and Pasqualini Pre-Filed Testimony, Ex. AWE 9, Cofelice and Pasqualini Supplemental Testimony; the conclusions reached in the Deloitte Report, Ex. PC 7; the financial expertise and backing of its upstream investors and consultants, namely US Renewables Group. The Applicant does not claim that it has the present financial ability to undertake the project from its own assets, but rather, acknowledges that it will need to obtain and secure project financing, either through a power purchase agreement ("PPA") or a "financial swap replicating the revenue certainty of a PPA." Ex. AWE 1 at 55-56; PC 7 at 24. The Applicant notes that the Deloitte Report commissioned by Counsel for the Public comes to a similar conclusion. In essence, the Applicant asserts that it has adequate financial capability to obtain project financing so long as it has secured a contractual stream of revenue. Absent that, the Applicant implies that financing the Project will be impossible.

The Applicant also recognizes that it will be impossible to secure construction financing without a PPA or some alternative contractual stream of revenue from the Facility. The Applicant also argues that project financing for renewable energy projects is typical in the industry and cannot be secured until all permits (including a Certificate) are in place. The Applicant also recognizes the need for a PPA or similar device in order to induce a lender to finance the Project. Along these lines, the Applicant notes that the federal production tax credit (PTC) has been extended to projects commenced in 2013 under recent federal legislation. The implication is that the extension of the PTC should render a PPA more likely to be obtained. The Applicant also argues that the testimony presented established a robust market for construction-ready wind energy projects and that the price of Renewable Energy Credits (RECs) has increased dramatically since May 2011, thus demonstrating significant demand for wind energy resources.

Thus, the Applicant agrees that sufficient financial capability only exists if the Applicant can secure construction financing prior to the commencement of construction. The Applicant, therefore, asks for the imposition of a condition similar to the condition imposed on the Granite Reliable Project in Docket No. 2008-04. Applicant's Post-Hearing Brief at 18.

The Applicant opposes the financial arguments proffered by IWAG. While IWAG claims that the fundamentals (i.e., extent of the wind resource and the capacity factor) of the Project are overstated, the Applicant responds, by noting the V-Bar Wind Study Summary, Ex. AWE 8, at 21, and by relying on the testimony of Sally Wright, that the predicted capacity factors are consistent with typical modern wind projects using large rotor turbines. Transcript, Day 2 at 226. The Applicant also asserts that IWAG is mistaken in its attempts to measure the Project's competitiveness against the entire electric grid. The Applicant points out that government imposed measures such as the Renewable Portfolio Standard ("RPS") adopted in many states drive the cost of wind energy, not the cost of natural gas. See, Ex. AWE 9, Cofelice and Pasqualini Supplemental Testimony at 12. In this regard, the Applicant argues that its financial capability must be measured in the context of the renewable energy market and not against the overall electricity market, which it admits is driven by the price for natural gas. Applicant's Post-Hearing Brief at 16.

Counsel for the Public argues that the Applicant has failed to establish that it has adequate financial capability to support the construction and continued operation of the Facility. Counsel for the Public first compares this Facility to other projects where the Subcommittee has granted a Certificate on a condition that, among other things, the developer must have financing in place prior to construction. Counsel for the Public notes that in the Laidlaw Berlin Biopower matter, the SEC required an approved PPA and review of the financing closing prior to

construction. Counsel for the Public notes that in that case, the conditions of the Certificate required the developer to file additional documentation regarding the ability to construct and operate the project. Counsel for the Public points out that the developer in the Laidlaw Berlin Biopower docket came before the Subcommittee with a draft PPA, a "comfort letter" from a recognized lender, a fuel supply agreement for the wood to fuel the facility, and a known capital structure. By comparison, Counsel for the Public notes that the Applicant in this case has no PPA, no signed O&M agreement, no turbine supply agreement, no financing or evidence of an interested financing prospect and an unknown capital structure. See, Post-Hearing Memorandum of Counsel for the Public at 44-47.

Counsel for the Public also argues that the Applicant's position is inferior to the developer in the Granite Reliable docket. In that docket, Counsel for the Public asserts that the developer had significant and recent experience in raising capital, had identified potential lenders and had made progress toward negotiating a PPA. Ultimately, Counsel for the Public asserts that this Applicant has failed to establish a record as strong as that made for the PPA and financing conditions in Laidlaw Berlin Biopower and Granite Reliable. Therefore, Counsel for the Public asserts that the Subcommittee is left with nothing but the experience of Mr. Cofelice and Mr. Pasqualini with CP Energy. Counsel for the Public also notes that there is no contract beyond the end of 2012 with CP Energy. Id. at 46-47.

Counsel for the Public also argues that the Deloitte Report does not support a finding of financial capability. The Deloitte Report suggests that the cost of the Project may be underestimated when compared to others in the region. Similarly, the Deloitte Report suggests that the capacity factor for the Project may be overstated when compared to capacity factors achieved at other projects. Additionally, Counsel for the Public points out that the Deloitte

Report establishes a fixed charge coverage ratio that, coupled with a PPA, might support financing of the Project with the assistance of CP Energy. Counsel for the Public claims that the Applicant argued against the Deloitte Report's conclusion and would not run it's pro forma with Deloitte's fixed charge coverage ratio. Counsel for the Public asks the Subcommittee to take that refusal as an acknowledgment that the Applicant cannot achieve the target fixed charge coverage ratio established by Deloitte. Without a PPA and without being able to meet the Deloitte fixed charge coverage ratio, Counsel for the Public argues that the Applicant has not demonstrated the financial capability to finance construction and operation of the Project. Id. at 47.

Counsel for the Public also argues that the Applicant has provided little, if any, evidence of the financial capacity to support the Project beyond the financing stage and into the operational phase. Counsel for the Public argues that the Applicant undertakes a nearsighted approach in this regard.

b. Subcommittee Deliberations

The Subcommittee expressed concern about the financial capability of the Applicant. The Subcommittee's concern stemmed from the fact that the Applicant did not present evidence of any significant progress towards obtaining construction financing, obtaining a PPA, or attracting a significant equity partner. The Subcommittee recognized and accepted the Applicant's proposition that obtaining a Certificate would enhance the ability of the Applicant to pursue project financing, additional equity partners, and the PPA. However, unlike other cases in which conditions were fashioned to address these issues, the subcommittee was concerned that the Applicant essentially comes to the table without any substantial progress towards establishing any of the key conditions necessary to render the Applicant to be financially capable to construct and operate the Facility. The Subcommittee did not make a final determination as to whether

there were conditions which, if met, would render the Applicant to be financially capable of constructing and operating the Facility as proposed. Consideration of such conditions was deferred and, ultimately, the Subcommittee voted to deny the Application on other grounds.

E. Orderly Development of the Region.

1. Positions of the Parties

RSA 162-H:16, IV(b) requires the Subcommittee to consider whether the proposed Project will unduly interfere with the orderly development of the region with due consideration given to the views of municipal and regional planning commissions and municipal governing bodies. RSA 162-H:16, IV(b).

a. Municipal and Planning Issues

The Subcommittee was presented with an unusual circumstance in this docket. Municipal and planning bodies within the Town of Antrim took different positions with respect to the Application.

The Town of Antrim, through its Board of Selectmen, supported the Project. See, Town of Antrim Post-Hearing Brief at 2. The Town, through its Board of Selectmen, negotiated an agreement with the Applicant. The Agreement with the town addressed a panoply of issues including, but not limited to, the appearance of the wind turbines, noise restrictions, construction conditions and decommissioning requirements and funding. Ex. AWE 4, Appdx. 17A. In addition, the Town of Antrim, through its Board of Selectmen, negotiated a PILOT Agreement. Ex. AWE 12. Additionally, when concerns were raised concerning the effect that the PILOT might have as a result of Antrim being in a cooperative school district, an alternative PILOT was negotiated. Ex. AWE 13. In addition, the Town of Antrim, through its Board of Selectmen, opines that the existence of the Facility in the Rural Conservation District of the Town is

consistent with the orderly development of the region and the Town's Ordinances as the Selectmen argue that public utilities are a permitted use in the rural conservation district where the Facility is proposed to be located. Town of Antrim Post-Hearing Brief at 1-2.

The Antrim Planning Board indicates that it does not take a position for or against the Facility. The Planning Board suggests that it has "defined its role as intervenor to provide the SEC with sufficient information so that it has a clear understanding of the Antrim master plan, zoning ordinances and subdivision and site plan review regulations." It has taken a position that the Antrim Planning Board should have jurisdiction over any subdivision that may be required pursuant to the Antrim Wind Energy, LLC project. Curiously, however, the Planning Board takes the position that there is insufficient evidence from which the Subcommittee could find that the Project will not unduly interfere with the orderly development of the region. The Planning Board submitted as exhibits copies of the Town's Zoning Ordinance, the Town's Master Plan, the Town's Planning Ordinance and the Town's Site Plan Review Regulations. See generally, APB 2, APB 10, APB 11, APB 12, APB 14.

The Antrim Conservation Commission similarly indicates that it is neither for nor against the proposed Facility. However, the Conservation Commission recommends conditions that would substantially reduce the size and nature of the Project and substantially increase the requirement of additional mitigation. See, Closing Memorandum and Proposed Conditions of Antrim Conservation Commission at 10-12.

In addition to the foregoing Boards and Commissions within the Town of Antrim, matters pertaining to the proposed Facility were submitted to the voters of the Town of Antrim on the Town's warrant at two Town meetings. While the Applicant, the various Boards and other intervenors vehemently disagree about how the votes at town meetings should be interpreted, it

was clear to the Subcommittee that those votes generally indicated that the townspeople who voted generally supported the development of the proposed Facility.

In addition to the aforementioned Boards and Commissions within the Town of Antrim, the Subcommittee also heard the views of the Stoddard Conservation Commission. The Stoddard Conservation Commission argued that the Application should be denied. The Stoddard Conservation Commission's opinion focused primarily on wildlife conservation issues and not issues that more generally pertain to the orderly development of the region. See, Final Brief, Stoddard Conservation Commission.

Finally, it should be noted that the Subcommittee invited the participation of the Southwest Regional Planning Commission. A letter from counsel to the Subcommittee was forwarded to the Southwest Regional Planning Commission on February 9, 2012. No response was received and the Southwest Regional Planning Commission did not participate in any manner in this proceeding.

b. Economic Impacts

As part of the Subcommittee's consideration of the impact of the proposed Facility on the orderly development of the region, the Subcommittee heard arguments from the parties addressing the likely impact of the proposed Facility on the local economy and on real estate values. The Applicant submitted the testimony of Professor Ross Gittell and Matthew Magnusson on both of these issues. Ex. AWE 1, Tab 11; Transcript, Day 6, Morning Session at 10-154. In addition, the Applicant submitted two studies performed by Professor Gittell and Mr. Magnusson. In the first study, they reviewed the economic impact of the proposed Facility. Ex AWE 3, Appdx. 14B. In the second study, they reviewed the impact of the Lempster Wind facility on local residential property values in Lempster. Ex. AWE 3, Appdx. 14A. Professor

Gittell and Mr. Magnusson determined that the Project would contribute to the local area economy approximately $12,000,000.00 during construction. Total economic benefits, including direct, indirect and induced benefits to the local economy from the Project are expected to be approximately $56,000,000.00 over a 20 year period. Ex. AWE 3, Appdx. 14B at 3. Professor Gittell and Mr. Magnusson also opined that the Facility in Lempster did not have a significant impact on local residential property values. Ex. AWE 3, Appdx. 14A. Intervenors, particularly the North Branch Residents and IWAG, contested the methodology used by Professor Gittell and Mr. Magnusson in both studies. IWAG primarily attacked the economic analysis done by Professor Gittell and Mr. Magnusson by criticizing the underlying computer model used to calculate state and local impacts. See, Post-Hearing Memorandum of Industrial Wind Action Group at 18. IWAG also criticized the Gittell/Magnusson report regarding Lempster real estate values. Likewise, the North Branch Residents criticized the Lempster property value report primarily based upon anecdotal information. See generally, Ex. NB 2, Ex. RB 2 (photographs of homes for sale in the vicinity of the Lempster wind turbines).

c. Effects on Conservation Efforts as Part of the Impact of the Facility on Orderly Development

The Applicant argues that the Project's conservation plan which provides for 808 acres of permanent conservation is consistent with the conservation goals of the Antrim Open Space Plan and the corresponding conservation contained in the Town's Master Plan. See, Applicant's Post-Hearing Brief at 30. The Applicant also argues that the Project is compatible with existing and historical land uses on the Tuttle Hill Ridge. The Applicant points out that the area has historically been used for sheep farming and timber harvesting and that present uses of the region include commercial timber production, hiking, hunting, with commercial enterprises, residences

and undeveloped forests, existing along Route 9 in the vicinity of the ridge. See, Applicant's Post-Hearing Brief at 31. The Antrim Conservation Commission points out that the proposed Facility is located in an area where there have been significant conservation efforts by the Town and neighboring towns. The Antrim Conservation Commission also points out that the Facility is located within the "Quabbin to Cardigan Initiative" which is a regional interstate conservation effort. See, Closing Memorandum and Proposed Conditions of Antrim Conservation Commission at 3.

d. Subcommittee Deliberations

After reviewing and discussing the Application and the evidence as it pertained to the orderly development of the region, the Subcommittee noted that residents of Antrim voted not to prohibit the Project. The Subcommittee also noted that the Master Plan for the Town of Antrim contained certain goals that included maintaining the rural character of the community, but also encouraging energy conservation and encouraging the use of renewable energy in their community. The Subcommittee noted that the community in Antrim had been careful and diligent in its planning efforts going back at least to 1989 with the establishment of the rural conservation district and the open space conservation plan. The Subcommittee also noted that these conservation efforts were coupled with commercial uses that are consistent with rural areas such as logging and timber harvesting.

It is important to recognize that although the Subcommittee must consider the views of municipal and regional planning commissions and municipal governing bodies, the Subcommittee is free to take a position that is different than those presented by those agencies with respect to the orderly development of the region. While the Subcommittee also considered the impact on real estate values, it was determined that the information provided was too limited

in scope in order to establish that construction of the Facility would have a detrimental impact on real estate values.

During deliberations, the Subcommittee also noted that in addition to the Quabbin to Cardigan Initiative, there are easements within areas close to the proposed Facility that are part of the Forest Legacy Program, a program that supports conservation efforts and applies state and federal funds to those efforts.

After considering the various issues impacting on this decision, the Subcommittee indicated that the proposed Facility would not unduly interfere with the orderly development of the region. Prior to reaching this conclusion, the Subcommittee addressed the views of municipal and regional planning commissions and municipal governing bodies, the economic impacts of the Facility and the impact that the Project would have on conservation efforts.

VI. ADVERSE EFFECTS

Under New Hampshire law, the Subcommittee may only issue a Certificate of Site and Facility if it finds that the Facility will not have an unreasonable adverse effect on: (1) aesthetics; (2) historic sites; (3) air and water quality; (4) the natural environment; and, (5) public health and safety. See, RSA 162-H:16, IV(c). The Subcommittee must consider each of the issues set forth in RSA 162-H:16, IV(c), without discretion to determine if one area of inquiry is more important than another. The statutory requirement states that the Subcommittee "must find that the site and facility . . . will not have an unreasonable adverse effect on aesthetics, historic sites, air and water quality, the natural environment, and public health and safety". See, RSA 162-H:16, IV. Therefore, if the Subcommittee finds that the proposed Project will have an unreasonable adverse effect on any one of the statutory criteria, the Subcommittee must deny a Certificate of Site and Facility.

A. Aesthetics

1. Positions of the Parties

In considering whether a Project will have an unreasonable adverse effect on aesthetics, the Subcommittee will generally consider the effects of the Project on the viewshed in the region. See, Application of Lempster Wind, LLC (SEC Docket 2006-01), Decision Issuing a Certificate of Site and Facility with Conditions at 27 (June 28, 2007). During the course of the adjudicatory hearing, the Subcommittee had the benefit of hearing from two experts. The Applicant engaged the services of Saratoga Associates. John Guariglia, a representative of Saratoga Associates, conducted a visual assessment of the Project and prepared a visual impact analysis report. Ex. AWE 3, Appdx. 9A. The analysis included a visual assessment of the area within five miles of the proposed Project. Subsequently, at the request of other parties, the Applicant had Saratoga extend its visual assessment report to an area extending up to ten miles surrounding the Project. Ex. AWE 7 at 2. In addition to creating a visual impact assessment, Mr. Guariglia also presented photo simulations from several locations to illustrate the visibility of turbines from what Saratoga considered to be a representative sample of viewsheds at varying distances from the Project. The initial and supplemental visual impact analyses identified 72 visual receptor locations within the five mile radius study and 258 visual receptors within the five to ten mile radius of the proposed Project. Ex. AWE 7, Appdx. 9A-1 at 1-14. It should also be noted that Mr. Guariglia performed additional photo simulations illustrating potential views from additional areas within the five to ten mile radius. In his testimony, Mr. Guariglia concludes that the project would not have an unreasonable adverse effect on aesthetics because the project would not be visible in a significant portion of the study area. In his testimony, he also admits that wind turbines are "large and highly visible structures". He further admits that since the turbines

are large and highly visible in some locations, their visibility "may not be readily avoided." Ex. AWE 1, Guariglia Pre-Filed Testimony at 17. In his testimony, Mr. Guariglia also indicated that his analysis of the effects on individual viewsheds was a concern for the effect on viewshed areas that were of "statewide significance." However, Mr. Guariglia had some difficulty in defining what the term "statewide significance" meant. Ultimately, he indicated that his definition was "a location with scenic and aesthetic values and is protected by law or a legislative body". Ultimately, Mr. Guariglia identifies this definition as coming from a State of Maine guidance document and from a New York State Department of Environmental Conservation policy. See, Transcript, Day 5, Afternoon Session at 197-199. Mr. Guariglia rendered the opinion that the proposed Facility would not have an unreasonable adverse effect on aesthetics and in particular, the viewshed in the area.

The Subcommittee also heard from Jean Vissering, a landscape architect consultant, hired by Counsel for the Public. Ms. Vissering did not prepare a viewshed map as part of her study, relying upon the viewshed maps created by Mr. Guariglia and Saratoga Associates, and did not dispute the finding contained within the viewshed maps that 95% of the area studied would not have a view of the turbines during leaf-on season. Transcript, Day 7 Morning at 114. However, Ms. Vissering testified that although the Saratoga study was in and of itself accurate, it was not complete and did not contain what is required for a visual impact assessment. She criticized the Saratoga Report as lacking any detailed analysis of the specific viewshed vantage points within the region. Ex. PC 1 at 17. Ms. Vissering determined that the Project, as designed, would have unreasonable adverse effects on the scenic quality and resources of the surrounding area. Ex. PC 1 at 2. Ms. Vissering found that there would be substantial impacts on visually sensitive resources throughout the region. She identified her approach as a more qualitative approach and

as an approach that should be taken in addition to the quantitative approach contained within the Saratoga Report. She found that there would be significant impacts on the viewsheds from Willard Pond, Bald Mountain, Goodhue Hill, Gregg Lake, and other locations. See, PC 1 at 5-15. In addition, she found that Willard Pond and the wildlife sanctuary, as a whole, would be unreasonably impacted by the Facility. Id. at 17. Ms. Vissering's approach and her qualitative assessment were significantly different than that provided by Mr. Guariglia. Ms. Vissering ultimately concluded that the Project, as presently configured, would have an unreasonable adverse impact on the aesthetics of the region. However, Ms. Vissering also indicated her opinion that the Site could support a wind energy facility if it were to undertake certain measures including the elimination of the turbines that would impose upon Willard Pond (believed to be turbines 9 and 10) and the use of a smaller turbine throughout the Project. Id. at 18. In addition, Ms. Vissering also indicated that the Project should use radar activated collision avoidance system for lighting of the towers and provide additional conservation lands as off-site mitigation. Additionally, Ms. Vissering recommended that steps be taken to shield the view of the road and turbine pads that may be visible from Goodhue Hill and other areas where the infrastructure of the Project other than the turbines will be significant. Id. at 18-19. It was Ms. Vissering's opinion that the Project, as configured, was not appropriately scaled and designed to work within the geographic setting. Id.

2. Subcommittee Deliberations

The Subcommittee spent considerable time evaluating the impact of the Facility on aesthetics. See, Transcript, Deliberations Day 1 at 40-71; Transcript, Deliberations Day 3 Afternoon Session at 6-79. The Subcommittee found that the Facility, as proposed, would have an unreasonable adverse effect on aesthetics. See, RSA 162-H:16, IV(c). Deliberation

Transcript, Day 3 Morning at 71. In coming to its determination, the Subcommittee considered three issues: the impact of the Facility's size and scope on the aesthetics of the overall community; the impact of the Facility on the area referred to as Willard Pond and the dePierre-feu Wildlife Sanctuary; and, the lack of satisfactory mitigation for the aesthetic impacts of the Facility.

The Facility, as proposed, would include ten wind turbine generators that would run along a ridgeline that is approximately 2.5 miles in length. Ex. AWE 1 at 5. Each turbine would rise to 492 feet when measured from its base to the tip of its blade. Ex. AWE 1 at 16. As proposed, each of the turbines would be constructed at the following site elevations: (1) WTG-1 1,431 feet; (2) WTG-2 1,743 feet; (3) WTG-3 1,758 feet; (4) WTG-4 1,682 feet; (5) WTG-5 1,726 feet; (6) WTG-6 1,516 feet; (7) WTG-7 1,676 feet; (8) WTG-8 1,700 feet; (9) WTG-9 1,646 feet; (10) WTG-10 1,896 feet. Ex. AWE 2, Appdx. 2E (FAA determinations); see also, Ex. AWE 3, Appdx. 7A (civil design drawings). The ridgeline designated for the location of the turbines has a site elevation fluctuating between 1,042 feet and 1,904 feet. Ex. AWE 1 at 48. As proposed, the height of each turbine would be between 25% and 35% of the elevation of the ridgeline where it will be located. Ex. AWE 2, Appdx. 2E (FAA determinations); see also, Ex. AWE 3, Appdx. 7A (civil design drawings).

The Tuttle Hill ridgeline is a prominent topographical feature in the Town of Antrim. The ridgeline extends along the northwest border of the Town of Antrim and along with Willard Mountain, Robb Mountain, Bald Mountain and Goodhue Hill, and creates a cradle that encompasses Willard Pond, Gregg Lake, Meadow Marsh and a number of areas containing sensitive viewpoints. Ex. PC 1 at 3-4; Ex. AWE 3, Appdx. 9A at 7. At least one of these

visually sensitive areas, Pitcher Mountain, already has an existing view of the Lempster wind project located in Lempster, New Hampshire. Ex. PC 1 at 10.

The Subcommittee finds that the size of the proposed wind turbine generators, when imposed upon the Tuttle Hill/Willard Mountain ridgeline would appear out of scale and out of context with the region. This is particularly so when considering the viewshed impacts on a combination of visually sensitive areas. There are significant qualitative impacts upon Willard Pond, Bald Mountain, Goodhue Hill and Gregg Lake. Ex. PC 1 at 5-10. There are moderate impacts on additional locations including, but not limited to, Robb Reservoir, Island Pond, Highland Lake, Nubanusit Pond, Black Pond, Franklin Pierce Lake, Meadow Marsh and Pitcher Mountain. Ex. PC 1 at 10-14.

The proposed turbines are the tallest ever sought to be certificated in this state.[3] In fact, if constructed they may be the tallest free-standing structures in the state. By way of illustration, the tallest building in Manchester, New Hampshire, One City Hall Plaza, is approximately 275 feet in height. The location for the site is not remote and is within the viewshed of numerous areas, both publicly and privately owned, where the public will see a significant impact on the landscape.

The Subcommittee found Mr. Guariglia's limitation of qualitative considerations only to areas meeting his definition of "statewide significance" to be an overly restrictive approach. Moreover, it appears that Mr. Guariglia may have misunderstood the status and values of certain viewpoints. For instance, the Audubon's wildlife sanctuary is an area to which state and federal funds have been designated. Regardless of the definition used to identify an area as being of

[3] Existing turbine heights are as follows: Lempster Wind, 396 feet; Granite Reliable, 411 feet; Groton Wind, 399 feet.

"statewide significance", it is clear that the Facility would have a significant impact on areas that are of significant value for their viewshed in the Town of Antrim and the surrounding region. A majority of the Subcommittee agreed with the assessment of Ms. Vissering that the Facility is not appropriately scaled and designed to work within the geographic setting. Ex. PC 1 at 18. In short, the turbines are too tall and too imposing in the context of the setting. They would overwhelm the landscape and would have an unreasonable adverse impact upon valuable viewsheds.

In addition to the unreasonable adverse effect on the aesthetics of the region, the Facility would have a particularly profound impact on Willard Pond and the dePierrefeu Wildlife Sanctuary which is owned in fee and managed by Audubon. The Wildlife Sanctuary comprises 1,700 acres. The Facility is proposed to be constructed within one mile of the property boundary of the Wildlife Sanctuary. In addition, Audubon holds conservation easements on approximately 1,300 acres of land adjacent to the Wildlife Sanctuary. Willard Pond is located in the interior of the Wildlife Sanctuary. Willard Pond is a state designated Great Pond. See generally, RSA 4:40-a; RSA 271:20; N.H. CODE OF ADMINISTRATIVE RULES ENV-WR 101.21. Willard Pond is approximately 100 acres and boasts an undeveloped shoreline and pristine water quality. Motorized vessels are prohibited from the Pond. Willard Pond is surrounded by forested peaks, including Bald Mountain and Goodhue Hill. Willard Pond and the Wildlife Sanctuary are popular locations that are enjoyed by numerous visitors. Environmental education programs, fishing, birding, wildlife viewing, and solitude all appear to generate visitors to the Pond and Wildlife Sanctuary. The Pond and the Wildlife Sanctuary are part of a larger tract of conserved lands consisting of approximately 30,000 acres and known as the "super sanctuary." See generally, Ex. ASNH 23.

Public funds have been dedicated to the dePierrefeu Wildlife Sanctuary and the surrounding conservation lands through a conservation program known as the Forest Legacy Program, the federal government has invested approximately $3.5 million to conserve the lands within and directly adjacent to the Wildlife Sanctuary. Transcript Day 8 Morning at 63, 68-69. The State has invested approximately $400,000.00 for similar purposes. Id. In addition, Willard Pond and the dePierrefeu Wildlife Sanctuary sit within the "Quabbin to Cardigan Initiative," an interstate regional effort to conserve the Monadnock Highlands of north central Massachusetts and western New Hampshire.

The visual impact of the Facility on Willard Pond and the dePierrefeu Wildlife Sanctuary is well illustrated in the photo simulations prepared by Mr. Guariglia and Ms. Vissering. Ex. AWE 3, Appdx. 13A, Figures A8-a and A8-B; PC 1, Appdx. A, photos 1A- 1-C. In addition, the Subcommittee had occasion to visit the Willard Pond area as part of a site visit prior to the public hearing in this docket. Having visited the area, the Subcommittee was able to understand first-hand the context and the setting of Willard Pond and the Wildlife Sanctuary. Having visited the Site and understanding the size and specifications of the proposed Facility, a majority of the Subcommittee is convinced that the Facility would impose an unreasonable adverse effect on the viewshed from Willard Pond, as well as in other areas throughout the dePierrefeu Wildlife Sanctuary.

The Applicant claims, however, that the visual effects of the Facility will be mitigated physically and by the dedication of off-site mitigation lands. The Applicant asserts that it has offered to mitigate many of the physical characteristics that contribute to the visual impact of the turbines through its mitigation program. Ex. AWE 3, Appdx. 13A at 21. The Applicant asserts, among other things, that the color of the turbines will be neutral to minimize reflected glare and

visual contrast with the background sky. The Applicant notes that the turbines will not be used for commercial advertising. The Facility will also maximize the use of underground transmission lines and interconnects. The Applicant also lists additional physical measures taken to minimize the visual impact of the Facility. Id.

In addition to physical mitigation, the Applicant submits that its overall environmental mitigation for the project consists of dedicating in excess of 800 acres of land in and around the Facility to conservation easements. Applicant's Post-Hearing Brief at 12.

After consideration and deliberation, a majority of the Subcommittee found that the proffered mitigation does not appropriately mitigate the unreasonable adverse aesthetic impacts of the Facility. The physical mitigation efforts as described by the Applicant, while appreciated, are comparable to what is the standard design of any wind turbine facility in the region. The Applicant refers to the standard features of a modern wind turbine facility as mitigation. These features were considered by the Subcommittee in its review of this Application. A majority of the Subcommittee finds that the physical mitigation program cited by the Applicant is insufficient to mitigate the visual effects of this Facility on the regional setting and on the Willard Pond – dePierrefeu Wildlife Sanctuary area.

Similarly, the Subcommittee finds that the offer of more than 800 acres of conservation easements in and around the proposed Facility is a generous offer by the Applicant. However, the dedication of lands to a conservation easement in this case would not suitably mitigate the impact. While additional conserved lands would be of value to wildlife and habitat, they would not mitigate the imposing visual impact that the Facility would have on valuable viewsheds.

A majority of the Subcommittee is reluctant to impose the mitigation measures suggested by Ms. Vissering on the Applicant. As noted above, Ms. Vissering suggested the elimination of

two turbines and a reduction in size of the balance of the Facility among other measures as mitigation. However, we note that the Applicant did not propose a smaller project as an alternative despite the fact that, at one point, this Facility was proposed to consist of smaller turbines. The reduction in scale suggested by Ms. Vissering may substantially mitigate the unreasonable adverse effect on aesthetics but would likely change other dynamics of the Project to such a degree that the Subcommittee would be unable to confidently assess the consequences of issuing a Certificate.

The Subcommittee debated whether there was some form of mitigation that would permit the Facility to be certificated while appropriately ameliorating its impacts. The Subcommittee simply could not structure appropriate mitigation measures for adverse visual effects of the magnitude presented by the Applicant without substantially affecting other important factors that must be considered by the Applicant in the planning, siting and construction of a wind-powered facility.

It should be noted that other jurisdictions have similarly denied authority for the construction of energy facilities that would cause adverse impacts on the viewshed or aesthetics of the region. In his Post-Hearing Memorandum, Counsel for the Public offers a summary of several decisions issued in other jurisdictions by agencies with siting and permitting authority. See, Post-Hearing Memorandum of Counsel for the Public at 24–26. The Subcommittee recognizes that its authority and jurisdiction has a scope that is somewhat different than the out-of-state agencies relied on by Counsel for the Public; however, the subject matter and consideration due to aesthetic issues is similar.[4] In this docket, as in those referenced by Counsel

[4] Counsel for the Public relies on agency decisions from the Maine Land Use Regulation Commission, the West Virginia Public Service Commission and the New York Public Service Commission. Post-Hearing Memorandum of Counsel for the Public at 24–26. In the cited Maine cases, the agency is required to "consider the state's policy of

for the Public, the Facility will have an unreasonable adverse effect on viewsheds of significant value within the State of New Hampshire. It is for this reason that we must deny the Application for a Certificate of Site and Facility.

We note that the Applicant has received FAA Determination letters that indicate that the turbines would not cause a hazard to aviation and requiring night-time lighting. The Applicant has also entered into an agreement with the AMC to install radar activated night lighting when it is approved by the FAA. Aviation safety is of paramount importance when constructing and operating turbines as tall as proposed for this Facility. However, if the FAA determines to approve radar activated lighting, we would defer to their expertise. Thus, if a Certificate were to be granted in this docket, the Subcommittee would approve the AMC Agreement as a condition of the Certificate. The radar activated lighting would serve to mitigate a portion of the unreasonable adverse effects on the aesthetics of the region. However, a majority of the Subcommittee does not believe that the use of radar activated lighting sufficiently adds to the mitigation of the aesthetic impact as to warrant the issuance of a Certificate.

B. Historic Sites

In order to issue a Certificate to the Applicant, the Subcommittee must decide that the Project will not have an unreasonable adverse effect on historic sites in the region. See, RSA 162-H:16, IV(c). The Project is subject to review pursuant to Section 106 of the Historic Preservation Act of 1996. The lead federal agency for Section 106 review in this case is the United States Army Corps of Engineers ("Army Corps"). The Army Corps is required to act in consultation with the New Hampshire Division of Historic Resources. See, 16 U.S.C. §470 et.

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identifying and protecting areas that possess scenic features and values of state or national significance." In West Virginia, the agency must determine whether the turbines will "significantly and adversely impact views from recognized public sites used as scenic overlooks."

seq. As a matter of practice, a review of historical resources is an iterative process. The evaluation considers two types of resources: (1) archeological resources, below ground, from the "pre-contact" period prior to European settlement; and (2) historic structures. Historic review under Section 106 generally involves three stages: (1)identification; (2) evaluation; and (3) mitigation, if necessary. Stages 2 and 3 are not triggered if appropriate study demonstrates that the Facility will not adversely impact any archeological resource or there will be no historic structures in the vicinity of the site.

1. Positions of the Parties

The Applicant has completed both Phase 1A and Phase 1B surveys with respect to archeological conditions. The Phase 1A survey indicated no historic period or pre-contact archeological sites were within the Project's boundaries or within 10 kilometers of the Project that have previously been documented. Ex. AWE 1; Will and Stevenson Pre-Filed Direct Testimony at 6. Additionally, the Phase 1B inspection indicated that there were no land forms that were suitable for pre-contact period subsurface testing and that no historic period features such as cellar holes (other than stone walls) were identified within the Project area. Id. The New Hampshire Division of Historical Resources concurs with these findings. See, Ex. AWE 3, Appdx. 9C.

With respect to historic structures, the Section 106 process is continuing. The Applicant has completed a Project Area Form which has been accepted by the Division of Historical Resources. In addition to the Project Area Form, the Applicant has provided the inventory and area forms to the Division of Historical Resources and has also sought determination of eligibility for the National Register. See, Ex. Comm. 9, Ex. Comm. 15. Though the Antrim Planning Board identified a number of historic structures that would be negatively impacted, it

did not conclude that the Facility would have an unreasonable adverse impact on historic structures.

The Subcommittee has received a report from the New Hampshire Division of Historical Resources requesting that, if the Subcommittee grants a Certificate, it be conditioned upon continuing compliance with the Section 106 process, including final identification of resources, assessment of effects, and avoidance, minimization and mitigation of impacts to historic resources. RSA 162-H:16, VII permits the Subcommittee to condition a Certificate upon the results of required federal or state agency studies whose study period exceeds the application period.

2. Subcommittee Deliberations

After reviewing the record as described above, the Subcommittee unanimously indicated that the Project would not have an unreasonable adverse effect on historic sites.

C. Air and Water Quality

Pursuant to RSA 162-H: 16, IV(c), the Subcommittee must consider whether the facility, as proposed, would have an unreasonable adverse effect on air and water quality.

1. Positions of the Parties

No party claimed that the Facility would cause unreasonable adverse effect on air quality, though IWAG argued that the Facility was not needed to meet environmental standards such as the Regional Greenhouse Gas Initiative as the regional level of emissions has been dropping in recent years for unrelated reasons.

The Applicant and intervenors testified to the potential impact on water quality. Other than some concerns regarding run off and disturbance of wetlands, which are governed by

Department of Environmental Services permits, there was no claim that the Facility would not have an unreasonable adverse effect on water quality.

2. Subcommittee Deliberations

It is undisputed that the Facility will not emit pollutants into the air. While the parties may disagree about the overall contribution of the proposed facility to a reduction in air pollution, there is no concern that the Facility will have an adverse effect on air quality.

Regarding water quality, potential concerns are adequately addressed in the three recommended permits issued by the Department of Environmental Services: the Alteration of Terrain Permit and §401 Water Quality Certification; the Wetlands Permit; and the Subsurface Systems Permit. See, §V, B, 2 above. Compliance with the conditions of said permits will support a finding that the Facility would not have an unreasonable adverse effect on water quality.

D. Natural Environment

The Subcommittee must consider whether the Facility will have an unreasonable adverse impact on the natural environment. See, RSA 162-H:16, IV(c). Review of the effects of the proposed Facility on the natural environment includes a review of rare plants and exemplary natural communities located within the Project area, wildlife within the Project area, the existence of avian species and bats within the Project area, and concerns about habitat fragmentation.

1. Positions of the Parties

a. Rare Plants and Exemplary Natural Communities.

The Applicant asserts that the construction and operation of the Facility will not have an adverse effect on rare plants or exemplary natural communities. To support its position, the

Applicant presented the testimony of Dana Valleau, (Ex. AWE 1, Valleau Pre-filed Direct Testimony at 9), as well as a natural communities report, see, (Ex. AWE 1, Appdx. 11A (natural communities)). The report indicates that surveys determined that there were no significant natural communities or rare plants in the Project area. Additionally, the assessment determined that none of the surveyed communities in the project area would qualify as exemplary. In addition to the information from the Applicant, the Subcommittee received two reports from the New Hampshire Natural Heritage Bureau. On July 2, 2012, the Natural Heritage Bureau provided a report indicating that a standard database query for known locations of rare species and exemplary natural communities found nothing of concern in the Project area. The July 2, 2012 report also indicated that representatives from the Natural Heritage Bureau walked through the site in December of 2011 and on that walk, could find no evidence of rare species or uncommon natural community types or exemplary examples of natural communities. However, the Natural Heritage Bureau wished to conduct a further review during the growing season. See, Ex. Comm. 10.

On August 2, 2012, the Natural Heritage Bureau reported that its representative conducted a further on-site review on July 13, 2012. Id. The purpose of the second on-site review was to search for state listed plant species within a few targeted natural community types with greater potential for rare species. No rare plant species were observed during these surveys. As a result of the survey and mapping performed by the Applicant, and the reviews by the Natural Heritage Bureau, both database reviews and on-site reviews, the Bureau determined that the proposed project will not impact rare plants species or exemplary natural communities. See, Ex. Comm. 10.

No other party to this proceeding offered additional evidence or disputed the findings of the Natural Heritage Bureau.

b. Wildlife (exclusive of avian species and bats)

The Applicant presented the testimony of Dana Valleau and Adam Gravel with respect to the impacts of the Facility on wildlife in the Project area. In his Pre-Filed Direct Testimony, Mr. Valleau asserts that a desk top review of known environmental factors reveals no known critical habitat or endangered species that are present at the Project site. The United States Fish & Wildlife Service concluded the same. Ex. AWE 3, Appdx. 18 at 2. In addition, the Applicant, through Mr. Valleau and Mr. Gravel, prepared and submitted a wildlife impact assessment. Ex. AWE 6, Appdx. 12G. In the wildlife impact assessment prepared by Messrs. Valleau and Gravel, they assert that "direct impacts to wildlife from construction and operation of the Project are not expected to be a significant concern". Ex. AWE 6, Appdx. 12G at 1. This conclusion is not disputed by any other parties.

c. Wildlife – Habitat Fragmentation

The Applicant presented the testimony of Dana Valleau and Adam Gravel with respect to the issue of wildlife and habitat fragmentation. Mr. Valleau and Mr. Gravel opined that the unfragmented habitat block associated with the project area consists of 12,994 acres. They point out, however, that the Project will only impact 5.4 acres of land that is designated as highest ranked habitat in New Hampshire and only 6.4 acres of land that is designated as highest ranked habitat in the biological region. Ex. AWE 9, Pre-Filed Testimony of Dana Valleau and Adam Gravel at 12. Mr. Valleau and Mr. Gravel also point out that after construction is complete, the final Project, including the maintained roads, electrical infrastructure and turbine pad footprints, will total only 11.5 acres. Id. Thus, Mr. Valleau and Mr. Gravel determined that the "narrow

and discontinuous footprint of the project does not create an island of isolated habitat and is . . . not significant habitat fragmentation". Id. The definition used by Mr. Valleau and Mr. Gravel is the definition contained in the text, The Theory of Island Biogeography, by E.O. Wilson and R.H. McArthur (1967). Id. Mr. Valleau and Mr. Gravel opine that the finished Facility will not cause habitat fragmentation because it is a very small incision into an otherwise large area. They also point out that most of the wildlife species found in the Project area are considered to be "generalist" and are found in many habitat types. As a result, they concluded the species of wildlife that are within the Project will not be excluded or isolated.

The North Branch Residents , along with the Stoddard Conservation Commission, presented the testimony of Susan Morse and Jeffrey Jones. These witnesses conducted a walk-through through the Project area. Ms. Morse described the Project area as being "core wildlife habitat". See, Ex. NB 4 at 5. In Ms. Morse's opinion, the Project would cause disruption of movement corridors, altered wildlife behavior and consequent energy losses, and impacts to the breeding practices of wildlife in the area. Id. Ms. Morse also expressed concern over the cumulative effects caused by humans which negatively impact wildlife. However, she recognizes cumulative assessment is a "relatively new applied environmental science". Ex. NB 4, Susan Morse Pre-Filed Testimony at 8.

d. Birds and Bats

The impact of the Facility on avian species and bats was contested amongst the parties in this docket. As a result of a tiered consultation process based on USFWS Guidelines, the Applicant submitted a number of studies. Ex. AWE 9, Valleau and Gravel Supplemental Testimony at 5-7. Though the studies are not in dispute, the parties did dispute the scope of appropriate conditions should a Certificate be granted. The Applicant's consultants conducted a

number of pre-construction surveys pertaining to avian species and bats. Those surveys include a breeding bird survey, diurnal raptor migration surveys, radar surveys for nocturnal avian migration, rare raptor nesting surveys, acoustic bat monitoring and bat mist nesting surveys. Ex. AWE 1 at 81. Based upon the above referenced pre-construction studies and experience at other wind farms in the Northeast, Mr. Valleau and Mr. Gravel expect bird collisions at the Facility to occur at a low frequency. AWE 1, Valleau/Gravel Pre-Filed Direct Testimony at 29-30. They also opine that any impact that does occur with respect to avian population is unlikely to adversely affect that population. Id. at 31. Messrs.Valleau and Gravel also note that bat fatalities are expected to be low at the Facility. Id. at 33. However, they state that the New England bat population is presently suffering from a disease known as white nose syndrome. White nose syndrome has caused a decline of all bat species that are known to hibernate in caves or mines in the Northeast. Therefore, as the bat population is decimated by white nose syndrome, the definition of a biologically significant level of bat mortality may change. Ex. AWE 1, Valleau/Gravel Pre-Filed Direct Testimony at 33.

Audubon, through its witness Carol Foss, also provided testimony regarding avian species within the project area, although her review was primarily limited to raptors and eagles. Ms. Foss points out that the Project area is within a documented golden eagle migration corridor. Ex. ASNH 25 at 5. Ms. Foss also extrapolated a golden eagle passage rate from various sites in Maine, New Hampshire, Vermont and Massachusetts. She compared that passage rate for Antrim and determined that the passage rate at the Facility was slightly above the mean. Id. Based upon her assessment, she found that the Facility site was in Category 2 "high to moderate risk to eagles/opportunity to mitigate impacts" as defined in the U.S. Fish & Wildlife Service Draft Eagle Conservation Plan Guidance. Ex. ASNH 25 at 6.

The Subcommittee was also provided with information from the United States Fish & Wildlife Service with respect to eagles and raptors. Ex. AWE 43. The U.S. Fish & Wildlife Service predicts the risk to golden eagles within the Project area to be considered to be low. The U.S. Fish & Wildlife Service predicts annual collision rates for bald eagles to be in the moderate category. The U.S. Fish & Wildlife Service also advised the Applicant that the avian and bat protection plan prepared by the Applicant is consistent with USFW Land Based Wind Energy Guidelines. Ex. AWE 43. The avian and bat protection program, as proposed by the Applicant, requires one year of post-construction avian studies followed by a program of adaptive management and phased consultation throughout the life of the Facility. The Applicant asserts that it's avian and bat protection plan, as amended, will help to assure that the construction and operation of the Facility does not have an unreasonable adverse impact on avian species and bats.

Counsel for the Public retained the services of Trevor Lloyd-Evans with respect to the effect of the Project on birds and bats. Mr. Lloyd-Evans did not conduct his own studies of the avian and bat species present on the Project site. However, having reviewed the studies prepared by the Applicant's consultants, Mr. Lloyd-Evans recommends that there be three consecutive years of post-construction avian and bat studies as well as an adaptive management program consistent with the avian and bat protection plan.

2. Subcommittee Deliberations

No party has suggested that wildlife, other than avian species and bats, will be harmed or killed as a result of the siting, construction and operation of the Facility. However, the parties do disagree with respect to whether the Project will cause habitat fragmentation that will affect the wildlife population in the project area. The Subcommittee concluded that the Facility will not have an unreasonable adverse effect on wildlife.

Regarding habitat, while Ms. Morse provided testimony regarding the potential impacts of habitat fragmentation on various species of wildlife, her testimony did not lead to a conclusion that the proposed Facility would, in fact, constitute "habitat fragmentation" of a degree that would have any impact in the Project area. In this regard, the Subcommittee finds the testimony of Mr. Valleau and Mr. Gravel to be better grounded in accepted science and more relevant to the Project area in question.

In considering the impact on birds and bats, the Subcommittee acknowledged that a one year post-construction study of avian species and bats would be too short upon which to base conclusions about impacts from the Facility, particularly given the threats to New Hampshire's bat species. A majority of the Subcommittee ultimately determined that if the Facility were to be certificated, it would require three years of post-construction avian species and bat surveys, as well as the implementation of the avian and bat protection plan, as offered by the Applicant, with its adaptive management and phased consultation provisions. The Subcommittee engaged in extensive discussions regarding the effects of the proposed Facility on the natural environment. Virtually all of the Subcommittee members, during the course of deliberations, opined that the Facility would not have an unreasonable adverse effect on the natural environment, so long as certain conditions were imposed.

The Subcommittee determined that the following conditions would be required in order to assure that the proposed Facility does not cause an unreasonable adverse effect to the natural environment:

- The Applicant must complete 3 years of avian and bat post-construction studies in addition to implementation of all of the provisions of the avian and bat protection plan as amended, including adaptive management and phased consultation;

- During the construction of the Facility, logging operations shall be limited to periods of time when the ground is dry or frozen;
- The Applicant must use New Hampshire licensed foresters who will apply best management and forestry practices such as those contained in the publication Good Forestry in the Granite State for all of its logging and forestry operations;
- The Applicant's plan to curtail invasive species shall be extended to the post-construction period, as well as the construction period;
- The conditions contained in the October 26, 2012 letter from the New Hampshire Fish & Game Department to counsel for the Subcommittee should be adopted as part of the avian and bat protection plan.

E. Public Health and Safety

1. Positions of the Parties

a. Noise

The issue of turbine generated noise and its effect on human health and annoyance was a highly contested issue in this docket. The Applicant, Counsel for the Public, and the North Branch intervenors all retained experts to testify before the Subcommittee.

The Applicant employed Epsilon Associates and Robert O'Neal. Epsilon Associates prepared a Sound Level Assessment Report. Ex. AWE 3, Appdx. 13A. The Epsilon Sound Level Assessment predicted that sound levels from the Facility would comply with conditions set forth in previous decisions of the Site Evaluation Committee and with the 1999 Guidelines set forth by the World Health Organization and the United States Environmental Protection Agency recommended guidelines. Ex. AWE 3, Appdx. 13 A at 9-1; Ex. AWP 1, O'Neal Pre-Filed Testimony at 10-11. Epsilon Associates asserts that it took a very conservative approach in its predictive modeling. In calculating predicted sound level at each receptor, Epsilon used a computer model that assumed that all 10 turbines were operating at maximum capacity and that the receptor was downwind from all 10 turbines at the same time. Ex. AWE 1, O'Neal Pre-Filed

Testimony at 6; Transcript Day 5 Morning at 19-20. Epsilon Associates prepared a table identifying the predicted sound levels at each of 155 receptors in the vicinity of the Facility. Ex. AWE 3, Appdx. 13A, Table 7-2; see also, Ex. AWE 41. The highest predicted sound level at any receptor, according to Mr. O'Neal's analysis, would be 41 dBA. The predicted sound levels were based on guaranteed broadband sound data provided by Acciona, the manufacturer of the turbines.

In addition to measuring predicted sound levels, Mr. O'Neal took measurements of existing ambient sound levels at five locations. Results shown in table 6-2 of the Sound Level Assessment Report indicate that the average background L90 sound (where sound level was exceeded 90% of the time during measurement period) was 37-44 dBA. Ex. AWE 3, Appdx. 13A at 6-3.

Mr. O'Neal also opined that low frequency or inaudible sound could be ignored with the advent of modern upwind turbines. He reported that low frequency sound "has been reduced to low levels in modern wind turbines and is generally not an issue". Ex. AWE 3 Appdx. 13A at 4-1. In support of this claim, Mr. O'Neal relies on peer reviewed research conducted by him along with others. See, O'Neal, R.D., R.D. Hellweg, Jr., and R. M. Lampeter, "Low Frequency Noise and Infrasound from Wind Turbines," Noise Control Engineering Journal, March-April 2011, 59(2), 135-157. In addition, he relies on recent research conducted by expert panels in the wind industry and by the Massachusetts Departments of Public Health and Environmental Protection in opining that there is insufficient evidence to demonstrate a causal connection between wind turbines and health problems or disease. Ex. AWE 9, O'Neal Supp. Testimony at 14–16.

Counsel for the Public retained Cavanaugh Tocci Associates and Gregory Tocci to address sound issues. The North Branch Residents retained Mr. Richard James and E-Coustic

Solutions. Both Mr. Tocci and Mr. James criticize the ambient sound level testing conducted by the Applicant. They point out that the sound level testing performed by Mr. O'Neal does not include a true baseline because it did not correct either for insect noise or a running brook – particularly at Locus 5 on Salmon Brook Road near the home of Intervenor Janice Longgood. Mr. Tocci obtained third octave band data from Mr. O'Neal and testified that when the data is corrected to eliminate insect noise the baseline is significantly lower. Thus, the predicted sound level will actually cause a significant increase in the sound levels that would cause a disturbance and significantly annoy people at the receptors when insect noise is not present. Mr. James opined that when the insect corrected data is considered, the increased noise at Ms. Longgood's home may cause her to abandon the property.

Mr. James and Mr. O'Neal significantly disagree about the alleged existence and effects on human health of infrasound. Mr. James cites to a number of articles and anecdotal experience to support his claims that infrasound causes human health effects.

b. Fire and Emergency Safety Issues

In considering the effects on public health and safety the Subcommittee also addressed fire safety issues. As indicated above, the State Fire Marshall made recommendations pertaining to conditions pertaining to the construction and operation of the Facility. The Fire Marshal recommends the following conditions:

1. All structures including, but not limited to, towers, nacelle, operation and maintenance buildings be constructed in accordance with the following codes and standards:

International Building Code, 2009 edition,

NFPA 1, Fire Code, 2009 edition,

NFPA 101, Life Safety Code, 2009 edition

NFPA 850, Recommended Practice for Fire Protection for Electric Generating Plants and High Voltage Direct Current Converter Stations, 2010 edition.

2. The State Fire Marshal or his designee will review all plans relative to the project and perform routine compliance inspections during construction and a final acceptance inspection in conjunction with the local fire and building code officials.

3. If technical assistance is required, the State Fire Marshal may require an independent third party review in accordance with NFPA 1, 1.15.

See, Comm. Exh. 1.

2. Subcommittee Deliberations

After extensive discussion, the Subcommittee determined that the Facility would not have an unreasonable adverse effect on public health and safety as it relates to noise if subjected to conditions that placed a limit on the noise that could be received at residences during the day and at night. In coming to this conclusion, the Subcommittee noted existing standards such as the EPA Guidelines and the 1999 WHO Guidelines. The Subcommittee relied upon the newer 2009 WHO Guidelines in establishing a sound level condition. The Subcommittee also agreed that there was insufficient data to determine that the turbines will emit low frequency inaudible or infrasound that would cause harm to human health.

The necessary conditions are as follows:

1. In the daytime, sound levels generated by the Facility at the outside façades of residences shall not exceed 45 dBA or 5 dBA above ambient, whichever is greater. For the purposes of these conditions, daytime is considered to begin each morning at 8 AM and conclude at 8 PM. All other time shall be considered to be the nighttime.

2. At nighttime, sound levels generated by the Facility shall not exceed 40 dBA or 5 dBA above ambient, whichever is greater.

3. Within a reasonable time after the commencement of commercial operations, the Applicant shall retain an independent qualified acoustics engineer to take sound pressure level measurements, including one third octave band measurements in accordance with the most current version of ANSI S 12.18. The measurements shall be taken at the same receptor locations as contained in Ex.

AWE 3, Appdx. 13A (Epsilon Associates, Inc. Sound Level Assessment Report dated November 17, 2011.) In addition, the Applicant shall take sound pressure level measurements at three additional locations as agreed upon with the Selectmen of the Town of Antrim.

Regarding fire and emergency safety, the Subcommittee considered the Fire Marshal's recommendations during deliberations and determined them to be reasonable requirements designed to assure public safety.

In addition, the Subcommittee considered the establishment of emergency training and planning requirements. The Subcommittee noted that the Applicant's agreement with the Town of Antrim, Ex. AWE 17A, contains a number of reasonable conditions that are designed to assure the safety of the public. The agreement requires the Applicant to cooperate with the Town's emergency services and mutual aid partners. See, Ex. AWE 17A p. 6. In addition, the Applicant is required to consult with the Town and purchase specialized equipment that would not otherwise be required by the Town but for the existence of the Facility. See, Ex. AWE 17A at 6-7. The agreement also calls for reimbursement to the Town of extraordinary expenses incurred in an emergency response to the Facility. Id. However, the Subcommittee noted that emergency planning and training are not included within the agreement between the Applicant and the Town of Antrim.

The Subcommittee recognizes that wind turbine generation facilities are unique and may require atypical emergency response efforts. The Applicant has indicated that it intends to establish an emergency response plan in coordination with the Town of Antrim. See, Applicant's Post-Hearing Brief at 90-91. The Subcommittee sees this as a positive attribute that will also help to assure the safety of the public. If a Certificate were to be issued in this docket, the Subcommittee would adopt the agreement between the Applicant and the Town of Antrim

and require compliance with that agreement as a condition the Certificate. Likewise, the Subcommittee would adopt the recommendations of the Fire Marshal as conditions of the Certificate.

The Subcommittee would also require the Applicant to consult with officials in the Town of Antrim who are responsible for emergency services in order to prepare an emergency response plan. As part of that plan, the Applicant must include a provision that training in emergency response to wind turbine facilities will be provided to the Town's emergency service providers on a regular basis at the expense of the Applicant.

VII. CONCLUSION

The Subcommittee's decision is not a determination that a wind facility should never be constructed in the Town of Antrim or on the Tuttle Hill/Willard Mountain ridgeline. The decision is based solely on the information provided regarding the specific Facility presented in this docket. A different facility may be adequately suited to the region.

Likewise, this decision should not be construed as a judgment against the use of wind turbines to generate electricity. The Subcommittee is cognizant of the need for new clean and renewable energy resources. The Facility, as proposed in this docket, is simply out of scale in context of its setting and adversely impacts the aesthetics of the region in an unreasonable way.

For the reasons set forth herein, the Application for a Certificate of Site and Facility is DENIED.

Amy Ignatius, Vice Chair, SEC
Chairman, Public Utilities Commission

Brad Simpkins, Interim Director
Division of Forests & Lands
Dept. of Resources & Economic Dev.

Brook Dupee, Bureau Chief
Dept. of Health & Human Services
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Richard Boisvert, Archeologist
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