THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2017 TERM

Case No. 2017-0313

APPEAL OF Mary Allen & a.; Appeal of Fred Ward
Appeal by Petition Pursuant to RSA 541:6 (2007) and Rule 10 of the New Hampshire Rules of Supreme Court of a Decision of the Site Evaluation Committee

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BRIEF OF THE APPELLANTS MARY ALLEN, BRUCE AND BARBARA BERWICK, RICHARD BLOCK, ROBERT CLELAND, KENNETH HENNINGER, JILL FISH, ANNIE LAW, JANICE LONGGOOD, MARK AND BRENDA SCHAEFER, THE STODDARD CONSERVATION COMMISSION, AND THE WINDACTION GROUP

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All statutes and regulations are provided in full in the Appellants' Appendix to the Brief.

V. QUESTIONS PRESENTED

1. Whether the SEC Subcommittee's decision was unjust, unlawful, and unreasonable when that decision was issued by a Subcommittee that consisted of only one public member in violation of RSA 162-H:4-a and when the initial second public member resigned early in the proceedings, the alternate public member left on maternity leave and did not preside over any adjudicative or deliberative sessions in this matter, and the Chairperson of the SEC did not seek to have the Governor and Executive Council fill the alternate public member's vacancy on the Subcommittee. **Raised by Appellants at Vol. II, Bk. at 7343-48; Appd'x. at 226-28.**

2. Whether the SEC Subcommittee's decision was unjust, unlawful, and unreasonable when it granted AWE's Application for a Certificate of Site and Facility (hereinafter "2015 Application") to construct a nine turbine wind farm on Tuttle Hill in the Town of Antrim (hereinafter "the Project") when the SEC denied a prior application for a Certificate of Site and Facility to construct a wind farm on Tuttle Hill in the Town of Antrim in SEC Docket No. 2012-01 (hereinafter "Antrim I") and the 2015 Application did not materially differ from the application submitted in Antrim I (hereinafter "2012 Application"). **Raised by Appellants at Vol. II, Bk. at 7342-45; Appd'x. at 228-30.**

3. Whether the SEC Subcommittee's decision was unjust, unlawful, and unreasonable when the Subcommittee found that the Project would not have unreasonable adverse impacts, despite the Subcommittee failing to properly apply the SEC's administrative rules regarding aesthetics and despite the Subcommittee failing to properly consider or analyze the Project's aesthetic impact on various scenic resources, including Highland Lake, Lake Nubanusit, and the dePierrefeau Wildlife Sanctuary in its entirety, when the SEC had previously identified those scenic resources as being impacted in the Antrim I case. **Raised by Appellants at Vol. II, Bk. at 7342-45, 7353-61-; Appd'x. at 228-30.**

4. Whether the SEC Subcommittee's decision was unjust, unlawful, and unreasonable when the Subcommittee considered mitigation measures proposed by AWE in finding that the Project would not have unreasonable adverse aesthetic impacts despite those mitigation measures being substantially similar to mitigation measures proposed in Antrim I that the SEC, in that case, found would not mitigate adverse aesthetic impacts. **Raised by Appellants at Vol. II, Bk. at 7342-45, 7363-67; Appd'x. at 229-30.**

5. Whether the SEC Subcommittee's decision was unjust, unlawful, and unreasonable when the Subcommittee found that the Project would not have unreasonable adverse aesthetic impacts, in part, because the Project would utilize radar detection lighting systems, despite the Subcommittee receiving no evidence as to the frequency, intensity, duration, or any other relevant facts associated with the operation of the radar detection lighting systems. **Raised by Appellants at Vol. II, Bk. at 7363-67; Appd'x. at 232.**

6. Whether the SEC Subcommittee's decision was unjust, unlawful, and

unreasonable when the Subcommittee found that the Project would not have any noise-related adverse public health or safety impacts when the only evidence supporting that conclusion was a Sound Assessment prepared by AWE's Expert, Robert O'Neal, which did not comply with standards and requirements set forth in the SEC's administrative rules. **Raised by Appellants at Vol. II, Bk. at 7368-7374.**

7. Whether the SEC Subcommittee's decision was unjust, unlawful, and unreasonable when the Subcommittee found that the Project would not have any noise-related adverse public health or safety impacts due to AWE's representation that AWE would implement "noise reduction operations," ("NRO") despite the Subcommittee receiving no evidence as to the specific details regarding NRO or NRO's impacts on the Project. **Raised by Appellants at Vol. II, Bk. at 7368-70; Appd'x. at 232-33.**

8. Whether the SEC Subcommittee's decision was unjust, unlawful, and unreasonable when the Subcommittee found that the Project would not have any shadow flicker-related adverse public health or safety impacts despite the fact that the shadow flicker analysis prepared by AWE's expert, Robert O'Neal, reflected that the Project would result in shadow flicker in excess of the maximum thresholds set forth in the SEC's administrative rules. **Raised by Appellants at Vol. II, Bk. at 7375-38; Appd'x. at 232-34.**

9. Whether the SEC Subcommittee's decision was unjust, unlawful, and unreasonable when the Subcommittee found that the Project would not have any shadow flicker-related adverse public health or safety impacts based upon AWE's representation that the Project would implement shadow control protocols ("SCP"), despite the Subcommittee receiving no evidence as to the specific details regarding SCP or SCP's impacts on the Project. **Raised by Appellants at Vol. II, Bk. at 7375-38; App. at 232-34.**

10. Whether the SEC Subcommittee's decision was unjust, unlawful, and unreasonable when the Subcommittee found that the Project would not have an unreasonable adverse impact on the orderly development of the region based upon the flawed and incomplete real estate analysis of AWE's real estate expert, Matthew Magnusson. **Raised by Appellants at Vol. II, Bk. at 7386-88.**

11. Whether the SEC Subcommittee's decision was unjust, unlawful, and unreasonable when the Subcommittee granted a Certificate of Site and Facility and declined to condition said approval upon the creation of a Property Value Guaranty despite the Subcommittee's acknowledgement that the Project may have adverse impacts on property values. **Raised by Appellants at Vol. II, Bk. at 7386-88.**

12. Whether the SEC Subcommittee acted unjustly, unlawfully, and unreasonably when it excluded evidence submitted by the Appellants which would have supported the establishment of a Property Value Guaranty and then later rejected the Property Value Guaranty due to a lack of evidence on the record associated with the Property Value Guaranty. **Raised by Appellants at Vol. II, Bk. at 7386-88.**

VI. STATEMENT OF THE CASE[1]

This case is an appeal of fourteen intervenors from a decision of a subcommittee of the Site Evaluation Committee ("SEC"), granting Antrim Wind Energy, LLC's ("AWE") 2015 Application for a Certificate of Site and Facility ("2015 Application") to construct nine wind turbines on Tuttle Hill in the Town of Antrim ("the project").

On March 17, 2017, a subcommittee of the SEC issued a Decision and Order Granting Application for Certificate of Site and Facility in SEC Docket No. 2015-02 ("Antrim II"). On April 14, 2017, the Appellants filed a Motion for Rehearing, in which the Appellants argued that the subcommittee's decision was unlawful and unreasonable because: (a) the subcommittee was bound by the SEC's April 25, 2013 decision in Docket No. 2012-01 ("Antrim I"), in which the SEC denied AWE's 2012 Application for a Certificate of Site and Facility ("2012 Application") and determined that AWE's proposal to construct ten turbines on Tuttle Hill would have adverse aesthetic effects to scenic resources; (b) the subcommittee that issued the decision in Antrim II was missing the second public member required by RSA 162-H:3 and :4-a and was, thus, unlawfully constituted; (c) the project would produce noise levels in excess of the limits set forth in the SEC's administrative rules; and, (d) there was no evidence supporting the feasibility or efficacy of proposed mitigation measures with regard to night-lighting, noise reduction, or shadow flicker control.

On May 5, 2017, the SEC denied the Appellants' Motion for Rehearing, which was followed by an Order Denying Motions for Rehearing dated June 21, 2017. Thereafter, the Appellants and co-Appellant Fred Ward timely filed these Appeals pursuant to Rule 10 of the Rules of Supreme Court.

[1] All citations to the certified record shall be as follows: Vol. __, Bk. __ at __, where "Vol." is the volume of the certified record and "Bk." is the book contained in the referenced volume. All citations to the Appendix to the Brief of the Petitioners Mary Allen, Bruce and Barbara Berwick, Richard Block, Robert Cleland, Kenneth Henninger, Jill Fish, Annie Law, Janice Longgood, Mark and Brenda Schaefer, the Stoddard Conservation Commission, and the Windaction Group shall be as follows: Appd'x. at __.

VII. STATEMENT OF THE FACTS

a. The 2012 Application, the Project Site, and the Antrim I Decision

On January 31, 2012, AWE filed the Application of Antrim Wind Energy, LLC for a Certificate of Site and Facility with the SEC, seeking authorization to construct ten wind turbines along the ridgeline of Tuttle Hill in the Town of Antrim, New Hampshire ("the Town"), commencing the Antrim I case. See Appd'x. at 241.

Tuttle Hill is immediately adjacent to a "supersanctuary," comprised of over 34,500 acres of conservation land, a portion of which includes the dePierrefeu Wildlife Sanctuary. Vol. II, Bk. 7 at 7200. This supersanctuary is part of a larger initiative called the Quabbin to Cardigan Partnership, which is a collaborative effort to conserve the Monadnock Highlands of north-central Massachusetts and western New Hampshire, an area spanning one hundred miles and encompassing approximately two million acres. Appd'x. at 289.

The wind turbines in Antrim I were to have a height of approximately 492 feet. Appd'x. at 248. In addition to the turbines, AWE proposed to construct a meteorological tower. Appd'x. at 246. The elevation of Tuttle Hill, on which these ten turbines and the meteorological tower were to be located ranges between 1,431 to 1,896 feet. Appd'x. at 248. In an attempt to mitigate the aesthetic impacts associated with siting nearly 500 foot wind turbines in an ecologically sensitive area, AWE proposed a mitigation plan which involved the dedication of 800 acres of land to conservation easements and the implementation of radar detection lighting systems. Appd'x. at 290-91.

In support of the 2011 Application, AWE submitted a Visual Impact Analysis, pre-filed testimony, and supplemental pre-filed testimony and photosimulations prepared by a John

Guariglia. Appd'x at 404-458. In opposition to Mr. Guariglia's testimony, Counsel for the Public submitted a Visual Impact Assessment prepared by Jean Vissering, which contained photo simulations as to what the turbines would look like from Willard Pond, Goodhue Hill, and Gregg Lake.[2] Appd'x. at 384-95.

On April 25, 2013, the SEC[3] denied the 2012 Application in a seventy-one page decision, following eleven days of hearings on the merits and three days of deliberations. In denying the 2012 Application, the SEC found that the project would be out of scale and out of context in the region. Appd'x. at 287-88. The SEC further found that the project would result in "significant qualitative impacts upon Willard Pond, Bald Mountain, Goodhue Hill, and Gregg Lake," and 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." Appd'x. at 287. The SEC summarized, stating: "[T]he 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." Appd'x. at 288.

The SEC went on to note that "in addition to the unreasonable adverse effect on the aesthetics of the region, the [project] would have a particularly profound impact on Willard Pond and the dePierrefeu Wildlife Sanctuary." Appd'x. at 287-89. The SEC recognized that Willard Pond is a "state designated Great Pond" under New Hampshire Law, and further recognized the importance of Willard Pond and the Sanctuary. Appd'x. at 287-89. The SEC stated that the visual impact to Willard Pond was well-illustrated by the photo simulations prepared by both Mr.

[2] Counsel for the Public would later submit Ms. Vissering's Visual Impact Assessment in Antrim II as an appendix to the pre-filed testimony of Kellie Connelly of Terrink.

[3] The Antrim I case was actually decided by a subcommittee of the SEC; however, to avoid confusion with the subcommittee in this case, the Appellants refer to the adjudicator in Antrim I case as the SEC.

Guariglia and Ms. Vissering, and, having visited the site, the SEC was "convinced that the [project] would impose an unreasonable adverse effect on the viewshed from Willard Pond, as well as in other areas throughout the dePierrefeu Wildlife Sanctuary." Appd'x. at 289.

The SEC rejected AWE's argument that the aesthetic impact was mitigated by the dedication of 800 acres of off-site lands to conservation easement. Appd'x. at 289-91. The SEC found that the "dedication of lands to a conservation easement in this case would not suitably mitigate the impact." Appd'x. at 290-91. "While additional conserved lands would be of value to wildlife and habitat, they would not mitigate the imposing visual impact the [project] would have on valuable viewsheds." App. at 290-91.

AWE did not appeal the SEC's denial of a certificate of site and facility.

b. AWE's 2015 Application

On October 2, 2015, AWE filed the 2015 Application, in which it sought to construct nine wind turbines and a meteorology tower along the ridgeline of Tuttle Hill. Vol. II, Bk. 7 at 7130. These nine turbines would be located in the same locations and at the same elevations as those proposed in the 2012 Application. Vol. II, Bk. 7 at 7138-40. Including turbine blades, eight of the turbines would be 488.8 feet tall and the ninth turbine would be 446.2 feet tall, constituting a reduction of 3.2 feet from the turbine heights in the 2012 Application (a 45.8 foot reduction for turbine nine). Vol. II, Bk. 7 at 7135, 7138-39. AWE's proposed mitigation package was nearly identical to that proposed in 2012, but provided an additional one hundred acres of conservation land, a grant of $100,000.00 to the New England Forestry Foundation, and additional monetary contributions. Vol. II, Bk. 7 at 7136, 7170.

With the 2015 Application, AWE provided: (a) a "Visual Assessment for the Antrim Wind Project" ("VA Report") prepared by David Raphael of Landworks; (b) a "Sound Level Assessment Report" prepared by Robert O'Neal of Epsillon Associates, Inc.; and (c) a "Shadow Flicker Analysis" also prepared by Mr. O'Neal.[4] Vol. II, Bk. 7 at 7141, 7224, 7266, 7281.

Mr. Raphael's VA Report opined that the project would not have an unreasonable adverse aesthetic impact to scenic resources. Vol. I, Bk. 3 at 17. In support of his VA Report, Mr. Raphael provided photo simulations of the project from Bald Mountain, Crotched Mountain, Franklin Pierce Lake, Island Pond, Pitcher Mountain, and Willard Pond. Vol. I, Bk. 3 at 1915-37, Vol I, Bk 5, 3508-3531. Contrary to Rule Site 301.05, Mr. Raphael's photo simulations used pictures taken under cloudy, hazy, and otherwise unclear conditions and with objects in the foreground, dulling the visibility of the project. Vol. I, Bk. 3 at 1915-37, Vol I, Bk 5, 3508-3531. Additionally, Mr. Raphael's VA Report failed to provide any specific details as to the turbine's night-lighting. See N.H. CODE OF ADMIN. R. Site 301.05(b)(9).

Mr. O'Neal's Sound Assessment sought to determine whether the noise from the project would exceed forty-five decibels (dBA) at any time during the day and forty dBA at any time during the night at properties used in whole or in part for residential purposes. Vol. I, Bk. 5 at 3650; see also N.H. CODE OF ADMIN. R. Site 301.14(f)(2). Mr. O'Neal predicted the noise produced by the turbines, as experienced by property within a two-mile radius of the project, purporting to utilize standard ISO 9613-2 1996-12-15 ("ISO 9613-2") and inputting into a software program called Cadna/A the turbine heights and elevations, the various properties' locations in relation to the project, and the terrain for the project. Vol. I, Bk. 5 at 3672-73. The

[4] These assessments would be supplemented due to an amendment to the SEC's administrative rules. For the purpose of this Brief, the Appellants refer to the supplemented assessments unless otherwise indicated.

Cadna/A program allowed for the application of a ground factor, which is the impact of the ground in the absorption or amplification of the turbine noise. See Vol. I, Bk. 5 at 3673. Mr. O'Neal assumed that sound would be partially absorbed prior to reaching a residence and, thus, applied a ground factor of 0.5, meaning that the ground would absorb (and thus reduce) noise from the turbines. Vol. I, Bk. 5 at 3673. Had Mr. O'Neal used a ground factor of 0.0, Mr. O'Neal's model would have added three dBA to predictive sound measurements. Vol. III, Bk. 2 at 1260; Vol. II, Bk. 5 at 4691. Mr. O'Neal did not make any adjustments to account for limitations inherent in ISO 9613-2. See Vol. I, Bk. 5 at 3673; Vol. II, Bk. 2 at 2293-94.

Mr. O'Neal's Shadow Flicker Analysis concluded that twenty-four locations within a one mile radius of the project would experience between eight hours and thirteen hours forty-eight minutes of shadow flicker per year — above the eight hours per year maximum established by the SEC's rules. Vol. I, Bk. 5 at 3544; see also N.H. CODE OF ADMIN. R. Site 301.14. Mr. O'Neal stated that the project would implement a "shadow control method" to ensure that the twenty-four properties would not experience more than eight hours of shadow flicker per year. Vol. I, Bk. 5 at 3544. AWE provided no evidence or detail as to how these "shadow control methods" would be operated or how these methods would impact the project's operations.

c. Procedural History of Antrim II

AWE submitted the 2015 Application on October 2, 2015. Vol. I, Bk. 1 at 1. On October 20, 2015, the SEC appointed a subcommittee to preside over the 2015 Application. Vol II, Bk. 1 at 1. The subcommittee was comprised, in part, of Roger Hawk as a Public Member, and Patricia Weathersby as a Public Member. Vol. I, Bk. 1 at 2.

On December 31, 2015, Public Member Hawk resigned. Vol II, Bk. 6. On January 11, 2016, SEC Chairman Martin Honigberg appointed Rachel Whitaker to act as an alternate public member on the subcommittee. Vol II, Bk. 6. Member Whitaker did not preside over any proceedings in the 2015 Application.

Between February and August, 2016, AWE, CFP, and the Appellants (amongst other intervenors) submitted pre-filed and supplemental pre-filed testimony challenging the 2015 Application. The SEC conducted adjudicative hearings over thirteen days between September 13, 2016 and November 7, 2016. Vol. II, Bk. 7 at 7133.

With regard to aesthetics, CFP and the Appellants asserted that Mr. Raphael's VA Report was predicated upon data inputs and methodologies that were intended to reach a predetermined result – that the Project would not have any unreasonable adverse impacts on aesthetics. See Vol. II, Bk. 7 at 7232. CFP submitted a Visual Impact Assessment prepared by Kellie Connelly of Terraink, Inc., which appended Ms. Vissering's VIA from Antrim I, and reached the same conclusion as that reached by Ms. Vissering: the project will have an unreasonable adverse effect on aesthetics. Vol II, Bk. 1 at 105-304; see RSA 162-H:16, IV (c) (2014).

The Appellants challenged the conclusions and methodologies set forth in Mr. O'Neal's Sound Assessment. The Appellants noted that the SEC required the use of the standard ISO 9613-2 and that the ISO 9613-2 standard advised that use of a ground factor is not applicable when predicting noise sources that are at high elevations or situated on uneven terrain. See e.g. Vol. III, Bk. 2 at 1260-61. The Appellants asserted that Mr. O'Neal should have applied a ground factor of 0.0 into CADNA/A, which would have increased modelled noise levels by three dBAs. See e.g. Vol. III, Bk. 2 at 1260-61. The Appellants presented further evidence that Mr.

O'Neal should have adjusted his predictive noise model to account for deficiencies in the ISO 9613-2 standard, which would have resulted in increased predictive noise levels by between three and five decibels. See e.g. Vol. III, Bk. 2 at 1253-54; Vol. III, Bk. 3 at 1749-1767, 1844-2036, 2123,-2130. The evidence and testimony submitted by the Appellants reflected that the project would result in exceedances of the forty-five dBA daytime and forty dBA nighttime noise levels in the SEC's rules. See N.H. CODE OF ADMIN. R. Site 301.14(f)(2).

In response to these criticisms, Mr. O'Neal, for the first time during the adjudicative hearings, stated that the Project would not result in exceedances because AWE could implement NRO to reduce sound-levels. See Vol. II, Bk. 3 at 2554-55. No details were provided as to how NRO would operate, when it would trigger, or the impact it would have on operations.

At the close of the evidence, the subcommittee permitted the parties to submit post-hearing memoranda. Through the post-hearing memoranda, CFP and various intervenors asserted that the SEC should deny the project because the Antrim I decision precluded consideration of the 2015 Application under the doctrines of res judicata and collateral estoppel. See e.g. Vol. II, Bk. 6 at 5745-47; Vol. II, Bk. at 5772-81. AWE asserted that res judicata/collateral estoppel did not apply because the project was different from the 2012 Application and because there had been a change in the law. Vol II, Bk. 7 at 7166-7170.

d. The Subcommittee's Decision in Antrim II

The subcommittee deliberated on December 7, 9, and 12, 2016. By a vote of 5-1, the subcommittee found, in pertinent part, that the project would not cause an unreasonable adverse effect to aesthetics or public health and safety. See Vol. II, Bk. 7 at 6840-41-; see also RSA 162-H:16, IV. The sole vote against granting the Certificate of Site and Facility was Member

Boisvert, the sole member of the subcommittee that had also presided over the Antrim I case. Vol. II, Bk. 7 at 6840. On March 17, 2017, the subcommittee formally issued a written decision memorializing its deliberations and granting a Certificate of Site and Facility.

In granting the Certificate of Site and Facility, the subcommittee determined that the project differed from the proposal in Antrim I and, therefore, the 2015 Application was not precluded under the doctrine of res judicata or collateral estoppel. Vol. II, Bk. 7 at 7170-71. The subcommittee noted the 2015 Application's addition of 100 acres of conservation land, removal of one turbine, change in turbine type, and addition of $100,000.00 in funding. Vol. II, Bk. 7 at 7170. The subcommittee also noted that the SEC amended its administrative rules since Antrim I. Vol. II, Bk. 7 at 7170-71. The subcommittee further found that the SEC's refusal in Antrim I to consider post-decision changes to the 2012 Application was "akin to an invitation for submission of a new Application." Vol. II, Bk. 7 at 7170.

Turning to aesthetics, the subcommittee noted that the identified scenic resources "are used for recreational purposes," that "the extent and duration of the uses depend on the activity enjoyed," and that "the use is generally limited in time with regard to each individual user." Vol. II, Bk. 7 at 7239. The subcommittee then analyzed the project's impact on Bald Mountain, Franklin Pierce Lake, Gregg Lake, Island Pond, Pitcher Mountain, Crotched Mountain, Willard Pond, Meadow Marsh, and Goodhue Hill. Vol. II, Bk. 7 at 7240-41. With regard to Willard Pond, the subcommittee noted that the "turbines will be clearly visible from the boat ramp," but "will not be prominent or dominant as considered from this location" and that "the project's impact on aesthetics from this location does not rise to the level of being unreasonably adverse." Vol. II, Bk. 7 at 7241. The subcommittee further found that, after considering the scenic

resources and mitigating measures offered by AWE, "the [p]roject will not have an unreasonable effect on aesthetics of the region." Vol. II, Bk. 7 at 7242.

With regard to noise, the subcommittee found that the project would not have any unreasonable adverse effects to public health and safety because AWE "demonstrated that it has the technical capability to decrease the [p]roject's noise by curtailment or implementation" of NRO. Vol. II, Bk. 7 at 7274. As for shadow flicker, despite AWE's own expert acknowledging that the project would exceed the limits set forth in the SEC's rules, the subcommittee stated that the project will not have unreasonable adverse effects on public health and safety, if it did not produce more than eight hours of shadow flicker each year and imposed a condition on AWE that AWE was to submit a report of the amount of shadow flicker produced by the project on a semi-annual basis. Vol. II, Bk. 7 at 7284-85.

e. Post-Decision Procedural History

The Appellants filed a Joint Motion for Rehearing on April 14, 2017, in which the Appellants asserted that the subcommittee's determinations with regard to res judicata/collateral estoppel, aesthetics, sound, and shadow flicker, (amongst other matters) were unlawful and unreasonable.[5] Vol. II, Bk. 7 at 7338-90; see RSA 541:3 (2007); RSA 541:4 (2007). The Appellants also argued that the subcommittee was unlawfully constituted because Member Whitaker did not preside over the adjudicative or deliberative hearings,. Vol. II, Bk. 7 at 7345-7348. AWE objected to the Joint Motion for Rehearing, Vol. II, Bk. 7 at 7417, to which the Appellants filed a Brief Response. Appd'x. at 224-236.

[5] On March 25, 2017, the Meteorological Intervenors filed a Motion to Rehear, to which AWE objected on April 5, 2017. filed a Motion for Rehearing and Reconsideration on April 17, 2017, in which it raised concerns similar to the Appellants, to which AWE objected on April 25, 2017.

On May 5, 2017, the subcommittee denied the various motions for rehearing at a public hearing, which was memorialized in an Order Denying Rehearing dated June 21, 2017. Vol. II, Bk. 7 at 7600-7607; Vol. II, Bk. 7 at 7622. With regard to the Appellants' res judicata and collateral estoppel arguments, the subcommittee stated that the "substantial" differences between the 2012 and 2015 Applications "preclude a finding that the two applications represent the same cause of action" and that the Antrim I subcommittee invited the filing of a new application. Vol. II, Bk. at 7625-7630. The subcommittee also restated that an intervening change in the SEC's rules precluded the application of res judicata and collateral estoppel. Vol. II, Bk. at 7629-7630.

With regard to the Appellants' unlawful constitution argument, the subcommittee noted that the subcommittee had a quorum throughout the proceedings. Vol. II, Bk. 7632. The subcommittee further denied the Appellants' request for rehearing on the basis of the subcommittee's sound analysis, stating that the subcommittee found Mr. O'Neal credible and, regardless, AWE agreed to implement NRO to keep sound limits within the parameters set forth in the subcommittee's rules. CR. at Vol. I, Bk. 7 at 7646-49. Similarly, the subcommittee denied rehearing on the basis of shadow flicker, stating that the shadow control protocols would keep shadow flicker levels within acceptable limits. Vol. I, Bk. at 7649-51.

The Appellants filed this appeal on June 2, 2017. Further facts will be discussed throughout the remainder of this Brief.

VIII. SUMMARY OF ARGUMENT

The Appellants raise four primary arguments on appeal. First, the Appellants argue that the subcommittee's decision was unlawful and unreasonable because the subcommittee was bound by the SEC's prior decision in Antrim I. Specifically, the Appellants argue that the

subcommittee's consideration of the 2015 Application was precluded by the doctrine of res judicata and the doctrine of Fisher v. Dover, 120 N.H. 187 (1980) because the 2015 Application was not materially different from the 2012 Application. Additionally, the Appellants argue that the subcommittee was bound by the SEC's findings in Antrim I with regard to the importance of scenic resources and the appropriateness of off-site mitigation proposals in analyzing the aesthetic impact of the Project.

Second, the Appellants argue that the subcommittee's decision was unlawful and unreasonable because the subcommittee misapplied ISO 9613-2 in finding that the project would not violate the SEC's administrative rules. The Appellants argue that ISO 9613-2 is clear with regard to the application of a 0.0 ground factor and the need to adjust projected sound levels to account for limitations in ISO 9613-2 and that the subcommittee failed to follow the SEC's administrative rules adopting ISO 9613-2 when it found Mr. O'Neal credible and found that the project would not adversely effect the public health and safety.

Third, the Appellants argue that the subcommittee's decision was unlawful and unreasonable because the subcommittee granted AWE a Certificate of Site and Facility without having sufficient evidence as to the feasibility and efficacy of various mitigation measures. Rather, the subcommittee found that the project would not have an adverse effect on public health and safety due to noise and shadow flicker or create unreasonable adverse aesthetic effects based on AWE's vague and unsupported assertions that AWE would employ mitigation measures, namely NRO, SCP, and radar-activated lighting. AWE provided no credible evidence as to the sufficiency, efficacy, or feasibility of these mitigation measures.

Fourth, and last, the Appellants argue that the subcommittee was not properly constituted and, thus, the subcommittee's decision granting a Certificate of Site and Facility is void, because the subcommittee did not have a second public member during any portion of the adjudicative or deliberative sessions as required by RSA 162-H:3 and :4-a.

IX. ARGUMENT

a. Standard of Review

RSA 541:13 sets forth the applicable standard of review:

> 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.

This Court will not set aside or vacate the order or decision appealed from except for errors of law, unless it is satisfied by a clear preponderance of the evidence before it, that such order is unjust or unreasonable. See Appeal of Coos County Comm'rs., 166 N.H. 379, 384 (2014).

b. Standard for Issuance of a Certificate of Site and Facility

To grant a certificate of site and facility, the SEC must first find, in part, that the proposed energy facility will not have an unreasonable adverse effect on aesthetics and public health and safety. See RSA 162-H:16, IV (c).

In determining whether a wind project will have an unreasonable adverse effect on public health and safety, the SEC must consider the amount of noise and shadow flicker that will be produced by the wind project. For noise, the SEC must determine that:

> 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 . . . 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.

N.H. CODE OF ADMIN. R. Site 301.14 (f)(2)(a). For shadow flicker, the SEC must determine that "shadow flicker created by the . . . [turbines] 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." N.H. CODE OF ADMIN. R. Site 301.14(f)(2)(b).

c. The subcommittee should have denied the 2015 Application because the SEC's decision in Antrim I was binding under the doctrine of res judicata and the Fisher doctrine

The subcommittee's decision was unlawful and unreasonable because the subcommittee was bound by the findings and conclusions from the Antrim I decision. The subcommittee's decision was controlled by Antrim I, and the subcommittee should not have considered the 2015 Application, because the 2015 Application did not materially differ from the 2012 Application.

"Res judicata, or claim preclusion, bars litigation of any issue that was or might have been raised with respect to the subject matter of the prior litigation." See North Country Envtl. Servs. v. Town of Bethlehem, 150 N.H. 606, 621 (2004). For the doctrine to apply, three elements must be met: (1) the parties must be the same or in privity with one another; (2) the same cause of action must be before the SEC in both instances; and, (3) a final judgment on the merits must have been rendered on the first action.

In the context of siting matters, the Fisher doctrine states that a prior denial of an application for land use approval will be binding upon successive applications unless, (a) there is

a material change in the proposed use of the land; or, (b) there are material changes in the circumstances affecting the merits of the application. See Brandt Dev. Co. v. City of Somersworth, 162 N.H. 553, 557 (2011) (citing Fisher v. Dover 120 N.H. 187, 191 (1980)). "An applicant . . . bears the burden of demonstrating that a subsequent application materially differs in nature and degree from its predecessor." CBDA Dev. v. Town of Thornton, 168 N.H. 715, 724 (2016) (applying Fisher doctrine to planning board decisions) (quotation omitted). "Before accepting a subsequent application . . . a board must be satisfied that the subsequent application has been modified so as to meaningfully resolve the board's initial concerns." Id. at 725 (emphasis added). "When a board has identified fundamental issues with an application, those issues must be addressed before the board—as well as the interested community members—should be required to invest additional time and resources into considering the merits of the application." Id. (emphasis added).

Res judicata and the Fisher doctrine should have precluded the subcommittee from granting the 2015 Application and issuing a certificate of site and facility because the 2015 Application did not "meaningfully resolve" the fundamental issues that the SEC identified in Antrim I. See CBDA, 168 N.H. at 724.

The subcommittee found that the 2015 Application was different because the 2015 Application added $100,000.00 and 100 acres in conservation land to AWE's proposed mitigation package, removed turbine ten, reduced the turbine heights of turbines one through eight by 3.2 feet, and reduced the height of turbine nine by 45.8 feet. Vol. II, Bk. 7 at 7170. The subcommittee state that these changes constituted "substantial" differences that "precluded a

finding that the two applications represent the same cause of action." Vol. II, Bk. at 7625-7630. The subcommittee's finding is unlawful and unreasonable. See RSA 541:13.

The subcommittee's decision is unlawful, unreasonable, and unsupported by the record because, in analyzing the 2015 Application in the context of the Antrim I decision, the record in this matter is wholly insufficient to support a finding that the 2015 Application was "modified so as to meaningfully resolve" the concerns raised by the SEC in the Antrim I decision. See CBDA, 168 N.H. at 724. The subcommittee found that AWE's addition of the 100 acres of conservation land, grant of $100,000.00 to the New England Forestry Foundation, and other monetary commitments were sufficient to support a finding that the 2015 Application meaningfully addressed the concerns of the SEC in Antrim I. Vol. II, Bk. at 7625-7630. The subcommittee's findings, however, confuse the Fisher doctrine's requirement that the subsequent application must "meaningfully resolve" the concerns which formed the basis for the initial denial. CBDA, 168 N.H. at 725. Here, the SEC previously found in Antrim I that off-site mitigation measures "would not mitigate the imposing visual impact the Facility would have on valuable viewsheds." Appd'x. at 290-91. It defies reason that these off-site mitigation measures would not be suitable to mitigate aesthetic effects in Antrim I but can now form the basis for the subcommittee's finding that the 2015 Application meaningfully resolved the SEC's stated concerns in Antrim I.[6] Such a finding flies in the face of the consistency and administrative finality that underlies the application of res judicata to adjudicative land-use proceedings. See

[6] For this same reason, the Appellants argue that the subcommittee was bound by the doctrine of collateral estoppel from considering off-site measures as aesthetic mitigation. The appropriateness of using off-site measures to mitigate aesthetic impacts in Antrim II is identical to that addressed in Antrim I; this issue was fully and finally resolved on the merits by the SEC in Antrim I; and the party to be estopped, AWE, was a party to the Antrim I case. See Gephart v. Daigneault, 137 N.H. 166, 172 (1993) (setting forth elements of collateral estoppel). Additionally, AWE had a full and fair opportunity to litigate the issue of aesthetic mitigation in the Antrim I case, and the issue of aesthetics mitigation was critical to the SEC's decision in Antrim I. See Simpson v. Calivas, 139 N.H. 1, 7 (1994).

CBDA, 168 N.H. at 721 (noting that application of Fisher doctrine serves administrative finality and limits arbitrary and capricious decision making).[7]

The subcommittee further erred when the subcommittee stated that AWE's proposed change to the project's turbines supported a finding that the 2015 Application meaningfully resolved the SEC's concerns in Antrim I. Vol. II, Bk. at 7625-7630. As noted above, the SEC in Antrim I ruled that the project in the 2012 Application would result in unreasonable adverse aesthetic effects to the region, finding that the project would have "significant qualitative impacts upon Willard Pond, Bald Mountain, Goodhue Hill, and Gregg Lake," and moderate impacts on Robb Reservoir, Island Pond, Highland Lake, Nubanusit Pond, Black Pond, Franklin Pierce Lake, Meadow Marsh, and Pitcher Mountain." Appd'x. at 287. Here, the 2015 Application proposed a 3.2 foot reduction for turbines one through eight, a .06% reduction from the 2012 Application, and a 45.8 foot reduction for turbine nine, a 9.3% reduction from the 2012 Application. See Vol. II, Bk. 7 at 7135-38. Situated atop Tuttle Hill, between elevations of 1,431 and 1,896 feet, these changes are imperceptible.

A comparison of the photo simulations from Antrim I and Antrim II support this conclusion.[8] Ms. Vissering's photo simulations of the 2012 project and Ms. Connelly and Mr. Raphael's photo simulations of the 2015 project demonstrate that seven turbines will dominate

[7] The subcommittee stated that the SEC statement in Antrim I that "dedication of lands to a conservation easement in this case would not suitably mitigate the impact" meant that the off-site measures could be considered as aesthetic mitigation in a subsequent application. The subcommittee's interpretation places undue emphasis on the phrase "in this case" and ignores the context of the SEC's statement. See Appeal of Lagenfeld, 160 N.H. 85, 89 (2010) (setting forth canons of construction for orders of tribunal). The context of this statement demonstrates that the SEC was rejecting the concept of off-site mitigation to offset the aesthetic impacts associated with placing nearly 500 foot wind turbines on Tuttle Hill, which is what the 2015 Application still seeks to do.

[8] For the Court's convenience, the Appellants have appended color copies of Ms. Vissering and Ms. Connelly's photo simulations, as filed with the SEC, in their Appd'x. at 385-95, 402-29.

the landscape around Willard Pond and that only one turbine would no longer be visible from that location.[9] Compare Vol. III, Bk. 2 at 1392-93 with Vol. I Bk. 2 at 1488 and Vol. I, Bk. 5 at 3528. The absence of any meaningful change to the 2012 Application is further demonstrated at other portions of the dePierrefeu Wildlife Sanctuary, specifically Goodhue Hill, as is demonstrated by a comparison of Ms. Vissering's photo simulations and Ms. Connelly photo simulations. Vol. III, Bk. 2 at 1395 with Vol. III, Bk. 2 at 1502.[10] These photo simulations, and numerous others contradict the subcommittee's determination that the 2015 Application contains "substantial differences" from the 2012 Application. Vol. II, Bk. at 7625-7630.

This case is similar to Mount Ulla Historical Pres. Soc'y, Inc. v. Rowan County, 754 S.E.2d 237 (N.C.App. 2013), wherein the North Carolina Court of Appeals addressed whether a board of county commissioners erred when it granted a conditional use permit to construct a 1,350 foot radio tower when the board previously denied a conditional use permit for a 1,500 foot radio tower due to concerns associated with air safety. Mount Ulla, 754 S.E.2d at 239. The Court noted that, for res judicata not to apply, the subsequent application must have "materially changed the design of the proposed tower in such a way as to vitiate the concerns regarding air safety which led to the denial" of the prior application. Id. at 242. The Court, applying a deferential standard of review, held that, while the "lowering of the tower by 150 feet constituted a change" from the denied application, "a review of the whole record does not reveal any

[9] This is particularly troubling considering that Willard Pond is located in the dePierrefeu Wildlife Sanctuary, is a State-designated Great Pond, and, presently, has no human development on its shores. Appd'x. at 288.

[10] The same can be said of Bald Mountain, which is also a part of the dePierrefeu Wildlife Sanctuary. Ms. Connelly's 2015 photo simulations from the Bald Mountain Overlook demonstrate that the Project will still have a dominant impact on this scenic resource. Vol. III, Bk. 2 at 1500. The photo simulations and VA Report further demonstrate that Gregg Lake will continue to be profoundly impacted and that other sites will continue to experience moderate impacts.

evidence that this change would undermine the reasoning behind the denial" of the prior application. Id. at 243. The Court continued: "The whole record reflects that the [b]oard essentially considered the same information in both the [prior and subsequent] applications and reached different decisions. Res judicata forbids such a result." Id.

Like in Mount Ulla, the 2015 Application does contain some changes from the 2012 Application, but those changes do not meaningfully resolve the concerns raised by the SEC in Antrim I. Id. at 243. The photosimulations demonstrate that the 2015 project will continue to have a "profound" impact on the aesthetics of important scenic resources. See Section IX (c) of this Brief, ¶11 supra. The SEC in Antrim I found off-site measures to be an insufficient tool to mitigate aesthetic impacts and, therefore, the 2015 Application's changes to off-site measures continue to be insufficient to meaningfully address the SEC's prior concerns regarding aesthetic impacts. Appd'x. at 290-91. Rather, like the board in Mount Ulla, the subcommittee here considered much of the same information as in Antrim I and reached a different result, a conclusion which is forbidden under the doctrine of res judicata.[11] See Mount Ulla, 754 S.E.2d at 243; see also In re McGrew, 974 A.2d 619 (Vt. 2009) (reversing grant of land-use approval for ten-story mixed use building when subsequent application did not address concerns raised in prior denial); In re Armitage, 917 A.2d 437 (Vt. 2006) (reversing grant of land use approval when subsequent application did not address all concerns raised by tribunal in prior denial).

[11] The inconsistency between the Antrim I and Antrim II decisions is glaring with regard to the respective subcommittees' discussions of scenic resources. The SEC in Antrim I noted throughout its analysis the importance of Willard Pond and the dePierrefeu Wildlife Sanctuary, mentioning the $400,000.00 in State funds invested in the area and the millions of dollars in private funding dedicated to maintaining this important ecological resource. Appd'x. at 289-90. The SEC further noted that Willard Pond and the dePierrefeu Wildlife Sanctuary hosted "environmental education programs, fishing, birding, wildlife viewing, and solitude," which generate visitors. Appd'x at 289-90. The subcommittee in Antrim II, discussing the same scenic resources, stated that resources are "generally limited in time with regard to each individual user," a factor which was cited during deliberations as a basis to dismiss concerns regarding aesthetic impacts. Vol. II, Bk. 7 at 7239.

In support of its decision, the subcommittee stated that the SEC in Antrim I invited the 2015 Application. Vol. II, Bk 7 at 7170. Specifically, the subcommittee referenced the SEC's decision in Antrim I denying AWE's Motion to Reopen the Record to revise the 2012 Application to, (a) remove turbine 10; (b) pay the Town a fee related to Gregg Lake; and, (c) make a one-time payment to the New Hampshire Audubon Society. Vol. II, Bk. 7 at 7628-29. The SEC in Antrim I premised its denial because such changes would "materially change the original application" which would require extensive review. Appd'x. at 290-91. The subcommittee in Antrim II stated that this ruling was "akin to an invitation" and acted as an acknowledgment that such changes would satisfy the material change requirement under the Fisher doctrine. Vol. II, Bk. 7 at 7628-29. The SEC's ruling in both regards was in error.

First, the subcommittee's statements are at odds with prior statements of the SEC that the 2015 Application was not invited. In 2014, after Antrim I, AWE submitted a Petition for Jurisdiction Over a Renewable Energy Facility, asking that the SEC exercise jurisdiction over what would become the 2015 Application. Appd'x. at 236. During that proceeding, AWE (and the Town of Antrim) argued that the 2015 Application was materially different from the 2012 Application and that the above-referenced language of the SEC in Antrim I was an invitation to submit a new application. Appd'x at 236. The SEC disagreed, stating: "nothing in the decision denying the original application or in the order denying rehearing can reasonably be construed as an invitation to file a subsequent application." Appd'x at 236. The SEC re-iterated: "[t]he 2012 subcommittee did not invite a re-filed application." Appd'x at 236. Therefore, the subcommittee's interpretation that the 2015 Application was invited is simply incorrect. See also

Hill-Grant Living Trust v. Kearsarge Lighting Precinct, 159 N.H. 529, 535-36 (2009) (reflecting circumstances when invitation could be construed from record).

Second, the subcommittee's interpretation conflates materiality for the purposes of re-opening an administrative record with materiality under the Fisher doctrine. When the SEC in Antrim I declined to open the record to consider revisions to the project, the SEC was noting that such a change would alter other aspects of the RSA chapter 162-H analysis, presumably AWE's financial, technical, and managerial capability.[12] Appd'x. at 290-91. The SEC was not commenting on the materiality of AWE's proposed changes in the context of the Fisher doctrine, but, rather, was discussing how significant changes to AWE's proposal would effectively require a new hearing on all other criteria associated with the issuance of a Certificate of Site and Facility. The subcommittee's interpretation ignores the context of the SEC's prior statements. See Guy v. Town of Temple, 157 N.H. 642, 649 (2008) (stating that interpretation of tribunal order is reviewed de novo); Appeal of Lagenfeld, 160 N.H. at 89 (interpreting tribunal's order in accordance with plain meaning "with reference to the issues it was meant to decide").

The subcommittee further found that the Fisher doctrine did not apply because the SEC amended its administrative rules following the Antrim I decision. The subcommittee's ruling in this regard was in error because the subcommittee failed to analyze or consider how the amendments to the SEC's administrative rules would have impacted the SEC's decision in Antrim I. A change in the law may give rise to a change in circumstances which affects the merits of an application if that change creates a possibility of a different outcome from the prior

[12] This interpretation is supported by the SEC's statement in the Antrim I decision when, in discussing Ms. Vissering's recommendations for mitigating aesthetic impacts, the SEC stated that it was reluctant to impose such measures because such changes "would likely change other dynamics of the Project to such a degree that the [SEC] would be unable to confidently assess the consequences of issuing a Certificate." Appd'x. at 290-91.

denial. See Brandt Dev. Co. v. City of Somersworth, 162 N.H. 553, 559-60. By way of illustration, in Brandt, the applicant sought a variance which was denied, whereupon this Court clarified the criteria for the issuance of a variance and, importantly, relaxed the "undue hardship" criteria. Id. at 558-60. The "undue hardship" criteria, being the central factor to a variance, and all other-criteria being inter-related, this Court held that the change in the law was a material change in circumstances affecting the merits of an application, and, thus, allowed consideration of a subsequent application due to the possibility of a different outcome. Id. at 559-60.

Here, unlike Brandt, the change in the SEC's rules would not have altered the SEC's decision in Antrim I. See Brandt 162 N.H. at 556. The change in the SEC's rules would not have altered the Antrim I decision because the SEC's deliberations in Antrim I considered many, if not all, of the considerations now codified in Rule Site 301.14(a). Appd'x. at 285-91. This is particularly evident with regard to the SEC's analysis of Willard Pond and the dePierrefeu Wildlife Sanctuary, whereupon the Committee's analysis addressed: (a) the character of the area; (b) the significance of an affected resource; (c) the extent, nature, and duration of the public use; (d) the scope and scale in the change in landscape; (e) the extent to which the Project would be a dominant and prominent feature within a natural or cultural landscape of high scenic quality; and, (f) the effectiveness of mitigation measures. See Appd'x. at 285-91 with N.H. CODE OF ADMIN. R. Site 301.14(a). Therefore, unlike Brandt, the change in the SEC's rules did not relax the standards applied in the prior analysis which would create the possibility of a different outcome. See N.H. CODE OF ADMIN. R. Site 301.14(a). As such, the change in the SEC's rules was not a material change of circumstances affecting the merits of an application under the Fisher doctrine. Brandt, 162 N.H. at 556.

In short, the subcommittee's ruling that the 2015 Application was materially different from the 2012 Application was unlawful, unreasonable, and unsupported by the evidence. The subcommittee misapplied the Fisher doctrine by elevating a mere change in the 2015 Application to a change that materially resolved the concerns expressed by the SEC in Antrim I. This Court should hold that the 2015 Application was not materially different from the 2012 Application and reverse the subcommittee's issuance of a certificate of site and facility.

d. The subcommittee's finding that the project would not result in adverse public health and safety impacts was unlawful and unreasonable because AWE's predictive sound assessment did not comply with the SEC's administrative rules.

The subcommittee's decision is unjust and unreasonable because the subcommittee relied upon the Sound Assessment Report submitted by Mr. O'Neal in determining that the project would not have an adverse effect on public health and safety. The subcommittee's reliance on Mr. O'Neal's Sound Assessment Report was in error because Mr. O'Neal did not properly apply ISO 9613-2, as required by Rule Site 301.18(c).

It is axiomatic that administrative agencies must follow their own rules. See Appeal of Town of Nottingham (N.H. Dep't. of Envtl. Servs.), 153 N.H. 539, 554-55 (2005). Rule Site 301.14 is clear that noise from an energy facility shall not exceed "the greater of 45 dBA . . . between the hours of 8:00 a.m. and 8:00 p.m. each day, and the greater of 40 dBA . . . at all other times during each day" on property that is used in whole or in part for permanent or temporary residential purposes. To allow the SEC to analyze the potential noise that may emanate from a wind project, applicants are to submit a sound assessment "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). This assessment must predict project noise under a "worst case" scenario and must correct for "model algorithm error to be disclosed and accounted for in the model." Id.

Here, the subcommittee deviated from the SEC's rules when the subcommittee found that the project would not result in adverse public health and safety effects based on Mr. O'Neal's Sound Assessment. Vol. II, Bk. 7 at 7274. The subcommittee expressly found that Mr. O'Neal's Sound Assessment Report was prepared in accordance with the SEC's administrative rules. Vol. II, Bk. 7 at 7274. The subcommittee further noted that AWE "guaranteed" that noise from the project would not exceed the SEC's requirements and that NRO could be implemented to control noise. Vol. II, Bk. 7 at 7274. In so ruling, the subcommittee ignored that the Sound Assessment Report was not prepared in accordance with the SEC's rules and that a "worst-case" model (as is required by the SEC rules) would have shown that multiple properties would experience noise levels that exceed the SEC's maximum noise threshold. N.H. CODE OF ADMIN. R. Site 301.14 (f); N.H. CODE OF ADMIN. R. Site 301.18 (c)(3).

The subcommittee deviated from the SEC's administrative rules when it relied upon Mr. O'Neal's Sound Assessment Report because the Sound Assessment Report did not comport with Rule Site 301.18(c). Mr. O'Neal's Sound Assessment Report did not follow Rule Site 301.18(c) because Mr. O'Neal (1) applied a ground factor of 0.5, contrary to the requirements of ISO 9613-2, and (2) failed to incorporate corrections for model algorithm error for the ISO 9613-2.

First, Mr. O'Neal's incorporation of a ground factor of 0.5 into his Sound Assessment Report was contrary to ISO 9613-2 because the project's turbines are to be constructed at such a height and elevation that sound from the turbines will not interact with the ground prior to reaching a receiver. See e.g. Vol. III, Bk. 2 at 1260-61; ISO 9613-2 identifies "ground effect" as

"the result of sound reflected by the ground surface interfering with the sound propagating directly from source to receiver." Appd'x. at 468. While ISO 9613-2 provides multiple equations for the calculation of a ground factor, the commonality between all equations is the potential for sound to interact with the ground or other objects prior to reaching a receiver. See e.g. Appd'x. at 468 (noting that "downward propagation path" for calculating ground effect "is applicable only to ground which is approximately flat, either horizontally or with a constant slope"); Appd'x. at 467 (identifying ground factors to be utilized for various ground types).

Notwithstanding the height, elevation, and terrain of the project, Mr. O'Neal utilized a ground factor of 0.5, meaning that he anticipated that the ground was going to absorb a portion of the sound. Vol. I, Bk. 5 at 3673. Had Mr. O'Neal assumed no ground effect and used a ground factor of 0.0, as ISO 9613-2 suggests, Mr. O'Neal's predictive models would have been three dBAs higher for properties within a two-mile radius of the project, causing predictive noise levels to exceed the limits set forth in the SEC's rules. See Vol. I, Bk. 5 at 3673.

The use of a 0.0 ground factor was supported by the evidence on the record. For one, 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 Vol. III, Bk. 3 at 2125. Moreover, Mr. James opined that the use of a ground factor of 0.5 would be inappropriate due to the few opportunities for sound from the turbines on Tuttle Hill to interact with the ground prior to reaching a structure. Vol. II, Bk. 2 at 2293-94.

Second, Mr. O'Neal's failure to adjust for inherent limitations in ISO 9613-2 is a further violation of the SEC's administrative rules. Rule Site 301.18(c) requires sound assessments to "incorporate other corrections for model algorithm error." ISO 9613-2 is a "series of standards"

that "specifies the methods for the description of noise outdoors in community environments." Appd'x. at 477. These accuracy limitations are reflected in ISO 9613-2, wherein it provides a table noting recommended adjustments based on height and distance. Appd'x. at 477. For structures up to thirty meters tall and for receptors that are 1000 meters away from a source, the ISO 9613-2 standard has an established accuracy of ± three dBAs to account for "meteorological conditions along the propagation path," meaning under the worst-case assessment methodology required by the SEC's administrative rules, a sound assessment would have to add at least three dBAs to predictive noise levels to account for ISO 9613-2 limitations. Appd'x. at 477.[13]

The weight of the evidence supports that an adjustment of at least three dBAs should be applied to account for limitations in ISO 9613-2. NARUC states that under normal weather conditions, operational turbine projects commonly produced sound levels that fluctuated by ± five decibels above the mean trend line and that, on some occasions, noise spikes of fifteen to twenty decibels were observed. See Vol. III, Bk. 3 at 2128. 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 that study accounted for atmospheric impacts to the ISO 9613-2 model, adding three decibels for "published limitations inherent in ISO Standard 9613-2." See Vol. III, Bk. 3 at 1750, 1755, 1765. A further study titled "Massachusetts Study on Wind Turbine Acoustics," also cited by Mr. O'Neal, reflects numerous exceedances when ISO 9613-2's modeling limitations were not taken into consideration Vol. III,

[13] Further adjustments were necessary, in this instance as AWE sought to construct noise sources nearly 150 meters high and receptors over 3,200 meters (two miles) away. see also Appd'x. at 476. ISO 9613-2 states, "estimates of accuracy in table 5 are for downwind conditions averaged over independent situations (as specified in clause 5). They should not necessarily be expected to agree in variation in measurements made at a given site on a given day. The latter can be expected to be considerably larger than values in table 5." (Emphasis added.)

Bk. 3 at 1908. Finally, Mr. James opined that ISO 9613-2 required adjustment to account for model limitations. Vol. III, Bk. 2 at 1254-55.

ISO 9613-2 required adjustments to accurately model the worst-case predictive noise from towering wind turbines proposed by the 2015 Application, which Mr. O'Neal did not do. Mr. O'Neal's failure to do so resulted in his Sound Assessment violating the SEC's rules and underestimating predictive noise levels by six dBA. Had those six dBAs been incorporated into predictive levels, Mr. O'Neal's Sound Assessment Report would show several properties that are expected to sustain noise levels in excess of the limits allowed under Rule Site 301.14(f)(2)(a). See Vol. I, Bk. 5 at 3677-80. When the subcommittee found Mr. O'Neal credible and that his Sound Assessment Report comported with the SEC's rules, the subcommittee violated Rule Site 301.18. The subcommittee's finding that the project would not result in adverse effects to public health and safety due to noise was, therefore, unlawful and unreasonable.

e. The subcommittee's finding that radar-activated lighting, NRO, and SCP will mitigate adverse impacts associated with the project was unlawful and unreasonable.

The subcommittee's decision is unlawful and unreasonable because the subcommittee found that the project would not have an undue adverse effect on aesthetics or public health and safety based upon proposed mitigation measures, for which there was no evidence as to those measures' efficacy or feasibility. The subcommittee found that (1) adverse aesthetic effects associated with night-lighting would be mitigated by "radar-activated lighting," (2) adverse public health and safety effects associated with noise would be mitigated by NRO, and (3) adverse public health and safety effects associated with shadow flicker would be mitigated by SCP. Vol. II, Bk. 7 at 7242, 7274, 7284-85. The record is devoid of any details as to the

operation, efficacy, or feasibility of these mitigation measures, and the subcommittee's findings predicated upon these mitigation measures is, therefore, unlawful and unreasonable.

AWE had the burden to provide sufficient evidence to demonstrate that the project would satisfy each of the criteria set forth in RSA 162-H and the SEC's administrative rules. N.H. CODE OF ADMIN. R. Site 202.19; see Jensen's, Inc. v. Dover, 130 N.H. 761, 765 (1988) (burden is on applicant to produce evidence of favorable finding in permitting matter). With regard to each of the referenced mitigation proposals, the record is insufficient for the subcommittee to find that these mitigation measures will protect scenic resources or the public health and safety.

With regard to aesthetics, AWE was to supply evidence on "the visual impacts of [night lighting], and the subcommittee was to evaluate, "nighttime visual impacts of the facility." N.H. CODE OF ADMIN. R. 301.05 (b)(9); N.H. CODE OF ADMIN. R. 301.14 (a)(5). Despite this requirement, AWE only presented the testimony of Mr. Raphael whose comment on radar-activated lighting was limited to one conclusory paragraph that radar detection lighting systems would "essentially eliminate the impacts of nighttime lighting on potential users of the Project area resources." Vol. I, Bk. 3 at 1861. AWE did not present any evidence as to when the radar-activated lighting systems would be triggered, what would trigger it, or how long the system would remain activated sufficient to allow the Appellants or the subcommittee to meaningfully analyze Mr. Raphael's conclusion. See N.H. CODE OF ADMIN. R. 301.05(b)(9).

The same could be said with regard to NRO and SCP, for which there was no evidence presented other than that AWE would implement these procedures to reduce sound and shadow flicker if the project exceeded the limits set forth in the SEC's rules. Vol. I, Bk. 5 at 3544; Vol. II, Bk. 3 at 2554-55; Vol. II, Bk. 3 at 2562-63; Vol. II, Bk. 4 at 3352; CR Vol. II, Bk. 4 at 3509.

This deficiency is particularly glaring in light of Mr. O'Neal's conclusion that shadow flicker resulting from the project will exceed the SEC's maximum threshold of eight hours per year at twenty four properties. Vol II, Bk. 5 at 3544; see N.H. CODE OF ADMIN. R. Site 301.14(f)(2)(b). AWE's response was that it would employ SCP using a program that was still being designed specifically for this project, for which there was no detail as to its specific use, operation, and efficiency. Vol. I, Bk. 3 at 2558-63; Vol. II, Bk. 3 at 3306-17; Vol. II, Bk. 4 at 3493-95. In other words, the only assurance to the public that shadow flicker will not exceed maximum limitations is AWE's assertions that AWE will not operate the project to cause such exceedances and, if shadow flicker results in exceedances, AWE will employ a program, for which no detail was provided, to curtail shadow flicker. Such evidence is insufficient to support AWE's burden of proving that the project will not result in adverse effects to the public health and safety.

Moreover, the subcommittee's decision is devoid of any analysis as to the economic feasibility of these mitigation measures. The uncontroverted evidence was that NRO would reduce the turbines power output for the project, and Mr. James testified that NRO can reduce energy output by 10% for each decibel reduction. Vol. II, Bk. 3 at 2512-13; Vol. II, Bk. 5, at 4639-41, 4649-50. AWE presented no evidence as to how the application of NRO would actually impact the overall project feasibility. Similarly, AWE's evidence as to the economic impact of SCP was the conclusory assertion of one AWE official that the matter was "studied" and that study (which was not produced) revealed that the Project's operations would not change. Vol. II, Bk. 2 at 1358-59. There was no evidence presented which would allow AWE to carry its burden and allow the subcommittee to find that the Project would not have unreasonable adverse

impacts to public health or safety. As such, the subcommittee acted unlawfully and unreasonably; this Court should reverse its decision.

f. The subcommittee's decision was unlawful and unreasonable because the subcommittee was unlawfully constituted.

The subcommittee's decision was unlawful and unreasonable because the subcommittee was missing a public member at all pertinent times during the Antrim II proceedings. RSA 162-H:4, II provides: "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." In the case of a public member, "if at any time a member must recuse himself or herself on a matter or is not otherwise available for good reason," the chairperson of the SEC "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." See RSA 162-H:3, X. This process is applicable to both the committee and subcommittee members. See RSA 162-H:3, XI.

Here, Chairman Honigberg originally appointed Roger Hawk and Patricia Weathersby to act as the two public members of the subcommittee. Vol. II, Bk. 1 at 2. Thereafter, Member Hawk resigned, and Chairman Honigberg appointed Rachel Whitaker to serve on the subcommittee as an alternate public member. Vol. II, Bk. 1 at 6. With the exception of an informational session held on February 22, 2016, Member Whitaker was not present for any hearing, including the adjudicative and deliberative sessions, nor did Member Whitaker execute or sign any orders docket. In short, there clearly was a vacancy of a public member from the subcommittee, and that vacancy was not duly filled as required by RSA 162-H:3.

As a result, the public did not have a full "seat at the decision-making table" as was intended when RSA 162-H:3 was amended in 2014 to expressly require that the SEC have two public members and that both of those public members sit on all subcommittees. Id. When the Legislature enacted RSA 162-H, and required the participation of public members on all subcommittees, the Legislature made a clear statement: the voice of the public shall be heard on the important matter of siting energy facilities — matters which impact the environment, economy, and public safety of entire regions — and that voice shall carry considerable weight (two out of seven members). See RSA 162-H:1 (2014)(Supp. 2016); RSA 162-H:3 One of those critical voices was absent from the subcommittee for the entirety of the Antrim II proceedings.[14]

The Appellants' argument is supported by decisions from other states, which hold that the absence of a necessary member from a quasi-judicial board makes the decision of that board invalid. In Du Baldo v. Department of Consumer Protection, State Electrical Work Examining Bd., 552 A.2d 813 (Conn. 1989), the Connecticut Supreme Court found that the Electrical Work Examining Board was without authority to revoke an electrician's license because two of the members that presided on board were not "engaged in and licensed for" electrical work, as required by Connecticut law. Du Baldo, 552 A.2d at 720-21. The Court noted that the enabling legislation required that two members be actively engaged in the profession, and finding that two of the members were not so engaged, held that the decision of the board was unlawful. Id. at 721-22; see Application of Puget Sound Pilots Ass'n, 385 P.2d 711, 715 (Wash. 1963).

[14] The absence of a public member was not without consequence; while deliberating the project's impacts, the subcommittee considered a "property value guaranty," a proposal meant to protect property owners with regard to impacts to real estate values associated with the project. See Vol. III, Bk. 7 at 6826-27. The subcommittee voted 3 to 3 with regard to adopting a property value guaranty, and the guaranty did not pass. See id.

In conclusion, the subcommittee was not lawfully constituted because a public member was absent, and the subcommittee's decision, made whilst unlawfully constituted, was unreasonable and unlawful as a result.

X. CONCLUSION

This Court should reverse the subcommittee's decision, issuing a Certificate of Site and Facility. The subcommittee, in granting the Certificate, undermined the administrative finality that is to be expected from the SEC's decision. The Appellants, having previously fought and won to preserve the character and scenic quality of their homes in Antrim I, were subjected to a repackaged application which did nothing to ameliorate the devastating aesthetic consequences manifest in the 2012 Application. The subcommittee in a misapplication of the Fisher doctrine considered the 2015 Application and then granted the Application based on unsupportable studies and unsupported assurances from AWE. To compound the error of the subcommittee, the subcommittee's decision was made without the benefit and input of a second public member, the very individual who was to represent the interests of people like the Appellants.

The errors of the subcommittee are numerous, the Certificate of Site and Facility should not have been issued, and this Court should reverse the decision of the subcommittee.

XI. REQUEST FOR ORAL ARGUMENT

The Appellants request that this Court schedule oral argument in this matter.

XII. CERTIFICATION OF APPENDED DECISIONS

The Appellants certify that the decisions that are the subject of this appeal are appended in the Appellants' Appendix.

Respectfully submitted,

Mary Allen, Bruce Berwick, Barbara Berwick, Richard Block, Robert Cleland, Kenneth Henninger, Jill Fish, Annie Law, Janice Longgood, Brenda Schaefer, Mark Schaefer, the Stoddard Conservation Commission, and the Windaction Group
By their attorneys:

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Dated: November 17, 2017

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing, Brief of the Appellants has been mailed this 17th day of November, 2017, via U.S. first-class mail, postage prepaid, to all counsel and/or parties of record and the New Hampshire Site Evaluation Commission.

_____
Eric A. Maher, Esq.