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VIA Electronic Filing

Hon. Kathleen H. Burgess
Secretary to the Siting Board
on Electric Generation and the Environment
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Hon. Michelle Phillips
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625 Broadway, First Floor
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Re: Motion Seeking Determination of Ineligibility, Recusal, or Disqualification of Gary Snell Sr., Siting Board Nominee, in Case No. 16-F-0268: Application of Atlantic Wind LLC for a Certificate of Environmental Compatibility and Public Need to Construct up to a 100 Megawatt Wind-Powered Electric Generating Facility in the Towns of Parishville and Hopkinton, St. Lawrence County, New York

Dear Secretary Burgess and Presiding Examiners,

Our office represents Atlantic Wind LLC ("Atlantic Wind" or "Project Sponsor") in case 16-F-0268, Application of Atlantic Wind LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 for construction of the North Ridge Wind Energy Project in the Towns of Parishville and Hopkinton, St. Lawrence County. We are in receipt of a letter dated August 4, 2017, in which New York Assembly Speaker Carl E. Heastie recommends Gary

P. Snell, Sr., of Potsdam, New York¹ to serve as an ad hoc member of the New York State Board on Electric Generation Siting and the Environment in the above proceeding.

However, it appears that Mr. Snell is not eligible to serve as an ad hoc member of the Siting Board, due to his status with an organization appearing before the Siting Board. (See PSL 161(3)). Even if eligible under the Public Service Law, Mr. Snell may still be required to recuse himself from participation in this matter under the Board's general Rules of Conduct, 16 NYCRR 2.2, which precludes participation in a matter in which the individual member may have a "bias or interest". Mr. Snell's serves as Chairman of a local citizens group, Concerned Citizens for Rural Preservation ("CCRP"), which has obtained pre-application intervenor funding to participate in the pre-application phase of this proceeding, and we anticipate will be seeking the same during the Application phase when additional intervenor funding is made available. Conflicts of interest exist between his appointment to the Siting Board, his role as Chairman of the CCRP, the award of intervenor funding to Mr. Snell's group, and Mr. Snell's publicly stated and open bias against the Facility, which is likely to affect any decisions made as a member of the Siting Board.

Mr. Snell is extensively involved in leading the CCRP, a citizens group opposing the project, the citizens group membership includes many family members of Mr. Snell and the relationships involved raise a serious concern for potential ex parte communications between Mr. Snell and the parties he is related to and involved within in this case. None of these conflicts were disclosed in Mr. Snell's resume submitted as part of his nomination, nor are we aware that these conflicts were disclosed in any other manner. This failure to disclose is, in and of itself, concerning. Thus, to the extent that Mr. Snell refuses to recuse himself from Case No. 16-F-0268, the Secretary should disqualify Mr. Snell pursuant to the Secretary's authority under 16 NYCRR 2.2 and other related state administrative law provisions.

We submit this letter motion, together with an Affidavit of Scott McDonald, with Attachments (hereinafter "McDonald Affidavit"), in support of this motion, seeking a determination from the Secretary or Presiding Examiners that Mr. Snell is ineligible to serve on the Siting Board and, in the alternative, seeking recusal or disqualification of Mr. Snell from serving on the Siting Board given his demonstrated bias, conflicts of interest, and the likelihood of improper ex parte communications.

As a Party Appearing Before the Board, Mr. Snell's Position as Chairman of the Concerned Citizens for Rural Preservation Makes Him Ineligible

Under NY Public Service Law § 161, to be eligible to serve as an ad hoc member of the Siting Board, an individual cannot "retain or hold any official relation to . . . any company, firm, partnership, corporation, association, or joint-stock association that may appear before the Board," and cannot have held a position as "director, officer or, within the previous ten years, an employee thereof." These longstanding eligibility rules existed under Article 10's predecessor law, Article X, which expired December 31, 2002, and are generally consistent with the Code of

¹ Based on information we have available to us, while Mr. Snell is listed as having a mailing address in Potsdam, he resides within the Town of Parishville. The Potsdam address is cited in the Heastie letter.

Ethics set forth in the New York Public Officers Law and elsewhere, which also apply to Siting Board members.²

As with many ethics provisions, these eligibility rules are intended to protect the due process rights of applicants to a fair and impartial hearing,³ and to require that decision-makers serving on tribunals such as the Siting Board have not appeared before the very board on which they are sitting, to ensure their ability to fairly and appropriately discharge their official duties.⁴ These issues are particularly evident in cases such as this, where the individual in question is the chief officer of a group appearing as a party before the Siting Board in the very same case in which the individual has been nominated to serve as an ad hoc member. *See* McDonald Affidavit at Attachment A.

The Concerned Citizens for Rural Preservation (“CCRP”) has represented to the Board in its intervenor funding application that it is a local community association organized to represent residents of the Towns of Parishville and Hopkinton to “provide a singular, focused voice for its members through which such member landowners and residents may most effectively participate in the Article 10 process.” *See* CCRP Revised Request for Intervenor Funding (June 26, 2017) at page 6, attached as McDonald Affidavit Attachment B. Mr. Snell is identified as the Chair of CCRP. *See* McDonald Affidavit Attachment B, page 3.

In the intervenor funding request and elsewhere, CCRP has stated its intention to actively participate in Case 16-F-0268, and, through its attorney, has indicated its intention to participate in negotiation of pre-application stipulations with the Applicant. In fact, CCRP was awarded intervenor funding, in part, for its attorney to negotiate stipulations with the Applicant. Mr. Snell’s organization was awarded \$17,230 of the \$35,000 in intervenor funding made available for the pre-application phase of the North Ridge Wind Farm Project’s Article 10 review. *See* Ruling on Intervenor Funding Requests in Case 16-F-0268 (July 11, 2017). This involvement is effectively an “appearance before the Board” and, as a result, Mr. Snell, as Chairman of the organization appearing before the Board, is not eligible to serve on the Siting Board under PSL § 161.

As noted above, it is not clear that Mr. Snell’s extensive involvement thus far was disclosed during the appointment and nomination process. Mr. Snell’s resume, as appended to Speaker Hestie’s nomination letter, does not indicate his position as Chairman of CCRP, an important omission. *See* McDonald Affidavit Attachment A. This information is, of course, relevant to assessing Mr. Snell’s proposed participation as an ad hoc member of the Siting Board and qualifications under PSL 161(3), and should have been disclosed and considered.

² Under PSL § 160, the ad hoc members must also “reside within the municipality in which the facility is proposed to be located.” Mr. Snell resides in the Town of Parishville. While the North Ridge Wind Farm Project was proposed in the Preliminary Scoping Statement for the Towns of Parishville and Hopkinton, since then, the Town of Parishville has enacted a restrictive local law regarding wind projects, in part, because of the efforts of Mr. Snell. Therefore, at this time, it is uncertain whether Parishville will remain in the project, the Company is evaluating its options in this regard. In the event that the geographic scope of the Facility Area changes at the time the Application is filed, Applicant reserves its rights to raise the issue of the residency of ad hoc members who do not reside within the municipality where the Facility is proposed, in accordance with PSL § 160, at the time of Application.

³ *See* NY State Administrative Procedures Act § 303.

⁴ *See, e.g.*, NY Public Officers Law § 74.

Even if Mr. Snell were to step down from his position with CCRP, the organization would nonetheless have direct Siting Board representation by one of its founding members and former Chairs, and would be perceived as having unwarranted access to a Siting Board member, potentially raising concerns of undue influence and the ability to engage in improper ex parte communication. This would, at the very least, create the impression that CCRP exercised, or could exercise, improper influence on Mr. Snell, or unduly gain access to the Siting Board's deliberations.

Even Assuming Mr. Snell is Not Disqualified by PSL 161(3), Mr. Snell's Conflicts of Interest Preclude His Appointment to the Siting Board

Public Officers Law § 74 outlines the Code of Ethics applicable to all State officers and employees, including both statutory and ad hoc Siting Board members. Under the Code of Ethics, Mr. Snell's position as the Chairman of CCRP precludes also serving as an ad hoc member of the Siting Board charged with reviewing and making a determination on certification of the project.

Public Officers Law § 74(2) states that:

"No officer or employee of a state agency . . . should have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his duties in the public interest.

Public Officers Law § 74 (3) points out that these rules address not only actual conflicts of interest, but also the appearance of a conflict, and further demands that:

"(d) No officer or employee of a state agency . . . should use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others.

...
(f) An officer or employee of a state agency . . . should not by his conduct give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is affected by the kinship, rank, position or influence of any party or person.

...
(h) An officer or employee of a state agency . . . should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to engage in acts that are in violation of his trust."

Given Mr. Snell's position as the chief officer of CCRP—a group engaged in ongoing advocacy against the North Ridge Wind Farm Project—there exist both actual and apparent conflicts of interest which appear contrary to the Public Officers Law. First, Mr. Snell's activities and position with CCRP indicate that he already has a personal and financial stake in the outcome of these proceedings. The financial stake in the proceeding itself is mentioned above with respect to intervenor funding. In addition to the intervenor funding, Mr. Snell's group is supported by funding related to opposition to the Project. Thus, the group is dependent

on financial contributions related to Mr. Snell's opposition to the Project. His public statements, both as an individual and on behalf of CCRP, indicate his strong opposition to the North Ridge Project and have enabled the CCRP group to hire consultants who likewise are opposed to the Project. *See, e.g.*, McDonald Affidavit at ¶¶ 7-16 and Attachments C-K.

In addition to the financial interest associated with this case, as discussed further below, Mr. Snell has appeared at many local meetings, including meetings between Company representatives and the taxing jurisdictions on potential payment in lieu of tax agreement discussions, spoken publicly regarding his opposition to wind projects, written letters regarding taxing issues and other concerns regarding wind projects, submitted comments to Town Boards advocating for specific stringent local law standards and regulations, and otherwise voiced his personal opposition and the opposition of CCRP, to the proposed North Ridge Wind Farm Project since at least the fall of 2016. *See* McDonald Affidavit ¶¶ 8-16 and Attachments D-K.

As an example of the potential conflict that arises from Mr. Snell's participation on the Siting Board, Mr. Snell strongly advocated for noise and property line setback standards that were recently enacted in local law by the Town of Parishville. As has been stated throughout the local law review process before the Town Board, these standards significantly complicate the continued development of the project in the Town of Parishville, as Mr. Snell is aware, such that if the project proceeds through Article 10, the Company is likely to need to seek a waiver from the Siting Board of these local law standards. It is the Siting Board's sole authority to determine whether an applicant is entitled to a waiver of local laws under PSL 168, the standard being whether the local law is "unreasonably burdensome." If Mr. Snell were approved for the Siting Board, he would be in the position of determining the reasonableness of a standard he was involved in and advocating for the Town enacting. His role as an active and vocal opponent of the project is in direct conflict with his proposed role as an ad hoc member of the Siting Board.

As indicated in the McDonald Affidavit ¶¶ 13-15 and Attachment H, Mr. Snell is participating in PILOT discussions, although he is not an elected official or representative of the involved taxing jurisdictions. Mr. Snell has been engaged in advocacy regarding the terms of any potential PILOT agreements with the Towns, St. Lawrence County, and the St. Lawrence County Industrial Development Agency. *See* McDonald Affidavit ¶ 13-14 and Attachments H and I.

In order to preserve the Siting Board's objectivity, and to ensure that all parties are treated fairly in Article 10 hearings and decisions, Siting Board members cannot hold leadership positions, negotiate agreements on behalf of one of the appearing parties, or have any personal or financial stake in the agencies and entities appearing before the Board, as such relationships create at a minimum the appearance of impropriety in contravention of the Public Officer's Law.

The Regulations Applicable to Siting Board Members Precludes Mr. Snell's Involvement Due to His "Bias and Interest" in the Matter

As members of a quasi-judicial administrative body charged with making findings of fact and conclusions of law, Siting Board members are subject to many of the same ethics rules that apply to Administrative Law Judges and Hearing Examiners under the State Administrative Procedures Act. As stated in 16 NYCRR § 2.2, this includes the requirement of impartiality, the

rules against ex parte communications, and other restrictions. Board members who have a personal bias or interest with respect to the matters before them are directed to recuse themselves. 16 NYCRR § 2.2.

The general rules of procedure in all proceedings before the Siting Board and Public Service Commission require the recusal of any presiding examiner, Commissioner and, by operation of 16 NYCRR § 1000.3, any Siting Board member who has “a personal bias or interest with respect to the matter involved.” 16 NYCRR § 2.2. Ad hoc members of the Siting Board are required to decide whether to grant or deny a Certificate “after considering, in an openminded manner, the information that is on the record made before the presiding hearing officer.” See *Letter to Siting Board Members from Secretary Burgess Regarding Duties and Responsibilities as Siting Board Members in Case 14-F-0490, Application of Cassadaga Wind LLC* (June 7, 2016). However, where personal biases and private interests prevent a Board member from objectively participating, recusal is required.

Officers involved in administrative adjudicatory processes are routinely disqualified from presiding over a proceeding where that Commissioner or official suffers a “personal bias, prejudice, or other disqualifying factor,” such as that individual’s “prejudgment of the facts of a particular case” (see *Matter of Crossroads Ventures LLC*, NYSDEC, 2009 WL 2141493 (April 29, 2009), citing *1616 Second Ave Rest. Inc. v New York State Liq. Auth.*, 75 NY2d 158 (1990)), or where the officer has a “financial or personal interest in or relationship to one of the parties in the matter” (see *Matter of Beer Garden, Inc. v New York State Liquor Authority*, 79 NY2d 266 (1992)). Where such an individual has “made public comments concerning a specific dispute that is to come before him” in his capacity as an administrative decision-maker, “he will be disqualified on the ground of prejudgment if a disinterested observer may conclude that he has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.” *1616 Second Ave. Restaurant, Inc.*, 75 NY2d. at 162., citing *Gilligan, Will & Co. v. Securities and Exchange Commission*, 267 F.2d 461 (2d Cir. 1959).

In addition to filing individual comments with the Siting Board in opposition to the project (McDonald Affidavit ¶ 10 and Attachment E), Mr. Snell has authored numerous letters in opposition to the project (McDonald Affidavit ¶¶ 7, 13, 14 and Attachments C, H and I), been cited as an active opponent in numerous local newspaper articles and editorials (McDonald Affidavit ¶ 9 and Attachment D), and has appeared before local boards and groups to argue against various facets of wind energy development (McDonald Affidavit ¶¶ 8, 9, 13-17 and Attachments D, H, I, J and K). He has also stated, in an editorial, his position that the State’s Clean Energy Standard and related policies are a “politically motivated energy goal that will serve only political purposes.” See McDonald Affidavit, Attachment D, *Snell Letter to the Editor in North Country Now*.

However, it is not simply that Mr. Snell has publicly and unequivocally stated his opposition to the North Ridge Wind Farm Project; he has clearly adjudged the facts in this matter. See McDonald Affidavit ¶¶ 8-12 and Attachments D-G. Mr. Snell’s involvement as Chair of CCRP, as well as his intensive involvement in town board meetings, planning board meetings, Article 10 related meetings, as well as numerous public statements against the Project, suggest an interest that extends beyond a mere opinion, but instead a campaign intended to stop the project. See McDonald Affidavit ¶¶ 7-9, 13-15, 16-17 and Attachments C, D, H, I, J and K.

This predisposition, public involvement and financial interest rises to a level that affects the impartiality of any decisions made by Mr. Snell in regards to this project and contravenes the requirements of 16 NYCRR 2.2.

Further, Mr. Snell has already demonstrated a refusal to objectively consider the professional opinions and testimony of Applicant's experts, as well as elected municipal officials whose communities host wind projects, and who spoke to the Town of Hopkinton Board about their positive experiences hosting a wind project. *See* McDonald Affidavit at ¶¶ 16-17 and Attachments J & K. In both cases, Mr. Snell dismissed the evidence offered by these experts and individuals, suggesting that their opinions were based on financial motives. A Siting Board member is charged with hearing evidence and testimony from all sides—including from those with whom he may disagree—and with weighing and considering the entire record in making a fair and rational determination on the merits of an Application. It is clear that Mr. Snell does not intend to objectively consider evidence and expert testimony submitted by the Applicant—including testimony by Dr. Christopher Ollson, PHD, QPRA—the same expert who Mr. Snell dismissed out of hand during the June 14, 2017 Parishville Town Board Meeting. *See* McDonald Affidavit at ¶ 16 and Attachment J.

Mr. Snell's organization, CCRP, operates the following websites: www.nnywind.com, the CCRP Facebook page (https://www.facebook.com/pg/CitizensForRuralPreservation/about/?ref=page_internal) and a blog site (<https://concernedcitizensforruralpreservation.wordpress.com/>) – all of which state opposition to wind energy and the North Ridge project, and which feature prominently the “No Wind Turbines” yard signs circulated by the group, as well as images of wind turbines with red circle-backslash symbols over them, and other alarmist imagery. *See* McDonald Affidavit ¶¶ 7, 11 and 12 and Attachments C, F and G. No Application has yet been submitted for this Project, yet Mr. Snell and his group have stated their unequivocal opposition to the Project and their intention to stop the Project entirely. It would be improper for an individual with such extensive ties and a formal leadership position in organizations opposing the Project to serve on the Siting Board.

Mr. Snell should be deemed ineligible to serve as an ad hoc Siting Board member as a matter of law. Furthermore, he must recuse himself from participating as a Siting Board member in the North Ridge proceeding, in compliance with 16 NYCRR § 2.2, or be disqualified by the Secretary.

Ex Parte Communications

Finally, in addition to the concerns expressed above, we are concerned about the potential for ex parte communications associated with Mr. Snell's participation on the Siting Board. State Administrative Procedures Act § 307(2) prohibits direct Siting Board member communication with parties to a proceeding—not just with an Applicant, but with any party, including groups like CCRP and its members. These rules make it clear that a Siting Board member cannot also be a party to the proceeding, for it would be impossible for such a Siting Board member *not* to communicate with that party or its agents. This is one of the reasons underlying such standards as set forth in 16 NYCRR 2.2.

Given CCRP's stated intention to participate as a party to these proceedings throughout the Article 10 process, including during the adjudicatory and hearing phase, there is a significant potential for ex parte communications between CCRP members and Mr. Snell, either through his own participation in CCRP meetings and communications, through his family's participation with CCRP, or by virtue of his close relationship with CCRP members who would continue with their involvement even in the event that Mr. Snell stepped down from his post with the CCRP. Mr. Snell's attendance at future CCRP meetings would at least create the appearance of impropriety and preferential treatment; once the Application was filed, such attendance would violate the law. SAPA § 307(2). Moreover, such behavior would be difficult, if not impossible to oversee or regulate, further raising the potential for unidentifiable ex parte communications.

Not only is Mr. Snell the Chairman of CCRP, approximately 15 of Mr. Snell's relatives, including his spouse and some of his children, are members of CCRP as well. *See McDonald Affidavit at ¶¶ 4-6 and Attachments A and B.* Several of these individuals have already submitted comments in opposition to the project, including Mr. Snell's closest family members: his spouse and children. *See McDonald Affidavit ¶ 10 and Attachment E.* The Siting Board's rules on Ex Parte Communications prohibit any Siting Board member from communicating with "any person, party or party representative about any issue of fact or question of law in the matter." *Memorandum from Secretary Burgess to the New York State Board on Electric Generation Siting and the Environment, regarding Ex Parte Communications, Conflicts of Interest, Project Sunlight* (October 29, 2014). Any discussions of the proposed Facility between Mr. Snell and his family would constitute an ex parte communication, were he to serve on the Siting Board.

Avoidance of ex parte communications in this situation may not be possible. Whether or not Mr. Snell continues his membership, he is so closely interconnected to CCRP and its membership that at least the appearance of inappropriate contact would remain throughout consideration of the Project.

Conclusion

For all of the reasons set forth above, we respectfully request either (1) the Secretary determine that Mr. Snell is not eligible to serve as a matter of law because he fails to meet the criteria under PSL 161(3) because the group that Mr. Snell chairs has appeared in this proceeding or (2) that Mr. Snell be directed to recuse himself because his "bias and interest" precludes him from serving as a result of the requirements of 16 NYCRR 2.2 and, if Mr. Snell refuses, that the Secretary disqualify Mr. Snell to avoid the appearance of impropriety, and as a matter of law.

Respectfully Submitted,



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Attorneys for Atlantic Wind LLC