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September 13, 2011

Via Hand Delivery

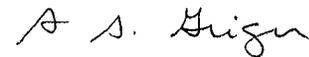
Ms. Eileen Fox, Clerk
New Hampshire Supreme Court
One Charles Doe Drive
Concord, NH 03301

**Re: Case No. 2011-064 Buttolph/Lewis/Spring
Intervenor Group, pro se v. New Hampshire
Site Evaluation Committee**

Dear Ms. Fox:

Enclosed for filing with the Court in the above-captioned matter please find an original and 7 copies of a Motion for Summary Disposition. Please let me know if there are any questions about this filing. Thank you for your assistance with this matter.

Very truly yours,



Susan S. Geiger

Lawrence A. Kelly
(Of Counsel)

Enclosures

cc: Parties of Record
Michael Delaney, Attorney General
New Hampshire Site Evaluation Committee
Michael Iaopino, Esq.

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2011 TERM

No. 2011-0640

Buttolph/Lewis/Spring Intervenor Group

v.

New Hampshire Site Evaluation Committee

**GROTON WIND, LLC'S
MOTION FOR SUMMARY DISPOSITION**

GROTON WIND, LLC

**By its Attorneys
Orr & Reno, P.A.**

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September 13, 2011

Groton Wind, LLC (“Groton Wind” or “Appellee”), by its undersigned attorneys, moves that this Honorable Court, pursuant to N.H. SUP. CT. R. 25(2), summarily dispose of this matter by affirming the New Hampshire Site Evaluation Committee’s (“NHSEC’s”) Decision Granting Certificate of Site and Facility With Conditions (“Decision”) and the NHSEC’s Order on Motions for Clarification, Rehearing and Reconsideration (“Order on Motions for Rehearing”) from which the Buttolph/Lewis/Spring Group of Intervenors (“Buttolph Intervenors” or “Appellants”) appeal.

I. Summary Affirmance of the New Hampshire Site Evaluation Committee’s Decision Granting Groton Wind’s Application for a Certificate of Site and Facility and the Order on Motions for Rehearing Is Appropriate.

1. This Court may enter an order of summary affirmance when “the case includes the decision of the administrative agency appealed from, and no substantial question of law is presented and the supreme court does not find the decision unjust or unreasonable.” N.H. SUP. CT. R. 25 (1) (c).

2. This appeal should be disposed of summarily because no substantial question of law is presented, and because the NHSEC’s Decision granting with conditions Groton Wind’s Application for a Certificate of Site and Facility to construct a wind-energy facility, and the NHSEC’s Order on Motions for Rehearing, from which the Buttolph Intervenors appeal, are neither unjust nor unreasonable.

No Substantial Question of Law Is Presented

3. This appeal was taken from the August 8, 2011 Order on Motions for Rehearing (Appellants’ Attachment 5) which denied, *inter alia*, the Buttolph Group’s Motion for Rehearing (Appellants’ Attachment 3). The Buttolph Intervenors’ Motion

sought rehearing of the NHSEC's May 6, 2011 Decision (Appellants' Attachment 1). The Decision is 90 pages in length, is fully consistent with all provisions of RSA 162-H, and contains all of the rulings and findings required by RSA 162-H:16, and analysis in support thereof. The Order on Motions for Rehearing is similarly thorough and well-reasoned.

4. The standard of review by this Court of the NHSEC's Decision and Order on Motions for Rehearing is well established:

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 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, that such order is unjust or unreasonable.

RSA 541:13; *see In re Londonderry Neighborhood Coalition*, 145 N.H. 201, 203 (2000).

5. Appellants have presented two questions in their Notice of Appeal. The first question is whether the NHSEC erred in its interpretation of RSA 162-H:1, the prefatory purpose section of a comprehensive statute establishing a process for dealing with the complex subject of energy facility "planning, siting, construction, and operation..." RSA 162-H:1. The second question is whether the NHSEC, which is responsible for implementing RSA 162-H, *see* RSA 162-H:4, erred in making determinations under RSA 162-H:16 that the Groton Wind project would not have unreasonable adverse effects. Neither of these questions presents a substantial question of law for the following reasons:

A. This Court pays substantial deference to the construction of statutes by those charged with administering them. *See N.H. Retirement System v. Sununu*, 126 N.H.

104, 108 (1985); *see also* *Dion v. Secretary of Health and Human Services*, 823 F. 2d 669, 673(1st Cir. 1987)(“Deference due an agency’s interpretation depends, in the first instance, on whether the matter is more properly viewed as within the agency’s expertise, or, on the contrary, as a clearly legal issue that courts are better equipped to handle.”) Thus, inasmuch as the Appellants’ first question presented for review by this Court is whether the NHSEC “erred in interpreting its mandate pursuant to NH RSA 162-H:1?” *Notice of Appeal* at 5, it is not a substantial question of law in light of the above-cited authority.

B. The Appellants’ second question presented is whether the NHSEC’s findings under RSA 162-H:16 (i.e. that the Groton Wind Project will not have unreasonable adverse effects) are erroneous due to the NHSEC’s alleged misinterpretation of the purpose section of RSA 162-H. This issue presents no substantial question of law as all findings of the NHSEC upon all questions of fact must be deemed *prima facie* lawful and reasonable. *See* RSA 541:13; *see also In re Londonderry Neighborhood Coalition*, 145 N.H. 201, 203 (2000). In addition, apart from presenting statements made during oral deliberations by just two members of the NHSEC, the Appellants cite nothing from the NHSEC’s Decision, Order on Motions for Rehearing or record evidence to support their position. Nor can they. The 90-page Decision clearly shows that the NHSEC fully considered the positions of all of the parties and weighed all of the evidence before it in making the specific findings and rulings required by RSA 162-H:16, IV (b) and (c), i.e. that the Groton Wind project will not have an unreasonable adverse effect upon aesthetics, historic sites, air and water quality, the natural environment and public health and safety, and that the Groton Wind Project will

not unduly interfere with the orderly development of the region, with due consideration having been given to the views of appropriate planning and governing bodies.

C. Because the NHSEC's Decision reflects policy choices and balances many competing economic, environmental and other interests, it is entitled to considerable deference by this Honorable Court. *See Appeal of Union Telephone Company*, 160 N.H. 309, 314 (2010).

6. With respect to both of the questions presented, Appellants have wholly disregarded the requirement of N.H. SUP. CT. R. 10 to state the reasons why a "substantial basis exists for a difference of opinion on the question and why the acceptance of the appeal would protect a party from substantial and irreparable injury, or present the opportunity to decide, modify or clarify an issue of general importance in the administration of justice." Nor can these grounds be reasonably inferred from the information set forth in the Notice of Appeal. Moreover, as discussed below in paragraph 11, acceptance of this appeal would result in substantial and irreparable injury to Groton Wind. In these circumstances, the Court can – and should- find that the requirements of N.H. SUP. CT. R. 10 have not been met. On that basis alone, the Court should summarily dispose of the instant appeal.

7. Appellants' "Arguments" do not supply the requisite grounds for this Court's consideration of this appeal. A careful reading of the Appellants' "Arguments" reveals that they are simply a restatement of the first two arguments of the Appellants' unsuccessful Motion for Rehearing below. At best, Appellants' "Arguments" recite various statements made by NHSEC members during their oral deliberations and the Appellants' disagreement with determinations made by the NHSEC in its written

Decision, but do not explain whether or why NHSEC's Decision or Order on Motions for Rehearing are unreasonable or unlawful.

The Site Evaluation Committee's Decision is Just and Reasonable

8. The NHSEC's Decision Granting Certificate of Site and Facility is just and reasonable, and should therefore be summarily affirmed. The NHSEC's Decision is the well-reasoned product of a thorough and exhaustive adjudicative process. The Appellants, and other parties, including Counsel for the Public represented by the New Hampshire Attorney General's Office, fully participated in this process. The NHSEC proceedings spanned over one (1) year, and comprised several rounds of discovery, technical sessions, pre-filed testimony, pre-filed rebuttal testimony, and post-hearing briefs. The Decision was issued after the NHSEC held six (6) days of adjudicative hearings in which twenty-one (21) witnesses testified and were subject to cross-examination as well as questioning by the NHSEC, and at which over 160 exhibits were submitted and considered. The NHSEC also held a public hearing in Grafton County as required by NH RSA 162-H: 6-a, IV, inspected the site of Groton Wind's proposed energy project and accepted oral and written comments on the Application from members of the public. The NHSEC conducted two (2) full days and one (1) partial day of public deliberations. The NHSEC also carefully considered and publicly deliberated motions for rehearing from several parties, including Groton Wind, ultimately denying the motions for rehearing except for a clarification sought by Groton Wind (Appellants' Attachment 5 at 4). No party other than the Buttolph Intervenors has appealed. In similar circumstances, this Honorable Court has exercised its discretion under N.H. SUP.

CT. R. 10 (1) and declined such an appeal. *See Appeal of Industrial Wind Action Group*, Case No. 2009-0889, Order Declining Appeal (April 15, 2010).

9. The NHSEC's comprehensive Decision Granting Certificate of Site and Facility With Conditions is based on an extensive record, and is supported by the evidence and the applicable law. The Decision recites and discusses the positions of all of the parties and examines the findings that the NHSEC is statutorily required to make under RSA 162-H:16, IV. As the NHSEC correctly observed in its Decision:

[t]he parties have had a full and fair opportunity to raise all issues and present their arguments. As a consequence, **we are confident that we heard and understand the positions of all parties, the potential impacts of the proposed Project and the effects that it will have on the region and the entire state.**

We have considered the Application, the exhibits, the testimony, the briefs, public comments, letters, and oral arguments. We have fully reviewed the environmental impacts of the proposed facility. **We have also considered all other relevant factors bearing on the objectives of R.S.A. 162-H.**

Appellants' Attachment 1 at 89. (emphasis added).

10. The NHSEC's findings and conclusions contained in the Decision and Order below "are entitled to great weight and are not to be set aside lightly." *See Public Service Co. v. Tenneriffe Development Co.*, 104 N.H. 339, 341 (1962) (citation and quotation omitted). The Buttolph Intervenors' Appeal presents no substantial or compelling reason to disregard the Decision or the Order on Motions for Rehearing. The Decision and Order, therefore, should be summarily affirmed.

11. Groton Wind respectfully notes that the Buttolph Intervenors' appeal poses a substantial risk to Groton Wind and to those who will benefit from the installation of the clean, renewable energy resource that is the subject of this appeal. In

order to qualify for a \$22 per megawatt hour (escalated for inflation over the first 10 years of operation) federal production tax credit under Section 45 of the Internal Revenue Code, the Groton Wind Project must be “placed in service” i.e., be fully operational and regularly delivering power to the transmission grid prior to January 1, 2013. This appeal jeopardizes Groton Wind’s ability to meet this deadline.

Alternatively, in order to qualify for a cash grant from the federal government (in lieu of the aforementioned production tax credit) pursuant to the American Recovery and Reinvestment Act of 2009 (“ARRA”), Pub. L. No.111-5 § 1603, the Project must commence construction during 2011 and be placed in service prior to January 1, 2013.

See Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (HR 4853, 111th Cong.) §707. To meet this “in-service” date, the Groton Wind Project must commence construction in October 2011 in order to qualify for the above-referenced federal grant. Commencing construction prior to the conclusion of this appeal creates great uncertainty for Groton Wind. Also, Groton Wind has contractual deadlines which, if not met, will result in substantial financial penalties to Groton Wind. In these circumstances, and because the Buttolph Intervenors’ appeal is without merit and has failed to satisfy the requirements of N.H. SUP. CT. R. 10, an order of summary affirmance should be issued as expeditiously as possible.

WHEREFORE, for the reasons discussed above, Groton Wind, LLC respectfully requests that this Honorable Court:

A. Affirm summarily and expeditiously the New Hampshire Site Evaluation Committee’s Decision and Order below;

B. Grant Groton Wind, LLC, its costs, including reasonable attorneys' fees pursuant to N.H. Sup. Ct. R.23; and

C. Grant such other relief, including but not limited to declining the appeal, as it deems appropriate.

Date: September 13, 2011

Respectfully submitted,

GROTON WIND, LLC

By its Attorneys,

ORR & RENO, P.A.

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CERTIFICATION OF SERVICE

I hereby certify that on this 13th of September, 2011, I have forwarded a copy of the foregoing Motion by first class mail, postage prepaid, to James Buttoph, Cheryl Lewis and Carl Spring, pro se; the Attorney General of the State of New Hampshire; and the New Hampshire Site Evaluation Committee.

Susan S. Geiger
Susan S. Geiger, Esq.