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July 24, 2012

**Via Electronic Mail and Hand-Delivery**

Ms. Jane Murray, Secretary  
New Hampshire Site Evaluation Committee  
N.H. Department of Environmental Services  
29 Hazen Drive  
Concord, NH 03302-0095

***Re: Docket 2012-01 - Application of Antrim Wind Energy, LLC  
for a Certificate of Site and Facility for a Renewable Energy Facility***

Dear Ms. Murray:

Enclosed for filing with the New Hampshire Site Evaluation Committee in the above-captioned matter please find an original and 9 copies of Applicant's Brief Regarding Authority of the Site Evaluation Committee to Create a Subdivided Lot.

Please contact me if there are any questions about this filing. Thank you.

Very truly yours,

  
Susan S. Geiger

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Lawrence A. Kelly  
(Of Counsel)

Enclosures

cc: Service List, excluding Committee Members  
904508\_1

THE STATE OF NEW HAMPSHIRE  
BEFORE THE  
NEW HAMPSHIRE  
SITE EVALUATION COMMITTEE

DOCKET NO. 2012-01

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

APPLICANT'S BRIEF REGARDING  
AUTHORITY OF THE SITE EVALUATION COMMITTEE  
TO CREATE A SUBDIVIDED LOT

NOW COMES Antrim Wind Energy, LLC (“AWE” or “the Applicant”) by and through its undersigned attorneys, and, pursuant to the Presiding Officer’s July 11, 2012 Order in this docket, respectfully submits this brief regarding the authority of the Site Evaluation Committee (the “SEC” or “Committee”) to create a subdivided lot.

**I. INTRODUCTION**

As part of its Application for a Certificate of Site and Facility, AWE seeks approval of a subdivided lot for the interconnection yard associated with its proposed wind facility. *Application of Antrim Wind Energy* at 45. The interconnection yard is an essential component of the Antrim Wind Project because it permits the generating facility to be interconnected with the Public Service of New Hampshire (“PSNH”) transmission system. *See* RSA 162-H:2, XII (definition of “renewable energy facility” includes “electric generating station equipment and associated facilities . . . .”) PSNH has informed AWE that PSNH policy requires that it own the land on which the interconnection yard is located. In order for PSNH to own the interconnection yard, the property must be subdivided to create a separate lot for the interconnection yard from the

rest of the Project's land, as indicated in Appendix 19 to the Application. The SEC's approval of the creation of the subdivided lot will replace planning board approval, which would be necessary in the absence of the SEC process. Subdivision approval by the SEC will enable the Hillsborough County Register of Deeds to record a subdivision plat for the interconnection yard as shown in Appendix 19. *See Part II. C., infra.*

On July 11, 2012, the Committee issued an Order requesting "that the parties provide pre-hearing legal memoranda or briefs addressing the authority of the Committee to create a subdivided lot." *Supplemental Procedural Order and Request for Briefing* (July 11, 2012) at 2. For the reasons discussed below, AWE respectfully submits that the Committee has the authority under RSA 162-H to create a subdivided lot as part of its review of AWE's Application for a Certificate of Site and Facility for a renewable energy project. This is because RSA 162-H preempts all local land use authorities with respect to the siting of such facilities, and because the Town of Antrim has expressly agreed that local approval is not needed for site plans and subdivisions certificated by the Committee. Agreement Between Town of Antrim, New Hampshire and Antrim Wind Energy, LLC (March 8, 2012), Application Appendix 17A, ¶ 2.8.

## **II. ARGUMENT**

### **A. THE AUTHORITY OF LOCAL LAND USE BOARDS TO REGULATE ENERGY FACILITIES HAS BEEN PREEMPTED BY RSA 162-H, THE NEW HAMPSHIRE SITE EVALUATION LAW.**

The actual text and purpose of RSA 162-H demonstrate that local land use controls – including subdivision authority – are preempted by the Site Evaluation Committee. "It is well settled that towns cannot regulate a field that has been preempted

by the State.” *JTR Colebrook v. Town of Colebrook*, 149 N.H. 767, 770 (2003) quoting *Town of Hooksett v. Baines*, 148 N.H. 625, 627 (2002). “Municipal legislation is deemed preempted if it expressly contradicts State law or if it runs counter to the legislative intent underlying a statutory scheme.” *JTR Colebrook v. Town of Colebrook*, 149 N.H. at 770. In this case, requiring an applicant to seek Planning Board subdivision approval would contravene the text of RSA 162-H as well as the Legislature’s intent that the SEC provide a single, integrated process for permitting energy projects.

1. **The express language of RSA 162-H and its legislative history demonstrate that it preempts all local land use authority for renewable energy facilities under the *Bio Energy* test.**

The New Hampshire Supreme Court has identified the following test for determining whether a statutory scheme preempts local land use authorities: (1) “whether the expressed purpose of the statute and the grant of authority evinces an intent to regulate the entire field in question”; (2) “the extent of the application process necessary to obtain a permit”; (3) “whether the statute contemplates public hearings on any proposal affecting a municipality”; (4) “the level of detail and technical specifics of the state’s regulations”; and (5) “whether the agency has the authority to investigate and take action in response to regulatory violations.” *Bio Energy, LLC v. Town of Hopkinton*, 153 N.H. 145, 151-153 (2005) (finding that the town did not have authority to issue a cease and desist order to a wood co-generation facility that was permitted by the Department of Environmental Services) (citations omitted).

Applying the *Bio Energy* factors to the instant inquiry leads to the inescapable conclusion that the SEC process preempts the local planning board’s authority to grant subdivision approval for renewable energy facility property that is subject to the siting

requirements of RSA 162-H. First, the expressed purpose of RSA 162-H and the grant of authority to the SEC evince an intent to regulate the entire field of local land use. RSA 162-H:16, II expressly states that a certificate of site and facility issued by the SEC “shall be *conclusive* on *all* questions of siting, *land use*, air and water quality.” RSA 162-H:16, II (emphasis added). This authority is consistent with the express purpose of RSA 162-H which is set forth below, and which reflects the Legislature’s intent to provide a single, integrated process for resolving all permitting issues related to renewable energy facilities, thereby preempting local controls that would otherwise apply:

The legislature recognizes that the selection of sites for energy facilities, including the routing of high voltage transmission lines and energy transmission pipelines, will have a significant impact upon the welfare of the population, the location and growth of industry, the overall economic growth of the state, the environment of the state, and the use of natural resources. Accordingly, the legislature finds that it is in the public interest to maintain a balance between the environment and the need for new energy facilities in New Hampshire; that undue delay in the construction of needed facilities be avoided and that full and timely consideration of environmental consequences be provided; that all entities planning to construct facilities in the state be required to provide full and complete disclosure to the public of such plans; and that the state ensure that the construction and operation of energy facilities is *treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion*, all to assure that the state has an adequate and reliable supply of energy in conformance with sound environmental principles. The legislature, therefore, *hereby establishes a procedure for the review, approval, monitoring, and enforcement of compliance in the planning, siting, construction, and operation of energy facilities.*

RSA 162-H:1 (emphasis added). Thus, as the purpose section and overall statutory scheme of RSA 162-H clearly reveals, the Committee has exclusive authority to review and approve all aspects of the planning, siting, construction and operation of renewable energy facilities. This conclusion is further supported by New Hampshire case law

which, for over 30 years, has recognized that this statutory scheme preempts local regulation of energy facilities. See *Public Service Company of N.H. v. Town of Hampton*, 120 N.H. 68 (1980). In *Public Service Company of N.H.*, the New Hampshire Supreme Court found that the

statutory scheme [for a precursor to RSA 162-H] envisions that all interests be considered and all regulatory agencies combine for the twin purposes of avoiding undue delay and resolving all issues “in an integrated fashion.” By specifically requiring consideration of the views of municipal planning commissions and legislative bodies, the legislature assured that their concerns would be considered in the comprehensive site evaluation.

*Id.* at 70-71. The Court went on to determine that because the Legislature intended that “all matters regarding the construction of ...[facilities] covered by [RSA 162-H] be determined in one integrated and coordinated procedure by the site evaluation committee, whose findings are conclusive,” the Legislature has preempted any power that “towns might have had with respect to [facilities] embraced by the statute.” *Id.* at 71.

Accordingly, the Town of Antrim’s subdivision authority is preempted in this case.

Legislative history regarding RSA 162-H after the *Public Service of N.H.* decision demonstrates the Legislature’s intent that the SEC process preempts local land use law. The 1990 State of New Hampshire Report of the Energy Facility Siting, Licensing & Operation Study Committee recognized this preemption. *State of New Hampshire Report of the Energy Facility Siting, Licensing & Operation Study Committee of the New Hampshire General Court* at 8-9 (Aug. 30, 1990) [relevant excerpt attached hereto as Exhibit A]. The Report states, in response to the suggestion that towns conduct their own independent review processes:

The Committee felt that it was unreasonable to expect communities to review facilities in separate processes *when the decision of the SEC is*

*defined to be the final authority.* It was felt that the one stop siting concept that is the basis of NH's siting statutes would be severely undermined and the ability of the SEC to evaluate the overall social impacts of facilities would be compromised.

*Id.* (emphasis added); *see also Prepared Notes of Michael Cannata* (April 30, 1991)

(stating "this bill would significantly advance the concept of one stop siting . . . .")

[attached hereto as Exhibit B]. The 1990 report was put into effect via HB 736 in 1991.

During the proceedings regarding that bill, Deputy Minority Leader Susan Spear submitted a letter into the record regarding HB 736 objecting to the preemption language

which continues to apply today. *Comments on Energy Facilities Siting Bill* (HB 736)

[attached hereto as Exhibit C] ("The language in [section 162-H:16, II] seems to preempt

local zoning and planning. . . . When this sentence is read in conjunction with the

statement of purpose, it implies that the state siting process overrides local zoning

ordinances and the local Master Plan. I suggest you add language which clearly states

that it is not the intent of this law to preempt local control.") Significantly, no such

language was added to the statute. Thus, although the Legislature had the opportunity to

modify the statute to allow local zoning and planning authority over energy projects, it

failed to do so. Finally, during the most recent legislative deliberations regarding the

Committee (in 2009), Public Utilities Commissioner Below emphasized the preemptive

language of RSA 162-H:16, II: "A certificate shall be conclusive when [sic] all questions

of siting, land use, air and water quality." *Hearing Before the Senate Committee on*

*Energy, Environment and Economic Development* at 6 (April 23, 2009) [Attached hereto

as Exhibit D].

When taken together, the express language of RSA 162-H, the purpose section of the statute, and the legislative history all evince an intent to regulate the entire field of

local land use law, meeting the first part of the *Bio Energy* test. *Bio Energy, LLC*, 153 N.H. 145 at 151.

Parts two through five of the *Bio Energy* test also indicate that local land use controls are preempted by RSA 162-H. The SEC application process is extensive and includes a minimum nine month review, with a detailed application that must incorporate the application forms for all state permits. RSA 162-H:7 and Admin. R. Site 301.03. This process requires public hearings, as well as adjudicative hearings, *see* RSA 162-H:6-a, VII and 162-H:10, on all proposals including those that impact municipalities, and allows for participation by municipal governing and planning bodies. RSA 162-H:16, IV. (b). The rules governing this process are extensive and detailed. *See* Admin. R. Site 101.01 through 302.04 and RSA 162-H. Finally, the Committee has authority to investigate and take action in response to regulatory violations under RSA 162-H:12 and Admin. R. Site 302.01-302.03. Thus, the RSA 162-H statutory scheme and related rules meet the preemption test laid out by the Court in *Bio Energy*. *Bio Energy, LLC*, 153 N.H. 145 at 151-53.

**2. Subdivision regulation falls within the Site Evaluation Committee's jurisdiction.**

Cities and towns have “only such local land use powers as are granted to them by the State.” *Bisson v. Milford*, 109 N.H. 287, 288 (1969); 15 New Hampshire Practice: Land Use Planning and Zoning § 29.03 (Dec. 2011). A municipality’s right to regulate subdivisions is contained in RSA 674, regarding “Local Land Use Planning and Regulatory Powers.” Thus, inasmuch as subdivision authority is part of a town’s overall land use authority, it is limited to the powers provided by the State Legislature. *Town of Tuftonboro v. Lakeside Colony, Inc.*, 119 N.H. 445, 448 (1979) (“Municipalities that

attempt to exercise this delegated power can only do so in a manner that is consistent with the provisions of the enabling statute.”)

The Legislature has indicated that “[s]ubdivision regulations are designed to insure that individual lots intended to be developed for such permitted uses may safely be used for such purposes and that the use of specific parcels as zoned will not impose the burden of expense upon the community or create health or other hazards.” 15 New Hampshire Practice: Land Use Planning and Zoning § 29.03 (Dec. 2011). The purpose of these regulations is to “promote the orderly and planned growth of relatively undeveloped areas within a municipality” because “[p]lanless growth and haphazard development accentuate municipal problems in the demand for streets, water and sanitary services which have a direct relation to traffic safety and health.” *Blevens v. Manchester*, 103 N.H. 284, 286 (1961) (internal citations omitted); see RSA 674:36 (enunciating elements which subdivision regulations may address).

The issues addressed by subdivision regulations are precisely the types of issues that the Legislature delegated to the SEC with regard to energy facility siting. See RSA 162-H:16 (SEC determination of land use issues are conclusive; SEC must consider whether energy facility will unduly interfere with orderly development of the region, giving consideration to the views of municipal planning commissions; and SEC must determine that project will not have an unreasonable adverse effect on aesthetics, historic sites, air and water quality, the natural environmental, and public health and safety.) Given that RSA 162-H is a detailed and comprehensive statute governing all aspects of energy facility siting, including land use issues, the statute “demonstrates legislative intent to preempt the field by placing exclusive control in the State’s hands.” *JTR*

*Colebrook v. Town of Colebrook*, 149 N.H. 767, 770 (2003). When a conflict exists between the authority of a local planning board and the SEC over the issues addressed in RSA 162-H, the planning board's authority is preempted because "[i]t is well settled that towns cannot regulate a field that has been preempted by the State." *Id.*

As the foregoing discussion indicates, the Legislature's intent in RSA 162-H to establish a single forum for permitting renewable energy facilities must, necessarily, override the authority of municipalities to regulate the land use elements of the AWE Project, including subdivision approval. This conclusion is further supported by the fact that municipalities have the ability to participate in the SEC process, *see* RSA 162-H:16, IV (b), and they do so as a matter of course.<sup>1</sup> Had the Legislature intended to provide local planning boards with the authority to approve subdivision plans or regulate any other land use aspects of energy projects, it would be unnecessary for the municipal planning commissions to participate in the SEC process.

Lastly, requiring an applicant to seek subdivision approval at a planning board after a certificate of site and facility has been granted would lead to piecemeal regulation, which is exactly the result that the Legislature sought to avoid by enacting RSA 162-H. Given that a planning board's review of an energy

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<sup>1</sup> For example, prior decisions of the Committee indicate that municipalities have intervened in the SEC process to make their views known to the SEC as part of the finding cited above that the proposed facility will not unduly interfere with the orderly development of the region. RSA 162-H:16,IV(b). *See, e.g., Decision of New Hampshire Site Evaluation Committee, Application of AES Londonderry L.L.C.*, SEC Docket No. 98-02, issued May 25, 1999 (approving the 720 megawatt gas-fired electric generating facility in Londonderry, NH); *see also, Decision of New Hampshire Site Evaluation Committee, Application of Newington Energy, L.L.C.*, SEC Docket No. 98-01, issued May 25, 1999 (approving the 525 megawatt gas-fired electric generating facility in Newington, NH). In the cases cited above, the towns intervened in the SEC dockets, the Committee took local views into consideration in making the decisions, and the final orders included numerous conditions in each certificate addressing local concerns. In this case, several municipal parties, including the Antrim Planning Board, have been granted intervenor status and will have an opportunity to participate and make the Board's views known to the SEC.

facility's subdivision plans could cause significant delays in the construction of a certificated facility, such review is impermissible as it would be in direct conflict with the express purpose of RSA 162-H which is to promote a timely, integrated permitting process in order to avoid "undue delay in the construction of needed facilities." RSA 162-H:1.

**B. THE TOWN OF ANTRIM HAS AGREED THAT AWE NEED NOT OBTAIN PERMITS OR APPROVALS REQUIRED BY TOWN REGULATIONS FOR SITE PLANS, SUBDIVISIONS OR OTHER FACILITIES CERTIFICATED BY THE SITE EVALUATION COMMITTEE.**

Appendix 17A of AWE's Application for a Certificate of Site and Facility contains a copy of an agreement executed by and between the Town and Antrim and AWE. Paragraph 2.8 of the Agreement provides, in pertinent part, as follows:

Building, occupancy or other permits or approvals required by Town regulations and ordinances are not required for any of the site plans, subdivisions, facilities, buildings, roads or other structures certificated by the New Hampshire Site Evaluation Committee.

Application, Appendix 17A at 3. As the above-quoted language clearly indicates, the Town of Antrim has agreed that AWE need not obtain local approvals for subdivisions or site plans approved by the SEC. This position is consistent with the preemption analysis set forth above. In addition, it demonstrates that even if, *assuming arguendo*, the Town retained authority to approve/create subdivisions of property to be used by the Antrim Wind Project, such authority has been ceded to this Committee in the instant docket. Accordingly, the Committee may properly determine that it has exclusive authority to approve AWE's subdivision plan for the interconnection yard.

**C. THE SITE EVALUATION COMMITTEE HAS AUTHORITY TO APPROVE AND SIGN A SUBDIVISION PLAN SO THAT THE PLAN MAY BE RECORDED.**

As described above, the Site Evaluation Committee has the authority to approve a plat of subdivision when it certifies a renewable energy facility. For the purposes of approving a proposed facility, the SEC's decisions are determinative regarding land use, including subdivision. RSA 162-H:16, II, IV. However, a separate statute governs the process by which subdivision plats are filed and recorded in the registry of deeds. *See* RSA 676:18. The latter statute, among other things, generally requires that the register of deeds file or record a subdivision plat only with the approval of the planning board. *See* RSA 676:18. I. Thus, while RSA 162-H preempts local planning board authority with respect to energy facility property subdivision, the statute does not directly address how it interfaces with the filing and recording provisions of RSA 676:18. Notwithstanding this statutory gap, the broad scope of the Committee's preemption of local land use authority, and principles of statutory construction, compel the reasonable and appropriate determination that the Site Evaluation Committee's decision and signature stand in the place of the planning board's for the purpose of recording a subdivision plan approved as part of the SEC process.

Analysis of the Legislature's intent regarding the relationship between two statutes must be based upon its choice of language. *State Employee's Ass'n of N.H. v. N.H. Div. of Personnel*, 158 N.H. 338, 345 (2009). However, in some cases, "any attempt to read consistent and coherent meaning into every word . . . may well be a fool's errand." *Id.* at 346. In such cases, if "literal construction of [the] statute does violence to the apparent policy of the Legislature, it will be rejected." *In re Justin D.*, 144 N.H. 450,

453 (1999) (quoting *State ex rel Fortin v. Harris*, 109 N.H. 394, 396 (1969)). In addition, “[w]hen the intention of the Legislature can be ascertained from the statute, words may be modified, altered or supplied to compel conformity of the statute to that intention.” *State Employee’s Ass’n of N.H.*, 158 N.H. at 346 (quoting *State v. Holmes*, 114 Mont. 372, 136 P.2d 220, 222 (Mont. 1943)).

Reading RSA 162-H together with RSA 676, leads to the logical conclusion that the Legislature intended to permit the Committee to approve subdivision plats for submission to the registry of deeds. First, as stated above, the Legislature intended to create a process which preempts local land use authorities via the Site Evaluation Committee, including subdivision approvals. Although the Committee may consider the views of municipal planning commissions in its analysis, as well as subdivision regulations, the Committee is not bound by those views nor required to apply those regulations to renewable energy facilities. See *Appeal of Londonderry Neighborhood Coalition*, 145 N.H. 201, 206 (2000). Meanwhile, the subject matter of RSA 676 is local land use, and it generally concerns administrative and enforcement issues, in addition to penalties associated with local land use issues. The purpose of RSA 676:18 is to assure that subdivision plans are approved by the appropriate regulatory authority<sup>2</sup> and meet the needs of a municipality’s health, safety, and welfare. Generally, the appropriate regulatory body would be the planning board. However, in these limited circumstances, the appropriate regulatory body is the Site Evaluation Committee and therefore,

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<sup>2</sup> If a town has not promulgated subdivision regulations then no such signature is required. See *Eddy Plaza Assocs. V. City of Concord*, 122 N.H. 416 (1983) (developer can proceed without site plan approval since no such regulations have been promulgated); 15 New Hampshire Practice: Land Use Planning and Zoning § 32.01 (Dec: 2011).

compliance with RSA 676:18 can be achieved via subdivision approval from the Committee.

The best way to honor the clear intent of both statutes at issue here is to find that the Committee must make regulatory determinations regarding energy facility subdivision approvals. Otherwise, the very limited language of RSA 676:18 would enable planning boards to assert authority over subdivisions needed for energy facilities, thereby rendering the Committee's comprehensive authority under RSA 162-H over land use issues meaningless. It would also add an unintended regulatory hurdle for applicants in direct contravention of the express text of RSA 162-H and would do violence to the Legislature's intent in establishing the Site Evaluation Committee. Such a result must be rejected. *See In re Justin D.*, 144 N.H. at 453.

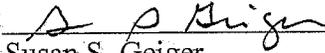
### **III. CONCLUSION**

For all of the reasons set forth above, the Site Evaluation Committee has authority to approve and sign the subdivision plat submitted by Antrim Wind Energy as Appendix 19. The express language of RSA 162-H, its legislative history, New Hampshire case law and AWE's agreement with the Town of Antrim all support this conclusion. Alternative conclusions would require AWE to proceed through a duplicative and potentially conflicting and time consuming local regulatory process to obtain final approval of its renewable energy project. As this result contravenes the Legislature's intent embodied in RSA 162-H to provide a single, integrated process at the state level for renewable energy facility siting, it must be rejected.

Respectfully submitted,

Antrim Wind Energy, LLC  
By its attorneys,

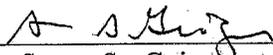
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By:   
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July 24, 2012

Certificate of Service

I hereby certify that on this 24<sup>th</sup> day of July, 2012, a copy of the foregoing Brief was sent by electronic or U.S. mail, postage prepaid, to persons named on the Service List of this docket, excluding Committee Members.

  
Susan S. Geiger

903540\_1

② 2-26-91 HB 736 Rep. Rodeschin

EXHIBIT A

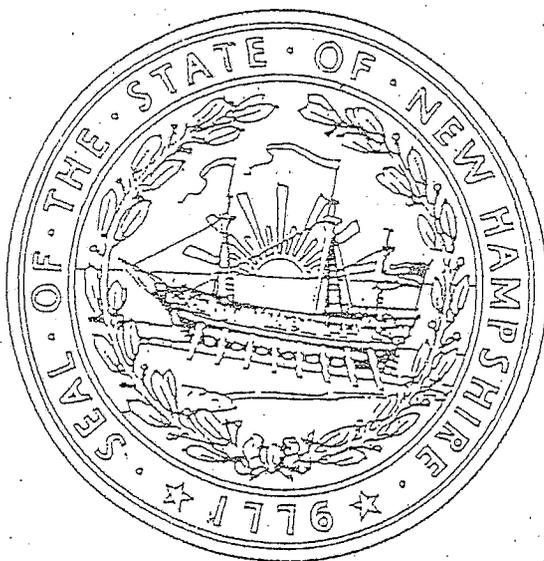
STATE OF NEW HAMPSHIRE

REPORT OF THE

ENERGY FACILITY SITING,  
LICENSING & OPERATION  
STUDY COMMITTEE

OF THE

NEW HAMPSHIRE GENERAL COURT



August 30, 1990

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STATE OF NEW HAMPSHIRE

Report of the

ENERGY FACILITY SITING,  
LICENSING, AND OPERATION  
STUDY COMMITTEE

of the

NEW HAMPSHIRE GENERAL COURT

Presented by

Senator Edward C. Dupont

Representative Beverly Rodeschin

Co-Chairmen

August 20, 1990

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STATE OF NEW HAMPSHIRE  
ENERGY FACILITY SITING,  
LICENSING, AND OPERATION  
STUDY COMMITTEE

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STATE OF NEW HAMPSHIRE  
ENERGY FACILITY SITING, LICENSING, AND OPERATION  
STUDY COMMITTEE

VOTING COMMITTEE MEMBERS

Senator Edward Dupont (Co-Chairman)  
Senator Wayne King  
Senator Mary Nelson  
Senator Eleanor Podles

Representative Beverly Rodeschin (Co-Chairman)  
Representative David Dow  
Representative Rick Trombley  
Representative Charles Vogler

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William Abbott, Land Conservation Investment Program  
Ralph Johnson, Public Service Company of NH  
Earl Legacy, Public Service Company of NH  
Elizabeth Blanchard, City of Concord  
Paul Cavicchi, Bridgewater Steam Corp.  
Paul Doscher, Society for the Protection of NH Forests  
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The committee particularly wishes to thank Lois Schmelzer for her long hours of effort in preparing the minutes of each meeting.

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## INTRODUCTION

The Energy Facility Siting, Licensing, and Operation Study Committee was created by vote of the New Hampshire General Court in its 1989 session. It was formed based on a recommendation offered by the State Electrical Energy Needs Planning Committee in its report dated November 30, 1988. The recommendation reads:

- 2b. The committee recommends that the New Hampshire General Court investigate the procedures for siting, licensing and operation of energy facilities for efficiency and fairness. The Committee further recommends that the N.H. General Court investigate the procedures of public involvement to insure that neither state nor local practices unduly hinder the process.

The study committee focused its attention on integrating the state's two siting laws, Revised Statutes Annotated 162-F and RSA 162-H into a single statute. The revision creates one committee, the Site Evaluation Committee (SEC) from the two existent under the present laws.

The study committee made numerous modifications to the processes defined in the present laws to enhance the public's opportunity for input and to speed the selection process. These include increasing the jurisdiction of the SEC, decreasing the time frame, removing restrictions on direct questioning by the public in informational hearings and many others as detailed in this report.

The study committee also offers nine recommendations to insure that the process is fair and relatively swift.

The committee believes that implementation of these recommendations will assist the State in meeting its long-term energy needs as spelled out in the report of the State Electrical Energy Needs Committee.

REPORT OF THE SITING, LICENSING AND OPERATIONS  
STUDY COMMITTEE

As a result of continuing concern about the ability of the State of New Hampshire to meet its growing energy needs while maintaining environmental quality, the New Hampshire General Court passed Chapter 239, Laws of 1989, creating the Energy Facility Siting, Licensing and Operations Study Committee. The law was based on Recommendation 2b of the State Electrical Energy Needs Planning Committee Report, dated November 30, 1988. The recommendation reads:

- 2b. The committee recommends that the New Hampshire General Court investigate the procedures for siting, licensing and operation of energy facilities for efficiency and fairness. The Committee further recommends that the N.H. General Court investigate the procedures of public involvement to insure that neither state nor local practices unduly hinder the process.

In testimony in support of House Bill 608, which became Chapter 239, it was noted that, despite significant progress in energy efficiency improvements, demands for energy production, handling and distribution systems would grow. Electrical generating plants typically have a minimum lead time of ten years and projections point to a need for new capacity within the New England region within five years. It is obvious that time frames which can be cut, must be cut.

It is also obvious that new facilities are difficult to site and license. The emergence of the so called NIMBY (Not In My BackYard) phenomenon, which is characterized by a generalized lack of willingness of communities or individuals to host facilities which may be required to meet greater social needs, demands that public input be unfettered by procedural rules. New and increasingly strict environmental laws also have the effect of lengthening the time periods necessary to site plants. Furthermore, appeals have sometimes prevented constructed and needed facilities from operating.

Chapter 239 described the composition of the committee and by whom the members were to be appointed. The membership was designed to bring together representation of each of the major sectors with a stake in the siting of energy producing

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facilities. Heading the list were representatives of the General Court consisting of four members of House of Representatives, appointed by the Speaker, and four members of the Senate, appointed by the President.

Because this was a Legislative Committee, technically only the legislators on the committee were empowered to vote. All other members were ex-officio. The Co-chairmen, at the start, recognized the need to gather as much input as possible while avoiding the inhibition imposed by the voting rules. The committee therefore was run as an open forum utilizing a strategy of consensus building.

The others on the committee included several from government. They came from the Public Utilities Commission, the consumer advocate, the Governor's Energy Office and the Department of Environmental Services and were designated by statute. Also included was a representative from municipal government, who was appointed by the Governor and his Executive Council.

From the private sector came two representatives of electrical utilities and one from a natural gas company. Two members represented the alternative energy sector and one each represented the general business and the financial communities. All were also appointed by the Governor and Council.

The study committee focused its attention on integrating the state's two siting laws, Revised Statutes Annotated 162-F and RSA 162-H into a single statute. The revision creates one committee, the Site Evaluation Committee (SEC) from the two existent under the present laws.

The study committee made numerous modifications to the processes defined in the present laws to enhance the public's opportunity for input and to speed the selection process. These include increasing the jurisdiction of the SEC, decreasing the time frame, removing restrictions on direct questioning by the public in informational hearings and many others as detailed in this report.

The study committee also offers nine recommendations to insure that the process is fair and relatively swift.

The committee believes that implementation of these recommendations will assist the State in meeting its long-term energy needs as spelled out in the report of the State Electrical Energy Needs Committee.

## DELIBERATIONS

The committee held its first meeting on September 11, 1989 shortly after the effective date of the enabling legislation. As its first order of business, the committee nominated and elected as Co-chairmen Senator Edward C. Dupont, District 6 and Majority Leader; and Representative Beverly T. Rodeschin, Sullivan District 2 and Chairman of the House Science Technology and Energy Committee. The committee elected Jonathan Osgood, director of the Governor's Energy Office, as clerk. That first session established guidelines for the committee and a schedule of monthly meetings and permitted members to outline their concerns and expectations.

At the second meeting, the committee reviewed the State's siting laws, RSA 162-F and 162-H. The former was written to provide a mechanism through which electrical generating plants above 50 megawatts (mw) could be judged by a single entity in state government. RSA 162-H provided a similar forum concerned with energy facilities including refineries and pipelines.

The committee immediately questioned the need for separate siting boards when the composition and duties of each was essentially the same. The committee appointed a subcommittee to examine the possibility of integrating the two boards. The subcommittee found no particular rationale for maintaining separate boards.

Over the next several months, the subcommittee discussed modifications to combine the boards. Changes were put in writing by Commissioner Bruce Ellsworth and the staff of the Public Utilities Commission (PUC).

The final major effort was to fully combine the individual passages of the new law so that it did not repeat requirements and was specific in its application to each type of facility. The resulting document was presented to the members at the May meeting of the full committee and became the document upon which all further modifications were made.

During the course of its deliberations, the committee learned that New Hampshire's siting laws were already among the most effective and least intrusive in the nation. In fact, the National Governors' Association Transmission Task Force had recognized the State's siting process as an example to other states of how siting should be conducted. Never-the-less, the committee noted specific flaws, ambiguities and omissions which could be clarified.

Informal testimony was taken from members of the committee. In the course of discussion several recommendations were made. Included was the suggestion that the other two Public Utility Commissioners added to the Site Evaluation Committee (SEC). (THE SUGGESTION WAS ENDORSED AND IMPLEMENTED.)

The need for greater public involvement in the process of siting facilities featured highly in many of the deliberations of the committee and the subcommittee. The two existing statutes require that public notices be placed in a newspaper having circulation in the counties which would host public meetings. (IN THE REVISIONS, THE COMMITTEE INCORPORATED REQUIREMENTS THAT MUNICIPALITIES BE NOTIFIED THROUGH THEIR TOP ELECTED OFFICIAL AND ADDITIONAL NEWSPAPERS BE USED FOR PUBLIC NOTICE.)

It was noted that the present statutes specifically preclude direct questioning of the applicants by the public at the informational hearings which initiate the existing siting committees' hearings procedure. Concern was expressed that the public could feel alienated from the process as a consequence. (THE COMMITTEE ELIMINATED THIS EXCLUSION IN ITS REDRAFT OF THE SITING PROCEDURE.)

The committee noted that there was some uncertainty of which facilities were covered by siting laws. In the case of bulk power plants, there is no description of how facilities which generate more than 30mw but less than 50mw should be evaluated. The Limited Electrical Energy Producers Act (RSA 362-A) was amended in 1989 to cover plants up to 30mw, but a gap remained. (AFTER CONSIDERABLE DISCUSSION, THE COMMITTEE RECOMMENDS LOWERING THE THRESHOLD OF SUBMISSION TO THE SEC TO 30MW TO REMOVE THE AMBIGUITY. MANY FELT THAT THIS WOULD ALLOW THE GREATER GOOD TO BE EXPRESSED BY ALLOWING CONSIDERATION OF A PROJECT, AS A WHOLE, AT THE STATE LEVEL.)

The committee recognized that any arbitrary number may, as an inadvertent consequence encourage the development of facilities sized just under the threshold to avoid the siting process. (TO PREVENT THIS AND TO ALLOW FACILITIES OF SMALLER SIZE TO BE EVALUATED AS PART OF THE STATE-WIDE ENERGY SUPPLY PICTURE, THE COMMITTEE, AFTER LONG AND ANIMATED DEBATE STRETCHING OVER THREE MEETINGS, CHOSE TO INCLUDE LANGUAGE ALLOWING THE PUC OR THE SEC TO EVALUATE OTHER PROPOSED PROJECTS.)

Inexact language was also contained in 162-H. For example, the preamble mentions that it covers "ancillary facilities" including storage tanks, but gives no guidance as to what size tanks are covered. (THE COMMITTEE DEFINED THE SIZE OF GAS STORAGE FACILITIES TO RECEIVE SCRUTINY TO THE AMOUNT OF GAS NEEDED TO OPERATE A GENERATION PLANT AT 30 MW FOR A SEVEN DAY PERIOD.)

There was general agreement that the 14 month time frame for approval of energy facilities was unnecessarily long and might preclude the construction of needed plants. (THE COMMITTEE SEPARATED THE PROCESS OF RECEIPT OF THE APPLICATION AND ITS ACCEPTANCE AND REDUCED THE TIME FRAMES TO A TOTAL OF 11 MONTHS FOR ENERGY FACILITIES AND 12 MONTHS FOR BULK POWER GENERATORS. THAT TIME IS BROKEN DOWN INTO A 2 MONTH TIME PERIOD DURING WHICH THE COMMITTEE CONSIDERS WHETHER TO ACCEPT OR REJECT THE APPLICATION AND 9 MONTHS TO EVALUATE THE PROPOSALS. A FURTHER MONTH IS RESERVED FOR THE PUC TO CONSIDER THE RECOMMENDATIONS OF THE SEC WHEN A BULK POWER GENERATOR IS INVOLVED.)

Timing is a critical concern to plant construction and the existing legislation failed to provide easily accessible time frame information. (THE REVISION CONTAINS A SEPARATE SECTION 162-H:6 WHICH SPELLS OUT ALL OF THE TIME LIMITS.)

Some question existed as to the responsibility of state agencies not represented on the Site Evaluation Committee to meet time frames and to provide feedback. (THE COMMITTEE ADDED A PROVISION REQUIRING THOSE AGENCIES TO REPORT PROGRESS WITHIN 5 MONTHS OF THE ACCEPTANCE OF THE APPLICATION AND TO RENDER A FINAL DECISION WITHIN 8 MONTHS.)

Considerable discussion involved the need to educate the public of the necessity of siting certain facilities. It was observed in a recent case, that the public thought the process was concluding with the initiation of the public sessions when, in fact, it was commencing. (THE COMMITTEE REMOVED THE LIMITATION THAT ONLY ONE INFORMATIONAL HEARING TAKE PLACE IN EACH AFFECTED COUNTY AND DIRECTED THE APPLICANT TO HOLD ADDITIONAL INFORMATIONAL HEARINGS UPON THE REQUEST OF A COMMUNITY OR THE COMMITTEE.)

The committee discussed at length whether or not it would be possible to provide the siting committee with the power, or ability, to negotiate a resolution of conditions which caused an agency not represented on the SEC to reject an application. It was felt that the opportunity for such discussion already existed among agencies represented on the SEC. (LANGUAGE WAS ADDED PERMITTING THE SEC TO RECOMMEND SPECIFIC PERMIT CONDITIONS WHICH IT FELT WOULD MEET THAT AGENCY'S CONCERN.)

The committee recommended the inclusion of the Director of the Governor's Energy Office on the SEC to advise on the overall energy requirements of the state and to promote energy conservation alternatives. (THE COMMITTEE DID SO.)

It was suggested that members of the SEC be allowed to designate alternates. (THE COMMITTEE CONCLUDED THAT SITING ENERGY FACILITIES AND POWER PLANTS WAS SO SIGNIFICANT TO THE OVERALL ECONOMIC AND ENVIRONMENTAL CONDITION OF THE STATE, THAT IT REQUIRED THE ACTIVE PARTICIPATION OF THE AGENCY HEADS, THEMSELVES.)

The committee noted that under the bulk power facility siting requirements, an applicant need not prove financial, technical and managerial ability. When the 162-F was written, the only builders of electrical plants were established utilities with a proven record. The emergence of the small power production market has made that assumption invalid. (THE COMMITTEE INCORPORATED LANGUAGE CONTAINING SUCH REQUIREMENT INTO THE INTEGRATED STATUTE.)

In discussion of the time frames, it was understood that the physical requirements for certain environmental studies take longer than the committee is allowed. (LANGUAGE SPECIFICALLY ALLOWING THE SITE EVALUATION COMMITTEE TO MAKE PERMITS CONDITIONAL UPON THE RESULTS OF FEDERAL AGENCY STUDIES WAS ADDED.)

Further testimony was taken from specific individuals who either expressed an interest in sharing ideas with the committee or who were invited to contribute. Assistant Attorney General Charles B. Holtman, who has served as Counsel to the Public under RSA 162-H on the two most recent occasions it has deliberated was asked to consider the progress of the committee and to offer recommendations. Mr. Holtman's comments were carefully prepared and delivered. First, he met with the subcommittee to comment on the work done to that time and to discuss the needs of the subcommittee. He assisted the committee by documenting his experience as counsel and making suggestions as to how the process might be improved. The following is a summary of his recommendations made by letter submitted in February of 1990.

Under present statute, an application to the committee is not considered received until the committee meets and deems it complete. It is at this time that the public counsel is appointed. His recommendation was to remove the reference to the point during the evaluation process when the public counsel is appointed. This would facilitate an earlier appointment, allowing the counsel to develop a strategy and a position on a proposal. The counsel could take necessary and appropriate actions in a more timely fashion and represent the public in a capacity now not possible. (THE COMMITTEE CONCURS AND REMOVED REFERENCE TO WHEN THE PUBLIC COUNSEL SHOULD BE APPOINTED.) He recommended mandating that the applicant reimburse the public counsel for the expense of consultants, investigations and other related costs of public representation. This would insure that the application received a full study without forcing the public counsel, and therefore the state's general fund, to pay for work needed by the counsel. (THE COMMITTEE FELT THAT THE EXISTING PROCESS UNDER WHICH THE EXISTING SITING COMMITTEES DIRECTED THE APPLICANT TO PAY FOR STUDIES CONSIDERED TO BE JUSTIFIED WAS ADEQUATE AND WOULD PRECLUDE ANY UNWARRANTED INVESTIGATIONS.)

Mr. Holtman expressed support for a committee proposal to allow direct questioning from the public at public hearings. It not only would allow for more public participation, but also allow the public counsel to gauge public opinion. (THE COMMITTEE HAS REMOVED THE STIPULATION THAT ONLY THE SEC QUESTION THE APPLICANT AT THE INFORMATIONAL HEARINGS.)

He recommended simplifying the procedures by which a member of the public or a town government is allowed to speak at hearings. The preferred procedure is simply to allow any member of the public, or any town, to file a motion "to intervene" at the hearing and let it be ruled on by the Chairman of the committee. In other words, empower the Chair to recognize speakers during the hearing to submit what they will, either written or oral in nature. (THE COMMITTEE FELT THAT NOTHING CONTAINED IN THE LEGISLATION INHIBITED THE PUBLIC'S ABILITY TO PROVIDE INPUT.) Because of the nature of adversarial proceedings, the requirement to pre-file testimony is restrictive and antiquated. It subtracts from the natural "discovery process" that occurs and hampers the hearing. This provision should be removed for the adversarial proceedings, though it may be maintained for the informational ones. (THE COMMITTEE FELT THAT THE EXISTING PROCESS PROVIDED THE MOST EFFECTIVE MECHANISM TO INSURE ACCURATE INPUT TO THE ADVERSARIAL HEARINGS.)

Mr. Holtman makes the recommendation that certain studies, such as wildlife, archaeological, and air emission modeling, should be submitted before the application is deemed complete. This procedure would help to avoid problems incurred when a statutory deadline is shorter than the time required to conduct the studies. This could jeopardize the project in that it could force the public counsel to take a position demanding the studies be completed before the review process was initiated, hence lengthening the process. (THE COMMITTEE NOTED THAT THE NEED FOR SOME STUDIES WILL ONLY BE IDENTIFIED BY THE HEARINGS AND THAT THERE IS NOTHING IN THE LEGISLATION WHICH SUGGESTS THAT AN APPLICANT COULD NOT INITIATE THE STUDIES DEFINITELY REQUIRED PRIOR TO FILING AN APPLICATION WITH THE SEC.)

To shorten the overall time frame for review, Attorney Holtman made the following suggestions: (1) Retain the existing time limit, measured from the point of application completeness (14 months for the SEC and 16 months for the PUC), as the outside limit for project review. (2) Require that final decisions be made within a certain time from the close of adversarial hearings, for example, one month for subsidiary agencies and three months for the committee. (3) Direct the committee chairman, following a conference with the parties, to establish a schedule for the hearing process--which allows for a great measure of flexibility and shorter periods of review. (THE COMMITTEE SAW THE WISDOM OF SHORTENING THE TIME FRAME OF THE DELIBERATION WHEN SPECIFYING THE DISTINCTION BETWEEN RECEIPT AND ACCEPTANCE OF THE APPLICATION AS NOTED BELOW.)

He urged amending the statute to insure a clear distinction between the actual "receipt of an application" and the committee's determination that an application is complete, ensuring that the latter point serves as the trigger date for the initiation of proceedings. (THE COMMITTEE AGREED WITH THIS POINT AND LIMITED THE TIME BETWEEN RECEIPT OF THE APPLICATION AND ITS ACCEPTANCE TO 60 DAYS, WITH THE PROVISION THAT AN APPLICATION IS NOT DEEMED RECEIVED UNTIL IT CONTAINS ALL REQUIRED INFORMATION.)

Attorney Holtman noted that current provisions mandate that agencies with jurisdiction need only notify the applicant if the application is not complete and suggested changing it to require all said agencies to reply in writing within one month of receiving the application. (THE COMMITTEE DETERMINED THAT THERE WAS NO COMPELLING REASON TO IMPOSE THIS ADDITIONAL REQUIREMENT ON AGENCIES.)

Mr. Holtman recommended providing general authority for the chairman to toll the running of the statutory time frame, on his own motion or at the request of the party, if it is determined that additional information is needed. (NEW SECTION 162-H:16 SPELLS OUT THE SEC'S ABILITY TO TEMPORARILY SUSPEND ITS DELIBERATIONS.)

He opposed the proposed four-month time limit for an agency decision inadvertently written in an early draft. The limit could have serious adverse effects on basic timing requirements already in effect. (THE COMMITTEE CORRECTED THE ERROR BY REQUIRING A PROGRESS REPORT FROM AGENCIES WITHIN 5 MONTHS AND A FINAL DECISION WITHIN 8 MONTHS.)

He suggested that applications include written documentation from each affected town, signed by the town's designated contact, that it has been notified of the proposal and of the state review process. (THE COMMITTEE CHOSE TO REQUIRE THE APPLICANT TO DOCUMENT THAT THE CHIEF ELECTED OFFICIAL IN EACH COMMUNITY HAD BEEN NOTIFIED IN WRITING.)

He recommended that appropriate bodies of a affected communities be automatically placed on the service list, insuring that they are actually notified and not reliant on published notice during the course of the proceedings. (Provision of intervention as of right.) (THE COMMITTEE FELT THAT COMMUNITIES SHOULD REQUEST TO BE ON THE SERVICE LIST.)

Mr. Holtman recommended allowing the towns to conduct their own review processes because this would permit a more local response to routing decisions. (THE COMMITTEE FELT THAT IT WAS UNREASONABLE TO EXPECT COMMUNITIES TO REVIEW FACILITIES IN SEPARATE PROCESSES WHEN THE DECISION OF THE SEC IS DEFINED TO BE

THE FINAL AUTHORITY. IT WAS FELT THAT THE ONE STOP SITING CONCEPT THAT IS THE BASIS OF NH'S SITING STATUTES WOULD BE SEVERELY UNDERMINED AND THE ABILITY OF THE SEC TO EVALUATE THE OVERALL SOCIAL IMPACTS OF FACILITIES WOULD BE COMPROMISED.)

Mr. Holtman noted that the relationship between the "Declaration of Purpose" and the "Findings" sections are unclear. He believed specific findings are required in addition to, and not in lieu of, the concepts enunciated in the "Declarations of Purpose". Therefore, he recommended explicitly tying the "Findings" to the "Declaration of Purpose". (THE COMMITTEE, IN INTEGRATING THE TWO STATUTES AND COMBINING THE FINDINGS REQUIREMENTS IN EACH, REMOVED THE AMBIGUITY.)

He suggested that in order to raise awareness of energy conservation needs, declarations of purpose and perhaps the findings sections should state that conservation possibilities are to be considered in weighing the need for proposed facilities. (THE COMMITTEE INCLUDED SPECIFIC REFERENCE TO RSA 378:37 WHICH DEFINES LEAST COST ENERGY PLANNING AS STATE POLICY. FURTHERMORE THE COMMITTEE MADE THE DIRECTOR OF THE GOVERNOR'S ENERGY OFFICE A MEMBER OF THE SEC.)

Attorney John Dabuliewicz, who had been General Counsel to the Energy Facility Evaluation Committee in the Champlain Pipeline proceedings agreed to address the committee. His suggestions are summarized as follows along with the committee's response:

He recommended that a specific preapplication process should be developed and public counsel should be available to participate in preapplication process. (AS NOTE EARLIER, THIS PROVISION WAS ACCEPTED BY THE COMMITTEE AND INCORPORATED IN THE REDRAFT.)

He said the use of each agency's forms should be specified as comprising the Site Evaluation Committee application, and provision for each agency to collect its own fees should be specified. (SPECIFIC LANGUAGE WAS ADDED TO INCORPORATE THIS RECOMMENDATION.)

Attorney Dabuliewicz commented that the committee should have one name. (THE COMMITTEE WILL BE KNOWN AS THE SITE EVALUATION COMMITTEE.)

The ability of the site evaluation committee to suspend proceedings should be clarified, he asserted. (THE COMMITTEE CONCURRED ADDING LANGUAGE IN SECTION 162-H:16 WHICH ALLOWS SUSPENSION OF DELIBERATIONS IF IT IS IN THE PUBLIC INTEREST.)

He felt that the requirement that 5 year plans be filed by utilities should be clarified to exclude small power producers. (THOSE WHO DEAL WITH THESE PLANS FEEL THAT THERE IS ADEQUATE UNDERSTANDING OF THE SYSTEM NOW.)

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He noted that time frames must contain provisions for delays caused by federal agencies and the applicant itself. (THE COMMITTEE ADDED LANGUAGE IN SECTION 162-H:18,VII STATING THAT THE CERTIFICATE MAY BE CONDITIONED UPON THE RESULTS OF REQUIRED FEDERAL AGENCY STUDIES WHOSE STUDY PERIOD EXCEEDS THAT OF THE APPLICATION PERIOD.)

Mr. Dabuliewicz noted that executive order agency personnel typically are not be included in legislation. (AS NOTED ABOVE, THE COMMITTEE CHOSE TO INCLUDE THE DIRECTOR, GOVERNOR'S ENERGY OFFICE, TO REPRESENT THE CONSERVATION ALTERNATIVES. THE SIGNIFICANCE OF THAT NEED OUTWEIGHS OTHER CONCERNS.)

Finally he recommended that the entire revision should be redrafted to more closely integrate the two existing statutes. (THE RECOMMENDED BILL WAS REDRAFTED TO DO SO.)

HB-736

PREPARED NOTES OF

MICHAEL D. CANNATA, JR., P.E.

CHIEF ENGINEER

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

APRIL 30, 1991

I thank you for the opportunity this morning to convey the Commission's thoughts on HB-736. My name is Michael D. Cannata, Jr. and I am the Chief Engineer at the New Hampshire Public Utilities Commission. I have also prepared some notes for your consideration in this matter.

The New Hampshire Public Utilities Commission and I are convinced that this bill would significantly advance the concept of one stop siting pioneered by the New Hampshire Legislature almost twenty years ago. The Energy Facility Siting, Licensing and Operation Study Committee chaired by Senator Dupont and Representative Rodeschin focused on improvement of that process. Their efforts resulted in the bill that is before you today. The major improvements in the legislation are as follows.

RSA-162-F and RSA-162-H are considered companion legislation in that they address related facilities in a similar fashion. The bill here today incorporates the provisions of both statutes into one. In so doing, the confusion that resulted between the subtle differences in treatment of Energy Facilities and Bulk Power Supply Facilities is eliminated.

The types of facilities over which the Site Evaluation Committee has jurisdiction is clarified. This is accomplished by specifically including major natural gas pipelines and the reduction of generation capability from 50 megawatts to 30 megawatts. The proposed bill allows for a smooth transition of generation classification between RSA-362-A which classifies small power producers as plants up to 30 megawatts and bulk power plants.

The new bill also provides an opportunity for the Site Evaluation Committee to invoke jurisdiction regarding smaller facilities. This capability currently exists relative to high voltage power lines. Clearly, the state's experts should be given an opportunity to address matters whether they are transmission or generation siting related, regardless of size.

The opportunity for local Government and the public to provide input to the process is enhanced. Currently, a public hearing in the county in which the facility is to be constructed must take place. The Bill as proposed would require specific notification of all town governments, would require public hearings upon request in any town that will host the facility and it eliminates the prohibition of the public asking questions at public informational hearings.

The Director of the Governor's Energy Office is added to the Site Evaluation Committee. That office is keenly astute in state energy matters and as such will augment the Site Evaluation Committee's decision process.

The process is made more responsive to the applicant as the Site Evaluation Committee is required to either accept or reject an application in 60 days, reduces the time to set a public hearing from 60 days, to 30 days and requires action by the Site Evaluation Committee within a 9 month period and by the Public Utilities Commission, if required, within 10 months. Currently, these times are 14 months and 16 months respectfully.

The bill clarifies the involvement of the Attorney General's office by requirement of notification upon receipt of an application for a proposed facility.

I again thank you for the opportunity to discuss this matter with you and am available to answer your questions or to provide further information if needed.



## State of New Hampshire

House of Representatives

State House, Concord

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### COMMENTS ON ENERGY FACILITIES SITING BILL (HB-736)

I would like to express a few specific concerns regarding House Bill 736:

#### 1. LOCAL CONTROL (NEW RSA 162-H:16, II)

The language in this section seems to preempt local zoning and planning. It states that "A majority vote of the site evaluation committee shall be conclusive on all questions of siting, land use, air and water quality." When this sentence is read in conjunction with the statement of purpose, it implies that the state siting process overrides local zoning ordinances and the local Master Plan. I suggest you add language which clearly states that it is not the intent of this law to preempt local control.

#### 2. DECOMMISSIONING (EXISTING RSA 162-F:1, II)

This bill would repeal existing RSA 162-F:1-13. Included in those sections is a statement of purpose regarding the establishment of the decommissioning fund for the Seabrook Nuclear Power Plant (existing 162-F:1, II). Now that Seabrook is operating and the ratepayers are being charged for this expense, we should not repeal its statement of purpose which reads in part, "...the costs are substantial, and because these costs are the direct and predictable result of operating such a facility, and should not have to be borne by the state, it is found to be in the public interest to require that adequate fiscal responsibility be established to ensure proper and safe decommissioning..." The fund itself has not been repealed (existing RSA 162-F:14-26) so its statement of purpose should not be repealed either. I suggest this section be added back into the pending legislation.

#### 3. LEAST COST ENERGY POLICY (EXISTING RSA 378:37)

Although our state's least cost energy policy is mentioned in the legislation, I believe the siting process should be premised on that policy. I suggest the legislation be amended to include a reference to the least cost energy policy (EXISTING RSA 378:37) in the statement of purpose so it is made clear immediately to everyone intending to site a facility.

4.a. TIMING (NEW RSA 162-H:6, I & II)

The word "expeditiously" should be substituted for the word "immediately" in these sections. I understand the concern that applications be reviewed in a timely manner, but immediately implies that agency personnel should drop all other projects in order to review an application.

4.b. TIMING (NEW RSA 162-H:6, VI & VII)

State agencies must submit a final decision on their portion of the application no later than 8 months after it has been accepted as complete. The committee then has 1 month to issue or deny the certificate. One month is not very much time for Commissioners who have many responsibilities to make a decision on complex, detailed, technical, and lengthy applications. This does not leave much time if a member of the committee has questions or requests additional information.

4.c. TIMING (NEW RSA 162-H:7, III & IV)

Again, immediate notification of an application's deficiencies is unrealistic. At the end of section IV the word "seasonably" appears. I assume this is a typographical error.

5. MODIFICATIONS (NEW RSA 162-H:7, I)

The language in this section seems to allow modifications at any point in the review process, with no requirement for additional public hearings. The previous language, in the REPEALED RSA 162-H:6, III states the modification must be "before or during the period of hearings" and it allows the agencies additional time to "allow reasonable inquiry into such modification." I suggest adding the repealed language back into the pending legislation.

6. COUNSEL FOR THE PUBLIC (NEW RSA 162-H:9, I)

This section allows the public counsel to serve until the certificate is issued or denied. It is unclear whether the public counsel can then serve during any appeals since the language in the repealed section (RSA 162-H:11) does not place such a time limit on public counsel. I suggest the time limits in the pending legislation be removed, or the language clearly state that the public counsel can serve through the appeals process.

In conclusion, I hope you will not pass this bill until these and other concerns have been addressed. I would suggest putting it off for further action until next session. New Hampshire and New England are in an excess capacity situation so there is no immediate need to streamline the permitting process. Also, please be aware that the state already has one of the most streamlined application processes in the country. If there have been complaints about delay, it is mostly at the federal level, not because of any state procedure.

Thank you.

Date: April 23, 2009  
 Time: 10:00 a.m.  
 Room: LOB 102

The Senate Committee on Energy, Environment and Economic Development held a hearing on the following:

HB 55 (New Title) relative to energy facility siting construction and operation.

Members of Committee present:

- Senator Fuller Clark
- Senator Merrill
- Senator Cilley
- Senator Lasky
- Senator Carson

The Chair, Senator Martha Fuller Clark, opened the hearing on HB 55 and invited the prime sponsor, Representative Naida Kaen, to introduce the legislation.

Representative Naida Kaen: Thank you, Madam Chairman.

Senator Martha Fuller Clark, D. 24: Thank you.

Representative Kaen: My name is Naida Kaen. I represent Strafford District 7. To begin, the bill was one line when I introduced it. It read, it changed the word kilowatts to kilovolts. It was intended to fix a mistake that was made in a floor amendment last session. And, then, my file became very thick because the PUC to help them revise the law so as to facilitate their process. And, in the interest of giving you the very best information, I would ask you to ask all questions of Commissioner Below instead of me.

Senator Martha Fuller Clark, D. 24: Thank you. And, I don't have a sign up sheet. Commissioner Below, you're on, again.

Commissioner Clifton Below: And, may I ask if Assistant Commissioner Mike Walls might join me from the Department of Environmental Services because we actually worked quite a bit on this together.

JFB

Senator Martha Fuller Clark, D. 24: And, were there any areas of major controversy that you want to draw our attention to?

Commissioner Below: Well, there were a few areas of controversy that were left out, so they are no longer controversial for you.

Senator Martha Fuller Clark, D. 24: Okay.

Commissioner Below: So, that helps. You know, the biggest thing that starts off is getting rid of the distinction of bulk power facilities. You know, having one statement of purpose that sort of integrates the two statements of purposes. So, you see that... Let me just take a couple of minutes, if I may, to run, highlight it.

On page two, you see at line six through seventeen, the deletion of the bulk power supply facility. Further down and you see deletion of commission because the PUC no longer has any distinct role under this statute, it's just the Siting Committee. It functionally didn't have any anymore, but it was sort of more of an artifact that we still had this distinct element. Energy facility has been amended to draw in the power generation and transmission. There is a slight change to this current law to clarify that, on page three, line nine, that an electric transmission line of design rating in excess of two hundred kilovolts would be automatically subject to the Site Evaluation Committee review, that's a fairly large transmission line. I am sorry I must be referring to the compare document. And, previously the laws covered one hundred kilovolt transmission lines over a route not already occupied by transmission lines. And, but it allowed the committee discretion to look at smaller transmission lines. So, this really doesn't change the authority of the Siting Committee, it just makes it clear that these large transmission lines would still get reviewed.

So, there is just a lot of little technical corrections like on page three at line twenty-five, instead of referring to board of selectmen, it is the governing bodies of communities. On page four, this is somewhat significant, at line six, there is one person who is added to the Site Evaluation Committee, which is the Commissioner of the Department of Culture Resources or the Director of Division of Historical Resources designee. In general the concept behind the Site Evaluation Committee was that all of the agencies that might individually have some review, sort of have a combined effort and do a joint review. And, there is still permits that DES has to issue, like wetlands permits that they still do, but they become part of the overall site evaluation process, so that they have to not just in parallel, but they kind of all end up integrated by the Site Evaluation Committee.

JB

Under federal law, I believe...

Senator Martha Fuller Clark, D. 24: Section 106?

Commissioner Below: Might be. You know more than me. On cultural, Historical Resources gets involved in reviewing many of these projects to ensure that cultural resources, you know, to be reviewed for the impact of archeological sites or historic resources. So, it made sense to also bring in on board like the other agencies.

One thing that has evolved, it shows up sort of at the bottom of page four, is that previously we, somebody could file an application and then file testimony later on, that's, maybe that's not exactly where it shows up. But, we've integrated that so that when somebody files an application, they also pre-file their initial testimony, so it sort of speeds up the process and clarifies the process for having public informational hearings in each county where the facility is proposed.

There is a, on page five at line twenty-three, it allows the chair, who is normally the Commissioner of DES, to designate the Assistant Commissioner of DES, to assume their responsibilities as a subcommittee for purposes of this paragraph. You might recall that a year or two ago legislation was passed to try to expedite siting review of renewable energy facilities. And, in the process of doing that, the Legislature allowed for the possibility of subcommittees. The Site Evaluation Committee I think has, is normally 14 people, allowed a subcommittee half of, at least half of that, seven, to go through these renewable projects. This bill would allow subcommittees for any project, not just renewable projects. And, it did call for either the Chair or the Vice Chair, meaning either the Commissioner of DES or the Chair of the PUC, to be the chair of any given subcommittee. This allows Commissioner Burack to appoint Assistant Commissioner Walls to function as a chair, potentially, on a subcommittee.

Assistant Commissioner Walls: It's punitive in nature.

Commissioner Below: He didn't speak up enough. And, it also makes the subcommittees function as the committee.

Senator Martha Fuller Clark, D. 24: Committee

Commissioner Below: So, when you have seven or eight people on the subcommittee, they do the whole process. There is ambiguity that may be at the end of their process, they kick it back up to the full committee for the final.

JB

Senator Martha Fuller Clark, D. 24: And, have to start over.

Commissioner Below: Final order and how could you do that if you didn't participate in all the hearings on the case and read all of the filings? It just didn't make sense.

So, a lot of what comes on the next page is just sort of a rearrangement of things. There is a lot of strikeout, but as Joel has noted, some things have simply been moved around or there are strikeouts because there was separate reference to bulk power facilities compared to energy facilities.

Mike, if you see anything, speak up.

Assistant Commissioner Walls: That's the gist of it.

Commissioner Below: There is a bit of clarification on the timeframes, but I don't think it changes anything, maybe just simply a reinsertion on pages eight and nine of something that was elsewhere. That is sort of the long and short of it.

The, on page 11, I think this was always the intent, at the bottom at line thirty-six, there is just a clarification that any certificate issued by the Site Evaluation Committee shall be based on the record. The decision to issue a certificate in its final form or to deny an application once it has been accepted shall be made by a majority of the full membership. And, there is a clarification, that could mean full membership of the subcommittee. A certificate shall be conclusive when all questions of siting, land use, air and water quality. And, that is actually already in the statute. Line thirty-four you see a strike out, it's just sort of reorganized. But, it just makes the whole process clearer. And, when you get out on page twelve and thirteen, a lot of that is just the strikeout of the separate bulk power facility plans.

I think it is important to note that the utilities still, like PSNH, as part of their integrated resource planning process, still do regularly present to us their planning framework for where they may be possibly considering new generation. Although they are proscribed in law from building a completely new generation, you know, they're still, they may be looking at modifying a plan or things like that. That's part of the integrated resource plan, as well as their transmission planning and stuff like that.

It is important to note that as a general rule, transmission planning is under federal jurisdiction and it occurs in a regional context through the regional transmission organization, ISO-New England which we actively participate in. But, that is, it's not really, it doesn't really make sense to have these bulk

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power facility plans filed at the commission level because we already get the information through other mechanisms and/or it is really part of a regional planning process that we participate in.

Senator Martha Fuller Clark, D. 24: Terrific. I think that was helpful for us. Additional questions from anyone on the Committee? Thank you both very much. I have one last speaker and that's Allen Brooks. Welcome, Allen.

Attorney Allen Brooks: Thank you very much. My name is Allen Brooks. I am Assistant Attorney General at the Department of Justice. And, my apologies up front, I was asked to testify by Assistant Attorney General Peter Roth, who could not be here. Peter serves as counsel for the public to the SEC. Under statute, someone from the Attorney General's Office. Peter, is appointed to represent essentially the public interest in that process. He did have a couple points for information only. We neither support nor oppose.

And, I believe that I talked a little bit with Assistant Commissioner Walls beforehand and if he is willing to, I bet that he can actually address some of the concerns that Peter raises in this, which is really for information.

Senator Martha Fuller Clark, D. 24: So, Mike would you like to come forward again?

Attorney Brooks: There is always room at the table for Michael. Thank you. The first question was simply in section three the definition of energy facility. Essentially, it looks like it excludes pipelines that are considered part of the local distribution network. There are also, in sections (b), (c), (d) and (e), it depends on the size of the transmission facility. The concern was that a lot of what we do, as counsel for the public, involves representing local communities; very small communities who might not have, either the financial resources to hire a counsel for this, they may not have local zoning. And, will making these threshold requirements mean that these local communities no longer have the representation that they usually get? That is basically put out there again as information and Mike can address that somewhat. But, we don't take a position on the policy matter; we just want to raise that and let everyone know that that is something that we do quite a bit during the SEC hearings and that is a concern that was raised.

Do you want me to go through all of them or do you want to do it point by point?

Assistant Commissioner Walls: Well, Madam Chairman, I am Mike Walls, the Assistant Commissioner at DES. And, Attorney Brooks and I did speak about this before the hearing. My view is that we tried to merge the

definitions of bulk power supply facility and energy facility and we have largely captured the same kinds of facilities, even the larger definition of energy facilities so that it covers pretty much the same thing. Now, in the process in the House, we, there were some technical corrections made to the definitions, and I actually couldn't really follow those and I don't think that we didn't intend to leave anything out that was covered before.

I think there are some small projects that Attorney Brooks is referring to that probably aren't, don't rise to the threshold of being covered by the SEC to begin with. If it's a local transmission line that's below a certain size, it wouldn't be a project that meets the threshold for SEC review anyway. So, I guess I don't really share the concern.

Senator Martha Fuller Clark, D. 24: Okay. Thank you. Any other comments that you wish to make in terms of the comments that came to us from the Attorney General's Office?

Attorney Brooks: Well, we just have two distinct comments from that, if I could go through those. The other concern was that, in section seven, there is an addition of the word federal, essentially saying that, if you have federal approval, you are at least a candidate for not having to go through SEC review if you meet other criteria. The concern was that the federal process, the FERC process, again, doesn't necessarily look at the local interests and is a process that is at least perceived to be more on paper and doesn't have the level of public hearings that we have. And so, there is a concern, that again, something will be missed. But, I believe that this is more specifically addressed by even the language and Mr. Walls.

Assistant Commissioner Walls: Right. And, the statute, as drafted now, and as proposed in this bill, would prevent redundancy in regulatory review. I mean, the concern expressed here really assumes an inadequacy in the part of the federal review, which we simply don't share that. If it's being reviewed by the Federal Energy Regulatory Commission for its regional purposes, and the SEC looks at it and decides that that is sufficient, I think in terms of the law, that is certainly legally sufficient review of any particular project.

Senator Martha Fuller Clark, D. 24: Are there questions for Assistant Commissioner Walls? Thank you very much. I have no one else signed up to speak. Is there anyone else who wishes to comment at this time? Seeing none, I'll close the hearing on House Bill 55.