November 12, 2015

Via Hand Delivery

Ms. Pamela Monroe, Administrator

New Hampshire Site Evaluation Committee

21 South Fruit Street, Suite 10

Concord, NH 03301

Re: SEC Docket No. 2014-04 (Rulemaking)– EDPR's Comments on JLCAR's objections to proposed SEC rules

Dear Ms. Monroe:

EDP Renewables ("EDPR") submits these comments regarding the objections of the Joint Legislative Committee on Administrative Rules ("JLCAR") to the New Hampshire Site Evaluation Committee's ("SEC's" or "Committee's") proposed rules. EDPR is an experienced developer of clean, renewable, wind energy, and the third largest wind energy developer, owner, and operator in the United States. We have 31 operating wind projects in the United States and are currently constructing three (3) projects and developing numerous new projects around the country, including here in New Hampshire.

As currently drafted, the proposed rules contain some of the most restrictive standards for wind development in the United States. If adopted, these rules will severely limit or prevent certain wind energy projects from being developed in New Hampshire. Such a result is inconsistent with New Hampshire's support for renewable energy technologies found in RSA 362-F and the energy policy articulated in RSA 378:37 which recognizes the need for diversity of energy sources. Adoption of these rules would signal to wind developers that New Hampshire is no longer open for business, and that the clean energy, jobs, tax revenues and other benefits of these projects should go elsewhere.

www.edpr.com

EDP Renewables North America LLC
Corporate Headquarters
808 Travis, Suite 700
Houston, TX 77002
T: 713 265 0350 F: 713 265 0365

Although EDPR applauds the state's efforts in ensuring that wind energy projects are thoroughly vetted and properly sited, we believe that the proposed rules go well beyond standards that are needed to protect the public. In particular, the 8 hour per year shadow flicker standard adopted by the Committee on its last day of deliberations is extremely troublesome. Throughout the rulemaking process and until the last day of its deliberations on the rules, the SEC had proposed a shadow flicker limit of 30 hours per year. This standard is reasonable and consistent with the shadow flicker standard used by other New Hampshire wind developers when developing earlier permitted projects in the State, standards in many other states including the recently enacted specific Connecticut shadow flicker standards, and a model ordinance for small wind energy systems released in 2008 by the New Hampshire Office of Energy and Planning. *See* Application of Antrim Wind, SEC Docket No. 2015-02, "Shadow Flicker Analysis" – Epsilon Associates (Dec. 22, 2014) at 3-1.

Given that there have been no complaints to the SEC about shadow flicker produced by the three wind projects certificated by the SEC, it is unclear why the Committee abruptly changed its position and adopted the 8 hour/year shadow flicker standard. The proposed standard will be difficult if not impossible for many wind projects to meet, which is consistent with the fact that the proponents of this last-minute change to the long-discussed rules are outright opponents of wind. This provision poses a barrier for wind developers wishing to enter the New Hampshire market that unreasonably precludes the construction of projects of environmental and economic value to the State. For all of the foregoing reasons, EDPR urges the Committee to revert to its earlier, more reasonable position on shadow flicker.

JLCAR's preliminary objection to the SEC's proposed rules was based, among other things, on written comments and testimony provided to JLCAR. *See* Letter from Committee Attorney Aaron J. Mitchell to Site Evaluation Committee (Oct. 16, 2015) at 1. Thus, although the SEC held a technical session to address the public interest and cumulative impacts issues, it is important that the SEC address **all** of JLCAR's objections- including the ones set forth in the attached letter submitted to JLCAR by EDPR's counsel. As the attached letter indicates, EDPR is concerned, among other things, about the proposed rules on:

- Shadow flicker (Site 301.14(f)(2)b.)
- Cumulative Impacts (Site 102.18 and 301.14(g))
- Photosimulations (Site 301.05(b)(7))
- Decommissioning (Site 301.08(a)(7))
- Criteria Relative to a Finding of Public Interest (Site 301.16)

www.edpr.com

EDP Renewables North America LLC
Corporate Headquarters
808 Travis, Suite 700
Houston, TX 77002
T: 713 265 0350 F: 713 265 0365

EDPR is also very concerned about the restrictive sound standards that are included in the draft rules as they are among the most restrictive standards in the country. Moreover, because there have been no noise complaints to the SEC about sound from the 3 existing New Hampshire wind projects that are operating under less restrictive standards, there is no good reason to impose more restrictive standards. EDPR urges the SEC to revisit the sound standards in the draft rules and include standards that are consistent with those that apply to existing New Hampshire wind projects. EDPR also respectfully asks that the SEC carefully review the attached letter and modify the draft rules to address the concerns expressed therein.

In addition, as the SEC is aware, JLCAR specifically objected to the public interest standard rule. Although the attached letter contains comments on the public interest rule, EDPR submits the following for the Committee's consideration as it addresses JLCAR's objection:

Site 301.16 should be revised to read as follows: Criteria Relative to Finding of Public Interest. *In determining whether a proposed energy facility will serve the public interest, the committee shall consider the project's overall public benefits such as economic and environmental benefits to the State of New Hampshire and the New England Region.*

The foregoing definition is consistent with the definition of public interest applied by the New Hampshire Public Utilities Commission ("PUC") and found reasonable by the New Hampshire Supreme Court. *See Appeal of Pinetree Power,* 152 N.H. 92. 96 (2005). It is also consistent with the legislative history on SB 245, the legislation which authorized this rulemaking. That history indicates that in questioning from Senator Bradley at a hearing on SB 245, Susan Geiger indicated that the public interest standard "is something that the PUC has reviewed in the past and so the standard is something...decision makers might be more familiar with." Thus, because the PUC's public interest standard was specifically referenced in the legislative history of SB 245, the PUC standard reflected in the *Pinetree Power* decision should replace the list of public interest considerations appearing in the draft rules.

In addition, the proposed formulation of the public interest standard must be abandoned because it is seriously flawed in many respects.

www.edpr.com

EDP Renewables North America LLC
Corporate Headquarters
808 Travis, Suite 700
Houston, TX 77002
T: 713 265 0350 F: 713 265 0365

- First, proposed subsections (a) and (b) improperly require a balancing of beneficial and "adverse effects". Under RSA 162-H:16, IV, the Committee is required to make findings under a standard of no **unreasonable** adverse effect. Thus, it is improper to introduce a new, lower standard in the rules.
- Second, subsection (c) is improper because the legislature repealed the requirement that the SEC find an application to be consistent with the state energy policy established in RSA 378:37. *See* N.H. Laws of 2009, Ch. 65:24, IX. (repealing RSA 162-H:16, IV (d)). The Committee may not circumvent the legislature's intent by including in its rules a requirement that the legislature has eliminated.
- Third, subsection (d) is improper because local land use regulations and ordinances are preempted by RSA 162-H. *See Town of Hampton,* 120 N.H. 68 (1980). Thus, by considering local regulations and ordinances under the public interest analysis, the SEC is providing municipalities with back door veto power even though the New Hampshire Supreme Court has held they have no authority over energy facility siting.
- Lastly, subsection (e) improperly requires a balancing of "impacts" and "benefits" (relative to aesthetics, historic sites, natural resources and public health and safety) thereby effectively lowering the statutory standard of "unreasonable adverse effects" found in RSA 162-H:16, IV(c). Because the above-referenced statute requires the SEC to determine whether a project will have an **unreasonable** adverse effect it is improper to for the SEC to apply a different/lower standard in assessing the public interest.

There is a lot of good work, created by much laudable effort, in the draft regulations. However, that work is undermined by the specific provisions described above that deviate from the clear instructions and intent of the legislature. The provisions we describe in depth in our attached comments and in this letter (some of which were added at the very last moment undermining the months of work that had been done by stakeholders, staff and the SEC) combine to create a de facto moratorium on wind development. Slamming the door on economic development, job creation and environmental protection both contradicts the statute and are at odds with the long New Hampshire traditions of respecting property rights, prudent and thoughtful stewardship of beloved and productive natural resources and seeking to bring economic value to the people of the Granite State.

Thank you for considering these comments and restoring balance.

www.edpr.com

EDP Renewables North America LLC
Corporate Headquarters
808 Travis, Suite 700
Houston, TX 77002
T: 713 265 0350 F: 713 265 0365

Sincerely,

Ryan Brown

Executive Vice President, Eastern Region

cc: David Wiesner, Esq.

Joint Legislative Committee on Administrative Rules

www.edpr.com

EDP Renewables North America LLC
Corporate Headquarters
808 Travis, Suite 700
Houston, TX 77002
T: 713 265 0350 F: 713 265 0365

Orr&Reno

October 14, 2015

William L. Chapman
George W. Roussos
James E. Morris
John A. Malmberg
Douglas L. Patch
Steven L. Winer
Peter F. Burger
Lisa Snow Wade
Susan S. Geiger
Jennifer A. Eber
Jeffrey C. Spear
Connie Boyles Lane
Judith A. Fairclough
Maureen D. Smith
James F. Laboe
Robert S. Carey
Jeremy D. Eggleton
Nicole M. T. Paul
John M. Zaremba
Caroline K. Brown
Heidi S. Cole
Justin M. Boothby
Andrew D. Grosvenor
Zachary D. Bland

Neil F. Castaldo
(Of Counsel)

Via Hand Delivery

The Honorable Carol McGuire, Chair
Joint Legislative Committee on Administrative Rules
c/o Office of Legislative Services
Administrative Rules
25 Capitol Street
Concord, NH 03301

Re: Comments on Notice No. 2015-12 – Site Evaluation Committee Rules – SEC Docket No. 2014-04

Dear Representative McGuire:

These comments are submitted on behalf of EDP Renewables ("EDPR") regarding the above-referenced proposed rules filed by the New Hampshire Site Evaluation Committee ("SEC" or "Committee"). EDPR is an experienced developer of clean, renewable, wind energy, and the third largest wind energy developer, owner, and operator in the United States. It has 31 operating wind projects in the United States and is currently constructing three (3) projects and developing new projects around the country, including here in New Hampshire. EDPR was an active member of the stakeholder groups that worked on Senate Bill 245 (2014) which resulted in changes to RSA 162-H that prompted this rulemaking.

Listed below are issues of concern that EDPR respectfully submits warrant objections from JLCAR.

1. **Site 301.14(f)(2) b.** This rule would restrict **shadow flicker** created by a proposed wind facility to **not more than 8 hours per year** at or within any residence, learning space, workplace, health care setting, public gathering area (outdoor and indoor), or other occupied building. This standard is unreasonable and could potentially prevent future wind projects from being built in New Hampshire. According to a study issued by the National Association of Regulatory Utility Commissioners – "Wind Energy & Wind Park Siting and Zoning Best Practices and Guidance for States" (Jan. 2012), a shadow flicker standard of 30 hours per year is a "commonly used" and "reasonable standard."

This standard was used by two New Hampshire wind project applicants (Groton and Antrim) and was acceptable to the SEC. In addition, throughout this rulemaking and until the final day of the SEC's deliberations on the rules, the SEC's draft rule contained the 30 hour standard. The SEC's abrupt departure of the 30 hours/year standard is unreasonable and therefore objectionable because it is not in the public interest. *See* RSA 541-A:13, IV(c).

2. The definition of "**Cumulative Impacts**" in **Site 102.18** is overly broad, unworkable and therefore not in the public interest. The term is defined as "the totality of effects resulting from the proposed facility, all existing energy facilities, all energy facilities for which a certificate of site and facility has been granted, **and all proposed energy facilities for which an application has been accepted.**" The term is used in **Site 301.14(g)** which states that in determining whether to grant a certificate of site and facility, the SEC must consider "*cumulative impacts* to public health and safety, natural, wildlife, habitat, scenic, recreational, historic, and cultural resources, including aesthetic impacts and sound impacts, and, with respect to aesthetics, the potential impacts of combined observation, successive observation, and sequential observation of energy facilities by the viewer."

The definition of cumulative impacts (above) would require that the SEC and applicant consider effects of another proposed facility – i.e. one that has not been built – in combination with those of the applicant's proposed facility. This would require speculation and could result in a futile effort to anticipate consequences of another facility that might never be built or whose layout may change at a later date. Accordingly, this rule is not in the public interest and, therefore, JLCAR should object. *See* RSA 541-A:13, IV(c).

3. **Site 301.05 (b)(7) Photosimulations** submitted with the application must be from "key observation points" (as defined in Site 102.25), from other scenic resources characterized as "high" in the visual impact analysis, **and, to the extent feasible, from a sample of private property observation points within the area of potential visual impact,** to illustrate the potential change in the landscape that would result from construction of the proposed facility...

This requirement is excessive and has the potential to cause significant expense and delay in the siting process. The rule could potentially result in an applicant conducting photosimulations from every potential private vantage point. The rule does not indicate to what extent an applicant is required to contact private property owners to conduct these visual simulations. It is unclear which sample of private property observation points will be acceptable to the SEC. In the past, visual experts have limited their analyses of wind projects to photosimulations taken from public vantage points. Now, it appears that a project's effect on private properties would have to be studied. Failure to study sufficient private vantage points may cause the SEC to find that an application is incomplete and/or order an applicant to conduct more visual simulations, which would delay the review process. For the foregoing reasons, JLCAR should object to this rule because it is not in the public interest. *See* RSA 541-A:13, IV(c).

4. **Site 301.08(a)(7).** This rule requires a wind project applicant to submit a decommissioning plan prepared by an independent expert with demonstrated knowledge and experience in wind generation and cost estimates. Among other things, the plan must provide for removal of all structures and site restoration "with a description of sufficient and secure funding to implement the plan, **which shall not account for the anticipated salvage value of facility components or materials, including the provision of financial assurance in the form of an irrevocable standby letter of credit, performance bond, surety bond, or unconditional payment guaranty executed by a parent company of the facility owner maintain at all times an investment grade credit rating.**

The legislature previously considered but rejected accounting for salvage value in a decommissioning funding plan. *See* SB 281, as amended by the Senate (2014). Including this provision is contrary to legislative intent and therefore is inappropriate and objectionable. *See* RSA 541-A:13, IV (b). In addition, the listed forms of financial assurances are financially onerous and are not required by statute. Accordingly, JLCAR should object to this rule as it is not in the public interest and would have a substantial economic impact. *See* RSA 541-A:13, IV (c) and (d).

5. **Site 301.09.** Among other things, this rule requires an applicant to submit the "**master plans of affected communities and zoning ordinances of the proposed facility host municipalities and unincorporated places...**".

The New Hampshire Supreme Court has held that the SEC process preempts local zoning and planning processes. *Town of Hampton, 120 N.H. 68 (1980).* Thus, master plans and zoning ordinances are arguably irrelevant to the SEC process. Accordingly, applicants should not be required to submit this information. JLCAR should object to this rule as it is beyond the authority of the SEC. *See* RSA 541-A:13, IV (a).

6. **Site 301.16** <u>**Criteria Relative to Finding of Public Interest**</u>. Among other things, this rule requires that in determining whether a proposed energy facility will serve the **public interest**, the SEC shall consider:

(c) The extent to which construction and operation of the facility will be consistent with federal, regional, state and **local plans and policies**, including those identified in **RSA 378:37...** and **(d) – municipal master plans and land use regulations.**

In 2009, the legislature repealed the requirement that the SEC find an application to be consistent with the state energy policy established in RSA 378:37. *See* N.H. Laws of 2009, Ch. 65:24, IX. (repealing RSA 162-H:16, IV (d)). Thus, a rule requiring the SEC to consider the state's energy policy is contrary to the legislature's intent and therefore JLCAR should object. *See* RSA 541-A:13, IV(b).

In addition, as noted above, local planning and zoning requirements are preempted by the SEC process. The New Hampshire Supreme Court has held that attempts by municipalities to regulate facilities under the jurisdiction of the SEC is impermissible. *Town of Hampton, 120 N.H. 68, 71 (1980).* Thus, it is beyond the authority of the SEC to adopt a rule that would enable a municipality, through its land use policies, plans and regulations, to improperly exert authority over energy facility siting. For the foregoing reasons, this rule is beyond the authority of the SEC, is contrary to the legislature's intent, and not in the public interest. Therefore, JLCAR should object to this rule. *See* RSA 541-A:13, IV(a), (b) and (c).

7. **Site 201.01 (b)** requires an applicant to mail a copy of the notice of the preapplication public information session to each abutting property owner by certified mail. This requirement is excessive and goes well beyond the statutory requirement of RSA 162-H:10, I which simply calls for newspaper publication. Accordingly, JLCAR should object. *See* RSA 541-A:13, IV(a) and (b).

Please do not hesitate to contact me if you or the other JLCAR members have questions about these comments. Thank you.

Very truly yours,

S. S. Geiger

Susan S. Geiger

1382145_1