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November 25, 2015

Rep. Carol M. McGuire, Chair
Joint Legislative Committee on Administrative Rules
State House Annex, Room 219
25 Capitol Street
Concord, NH 03301-6312

**Re: Response to Preliminary Objection to FP 2015-11 and FP 2015-12
Site 100 and Site 201-204 - Organizational Rules and Rules of
Practice and Procedure of the Site Evaluation Committee
Site 205 and 300 - Explanation of Proposed Rule and Certificates
of Site and Facility Rules of the Site Evaluation Committee
SEC Docket No. 2014-04**

Dear Chair McGuire:

I write to you as Chairman of the Site Evaluation Committee (SEC) in response to the preliminary objection issued by the Joint Legislative Committee on Administrative Rules (Committee) to Final Proposals 2015-11 and 2015-12 regarding the SEC's Site 100-300 rules. The preliminary objection was entered on October 15, 2015, by vote of the Committee, pursuant to RSA 541-A:13, IV, based on the grounds as outlined in the Committee staff annotations to the final proposals, on the written testimony provided to the Committee prior to its meeting, on oral and written public testimony provided by the public at the Committee's meeting, and on the Committee's concerns as reflected by its comments at the meeting.

In order to address the Committee's preliminary objection, SEC Staff held a technical session with interested stakeholders on October 28, 2015, to seek resolution of the two primary bases of objections raised by public submissions and identified by the Committee: (1) the "public interest" siting criteria set forth in Site 301.16, and (2) the "cumulative impacts" analysis requirement set forth in Site 301.14(g). The technical session did not result in a consensus position regarding resolution of these two issues.

The SEC met on November 18, 2015, to consider the preliminary objection, and to develop and then approve the substance of this response to the preliminary objection. At that meeting, the SEC also established the text of rules language changes to be submitted in connection with its response and, as described below, authorized its Chairman to request revised objections at the relevant Committee meeting in order to avoid a final objection and/or joint resolution with respect to a number of issues covered by the preliminary objection.

Cultural Resources • Environmental Services • Public Utilities Commission • Resources and Economic Development • Transportation

The rules language changes approved by the SEC at its November 18 meeting, including a number of substantive revisions and certain editorial revisions, are incorporated in the annotated versions of the Site 100-204 rules and the Site 205-300 rules submitted herewith. Also attached are revised versions of Appendix A and Appendix B which address comments made by Committee staff counsel.

The following addresses in greater detail specific issues covered by the preliminary objection and the SEC's response to such issues:

Public Interest Criteria

The preliminary objection incorporated comments submitted by Northern Pass Transmission, the New England Ratepayers Association, Monadnock Paper Mills, and the International Brotherhood of Electrical Workers asserting that the public interest siting criteria in Site 301.16 in the Final Proposal were inconsistent with the legislature's intent based on the legislative history of Senate Bill 245 of 2014 (SB 245). Northern Pass also claimed that the public interest criteria were inconsistent with the other siting standards under RSA 162-H:16, IV.

EDP Renewables asserted that the public interest siting criteria were objectionable because they required consideration of a facility's consistency with local plans and policies and with municipal master plans and land use regulations. EDP Renewables also challenged the inclusion of a reference in the criteria to the state energy policy as contrary to legislative intent, based on the 2009 repeal of a requirement that the SEC determine that a proposed facility is consistent with this policy.

Joe Lukeman claimed that the public interest criteria were objectionable because they do not differentiate between essential and elective energy projects, and because they do not fully consider the economy of a town or the impact on a town's master plan.

In response to the preliminary objection, the SEC has revised the provisions of Site 301.16 to remove the language that was subject to the objections based on legislative intent and instead to require the SEC to consider a list of values and factors that is taken directly from the purpose section of the statute, RSA 162-H:1. The SEC also expressly authorized its Chairman to request that the Committee issue a revised objection if it appears that the Committee would find the revised language to be objectionable. Such a revised objection request could be either to restore the language included in the final proposal or to entirely remove Site 301.16 and not include any specific public interest siting criteria, as determined in the discretion of the Chairman during the Committee meeting.

The SEC approved these actions in response to the preliminary objection without finding that the public interest criteria set forth in the final proposal were inconsistent with the intent of the legislature in adopting the SB 245 amendments to RSA 162-H. The legislative history of SB 245, while perhaps not completely clear on this point, does not compel the conclusion that the final proposal criteria violate this legislative intent.

We note further that SB 245, in addition to requiring that the SEC find that issuance of a certificate “will serve the public interest,” also amended RSA 162-H:16, IV to include the following sentence (emphasis added):

After due consideration of *all relevant information* regarding the potential siting or routes of a proposed energy facility, *including potential significant impacts and benefits*, the site evaluation committee shall *determine if issuance of a certificate will serve the objectives of this chapter*.

SB 245 also amended the SEC rulemaking mandate in RSA 162-H:10, VII to require that the SEC adopt rules relative to the criteria for siting energy facilities, “including specific criteria to be applied in determining if the requirements of RSA 162-H:16, IV have been met by the applicant for a certificate of site and facility.” Notably, this amendment *broadened* the scope of the rulemaking directive to adopt specific criteria to encompass *all* of RSA 162-H:16, IV, including the “public interest” finding under subsection (e) and the sentence quoted above, while the prior language of this section had referenced only subsections (b) and (c) of RSA 162-H:16, IV.

This appears to be strong evidence of the legislature’s intent that the SEC adopt specific criteria regarding the required “public interest” finding and the determination called for under the quoted sentence. The SEC did so through its adoption of the final proposal language of Site 301.16 and, in response to the preliminary objection, it has now revised the language of this section to more explicitly cover the values and factors referenced in the statutory purpose section, RSA 162-H:1. We believe this revision has removed any potential basis for objection to the public interest siting criteria set forth in Site 301.16.

Cumulative Impacts Analysis

The preliminary objection incorporated comments submitted by Northern Pass Transmission, New England Ratepayers Association, Monadnock Paper Mills, and the International Brotherhood of Electrical Workers asserting that the requirement set forth in Site 301.14(g) that the SEC analyze the “cumulative impacts” of all energy facilities on public health and safety, natural, wildlife, habitat, scenic, recreational, historic, and cultural resources, including aesthetic impacts and sound impacts, was inconsistent with legislative intent. Their assertion is based on the removal during the SB 245 legislative process of language that would have applied a cumulative impacts analysis to all energy facilities, as well as the inclusion through other legislative enactments of specific references to a cumulative impacts analysis for wind energy systems (RSA 162-H:10-a) and natural gas pipelines (RSA 162-H:10-b). Northern Pass also claimed that the required cumulative impacts analysis, as applied to non-wind energy facilities, was inconsistent with the other siting standards under RSA 162-H:16, IV.

The SEC was advised during its November 18 meeting that there may be a stronger basis to question whether the broader cumulative impacts analysis requirement is consistent with the legislature’s intent, in view of this legislative history and principles of statutory construction. The SEC decided to revise the language of Site 102.18, Site 301.03(h)(6), and Site 301.14(g), such that those rules

provisions regarding cumulative impacts would apply only to wind energy facilities and not to other types of energy facilities. We believe this revision has removed any potential basis for objection to the provisions of Site 301.14(g).

Municipal Preemption Impermissible

The preliminary objection incorporated comments submitted by the Towns of Easton, Littleton, Sugar Hill, Bethlehem, and Monroe, Executive Councilor Joe Kenney, and several other individuals, asserting that municipal master plans and other local land use regulations, plans and policies should not be preempted through the SEC's energy facility certificate process.

We would note as an initial matter that the final proposal does not include a rule that could fairly be characterized as one calling for preemption of municipal regulation. During the course of the rulemaking process, many individuals and entities proposed rules that would require projects subject to the SEC's jurisdiction to comply with local ordinances. The SEC declined to adopt any of those proposals.

Substantively, the SEC does not believe any change to the rules is appropriate regarding this issue. Under the New Hampshire Supreme Court precedent in *PSNH v. Town of Hampton*, 120 N.H. 68 (1980), it is clear that municipal planning and zoning are preempted by the pervasive state siting process implemented by the SEC. Since that judicial decision was issued, the legislature has not amended the statute in any way that affects this conclusion. The SEC therefore has made no revision to the proposed rules in response to these comments.

Municipal Veto Impermissible

The preliminary objection incorporated comments submitted by New England Ratepayers Association and EDP Renewables, asserting that the requirements for applicants to submit and the SEC to consider the municipal master plans and local zoning ordinances of certain host and affected communities are arguably irrelevant to the SEC process because of state preemption under the *Town of Hampton* case cited above. EDP Renewables argued that this requirement under Site 301.09 is beyond the SEC's authority.

These comments effectively present a "mirror image" of the municipal preemption issue addressed in the preceding section above. The SEC was advised that the proposed rules merely require filing of municipal master plans and zoning ordinances as written evidence of municipal views on relevant issues as permitted by statute. These are only factors to be considered by the SEC and are subject to SEC preemption under the Supreme Court precedent as noted above. The SEC therefore has made no revision to the proposed rules in response to these comments.

Transmission Setbacks Specific Criteria

The preliminary objection incorporated comments submitted by Pamela Martin, Kris Pastoriza, and a number of other individuals, asserting that the proposed SEC rules amendments should include

specific setback restrictions for electric transmission projects, and that the failure to do so is inconsistent with the SEC rulemaking directive under RSA 162-H:10, VII.

Through the public rulemaking process, the SEC was persuaded that specific setback distances would not be appropriate in all situations, so it would be preferable to permit specification of applicable setbacks and safety zones on an individualized, case-by-case basis, based on the record as developed for each application. The SEC believes that conclusion represents a policy determination made by the SEC and is not a proper ground for objection before the Committee. The SEC therefore has made no revision to the proposed rules in response to these comments.

Site Control and Eminent Domain

The preliminary objection incorporated testimony and comments presented by Senator Jeannie Forrester and by Dorothy McPhaul, effectively asserting that the SEC should not provide or recognize the exercise of eminent domain by applicants to secure site or route control. As stated by the SEC Chairman during the Committee's October 15th meeting and reiterated at the SEC's November 18th meeting, the SEC has no authority to grant eminent domain rights to an applicant or to any other party.

The site control requirements of proposed Site 301.03(c)(6) contain a narrow exception for applicants that can demonstrate they have taken action that may lead to eminent domain authority under a *separate* source of law, such as FERC interstate natural gas pipeline certification. Those applicants may submit an application to the SEC if they have initiated a federal regulatory proceeding or taken other action that would, if successful, provide the applicant with a right of eminent domain to acquire control of the site for the purpose of constructing, operating, and maintaining the proposed facility thereon. The SEC concluded that the related testimony and comments do not form a basis for objection, and therefore the SEC has made no revision to the proposed rules in response to these comments.

Decommissioning Plans for Energy Facilities

The preliminary objection incorporated comments submitted by Dorothy McPhaul and by EDP Renewables with respect to the decommissioning plan requirements set forth in Site 301.08(a)(7) and (c)(2). Ms. McPhaul argued that the rules should not permit applicants to provide decommissioning plan financial assurance in the form of corporate guaranties, and that the removal of structures and site restoration should be required for all energy facilities and not only for wind energy systems.

EDP Renewables argued that the express exclusion of potential salvage value when determining the required amount of decommissioning plan funding is inconsistent with legislative intent, because such exclusion was included in a prior version of the legislation which was eventually enacted through House Bill 1602 of 2014, but was removed prior to enactment. EDP Renewables also asserted that the listed forms of financial assurance are financially onerous and are not required by statute.

The SEC determined that the specific financial assurance requirements for energy facility decommissioning plans are policy decisions that it made after consideration of extensive and detailed comments submitted through the public rulemaking process. With respect to the exclusion of salvage

value from decommissioning plan funding amount calculations, the SEC concluded that this was not contrary to legislative intent but also falls within the purview of its policymaking authority. The SEC therefore has made no revision to the proposed rules in response to these comments.

EDP Renewables' Other Objections

The preliminary objection incorporated additional comments submitted by EDP Renewables, a developer and operator of wind energy facilities, objecting to the following proposed SEC rules provisions:

- (1) the eight-hour annual shadow flicker limit under Site 301.14(f)(2)b;
- (2) the inclusion of energy facilities for which the SEC has accepted an application in the definition of "cumulative impacts" under Site 102.18;
- (3) the requirement that wind energy facility applicants submit photosimulations from a sample of private property observation points, to the extent feasible, under Site 301.05(b)(7); and
- (4) the requirement that applicants provide notice of initial public information sessions to abutting property owners by certified mail, under Site 201.01(b).

The SEC determined that the specified shadow flicker hour limit, the inclusion of accepted applications in the "cumulative impacts" definition, and the requirement for submission of photosimulations from a sample of private property observation points, are all policy decisions squarely within the SEC's rulemaking authority that were made after consideration of comments submitted through the public rulemaking process. The SEC further determined that the requirement that abutting property owners be given notice of initial public information sessions by certified mail is not inconsistent with the statutory notice provisions under RSA 162-H:10, I. The SEC therefore has made no revisions to the proposed rules in response to these additional comments of EDP Renewables.

Committee Staff Issues

The preliminary objection included the grounds as outlined in Committee staff annotations to the SEC's final proposals. A number of those issues have been resolved by the SEC in rules language revisions incorporated in the attached annotated rules documents. Other such issues were addressed by the SEC as follows:

"Scenic quality" definition (Site 102.44). Committee staff commented that this definition is overly subjective, and that it includes substantive aspects and so should be moved to the Site 300 rules. The SEC determined that the concept of aesthetic significance embodied in this definition is to a great extent inherently subjective and does not lend itself to more definitive explication. The SEC also noted that this term is referenced in a number of other definitions in Site 102, and so should remain in this section of the proposed rules. The SEC therefore has made no revisions to the proposed rules in response to

these comments.

Subcommittee formation (Site 103.03(a) and (d)). Committee staff commented that these proposed rules provisions should specify the circumstances and criteria for formation of subcommittees. The SEC noted that the proposed rules language tracks and cites the relevant statutory provisions. The SEC therefore has made no revision to the proposed rules in response to these comments; however, the SEC expressly authorized its Chairman to request that the Committee issue a revised objection directing removal of these rules provisions, if it appears that the Committee would find the proposed rules language to be objectionable.

State agency member designation of senior staff person (Site 103.03(d)(1)). Committee staff commented that this proposed rules provision should specify the circumstances and criteria for designation by state agency SEC members of senior staff to serve in their stead. The SEC noted that the proposed rules language tracks and cites the relevant statutory provisions. The SEC therefore has made no revision to the proposed rules in response to this comment; however, the SEC expressly authorized its Chairman to request that the Committee issue a revised objection directing removal of this rules provision, if it appears that the Committee would find the proposed rules language to be objectionable.

SEC public hearing in county or counties (Site 201.03(a) and (b)). Committee staff commented that the procedures for the SEC's non-adjudicative public hearings in the energy facility host county or counties should be specified, as in the NHDES Env-C 205 rules. The SEC noted that the proposed rules language tracks the relevant statutory provisions and that the NHDES rules seem inapposite. The SEC, however, did approve additions to Site 201.03 regarding public comments, transcripts, and website posting of information submitted in connection with its public hearings held in the county or counties.

Additional information sessions (Site 201.04). Committee staff commented that this proposed rules provision should specify the factors to be considered by the SEC when determining if any additional sessions are reasonable. The SEC noted that the proposed rules language tracks and cites the relevant statutory provision. The SEC therefore has made no revision to the proposed rules in response to this comment; however, the SEC expressly authorized its Chairman to request that the Committee issue a revised objection directing removal of this rules provision, if it appears that the Committee would find the proposed rules language to be objectionable.

Conditions of certificate (Site 301.17). Committee staff commented that this proposed rules provision should specify under what circumstances the enumerated potential certificate conditions will be imposed, and what factors and criteria will be assessed when making these decisions. The SEC has addressed this comment by adding the phrase "in order to meet the purposes of RSA 162-H" to the introductory language in Site 301.17.

Access to facility site for inspection and monitoring (Site 302.01(b)). Committee staff commented that this proposed rules provision may violate the Fourth Amendment to the United States Constitution if no pre-compliance review is provided for prior to an agency search of business premises, citing the June 2015 decision of the Supreme Court of the United States in *City of Los Angeles v. Patel*. The SEC has addressed this comment through revision of this subsection in the proposed rules.

Suspension of certificate by SEC (Site 302.01(f) and 302.02(d)). Committee staff commented regarding the use of "may" rather than "shall" in these proposed rules provisions, and indicated that the SEC should specify the basis on which it might *not* suspend a certificate following a violation or misrepresentation. The SEC noted that these proposed rules track and cite the relevant statutory provisions. The SEC therefore has made no revision to the proposed rules in response to these comments; however, the SEC expressly authorized its Chairman to request that the Committee issue a revised objection directing removal of these rules provisions, if it appears that the Committee would find the proposed rules language to be objectionable.

Based on this response and the related rules language revisions shown in the enclosed documents, the SEC believes that the Committee's preliminary objection has been fully addressed and resolved, and that no further basis exists for objection to the proposed Site 100-300 rules amendments. The SEC respectfully requests that the Committee approve the revised rules submitted with this response without further amendment or objection.

Thank you for your attention to this matter.

Sincerely,



Martin P. Honigberg
Chairman

Enclosures
cc: Service List

Readopt with amendments Site 100, effective 6-17-08 (Document #9182), to read as follows:

CHAPTER Site 100 ORGANIZATIONAL RULES

PART Site 101 PURPOSE AND APPLICABILITY

Site 101.01 Purpose. The purpose of the rules of the site evaluation committee is to:

(a) Describe the requirements and procedures of the site evaluation committee in reviewing and acting upon applications to construct energy facilities, requests for modification of facilities, determinations of jurisdiction and exemption, and similar or related business before the committee or any designated subcommittee; and

(b) Describe the organization of the site evaluation committee and any designated subcommittee.

Site 101.02 Applicability. The rules of the site evaluation committee shall apply to:

(a) Any person who constructs or operates, or proposes to construct or operate an energy facility in New Hampshire;

(b) Any person who participates in public information sessions scheduled by the applicant or adjudicative or informational public hearings conducted by the committee, or a designated subcommittee, concerning an energy facility; and

(c) Any person or organization appearing as a party, an intervenor, or a public commenter before the committee or any designated subcommittee.

PART Site 102 DEFINITIONS

Site 102.01 “Abutting property” means any property that is contiguous to or directly across a road, railroad, or stream from property on, under or above which an energy facility is located or proposed to be located.

Site 102.02 “Acceptance” means “acceptance” as defined in RSA 162-H:2, I, namely, “a determination by the committee that it finds that an application is complete and ready for consideration.”

Site 102.03 “Adaptive management” means a system of management practices based on specified desired outcomes, monitoring to determine if management actions are meeting the desired outcomes, and, if not, provisions for management changes designed to ensure that the desired outcomes are met or are re-evaluated.

Site 102.04 “Adjudicative hearing” means a public hearing held by the committee in an adjudicative proceeding.

Site 102.05 “Adjudicative proceeding” means “adjudicative proceeding” as defined in RSA 541-A:1, I, namely, “the procedure to be followed in contested cases, as set forth in RSA 541-A:31 through RSA 541-A:36.”

Site 102.06 “Administrator” means “administrator” as defined in RSA 162-H:2, I-a, namely, “the administrator of the committee,” as established by RSA 162-H.

Site 102.07 “Affected Communities” means the proposed energy facility host municipalities and unincorporated places, municipalities and unincorporated places abutting the host municipalities and

unincorporated places, and other municipalities and unincorporated places that are expected to be affected by the proposed facility, as indicated in studies included with the application submitted with respect to the proposed facility.

Site 102.08 “Applicant” means any person seeking to construct and operate any energy facility within this state.

Site 102.09 “Application” means the written document filed with the committee seeking the issuance of a Certificate of Site and Facility.

Site 102.10 “Area of potential visual impact” means a geographic area from which a proposed facility would be visible, and would result in potential visual impacts, subject to the areal limitations specified in Site 301.05(b)(4).

Site 102.11 “Astronomical maximum” means the theoretical maximum number of hours that shadow flicker will be produced at a location assuming the sun is shining all day from sunrise to sunset, the rotor-plane of the turbine is always perpendicular to the sun, and the turbine is always operating.

Site 102.12 “Best practical measures” means available, effective, and economically feasible on-site or off-site methods or technologies used during siting, design, construction, and operation of an energy facility that effectively avoid, minimize, or mitigate relevant impacts.

Site 102.13 “Certificate” or “certificate of site and facility” means “certificate” or “certificate of site and facility” as defined in RSA 162-H:2, II-a, namely “the document issued by the committee, containing such terms and conditions as the committee deems appropriate, that authorizes the applicant to proceed with the proposed site and facility.” “Certificate” includes the document issued by a subcommittee, containing such conditions as the subcommittee deems appropriate, that authorizes the applicant to proceed with the proposed renewable energy facility.

Site 102.14 “Combined observation” means a viewer sees multiple energy facilities from a stationary point within a typical cone of vision.

Site 102.15 “Commission” means the New Hampshire public utilities commission.

Site 102.16 “Committee” means the site evaluation committee established under RSA 162-H.

Site 102.17 “Critical wildlife habitat” means, for a federally listed threatened or endangered species:

(a) The designated and mapped specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of the Endangered Species Act, 16 U.S.C. §1533, on which are found those physical or biological features:

(1) Essential to the conservation of the species; and

(2) Which can require special management considerations or protection; and

(b) Specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of the Endangered Species Act, 16 U.S.C. § 1533, upon a determination by the Secretary of the United States Department of the Interior that such areas are essential for the conservation of the species.

Site 102.18 “Cumulative impacts” means the totality of effects resulting from ~~at~~the proposed wind energy facility, all existing wind energy facilities, all wind energy facilities for which a certificate of site and facility has been granted, and all proposed wind energy facilities for which an application has been accepted.

Site 102.19 “Energy facility” means “energy facility” as defined in RSA 162-H:2,VII, namely

(a) any industrial structure that may be used substantially to extract, produce, manufacture, transport or refine sources of energy, including ancillary facilities as may be used or useful in transporting, storing or otherwise providing for the raw materials or products of any such industrial structure. This shall include but not be limited to industrial structures such as oil refineries, gas plants, equipment and associated facilities designed to use any, or a combination of, natural gas, propane gas and liquefied natural gas, which store on site a quantity to provide 7 days of continuous operation at a rate equivalent to the energy requirements of a 30 megawatt electric generating station and its associated facilities, plants for coal conversion, onshore and offshore loading and unloading facilities for energy sources and energy transmission pipelines that are not considered part of a local distribution network.

(b) electric generating station equipment and associated facilities designed for, or capable of, operation at any capacity of 30 megawatts or more.

(c) an electric transmission line of design rating of 100 kilovolts or more, associated with a generating facility under subparagraph (b), over a route not already occupied by a transmission line or lines.

(d) an electric transmission line of a design rating in excess of 100 kilovolts that is in excess of 10 miles in length, over a route not already occupied by a transmission line.

(e) a new electric transmission line of design rating in excess of 200 kilovolts.

(f) a renewable energy facility.

(g) any other facility and associated equipment that the committee determines requires a certificate, consistent with the findings and purposes of RSA 162-H:1, either on its own motion or by petition of the applicant or 2 or more petitioners as defined in RSA 162-H:2, XI.”

Site 102.20 “Energy transmission pipeline” means a pipeline used to transport natural gas, oil, or other source of energy.

Site 102.21 “Exemplary natural community” means “exemplary natural community” as defined in RSA 217-A:3, VII, namely, “a viable occurrence of a rare natural community type or a high quality example of a more common natural community type as designated by the natural heritage bureau based on community size, ecological condition, and landscape context.”

Site 102.22 “Fragmentation” means the loss of habitat that results from the division of relatively large, continuous habitats into smaller, more isolated remnants.

Site 102.23 “Historic sites” means “historic property,” as defined in ~~36 C.F.R. §800.16(i)(1) and~~ RSA 227-C:1, VI, namely “any building, structure, object, district, area or site that is significant in the history, architecture, archeology or culture of this state, its communities, or the nation.” ~~The term and may includes rural, designed, traditional and natural landscapes~~ “any prehistoric or historic district, site,

building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior,” pursuant to 36 C.F.R. §800.16(l)(1).

Site 102.24 “Investment grade credit rating” means a current rating for senior unsubordinated debt of AAA, AA, A, or BBB, as issued by Standard and Poor’s Corporation, or Aaa, Aa, A, or Baa, as issued by Moody’s Investors Service, Inc.

Site 102.25 “Key observation point” means a viewpoint that receives regular public use and from which the proposed facility would be prominently visible.

Site 102.26 “Landscape” means the characteristic, visible features of an area including landforms, water forms, vegetation, historic and cultural features and all other objects and aspects of natural and human origin.

Site 102.27 “Migration corridors” means routes travelled by fish or wildlife when travelling between seasonal habitats that are necessary to maintain sustainable fish and wildlife populations.

Site 102.28 “Motion” means a request made to the committee or the presiding officer after the commencement of a contested proceeding for an order or ruling directing some act to be done in favor of the party making the motion, including a statement of justification or reasons for the request.

Site 102.29 “Natural community” means “natural community” as defined in RSA 217-A:3, XI, namely, “a recurring assemblage of plants and animals found in a particular physical environment.”

Site 102.30 “Natural heritage bureau” means the natural heritage bureau administered within the division of forests and lands of the department of resources and economic development.

Site 102.31 “Party” means “party” as defined by RSA 541-A:1, XII, namely, “each person or agency named or admitted as a party, or properly seeking and entitled as a right to be admitted as a party.” The term “party” includes all intervenors in a proceeding, subject to any limitations established pursuant to RSA 541-A:32, III.

Site 102.32 “Person” means “person” as defined by RSA 162-H:2, IX, namely, “any individual, group, firm, partnership, corporation, cooperative, municipality, political subdivision, government agency or other organization.”

Site 102.33 “Petition” means:

- (a) A request to the committee to rule on the applicability of this chapter to a particular proposed energy facility;
- (b) A petition for intervention made pursuant to RSA 541-A:32; or
- (c) Any other initial filing that requests the committee to take action with respect to a matter within its jurisdiction or to determine whether it has jurisdiction over a matter.

Site 102.34 “Petitioner” means

- (a) For a petition as defined in Site 102.33(a), “petitioner” as defined in RSA 162-H:2, XI, namely, “a person filing a petition meeting any of the following conditions:

- (a) A petition endorsed by 100 or more registered voters in the host community or host communities;

- (b) A petition endorsed by 100 or more registered voters from abutting communities;
- (c) A petition endorsed by the governing body of a host community or 2 or more governing bodies of abutting communities; or
- (d) A petition filed by the potential applicant;”

(b) For a petition as defined in Site 102.33(b), a person who files a petition for intervention pursuant to RSA 541-A:32; or

(c) For a petition as defined in Site 102.33(c), a person who files the petition with the committee.

Site 102.35 “Photosimulations” means computer-enhanced images generated using professionally accepted software that illustrate the visible effects anticipated from a proposed facility.

Site 102.36 “Presiding officer” means “presiding officer” as defined in RSA 541-A:1, XIV, namely, “that individual to whom the agency has delegated the authority to preside over a proceeding, if any; otherwise, it shall mean the head of the agency.”

Site 102.37 “Proof by a preponderance of the evidence” means that what is sought to be proved is determined to be more probable than not.

Site 102.38 “Public information hearing” means a hearing scheduled pursuant to RSA 162-H:10, I-c where the applicant presents information to the committee and other agencies that have permitting or other regulatory authority over the subject matter and to the public about the proposed facility.

Site 102.39 “Public information session” means a public meeting held before or after the filing of an application at which the applicant presents information to the public regarding the proposed facility, as provided for in RSA 162-H:10, I and I-a.

Site 102.40 “Rare natural community” means a natural community ranked by the natural heritage bureau as S1 (critically imperiled), S2 (imperiled), or S3 (very rare and local).

Site 102.41 “Rare plant” means any species included on the most recent version of the “Rare Plant List for New Hampshire” maintained by the natural heritage bureau.

Site 102.42 “Renewable energy facility” means “renewable energy facility” as defined in RSA 162-H:2, XII, namely, “electric generating station equipment and associated facilities designed for, or capable of, operation at a nameplate capacity of greater than 30 megawatts and powered by wind energy, geothermal energy, hydrogen derived from biomass fuels or methane gas, ocean thermal, wave, current, or tidal energy, methane gas, biomass technologies, solar technologies, or hydroelectric energy. “Renewable energy facility” shall also include electric generating station equipment and associated facilities of 30 megawatts or less nameplate capacity but at least 5 megawatts which the committee determines requires a certificate, consistent with the findings and purposes set forth in RSA 162-H:1, either on its own motion or by petition of the applicant or 2 or more petitioners as defined in RSA 162-H:2, XI.”

Site 102.43 “Rural area” means any geographic area in the State of New Hampshire that is not included within an urbanized area or an urban cluster.

Site 102.44 “Scenic quality” means a reasonable person’s perception of the intrinsic beauty of landforms, water features, or vegetation in the landscape, as well as any visible human additions or alterations to the landscape.

Site 102.45 “Scenic resources” means resources to which the public has a legal right of access that are:

(a) Designated pursuant to applicable statutory authority by national, state, or municipal authorities for their scenic quality;

(b) Conservation lands or easement areas that possess a scenic quality;

(c) Lakes, ponds, rivers, parks, scenic drives and rides, and other tourism destinations that possess a scenic quality;

(d) Recreational trails, parks, or areas established, protected or maintained in whole or in part with public funds;

(e) Historic sites that possess a scenic quality; or

(f) Town and village centers that possess a scenic quality.

Site 102.46 “Sequential observation” means a viewer is capable of seeing multiple energy facilities from different viewpoints as the viewer travels along a particular route such as a trail, river, scenic byway, or on a lake.

Site 102.47 “Service list” means a list maintained by the committee containing the names and addresses of all parties and intervenors in a proceeding and all other interested persons or groups who request to be included on the service list.

Site 102.48 “Shadow flicker” means the alternating changes in light intensity that can occur when the rotating blades of a wind turbine are back-lit by the sun and cast moving shadows on the ground or on structures.

Site 102.49 “Significant habitat resource” means habitat used by a wildlife species for critical life cycle functions.

Site 102.50 “Significant wildlife species” means:

(a) Any species listed as threatened or endangered, or which is a candidate for such listing, by the United States fish and wildlife service; or

(b) Any species listed as threatened, endangered, or of special concern by the New Hampshire department of fish and game.

Site 102.51 “Subcommittee” means any subcommittee established under RSA 162-H:4-a for the purpose of reviewing an application for an energy facility or to exercise any other authority or perform any other duty of the committee, subject to the limitations set forth in RSA 162-H:4-a, I.

Site 102.52 “Successive observation” means a viewer sees multiple energy facilities from a particular viewpoint, but not within the same viewing arc, by changing the viewer’s cone of vision.

Site 102.53 “Urban cluster” means an “urban cluster” as designated by the U.S. Census Bureau.

Site 102.54 “Urbanized area” means an “urbanized area” as designated by the U.S. Census Bureau.

Site 102.55 “Visibility analysis” means a spatial analysis conducted using computer software to determine the potential visibility of a proposed facility.

Site 102.56 “Visual impact assessment” means the process for determining the degree of change in scenic quality resulting from construction of a proposed facility.

Site 102.57 “Wildlife” means “wildlife” as defined in RSA 207:1, XXXV, namely, “all species of mammals, birds, fish, mollusks, crustaceans, amphibians, invertebrates, reptiles or their progeny or eggs which, whether raised in captivity or not, are normally found in a wild state.”

PART Site 103 COMMITTEE DESCRIPTION

Site 103.01 Committee Membership and Responsibilities.

(a) The committee consists of the following 9 persons, except as otherwise provided in (b) below:

- (1) The commissioners of the commission;
- (2) The commissioner of the department of environmental services;
- (3) The commissioner of the department of resources and economic development;
- (4) The commissioner of the department of transportation;
- (5) The commissioner of the department of cultural resources or the director of the division of historical resources as designee; and
- (6) Two members of the public appointed pursuant to RSA 162-H:3, I (f), except in any matter for which an alternate public member is appointed pursuant to RSA 162-H:3, XI.

(b) If at any time a member who is a state employee must recuse himself or herself on a matter, or is not otherwise available for good reason, such member shall designate a senior administrative employee or a staff attorney from his or her agency to sit on the committee.

(c) The committee shall be responsible for the following:

- (1) Evaluation and issuance of any certificate for an energy facility under RSA 162-H and these rules;
- (2) Determination of the terms and conditions of any certificate issued under RSA 162-H and these rules;
- (3) Adjudication and determination of any petition filed under RSA 162-H and these rules;
- (4) Monitoring of the construction and operation of any energy facility issued a certificate under RSA 162-H and these rules to ensure compliance with such certificate;

(5) Enforcement of the terms and conditions of any certificate issued under RSA 162-H and these rules; and

(6) Assistance to the public in understanding the requirements of RSA 162-H and these rules.

Site 103.02 Committee Chairperson and Vice-Chairperson and Authority.

(a) The chairperson of the commission shall be chairperson of the committee.

(b) The commissioner of the department of environmental services shall be the vice-chairperson of the committee.

(c) The chairperson shall serve as the chief executive of the committee and shall have the authority to do the following:

(1) Delegate to other members the duties of presiding officer;

(2) Perform administrative actions for the committee;

(3) Establish the budgetary requirements of the committee, with the consent of the committee;

(4) Hire or engage the administrator and other personnel to provide services to the committee;

(5) In the absence of an administrator, and with approval of the committee, engage independent contractors or additional personnel to provide technical, legal, or administrative support to fulfill the functions of the committee; and

(6) Form subcommittees pursuant to RSA 162-H:4-a and Site 103.03.

Site 103.03 Subcommittee Formation and Authority.

(a) Pursuant to RSA 162-H:4-a, I, the chairperson may establish a subcommittee to consider and make a decision on an application, including the issuance of a certificate, or to exercise any other authority or perform any other duty of the committee under this chapter, except that no subcommittee shall:

(1) Approve the budgetary requirements of the committee;

(2) Approve any support staff positions paid for through the site evaluation committee fund;

(3) Propose the committee funding plan under RSA 162-H:21; or

(4) Adopt initial or final rulemaking proposals.

(b) For purposes of executing its regulatory functions under RSA 162-H and these rules, a subcommittee shall assume the role of and be considered the committee with all of its associated powers and duties in order to execute the charge given the subcommittee upon its formation.

(c) When considering the issuance of a certificate or a petition of jurisdiction, a subcommittee shall have no fewer than 7 members, provided that:

(1) The 2 public members shall serve on each subcommittee with the remaining 5 or more members selected by the chairperson from among the state agency members of the committee;

(2) Pursuant to RSA 162-H:4-a, II, each selected member may designate a senior administrative employee or staff attorney from his or her respective agency to sit in his or her place on the subcommittee; and

(3) The chairperson shall designate one member or designee to be the presiding officer who shall be an attorney whenever possible.

(d) Pursuant to RSA 162-H:4-a, III, in any matter not covered under (c) above, the chairperson may establish a subcommittee of 3 members, consisting of 2 state agency members and one public member, provided that:

(1) Pursuant to RSA 162-H:4-a, III, each state agency member may designate a senior administrative employee or staff attorney from his or her agency to sit in his or her place on the subcommittee; and

(2) The chairperson shall designate one member or designee to be the presiding officer who shall be an attorney whenever possible.

(e) Any party whose interests ~~might~~ may be affected ~~may~~ shall have the right to object to a matter being assigned to a 3-person subcommittee pursuant to (d) above not less than 14 days before the first hearing before such subcommittee.

(f) If an objection as described in (e) above is received by the committee, the chairperson shall remove the matter from the 3-person subcommittee and either assign it to a subcommittee formed under (c) above or have the full committee decide the matter.

Site 103.04 Committee Administrator and Staff.

(a) Administrative services for the Committee shall be provided by the administrator.

(b) The administrator shall monitor the construction or operation of any energy facility issued a certificate under RSA 162-H and these rules, if and to the extent such monitoring duties are delegated to the administrator pursuant to RSA 162-H:4, III.

(c) The administrator shall specify the use of any technique, methodology, practice, or procedure approved within a certificate, if and to the extent such duty is delegated to the administrator pursuant to RSA 162-H:4, III-a.

(d) The administrator shall specify minor changes in route alignment to the extent that such changes are authorized by a certificate for those portions of a proposed electric transmission line or energy transmission pipeline, for which information was unavailable due to conditions which could not have been reasonably anticipated prior to the issuance of the certificate, if and to the extent such authority is delegated to the administrator pursuant to RSA 162-H:4, III-a.

(e) The administrator, with committee approval, shall engage additional technical, legal, or administrative support to fulfill the functions of the committee as are deemed necessary, provided that any such person to be hired by the administrator shall be approved by the chairperson.

(f) The chairperson or the administrator shall appoint counsel to conduct all prehearing conferences, if such appointment would promote the orderly conduct of the proceeding.

Site 103.05 Counsel for the Public. Pursuant to RSA 162-H:9, the attorney general shall appoint an assistant attorney general as counsel for the public in seeking to protect the quality of the environment and in seeking to assure an adequate supply of energy.

PART Site 104 PUBLIC REQUESTS FOR INFORMATION

Site 104.01 Requests for Committee Public Records.

(a) Requests for access to the public files and records of the committee shall be directed to the administrator, or to the chairperson of the committee if no administrator has been appointed, as follows:

Administrator [Chairperson]
Site Evaluation Committee
c/o New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH 03301-2429
Tel. (603) 271-2431
Fax (603) 271-3878
TDD Access Relay N.H. 1-800-735-2964

(b) Any member of the public may request photocopies of minutes and records of the committee in any proceeding or in any other matter before the committee pursuant to (a) above upon a determination by the presiding officer, in the case of a proceeding, or the chairperson, with respect to all other committee matters, that such requested documents are not exempt from disclosure pursuant to RSA 91-A:5.

(c) The committee shall provide the requested documents to the person requesting such documents upon payment of the cost of copying such documents pursuant to (b) above and (d) and (e) below.

(d) Copies shall be free for requests of 10 pages or less.

(e) A charge of \$0.10 per page shall be assessed for every copy over the first 10 pages.

(f) The committee shall post public information on its website at www.nhsec.nh.gov.

Readopt with amendments Site 201 – 204, effective 6-17-08 (Document #9183-A), cited and to read as follows:

CHAPTER Site 200 PRACTICE AND PROCEDURE RULES

PART Site 201 PUBLIC INFORMATION SESSIONS AND HEARINGS

Site 201.01 Public Information Sessions Prior to Application.

(a) Not less than 30 days prior to filing an application for a certificate, the applicant shall hold not less than one public information session in each county in which the proposed facility is to be located, at which session the applicant shall present information regarding the project and provide an opportunity for comments and questions from the public to be addressed by the applicant.

(b) The applicant shall publish a public notice not less than 14 days before each such session in one or more newspapers having a regular circulation in the county in which the session is to be held. This notice shall describe the nature and location of the proposed facility. The applicant shall mail a copy of this notice to each of the affected communities by first class mail and to each owner of abutting property by certified mail.

(c) Not less than 10 days before each such session, the applicant shall provide to the chairperson of the committee a copy of the public notice published pursuant to (b) above.

(d) The applicant shall arrange for a transcript of such session to be prepared and shall include the transcript in its application for a certificate.

Site 201.02 Public Information Sessions After Application.

(a) Within 45 days after acceptance of an application for a certificate pursuant to Site 301.10, the applicant shall hold not less than one public information session in each county in which the proposed facility is to be located, at which session the applicant shall present information regarding the proposed energy facility described in the application and provide an opportunity for comments and questions from the public to be addressed by the applicant.

(b) The applicant shall publish a public notice not less than 14 days before each such session in one or more newspapers having a regular circulation in the county in which the session is to be held, describing the nature and location of the proposed facility. The applicant shall mail a copy of this notice to each of the affected communities by first class mail.

(c) Not less than 10 days before each such session, the applicant shall provide to the presiding officer of the committee a copy of the public notice published pursuant to (b) above.

(d) The administrator, or a designee of the presiding officer of the committee, shall act as presiding officer of the public information session, and shall explain to the attendees at such session the process to be used by the committee to review the application for the proposed facility.

Site 201.03 Public Hearings in Host Counties.

(a) Within 90 days after acceptance of an application for a certificate pursuant to Site 301.10, the committee shall hold not less than one public hearing in each county in which the proposed facility is to be located.

(b) Each public hearing held under (a) above shall be a joint hearing with representatives of any agencies that have permitting or other regulatory authority over the subject matter, and shall be in lieu of and deemed to satisfy all initial requirements for public hearings under the statutes requiring permits relative to environmental impact applicable to the proposed facility.

(c) Notwithstanding (b) above, if any agency that has permitting or other regulatory authority over the subject matter does not otherwise have authority to conduct hearings, such agency may not join in the public hearing, provided that the ability or inability of any such state agency to join in the public hearing shall not affect the composition of the committee or the ability of any member of the committee to act in accordance with RSA 162-H and these rules.

(d) The committee shall publish a public notice not less than 14 days before each such public hearing in one or more newspapers having a regular circulation in the county in which the hearing is to be held, describing the nature and location of the proposed facility. The committee shall mail a copy of this notice to each of the affected communities by first class mail.

(e) At each such public hearing, members of the public having an interest in the subject matter shall be provided with an opportunity to state their positions.

(f) The committee shall require members of the public desiring to make oral statements at any such public hearing to so indicate by providing their names, town or city of residence, and parties represented on a roster made available for this purpose prior to the commencement of the hearing. Individuals who do not wish to speak in public may submit a statement to be read by a person of their choice.

(g) The committee shall arrange for a transcript of each such public hearing to be prepared and shall post the transcript on its website.

(h) The committee shall post on its website all written documents submitted in connection with any such public hearing, including those submitted by members of the public.

Site 201.04 Additional Information Sessions. Pursuant to RSA 162-H:10, I-b, upon request of the governing body of a municipality or unincorporated place in which the proposed energy facility is to be located, or on the committee's own motion, the committee may order the applicant to provide such additional public information sessions as are reasonable to inform the public regarding the proposed energy facility. At each such additional public information session, the applicant shall present information regarding the project and provide an opportunity for comments and questions from the public to be addressed by the applicant.

PART Site 202 ADJUDICATIVE PROCEEDINGS

Site 202.01 Adjudicative Hearing. Except for petitions to intervene, which shall be governed by Site 202.11, the committee shall conduct an adjudicative proceeding regarding an application or petition, or when determining whether to suspend or revoke a certificate, in accordance with the administrative procedure act, RSA 541-A, and these rules.

Site 202.02 Presiding Officer and Hearing Officer.

(a) The chairperson of the committee shall preside over adjudicative hearings conducted before the full committee or shall designate the vice-chairperson or another member as presiding officer for such proceedings. In the case of any adjudicative proceeding to be conducted before a subcommittee, the chairperson shall designate one member or designee to be the presiding officer, who shall be an attorney whenever possible.

(b) In the absence of the designated presiding officer, the members of the committee or subcommittee, as applicable, who are present shall select by majority vote a member of such committee or subcommittee to serve as presiding officer.

(c) In adjudicative proceedings, the presiding officer shall:

- (1) Facilitate informal resolution of contested issues;
- (2) Conduct any hearing in a fair, impartial and efficient manner;
- (3) Decide any disputed petitions for intervention;
- (4) Admit relevant evidence and exclude irrelevant, immaterial or unduly repetitious evidence;
- (5) Provide opportunities for the parties and committee members to question any witness;
- (6) Receive public statements; and
- (7) Cause a complete record of any hearing to be made.

(d) In any matter before the committee or any subcommittee, the presiding officer, or a hearing officer designated by the presiding officer, shall hear and decide procedural matters that are before the committee, including the following:

- (1) Procedural schedules for proceedings;
- (2) Discovery schedules for proceedings;
- (3) Discovery motions in proceedings;
- (4) Consolidation of parties having substantially similar interests;
- (5) Decisions on undisputed petitions for intervention; and
- (6) Identification of significant disputed issues for hearing and decision by the committee.

Site 202.03 Withdrawal of Committee or Subcommittee Member.

(a) Upon his or her own initiative, or upon the motion of any party, a member of the committee or any subcommittee shall, for good cause, withdraw from a proceeding to consider an application or petition.

(b) Good cause shall exist if a committee or subcommittee member has:

- (1) A direct interest in the outcome of the proceeding, including, but not limited to, a financial or family relationship within the third degree of relationships, with any party or representative;
- (2) Made statements or engaged in behavior which a reasonable person would believe indicates that he or she has prejudged the facts of the case; or
- (3) Personally believes he or she cannot fairly judge the facts of the case.

(c) Mere knowledge of the issues, the parties, counsel, consultants, representatives or any witness shall not constitute good cause for withdrawal.

Site 202.04 Appearances and Representation. A party or the party's representative shall file an appearance that includes the following information:

- (a) A brief identification of the matter;
- (b) A statement as to whether or not the representative is an attorney and, if so, whether the attorney is licensed to practice in New Hampshire; and
- (c) The party or representative's daytime address, telephone number, e-mail address, and other basic contact information.

Site 202.05 Participation of Committee and Agency Staff.

(a) The commissioner or director of each state agency that intends to participate in a committee proceeding shall advise the presiding officer of the name of the individual on the agency's staff designated to be the agency liaison for the proceeding.

(b) The presiding officer shall request the attendance of a participating state agency's designated liaison at a session of the committee or any subcommittee, if that person could materially assist the committee or subcommittee in its examination or consideration of a matter.

(c) Within 30 days of receipt of notification of a committee proceeding, a state agency not having permitting or other regulatory authority but seeking to participate in the proceeding shall advise the presiding officer of the committee in writing of such intent to participate.

(d) The presiding officer shall permit the participation of a state agency in a committee proceeding pursuant to a request submitted under (c) above if the presiding officer finds that the agency has demonstrated a material interest in the proceeding and its participation conforms with the procedural rules of the committee.

(e) All communications between the committee and state agencies regarding a pending committee proceeding shall be included in the official record of the proceeding and shall be publicly available.

Site 202.06 Format of Documents.

(a) All correspondence, pleadings, motions, petitions or other documents filed under these rules shall:

- (1) Include the title and docket number of the proceeding, if known;
- (2) Be typewritten or clearly printed on paper 8 ½ by 11 inches in size;
- (3) Be signed by the party or proponent of the document, or if the party appears by representative, by the representative; and
- (4) Include a statement certifying that the document has been served on all parties to the proceeding.

(b) The signature on a document filed with the committee or subcommittee, as applicable, shall constitute certification that:

- (1) The signer has read the document;
- (2) The signer is authorized to file the document;
- (3) To the best of the signer's knowledge, information and belief, there are good and sufficient grounds to support the document; and
- (4) The document has not been filed for purposes of delay.

Site 202.07 Service of Documents.

(a) All petitions, motions, exhibits, memoranda, comments, correspondence or other documents filed by any party to a proceeding governed by these rules shall be served by that party upon all other parties on the service list.

(b) All notices, orders, decisions or other documents issued by the committee or subcommittee, as applicable, pursuant to these rules shall be served by the presiding officer upon all parties on the service list.

(c) Service of all documents relating to a proceeding shall be made by electronic mail, unless a party or person listed on the service list has indicated an inability to receive service by electronic mail, in which case service shall be made by first class mail, postage prepaid, in the United States mail.

(d) If a party serving any document does not have the ability to serve such document by electronic mail, service shall be made by first class mail, postage prepaid, in the United States mail.

(e) Notwithstanding paragraphs (a) through (c), when a party appears by a representative, service shall be upon the representative by electronic mail, unless the representative has indicated an inability to receive service by electronic mail, in which case service shall be made by first class mail, postage prepaid, in the United States mail at the address stated in the appearance filed by the representative.

Site 202.08 Computation of Time.

(a) Unless otherwise specified, all time periods referenced in this chapter shall be calendar days.

(b) Computation of any period of time referred to in these rules shall begin with the day after the action which sets the time period in motion, and shall include the last day of the period so computed.

(c) If the last day of the period so computed falls on a Saturday, Sunday or legal holiday, then the time period shall be extended to include the first business day following the Saturday, Sunday or legal holiday.

Site 202.09 Notice of Hearing. A notice of an adjudicative hearing issued by the committee or subcommittee, as applicable, shall contain the information required by RSA 541-A:31, III and a description of the nature and location of the proposed energy facility.

Site 202.10 Prehearing Conference.

(a) Prehearing conferences shall be conducted in accordance with RSA 541-A:31.

(b) The committee or subcommittee shall designate counsel or the administrator to serve as the presiding officer for a prehearing conference when it is necessary to assure the orderly process of the proceeding.

(c) Following the prehearing conference, the presiding officer shall issue in writing to the parties and intervenors a procedural schedule for the proceeding, including a schedule for the conduct of discovery.

Site 202.11 Intervention.

(a) Persons seeking to intervene in a proceeding shall file petitions with the committee or subcommittee, as applicable, with copies served on all parties identified in the committee or subcommittee notice of hearing or prehearing conference.

(b) The presiding officer, or any hearing officer designated by the presiding officer if the petition is undisputed, shall grant a petition to intervene if:

(1) The petition is submitted in writing to the presiding officer, with copies mailed to all parties named in the order of notice of the hearing or prehearing conference, not less than 3 days before the hearing or prehearing conference;

(2) The petition states facts demonstrating that the petitioner's rights, duties, privileges, immunities or other substantial interests might be affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of law, including a state agency pursuant to RSA 162-H:7-a, VI; and

(3) The presiding officer or hearing officer, as applicable, determines that the interests of justice and the orderly and prompt conduct of the proceedings would not be impaired by allowing the intervention.

(c) The presiding officer, or any hearing officer designated by the presiding officer if the petition is undisputed, shall grant one or more late-filed petitions to intervene pursuant to RSA 541-A:32, II, upon determining that such intervention would be in the interests of justice and would not impair the orderly and prompt conduct of the hearings.

(d) The presiding officer, or any hearing officer designated by the presiding officer if the petition is undisputed, shall impose conditions upon an intervenor's participation in the proceedings, either at the time that intervention is granted or at any subsequent time, including the following conditions, if such conditions promote the efficient and orderly process of the proceeding:

(1) Limitation of such intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition;

(2) Limitation of such intervenor's use of cross-examination and other procedures so as to promote the orderly and prompt conduct of the proceedings; and

(3) Requiring 2 or more such intervenors to combine their presentations of evidence and argument, cross-examination and other participation in the proceedings.

(e) Limitations imposed in accordance with paragraph (d) shall not be so extensive as to prevent such an intervenor from protecting the interest that formed the basis of the intervention.

(f) Any party aggrieved by a decision on a petition to intervene may within 10 days request that the decision be reviewed by the committee or subcommittee, as applicable.

Site 202.12 Discovery.

(a) The applicant or petitioner, the public counsel, and any person granted intervenor status shall have the right to conduct discovery in an adjudicative proceeding pursuant to this rule and in accordance with an applicable procedural order.

(b) Any person entitled to conduct discovery pursuant to (a) above shall have the right to serve upon any party data requests, which may consist of a written interrogatory or request for production of documents.

(c) Data requests shall identify with specificity the information or materials sought.

(d) A person or group of persons who or which are voluntarily or by order participating in the proceeding together may serve more than one set of data requests on a party, but the total number of data requests served by each person or group, as the case may be, shall not exceed 50, unless otherwise permitted by ruling of the presiding officer or any hearing officer designated by the presiding officer, upon request of the person and a finding that the proposed number of data requests is necessary to address the complexity of relevant issues and would not adversely affect the conduct of the proceeding.

(e) In determining what constitutes a data request for the purpose of applying the number limitation set forth in (d) above, each question shall be counted separately, whether or not it is subsidiary or incidental to or dependent upon or included in another question, and however the questions may be grouped, combined, or arranged.

(f) A copy of each data request, each objection to data requests, and each response to data requests shall be served upon every person designated for discovery filings on the committee's official service list for the proceeding.

(g) Responses to data requests and objections to data requests shall not be filed with the committee or subcommittee.

(h) A response to a data request shall be made within 10 days of the date of receipt or in accordance with a procedural schedule established by the presiding officer or any hearing officer designated by the presiding officer in order to permit the timely and efficient conduct of the proceeding.

(i) Objections to data requests shall:

- (1) Be served in writing on the propounder of the requests within 10 days following receipt of the request unless a different time period is specified in an applicable procedural order; and

- (2) Clearly state the grounds on which the objections are based.

(j) Failure to object to a data request or requests for documents within 10 days of its receipt without good cause shall be deemed a waiver of the right to object.

(k) Motions to compel responses to data requests shall:

- (1) Be made pursuant to Site 202.14;

- (2) Be made within 10 days of receiving the applicable response or objection, or the deadline for providing the response, whichever is sooner;

(3) Specify the basis of the motion; and

(4) Certify that the movant has made a good-faith effort to resolve the dispute informally.

(l) The presiding officer or any hearing officer designated by the presiding officer shall authorize other forms of discovery, including technical sessions, requests for admission of material facts, depositions, and any other discovery method permissible in civil judicial proceedings before a state court, when such discovery is necessary to enable the parties to acquire evidence admissible in a proceeding.

(m) When a party has provided a response to a data request, and prior to the issuance of a final order in the proceeding, the party shall have a duty to reasonably and promptly amend or supplement the response if the party obtains information which the party would have been required to provide in such response had the information been available to the party at the time the party served the response.

Site 202.13 Site Inspections.

(a) The committee or subcommittee, as applicable, and public counsel shall conduct a site visit of any property which is the subject of a proceeding if requested by a party, or on its own motion, if the committee or subcommittee determines that the site visit will assist the committee or subcommittee in reaching a determination in the proceeding.

(b) The presiding officer shall determine who may attend any site visit conducted pursuant to (a) above and shall specify the conditions and restrictions applicable to the site visit.

(c) The applicant shall provide full access to the site of its proposed energy facility for any site visit conducted pursuant to (a) above at reasonable times and subject to reasonable conditions.

Site 202.14 Motions and Objections.

(a) Motions shall be in writing and filed with the committee unless made in response to a matter asserted for the first time at a hearing.

(b) Oral motions and any contemporaneous objection to such motions shall be recorded in full in the record of the hearing.

(c) The presiding officer or any hearing officer designated by the presiding officer shall direct the moving party to submit the motion in writing, with supporting information, by the deadline established by the presiding officer or hearing officer if the presiding officer or hearing officer finds that the motion requires additional information in order to be fully and fairly considered. The presiding officer or hearing officer designated by the presiding officer shall establish a deadline that promotes the efficient and orderly process of the proceeding.

(d) The moving party shall make a good faith effort to obtain concurrence with the relief sought from other parties, if the relief sought involves a postponement or extension of time.

(e) The caption of a motion shall state whether it is assented-to or contested, and shall identify within the body of the motion those parties that:

(1) Concur in the motion;

(2) Take no position on the motion;

(3) Object to the motion; and

(4) Could not be reached despite a good faith effort to do so, if the motion requests a postponement or extension of time.

(f) Objections to written motions shall be filed within 10 days after the date of the motion, unless a different time period is prescribed by the presiding officer or any hearing officer designated by the presiding officer.

(g) Failure by an opposing party to object to a motion shall not in and of itself constitute grounds for granting the motion.

(h) The presiding officer or any hearing officer designated by the presiding officer shall rule upon a motion after full consideration of all objections and other factors relevant to the motion.

Site 202.15 Waiver of Rules.

(a) The committee or subcommittee, as applicable, shall waive any of the provisions of these rules, except where precluded by statute, on its own motion or upon request by an interested party, if the committee or subcommittee finds that:

(1) The waiver serves the public interest; and

(2) The waiver will not disrupt the orderly and efficient resolution of matters before the committee or subcommittee.

(b) In determining the public interest, the committee or subcommittee shall waive a rule if:

(1) Compliance with the rule would be onerous or inapplicable given the circumstances of the affected person; or

(2) The purpose of the rule would be satisfied by an alternative method proposed.

(c) Any interested party seeking a waiver shall make a request in writing, except as provided in (d) below.

(d) The committee or subcommittee, as applicable, shall accept for consideration any waiver request made orally during a hearing or prehearing conference.

(e) A request for a waiver shall specify the basis for the waiver and the proposed alternative, if any.

(f) Other parties shall be provided the opportunity to comment on any waiver request before the committee.

Site 202.16 Postponements.

(a) A party requesting postponement of a hearing shall file a written request with the committee or subcommittee, as applicable, not less than 7 days prior to the date of the hearing.

(b) The party requesting postponement shall make a good faith attempt to seek the concurrence of the other parties with the request.

(c) The committee or subcommittee, as applicable, shall grant a request for postponement of a hearing if it finds that to do so would promote the orderly and efficient conduct of the proceeding.

(d) If the later date, time and place are known at the time of the hearing that is being postponed, the date, time and place shall be stated on the record.

(e) If the later date, time and place are not known at the time of the hearing that is being postponed, the committee shall issue a written order stating the date, time and place of the postponed hearing as soon as practicable.

Site 202.17. Continuances.

(a) The applicant or any other party may make an oral or written motion at hearing that the hearing be continued to a later date or time, stating good cause for such requested continuance.

(b) A motion for continuance shall be granted if the presiding officer or any hearing officer designated by the presiding officer determines that the ~~moving party has stated a valid basis for the proposed continuance and the continuance~~ will promote the orderly and efficient conduct of the proceeding and could assist in resolving the case fairly.

(c) If the later date, time and place are known when the hearing is continued, the information shall be stated on the record.

(d) If the later date, time and place are not known when the hearing is continued, the presiding officer or the designated hearing officer, as applicable, shall issue a written scheduling order stating the date, time and place of the continued hearing.

Site 202.18 Record of the Hearing. A record shall be kept of hearings and transcripts shall be made available in accordance with RSA 541-A:31.

Site 202.19 Burden and Standard of Proof.

(a) The party asserting a proposition shall bear the burden of proving the proposition by a preponderance of the evidence.

(b) An applicant for a certificate of site and facility shall bear the burden of proving facts sufficient for the committee or subcommittee, as applicable, to make the findings required by RSA 162-H:16.

(c) In a hearing held to determine whether a certificate, license, permit or other approval that has already been issued should be suspended, revoked or not renewed, the committee or subcommittee, as applicable, shall make its decision based on a preponderance of the evidence in the record.

Site 202.20 Order of Proceeding. Unless otherwise determined by the presiding officer upon a finding that a different order would facilitate the conduct of the proceeding fairly and expeditiously, evidence shall be offered in the following order at any proceeding before the committee or subcommittee, as applicable:

- (a) The applicant or other party bearing the overall burden of proof;
- (b) Intervenors; and
- (c) Counsel for the public.

Site 202.21 Testimony. All testimony shall be under oath or affirmation, and shall be subject to cross-examination by parties or their representatives and to questioning by members of the committee or subcommittee, as applicable.

Site 202.22 Prefiled Testimony.

- (a) An applicant's prefiled testimony and exhibits shall be filed with its application.
- (b) Prefiled testimony and exhibits from other parties or rebuttal testimony from the applicant or any other party shall be filed as determined by a procedural order issued by the presiding officer.
- (c) One copy of prefiled testimony and exhibits shall also be forwarded by the applicant to each party and to each person listed on the service list, through electronic mail distribution unless otherwise specified in a procedural order issued by the presiding officer.

Site 202.23 Filings and Applications.

- (a) All applications, petitions and filings shall be made to the following address:

Site Evaluation Committee
c/o N.H. Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, New Hampshire 03301-2429

- (b) Each person filing a document shall, in addition to any required paper filing, electronically file the document, to the extent practicable, in an electronic file format compatible with the computer system of the commission.
- (c) The committee shall maintain a list on its website of the types of electronic file formats compatible with the computer system of the commission.

Site 202.24 Evidence.

- (a) Receipt of evidence shall be governed by the provisions of RSA 541-A:33.
- (b) All documents, materials and objects offered as exhibits shall be admitted into evidence, unless excluded by the presiding officer as irrelevant, immaterial, unduly repetitious or legally privileged.
- (c) All objections to the admissibility of evidence shall be stated as early as possible in the hearing, but not later than the time when the evidence is offered.
- (d) Transcripts of testimony and documents or other materials admitted into evidence shall be public records, unless the presiding officer determines that all or part of a transcript or document is exempt from disclosure under RSA 91-A:5, as interpreted by case law.

Site 202.25 Public Statements.

- (a) Members of the public who do not have intervenor status in a proceeding but have an interest in the subject matter shall be provided with an opportunity at a hearing or prehearing conference to state their positions.
- (b) The committee shall require members of the public desiring to make oral statements at a hearing or prehearing conference to so indicate by providing their names, contact information, and parties represented on a roster made available for this purpose prior to the commencement of the hearing or prehearing conference. Individuals who do not wish to speak in public may submit a statement to be read by a person of their choice.
- (c) Statements by members of the public shall be unsworn and shall not be subject to cross-examination.

(d) Any written information or reports submitted by members of the public pursuant to RSA 162-H:10, III shall be presented prior to the close of the record of the proceeding.

(e) Members of the public providing written information or reports pursuant to RSA 162-H:10, III shall provide copies of the written materials to the applicant.

(f) Records shall be maintained of all submittals of information and reports by members of the public and of all other actions, proceedings, and correspondence of or before the committee.

(g) The committee shall post on its website all written documents submitted in connection with an adjudicative proceeding, including those submitted by members of the public, except as provided in 202.24(d).

Site 202.26 Closing the Record.

(a) At the conclusion of a hearing, the record shall be closed and no other evidence, testimony, exhibits, or arguments shall be allowed into the record, except as allowed by (b) below.

(b) Prior to the conclusion of the hearing, a party may request that the record be left open to accommodate the filing of evidence, exhibits or arguments not available at the hearing.

(c) If the other parties in the proceeding do not object, or if the presiding officer determines that such evidence, exhibits or arguments are necessary for a full consideration of the issues raised in the proceeding, the presiding officer shall specify a date no later than 30 days after the conclusion of the hearing for the record to remain open to receive the evidence, exhibits or arguments.

(d) If any other party in the proceeding requests time to respond to the evidence, exhibits or arguments submitted, the presiding officer shall specify a date no later than 30 days following the submission for the filing of a response.

(e) If any other party in the proceeding requests the opportunity to cross-examine on the additional evidence, exhibits or arguments submitted, the presiding officer shall specify a date no later than 30 days following the submission for a hearing at which cross-examination on the additional evidence, exhibits or arguments submitted shall be allowed.

Site 202.27 Reopening the Record.

(a) A party may request by written motion that the record in any proceeding be re-opened to receive relevant, material and non-duplicative testimony, evidence or argument.

(b) If the presiding officer determines that additional testimony, evidence or argument is necessary for a full consideration of the issues presented in the proceeding, the record shall be reopened to accept the offered testimony, evidence or argument.

(c) The presiding officer shall specify a date no later than 30 days from the date of receiving the additional testimony, evidence or argument by which other parties shall respond to or rebut the newly submitted testimony, evidence or argument.

Site 202.28 Issuance or Denial of Certificate.

(a) The committee or subcommittee, as applicable, shall make a finding regarding the criteria stated in RSA 162-H:16, IV, and Site 301.13 through 301.17, and issue an order pursuant to RSA 541-A:35 issuing or denying a certificate.

(b) The committee shall keep a written decision or order and all filings related to an application on file in its public records for not less than 5 years following the date of the final decision or order or the date of the decision on any appeal, unless the director of the division of records management and archives of the department of state sets a different retention period pursuant to a uniform procedures manual rules adopted under RSA 5:40.

Site 202.29 Rehearing.

(a) The rules in this section are intended to supplement RSA 541, which requires or allows a person to request rehearing of an order or decision of the committee prior to appealing the order or decision.

(b) The rules in this section shall apply whenever any person has a right under applicable law to request a rehearing of an order or decision prior to filing an appeal of the order or decision with the court having appellate jurisdiction.

(c) A motion for rehearing shall be filed within 30 days of the date of a committee decision or order.

(d) A motion for rehearing shall:

(1) Identify each error of fact, error of reasoning, or error of law which the moving party wishes to have reconsidered;

(2) Describe how each error causes the committee's order or decision to be unlawful, unjust or unreasonable, ~~or illegal in respect to jurisdiction, authority or observance of the law, an abuse of discretion or arbitrary, unreasonable or capricious;~~

(3) State concisely the factual findings, reasoning or legal conclusion proposed by the moving party; and

(4) Include any argument or memorandum of law the moving party wishes to file.

(e) The committee shall grant or deny a motion for rehearing, or suspend the order or decision pending further consideration, within 10 days of the filing of the motion for rehearing.

Site 202.30 Ex Parte Communications Prohibited.

(a) Committee members shall not communicate directly or indirectly with any person or party about the merits of an application or petition, unless all parties are given notice of the communication and are afforded an opportunity to participate.

(b) Communications between or among committee members, or between committee members and their attorneys, the administrator or committee staff, or between or among the presiding officer and one or more personal assistants or support staff personnel are not prohibited under this section.

PART Site 203 DECLARATORY RULINGS

Site 203.01 Declaratory Rulings.

(a) Any person may submit a petition for declaratory ruling from the committee on matters within its jurisdiction by filing an original written petition and 10 copies with the committee.

(b) A petition for declaratory ruling shall set forth the following information:

(1) The exact ruling being requested; and

- (2) The statutory and factual basis for the requested ruling, including any supporting affidavits or memoranda of law.

Site 203.02 Action on Requests.

(a) The person filing a petition to request a declaratory ruling shall provide such further information or participate in such evidentiary or other proceedings as the committee shall direct after reviewing the petition and any objections or other replies received with respect to the petition.

(b) Upon review and consideration, the committee shall issue a written ruling either granting or denying the petition, including an explanation of the factual and legal basis for granting or denying the petition, within 90 days of receipt of the petition.

(c) The committee may dismiss a petition for declaratory ruling that:

- (1) Fails to set forth factual allegations that are definite and concrete;
- (2) Involves a hypothetical situation or otherwise seeks advice as to how the committee would decide a future case;
- (3) Does not implicate the legal rights or responsibilities of the petitioner; or
- (4) Is not within the committee's jurisdiction.

PART Site 204 RULEMAKING

Site 204.01 How Adopted.

(a) A rule of the committee or any amendment or repeal thereof shall be adopted by the committee after notice and opportunity for hearing in accordance with this part.

(b) Rules may be proposed by any person or by the committee.

Site 204.02 Manner for Adoption.

(a) The committee shall commence a rulemaking proceeding by drafting a proposed rule or by accepting as a proposed rule the draft of a rule proposed by any person.

(b) With respect to any proposed rule, the committee shall conduct rulemaking and adoption proceedings pursuant to RSA 541-A.

Site 204.03 Requests to Committee for Rulemaking. A request from an interested person proposing the adoption, amendment or repeal of a rule shall be submitted, received and resolved in the following manner:

- (a) Requests shall be submitted to the committee by letter addressed to the chairperson;
- (b) Requests shall contain the following:
 - (1) The date of the request;
 - (2) The name, address and telephone number of the person making the request; and
 - (3) The name and address of any other person or organization represented by the person making the request;

- (c) The person making the request shall sign the request;
- (d) The request shall be typed or printed in a legible fashion;
- (e) The person making the request shall cite the rule and its provisions and specify any changes desired if repeal or amendment is sought, and, if possible, shall provide the text of the proposed rule if promulgation is sought;
- (f) The person making the request shall include a detailed and complete statement of the reasons offered in support of the requested action;
- (g) If the committee determines that any rulemaking request is deficient in any respect, the committee shall, within 15 days of receipt of said request, notify the person making the request in writing of the specific deficiencies and allow such person to amend the request;
- (h) Within 30 days of receipt of a request or amended request for rulemaking, the committee shall take one of the following actions:
 - (1) Initiate the requested rulemaking procedures, in accordance with this part; or
 - (2) Deny the request, in writing, stating the reasons for denial;
- (i) The committee shall grant the rulemaking request if the request is consistent with statute and case law and will assist the committee with its statutory duties.

Site 204.04 Request for Notice of Intended Rulemaking Action. Pursuant to the provisions of RSA 541-A:6, III, the committee shall maintain a current listing of all persons having made a request for advance notice of rulemaking proceedings.

Site 204.05 Public Hearing.

- (a) If the committee initiates rulemaking proceedings under RSA 541-A, or if rulemaking is initiated pursuant to a request for rulemaking, the committee shall hold not less than one public hearing pursuant to RSA 541-A:11.
- (b) Notice shall be given not less than 20 days prior to the public hearing pursuant to RSA 541-A:6, I.
- (c) The committee shall limit the time allowed at hearing for each person's comments when necessary to allow all persons who wish to make oral comments a reasonable opportunity to do so.
- (d) The committee shall require persons desiring to make oral comments to so indicate by providing their names, contact information, and parties represented on a roster made available for this purpose prior to the commencement of the public hearing.
- (e) The committee shall permit persons to submit written comments in any rulemaking proceeding for a period of time ending not less than 5 days following the close of the public hearing.

APPENDIX A

Rule	Statute
Site 101.01-02	RSA 162-H:3, 4, and 10,VI and VII; RSA 541-A:16, I (a)
Site 102.01-57	RSA 162-H:2 and 10,VI and VII
Site 103.01	RSA 162-H:3, 4, and 10,VI and VII; RSA 541-A:16, I (a)
Site 103.02	RSA 162-H:3 and 10,VI and VII; RSA 541-A:16, I (a)
Site 103.03	RSA 162-H:4-a and 10,VI and VII; RSA 541-A:16, I (a)
Site 103.04	RSA 162-H:3-a, 4, and 10,VI and VII; RSA 541-A:16,I(a)
Site 103.05	RSA 162-H:9 and 10,VI and VII; RSA 541-A:16, I (a)
Site 104.01	RSA 162-H:10,VI and VII, 13; RSA 541-A:16, I (a)
Site 201.01	RSA 162-H:10,I, VI and VII
Site 201.02	RSA 162-H:10,I-a, VI and VII
Site 201.03	RSA 162-H:10,I-c, VI and VII
Site 201.04	RSA 162-H:10,I-b, VI and VII
Site 202.01	RSA 162-H:10,VI and VII; RSA 541-A:30-a
Site 202.02	RSA 162-H:4, 4-a, 10,VI and VII; RSA 541-A:30-a
Site 202.03	RSA 162-H:10,VI and VII; RSA 541-A:30-a,III (k)
Site 202.04	RSA 162-H:10,VI and VII; RSA 541-A:30-a,III
Site 202.05	RSA 162-H:7-a, 10,VI and VII; and RSA 541-A:30-a,III
Site 202.06-07	RSA 162-H:10,VI and VII; and RSA 541-A:30-a,III
Site 202.08	RSA 162-H:10,VI and VII; RSA 541-A:30-a,III (f)
Site 202.09	RSA 162-H:10,VI and VII; RSA 541-A:30-a,III and 31, III
Site 202.10	RSA 162-H:10,VI and VII; RSA 541-A:31,V(c)
Site 202.11	RSA 162-H:4,V, 10,VI and VII; RSA 541-A:32
Site 202.12-14	RSA 162-H:10,VI and VII; RSA 541-A:30-a
Site 202.15	RSA 162-H:10,VI and VII; RSA 541-A:30-a,III (j)
Site 202.16	RSA 162-H:10,VI and VII; RSA 541-A:30-a,III
Site 202.17	RSA 162-H:10,VI and VII; RSA 541-A:30-a,III (h)
Site 202.18	RSA 162-H:10,VI and VII; RSA 541-A:30-a,III
Site 202.19	RSA 162-H:10,VI and VII; RSA 541-A:30-a,III (d) and (e)
Site 202.20-23	RSA 162-H:10,VI and VII; RSA 541-A:30-a,III
Site 202.24-25	RSA 162-H:10,VI and VII; RSA 162-H:10, III
Site 202.26	RSA 162-H:10,VI and VII; RSA 541-A:30-a,III
Site 202.27	RSA 162-H:10,VI and VII; RSA 541-A:30-a,III (i)
Site 202.28	RSA 162-H:10,VI and VII, 16, IV; RSA 541-A:35
Site 202.29	RSA 162-H:10,VI and VII; RSA 541
Site 202.30	RSA 162-H:10,VI and VII; RSA 541-A:30-a,III
Site 203.01-02	RSA 162-H:10,VI and VII; RSA 541-A:16,I(d)
Site 204.01-05	RSA 162-H:10,VI and VII; RSA 541-A:16,I(c)

APPENDIX B: INCORPORATION BY REFERENCE INFORMATION

RULE	TITLE/CITATION (DATE)	SOURCE
Site 102.23	36 C.F.R. §800.16(l)(1) (2014)	Available from U.S. Government Publishing Office, http://www.gpo.gov

