Orr&Reno
*Professional Association*

One Eagle Square, P.O. Box 3550, Concord, NH 03302-3550
Telephone 603-224-2381 • Facsimile 603-224-2318
www.orr-reno.com

Malcolm McLane
(Retired)

Ronald L. Snow
William L. Chapman
George W. Roussos
Howard M. Moffett
James E. Morris
John A. Malmberg
Martha Van Oot
Douglas L. Patch
Connie L. Rakowsky
Jill K. Blackmer
James P. Bassett
Emily Gray Rice
Steven L. Winer
Peter F. Burger
Lisa Snow Wade
Jennifer A. Eber
Pamela E. Phelan
Connie Boyles Lane
Jeffrey C. Spear
Judith A. Fairclough
James F. Laboe
John M. Zaremba
Maria M. Proulx
Phillip Rakhunov
Jessica E. Storey
Justin M. Boothby

Susan S. Geiger
(Of Counsel)

August 28, 2006

Michael P. Nolin, Chairman
Site Evaluation Committee
Department of Environmental Services
P.O. Box 95, 29 Hazen Drive
Concord, NH 03302-0095

***Re: Application of Lempster Wind, LLC***

Dear Chairman Nolin:

Enclosed please find an original and one copy of Lempster Wind, LLC's Application for a Certificate of Site and Facility. For the reasons discussed below, Lempster Wind, LLC is submitting this application to the Site Evaluation Committee for approval as an energy facility.

RSA 162-H contains conflicting provisions that make it difficult to determine whether this project, which is under 30 megawatts, should be considered an energy facility or a bulk power supply facility. Both "bulk power supply facilities" and "energy facility" are defined as electric generating stations capable of operation at a capacity of greater than 30 megawatts. *See* RSA 162-H:2, II.(a) and RSA 162-H:2,VII. The statutory definition of "bulk power facilities" also includes electric generating station equipment (without regard to megawatt capacity) which an applicant, 2 or more petitioners (with agreement by the Site Evaluation Committee) or the SEC itself determines should require a certificate. RSA 162-H:2, II. (a). Similarly, the statutory definition of "energy facility" also includes "any other facility" which an applicant, 2 or more petitioners (with agreement by the SEC) or the SEC itself determines should require a certificate. RSA 162:2, VII. In addition, the definition of "energy facility" contains a further statement that such facilities include electric generating station equipment "only if they are designed for, or capable of, operation at a capacity of greater than 30 megawatts." *Id.* To add to the confusion, RSA 162-H:5, IV(a) states notwithstanding the definition of bulk power facilities contained in RSA 162-H:2, II., all electric generating station equipment capable of operating at greater than 30 megawatts owned by entities not subject to rate regulation by the Public Utilities Commission "shall be considered energy facilities and shall not be considered bulk power facilities."

The determination of whether the project is a bulk power supply facility or an energy facility has certain ramifications under the statute. RSA 162-H:7, I. requires that an application for a bulk power supply facility certificate be filed with the Public Utilities Commission, while RSA 162-H:7, II. requires that an application for an energy facility certificate be filed with the Chairman of the Site Evaluation Committee. Depending on whether the applicant is a bulk power supply facility or an energy facility, under RSA 162-H:10, either the Committee or the Commission must consider the evidence, require certain information from the applicant, and conduct such studies and investigations as necessary. In the case of a bulk power supply facility, RSA 162-H:16,V. requires the Public Utilities Commission to issue or deny the certificate, while in the case of an energy facility the Committee issues the certificate.

Given the ambiguity in the language of the statute, an examination of the legislative history of the amendments to the statute is appropriate . One of the principles of statutory construction is that when the language of a statute is ambiguous, a statute must be construed in light of the Legislature's intent in enacting it, and in light of the policy sought to be advanced by the entire statutory scheme. *State v. McCarthy*, 150 N.H. 389, 391 (2003). The Legislature added the language in RSA 162-H:2 and :5 cited above when it enacted HB 1496 in 1998. The legislative history of HB 1496 shows clear legislative intent that all electric plants built by entities that are not subject to rate regulation should be considered energy facilities and thus not subject to PUC review for a certificate of need. The intent to treat all electric generation facilities that are in the competitive market as energy facilities is evident from the House Science, Technology and Energy Committee report on the bill, as well as from the transcript of the testimony on the bill provided to the Senate Ways and Means Committee by HB 1496 sponsors Representatives Jeffrey MacGillivray and Clifton Below. *See* attached excerpts from the legislative history of HB 1496. As the attached House Committee Report indicates, HB 1496 was intended to update RSA 162-H "to be consistent with competition in electric generation." The Committee Report further states: "The bill, as amended, moves all of the following from 'bulk power supply facilities' to 'energy facilities' and thus eliminates the need for them to obtain the certificate that the project is needed: (1) all electric plants built by entities not subject to rate regulation; 2) all electric plants built by anyone after competition exits in half of the state; and 3) transmission lines connecting generating plants to the transmission grid.". Moreover, as Rep. MacGillivray told the Senate Committee: "we're taking things that belong to the competitive generation market and moving them out of the need for certificate of financial need." Rep. Below's testimony to the Senate Committee supports this: "when an electric generating plant is in the competitive world, as opposed to the rate regulated world, then we eliminate the step where it has to go to the Public Utilities Commission".

If this project is approved it will operate in the competitive generation market; it will not be regulated by the Public Utilities Commission. Based on RSA 162-H and the legislative history of the 1998 amendments to that statute cited above, as well as the fact that the

Committee, not the Commission, has voted to assert jurisdiction over CEI's application for the project, we are submitting this application to the Site Evaluation Committee for approval as an energy facility.

Please do not hesitate to contact me if you have any questions about this filing.

Very truly yours,

Susan S. Geiger

Enclosure

cc: Committee Members
Service List

# COMMITTEE REPORT

COMMITTEE: Science, Technology and Energy

BILL NUMBER: HB 1496

TITLE: relative to energy facility evaluation.

DATE: February 17, 1998 CONSENT CALENDAR YES ☒ NO ☐

☐ OUGHT TO PASS

☒ OUGHT TO PASS WITH AMENDMENT

☐ INEXPEDIENT TO LEGISLATE

☐ RE-REFER

☐ REFER TO COMMITTEE FOR INTERIM STUDY
(Available only in second year of biennium.)

**STATEMENT OF INTENT**
**(Include Committee Vote)**

This bill updates the energy facility site evaluation laws (RSA 162-H) to be consistent with competition in electric generation. Under current RSA 162-H, proposed energy facilities are divided into "energy facilities", requiring environmental review by the site evaluation committee, and "bulk power supply facilities", requiring both this environmental review and an additional certificate from the Public Utilities Commission that the project is needed. The bill, as amended, moves all of the following from "bulk power supply facilities" to "energy facilities" and thus eliminates the need for them to obtain the certificate that the project is needed: (1) all electric plants built by entities not subject to rate regulation; (2) all electric plants built by anyone after competition exists in half of the state; and (3) transmission lines connecting generating plants to the transmission grid. The bill also exempts electric generating facilities of less than 30 megawatts from RSA 162-H, updates the purpose statement of RSA 162-H to conform with these changes, and corrects and eliminates cross references.

Vote 16-0.

Rep. Jeffrey C. MacGillivray
FOR THE COMMITTEE

Original: House Clerk
cc: Committee Bill file

USE ANOTHER REPORT FOR MINORITY REPORT

Science, Technology and Energy

HB 1496, relative to energy facility evaluation. OUGHT TO PASS WITH AMENDMENT

Rep. Jeffrey C. MacGillivray for Science, Technology and Energy: This bill updates the e
facility site evaluation laws (RSA 162-H) to be consistent with competition in electric gener
Under current RSA 162-H, proposed energy facilities are divided into "energy facilities", requ
environmental review by the site evaluation committee, and "bulk power supply facilities", requ
both this environmental review and an additional certificate from the Public Utilities Comm
that the project is needed. The bill, as amended, moves all of the following from "bulk power s
facilities" to "energy facilities" and thus eliminates the need for them to obtain the certificat
the project is needed: (1) all electric plants built by entities not subject to rate regulation; (
electric plants built by anyone after competition exists in half of the state; and (3) transmission
connecting generating plants to the transmission grid. The bill also exempts electric gener
facilities of less than 30 megawatts from RSA 162-H, updates the purpose statement of RSA 162
conform with these changes, and corrects and eliminates cross references.

Vote 16-0.

OK PB

**SENATE WAYS & MEANS COMMITTEE**
State House, Room 103
Concord, New Hampshire
Tuesday, April 14, 1998

**HOUSE BILL 1496, AN ACT** relative to energy facility evaluation.

**Testimony of:**


CHAIRMAN F. KING: I'll open the hearing on House Bill 1496, an act relative to energy facility evaluation. Rep. MacGillivray wishes to speak.

JEFFREY MACGILLIVRAY, Representative, Hillsborough County, District 21: Thank you, Mr. Chairman. For the record, I am Rep. Jeffrey MacGillivray, from Hillsborough, District 21. I am the prime sponsor of House Bill 1496, an act relative to energy facility evaluation.

The bulk of this bill and where this bill started was to try to clean up some pieces of the RSAs regarding electricity, energy facility evaluation, energy facility definitions to better conform with the new era of electric deregulation. Also, while they were at, the folks in Legislative Services found a couple of places where the references were wrong and fixed them, too.

The bulk of this statute, the declaration of purpose of RSA 162:H and the changes in the definition of energy facilities, the bulk of this is designed to take into account a difference between the old way of doing business, where power plants were only built in response to a need perceived by the regulatory community and the new era where plants will be built by the competitive market, when they're ready to do it, and they will only need – they will only need environmental and other approvals, but will no longer need to be approved from a financial basis before they're put into a rate base, because there is no rate base.



We used to have a least cost energy policy that was tied into that process. There still is some sort of a least cost energy policy, but it no longer will be used to decide what type of facility should be built. That determination will be made by the market.

The old process required that anybody that was building a power plant had to first go through all the processes involved in siting a large scale energy facility in the State of New Hampshire, which was designed to go through a special committee, made up of very high level people in the various state agencies, who would give it the expedited treatment that something of this magnitude deserved in the sense of the committee would not sit there and meet forever and forever, such that the plant never got built. That process will still remain. We will still have the energy facility evaluation process for evaluation and siting and getting it through its environmental permits, but what we are getting rid of for those plants that are going to be used for generation as opposed to, say, transmission, is the process whereby it then goes through a financial review of should we allow this plant to be built, should we put it into the customers' rate base?

So, the first part is we've taken the declaration of purpose and dropped a few sentences out of it that no longer apply. So that, it now only applies to high voltage transmission lines in the sense – I'm sorry. The parts of it that refer to financial check off now only apply to the high voltage transmission lines and not to the electric generator plants. However, since some of the language in paragraph 2 still applies to the planning, siting and construction of bulk power supply facilities, we have taken the definition – we have taken large electric generator facilities out of the definition of large, bulk large – bulk power supply facilities, so that now we have to spell that out differently.

On page 2, section 2 of the bill, it describes what an energy facility is. An energy facility is designed to be – an energy facility is – this new change to this paragraph takes the process of permitting energy facilities and takes out of it all the electric generation plants that are smaller than 30 megawatts. Thirty megawatts is – anything smaller than that is really something in the realm of a small piece of the energy equation. The plants being proposed for construction by natural gas suppliers are generally in the 100 to 500 megawatt range. Merrimack and Newington are in the 400 megawatt range, Seabrook's 1,150. So, what we're talking about excluding here is things that are pretty small. Most of the things that are smaller

than 30 megawatts are either a localized diesel generator to take care of the problem of local problems or small hydroplants that are scattered around the state.

The way we have gone about addressing this, you need to look at the rest of the statute to understand this completely, but if you look down at lines 34 through 37, of page 2, and read the sentence that runs from 34 to 36, you'll understand, to some extent, what it is we're doing. In the past, we defined energy facilities and we defined bulk power supply facilities. An energy facility was something that needed environmental permitting. A bulk power supply facility was something that needed not only environmental permitting, but also required a certification of financial needs of space. It required somebody from the commission to look at it and decide if this was something that's valuable enough and appropriate to put in the rate base prior to construction.

What we've done here is take electric generating facilities, larger than 30 megawatts, which are not going to be subject to rate regulation by the commission, and made them energy facilities needing environmental permitting and not bulk power supply facilities requiring energy permitting and – I mean, requiring environmental permitting and the like, and a certificate of need.

It also states that not only those plants belonging to those people who will be considered energy facilities, but also after the date when competition has been certified to exist in that portion of the state or in more than half of the state, all proposed electric generating facilities come into that. Then, it makes clear that the small subset of transmission lines that are used just to connect the generating facilities out to the beginning of the grid, which are really tied to one generation plant rather than part of the unified transmission grid, shall get the same treatment. In other words, we're taking things that belong to the competitive generation market and moving them out of the need for certificate of financial need.

Section 4 of the bill, lines 10 through 12, page 3, talks about bulk power facility plans where people are required to draw up plans, saying that we are providing enough power for the needs of the State of New Hampshire. After competition exists, this won't be our method of regulating this. So, we are exempting utilities that have competition,





certified to exist from the need for writing up plans in – consistent with this with respect to electric generating plants.

The other, to the best of my knowledge, are simply changes in references and changes in cross-references. Apparently, once upon a time some part of this was in 162:F rather than 162:H. That, I believe, summarizes what we've done. Basically, what we've done is we've made this section of the RSAs conform to the new reality of electric competition, rather than the old centralized control overseen by the PUC, and this all kicks in. The parts are designed to kick in at the appropriate times. The statement of purpose, we figure it doesn't hurt to change it now. The rest of it is defined to change when competition occurs. Thank you.

CHAIRMAN F. KING: Questions? Sen. Rubens.

SEN. RUBENS: Could you define energy facility versus bulk power supply facility, the reference to the definition?

REP. MACGILLIVRAY: There's a reference to other definitions in here. A bulk power supply facility is approximately defined to be a large generation plant or a large high voltage transmission. An energy facility is then defined to be anything that sort of looks and smells like that, but isn't a bulk power supply facility. Thus, we could either go and drastically reword the definitions, and in effect change statute by changing the definitions or we could do what Legislative Services chose, and I think properly to do instead, which is to insert a new paragraph that says that at various times, depending on whether you are subject to rate regulation or depending on whether competition has come to your part of the state yet or not. Your plant, even though it might otherwise be looked upon as a bulk power supply facility and be subject to the two-step process rather than the one-step process. The change gets made at the appropriate time.

SEN. RUBENS: The same thing, one is post C-day and the other is pre C-day and one is 30 megawatts, plus –

REP. MACGILLIVRAY: No. Well, the definition of energy facility is spelled out on lines 15 through 30, of page 2. I'm sorry I wasn't – it was staring me right in the face and – that's the definition of energy facility, and as you can see, it's any industrial structure that we use to –

SEN. RUBENS: Right. Well, my question is bulk power supply facility, defined in paragraph 2, which I don't see here in the bill.

REP. MACGILLIVRAY: In the other part of the RSA, paragraph 2. It states that a bulk power supply facility means electric generating station, equipment and associated facilities...30 megawatts or more, or something that's petitioned to be included in this or something that the committee determines should require a certificate. In this case, they're talking about something that could be approximately thought of a certificate of need that the project exists. That's section (a). There's also a section (b) and (c), both of which refer to certain types of transmission lines, sufficiently high voltage, and in both cases they're talking about transmission lines over 100 kilovolts, and the definition is slightly wordy, depending on whether it's going over a new route or an old route.

But, the primary thing that we're changing here is we're taking things that used to be defined as bulk power supply facilities under this definition of anything that's 30 megawatts or more, and anything else that the committee chooses to include in that is a bulk power supply facility and needs both the environmental permit and the certificate of need, if I may use that phrase. It's taking a bunch of things out. First, any electric generating facility that belongs to somebody that isn't being – that isn't subject to rate regulation. That comes out immediately, because if someone wants to build a merchant plant and start getting ready for competition, they could do that immediately.

After competition exists in a utility service area or in more than half of the state, all proposed electric generating facilities in that area, then join the pool and become energy facilities and not bulk power supply facilities. I guess we would draw up one of these decision tree sort of things or a flow chart, but –

CHAIRMAN F. KING: If there are no questions, why don't we have Rep. Below bat clean-up.

CLIFTON BELOW, Representative, Grafton County, District 13: Just briefly, I would just say that our committee spent a good amount of time on this. We actually started under another bill last winter, and then decided to file a new bill this fall to take this up. We looked at a lot of





different ways to do this, and even though this seems somewhat cumbersome it was the cleanest way we could figure out how to do it.

The key point is simply that when an electric generating plant is in the competitive world, as opposed to the rate regulated world, then we eliminate the step where it has to go to the Public Utilities Commission for what is called a certificate of site and facility, which is a whole separate process that the commission has to make a determination that the plant is needed to meet future electricity needs. What we're saying is the competitive market is going to decide that, and we don't need to regulate that.

So, the whole point of this is to reduce the regulation and the constraint on new competitive power plants, called merchant plants, if you will. I think it's important to get this in place so that, for instance, the new power plants that are being proposed in Newington would not be hamstrung by this extra administrative step that's not necessary.

SEN. HOLLINGWORTH: Thank you. Cliff, the Federal Environmental Protection Agency, is that more restrictive or less restrictive than the State Environmental Protection?

REP. BELOW: I guess I'm not qualified to answer that. My general understanding is that the state has to either uphold the federal standards or go beyond them. I can't – in many cases, we can't have laxer standards.

SEN. HOLLINGWORTH: I know this is old language, and I tend to think that I was around when this first stuff was created, and, in fact, I think I might have had a play in it. For some reason that part about the Federal Environmental Protection sends up some kind of a signal to me. You don't happen to know?

REP. BELOW: That's from the original bill.

SEN. HOLLINGWORTH: I know.

REP. BELOW: In 1991, that was created. Again, it says to at least require that the guidelines of the federal EPA.

SEN. HOLLINGWORTH: Right.

REP. BELOW: Quite honestly, this energy facility siting hasn't been used a lot in recent years. You know, Seabrook was the last big electric project that it was used for, but it has been used for the natural gas pipe line proposals, which didn't have to go to the PUC for certificate of need and facility. But there are pending, you know, natural gas electric generating plants that would have to go to them unless we change the law. This really doesn't effect the environmental review at all. As you might recall, through a separate bill we did amend the composition of the site evaluation review committee, so that some of the agencies could appoint designees rather than having to be the head of all the agencies.

CHAIRMAN F. KING: Additional questions? Thank you very much. No one else has indicated an interest in testifying on this bill either for or against. Does anyone wish to do that? I'll close the hearing.

[Hearing closed]



STATE OF NEW HAMPSHIRE

SENATE

REPORT OF THE COMMITTEE

Date: May 28, 1998

THE COMMITTEE ON Ways & Means

to which was referred House Bill 1496

AN ACT relative to energy facility evaluation.

VOTE: 6-0

AMENDMENT #1828S

Having considered the same, report the same with the following amendment and recommend that the bill **AS AMENDED OUGHT TO PASS**

Senator Richard Damais
For the Committee

**SB 1496**
**SENATOR JOHNSON**
**FOR THE COMMITTEE ON WAYS AND MEANS**

---

SB 1496, AN ACT RELATIVE TO ENERGY FACILITY EVALUATION, UPDATES THE ENERGY FACILITY SITE EVALUATION LAWS (RSA 162-H) TO BE CONSISTENT WITH COMPETITION IN ELECTRIC GENERATION.

THE BILL ALSO EXEMPTS ELECTRIC GENERATING FACILITIES OF LESS THAN 30 MEGAWATTS FROM RSA 162-H, UPDATES THE PURPOSE STATEMENT OF THIS SECTION AND CORRECTS AND ELIMINATES CROSS REFERENCES.

THE COMMITTEE ON WAYS AND MEANS RECOMMENDS THIS BILL OUGHT TO PASS.