

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

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RE: Application of Granite Reliable )  
Power, LLC for Certificate of site and )  
facility to construct up to 99 MW of wind )  
electric generation in Coos County, )  
New Hampshire and operate the same )  
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**Docket No. 2008-04**

**MOTION OF COUNSEL FOR THE PUBLIC FOR REHEARING**

Counsel for the public, Senior Assistant Attorney General Peter C.L. Roth, by his attorneys, the Office of the Attorney General, hereby moves the Site Evaluation Sub-Committee to reconsider its decision and order granting to Granite Reliable Power, LLC (the “Applicant”) a Certificate of Site and Facility, dated July 15, 2009. Counsel for the Public makes this motion pursuant to RSA 541:3 to ask the Sub-Committee to hold a rehearing to consider its finding that the Applicant demonstrated adequate financial capability and the condition that it ordered. In support hereof, Counsel for the Public respectfully represents as follows:

1. On July 15, 2008, GRP submitted an application for a certificate to construct and operate a 99-mw wind-generation power plant in Coos County at an estimated cost of \$300 million.
2. On August 25, 2008, the Attorney General appointed the undersigned as counsel for the public pursuant to RSA 162-H:9.
3. On March 16, 2009, and April 2, 2009, the Sub-Committee held evidentiary hearings to take testimony and receive documents into evidence on the question of the Applicant’s financial capability. Significant portions of the hearings on

financial capability were closed to the public and the press. Many of the Applicant's documents submitted in support of its financial capability at the hearings and along with its application were confidential and not available to the public and the press.<sup>1</sup> However, these documents were made available to the Counsel for the Public.

4. On July 15, 2009, the Sub-Committee issued its Decision and Order granting the Applicant a Certificate of Site and Facility for the project (the "Decision").

5. In the Decision, the Sub-Committee made a finding that the Applicant had met its burden of showing by a preponderance of the evidence that the Applicant had the requisite financial capability to construct and operate the project. Decision at 32.

6. In the Decision and Order, the Sub-Committee ruled that as a condition to the certificate the Applicant could not begin construction until construction financing was committed and it had provided the Sub-Committee a notice identifying the name and address of the party extending financing to the Applicant. *Id.*

7. Pursuant to RSA 162-H:16, IV (a) the Sub-Committee must find that the applicant for a certificate of site and facility has "adequate financial, technical and managerial capability to assure construction and operation of the facility in continuing compliance with the terms and conditions of the certificate."

8. In its Decision and Order the Sub-Committee based this finding on evidence that the Applicant had in the past raised construction financing for similar projects and the expressions of confidence by the Applicant's witnesses that the Applicant would be able to do so again in the future for this project. Decision at 31.

9. At the time of the hearings neither the Applicant nor its parent company possessed sufficient capital or credit to pay for the construction of the facility.

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<sup>1</sup> In this case the Applicant sought confidential treatment of its submissions at least four times.

Transcript, 3/16/2009, pgs. 46-49. The evidence presented in the record also suggests that there is no way to accurately predict when the Applicant will be able to raise the capital or credit sufficient to construct and operate the facility. Transcript, 3/16/2009, pg. 199. Finally, due to uncertainties in the market and an inability to reliably predict the Applicant's financial condition at an unknown time in the future it is not possible to know now what would be the terms and conditions of the project finance that the Applicant hopes to secure. *Id.*

10. Consequently, neither the Sub-Committee, any of the parties, nor the public knows the identity of the source of funds, the amounts, or the specific terms of any future financing that may be obtainable by the Applicant. Without such concrete information, the public lacks any objective assurance that the project will be constructed and operated in continuing compliance with the certificate. The public will also be denied the ability to provide other useful information to the Sub-Committee with respect to specific sources of funds or financing terms thereby limiting the ability of the Sub-Committee to appropriately review these aspects of the projects. Therefore, unless the Decision is revised to allow for further public review, the public will be denied the benefits conferred to it by statute.

11. The Sub-Committee's findings and ruling concerning financial capability are not in accord with the plain language and purpose of the statute. In order to fulfill the statutory purpose of protecting the public's interest in the siting of new energy facilities, the requirement of financial capability should properly be interpreted to mean *present monetary* resources, not the Applicant's good intentions and general financial acumen. The statute should be understood to clearly distinguish between managerial capability

and financial capability. The ability to arrange financing in the future is managerial capability, not financial resources. If the statute is to have meaning for all its parts, the words “financial capability “must mean something more than managerial ability to seek out and obtain funding. As a result, the Decision can be seen to nullify words in the statute in violation of well-established statutory interpretation principles. *See Town of Amherst v. Gilroy*, 157 N.H. 275, 279 (2008) (“The legislature is not presumed to waste words or enact redundant provisions and whenever possible, every word of a statute should be given effect.”) The requirement of financial capability is designed to assure the public that the applicant of a proposed project has the money or credit to build and operate the project as planned. To best fulfill that purpose the Sub-Committee should follow a relatively straightforward approach that objectively compares the budget for the project with the financial resources at hand to measure the likelihood of success or failure. An analysis like this best protects the public from the environmental and energy reliability consequences that could arise should an applicant not possess the necessary financial resources. Although the Sub-Committee faces the difficult task of reconciling the need for the siting of new energy facilities with the current economic climate, Counsel for the Public believes that the Decision can be revised to both protect the public’s interest and address the existing financial reality. Indeed, it is the existence of the difficult market conditions referenced by the Applicant that requires the Sub-Committee to proceed cautiously in its review of financial resources.

12. The Site Evaluation Committee has never previously made a finding of financial capability without a balance sheet or financial commitments demonstrating adequate monetary strength. In other instances, applicants presented concrete

information concerning a parent company's balance sheet, cash resources, or credit commitments. *See AES Londonderry* (identified well known lender group expressing a willingness to finance \$40 million during an interim ownership period); *Newington Energy*, SEC Docket No. 98-01, Decision, dated May 25, 1999 at 10-11 (Consolidated Edison, a company with over \$15 billion worth of assets, "one of the largest investor-owned utilities in the United States, ... ready to continue to make substantial contributions to the Applicant and its proposed facility."). Yet in this case, despite enormous uncertainty in world financial markets, a lack of evidence on when the economy will recover, evidence on the record that previous financings by this Applicant's parent were based on a now unusable model, the Sub-Committee made a finding on financial capability without comparable evidence. The Sub-Committee attempted to reconcile the difficulty of obtaining firm immediate financing with the need for new energy facilities by deferring the issue of financial ability. However, the Decision appears to leave out any opportunity for public review or actual evaluation by the Sub-Committee. A certificate requiring only notice of the identity of the source of funding should be carefully reconsidered in the face of the evidence and the reality of the present financial marketplace.

13. The Sub-Committee's finding of financial capability should be reconsidered where there is no evidence in the record showing that the Applicant has project financing committed or what the terms of future financing would be. The Sub-Committee should reconsider and revise the Decision to make a finding that specifies that this Applicant may demonstrate financial capability at a later date solely because of the unusual circumstances with the collapse of world financial markets. This later showing

should be based on actual monetary resources – cash, credit or a combination thereof, sufficient to construct and operate the facility in compliance with the certificate.

14. The Sub-Committee’s implicit ruling of law that “financial capability” means that the Applicant need only demonstrate its past ability to raise similar financing indicating a likely future ability to do so, and not show actual capital on hand or committed project financing, should also be reconsidered. The Sub-Committee should reconsider and revise the Decision to make an express ruling of law that “financial capability” means that the Applicant must demonstrate that it has actual capital or credit to construct and operate the proposed project on hand or committed.

15. For these reasons, the Sub-Committee’s condition in the Certificate that the Applicant need only identify the name and address of the party providing financing should be reconsidered because it unreasonably broadens the standards for approval and does not provide any of the parties, and more significantly, the Sub-Committee, the opportunity to review and test the sufficiency of the terms of the financing. As a result, under the condition ordered by the Sub-Committee, the Applicant’s financial capability escapes any objective measurement. The Sub-Committee should reconsider this determination and revise the Certificate to provide a condition that: (a) prior to beginning construction of the project, the Applicant must provide the Sub-Committee and Counsel for the Public evidence of the actual commitment of financing including the commitment of equity capital and a description of all material terms and conditions, (b) that Counsel for the Public be afforded ten (10) business days after receipt of such to provide written comments to the Sub-Committee and, if warranted request a hearing, and (c) that the Sub-Committee independently review the information provided and, if warranted hold a

hearing, and make an express determination that the financing package presented evidences that the financing is adequate to assure construction and operation of the facility in continuing compliance with the terms and conditions of the certificate.

WHEREFORE, Counsel for the Public prays that the Sub-Committee reconsider its findings and ruling on the question of financial capability and revise the conditions imposed to the Certificate to provide, as discussed above, for greater scrutiny of the Applicant's financial capability once such is actually committed, and grant such other and further relief as may be just.

Respectfully submitted this 14<sup>th</sup> day of August, 2009.

PETER C.L. ROTH  
COUNSEL FOR THE PUBLIC

By his attorneys

ORVILLE B. FITCH, II  
DEPUTY ATTORNEY GENERAL  
ACTING ATTORNEY GENERAL

/s/ Peter C.L. Roth  
Peter C.L. Roth  
Senior Assistant Attorney General  
Environmental Protection Bureau  
33 Capitol Street  
Concord, New Hampshire 03301-6397  
Tel. (603) 271-3679

### **Certificate of Compliance With SITE 202.14**

I, Peter C.L. Roth, do hereby certify that I sought the concurrence of the other parties to the relief sought herein. In response, AMC and Fish & Game indicated their non-objection, and Kathlyn and Robert Keene, and the Industrial Wind Action Group indicated that they concur with the relief sought. Only the Applicant indicated its objection. No other party responded.

Dated: August 14, 2009

s/ Peter C.L. Roth  
Peter C.L. Roth

**Certificate of Service**

I, Peter C.L. Roth, do hereby certify that I caused the foregoing to be served by electronic mail upon each of the parties on the Service List.

Dated: August 14, 2009

s/ Peter C.L. Roth  
Peter C.L. Roth