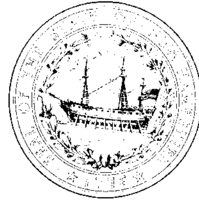
ATTORNEY GENERAL
DEPARTMENT OF JUSTICE

33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

MICHAEL A. DELANEY
ATTORNEY GENERAL

ORVILLE B. "BUD" FITCH II
DEPUTY ATTORNEY GENERAL



November 19, 2010

NH Site Evaluation Committee
c/o Jane Murray, Secretary
29 Hazen Drive, PO Box 95
Concord, New Hampshire 03301-0095

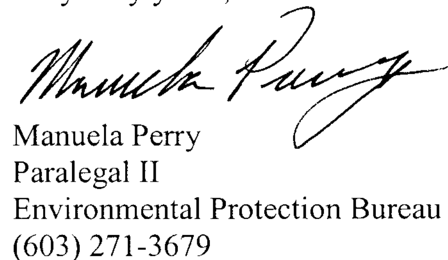
Re: Application of Groton Wind, LLC
Docket No. 2010-01

Dear Ms. Murray:

Enclosed for filing with the New Hampshire Site Evaluation Committee with reference to the above-captioned matter please find an original plus three copies the *Memorandum for Counsel for the Public Concerning Due Process Required for Matters Unresolved at Close of Evidentiary Hearings on November 5, 2010.*

Thank you for your attention to this matter.

Very truly yours,



Manuela Perry
Paralegal II
Environmental Protection Bureau
(603) 271-3679

/MP
Enclosure

STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

Docket No. 2010-01

Application of Groton Wind, LLC for a Certificate of Site and Facility for a Renewable Energy Facility in Groton, New Hampshire

Memorandum of Counsel for the Public Concerning Due Process Required for Matters Unresolved At Close of Evidentiary Hearings on November 5, 2010

As per direction from Vice Chairman Getz, at the conclusion of the hearings for the Application of the Groton Wind, LLC (hereafter "the Proposed Project), all parties were asked to submit to the Site Evaluation Committee (hereafter "the Committee") a procedural schedule for the continuance of such hearings and procedures required under RSA 162-H. The Committee requested such filings be made by November 19, 2010. Counsel for the Public submits this memorandum as his proposal and respectfully requests that the Committee consider it for the continuance for such hearings. At its most fundamental, what is at stake is the right of intervenors, including Counsel for the Public, to have a full and fair opportunity to be heard on several matters directly within the Committee's jurisdiction.

In an email to Public Counsel and other intervening parties dated November 11, 2010, the Applicant suggested filing additional testimony by Applicant's witnesses on November 19, 2010. This filing would be limited to testimony and reports regarding the proposed overhead line from Proposed Project site to Rte. 25. In addition, the Applicant suggested that the parties and Committee Counsel meet in a technical session to conduct additional discovery of said witnesses. The Applicant also indicated that it would make its witnesses, who have information about such

interconnection/overhead line, available for questioning at the technical session. Any issues outside of the interconnection/overhead line would be discussed at the discretion of the Committee.

Counsel for the Public requests that the Committee grant an extension for the Proposed Project as it is within the public interest to do so. See RSA 162-H:6-a, IX. Although the Applicant suggests a thirty day time period it is not necessary to conduct the process within this hurried time frame. The Applicant's witness, Trevor Mahalik, stated that the yearend deadline for Investment Tax Credit qualification could be met. In addition, the Applicant has moved its start of construction another year forward and its start of commercial operation another year forward as well to at least the end of 2012. See Hearing Tr., Nov. 1, 2010, A.M. at 84-86 (Mr. Cherian). Clearly there is no rush to get approval on the Proposed Project before the end of the year. Therefore, Counsel for the Public respectfully requests that a grant of extension be allowed to at least May 1, 2011. In support of this request, Counsel for the Public respectfully represents as follows:

A. The Proposed Interconnection Route

The Applicant proposed a completely new interconnection and distribution and transmission route shortly before the hearings began with additional information provided last week as Applicant's Exhibit 44. This suggested interconnection presents a completely different interconnection route than was previously provided for in the Application. See App. Ex. 44, Attachment A. The interconnection and route are still only proposed and are not yet approved by a feasibility study and ISO-

NE determination. This substantial last-minute change and the remaining uncertainty about it raised several issues that need to be addressed before issuance of a certificate.

Before closing the record, the Committee must consider all available alternatives and review the environmental impact of the site or route. RSA 162-H:16, IV. The Applicant conducted environmental impact assessments based on the previous interconnection route and a 34 kV model that had been determined to be feasible.

The Application provided,

> A Feasibility Study analysis has been performed by PSNH evaluating six (6) different interconnection alternatives. A copy of the Feasibility Study report is attached as Appendix 13. PSNH evaluated alternatives that would interconnect the Project into either the Ashland Substation, the Beebe River Substation, or both substations. The Feasibility Study was performed to determine the feasibility, maximum project size, and operating constraints for the various interconnection alternatives. For the Feasibility Study, PSNH performed steady state and transient analysis to verify the Project does not adversely impact the PSNH system. As part of the study process, the results were shared and reviewed with ISO-NE and NHEC.
>
> Following completion of the Feasibility Study, the Project chose to proceed with an interconnection option which would interconnect the Project via 34.5 kV lines to the Beebe River Substation. This option will now undergo a detailed interconnection study, including stability, power flow and short circuit analysis.
>
> Application at 23.

And in addition, the Application stated,

> The Project is not expected to not require any new substations or transmission lines. (sic) It will deliver electricity to the grid via standard distribution system level, three-phase power (34.5 kV) circuits, via an on-site project switchyard. The distribution line will be approximately 13.0 miles long, and will deliver the Project's output to PSNH's Beebe River substation. This line will be routed in existing electrical rights-of-way, and wherever practical, collocating with

> NHEC and/or PSNH facilities. The circuits are expected to be constructed utilizing covered conductor to allow for a more compact design.

Application at 24.

Thus, at the time of the Application, it was clear to anyone reading it that the interconnection had been worked out and determined to be feasible and all that remained was for the completion of the detailed interconnection study to determine that once connected the Project would not result in impacts to system reliability and stability. See Application at 23-24 & Appendix 13.

In case there was any doubt about it, the Applicant's representative, Mr. Cherian, was emphatic in his response to questions at the June 28, 2010 public meeting concerning the interconnection feasibility. See June 28, 2010 Public Meeting Tr. at 54 and 79 ("What we put in the Application was accurate and complete at that time, and still is.") Based on the Application and Mr. Cherian's statements at the public meeting, discovery proceeded in the case and expert witnesses were retained by Counsel for the Public. Testimony was submitted. Technical sessions were held. Based on the testimony in November, however, the Applicant knew during the summer and certainly knew by early September that the interconnection feasibility was not final as the Application asserted. Hearing Tr., Nov. 1, 2010, P.M. at 39 (Mr. Cherian) Yet it was not until October 12th that the Applicant made the new proposed interconnection known to the other parties in this process; after the deadlines for discovery, technical sessions and submission of testimony.

The current proposal uses a different route, and interconnects at 115 kV, and provides for different locations for the step up facilities. The Applicant is not

asserting that PSNH has made a feasibility determination or issued any feasibility report. See Supplement to Application dated October 12, 2010 at p. 3-4. This renders the previously created environmental impact assessments, historic resource impact assessments and visual impacts analyses of the route or by the necessary facilities inconclusive and, importantly, until the feasibility of the proposal is determined, speculative and lacking in evidentiary weight.

The Committee may only issue a certificate if the Proposed Project will not unduly interfere with development of the region or "[w]ill not have an unreasonable adverse effect on aesthetics, historic sites, air and water quality, the natural environment, and public health and safety." RSA 162-H:17, IV(b)- (c). Although the Applicant has conducted an assessment for an AIR corridor study area, as mentioned in Applicant's Exhibit 44 the study area is ". . . merely based on a sketch provided to Vanasse Hanger Brustlin, Inc. (hereafter "VHB") by Ed Cherian of Iberdrola Renewables" and neither surveyed, nor, as already noted, final. App. Ex. 44, 1. Additionally, Applicant has provided a letter from VHB stating that an online Data Check Tool was used to determine there were no known records of threatened, endangered or species of concern within a one-mile radius of the AIR study corridor. See App. Ex. 45.

Applicant's Exhibit 45 does not present a comprehensive showing that there will be no unreasonable environmental impacts as required by RSA 162-H:17, IV (c). Exhibit 45 is merely an electronic check of the listed species in the area. It does not take into account any actual observations of species nor any potential construction impacts on the area as required under RSA 162-H:16, IV. In addition, Mr. Cherian's

testimony was unmistakable that the impacts from the interconnection and the new route were not known. Hearing Tr., Nov. 1, 2010, A.M. at 58-62, 80-82 (Mr. Cherian testified that the impacts of the interconnection facilities were not known because the places those facilities might go were not known). As such, this significant change should be fully vetted and not approved hastily without appropriate development of the record. See Appeal of Society for the Protection of the Envt. of S.E.N.H., 122 N.H. 703, 707 (1982) (appropriate to deny motion to change route and deny certificate when facility changes significantly).

Finally, the Applicant has argued that the new wires, new poles, and other electrical equipment that must be installed to bring the power it will produce to the grid are not within the Committee's jurisdiction unless they are actually on property owned or leased by the Applicant. This interpretation is not consistent with the plain meaning of the definition of an "energy facility" contained in RSA 162-H:2, VII. In interpreting RSA 162-H:2 the Committee should look at the plain meaning of the words. Clare v. Town of Hudson, 160 N.H. 378, 384 (2010). The Committee should not attempt to discern what the legislature might have said and should not add words that the legislature did not see fit to include. Id. at 385.

RSA 162-H:2, VII provides in pertinent part,

> VII. "Energy facility" means:
> (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.
>
> ....
>
> (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.

Clearly the legislature intended a broad scope of the definition and sought to be inclusive. See PSNH v. Town of Hampton, 120 N.H. 68, 70-71 (1980) (SEC has comprehensive jurisdiction to adjudicate all matters involved in siting energy facilities and related transmission lines). Equally clearly, an electrical transmission line rated for at least 100 kV associated with generation equipment of at least 30 mw was intended to be included. But the legislature also intended to include associated facilities within the scope of the Committee's jurisdiction. For a power plant, the plain meaning of associated facilities should include the new wires, new poles, and new transformers and other electrical equipment necessary to deliver the power produced by the facility to the grid. See, e.g., 2010 Fl. Stat. 403.503(7) (Florida's energy facility siting statute defines "associated facilities" to mean "those onsite and offsite facilities which directly support the construction and operation of the electrical power plant such as electrical transmission lines, substations, and fuel unloading

facilities; pipelines necessary for transporting fuel for the operation of the facility or other fuel transportation facilities; water or wastewater transport pipelines; construction, maintenance, and access roads; and railway lines necessary for transport of construction equipment or fuel for the operation of the facility.")

RSA 162-H:2 also provides,

> XII. "Renewable energy facility" means electric generating station equipment *and associated facilities* designed for, or capable of, operation at a nameplate capacity of greater than 30 megawatts but less than 120 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.

Thus, the language of the statute includes within the Committee's jurisdiction the 115 kV lines that are required, the step-up facilities, and the new poles and lines required to get the Project's power to the grid because these are associated facilities. See Town of Hampton, 120 N.H. at 71 (holding it "inconceivable" that with the comprehensiveness of the statute power lines need for a generating facility to get to the grid would be kept from SEC jurisdiction and left to individual towns along the route to determine). In addition, there is nothing in the statute that requires that associated facilities be actually owned by the Applicant in order to be included within the jurisdiction of the Committee. It may be that the Applicant does not bear the responsibility to bring an application for the associated facilities but that is not the same as saying that the associated facilities therefore escape all scrutiny by the Committee. But without a determination of the impacts of the associated facilities, whether those impacts would be described by this Applicant or another, it is not possible for the Committee to determine that this facility would meet the standards set

forth in the statute. Hearing Tr., Nov. 1, 2010, A.M. at 58-62, 80-82 (Mr. Cherian testified that the impacts of the interconnection facilities were not known because the places those facilities might go were not known).

Given the scope of the Committee's jurisdiction over the facilities and the impacts that are to be analyzed, and the lateness of the complete and yet uncertain re-do of the interconnection, the Committee should leave open the record for such time as is necessary for the Applicant to finalize its interconnection with PSNH and the Coop and to present complete testimony discussing any impacts. Mr. Cherian testified that this would occur in late February or mid-March. Hearing Tr., Nov. 1, 2010, P.M. at 7. In addition, time must be provided to enable the other parties to assess the evidence presented, hire any additional experts that may be necessary and present testimony. In addition, sufficient time must be built in for tech sessions, data requests and hearing dates. From the time that the interconnection feasibility is determined with finality, we estimate 2-3 months for the process to run its course.

B. Bird And Bat Survey Finalized Findings From NH Fish And Game

On November 5, 2010, the New Hampshire Fish & Game Department provided commentary on the Applicant's bat and bird impacts and studies done in 2010. Counsel for the Public generally agrees with the assessments made by NHF&G but requires additional time to have his avian expert, Mr. Trevor Lloyd Evans, review the recommendations and provide additional testimony.

In addition, it is expected that the Applicant's avian specialists will submit additional testimony on the points raised in the NHF&G letter and will wish to submit additional supplemental testimony. Counsel for the Public may wish to submit

supplemental testimony in response. Following the submission of the testimonies there may be a need for data requests and a tech session followed by an additional hearing day. The conclusion of this process could easily be subsumed within that proposed for the interconnection impacts evidence. Otherwise, we would anticipate that 2-3 months would be required from the date the process begins with a scheduling order

C. The Findings Of The NH Division Of Historical Resources

On October 28, 2010, NHDHR informed the Applicant that it had rejected a key primary submittal. While there is some question about what these means, it is clear that the Applicant's progress with NHDHR has been unusually problematic and has not advanced much beyond preliminaries. During her testimony on November 1, 2010, Dr. Luhman stated that to get the process completed could take months. Dr. Luhman, testimony, Nov. 1, 2010 at 135. While the Applicant's expert professes "faith in the process" the record does not suggest that the Applicant fully understands the process and has a grasp on how to complete it. See Hearing Tr. Nov. 1, 2010, P.M. at 19 (Mr. Cherian arguing that problem is not with the form it is the data formatting); Buttolph Exhibit 39 (DHR letter detailing extensive fundamental problem with applicant's submittals and rejecting project area form); Hearing Tr. Nov. 1, 2010, P.M. at 114 (Dr. Luhman describing her confusion with the basics of what is required).

Important work remains to be done to assess whether the Project will have an impact on historic properties in West Plymouth and in the Town of Rumney. At this time the best the Applicant can offer is more or less, 'trust us; the process will ensure

that it is done correctly.' In prior cases, applicants have been much further along in the historic resources process such that an appropriate evaluation of impacts on historic resources could be made by the Committee. Conditions have been imposed in those cases to deal with final completion of the Section 106 process and mitigation. There appears to be too little in the record other than Dr. Luhman's faith in the process, which in our view does not meet the evidentiary burden in this case. Further testimony is necessary once Dr. Luhman has properly identified the scope of the historic resources to be considered and then considered them. The iterative process with NHDHR and the Army Corps can then take place under certificate conditions as in previous cases. Counsel for the Public estimates that for the Applicant to submit additional prefiled testimony, provide an opportunity for intervenors to assess that evidence, engage experts if necessary and submit testimony, conduct discovery and hold a half day of hearings could be accomplished in 2-3 months.

Respectfully submitted,

PETER C.L. ROTH
COUNSEL FOR THE PUBLIC

By his attorneys,

MICHAEL A. DELANEY
ATTORNEY GENERAL

Peter C.L. Roth
Senior Assistant Attorney General
Evan J. Mulholland
Assistant Attorney General
33 Capitol Street
Concord, New Hampshire 03301
603-271-3679