STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

APPLICATION OF GROTON WIND, LLC
NO. 2010-01

# MEMORANDUM OF COUNSEL FOR THE PUBLIC

Counsel for the Public, by his attorneys, the Office of the Attorney General, hereby submits this Memorandum of Law in response to the Presiding Officer's "Procedural Order and Notice of Possible Suspension of Certificate of Site and Facility, dated November 4, 2013 (the "Order and Notice"). In the Order and Notice, the Presiding Officer invited briefs on two questions:

- The first question is: Did the Department of Environmental Services have the authority to modify the certificate regarding the placement of the O&M Building and the turbines?
- The second question is: Does the Office of the State Fire Marshal have the authority to regulate the project and does he have the authority to request suspension of the certificate in the manner contained in Inspector Anstey's letter dated August 12, 2013?

Counsel for the Public urges the Committee to answer question one in the negative and question two in the affirmative. In support hereof, Counsel for the Public respectfully represents as follows:

1. Counsel for the Public was appointed by the Attorney General pursuant to RSA 162-H:9 to represent the public interest and assure that the

project presents an appropriate balance between environmental effects and energy production. Counsel for the Public has all the rights of an intervenor.

2. On May 6, 2011, the Committee issued its Order and Certificate of Site and Facility With Conditions (the "Order") and its Decision Granting Certificate of Site and Facility With Conditions (the "Decision").

3. In both documents, the Committee referred to the project's operations and maintenance building (the "O&M Building") as "described in the Application as Amended" as constituting part of the certificated facility. Order at 1; Decision at 4, 6.

4. In the Order, the Committee provided

> …that the New Hampshire Department of Environmental Services is authorized to specify the use of any appropriate technique, methodology, practice, or procedure associated with the conditions of the Wetlands Permit, the Site Specific Alteration of Terrain Permit, and the Section 401 Water Quality Certificate, including the authority to approve modifications or amendments to said permits and certificates.

Order at 3.

5. In the Decision, the Committee stated that it delegated its "authority to approve amendments" to the wetlands and alteration of terrain permits to DES and incorporated the permits into the Certificate. Decision at 19-20 (referring to "said permits and certificates"). The Decision further stated,

> The Department of Environmental Services is hereby delegated the authority to monitor the project and its compliance with the conditions of the certificate and with all laws and regulations pertaining to the permits that it has issued.

> The Department of Environmental Services is hereby delegated the authority to specify the use of any technique, methodology, practice, or procedure, as may be necessary to effectuate the provisions of this Certificate, however, any action to enforce the provisions of the Certificate must be brought before the Site Evaluation Committee.

Decision at 61. The Committee did not pre-authorize changes to transmission line routes or delegate the approval of any such changes to DES. *See* RSA 162-H:4, III-a.

6. The terms found in the Decision are substantially the same terms that have been included by the Committee in certificates granted to other facilities for many years. *See*, *e.g.*, *In Re*: Joint Motion of Laidlaw Berlin BioPower, LLC and Berlin Station, LLC, N.H. Site Eval. Comm., no. 2011-01, *Order and Amended Certificate*, dated July 12, 2011, at 7; *In Re*: Application of Granite Reliable Power, LLC, N.H. Site Eval. Comm., no. 2008-04, *Order and Certificate of Site and Facility*, dated July 15, 2009, at 3; *In re* Application of Portland Natural Gas Transmission System, N.H. Site Eval. Comm., no. 1996-01, *Order*, dated July 16, 1997, at 2. Berlin Station sought Committee approval for changes far more modest than those at issue here. *See* In re Berlin Station, LLC, SEC no. 1011-01, *Decision Granting the Motion of Berlin Station, LLC for a Second Amendment of the Certificate of Site and Facility*, dated April 16, 2013.

7. The 2010 Application described the dimensions of the O&M Building and its yard and specified its location by reference to the Groton Wind Project Map, being figure 3 of the 2010 Application on page 8 thereof. In that figure the O&M Building is shown located on the east side of the access road and appears to be some

distance away from the road. In the Site Plans submitted to the Committee with the 2010 Application, the O&M Building and associated structures and excavations are shown east of Groton Hollow Road and east of Clark Brook. Application, vol. II, App. 2, C-3.1.

8. According to the Application Supplement, vol. IA, dated October 12, 2010, revised plans were submitted to the Committee and DES, dated July 9 2010, but the changes in those plans do not appear to have had any relation to the O&M Building. *See* Supplemental Testimony of Rendall & Walker, dated October 12, 2010, at 3-4.

9. On or about November 10, 2011, Groton Wind submitted revised plans dated October 28, 2011, to DES showing revisions to the previously permitted plans dated July 9, 2010. The 2011 plans show the O&M Building moved to the west side of Groton Hollow Road and the west side of Clark Brook.

10. In addition, Groton Wind made a number of other modifications to the construction of the facility that were neither reviewed and approved by the Committee nor reported to it by Groton Wind. Those changes are all shown on an aerial illustrated to depict Project Revisions, Groton Wind LLC, dated October 2011, which was submitted by the Certificate Holder to DES.

11. DES approved the changes with respect to the alteration of terrain and wetlands permits on December 5, 2011. The Alteration of Terrain Bureau Permit Amendment, dated December 5, 2011, expressly provided that the AoT permit "does not relieve the Applicant from the obligation to obtain other local, state or federal

permits that may be required ….” AoT Amendment, dated Dec. 5, 2011, attch. A. to Letter from Susan Geiger to the Committee, dated Jan. 16, 2013 (Project Specific Conditions no. 6).

12. RSA 162-H:5, I, provides,

> No person shall commence to construct any energy facility within the state unless it has obtained a certificate pursuant to this chapter. Such facilities shall be constructed, operated and maintained in accordance with the terms of the certificate. Such certificates are required for sizeable changes or additions to existing facilities.

## ARGUMENT

## I. THE DEPARTMENT OF ENVIRONMENTAL SERVICES DID NOT HAVE THE AUTHORITY TO MODIFY THE CERTIFICATE REGARDING THE PLACEMENT OF THE O&M BUILDING AND THE TURBINES.

### A. Only The Committee May Modify The Certificate.

The Committee is “granted only limited and special subject matter jurisdiction … . That jurisdiction is dependent entirely upon the statutes vesting the agency with power and the agency cannot confer jurisdiction upon itself. Furthermore, a tribunal that exercises a limited and statutory jurisdiction is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation.” *Appeal of Campaign for Ratepayers’ Rights*, 162 N.H. 245, 250 (2011) (internal quotations and citations omitted).

Under the governing statute for questions of delegation, the Committee possessed only limited powers of delegation. From one section it could delegate monitoring construction. From another, it could delegate only

the ability to specify certain practical and technical methods, approved by the Committee or authority to specify minor changes in route alignment under particular circumstances not present here. Under RSA 162-H:4, III,

> The committee may delegate the authority to **monitor** the construction or operation of any energy facility granted a certificate under this chapter to such state agency or official represented on the committee as it deems appropriate, but, subject to RSA 162-H:10, it **may not delegate authority to hold hearings, issue certificates, determine the terms and conditions of a certificate, or enforce a certificate**. Any authorized representative or delegate of the committee shall have a right of entry onto the premises of any part of the energy facility to ascertain if the facility is being constructed or operated in continuing compliance with the terms and conditions of the certificate. During normal hours of business administration and on the premises of the facility, such a representative or delegate shall also have a right to inspect such records of the certificate-holder as are relevant to the terms or conditions of the certificate.

Under RSA 162-H:4, III-a,

> The committee may delegate to an agency or official represented on the committee the authority to specify the use of **any technique, methodology, practice, or procedure** approved by the committee within a certificate issued under this chapter, or the authority to specify **minor changes in the route alignment** to the extent that such changes are authorized by the 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.

The authority to site the O&M Building and a turbine string in one place versus another does not fit any of these categories of delegation. These siting changes went far beyond monitoring the construction or operation. They were not merely a question of technique, methodology, practice or procedure. Nor were they pre-approved minor changes in route alignment. As such,

authorizing them –which is clearly not what the Committee purported to do[1]– would have been outside the Committee's jurisdiction. Instead, the ability to change the location of major structural components of the facility was expressly excepted from the legislatively granted limited power to delegate.

Under section 162-H:4, III, the Committee may not "delegate authority to … determine the terms and conditions of a certificate …." Further, under RSA 162-H:5, I, "facilities shall be constructed, operated, and maintained in accordance with the terms of the certificate."[2] Under the terms and conditions of the Certificate granted on May 6, 2011, the Committee determined that Groton Wind "site, construct and operate the Project as outlined in the Application, as amended, and subject to the terms and conditions of the Decision and this Order." Order at 2. Consequently, the only way to site and construct the facility in the way Groton Wind did would be to change and re-determine the terms and conditions of the Certificate. Logically, under 162-H:4, III, re-determining the basic siting and construction authorization would be no more delegable than the original determination.

---

[1] Although outside the scope of the questions on which the Committee requested briefing, to the extent substantive arguments are accepted on this issue, Counsel for the Public will argue that actually authorizing a change to the certificate was also far beyond what DES purported to do.

[2] "The word 'shall' is 'a command, which requires mandatory enforcement.'" *Hudson v. Baker*, 133 N.H. 750, 752 (1990).

The statute on its face, and strictly construed in accordance with *Campaign for Ratepayers' Rights,* does not allow the Committee to delegate the re-siting of the facility's components to DES. *See* 162 N.H. at 250 (Committee's exercise of jurisdiction must be "under the precise circumstances and in the manner particularly prescribed by the enabling legislation"). Thus, the answer to the first question posed is, no, DES did not have the authority to modify the Certificate, because such would have been unlawful.

### B. Neither The Order Nor The Decision Granted DES Authority To Modify The Terms And Conditions Of The Certificate.

Assuming for the argument that the Committee *could* delegate authority to change the certificate to DES, it is nonetheless clear that it did not do so. In the Decision and Order, the Committee appropriately exercised its limited authority to delegate by granting DES the authority to "monitor the project and its compliance with the conditions of the certificate and with all laws and regulations pertaining to the permits that it has issued." Decision at 61. The Committee also delegated to DES the "authority to specify the use of any technique, methodology, practice, or procedure, as may be necessary to effectuate the provisions of [the] Certificate." *Id.* Finally, the Committee only authorized DES "to specify the use of any appropriate technique, methodology, practice, or procedure associated with the conditions of the Wetlands Permit, the Site Specific Alteration of Terrain Permit, and

the Section 401 Water Quality Certificate, including the authority to approve modifications or amendments to said permits and certificates." Order at 3. Obviously, the Committee only expressly delegated to DES the power to authorize Groton Wind to modify DES' own permits. There was no apparent attempt to delegate the power to modify the project itself or any of the terms and conditions of the Certificate. Equally obvious is that the remaining delegations, *i.e.*, monitoring, and specification of technique associated with the *DES permits*, cannot be seen as impliedly including the extraordinary power to approve new terms and conditions such as project modifications. To imply such a grant 'wags the dog' and would violate the statute, because the DES permit conditions are subsumed in and subservient to the certificate. *See Appeal of Londonderry Neighborhood Coalition*, 145 N.H. 201, 205 (2000) (it would be improper to delegate to DES the creation of terms and conditions because this is the role of the Committee).

Significantly, DES permits are limited to addressing whether construction of a particular facility impacts wetlands, affects water quality, or alters natural terrain. They do not serve as site approval and do not evaluate the full suite of impacts addressed by the Committee. For instance, they do not assess aesthetic or economic impacts – impacts that are very much at issue with respect to relocation of the O&M Building. As the DES AoT permit unequivocally says, the permits do "not relieve the Applicant from the obligation to obtain other local, state or federal permits that may be required."

## II. THE OFFICE OF THE STATE FIRE MARSHAL HAS AUTHORITY TO REGULATE THE PROJECT.

The Office of the Fire Marshal has broad and significant powers to protect public safety and property granted by the legislature. Pursuant to RSA 153:4-a, the State Fire Marshal is "responsible for supervising and enforcing all laws of the state relative to the protection of life and property from fire, fire hazards and related matters…" In Groton, which does not have a building inspector, the State Fire Marshal has this authority as well. RSA 155-A:7, I.

The Fire Marshal has adopted rules to implement State Fire and Building Codes. RSA 153:5; *see, e.g.,* N.H. Admin. R. Saf-C 6000 (State Fire Code). The Fire Marshal may require the installation of automatic fire suppression or sprinkler systems. RSA 153:5. The Fire Marshal "may inspect all buildings, excluding single family dwellings and multi-unit dwellings containing 2 units, and premises … and, if consent for such inspection is denied or unobtainable, may obtain an administrative inspection warrant under RSA 595-B." RSA 153:14, II(a). If the Fire Marshal finds "any condition that [he] deems to be hazardous to life or property, [he] shall order the hazardous condition to be removed or remedied by written order. If such order requires a structural change or alteration, it shall be approved by the state fire marshal or fire chief before it is effective. Such order shall be complied with by the owner of such premises or buildings within the time limit specified in such order…" *Id.*

The State Fire and Building Codes contained hundreds of detailed and technical specifications concerning fire and fire hazards for buildings and structures. This is an intensely detailed regulatory program. The Office of the Fire Marshal is imbued with a high degree of expertise and technical knowledge about these Codes and specifications. The Office of the Fire Marshal is not, however, represented on the Committee. RSA 162-H:3.

While RSA 162-H:16, IV(c) requires the Committee to make a finding that the "site and facility will not have an unreasonable adverse effect on … public health and safety" this grant of authority is not meant to install the Committee as the 'Fire Marshal' of energy facilities within the Committee's jurisdiction. Committee members have a broad amount of expertise and knowledge but do not necessarily share the expertise and knowledge on fire and life safety that the Office of the Fire Marshal clearly possesses. The SEC process and Site and Facility certification do not lend themselves to a high degree of technical specification or regulation. Instead, the Committee's authority is to make a somewhat generalized "finding" that the project will not have an unreasonable adverse effect on safety. While the statute promises many benefits to promote the sustainable development of energy projects, it does not establish either a new regulatory program for safety of energy projects, or, for that matter "freedom from regulation." *See Stablex Corp. v. Town of Hooksett*, 122 N.H. 1091, 1104 (1982) (comprehensive hazardous waste disposal law does not preempt local health and safety laws); *accord Panhandle East.*

*Pipeline Co. v. Public Serv. Comm'n,* 332 U.S. 507, 522 (1947); *Irving Tanning Co. v. Maine Super't of Ins.*, 496 B.R. 644, 663 (B.A.P. 1st Cir. 2013).

The Committee considered the scope of the Fire Marshal's regulation of the facility in its Decision and said, "we find that the Applicant shall comply with all applicable federal and state fire, safety, and building codes and we condition the Certificate upon this requirement." Decision, at 74. The Order and Certificate, however, contain no corresponding order or condition. This in effect leaves the Fire Marshal in control of this matter, and based on the discussion in the Decision, this is what the Committee intended.[3]

While the Committee "may delegate the authority to monitor" the operation of a permitted facility, it expressly may not delegate the power to enforce the terms of a certificate. RSA 162-H:4. In the case of the State Fire Marshal's authority there is no need to delegate to him the authority he already has by law and which

[3] The Committee has often dealt with the problem faced by an applicant when the non-SEC regulatory process is outside the reach of the Committee. *See Application of Granite Reliable Power, LLC*, Site Eval. Comm. no. 2008-04, Order Denying Motions for Rehearing, dated Nov. 9, 2009, at 6; *see also In re Joint Motion of Laidlaw Berlin Biopower, LLC and Berlin Station, LLC for Transfer and Amendment of Certificate*, N.H. Site Eval. Comm., no. 2009-02, Order and Amended Certificate, dated July 12, 2011, at 4 (conditioning certificate upon final approval of PPA by NHPUC). Clearly the Committee does not view the one stop approach provided by the statute as all encompassing. *Accord* RSA 162-H:16, VI & VII. The Committee's jurisdiction is broad for site selection, but in other aspects, limited.

was not taken away by this process.[4] Moreover, on questions of the multitude of everyday law enforcement activities that may arise, the SEC governing law and the Decision and Order are silent. For example, just because the Decision and Order say nothing about the power of the Rumney police to enforce the speed laws against Groton Wind vehicles on Groton Hollow Road, it does not mean that it somehow lost the power to do that or must bring the enforcement of those laws to the Committee. *See Stablex*, 122 N.H. at 1104.

There is no evidence that the legislature intended to effectuate an implicit repeal of the Fire Marshal's powers as they might concern energy facilities. "The intention of the legislature to repeal must be 'clear and manifest.'" *United States v. Borden Co.*, 308 U.S. 188, 198 (1939), (*quoting Red Rock v. Henry*, 106 U.S. 596, 602 (1883)). The climate for repeal by implication is "frosty and inhospitable" in New Hampshire. *Opinion of the Justices*, 107 N.H. 325, 328 (1966). Absent evidence of "convincing force" that the legislature intended a repeal, the rule will not be invoked. *State v. Wilton Railroad*, 89 N.H. 59, 61-62 (1937). Repeal by implication will not be found if any reasonable construction of the statutes can avoid it. *State v. Miller*, 115 N.H. 662, 663 (1975); *State v. Otis*, 42 N.H. 71, 72-73 (1860) (Doe, J.).

[4] Underlying the question of jurisdiction of the Fire Marshal is the question of jurisdiction of the Committee. Although the Committee may presumably properly determine that its authority *does not* preempt that of the Fire Marshal, a ruling that its authority *does* preempt that of the Fire Marshall appears outside the scope of the Committee's statutory authority for the reasons discussed herein. As such, it would not appear binding on the Fire Marshal and it does not appear that the Fire Marshal has or could submit himself to the jurisdiction of the Committee with respect to this finding.

With amendments, the Fire Marshal's powers have existed since at least 1947. RSA 162-H had its origins in 1974. We are unaware of anything in the complex legislative history of Chapter 162-H which clearly and manifestly shows the intent of the legislature to override the State Fire Code, the State Building Code or the State Fire Marshal's powers to enforce them in preference to RSA 162-H's land use and siting program. As the Committee appears to have recognized by not delegating and not specifying particular Fire and Building Code provisions to follow in the Order, the two laws can be rationally and reasonably read to function together. The issuance of the Certificate, and the right of Groton Wind to hold it, is "condition[ed]" upon Groton Wind's compliance with those Codes and the Fire Marshal's authority. *See* Decision, at 74 ("the Applicant shall comply with all applicable federal and state fire, safety, and building codes and we condition the Certificate upon this requirement."). The fact that the legislature chose not to include the Office of the Fire Marshal or any other Department of Safety officials on the Committee also evidences that while a generalized finding about public health and safety of a facility was appropriate, the details of that in their technical specificity and everyday application are left to the officials appropriately designated by the legislature in other chapters. The Committee is not the fire marshal of energy facilities.

## III. THE STATE FIRE MARSHAL HAS AUTHORITY TO REQUEST SUSPENSION OF THE CERTIFICATE

In his letter dated August 12, 2013, the Fire Marshal did two notable things. First, he informed the Committee that Groton Wind was not in compliance with State Fire and Building Codes which was a "condition" to the certificate. Second, he informed the Committee that the Certificate had been obtained by means of a material misrepresentation of fact – "Mr. Edward Cherian, project manager, testified that the State Fire Marshal's Office had refined its position on fire suppression and 'now requires only compliance with the [intent of the codes not the actual specifications].' Mr. Cherian's statement is not true." Both of these events give the Fire Marshal the power to seek suspension and revocation of the certificate. *See* RSA 162-H:12, I, and II; *see Appeal of Regenesis Corp.*, 156 N.H. 445, 454 (2007) (not an abuse of discretion for agency to revoke permit based on material misrepresentation in permit process).

With respect to the compliance issues, as previously discussed, the Fire Marshal has the authority to seek enforcement of the Fire and Building Codes in his usual manner. The Decision, however, in essence also provided him another arrow: it conditioned the Certificate upon compliance with the Fire and Building Codes. The Fire Marshal, who has express statutory authority to enforce those laws, is the most natural person to seek relief here.

The Fire Marshal also brought to the Committee's attention a separate ground for suspension and revocation. He pointed out that the Applicant during the

hearing made an untrue statement. The record corroborates Mr. Anstey's assertion, and it is clear from the Decision, that the Committee credited and relied to some extent upon the misrepresentation made by the Applicant at the hearing when it conditioned its RSA 162-H:16 safety finding on compliance with the Codes. It is impossible at this point to determine whether the Committee may have decided the case or the fire safety issue differently had the misrepresentation been unmasked at the time.[5] RSA 162-H:12, II does not, however, require that the misrepresentation may have determined the outcome, only that it was material. Its materiality is manifest given that, out of many hours of testimony, it was quoted in the Decision and appears to have been a significant part of the basis for making the conditional safety finding. Decision, at 74.

Whether the Certificate ought to be suspended or revoked is not, however, the point of the present briefing. Instead all that needs be shown is whether the Fire Marshal, about whom the misrepresentation was made, should have the ability to raise the issue and pursue it. Given the intimacy of the misrepresentation to the Fire Marshal's regulation of the facility and the Committee's deference to the Fire Marshal in its Decision, it is fitting and natural that he should be the one to raise it and, if he wishes, prosecute it. *See* RSA 153:4-a ("The state fire marshal shall be

[5] The record also reflects that the introduction of Mr. Cherian's testimony as an "update" at the hearing brought an objection from Counsel for the Public because of the surprise and the inability to cross examine the applicant's witness about the assertion. Hearing Transcript, 3/22/11, A.M. at 103-104. The objection and motion to strike the testimony were subsequently overruled. Hearing Transcript, 3/22/11, P.M. at 4.

responsible for supervising and enforcing all laws of the state relative to the protection of life and property from fire, fire hazards and *related matters*"). Where Groton Wind may have obtained a Certificate based upon a finding from the Committee regarding fire safety by means of an untrue statement about the Fire Marshal's regulatory program, it seems apparent that the certification proceeding is at least a "related matter" and within his authority.

## Conclusion

Based upon the foregoing, Counsel for the Public urges the Committee to find that DES did not have the authority to approve modifications to the project or the Certificate. He also urges the Committee to find that the State Fire Marshal retains all of his authority to regulate the project with respect to fire safety, and inherent in that regulation, the authority to seek a suspension of the Certificate.

Respectfully submitted,

COUNSEL FOR THE PUBLIC

JOSEPH A. FOSTER
ATTORNEY GENERAL

Dated: December 4, 2013

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

CERTIFICATE OF SERVICE

I, Peter C.L. Roth, do hereby certify that I served the foregoing upon the parties by email.

December 4, 2013 /s/ Peter C.L. Roth
Peter C.L. Roth

#977877