

**STATE OF NEW HAMPSHIRE  
SITE EVALUATION COMMITTEE**

<i>In re</i> Proceeding to Suspend the Certificate of Site and Facility of Groton Wind, LLC.	) ) ) ) )	No. 2010-01
--	-----------------------	-------------

**OBJECTION OF COUNSEL FOR THE PUBLIC  
TO MOTION TO AMEND CERTIFICATE**

Counsel for the Public, by his attorneys, the Office of the Attorney General, hereby objects to the Contested Motion of Groton Wind, LLC to Amend Certificate of Site and Facility (the “Motion to Amend”). Counsel for the Public objects because the Motion to Amend does not state a sufficient basis on which to amend Groton Wind’s Certificate and because it is untimely. 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. 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.

5. The 2010 Application and plans also showed the locations of the access road and turbine pads for the eastern turbine string. Application, vol. II, App. 2, C-2.5 and C-2.6.

6. 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 or the turbine string at issue. *See* Supplemental Testimony of Rendall & Walker, dated October 12, 2010, at 3-4.

7. 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. From a wooded location by itself, to a cleared and terraced area in the midst of a residential neighborhood. Without notifying the Committee or seeking its authorization, Groton Wind constructed the O&M Building in its present location and the turbine string in its present unapproved location.

8. 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. Most significantly, the northern end of the eastern turbine string shows WTs E-2, E-3, E-4, E-5 and E-6 (the “Northeast String”) located on 2 parallel access roads joined near E-6 and running north. In the October 28, 2011 plans, however, the Northeast String is now shown on a single access road following a different northerly path. See Sheet C-2.6.

9. 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, attach. A. to Letter from Susan Geiger to the Committee, dated Jan. 16, 2013 (Project Specific Conditions no. 6).

10. Without seeking any approval from the Committee or notifying the Committee of its intent to do so, and without complying with the Fire and Building Codes, the Applicant went ahead and constructed the O&M Building in an unapproved location and the constructed the Northeast String in a significant deviation from the approved plans.

11. 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.

12. The question of the location of the O&M Building and the Northeast String have been before the Committee for a year without Groton Wind seeking in any of its submittals and arguments until now to have the Certificate amended to approve the new locations of the project.

## ARGUMENT

### I. THE MOTION TO AMEND SHOULD BE DENIED BECAUSE IT DOES NOT STATE SUFFICIENT BASIS UNDER RSA 162-H:16.

Groton Wind's Motion to Amend provides prefiled testimony of the facility's wetlands professional to address the wetlands impacts that were already reviewed and addressed by the Department of Environmental Services. Groton Wind bears the burden of proof on its Motion to Amend. Site 202.19(b). The Motion to Amend presents no evidence or offers of proof on any of the other required findings under RSA 162-H:16. *See* Site 301.03 (h), (i), (j), and (k) (setting forth requirements of a complete application). The Motion to Amend, instead, addresses all of the other required findings with a legal argument. Groton Wind argues that because the Committee did not specifically address aesthetics, historic sites, air and water quality, natural environment, and public health and safety on a standalone basis when the O&M Building and the Northeast String were proposed for different and distinct locations, that it should not do so now when they are located in new and uncertificated locations. Motion to Amend at 7 ("it is reasonable to conclude that the Committee's original determinations are not undermined by the revised location"). There is no effort by Groton Wind to describe the new location of the O&M Building or the Northeast String and access road locations. There is no effort made by Groton Wind to address any possible impacts caused by these facilities in these

locations with respect to noise, visual impacts, historic and cultural impacts, orderly development of the region, natural environment, or public safety.<sup>1</sup>

Instead, these bedrock elements of the Committee's jurisdiction are swept aside by Groton Wind with an argument principally based on the absence of any evidence, analysis or information. Without evidence supporting each of the required findings, and alternatives analyses, the Motion to Amend cannot be granted.

Counsel for the Public, having seen the O&M Building as constructed believes that there is a strong likelihood that the Committee would find that the present location would not satisfy many of the statutory criteria. But because Groton Wind has not met its burden of production, the Motion ought to be denied without further proceeding. Counsel for the Public, however, reserves the right to seek the retention of experts pursuant to RSA 162-H:10 and to present evidence on any of the required findings under RSA 162-H:16, should the Committee determine to proceed with an adjudicative hearing on this very deficient and much belated Motion to Amend.

---

<sup>1</sup> One might also question whether Groton Wind's violations of the terms of the Certificate evidence a lack of managerial capability, also calling for denial of the relief requested.

## II. THE MOTION TO AMEND IS NOT TIMELY

Prior to the Motion to Amend, the Committee Chair issued a Notice of Possible Suspension, on November 4, 2013, commencing a proceeding against Groton Wind to suspend its certificate for violating the terms of its Certificate. Under the Committee's rules, the notice commenced an adjudicative enforcement proceeding. N.H. Admin. R. Site 302.01. If the outcome of that proceeding is that violations of the terms of the Certificate are found, the Committee must suspend the Certificate until such time as the violations are corrected. Site 302.01(d). A further consequence of Groton Wind's violations could be the imposition of significant civil penalties. *See* RSA 162-H:19 ("Any construction or operation of energy facilities in violation of this chapter, or in material violation of the terms and conditions of a certificate issued under this chapter, may result in an assessment by the superior court of civil damages not to exceed \$10,000 for each day in violation"). Thus, the jurisdiction of the Committee is now directed solely to enforcement of the terms of the Certificate with an adjudicative proceeding to suspend the Certificate now underway. The Motion to Amend, therefore, is not timely because it comes after the Committee's jurisdiction is directed to enforcement by Certificate suspension.

It would be an abuse of the Committee's jurisdiction to allow Groton Wind to subvert and distract the Committee with a request for amendment two years after the project was built in violation of the Certificate and after the

commencement of the enforcement proceeding. The time to amend the Certificate with the changes for which approval is sought now was in 2011, before the facility was constructed, not two years afterward. Therefore, the Motion to Amend should be denied as untimely, but without prejudice pending the outcome of the enforcement proceeding. Groton Wind must first deal with the consequences of its violations before it can ask the Committee to exercise grace and discretion in its favor.

In the Motion to Amend, Groton Wind has referred to no appropriate legal authority for the relief it seeks. Its reference to the uncontested *Berlin Station* case is well off the mark. Berlin Station, unlike Groton Wind, sought leave to amend its certificate *before* it constructed the requested changes and before any enforcement proceeding had begun.<sup>2</sup> Thus, the “reasonableness” standard deduced from *Berlin Station* does not apply here especially where Groton Wind did not itself act reasonably. The standard it must now meet, in light of the decision it made to break the rules (instead of asking permission) and then to seek forgiveness, is that it has not in fact violated the terms and conditions of its Certificate, not that somehow doing so should be determined to be reasonable and forgivable. The measure of whether there are violations should not be:

---

<sup>2</sup> It is also important that the scope of the changes proposed by Berlin Station for which it sought Committee approval were, in comparison to what Groton Wind did without permission, very modest. No one contested the Berlin Station motion either, so its value as precedent is minimal.



‘would it otherwise be permitted?’ Site 302.01 does not allow for such a relaxed and unaccountable response to the violations. If the violations are found, suspension “shall” result until they are “corrected.” The statute and rules do not allow for after-the-fact permitting, they require correction. Site 302.01(d) (“If the committee determines that a violation has occurred following an adjudicative hearing, the committee *shall* issue an order that suspends the holder’s certificate...”) (emphasis added).

To allow what Groton Wind asks with its Motion to Amend would deprive RSA 162-H:5, I, N.H. Admin. R. Site 302, RSA 162-H:12, I, and RSA 162-H:19, of any force or effect because in nearly any case a facility owner could build without regard to a certificate, then, if caught, plead to the Committee to exonerate the violations by amendment and thereby moot the enforcement. This would not be consistent with the ends of justice. *Accord United States Bancorp Mortg. Co. v. Bonner Mall Assocs. L.P.*, 513 U.S. 18, 24-25 (1994 (mootness principles must be applied “most consonant to justice’ . . . in view of the nature and character of the conditions which have caused the case to become moot.”).

Wherefore, Counsel for the Public prays that the Committee deny the Motion to Amend, and grant him such other and further relief as may be just.

Respectfully submitted,

COUNSEL FOR THE PUBLIC

JOSEPH A. FOSTER  
ATTORNEY GENERAL



Dated: December 16, 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 16, 2013

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

#981933