

STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

APPLICATION OF GROTON WIND, LLC
NO. 2010-01

PREHEARING MEMORANDUM OF COUNSEL FOR THE PUBLIC

Counsel for the Public, by his attorneys, the Office of the Attorney General, hereby submits this Prehearing Memorandum with respect to issues remaining for determination.

The Presiding Officer in his Procedural Order and Notice of Final Public Hearing on the Merits, as amended as of April 13, 2014, has indicated that the hearing will include final adjudication of the Applicant's Motion to Amend the Certificate, the Motion to Approve the Agreement with the Town of Groton, the Applicant's Environmental Health and Safety Plan, Counsel for the Public's Motion to Approve the Settlement Agreement, and the Fire Marshall's Compliance Agreement.

While it is true that Council for the Public has reached a settlement agreement resolving his Enforcement Claims over the location of the O&M Building, he reserved the right to participate in the proceeding to amend the certificate, provided that he would not insist on the O&M Building being removed and relocated. *See* Settlement Agreement, Recitals & ¶ 1. He did this upon the understanding that the Settlement did not resolve the Motion to

Amend which would be dealt with in a separate proceeding in which Groton Wind would bear the burden of proof after the settlement was approved. The Settlement Agreement did not resolve Groton Wind's Motion to Amend the Certificate. Moreover, where the SEC has not previously had the opportunity to give the O&M Building's construction at its present location an appropriate review, or to determine what conditions, if any, that it might place upon its construction and use, it is in the public interest that it do so now.

Counsel for the Public understands that Groton Wind still believes in its legal position that DES properly authorized the relocation through delegation by the Committee. While Counsel for the Public continues to strongly disagree with that position with respect to the Motion to Amend, and did not concede it in the settlement other than as an Enforcement Claim, it is not necessary for the Committee to address or rule on that argument to determine that the public interest is best served by a review. Moreover, it would be imprudent for the Committee to accept that proposition without evidence concerning DES's actions and without considering the various legal arguments made by the parties. *See, e.g., Sinclair v. Bow*, 125 N.H. 388, 393 (1984) (doctrine of implied authority depends upon the "agent's understanding of his authority"); *see* Memorandum of Counsel for the Public, dated December 4, 2013; Reply Memorandum of Counsel for the Public, dated Jan. 6, 2014. Groton Wind has presented no evidence demonstrating that, when it approved the amendments to the wetlands permit,

DES understood it was also acting under delegated authority from the Committee to approve changes to the certificate.

Even if it is true that the Committee could and did delegate such extraordinary authority, such a delegation does not divest the SEC of its predominant power to exercise its jurisdiction. RSA 162-H:4, I, (c) and (d); *see In re Boston & Me. R.R.*, 82 N.H. 116, 116 (1925) (“the exercise of such delegation does not extend beyond expressed enactment or its fairly implied inferences...power and authority not granted are withheld”). The Committee has, and retains, the exclusive and non-delegable jurisdiction to “issue certificates, determine the terms and conditions of a certificate, or enforce a certificate.” RSA 162-H:4, III. The Committee cannot divest itself of its jurisdiction unless the statute allows such; it does not so allow. *See Appeal of Campaign for Ratepayers’ Rights*, 162 N.H. 245, 250 (2011). Under its clear statutory authority, the SEC can and should proceed to consider Groton Wind’s Motion to Amend. That authority does not, as Groton Wind argues, require the Committee first to determine that DES was not delegated authority to approve the relocation of the O&M Building. As the Supreme Court held in *Boston & Maine*, that question is “immaterial.” 82 N.H. at 119.

Respectfully submitted,

COUNSEL FOR THE PUBLIC

JOSEPH A. FOSTER
ATTORNEY GENERAL

Dated: April 14, 2015

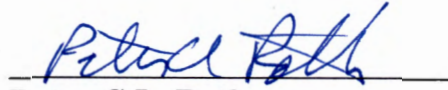


Peter C.L. Roth
Senior Assistant Attorney General
33 Capitol Street
Concord, New Hampshire 03301
603-271-3679

CERTIFICATE OF SERVICE

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

April 14, 2015



Peter C.L. Roth