

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

RE: Petition of Antrim Wind, LLC
for Jurisdiction

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Docket No. 2011-02

REPLY MEMORANDUM OF COUNSEL FOR THE PUBLIC

Counsel For The Public, Peter C.L. Roth, hereby makes this reply memorandum to the Petitioner's Reply to the Response of Counsel for the Public to Counsel for the Public (the "Petitioner's Reply"). Counsel for the Public requests that the relief requested by the Petitioner in its Petitioner's Reply be denied, because it is not made in proper form, the Petitioner lacks standing to object, the issue is non-justiciable and because the grounds for the requests are not meritorious. In support hereof, Counsel for the Public respectfully represents as follows:

1. On April 20, 2011, Counsel for the Public was appointed by Attorney General Michael A. Delaney pursuant to RSA 162-H:9. The appointment was made in response to a request from the Chairman of the Committee to the Attorney General on April 20, 2011.
2. On April 22, 2011, at the hearing on the Petition, Counsel for the Petitioner, delivered a copy of the Petitioner's Reply to the Response of Counsel for the Public to Counsel for the Public.
3. In its Reply, the Petitioner requests that the Committee strike the Response filed by Counsel for the Public and requests that the views that he presented not be considered.

4. The requests that the Response be struck and the views of Counsel for the Public not be considered should be denied because they are not in the proper form of a motion and in compliance with the rules. Site 202.13.

5. The Committee should deny the request to exclude Counsel for the Public for the following reasons:

- The appointment of Counsel for the Public is not an action that is subject to an adjudicatory proceeding and thus there should not be a contest over it here. *See* RSA 541-A:29 & 31. The Petitioner is not aggrieved by the decision of the Attorney General to appoint Counsel for the Public and thus lacks standing to challenge it. Moreover, there does not appear to be any avenue in this proceeding for making such an objection by anyone – simply put, the appointment of Counsel for the Public was not an act by the Committee that it can review or undo. With that in mind, where there is no proper way to challenge the appointment itself, there is no basis for striking Counsel for the Public’s written pleading. RSA 162-H:9 (“The counsel shall be accorded all the rights and privileges, and responsibilities of an attorney representing a party in formal action . . .”)
- The Petitioner ignores recent precedent where Counsel for the Public was appointed even though no application had yet been filed. *E.g. In re Community Energy, Inc. (Lempster Wind, LLC)*, SEC no. 2006-01, Jurisdictional Order, dated September 23, 2006; *In re Community Energy, Inc. (Lempster Wind, LLC)*, SEC no. 2006-01, Order and Decision, dated June 28, 2007 at 11 (counsel for the

public appointed June 20, 2006) & at 2 (application filed August 28, 2006).¹ In addition, if merely being a potential applicant gets the Petitioner through the statutory door, *but see* RSA 162-H:2 XI and XII (using a particularized definition for petitioner for a renewable energy facility that is different from the definition of petitioner for other kinds of facilities), a “potential” application should also be sufficient for appointing Counsel for the Public. *Accord United States v. Dotterweich*, 320 U.S. 277, 280 (1943) (Frankfurter, J.) (“The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection. Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely a collection of English words.”)

- The Petitioner wants to have its cake and eat it too --it seeks jurisdiction yet without any of the burdens of jurisdiction, including the requirement of application and participation by Counsel for the Public, and simultaneously wants to limit intervenors on the basis that Counsel for the Public speaks for them. *See* Petitioner’s Response to Intervention Requests, dated 4/21/2011 at 4 and 18 (“it is important that all intervenors understand the role that Public Counsel plays in the proceeding, as a spokesperson and resource for members of the public...”). This stratagem should not be condoned in a question so connected to the public interest and the very purpose of the proceeding. *See Dotterweich*, 320 U.S. at 280.

¹ It is worthy of note that Counsel for the Petitioner here was also counsel for Lempster and uses the Lempster example as a valuable precedent for the argument that jurisdiction should be accepted. Petition at ¶ 18.

6. The Committee should deny the request to limit Counsel for the Public's arguments on jurisdiction for the following reasons:

- There is nothing in the statute suggesting that Counsel for the Public's role is limited in the ways urged by the Petitioner. Instead, the statute clearly says that Counsel for the Public has all the rights of an attorney representing a party in formal action. RSA 162-H:9, I. In SEC cases, the "public" is a party and it has the right to be heard on every issue. *Id.* After all, the whole point of the proceeding is to protect the public interest, not simply to provide the Petitioner a forum through which to get projects completed efficiently. RSA 162-H:1. It does not make sense in the context of this public interest statutory program to mute the public's voice on any issue in the proceeding by restricting what its counsel is permitted to say. *Accord Dotterweich*, 320 U.S. at 280 (statutes to protect the public interest should be liberally construed).
- Counsel for the Public's general function is nearly the same as that of the Committee itself under RSA 162-H:1. *Compare* 162-H:1, I (describing that the purpose of the proceeding is "the public interest requires that it is essential to maintain a balance between the environment and the possible need for new energy facilities in New Hampshire") *with* RSA 162-H:9 ("counsel shall represent the public in seeking to protect the quality of the environment and in seeking to assure an adequate supply of energy."). *See Petition of Laflamme (Clean Power Develop., LLC)*, SEC no. 2009-03, Order dated 4/7/2010 at 7 ("Before it can assert jurisdiction, the Committee must find that the requirement of the Certificate is consistent with the findings and purposes set forth in RSA 162-H:1. The

purpose of RSA 162-H:1 is to ‘assure that the state has an adequate and reliable supply of energy in conformance with sound environmental principles.’”). As such, his views should be heard and considered just as the Committee itself is heard and considered in deliberation. In contrast, following the Petitioner’s logic, one could wonder whether the Committee itself would still be entitled to take a position on the question of jurisdiction because of a lack of express statutory authorization to opine on the question. *See* RSA 162-H:4, I (setting forth powers of the committee which do not expressly include the power to determine its own jurisdiction); Site 103.01(b)(“The committee shall be responsible for evaluating, siting, and monitoring the construction and operation of energy-related facilities as specified in RSA 162-H.”). Absurd. It would be equally absurd, however, to conclude that even though Counsel for the Public’s role fits squarely within the jurisdictional question, he should not be heard on it.

Wherefore, Counsel for the Public prays that the Petitioner’s request to strike Counsel for the Public’s pleading or to disregard his views on the question of jurisdiction be rejected for the reasons set forth above, and for such other and further relief as may be just.

Respectfully submitted,

COUNSEL FOR THE PUBLIC

By his attorneys

MICHAEL A. DELANEY
ATTORNEY GENERAL

A handwritten signature in black ink, reading "Peter C.L. Roth", with a horizontal line extending to the right from the end of the signature.

Dated: May 2, 2011

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