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August 3, 2012

Via Hand-Delivery and Electronic Mail
Ms. Jane Murray, Secretary
New Hampshire Site Evaluation Committee
N.H. Department of Environmental Services
29 Hazen Drive
Concord, NH 03302-0095

Re: Docket 2012-01 - Application of Antrim Wind Energy, LLC for a Certificate of Site and Facility for a Renewable Energy Facility

Dear Ms. Murray:

Enclosed for filing with the New Hampshire Site Evaluation Committee in the above-captioned matter please find an original and 9 copies of Applicant's Replies to Memorandum of Law of Counsel for the Public, Antrim Planning Board's Memorandum of Law and the Pre-Hearing Legal Memorandum of Law by Industrial Wind Action Group.

Please contact me if there are any questions about this filing. Thank you.

Very truly yours,

Susan S. Geiger

Enclosures

cc: Service List, excluding Committee Members
Clark A. Craig, Jr. (by first class mail)

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

DOCKET NO. 2012-01

APPLICATION OF ANTRIM WIND ENERGY, LLC
FOR A CERTIFICATE OF SITE AND FACILITY

APPLICANT'S REPLY TO MEMORANDUM OF LAW OF COUNSEL FOR THE PUBLIC ON JURISDICTION OF SITE EVALUATION COMMITTEE TO APPROVE APPLICANT'S SUBDIVISION PLAN AND ANTRIM PLANNING BOARD'S MEMORANDUM OF LAW CONCERNING THE COMMITTEE'S LACK OF AUTHORITY OVER SUBDIVISION AND PRE-HEARING LEGAL MEMORANDUM BY INDUSTRIAL WIND ACTION GROUP ADDRESSING THE COMMITTEE'S AUTHORITY TO CREATE SUBDVIDED LOTS

NOW COMES Antrim Wind Energy, LLC ("AWE" or "the Applicant") by and through its undersigned attorneys, and, respectfully submits this reply to the memoranda of law submitted by Counsel for the Public, the Antrim Planning Board, and the Industrial Wind Action Group ("IWAG") regarding the Site Evaluation Committee's (the "SEC" or "Committee") authority to create a subdivided lot.

I. INTRODUCTION

In their memoranda of law, Counsel for the Public, the Antrim Planning Board, and IWAG assert that RSA 162-H does not preempt local land use regulation of renewable energy projects, including subdivision approval. *Memorandum of Law of Counsel for the Public on Jurisdiction of Site Evaluation Committee to Approve Applicant's Subdivision Plan* ("Counsel for the Public Memorandum"); *Antrim Planning*

Board's Memorandum of Law Concerning the Committee's Lack of Authority over Subdivision ("Antrim Planning Board Memorandum"); *Pre-Hearing Legal Memorandum by Industrial Wind Action Group Addressing the Committee's Authority to Create Subdivided Lots* ("IWAG Memorandum"). These memoranda of law misapprehend the Legislature's purpose in establishing a single process for approval of all state and local permitting for a renewable energy project under RSA 162-H:2 and the relationship between the various applicable statutes. As discussed more fully below, the substation falls within the SEC's jurisdiction as an "associated facility" under RSA 162-H:2, XII, and the Site Evaluation Committee's decisions preempt local land use processes, including subdivision authority.

II. ARGUMENT

A. THE SITE EVALUATION COMMITTEE HAS JURISDICTION OVER THE INTERCONNECTION YARD

As a preliminary matter, Counsel for the Public asserts that the proposed substation does not fall within the SEC's jurisdiction. According to Counsel for the Public, "[w]here the substation is part of the distribution or transmission system, it is not 'associated' equipment for the Applicant's facility and this Committee does not have jurisdiction over it. If somehow, part of the 'project substation' is associated with the generation of the facility, the Applicant should establish that with expert testimony." *Counsel for the Public Memorandum* at 6. Further, Counsel for the Public asserts that because PSNH will own the substation, it does not fall within the ambit of the SEC's jurisdiction. These arguments are without merit, however, because they are not supported by the text of RSA 162-H or the Committee's precedent. In addition, they directly contradict Counsel for the Public's positions in previous dockets before this Committee.

RSA 162-H:2, XII includes in its definition of "renewable energy facility" "electric generating station equipment and ***associated facilities*** . . ." RSA 162-H:2, XII (emphasis added). It is axiomatic that a utility-scale electric generating facility must be interconnected to the grid, and therefore must include required step-up facilities. In the Groton Wind docket, the Site Evaluation Committee confronted the issue of whether an application for a certificate of site and facility for a wind project should include associated facilities such as lines and substation facilities needed to connect the wind project to the regional power grid. During the pendency of the hearings regarding the Groton project, the Applicant alerted the Committee that an alternate interconnection route and a step-up transformer, which were not described in the application, would be required by the project. *Application of Groton Wind, LLC for a Certificate of Site and Facility for a Renewable Energy Facility in Groton, New Hampshire*, Order on Pending Motions and Further Procedural Order (Dec. 14, 2010) at 3-4. Responding to the proposed route and transformer station, Counsel for the Public submitted a detailed and lengthy memoranda asserting that "[t]he 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***." *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 (Nov. 19, 2010) at 8 (quoting RSA 162-H:2) (emphasis added). Counsel for the Public went on to cite *Public Serv. Co. of New Hampshire v. Town of Hampton*, 120 N.H. 68, 71 (1980) for the proposition that it is

"'inconceivable' that with the comprehensiveness of the statute power lines need (sic) 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." *Id.* Counsel for the Public also concluded that the ownership of these facilities was irrelevant to the Committee's jurisdiction. *Id.* The Committee required an additional adjudicative process for these facilities. In so doing, the Committee stated that "[t]hese developments affect the statutory concerns of the Subcommittee and... [i]t is in the public interest to ensure that these matters are appropriately addressed in the course of the proceedings in the docket." *Application of Groton Wind, LLC for a Certificate of Site and Facility for a Renewable Energy Facility in Groton, New Hampshire*, Order on Pending Motions and Further Procedural Order (Dec. 14, 2010) at 4.

Here, however, with respect to the step-up substation in Antrim, Counsel for the Public takes precisely the opposite positions he took in the Groton case. Counsel for Public now asserts that the Applicant does not have standing to seek Committee approval of the substation because the Applicant does not now own the underlying land and because PSNH will own the substation. In addition, Counsel for the Public argues that Committee does not have jurisdiction over substation facilities associated with a wind project, and that the comprehensiveness of the statute does not extend to the substation which is required to interconnect the project to the grid. These positions are unpersuasive as they directly contradict Public Counsel's own previous analysis, as well as the conclusions drawn by the Site Evaluation Committee in the Groton matter, and the plain language of RSA 162-H:2, XII.

B. THE AUTHORITY OF LOCAL LAND USE BOARDS TO REGULATE ENERGY FACILITIES HAS BEEN PREEMPTED BY RSA 162-H, THE NEW HAMPSHIRE SITE EVALUATION LAW.

1. The Site Evaluation Process is more than a "Site Selection and Environmental Protection Statute."

Counsel for the Public asserts that "RSA 162-H is a site selection and environmental protection statute, not a land ownership or local planning statute." *Counsel for the Public Memorandum* at 2. However, this position fails to recognize that RSA 162-H, its legislative history, and long-standing case law all establish that the Site Evaluation Committee process preempts all local land use authorities. *See Applicant's Brief Regarding Authority of the Site Evaluation Committee to Create a Subdivided Lot* at 3-7 (June 24, 2012) ("Applicant's Brief"). Further, Counsel for the Public's assertion that the Site Evaluation Committee's work is merely about "site selection"[1] is not borne out by the records of prior Committee proceedings covering numerous topics beyond site selection, or by the language of RSA 162-H. If the Committee's authority under RSA 162-H were merely limited to site selection, the Legislature would have established a process by which the SEC would approve a site, and the local planning and zoning boards would decide siting details. Since this is not how energy facilities are permitted in New Hampshire, Counsel for the Public's position must fail.

Legislative history cited by Counsel for the Public actually supports the finding that the Site Evaluation Committee was intended to be a *land use* bill: "this is probably the largest environmental bill brought in this session. It is an environmental bill. It is ***a land use bill.***" HB 34, S. Jour. 570 (Mar. 27, 1974) (Sen. Porter addressing bill). Counsel for the Public further cites pages 8-9 of the 1990 legislative report, which states

[1] *Counsel for the Public Memorandum* at 5, 11 and 14.

that separate local review would not make sense, given the fact that "the decision of the SEC is defined to be the final authority. It was felt that the one stop siting concept that is the basis of NH's siting statutes would be severely undermined and the ability of the SEC to evaluate the overall social impacts of facilities would be compromised."[2] *Counsel for the Public Memorandum* at 5 (citing *State of New Hampshire Report of the Energy Facility Siting, Licensing & Operation Study Committee of the New Hampshire General Court* at 8-9 (Aug. 30, 1990) (attached as Exhibit A to Applicant's Brief).

However, in reciting this history, Counsel for the Public fails to recognize that one major goal of the Committee was to eliminate a multi-jurisdictional review process for energy facilities. No one is claiming, for example, that renewable energy projects must seek zoning board relief for height or use restrictions, or planning board approval for site plan requirements. That is because application of these standards to a Site Evaluation Committee Application is impermissible as it would directly contradict legislative history. *State of New Hampshire Report of the Energy Facility Siting, Licensing & Operation Study Committee of the New Hampshire General Court* at 8-9 (Aug. 30, 1990) [attached as Exhibit A to the *Applicant's Brief*] (stating that "it was unreasonable to expect communities to review facilities in separate processes *when the decision of the SEC is defined to be the final authority*.") (emphasis added). Such a

[2] Counsel for the Public also asserts that the Committee can condition approval on a non-regulatory process, citing the ISO-NE System Impact Study development and the PUC's approval of a power purchase agreement ("PPA"), to conclude that the Committee should condition any approval on future planning board action. *Counsel for the Public Memorandum* at 18-19. The Committee has the authority to make decisions regarding local land use and the orderly development of the region. RSA 162-H:16. The Committee does not have the authority or the expertise to draw conclusions regarding impacts to the regional grid; nor does it have authority to regulate public utilities whose PPAs must be approved. In those instances, conditional approval by the SEC is appropriate. Here, where the Committee has the express authority and obligation to establish an integrated process that completes "the planning, siting, construction, and operation of energy facilities," it should not abdicate responsibility for the subdivision-related portions of an associated facility.

conclusion would also contradict longstanding New Hampshire case law. *Public Service of New Hampshire v. Town of Hampton*, 120 N.H. 68, 71 (1980) ("We regard it as inconceivable that the legislature, after setting up elaborate procedures and requiring consideration of every imaginable interest, intended to leave the regulation of transmission lines siting to the whim of individual towns. Towns are merely subdivisions of the State and have only such powers as are expressly or impliedly granted to them by the legislature.")

In a related argument, the Antrim Planning Board asserts that RSA 162-H:16, II is not an expression of preemption despite its statement that "[a] certificate shall be conclusive on all questions of siting, land use, air and water quality."[3] *Antrim Planning Board Memorandum* at 4-5. Instead, according to the Antrim Planning Board, this statement concerns only "finality" of the certificate process. *Id.* at 4. However, this argument is unpersuasive as it fails to recognize that the "finality" of an SEC decision would be rendered meaningless if a Planning Board were given free reign to further regulate a renewable energy project by reviewing subdivision or other land use plans. For example, the Committee's "conclusive" decision regarding "land use" under RSA 162-H:16 could not possibly be considered final if the Planning Board can begin a new, lengthy process regarding an associated facility for which the Board could require additional noise, light, road and public health and safety obligations beyond those contained in the SEC's certificate and from which procedural and substantive appeals can be taken to the Superior Court and then to the Supreme Court. Such processes would denude the certificate "finality" intended by the Legislature in enacting RSA 162-H.

[3] It is unclear what the ultimate meaning of the Planning Board's analysis is, since on page 5 it indicates that "the SEC's process under RSA 162-H ***does*** have some degree of preemptive effect over inconsistent local ordinances." *Antrim Planning Board Memorandum* at 5.

The Antrim Planning Board also asserts that because a Planning Board's subdivision requirements are not inconsistent with the Site Evaluation Committee regulations, separate subdivision regulation by the Planning Board should be permitted. *Antrim Planning Board Memorandum* at 8. The Antrim Planning Board further asserts that the Site Evaluation Committee's processes are akin to hazardous waste regulation, in which the Court has found a "'residual' area of local regulation" which permitted local regulations to be applied "without exclusionary effect." *Antrim Planning Board Memorandum* at 9 (quoting *Town of Pelham v. Browning-Ferris Industries*, 141 N.H. 355 (1996)). These arguments are problematic because, as described above and in the Applicant's Brief, the Site Evaluation Committee is intended to be a single/ "one stop" process that eliminates the obligation to seek approvals from various state or local authorities. If the Legislature had wanted to cede authority over local planning issues such as subdivision approval to the Planning Board, it would have granted a request to that effect made by Deputy Minority Leader Susan Spear in 1990. *Applicant's Brief* at 6.

Finally, Counsel for the Public asserts that the Groton Wind decision stands for the proposition that "the legislature did not intend to usurp the local powers" and that the "Committee cannot regulate local issues because they do not affect orderly development of the region." *Counsel for the Public Memorandum* at 9. Counsel for the Public misconstrues the Groton Wind decision. When read carefully, it is clear that the Groton decision merely stands for the narrow proposition that in considering the "orderly development of the region" the Committee will not give excessive weight to impacts to a "limited number of residences." *Application of Groton Wind, LLC,* SEC Docket No. 2010-01, Decision Granting Certificate of Site and Facility with Conditions (May 6,

2011) at 37-38. In making this determination, the Committee in no way indicated that it was deferring to the judgment of local authorities to decide the project's local impacts. Rather, the holding merely applies the statutory "orderly development" standard; it does not determine that there is both local and state-based review. Notwithstanding Counsel for the Public's claims, the Groton decision does not stand for the proposition that the Committee has turned its back on thirty years of precedent and has ceded its planning authority over energy facilities to municipal planning boards.

2. RSA 162-H Preempts the Field – All Local Land Use Issues Must be Addressed in the Site Evaluation Committee Process.

Counsel for the Public asserts that RSA 162-H leaves room for municipalities to regulate energy facilities. *Counsel for the Public Memorandum* at 12-17. Counsel for the Public construes the Site Evaluation Committee's laws and rules as failing to "apply detailed technical specifications" and contends that these laws and rules are not "'a comprehensive and detailed regulatory scheme governing the design, construction, operations and closure' of energy facilities." *Counsel for the Public Memorandum* at 14 (quoting *North Country Envtl. Servs. V. Town of Bethlehem*, 150 N.H. 606, 615, (2004)). Counsel for the Public, the Antrim Planning Board, and IWAG all assert that the issues addressed in the subdivision regulations are not addressed by the SEC. *Id.* at 16; *Antrim Planning Board Memorandum* at 7; *IWAG Memorandum* at 1-2.

These positions ignore that every detail regarding an energy project, down to engineering plans and standards for construction, are reviewed, approved or denied by the Committee, including details usually reserved to Planning Boards (e.g., road dimensions and usage, noise levels, lighting, setbacks, town services, etc...). *See Petition for Jurisdiction Over Renewable Energy Facility Proposed by Antrim Wind Energy LLC,*

Docket No. 2011-02, Jurisdictional Order (Aug. 10, 2011) at 26 ("The Committee ... has a well developed regulatory scheme designed to address the siting, construction and operation of renewable energy facilities consistent with the purposes and findings articulated in RSA 162-H:1); *see Applicant's Brief* at 8 (regarding the statutory goals of subdivision regulations). The Site Evaluation Committee Rules expressly require, among other things, that the application include the project's effects and mitigation on impacts to "aesthetics," "historic sites," and "public health and safety," and "***local land use***." *See, e.g.*, N.H. Site Rule 301.03 (i) and (j). To assert that the work of the Site Evaluation Committee is ***limited*** to "site selection and environmental and regional economic impacts" is to rely on an overly narrow view of the SEC's jurisdiction.

While local planning boards may not separately regulate a project covered by RSA 162-H, the SEC must take the views of municipal and regional planning commissions and municipal governing bodies into account. RSA 162-H:16, IV. The Committee's decisions consider the types of issues generally addressed by local planning and zoning bodies. *See, e.g., Application of Groton Wind, LLC,* SEC Docket No. 2010-01, Decision Granting Certificate of Site and Facility with Conditions (May 6, 2011) at 38-42 (property values), 43-45 (land use and tourism), 45-46 (decommissioning and the town of Groton's position regarding decommissioning), 77-80 (safety and use of Groton Hollow Road), and 80-88 (noise). In addition, the SEC's analysis incorporates concerns of towns and town planning authorities. *Id.* at 35-37 (incorporating considerations including site access, turbine requirements, site security, public communication and emergency response, use of public roads, noise and setbacks and containing liability,

impacts on character and scenic beauty, as well as the region's transportation and emergency response system).

In the instant docket, the Town of Antrim has agreed that "permits or approvals required by Town regulations and ordinances are not required for any site plans, subdivisions, facilities, buildings, roads other structures certificated by the New Hampshire Site Evaluation Committee." Application of Antrim Wind Energy, LLC, Appendix 17A, paragraph 2.8. The Town's clear expression of its view that it retains no authority over subdivision approvals for components of the AWE project certificated by the SEC must be taken into consideration by the Committee. *See* RSA 162-H:16, IV. Moreover, the Town's agreement is entirely consistent with the position that the Site Evaluation Committee's certification authority preempts local land use regulation.

3. The Doctrine of Repeal by Implication Does Not Apply.

Counsel for the Public asserts that AWE seeks repeal by implication because AWE's request "suggests" that RSA 162-H repeals RSA 674:35 or other local land use laws. *Counsel for the Public Memorandum*, at 7–8. Counsel for the Public misapprehends AWE's arguments and thus inappropriately applies the doctrine of repeal by implication. First, AWE has not asserted that RSA 162-H repeals any other statute by implication. Therefore, the doctrine of repeal by implication is inapplicable here, because repeal by implication is invoked only where it is asserted that a statute is actually *repealed*. *See King v. Sununu*, 126 N.H. 302, 306 (1985) ("A 'repeal' of a statute is effectuated if an *entire act or section is abrogated*.") (emphasis added). In addition, the doctrine is not implicated where a specific statute (like RSA 162-H) is an exception to a general one. *See State v. Wilton R.R.*, 89 N.H. 59, 62 (1937) ("Where a special charter is

followed by general legislation on the same subject, which does not in terms, or by necessary construction, repeal the particular grant, the two are to be deemed to stand together: one as the general law of the land, the other as the law of the particular case.") (quoting *New York, New Haven & Hartford R.R. Co. v. Bridgeport Traction Co.*, 65 Conn 410, 429 (1895)). "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton v. Mancari*, 417 U.S. 535, 550–51 (1974).

AWE has never asserted that RSA 162-H repeals any entire act or section of RSA 674:35 or any other land use law. While, RSA 162-H governs energy facilities specifically, RSA 674:35 is the law of general applicability to subdivisions. General municipal subdivision authority has not been repealed by RSA 162-H, just as no other zoning or land-use statutes have been repealed by RSA 162-H. Both statutes may stand together; one applies specifically to energy facilities, and the other applies to subdivisions generally. Here, it is improper to allege that RSA 674:35 has been repealed by implication. Rather, the proper analysis is that municipal land use authority is preempted by the site evaluation process.

4. Local Land Use Statutes Do Not Indicate an Intent to Divest the Site Evaluation Committee's Authority.

Counsel for the Public asserts that amendments to RSA 672:1 and RSA 674:36 indicate that the legislature intended to maintain local control over renewable energy projects, concluding that the legislature did not intend for the Site Evaluation Committee to preempt local planning authorities. *Counsel for the Public Memorandum* at 9, 15. RSA 672:1 and RSA 674:36 encourage planning regulations which permit renewable energy facilities, and have the ability to impact many locally regulated projects. These

statutes are not rendered meaningless by a finding that the Site Evaluation Committee preempts local land use authorities for larger, utility-scale projects that are subject to the Committee's jurisdiction. Similarly, Counsel for the Public's reliance on the release valve from local regulation that public utilities enjoy under RSA 674:30, III (which permits the Public Utilities Commission ("PUC") to overrule local land use decisions in certain situations) is irrelevant to the instant analysis. *See Counsel for the Public Memorandum* at 10. Energy facilities certificated by the SEC need not obtain waivers of local regulations from the PUC because local land use authorities do not apply.

Citing New Hampshire Practice: Land Use Planning & Zoning, Counsel for the Public asserts that subdivision is the "'exclusive' province of a Town's Planning Board." However, the referenced section pertains only to the province of the Planning Board, as compared with other municipal bodies (e.g., a town meeting)[4] – not as compared with state authority. *Counsel for the Public Memorandum* at 5; 5 N.H. Practice: Land Use Planning & Zoning § 26.03 (Dec. 2011); *see also Antrim Planning Board Memorandum* at 8.

Counsel for the Public's position must also fail as it does not acknowledge the principle of statutory construction that requires a later-enacted, more specific statutory requirement take precedence over an earlier, more general one. *State v. Dean*, 115 N.H. 520 (1975). Here, because RSA 162-H was recently amended in 2009, while RSA 676:18, was last amended in 1995, the provisions of RSA 162-H take precedence.

Finally IWAG asserts that RSA 674:37 and RSA 676:18 should be read to obligate subdivision approval by the Planning Board. *IWAG Memorandum* at 3. As

[4] IWAG asserts that RSA 674:11, relating to municipal maps, supports its conclusions. However, because an official map is irrelevant to the subdivision issue before the Committee, IWAG's argument is unpersuasive.

enunciated fully in the Applicant's Brief on this subject, as well as for the reasons set forth above, reading RSA 676:18 (and RSA 674:37 which is not referenced in the Applicant's Brief but which should be accorded the same treatment as RSA 676:18) together with RSA 162-H, leads to the logical conclusion that the Legislature intended to permit the Committee to approve subdivision plats for submission to the registry of deeds. *Appellant's Brief* at 11-13.

Respectfully submitted,

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August 3, 2012

Certificate of Service

I hereby certify that on this 3rd day of August, 2012, a copy of the foregoing Reply was sent by electronic or U.S. mail, postage prepaid, to persons named on the Service List of this docket, excluding Committee Members.

_____
Susan S. Geiger

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