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November 16, 2015

Mr. David K. Wiesner, Esq.
Site Evaluation Committee
21 South Fruit Street
Concord, NH 03301

RE: Site Evaluation Committee Proposed Rules; Site 301.16 & Site 301.14 (g)
An agency should not by rule adopt new standards which were considered and rejected by the Legislature------An agency should not by rule adopt new standards which conflict with existing statutory standards

Dear Mr. Wiesner:

In advance of the planned meeting on November 18, 2015, we write on behalf of Northern Pass Transmission, LLC ("Northern Pass") to strongly urge the Site Evaluation Committee ("SEC") to **embrace** the preliminary objection submitted by the Joint Legislative Committee on Administrative Rules ("JLCAR") and to revise the proposed rules to comply with JLCAR's staff memorandum discussing the "public interest" and "cumulative impacts" standards (which memorandum has been attached to this letter).

Site 301.16 (including the "net benefits" test) is contrary to legislative intent.

During the 2014 session, the Legislature substantially revised New Hampshire's energy siting law by passing Senate Bill 245. As the JLCAR memo explains, the Legislature provided for "a public interest standard" and specifically considered and rejected a net benefits standard. (JLCAR Comments at pp. 2–3.) While the "net benefits" language was contemplated, it was specifically removed by the Senate Finance Committee. ("On March 20, 2014, the Senate Finance Committee adopted amendment #2014-1125s specifically removing reference to the specific criteria and inserting the phrase 'public interest' as a new standard at RSA 162-H:16, IV(e)). Senate Bill 245 was ultimately enacted by both bodies without reinserting a "net benefits" standard.

JLCAR staff recognized that the SEC now proposes rules that reflect, in substance, the net benefits test. In reference to Site 301.16, the JLCAR memo states: "While these criteria do not include the phrase 'net,' criteria (a) and (b) apparently do refer to net requirements." (JLCAR Comments at 3.) JLCAR staff further pointed out that "criteria (c) and (d) almost quote the language the Senate removed from SB 245." (Id.) We note further that criteria (e) has the same substantive effect as (a) and (b).

Site 301.16 violates JLCAR law and rules and forms the basis for an objection as "Contrary to the intent of the legislature." RSA 541-A: 13, IV (b); See also 402.01 (a) and 402.02 (a) the latter of which because the proposed new standard also conflicts with the existing statutory standard contained in RSA 162-H: 16, IV (c) with respect to the finding of "...unreasonable adverse effects..."

I. The SEC's inclusion of a new standard applying cumulative impacts to all energy facilities in Site 301.14 (g) is contrary to legislative intent and conflicts with the present statutory scheme.

The proposed rules also incorporate the concept of "cumulative impacts" as a new standard that accumulates impacts to various resources when considering whether to approve energy facilities. As JLCAR staff noted, this standard was considered and specifically rejected by the Legislature during the Senate Bill 245 process as applied to all energy facilities. (JLCAR comments at p. 7) The new "cumulative impacts" standard was subsequently passed only with respect to wind energy facilities (HB 1602, 2014 Session). Moreover, the new standard produces irreconcilable conflicts with the existing statutory standards for approval of energy facilities contained in RSA 162-H: 16, IV(c) with respect to the finding of "unreasonable adverse effects."

Proposed 301.14 (g) violates JLCAR law and rules and forms the basis for an objection as "Contrary to the intent of the legislature." RSA 541-A: 13, IV (b); See also 402.01 (a) and 402.02 (a) the latter of which because the new standard also conflicts with the existing statutory standard contained in RSA 162-H: 16, IV (c) with respect to the finding of "...unreasonable adverse effects..." and RSA 162-H: 10-a concerning wind energy.

We strongly urge the SEC to **embrace** JLCAR's preliminary objection and to revise its proposed rules to comport with the legislative history of Senate Bill 245 by removing Site 301.16 and Site 301.14 (g).

Respectfully submitted,

Donald J. Pfundstein

DJP:bal
Attachment

cc: JLCAR Members via Cheryl Walsh
Honorable Chuck Morse, Senate President
Kristie Merrill, Senate Chief of Staff
Honorable Shawn Jasper, Speaker of the House
Terence Pfaff, House Chief of Staff

Comments on Potential Bases for an Objection on Legislative Intent:

I. Introduction:

In Site 301.16, the Site Evaluation Committee (SEC) defines the criteria it will use when it considers whether an energy project "will serve the public interest" pursuant to RSA 162-H:16, IV(e). The criteria that the rule lists closely resemble criteria that the Senate initially included in legislative changes made to RSA 162-H:16 in Senate Bill 245 (SB 245) in 2014 bill, but which it ultimately removed.

It will be up to the Joint Legislative Committee on Administrative Rules (Committee) to assess the legislative record of SB 245 and reach a final determination. Committee staff expects significant public testimony regarding the proper interpretation of the legislative record. The comments below outline the findings the Committee would need to make to form a legally sufficient basis for a legislative intent objection.

If the Committee finds that the criteria in Site 301.16 revive standards that the legislature considered, but chose not to adopt in favor of a different standard, thereby defeating it, then the Committee could object pursuant to Committee Rule 402.01(a). Committee Rule 402.01(a) states that "a proposed rule shall be considered contrary to legislative intent if the Committee determines that the rule attempts to implement a bill which the Legislature defeated, unless there is evidence that the bill was defeated at least in part because its content could be implemented with existing rulemaking authority."

Alternatively, if the Committee finds that the phrases "public interest" is a distinct phrase with a meaning that conflicts with the SEC's proposed criteria, and that in choosing to adopt "public interest" it expressed its preference for that standard, then the Committee could object that the rule "violates or otherwise conflicts with a specific state...statutory provision," pursuant to Committee rule 402.02(a).

If the Committee does not make such findings, then the rule would not be objectionable pursuant to legislative intent.

II. Legislative History:

A. During the 2014 session in SB 245, the New Hampshire Legislature made substantial changes to the make up of the SEC, and incorporated new requirements into what the SEC must consider before it grants a certificate:

In 2014, the New Hampshire Legislature made substantial changes to the make up and structure of the SEC. Part of that process involved changes to the conditions on which the SEC grants certificates. In the final version of SB 245, the Legislature made the following change, highlighted in bold below, to RSA 162-H:16, IV:

IV. After due consideration of all relevant information regarding the potential siting or routes of a proposed energy facility, including potential significant impacts and benefits, the site evaluation committee shall determine if issuance of a certificate will serve the objectives of this chapter. In order to issue a certificate, the committee shall find that:

(a) The applicant has adequate financial, technical, and managerial capability to assure construction and operation of the facility in continuing compliance with the terms and conditions of the certificate.

(b) The site and facility will not unduly interfere with the orderly development of the region with due consideration having been given to the views of municipal and regional planning commissions and municipal governing bodies.

(c) The site and facility will not have an unreasonable adverse effect on aesthetics, historic sites, air and water quality, the natural environment, and public health and safety.

(d) [Repealed.]

(e) Issuance of a certificate will serve the public interest.

B. In legal effect, the SEC's rule implements several requirements that the Senate considered, but ultimately removed:

In the current proposal, the SEC attempts to define public interest using the following language:

Site 301.16 Criteria Relative to Finding of Public Interest. In determining whether a proposed energy facility will serve the public interest, the committee shall consider:

(a) The beneficial and adverse environmental effects of the facility, including effects on air and water quality, wildlife, and natural resources;

(b) The beneficial and adverse economic effects of the facility, including the costs and benefits to energy consumers, property owners, state and local tax revenues, employment opportunities, and local and regional economies;

(c) The extent to which construction and operation of the facility will be consistent with federal, regional, state, and local plans and policies, including those specified in RSA 378:37 and RSA 362-F:1;

(d) The municipal master plans and land use regulations pertaining to (i) natural, scenic, historic, and cultural resources, and (ii) public health and safety, air quality, economic development, and energy resources; and

(e) The extent to which siting, construction, and operation of the facility will have impacts on and benefits to the welfare of the population, the location and growth of industry, historic sites, aesthetics, the use of natural resources, and public health and safety, consistent with RSA 162-H:1.

This language describes public interest by referring to several different criteria. While these criteria do not include the phrase "net," criteria (a) and (b) apparently do refer to net requirements. For example, it would appear that in comparing "the beneficial and adverse environmental effects of the facility" the SEC would not make a finding of public interest if it determined that, in the aggregate, the effect of the facility on the environment would be negative. Additionally, criteria (c) and (d) almost quote the language the Senate removed from SB 245.

C. The Senate Energy and Natural Resources Committee heard testimony regarding "public interest" and "net benefit" during Committee hearings related to an amendment to the original SB 245, and chose to adopt the net benefit language when it sent it to the Senate as a whole:

In its February 19, 2014 hearing on SB 245 and its amendments, the New Hampshire Senate reviewed SB 245 and received testimony about "public interests" and "net benefits." Later, the Senate Energy and Natural Resources Committee (Energy Committee) voted 4-1 in favor of SB 245, reporting it to the full Senate with a recommendation of Ought to Pass with Amendment. Please find the specific amendment, #2014-0921s.

In #2014-0921s, the following changes, identified in bold lettering, were added to RSA 162-H:16, VI:

IV. The site evaluation committee, after having considered available alternatives, ***including reasonable alternative not described in the application,*** *and fully reviewed the environmental impact of the site or route, and other relevant factors bearing on whether the objectives of this chapter would be best served by the issuance of the certificate, must find that [~~the site and facility~~]:*

> *(a)* ***The*** *applicant has adequate financial, technical, and managerial capability to assure construction and operation of the facility in continuing compliance with the terms and conditions of the certificate.*
>
> *(b)* ***The site and facility*** *will not unduly interfere with the orderly development of the region with due consideration having been given to the views of [~~municipal and~~] regional planning commissions and municipal [~~governing~~]****legislative*** *bodies.*
>
> *(c)* ***The site and facility*** *will not have an unreasonable adverse effect,* ***including unreasonable adverse cumulative***

effects, *on aesthetics, historic sites, air and water quality, the natural environment, and public health and safety.*

(d) [Repealed.]

(e) The site and facility will serve the public interest when taking into account:

> ***(1) The net environmental effects of the facility, considering both beneficial and adverse effects.***
>
> ***(2) The net economic effects of the facility, including but not limited to costs and benefits to energy consumers, property owners, state and local tax revenues, employment opportunities, and local and regional economies.***
>
> ***(3) Whether construction and operation of the facility will be consistent with federal, regional, state, and local policies.***
>
> ***(4) Whether the facility as proposed is consistent with municipal master plans and land use regulations pertaining to (i) natural, historic, scenic, cultural resources and (ii) public health and safety, air quality, economic development, and energy resources.***
>
> ***(5) Such additional public interest considerations as may be deemed pertinent by the committee.***

(f) The site and facility will be consistent with the state energy strategy established in RSA 4-E:1. (Attached 25-26).

In its hearing, the Energy Committee considered the oral and written testimony of several different parties, many of whom testified regarding "public interest" and "net criteria."

The Energy Committee's meeting minutes reflect that the Committee heard oral testimony from individuals and corporations. In favor of the bill, Sheryl Lewis supported the amendment. (Attached 40). The minutes reflect that she testified to the necessity for a "balance between different aspects" presented to the Committee. In opposition, as representative of EBP Renewables, Susan Geiger testified that "her first concern is in

regard to the first section and facilities that provide a net public benefit." In response to her testimony, Senator Bradley asked whether the "net public benefit standard is less defined than no adverse impact," to which Attorney Geiger responded "whether a project is in the public interest is certainly something the PUC can view." (Attached 41).

In addition to the oral testimony, the Energy Committee received written testimony regarding public interest and net benefit.

Several letters were written in support of the amendment. In their capacities as then Chair and Vice Chair of the SEC, Commissioners Thomas Burack and Amy Ignatius testified that:

The amendment then creates a new test of "net public benefits". Guidance as to what such a test should weigh would be beneficial to applicants, intervenors and the SEC. We recognize that the language on Page 8, lines 24-27 provides some further definition of "net public benefits," but should be further expanded in order to help avoid the possibility of multiple conflicting interpretations arising. (Attached 51)

In support of the amendment, four environmental groups, the Society for the Protection of NH Forests, The Appalachian Mountain Club, the Conservation Law Foundation, and the Nature Conservancy wrote the following:

First, the purpose of the state's current siting statute – to balance environmental protection with the need for new energy – would be better served if the SEC were required to make a determination that a proposed project serves the public interest. The SEC makes no such determination under current law; rather, the siting board is only required to determine that there is no "unreasonable adverse effects" on such things as aesthetics and the environment.

Senator Forrester's amendment requires that the SEC make a finding that a proposed project results in net public benefits, after considering all environmental, social, and economic cost and benefits – whether for our natural resources, for ratepayers and businesses, for public health, or for the state's economy, or for all of the above – and that these benefits outweigh a project's potential adverse impacts. Other states, including Maine and Vermont, have such a requirement ensuring that the greater good of the state and its communities is weighed as part of every siting decision. (Attached 57-58)

The Nature Conservancy of New Hampshire wrote further, stating that:

As noted above, a public interest standard derived from weighing a proposed project's benefits and costs is not new to energy facility siting. And in New Hampshire, the state continues to play an important role in energy regulation.

...

However, before the PUC authorizes the utility's recovery of its investments in distributed energy resources, the PUC must determine that the utility's investment and recovery of that investment (through increased electricity rates) are in the public interest. A determination of the public factors must include giving balanced consideration and equal weight to the following nine factors:

(a) The effect on the reliability, safety, and efficiency of electric service.
(b) The efficient and cost-effective realization of the purposes of the state's renewable portfolio standards and the state's restructuring policy principles.
(c) The energy security benefits of the investment to the state of New Hampshire.
(d) The environmental benefits of the investment to the state of New Hampshire.
(e) The economic development benefits and liabilities of the investment to the state of New Hampshire.
(f) The effect on competition within the region's electricity markets and the state's energy services market.
(g) The costs and benefits to the utility's customers, including but not limited to a demonstration that the company has exercised competitive processes to reasonably minimize costs of the project to ratepayers and to maximize private investment in the project.
(h) Whether the expected value of the economic benefits of the investment to the utility's ratepayers over the life of the investment outweigh the economic costs to the utility's ratepayers.
(i) The costs and benefits to any participating customer or customers. (Attached 66-67)

The New Hampshire Sierra Club (NHSC) testified that:

NHSC urges the members of this committee to be specific in the application section of the statute. If more information is needed in the application, the specifically add that information to RSA 162-H:7-r(sp)*, or word in such a way that it will direct future rulemaking. Studies, lists of pre-application meetings, emissions savings, costs associated with leases, decommissioning commitments and many other ideas could be required in the application. Secondly, it is important that the application requirements in RSA 162-H-7 correlate with findings in RSA 162-H:16 because the application supplies the information to make the findings and ultimately the final decision. The amendment proposal expands the findings with a new requirement, a so called "net benefit" requirement, but does not add corresponding documentation in the application. NHSC suggests that the Committee* ***define*** *the new finding requirement and include those elements in its application.* (Attached 70)

Finally, Marc Brown of the New England Ratepayers Association opposed the bill in its then current form, stating:

In our opinion, the language in SB 245 is extremely vague and will likely excessively restrict the development of new energy projects, not to mention the potential legal morass that the current language will provoke:

Page 1, Line 15-16 "...facilities that provide net public benefits..." Is benefit based on reduced cost to ratepayers? Jobs for the communities in which they are sited? Tax benefits? Environmental? A combination of those and/or others? (Attached 72)

The bill was considered by the full Senate on March 13, 2014. There, the Senate voted to adopt the Committee Amendment, and then ordered the bill to the Committee on Finance pursuant to Senate Rule 4-5. (Attached 16).

D. The Senate Finance Committee removed the "cumulative impact" language, and the "net" criteria, the references to compliance with other law, and compliance with master plans from the statute and included the term "public interest":

On March 20, 2014, the Senate Finance Committee amended the bill in #2014-1125s to remove the reference to specific criteria and instead added the phrase "public interest" into RSA 162-H:16, IV, and added a single new subparagraph, RSA 162-H:16, IV(e), which adds a consideration of whether the site and facility "will serve the public interest." (Attached 34). It then reported it to the full senate as Ought to Pass with Amendment.

E. No subsequent official record exists regarding the change from "net" criteria to "public interest":

From that point forward the issue of "public interest" versus "net benefit" does not feature in any official part of the legislative record to which Committee staff had access when it analyzed the record, but staff has since learned that it apparently was discussed before the House Science, Technology, and Energy Committee. Neither House Calendar dealing with the bill addresses the issue, nor does the subsequent Senate Journal. The current text of RSA 162-H:16, IV matches the relevant text proposed in #2014-1125s.

F. The decision whether the facts support an objection on legislative intent properly belongs to the Committee after consideration of the record and the testimony:

The Committee may choose whether to object to a rule, and it does so at this stage by determining, pursuant to Committee Rule 303.01(b)(3), that, "the final proposal or amended final proposal falls into any of the 4 categories listed in RSA 541-A:13, IV." One of those bases is that the rule is contrary to legislative intent. The Committee has further interpreted this basis by adopting Committee Rule 402. Two rules in Committee Rule 402 may apply: 402.01(a), and 402.02(a).

Committee Rule 402.01(a) states that "a proposed rule shall be considered contrary to legislative intent if the Committee determines that the rule attempts to implement a bill which the Legislature defeated, unless there is evidence that the bill was defeated at least in part because its content could be implemented with existing rulemaking authority."

Committee Rule 402.02(a) states that "The Committee may object to a proposed rule as contrary to legislative intent if the Committee determines that the rule violates or otherwise conflicts with a specific state or federal statutory provision or federal regulation."

In order for the basis to exist pursuant to Committee Rule 402.01(a), the Committee would first have to determine that an amendment to SB 245 which removed the other amendment on "net benefit" and included "public interest" constituted a "defeat" of that language on its merits and not because the issue was better suited to rulemaking. If the Committee makes this determination, then a basis would exist because there is no evidence indicating that the language was defeated because its content could be implemented within existing rulemaking authority.

In order for the basis to exist pursuant to Committee Rule 402.02(a), the Committee would have to find that "public interest" and "net benefit," or its equivalent as represented in the current Site 302.16, are contradictory terms. If it made such a finding, then adopting the proposed criteria would conflict with the statute, meaning the Committee may conclude that they were contrary to legislative intent.

Finally, if the Committee makes neither such finding, then a basis for objection would not exist.