

BY ELECTRONIC MAIL

November 16, 2015

Chairman Martin Honigberg
New Hampshire Site Evaluation Committee
21 South Fruit Street, Suite 10
Concord, NH 03301

Re: NH Site Evaluation Committee Rulemaking, Docket No. 2014-04

Dear Chairman Honigberg and Committee Members:

On behalf of our respective organizations, we wish to express our appreciation for the Committee's work and that of Attorneys Wiesner and Iacopino in developing the proposed rules before the Joint Legislative Committee on Administrative Rules ("JLCAR"). The final draft rules will serve to shorten the SEC review process, better quantify the data presented by applicants, reduce subjectivity and lead to more informed, and more consistent decisions on energy facility siting.

We carefully reviewed JLCAR's preliminary objection¹ to Rule Site 301.16, and found several material errors in the information that we believe has led to a general misunderstanding of legislative intent. The purpose of this letter is to explain our findings and to show how Site 301.16, in fact, is fully consistent with RSA 162-H.

Two exhibits are attached to this letter. Exhibit A itemizes the amendments to SB 245 pertaining to *net public benefits* and *public interest*. Exhibit B presents relevant excerpts from the Senate Energy and Natural Resources Committee public hearing held February 19, 2014.

1. Net Public Benefits vs. Certificate Conditions: Amendment #2014-0568s

Amendment #2014-0568s² introduced two changes to the bill relative to *net public benefits* as follows:

- a. Under RSA 162-H:1, the phrase *needed facilities* was replaced with *facilities that provide net public benefits*;
- b. A new criterion (e) was added to RSA 162-H:16 IV requiring the SEC find that a facility ***“Will provide demonstrable net public benefits when considering the costs and benefits of the project to the environment, the New Hampshire economy, New Hampshire energy consumers, and the communities affected by the project, with such benefits reflected in enforceable conditions of the certificate.” (emphasis added)***

JLCAR's objection letter³ affirms that the Senate Energy and Natural Resources Committee heard testimony regarding *public interest* and *net public benefits* but the letter's summary of the February 19, 2014 minutes lacks context and confuses what actually transpired.

¹ Preliminary Objection to Final Proposals 2015-11 and 12, pdf pages 147-154 of 238.

² See amendments at http://gencourt.state.nh.us/SofS_Archives/2014/senate/SB245S.pdf, page 8 lines 23-26 and in Exhibit A.

³ Preliminary Objection letter (C) at pdf page 149 out of 238

JLCAR fails to report that the comments by Susan Geiger for EDPR, the then seated Chair and Vice Chair of the SEC, the Sierra Club, New England Ratepayers Association and Doug Patch for Wagner Forest Management all centered on the fact that the term *net public benefits* was not defined in the bill⁴. In fact, Ms. Geiger’s comments generally supported the idea of an applicant providing net public benefits. It was the confusion over the term’s meaning that prompted Senator Bradley to propose the *public interest* standard which he described as “a much more defined term in terms of case law and legal implications” and a term that regulators would find more familiar. The record shows that Ms. Geiger generally concurred with Senator Bradley’s statement.

JLCAR’s summary omits any reference to the larger complaint made by Ms. Geiger and others, that the new criterion under RSA 162-H:16 IV required such net benefits be imposed as enforceable conditions of the certificate. Introducing the *net public benefits* language and requiring enforcement of those benefits via conditions on a certificate are two very different issues. We would expect a much stronger negative response to the latter. Yet JLCAR’s letter makes no distinction between the two and leaves the reader to believe that the very concept of net benefits was firmly opposed. That was not the case.

Exhibit B provides a partial transcript of Ms. Geiger’s oral comments and the important context that is missing from JLCAR’s letter.

2. Public Interest Guidance vs. Rulemaking: Amendments #2014-0921s, #2014-1125s

The Senate Energy Committee responded to the confusion over *net public benefits* in two important ways (Amendments #2014-0921s). In the Declaration of Purpose, the Committee a) removed the reference to net benefits, b) reinstated *needed* facilities and c) introduced new balancing language (“significant impacts and benefits”). In the Findings provision (RSA 162-H:16 IV), the Committee replaced the offending criterion (e) with the more benign *public interest guidance language* (See Exhibit A). JLCAR’s letter ignores the changes to the bill’s Purpose section and only cites the change to RSA 162-H:16 IV.

These changes, collectively, worked to preserve the principle of *net benefit* and also clarify what information the SEC might consider when making a public interest determination. The bill was approved by the full Senate and referred to Senate Finance where it was further refined. Senate Finance retained the balancing language in the Purpose section but changed “needed facilities” to “new energy facilities.” It also inserted “public interest” into the introductory paragraph for RSA 162-H:16 IV and replaced the public interest guidance with a new subparagraph (e) that read “Will serve the public interest.” Amendment #2014-1125s was approved by the full Senate and sent to the House for consideration.

There is no evidence in the record to support a claim that removing the public interest guidance in #2014-0921s constituted a “defeat” of that language on its merits. In fact, there is no information in any official record to explain why the change was made. However, we have since learned from the SEC’s October 28 technical session that Amendment #2014-1125s was the result of a meeting convened by Senator Bradley wherein various stakeholders agreed that the net public benefits guidance language be removed with the understanding that it would be more fully considered during the rulemaking process. This meeting has been confirmed for us by Senator Forrester and others involved at the time.

⁴ Testimony before the Committee covered a number of sections of the bill’s amendment. This letter only addresses testimony relative to *net public benefits* and *public interest*.

You may recall the pace at which SB 245 was moving through the process and the level of stakeholder participation. It is entirely credible that such a meeting happened and the resulting action is consistent. JLCAR's letter makes no reference to a meeting.

3. Balancing Language: Amendment #2014-1442h (House)

JLCAR asserts in its letter that “the current text of RSA 162 H:16, IV matches the relevant text proposed in #2014-1125s.” This statement is true but incomplete.

The House introduced a material change to the introductory paragraph of RSA 162 H:16, IV where we again see the balancing language “...potential significant impacts and benefits.” (See Exhibit A) This balancing language now appears *three* times in RSA 162-H, twice in the Declaration of Purpose and again in the Findings provision. To be clear, no such balancing language existed in any predecessor versions of RSA 162-H. The legislative history of SB 245 may show that literal reference to *net public benefits* and related guidance have been removed, but the intent of the legislature is still very evident in the statute.

4. Site 301.16 vs. the Senate Language

We disagree with JLCAR's claim that Site 301.16 “implements several requirements that the Senate considered but ultimately removed.” As already stated, there is no evidence in the record that the Senate language was removed on its merits, however, there is credible information that shows the language was removed, in part, because its content could be implemented through rulemaking (402.01(a)).

More importantly, Site 301.16 is consistent with the statute's purpose clause.

The legislature declared in RSA 162-H that “it is in the *public interest* to maintain a balance among those potential significant impacts and benefits in decisions about the siting, construction and operation of energy facilities in New Hampshire”. It is appropriate, and required that the SEC consider *the beneficial and adverse effects* of a proposed energy facility on the “the welfare of the population, private property, the location and growth of industry, the overall economic growth of the state, the environment of the state, historic sites, aesthetics, air and water quality, the use of natural resources, and public health and safety.” The fact that several of the factors listed in Site 301.16 also appeared in a Senate amendment is not significant given that the foundation for this language tracks back to the statute's declaration of purpose.

JLCAR's characterization that the SEC is attempting to define public interest using the language in Site 301.16 is unfair and also not accurate. A plain reading of Site 301.16 makes clear that (a) through (e) only list the information that will be considered in making a public interest determination. This is consistent with RSA 162-H:16, IV which requires the SEC give “due consideration to *all* relevant information” relating to a proposed facility “including potential significant impacts and benefits” before determining whether a certificate will serve the objectives of the statute. By citing the criteria in Site 301.16, the SEC is providing clarity to the process.

Finally, we take issue with JLCAR's use of the following example⁵ to express a concern with Site 301.16:

⁵ Preliminary Objection letter (B) at pdf page 148 out of 238

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.

JLCAR’s example is an obvious oversimplification of the complex and comprehensive siting process established under RSA 162-H. Site 301.16 encompasses numerous data points that will be considered in making a public interest determination. There is nothing in the draft rules to suggest the SEC will act as the example states, nor is there any historic precedence to suggest such a cavalier outcome. That said, if, after a thorough review of a docket’s record, the SEC finds that a project’s impact on the environment is unreasonable or that the impacts far outweigh the benefits, the statute allows for a certificate to be denied, and for appeals to follow. The concern cited in JLCAR’s example is unfounded.

Thank you again for the opportunity to be part of this important process. We fully support the work of the SEC on this matter and encourage the Committee to carefully consider the issues we found with JLCAR’s legislative history on SB 245. If you have any questions or would like to discuss these topics further, we would welcome hearing back from you.

Respectfully,

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EXHIBIT A: SB 245 Amendment History

Date	Amendment	RSA 162-H:1 Declaration of Purpose	RSA 162-H:16, IV Findings	Votes
8-Jan-14	ORIGINAL	Changed one word: 'resolved' was changed to 'evaluated'.	none	none
13-Feb-14	2014-0568s	<p>The legislature recognizes that the selection of sites for energy facilities, including the routing of high voltage transmission lines and energy transmission pipelines, will have a significant impact upon the welfare of the population, the location and growth of industry, the overall economic growth of the state, the environment of the state, and the use of natural resources. Accordingly, the legislature finds that it is in the public interest to maintain a balance between the environment and the [need for] potential benefits of new energy facilities in New Hampshire; that undue delay in the construction of [needed] facilities that provide net public benefits be avoided and that full and timely consideration of environmental consequences be provided; that all entities planning to construct facilities in the state be required to provide full and complete disclosure to the public of such plans; and that the state ensure that the construction and operation of energy facilities is treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion, all to assure that the state [has an] develops adequate [and], reliable [supply of] energy and cost-effective energy resources in conformance with sound environmental principles. The legislature, therefore, hereby establishes a procedure for the review, approval, monitoring, and enforcement of compliance in the planning, siting, construction, and operation of energy facilities.</p>	<p>IV. The site evaluation committee, after having considered available alternatives, including reasonable alternative [sic] 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:</p> <p>(b) 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.</p> <p>(c) 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.</p> <p>(e) Will provide demonstrable net benefits when considering the costs and benefits of the project to the environment, the New Hampshire economy, New Hampshire energy consumers, and the communities affected by the project, with such benefits reflected in enforceable conditions of the certificate.</p>	none

6-Mar-14	2014-0921s	<p>The legislature recognizes that the selection of sites for energy facilities, including the routing of high voltage transmission lines and energy transmission pipelines will may have a significant impact upon impacts and benefits on the following: The welfare of the population, property values, the location and growth of industry, the overall economic growth of the state, the environment of the state, and historic sites, aesthetics, air and water quality, the use of natural resources, and public health and safety. Accordingly, the legislature finds that it is in the public interest to maintain a balance between the environment those potential significant impacts and benefits and the need for new energy facilities in New Hampshire; that undue delay in the construction of needed facilities be avoided and that full and timely consideration of environmental consequences be provided; that all entities planning to construct facilities in the state be required to provide full and complete disclosure to the public of such plans; and that the state ensure that the construction and operation of energy facilities is treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion, all to assure that the state has an adequate and reliable supply of energy in conformance with sound environmental principles. The legislature, therefore, hereby establishes a procedure for the review, approval, monitoring, and enforcement of compliance in the planning, siting, construction, and operation of energy facilities.</p>	<p>IV. The site evaluation committee, after having considered available alternatives, including reasonable alternative [sic] 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:</p> <p>(b) 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.</p> <p>(c) 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.</p> <p>(e) The site and facility will serve the public interest when taking into account:</p> <p>(1) The net environmental effects of the facility, considering both beneficial and adverse effects.</p> <p>(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.</p> <p>(3) Whether construction and operation of the facility will be consistent with federal, regional, state, and local policies.</p> <p>(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.</p> <p>(5) Such additional public interest considerations as may be deemed pertinent by the committee.</p> <p>(f) The site and facility will be consistent with the state energy strategy established in RSA 4-E:1.</p>	<p>Mar 6, 2014: Voted 4-1 out Senate Policy Committee.</p> <p>March 13, 2014: Approved on voice vote of full senate; referred to Finance.</p>
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27-Mar-14	2014-1125s	<p>The legislature recognizes that the selection of sites for energy facilities, including the routing of high voltage transmission lines and energy transmission pipelines will may have a significant impact upon impacts and benefits on the following: The welfare of the population, private property, the location and growth of industry, the overall economic growth of the state, the environment of the state, and historic sites, aesthetics, air and water quality, the use of natural resources, and public health and safety. Accordingly, the legislature finds that it is in the public interest to maintain a balance between the environment among those potential significant impacts and benefits in the siting, construction and operation of and the need for new energy facilities in New Hampshire; that undue delay in the construction of needed new energy facilities be avoided and that full and timely consideration of environmental consequences be provided; that all entities planning to construct facilities in the state be required to provide full and complete disclosure to the public of such plans; and that the state ensure that the construction and operation of energy facilities is treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion all to assure that the state has an adequate and reliable supply of energy new energy facilities are sited, constructed, and operated in conformance with sound environmental principles. The legislature, therefore, hereby establishes a procedure for the review, approval, monitoring, and enforcement of compliance in the planning, siting, construction, and operation of energy facilities.</p>	<p>IV. The site evaluation committee, after having considered available alternatives and fully reviewed the environmental impact of the site or route, and other relevant factors bearing on whether the objectives of this chapter public interest would be best served by the issuance of the certificate, must find that the site and facility:</p> <p>(e) Will serve the public interest.</p>	<p>Mar 20, 2014: Voted 4-1 out Senate Finance.</p> <p>March 27, 2014: Approved on voice vote of full senate.</p>
4/1/2014	Introduced in House; Referred to STE			

4/17/2014	2014-1442h	<p>The legislature recognizes that the selection of sites for energy facilities, [including the routing of high voltage transmission lines and energy transmission pipelines, will have a significant impact upon] may have significant impacts on and benefits to the following: the welfare of the population, private property, the location and growth of industry, the overall economic growth of the state, the environment of the state, historic sites, aesthetics, air and water quality,[and] the use of natural resources, and public health and safety. Accordingly, the legislature finds that it is in the public interest to maintain a balance [between the environment and the need for new] among those potential significant impacts and benefits in decisions about the siting, construction, and operation of energy facilities in New Hampshire; that undue delay in the construction of [needed] new facilities be avoided; [and] that full and timely consideration of environmental consequences be provided; that all entities planning to construct facilities in the state be required to provide full and complete disclosure to the public of such plans; and that the state ensure that the construction and operation of energy facilities is treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion. [all to assure that the state has an adequate and reliable supply of energy in conformance with sound environmental principles.] In furtherance of these objectives, the legislature [therefore,] hereby establishes a procedure for the review, approval, monitoring, and enforcement of compliance in the planning, siting, construction, and operation of energy facilities.</p>	<p>IV. [The site evaluation committee, after having considered available alternatives 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:] 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:</p> <p>(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.</p> <p>(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.</p> <p>(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.</p> <p>(d) [Repealed.]</p> <p>(e) Issuance of a certificate will serve the public interest.</p>	<p>Apr 17, 2014: Voted 16-1 out STE.</p> <p>Apr 23, 2014: Approved by the full house with a vote of 227-69.</p> <p>Final amendment #2014-1795h included changes to the bill based on the Finance Committee review. These changes did not address public interest.</p>
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EXHIBIT B

Senate Energy and Natural Resources Committee

Public Hearing on SB 245 re: Siting of Energy Facilities

February 19, 2014

Sources:

The audio of the public hearing is available here:

http://www.gencourt.state.nh.us/senateaudio/committees/2014/EnNatRes/SB0245_02192014.aspx

Written minutes of the public hearing are available here:

http://gencourt.state.nh.us/SofS_Archives/2014/senate/SB245S.pdf

Transcript of Attorney Susan Geiger Oral Testimony and Q&A

1 **Attorney Susan Geiger (at 23:34)** The first thing that I'll mention is just
2 that in the very first section of the amendment there's language
3 concerning facilities that provide a net public benefit but that term isn't
4 defined so we see that as an issue that should be addressed.

5 **(at 26:16):** Also Section 13 on page 8 adds a new criterion that
6 applications for Certificate of Site and Facility must meet. The new
7 criterion is that the project *will provide demonstrable net benefits when*
8 *considering the costs and benefits of the project to the environment, New*
9 *Hampshire's economy, energy consumers, and the communities affected*
10 *by the project, with such benefits reflected in enforceable conditions in*
11 *the certificate.*

12 And we have concerns about this language because 'demonstrable net
13 benefits' is not defined and so there again it raises some uncertainty or
14 lack of clarity on the part for developers and even for the committee
15 members in terms of how to decide what constitutes a demonstrable net
16 benefit. In addition the requirement that benefits be imposed as
17 certificate conditions seems problematic. For example, currently a
18 developer's commitments say in a town agreement or a payment in lieu
19 of taxes or decommissioning agreements that it makes with the host
20 community and, you know, other commitments that it makes with
21 neighbors such as conservation easements for example those issues and

1 those types of commitments are usually considered or included by the
2 SEC as certificate conditions. So we don't see the need for, you know for
3 including other commitments or other projected benefits as an
4 enforceable obligation. However if, for example, if estimates of projected
5 benefits are included as certificates, a project's failure to achieve its
6 projections could result in an enforcement action and certificate
7 suspension. And so we see that as rather problematic because it creates a
8 significant risk for energy facility developers that other developers don't
9 face in New Hampshire and this can have a chilling effect on the
10 development of needed renewable energy resources in this state. We
11 appreciate the opportunity to comment this morning and we would be
12 very interested in working with others to develop language that produces
13 a fair and workable site evaluation process. Thank you.

14 **Chairman:** Thank you very much for your testimony. Would you take
15 questions?

16 **Ms. Geiger:** Yes absolutely.

17 **Chairman:** Any questions of the committee? Senator Odell.

18 **Senator Odell:** Thank you Ms. Geiger. I guess you're saying that this
19 whole amendment, although you're prepared to work on it, would have a
20 chilling effect, my word, on development?

21 **Ms. Geiger:** I think aspects of it are very problematic. I think the chilling
22 effect really results from the fact that, and again, it is my interpretation of
23 the language not having had a lot of time to review it carefully, that, if
24 for example, a developer in their application makes certain projections
25 about economic benefits of their project or environmental benefits or
26 other benefits, and those projections or estimates are actually included as
27 certificate conditions that may create a problem because estimates are
28 just that, really. It's someone's best judgement, or best guess as to what
29 would happen in the future. And if a developer or an applicant is held to
30 those standards, those net benefit standards, that they believe will accrue,
31 and they don't materialize, then, as I understand it, and I could be
32 missing something, as I understand it that, that applicant could be subject

1 to a review or an enforcement proceeding that could result in suspension
2 or revocation of their license. So while we understand the concept about
3 having a project put forward what they believe the net benefits of the
4 project will be, actually the projects I've worked on and the applications
5 actually do put that information in their applications so that the
6 committee can understand some of the environmental benefits you know,
7 associated with wind development, for example, I think it will be very
8 difficult for a lot of developers to have some of those projections be
9 included as certificate conditions.

10 **Senator Odell:** Thank you.

11 **Chairman:** Senator Bradley?

12 Senator Bradley: Good Morning. Thank you Mr. Chairman. Ms. Geiger,
13 you talked about the uncertainty of a net public benefits standard. The
14 standard today is no adverse impact. Would you be more comfortable
15 with a public interest standard because that's a much more defined term
16 in terms of case law and legal implications and, obviously as a former
17 PUC commissioner, there was a lot of familiarity with that? I mean is
18 that something that would be more, you would be more amenable with?

19 **Ms. Geiger:** I'd have to think about that but I think that makes sense as
20 you point out, whether a project is in the public interest I think is
21 something that the PUC has reviewed in the past and so the standard is
22 something I think decisions makers might be more familiar with.

Transcript of Attorney Tom Getz Oral Testimony

23 **Attorney Tom Getz (Start Time 46:50):** I share some of the concerns
24 that Commissioner Geiger had about the net public benefits test. I think
25 some of the amendment has been characterized as modest or moderate in
26 its goal and I think for the most part it is. I think that new standard is
27 more fundamental than modest or moderate and really needs to be given
28 a lot of consideration what's intended, how that will be interpreted. And I
29 can attest that whatever legislature writes, the members of the Committee

1 are going to take very, very seriously and try to understand what you've
2 intended. And everybody here before the Committee is going to take
3 every single word very seriously and there's a body of precedent for
4 decades about the current law. This is something new that will have to
5 play its way out and I am sure will be subject to a rehearing appeal as a
6 lot of consideration as it goes through the process.

Transcript of BIA, Michael Licata Oral Testimony

7 **Mr. Licata (Start Time 56:25):** We have grave concerns over the
8 language requiring a net public benefit.