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March 26, 2021

Ms. Dianne Martin
New Hampshire Site Evaluation Committee
21 South Fruit Street, Suite 10
Concord, NH 03301-2429

**Re: SEC Docket No. 2021-01
Petition for Jurisdiction over
Proposed Solar Energy Facility in Milford, NH**

Dear Chairwoman Martin:

On behalf of Milford Spartan Solar, LLC please find enclosed for filing in the above captioned matter a copy of a Motion to Deny the Petition for Jurisdiction. A copy of the enclosed filing has also been sent electronically to all persons listed on the Committee's official Service List for this docket.

Please let me know if you have any questions regarding this filing.

Sincerely,

A handwritten signature in black ink, appearing to read "Barry Needleman".

Barry Needleman

BN:rs3

Enclosure

cc: Service List

McLane Middleton, Professional Association
Manchester, Concord, Portsmouth, NH | Woburn, Boston, MA

McLane.com

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

Docket No. 2021-01

**PETITION FOR JURISDICTION OVER
PROPOSED SOLAR ENERGY FACILITY IN MILFORD, NH**

**MILFORD SPARTAN SOLAR, LLC'S MOTION TO
DISMISS PETITION FOR JURISDICTION**

Milford Spartan Solar, LLC (“Spartan Solar”) by and through its attorneys, McLane Middleton, Professional Association, submits this motion asking the Site Evaluation Committee (“SEC”) to dismiss the Brox Environmental Citizens (“Brox”)¹ Petition for Jurisdiction (“Petition”) filed on December 3, 2020. The SEC subsequently issued a notice on February 2, 2021 commencing an adjudicative proceeding. In support of its motion to dismiss, Spartan Solar shows that Brox has failed to provide any evidence or analysis that would justify the SEC taking away jurisdiction from the Town of Milford (“Town”).

I. Background

1. Spartan Solar has worked diligently for nearly three years to develop a 16 MW solar electric facility to be constructed on approximately 83 acres (“Project”) within the Town. This effort is ongoing and has involved extensive interaction with the Town to share information and seek input. Many aspects of this iterative process have been public. However, Spartan Solar has not yet submitted a permit application to the Town. When that occurs, as is the case with all permitting of this type, significant amounts of additional information will be provided.

2. Beginning in August of 2018, Spartan Solar held numerous meetings with the Town Administrator, the Select Board, the Planning Board, and the Zoning Board of

¹ Brox Environmental Citizens has a Trade Name on file with the New Hampshire Secretary of State’s Office. Suzanne Fournier holds the Trade Name. The organization has a Facebook page with 74 followers as of March 25, 2021. The organization does not have a website or listing of its members.

Adjustment. Among other things, during public meetings of the Select Board and in other public meetings, the Town negotiated the land lease option agreement with Spartan Solar for 119.62 acres of public land. Approximately 36 acres of the 119.62 acres are anticipated to be included in the project site and the land not included in the project site would be released from the agreement and used (e.g., recreation, conservation, or other purpose) as determined by the Town. The Town also worked with Spartan Solar to negotiate the payment in lieu of taxes (“PILOT”) agreement for this Project, which the Select Board approved on February 10, 2020.

3. Notably, the Town has a detailed ordinance that specifically addresses the development of solar projects. *See* Town of Milford Zoning Ordinance, ¶7.11 (<https://www.milford.nh.gov/zoning-board-adjustment/files/zoning-ordinance>). The 36 acres anticipated to be on Town-owned land are zoned Integrated Commercial-Industrial 2 (“ICI-2”) and the proposed scale solar project is a permitted use in ISI-2 zones, subject to application to the Planning Board for a Conditional Use Permit and Site Plan Approval. The approximately 47 acres of project site proposed on one 101-acre, privately-owned parcel is zoned Residential. Pursuant to the requirements of the Milford Zoning Ordinance, Spartan Solar, among other things, presented the conceptual design to the Planning Board and submitted an application for a variance to permit construction of a utility scale solar collection system on a parcel in a residential zone on April 15, 2020. After conducting a thorough review during several public meetings, the Zoning Board of Adjustment approved the variance application on July 2, 2020.

4. Moreover, the Town’s process, pursuant to its ordinance, requires input from State agencies, including New Hampshire Fish & Game (“NHF&G”). Spartan Solar has engaged with NHF&G as part of this process. NHF&G is knowledgeable about and familiar

with the site and the Project. There will be in-depth consultation with NHF&G as Spartan Solar prepares the permit application.

5. The Town clearly has the necessary procedures in place to handle review of this Project. Moreover, the Town's actions thus far have plainly demonstrated its capability to conduct that review and during the March 15, 2021 Pre-Hearing Conference, the Town expressed its desire to do so.

II. SEC Precedent

6. Pursuant to RSA 162-H:2, VII (g) and XII, the SEC may take jurisdiction of an electric generation facility with a capacity of less than 30 megawatts ("MW") if it determines a project "requires a certificate, consistent with the findings and purpose set forth in RSA 162-H:1." As set forth in RSA 162-H:2, XI, a petition for jurisdiction may be filed by registered voters, communities, or the developer of a project.

7. Relevant SEC proceedings and decisions concerning whether to assert jurisdiction over a proposed renewable energy project with a capacity of less than 30 MW include the following: (1) *Community Energy, Inc. and Lempster Wind, LLC*, Docket No. 2006-01 ("Lempster") (granting petition to assert jurisdiction); (2) *Antrim Wind Energy LLC*, Docket No. 2011-02 ("Antrim") (granting petition to assert jurisdiction); and (3) *Timbertop Wind 1, LLC*, Docket No. 2012-04 ("Timbertop") (denying petition to assert jurisdiction).

8. In *Lempster*, the Towns of Lempster and Washington asked the SEC to take jurisdiction over a 16 MW wind facility. In *Antrim*, the Board of Selectmen asked the SEC to take jurisdiction over a 20 MW wind facility. In *Timbertop*, the Towns of Temple and New Ipswich asked the SEC to deny a developer's petition for jurisdiction over a 16 MW wind facility. The determining factors for the SEC's decision in each case appear to have been the

stated preference of the affected municipalities and their respective capabilities to review the proposed project.

9. As the cases evolved, the SEC focused on whether there was an applicable ordinance in force. In *Antrim*, the SEC took jurisdiction, observing that “the Town of Antrim does not have an ordinance or any other rules or regulations specifically designed to address the construction and operation of the renewable energy facility.” See *Jurisdictional Order*, August 10, 2011, p.23. In *Timbertop*, the SEC refused jurisdiction, concluding, “the local municipalities have sufficiently planned for and are equipped to address...impacts through their local land use ordinances.” See *Final Order Denying Jurisdiction*, August 13, 2013, p.4.

III. Brox Petition for Jurisdiction

10. In its Petition for Jurisdiction, which was never served on Spartan Solar, Brox briefly describes the Project, Spartan Solar, the site and its present uses, and the status of the Project in certain respects. Brox concludes by asserting in the most general manner that there would be “benefits to the public” if the SEC were to take jurisdiction.

11. Critically, Brox does not allege any basis on which the SEC could, consistent with the governing statute and precedent, exercise its discretionary jurisdiction over this renewable energy facility with a capacity of less than 30 MW. To the contrary, Brox recounts facts that undercut its Petition by demonstrating that Agencies that will be required to review the permit application under the Town permitting process are knowledgeable about portions of the site and have the ability to provide information to the Town to facilitate the Town’s proper and thorough review without any SEC involvement. For example, Brox cites to Spartan Solar’s interactions with the Town Zoning and Planning Boards and recognizes the involvement of the Department of Environmental Services (“DES”) and NHF&G. Brox discusses the significant familiarity that

NHF&G already has with parcels associated with the site. Finally, Brox never explains why a certificate is *required* or how the involvement of the SEC would be consistent with the findings and purpose set forth in RSA 162-H:1.

IV. Discussion

A. **Brox Environmental Citizen's has not met its burden to show that a certificate is required consistent with the findings and purposes set forth in RSA 162-H:1.**

12. Brox requests that the SEC assert jurisdiction over the Project pursuant to RSA 162-H:2, XII. Since the Project is well below the 30 MW threshold for mandatory jurisdiction, it is only subject to RSA 162-H if “the Committee determines [the Project] requires a certificate, consistent with the findings and purposes set forth in RSA 162-H:1.” RSA 162-H:2, XII.

13. RSA 162-H:1 recognizes that the selection of sites for energy facilities requires careful consideration of “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.” As was the case in *Timbertop*, the Project here is simply not large enough and does not present enough demonstrated impact to warrant the exercise of SEC jurisdiction. *See Final Order Denying Petition for Jurisdiction filed by Timbertop Wind I, LLC*, Docket No. 2012-04 (August 13, 2013), p. 4.

14. Brox bears the burden of proof to demonstrate that the Project requires a certificate. *See* Site 202.19(a). Brox must meet that burden by setting forth sufficient facts in its Petition. The Petition completely fails to satisfy this burden and, therefore, SEC should dismiss it.

15. As in *Timbertop*, the Project is roughly half the jurisdictional threshold triggering automatic SEC review. Not only is this Project relatively small in terms of capacity, but because of the low profile and nature of solar facilities “[t]here is nothing about the size of the Facility or

its impacts that suggest that the Committee’s discretionary jurisdiction is needed to protect the public interests expressed in the statute.” *Timbertop Order*, p. 4.

16. In evaluating whether or not the purpose section requires the SEC to assert jurisdiction, the SEC has considered whether such review is necessary to avoid undue delay in the construction of needed facilities. In this case, however, Spartan Solar and the Town have been working through the review process for 2½ years in order to incorporate Town input in advance of an anticipated permit application. Spartan Solar has taken and is taking the steps necessary to ensure that a permit process directed by the Town fully addresses all concerns, outlined in RSA 162-H, associated with project permitting and development. Requiring additional oversight by the SEC in this case would do nothing but further extend out project review. Additionally, unlike in *Timbertop*, this Project only involves the review of one town, not two.² SEC jurisdiction at this time would actually run counter to goals of RSA 162-H by creating undue delay.³

17. Additionally, the SEC does not need to assert its discretionary jurisdiction to ensure that Spartan Solar will provide full and complete disclosure to the public of its plans. The process that has unfolded to date within the Town demonstrates that Spartan Solar has consistently made information regarding the Project available to the public. Spartan Solar has presented at nine public meetings or hearings describing the Project details and evolution.

² Despite the fact that *Timbertop* did require review from two separate municipalities, the SEC still concluded that “discretionary jurisdiction is not required to avoid undue delay in the construction of needed facilities on the basis that the Petitioner must appear before two sets of land use boards.” *See Final Order Denying Petition for Jurisdiction filed by Timbertop Wind I, LLC*, Docket No. 2012-04 (August 13, 2013), p. 9.

³ In fact, Suzanne Fournier stated during a public meeting that the purpose of seeking SEC review of the project was in essence to delay the project, saying “[t]here will be stumbling blocks. I’m just going to name one. But there will be, as many as possible will be put into the path of this project. One of them will be, if it comes to it, a petition to the State’s Site Evaluation Committee.” *See Milford Deliberative Session February 2, 2019* at <http://gtm.milford.nh.gov/CablecastPublicSite/show/1258?channel=2>. Ms. Fournier’s comment is six hours, nine minutes, and 54 seconds into the meeting. This is clearly contrary to the spirit and intent of RSA 162-H.

Furthermore, as with all town meetings, all minutes and information presented at public meetings are subject to RSA 91-A and, therefore, are available to the public.

18. While Brox alleges that Spartan Solar has not fully disclosed its contractual agreements with third party entities, *see Environmental Citizens Petition for Jurisdiction*, p. 4, even if the SEC were to assert jurisdiction, it has routinely held that third party contractual agreements and corporate ownership details are confidential business information, exempt from the requirements of RSA 91-A. If the SEC required disclosure at all, it would be subject to a protective order and only discussed in non-public session.

19. Further, it is indisputable that this Project, and any proposed solar project in the Town, will be treated as a significant aspect of land use planning with consideration given to environmental, economic, and technical issues. The Town's detailed zoning ordinance requires the Town to treat any such project as a significant aspect of land use planning. The Town is already in the process of reviewing and considering each of these areas and has been doing so since the Town first engaged in review of this Project.

20. Moreover, Spartan Solar, with the Town's full knowledge, has already engaged with DES, Fish & Game, and the Natural Heritage Bureau to address wetlands, alteration of terrain, and other environmental issues. There will be additional consultation with State agencies prior to submission of an application for site plan review.

21. Finally, the Town and Spartan Solar negotiated a PILOT agreement in consideration of providing stable, long-term economic concerns for the Town.

22. In light of these processes, which have already occurred and continue to occur, there is no basis for the SEC to conclude that jurisdiction is necessary to ensure the Town will treat the Project as a significant aspect of land use planning.

B. The Town has the capability to review the proposed project and jurisdiction by the SEC is not necessary to maintain a balance between the environment and the need for new energy facilities.

23. Brox contends in conclusory fashion that there are a broad range of potential impacts that DES and NHF&G cannot evaluate on their own and that the SEC could conduct a more thorough review. *See Brox Environmental Citizens Petition for Jurisdiction*, p. 4. In light of the established relationship between Spartan Solar, its environmental consultants, DES, and NHF&G, and the discussions and review that has already taken place, and the additional consultation prior to submission of an application for site plan review, as well as the experience of the Town in implementing its own zoning ordinance, this Project does not warrant any such additional process.

24. As pointed out above, the Town has “sufficiently planned for and [is] equipped to address those impacts.” *See Final Order Denying Petition for Jurisdiction filed by Timbertop Wind I, LLC*, Docket No. 2012-04 (August 13, 2013), p. 4. Specifically, the Town’s detailed zoning ordinance pertaining to solar project development adequately addresses issues regarding the orderly development of the region as well as the other criteria consistent with those the SEC considers in a certificate proceeding. In fact, the purpose section of the Town ordinance specifically states that the purpose is “to accommodate solar energy collections systems...in appropriate locations, while protecting the public’s health, safety and welfare, and the environment.” *See Town of Milford Zoning Ordinance*, ¶7.11.2.

25. Spartan Solar has engaged with the Town as well as DES and NHF&G since 2019. Even in a certificated proceeding, the SEC would look to these State agencies for determinations regarding air and water quality and the natural environment. Furthermore, the

Town Zoning Ordinance includes extensive provisions that require a potential project developer to assess and address environmental concerns relating to tree clearing, stormwater and erosion control, as well as impacts to natural resources. *See Town of Milford Zoning Ordinance*, ¶7.11.6. The applicable state and local processes are sufficient to address any environmental or natural resource impacts associated with the Project.

26. With regard to aesthetics and historic sites, because of the low profile associated with a solar project, these areas of consideration are not as affected as in, for example, review of a wind facility. Nevertheless, Spartan Solar has engaged with the New Hampshire Division of Historical Resources (“DHR”) and has already completed a Phase IA for this Project, which Spartan Solar submitted to DHR in July 2020.

27. As for aesthetic considerations, the Town Zoning Ordinance contemplates consideration of potential impacts to scenic resources. For example, the Zoning Ordinance requires that solar collection systems be “visually screened through the preservation of existing vegetation.” *See Town of Milford Zoning Ordinance*, ¶7.11.6. The Ordinance further requires consideration of glare on abutting structures and roadways. Procedures in place at the local level ensure that the Town will adequately address these additional considerations.

V. **CONCLUSION**

Based on the foregoing, Brox has failed to demonstrate that the Project requires a certificate to carry out the purposes set forth in RSA 162-H:1 and that the SEC should assert its discretionary jurisdiction over the Project.

WHEREFORE, Milford Spartan Solar, LLC respectfully requests that the New Hampshire Site Evaluation Committee:

A. Dismiss the Petition for Jurisdiction with prejudice; and

B. Grant such other and further relief as is deemed just and appropriate.

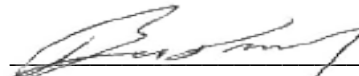
Respectfully Submitted,

MILFORD SPARTAN SOLAR, LLC

By its attorneys,

McLANE MIDDLETON,
PROFESSIONAL ASSOCIATION

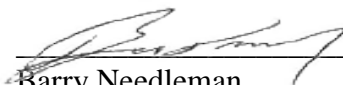
Dated: March 26, 2021

By: 

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Certificate of Service

I hereby certify that on the 26th day of March, 2021, this Motion to Deny Petition for Jurisdiction was served electronically on the Docket Service List.



Barry Needleman