

STATE OF NEW HAMPSHIRE
SITE EVALUTION COMMITTEE

Docket No. 2021-01

Petition for Jurisdiction
Over Proposed Solar Energy Facility in Milford, NH

ORDER ON
MILFORD SPARTAN SOLAR, LLC'S MOTION TO DISMISS AND
BROX ENVIRONMENTAL CITIZENS' MOTION TO AMEND

This order addresses two pending motions before the Committee: Milford Spartan Solar, LLC's Motion to Dismiss Petition for Jurisdiction (March 26, 2021), Doc. No. 10, and Brox Environmental Citizens' Motion to Amend Petition (March 24, 2021), Doc. No. 13. Pursuant to Site 202.14(h), "[t]he presiding officer or any hearing officer designated by the presiding officer shall rule upon a motion after full consideration of all objections and other factors relevant to the motion." For the following reasons, both motions are denied.

Motion to Dismiss

A. Procedural History

On December 3, 2020, Brox Environmental Citizens ("Brox") filed two petitions for jurisdiction under RSA 162-H:2, XII, asking the Site Evaluation Committee ("SEC") to exercise jurisdiction over a sixteen megawatt solar energy facility proposed by Milford Spartan Solar, LLC ("Spartan") (Dec. 3, 2020), Doc. No. 1. One petition is "endorsed by 100 or more registered voters in the host community," RSA 162-H:2, XI(a); the other is "endorsed by 100 or more registered voters from abutting communities," RSA 162-H:2, XI(b).

Brox's petition identifies eight "Benefits to the Public" that Brox asserts will accrue if the SEC grants the petition. These benefits include an evaluation by the SEC of the financial, technical, and managerial capabilities of Spartan, as well as the impacts on regional development, aesthetics, and various environmental issues. Doc. No. 1. at 4-5.

Spartan filed a motion to dismiss Brox's petition on two grounds. First, Spartan argues that Brox "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." Doc. No. 10 at 6. Second, Spartan argues that the town of Milford "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." Doc. No. 10 at 9. For the reasons that follow, neither argument provides a basis for dismissing the complaint.

B. Standard of Review

The SEC has not promulgated rules specifically outlining the standard by which a motion to dismiss must be judged. Neither Spartan nor Brox has identified a prior proceeding in which the SEC ruled on a motion to dismiss, let alone identified a standard for doing so. In the absence of clear SEC precedent establishing a standard of review, my analysis is guided by New Hampshire case law. In New Hampshire,

in ruling upon a motion to dismiss, the trial court is required to determine whether the allegations contained in the plaintiff's pleadings are sufficient to state a basis upon which relief may be granted. To make this determination, the court would normally accept all facts pled by the plaintiff as true, construing them most favorably to the plaintiff.

Alward v. Johnston, 171 N.H. 574, 580 (2018) (quoting *K.L.N. Constr. Co. v. Town of Pelham*, 167 N.H. 180, 183 (2014)) (brackets omitted).

C. Applicable Law

Among the SEC's duties is to "[e]valuate and issue any certificate under [RSA Chapter 162-H] for an energy facility." RSA 162-H:4, I(a). "Energy facility" is defined to include a "renewable energy facility." RSA 162-H:2, VII(f). The definition of "renewable energy facility," in turn, includes

electric generating station equipment and associated facilities of 30 megawatts or less nameplate capacity but at least 5 megawatts which the [SEC] determines requires a certificate, consistent with the findings and purposes set forth in RSA 162-H:1, either on its own motion or by petition of the applicant or 2 or more petitioners as defined in RSA 162-H:2, XI.

RSA 162-H:2, XII. Thus, in order to determine whether a proposed facility with a nameplate capacity between five and thirty megawatts requires a certificate, the SEC must evaluate the proposal in light of the findings and purposes set forth in RSA 162-H:1. Those findings and purposes bear recitation in full:

The legislature recognizes that the selection of sites for energy facilities 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, 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 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 new energy facilities be avoided; 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. In furtherance of these objectives, the legislature hereby establishes a procedure for the review, approval, monitoring, and enforcement of compliance in the planning, siting, construction, and operation of energy facilities.

RSA 162-H:1.

D. Application

1. Spartan's "Burden of proof" argument

Although Spartan correctly identifies that, under SEC rules, the "party asserting a proposition shall bear the burden of proving the proposition by a preponderance of the evidence," Site 202.19 (a), that standard has no application at the motion to dismiss stage. This early in the proceeding, Brox need only state facts that, if true and construed in their favor, are sufficient to state a basis upon which relief may be granted. *See Alward*, 171 N.H. at 580. Brox's petition easily clears this low bar.

The petition has no shortage of alleged facts that bear upon the findings and purposes articulated in RSA 162-H:1 and that the SEC could use as a basis to assert

jurisdiction over the Spartan facility. For example, it identifies recreational trails that implicate public welfare considerations, Doc. No. 1 at 3; natural habitats, threatened and endangered species, groundwater, and other environmental considerations, Doc. No. 1 at 2-3; farming, sand and gravel activities that implicate industry and economic development, Doc. No. 1 at 3; and a nearby school that may be impacted by the aesthetics, Doc. No. 1 at 4. These concerns may have merit and they may not. To weigh them in light of RSA 162-H:1, the SEC would need to take evidence and fully hear the arguments on both sides of the issue. Moreover, although the presiding officer or hearing officer may rule on a motion under Site 202.14(h), it is the SEC that must determine whether to exercise jurisdiction under RSA 162-H:2, XII. It would not be appropriate for the presiding officer to usurp the SEC's role in determining the ultimate merits of a petition for jurisdiction. In short, Spartan's request that the SEC evaluate the merits of Brox's petition prior to the admission of any evidence is premature.

The three prior SEC matters that Spartan cites in support of its motion only serve to bolster this conclusion. In *Community Energy, Inc.* and *Lempster Wind, LLC*, Docket No. 2006-01, *Antrim Wind Energy LLC*, Docket No. 2011-02, and *Timbertop Wind 1, LLC*, Docket No. 2012-04, the SEC ruled on petitions for jurisdiction only after a hearing. Spartan's "burden of proof" argument is not sufficient to support a motion to dismiss.

2. The Town's capability

Spartan's second argument is, similarly, premature. Spartan argues that the Town's own procedures adequately protect the interests in RSA 162-H:1 and, therefore, there is no need for SEC involvement. Like Spartan's earlier arguments, this may ultimately prove true, and it may not. As already explained in greater detail above, this determination can only be made after taking evidence and fully hearing the arguments on both sides. The ultimate determination on the town's capability to protect all relevant interests is also a question for the SEC, and not the presiding officer to decide. This argument similarly cannot support a motion to dismiss.

In denying Spartan's motion to dismiss on these two grounds, this order makes no pronouncement about the ultimate merits of the arguments for or against granting

the petition for jurisdiction. Spartan may raise all of the arguments made in its motion at the appropriate stage in the proceedings.

Motion to Amend

Brox filed a motion to amend its petition “to provide additional facts to remedy any deficiencies in the Petition.” Doc. No. 13 at 1. Spartan timely objected. Doc. No. 14. Neither the motion, nor the objection warrant extensive discussion.

Just as with the motion to dismiss above, the SEC has no rule or statute directly on point governing the standard for evaluating a motion to amend. The New Hampshire Superior Court Rules provide helpful guidance in this analysis. *See generally* N.H. Super. Ct. R. 12(a).

Typically, a petition may be amended for several reasons. Perhaps most commonly, a motion to amend a petition may either add an additional cause of action or an additional prayer for relief. Brox seeks neither – nor could it. There is only one cause of action at issue in this matter: a petition for jurisdiction under RSA 162-H:2, XII. There is only one form of relief available: a grant of the petition. Alternatively, a motion to amend a petition may seek to raise additional grounds or new legal theory in support of the relief sought. Here again, there is only one basis for the SEC to grant a petition for jurisdiction: a determination by the SEC consistent with the findings and purposes set forth in RSA 162-H:1. Finally, it may be appropriate to allow an amendment to a petition where the initial petition was procedurally or factually inadequate.¹ Spartan has not identified any procedural inadequacies, and the factual adequacy of Brox’s petition has already been established as outlined in the order denying Spartan’s motion to dismiss. There is, therefore, no basis to grant Brox’s motion.

In denying Brox’s motion to amend, it is not necessary to evaluate Spartan’s arguments on this issue. It is worth noting, however, that Spartan’s arguments appear largely to be premature attempts to litigate the ultimate merits of Brox’s.

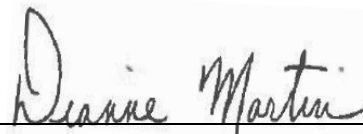
¹ There may, of course, be other reasons for permitting a motion to amend, but neither party has identified them and it would not be appropriate in an order of this nature to exhaustively describe every conceivable grounds upon which a motion to amend may be granted.

Similar to the denial of Spartan's motion to dismiss, this denial of Brox's motion to amend makes no pronouncement as to the ultimate merits of Brox's petition. Brox may seek to enter into evidence testimony and documentation in support of the facts alleged in its proposed amendment to the same extent it may seek to enter such evidence in support of its initial petition. The presiding officer will rule on the admissibility of any such evidence at that time. This order should not be construed as limiting Brox's ability to introduce otherwise admissible evidence simply because it relates to facts in Brox's proposed amendment.

Conclusion

For the foregoing reasons, Spartan's motion to dismiss (Doc. No. 10) and Brox's motion to amend (Doc. No. 13) are **DENIED**.

SO ORDERED this twentieth day of May, 2021.

A handwritten signature in cursive script that reads "Dianne Martin". The signature is written in black ink on a white background.

Dianne Martin, Chairwoman
Site Evaluation Committee &
Presiding Officer in Docket No. 2021-01