

February 18, 2014

The Honorable Russell Prescott, Chairman
Senate Energy and Natural Resources Committee
Legislative Office Building, Room 101
Concord, NH 03301

RE: SB 245, relative to the siting of energy facilities (per amdt 2014-0568s)

Dear Chairman Prescott:

We write in our respective capacities as Chairman and Vice Chairman of the Site Evaluation Committee (SEC) established pursuant to RSA 162-H, to provide comments that may be helpful to your Committee in its consideration of SB 245 (as amended by 2014-0568s) relative to the siting of energy facilities. Please understand that we are not writing on behalf of the full SEC membership, as the SEC has not had an opportunity to call a public meeting for purposes of holding discussions or deliberations regarding this legislation. We have, however, received comments and questions from various SEC members in response to a summary document that was previously provided by the bill sponsor to all of the SEC members, and we have attempted to include this input along with our own thoughts based on our respective experiences with the SEC in our roles as the Commissioner of the Department of Environmental Services and the Chairman (and a Commissioner) of the Public Utilities Commission.

First and foremost, we wish to applaud Senator Forrester and all of the co-sponsors of this legislation for recognizing the need to review, improve and update our state's processes for considering energy facility proposals. The issues and implications are numerous, complex, and have engendered a broad range of views and opinions. We are encouraged by the general results of the SB99 stakeholder process, which suggest that people of various backgrounds and interests should be able to find common ground on constructive approaches to these difficult issues.

It is in this spirit that we offer more detailed comments below, and extend an offer to work collaboratively with both the Senate and the House to try to help reach that common ground. We recognize that time is now limited in the Senate to engage in detailed analyses of, and revisions to, the bill. We provide these comments in order to initiate a conversation during the Senate's work on the bill and in the hope that if the issues cannot be fully resolved in the Senate phase, the work can be completed during the House phase.

The questions and comments below relate to specific sections (by page and line number) of SB 245, as amended by 2014-0568s, and include both policy and administrative considerations.

Policy: Determination of “need”; “net public benefits”

Page 1, lines 14-15: Whether the SEC must find a projected is “needed” has been a contested matter in SEC proceedings and should be clarified. This amendment provides clarity by deleting the reference to need. 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.

Policy: Cost-Effectiveness

Page 1, lines 21-22: The replacement of the term “supply of energy” with “energy resources” is an appropriate recognition of the importance of thinking about energy in a holistic manner.

However, the insertion of the term “cost effective” as a modifier of “energy resources” creates a substantial likelihood of disputes arising over the cost effectiveness of each project considered by the SEC. In the largely free-market regulatory setting in the energy field today, project developers make their own decisions as to whether a project will be cost effective; the SEC does not evaluate cost effectiveness except as it relates to the financial capability of the applicant.

Guidance as to what a cost effectiveness test should consider would be beneficial to applicants, intervenors and the SEC.

Administration: Structure of the SEC

Page 2, lines 1-15: We support reducing the number of members of the SEC but are concerned about the amendment’s provision that the Commissioner of DES, Chairman of the PUC and Commissioner of DRED hear all SEC matters. We project that over the next 12 to 24 months the SEC will be involved in at least 9 significant matters, likely to require 100 business days for each panelist, leaving little time for these three state officials to tend to their primary duties within their agencies. Accordingly, we respectfully suggest two alternatives: establish the SEC as an independent, quasi-judicial authority, consisting of 6 members, all of whom are appointed for terms by the Governor and Executive Council; or establish the SEC as a “hybrid” body whose members include some members who are appointed to terms by the Governor and Executive Council and others who serve as permanent designees of specified agency heads. Under the “independent authority” model, three of the members (who might be called “expert members”) would be appointed by the Governor and Executive Council based upon their respective experience and expertise in such fields as: environmental protection; energy resource or facility management; and community or economic development. They would not, however, be state officials. Under either approach, the SEC could be administratively attached to the PUC, for efficiency of operations.

Administration: Role of state agencies that are not members of SEC

Some SEC members have expressed concern about how best to meet their statutory responsibilities before the SEC if they are no longer members. This is of particular concern for those agencies that do not have separate permitting authority. Two examples are the Fish and

Game Department and the Division of Historic Resources. Both agencies provide critical information to assist the SEC in its decisionmaking process, but they do not have separate permitting processes. Therefore, defining the way in which their input is considered by the SEC will be important. Providing resources to them to allow for appropriate review of energy facilities is a separate issue raised below.

Administration: Designation of Public Members

Page 2, lines 5-23: The amendment calls for a public member-at-large, appointed by the Governor and Executive Council, and a local public member, appointed by the Chairman of the PUC, to serve on the SEC for a term of 3 years. We recommend that all public members be appointed to terms by the Governor and Executive Council. It is rare that members of a quasi-judicial board, commission or committee are appointed by any authority other than the Governor and Executive Council, and we suggest that it would be most appropriate for that authority to be retained by the Governor and Executive Council.

One way to structure public member participation on the SEC would be to require Governor and Council appointment of 3 public members representing specifically defined geographic regions (e.g., one to represent the 4 most northern counties, one to represent the 3 southeastern counties, and one to represent the 3 southwestern counties). Under this model, a “local” public member would already be available to serve on a panel for a matter within their “territory”, and their appointment would have been based upon broad criteria of suitability and availability to serve. Our understanding is that this approach has been used successfully for a number of years by the Health Services Planning and Review Board, RSA 151-C:3, I.(a)(2)(B), in selecting four consumers to serve on that board, each from a different region of the state.

Administration: Per diem for service on the SEC

Page 2, lines 16-23: We strongly recommend that “public members” and “expert members,” however appointed, be paid a substantial “per diem” for their time given the very significant demands of this work. It is likely that the SEC will sit at least 60 days or more per year for the foreseeable future. The documents are voluminous, the issues complex and hearing days are long and at times contentious. When the PUC requires a “temporary” Commissioner in the event that one or more sitting PUC Commissioners must recuse themselves from, or are otherwise unavailable for a matter, the “temporary” Commissioner has historically been paid a per diem based on the salary of a PUC Commissioner. Given the demanding nature of this work, we do not believe that it would be reasonable to expect to find an adequate number of suitable and qualified “volunteers” to serve as members of the SEC.

Page 2, Line 16, prohibits any public member from deriving “any significant portion of their income” from parties in any way involved with the applicant. We support the provision but would recommend deleting the word “significant”. It will be important to maintain the very bright line that currently exists among members of the SEC, which is that they do not derive any of their income from parties seeking or holding certificates issued by the SEC.

With respect to the “hybrid” alternative in which representatives of specific state agencies would sit as panelists on docketed SEC matters, we recommend that funding and authority be provided

to each specified department to enable them to hire a full-time, high-level staff member whose principal role would be to serve as that department's designee to the SEC. This would enable these employees to be available immediately to address SEC matters as soon as they arise, and would ensure expertise, professionalism and consistency in the consideration of these matters. If there are "lulls" in SEC docketed matters, they would be available to work on SEC rulemaking or other matters that would not conflict with their roles as SEC members.

Administration: SEC Staff Support and Transitional Issues

Page 2, Lines 24-33: We strongly support a permanent, paid staff director and other full-time staffing to enable the SEC to fulfill its statutory responsibilities. We would be pleased to provide assistance in developing and evaluating potential funding mechanisms, as requested.

Because appointment of new SEC members under either the independent authority or hybrid approach (described above) will likely take a period of time, we recommend including authority in a set of transition provisions to enable the PUC Chairman, in consultation with the DES Commissioner, to appoint a temporary staff director who shall serve until such time as all of the new SEC members have assumed their respective posts and they are able to meet as a body and appoint a staff director. Moreover, the timeframes for submittal of plans for staffing and funding may need adjustments to align with the practicalities of the appointment process for the members.

Page 2, lines 35-37, and Page 3, Lines 1-7: Including the SEC staff director (which should be amended to include any staff designated by the staff director) on the list of parties to whom the SEC can delegate inspection and compliance assurance responsibilities is an important and valuable addition.

Page 3, Lines 8-14: Again, including the SEC staff director on the list of parties to whom the SEC can delegate authority to specify techniques and the like or to specify minor changes in route alignment is an important and valuable addition. We further recommend that in requesting such minor changes, the applicant be required to notify both the state agency having jurisdiction over or an interest in the matter, as well as the SEC. To ensure appropriate coordination between and among all participating state agencies and the SEC with respect to any certificates issued by the SEC, we recommend including language that would clarify that in incorporating permit conditions proposed by participating state agencies into SEC certificates, the SEC may not modify those proposed conditions without prior notice to and consultation with the participating state agency, and in no case may any conditions of SEC certificates be less stringent than would have been required by law if included in a permit issued directly by the participating state agency.

Administration: Designation of hearing officer

Page 3, Lines 15-20: Provided that subcommittees will no longer be necessary, we would support replacing the current language of RSA 162-H:4, V with the proposed language that would provide for designation by the SEC staff director of a hearing officer. In order to ensure consistency and predictability of process, we believe the best approach is to have an SEC staff member designated to handle procedural matters in most cases, though the director should have

the flexibility to designate someone else if for reasons of workload or conflict, such alternate designation is appropriate.

Administration: Pre-application process

Page 3, Lines 21-30: We support a pre-application information and listening session in a host community for a facility as it is likely to make the overall SEC process more understandable and accessible to the public, and may help to reduce conflicts that could otherwise arise. It may be helpful to include language to clarify whether such pre-application sessions are only necessary in the case of a proposed new facility, or whether they would also be required for amendments to existing facilities, petitions for exemptions, or other procedural motions. Our suggestion would be that such pre-application processes only apply to proposed new facilities, but that the Chairman be authorized to require such proceedings under such other circumstances as appropriate.

Administration: Role of state agencies not represented on SEC

Page 3, Lines 31-37, and Page 4, Lines 1-10: This set of amendments to RSA 162-H:7, IV through VI-e, refers to a newly defined term, “participating state agency” (see Page 1, Lines 28-29), which means “each state agency having jurisdiction, under state or federal law, to regulate any aspect of the construction or operation of the energy facility.” We suggest that participation based solely upon “jurisdiction” is too narrow for the intended purposes of the proposed amendments to RSA 162-H:7, which would appear to include ensuring timely and substantial involvement in the SEC process by all state agencies having an interest in the matter.

For example, the Fish & Game Department may not necessarily have a direct regulatory role through a statute that would confer legal “jurisdiction” over some aspect of a proposed project, but the Fish & Game Department is, nevertheless, frequently consulted by project developers regarding potential impacts to wildlife or wildlife habitat, often in order to help provide reasonable assurances that the proposed activities will not cause subsequent violations of state or federal species protection laws. Accordingly, we would recommend revising the definition of “participating state agency” on Page 1, lines 28-29 to read, “‘Participating state agency’ means each state agency having regulatory or other jurisdiction over, an interest in, or which is otherwise consulted by an applicant for, an energy facility, including any aspect of the construction, operation or impacts of such facility.” Alternatively, the provisions regarding other state agencies that wish to provide input (Page 5, lines 21-23) may be a useful vehicle for establishing a role for the agencies noted above, if the provisions were adequately amended.

Administration: Application fee

Page 4, lines 32-37: We support the creation of an application fee or other funding mechanisms. We would be pleased to provide assistance in developing and evaluating options for an appropriate tiered application fee and possible other funding mechanisms, as requested.

Page 5, lines 21-23 and 24-28 may not provide sufficient time for agencies without regulatory jurisdiction to provide initial comments, and it appears that they do not have an ongoing role after providing initial comments within 90 days. In addition, while it would be helpful for those agencies to designate a staff liaison, those agencies often lack permit fees or other funds to

support SEC-related work other than general funds or other funds designated for specific programs or uses. Therefore, it would be appropriate if the legislation could include a mechanism for those agencies to be able to recover the costs for time related to an energy facility application from an applicant. For some agencies this work can be intensive, and may begin months or even years before an application is filed with the SEC.

Administration: Role of public counsel

Page 5, lines 29 through 36: We support clarification of the role of public counsel. Further guidance regarding the meaning of “the interests of the state as a whole” would be useful.

Policy: Reasonable alternatives need definition

Page 8, line 10: The term “reasonable alternatives” should be further defined in order to avoid the potential for multiple conflicting interpretations of this term arising.

Administration: Timetables and transition issues

Page 6, lines 10-26: The amendment calls for a public hearing within 30 days of the last public information session; it is not entirely clear what these terms envision and the sequence of the proceedings and whether there is adequate time for the applicant and community to be prepared. Moreover, in the case of a project that is physically located in more than one county, it may not be possible to schedule public hearings in all affected counties within that 30 day time period. Accordingly, we recommend changing this to 45 days (or more), or providing discretion to the SEC staff director in consultation with the SEC Chairman to extend the timeframe as necessary and appropriate.

Administration: Ability of SEC or SEC staff to retain consultants.

Page 7, lines 12-13 and 17-20: Because each docketed matter is different in scope, complexity and issues raised, it is possible that any particular matter may present issues on which specialized experts are required to fully inform the SEC. Accordingly, although most costs of proceedings would be covered by application or other fees, we recommend that the SEC retain the authority to hire consultants, experts or special legal counsel and to recover those costs from the applicant. In addition, we recommend that the reference in line 17 to “application fees” be broadened to include all sources of revenue received by the SEC.

Policy: “Orderly development of the region”

Page 8, line 17, changes “municipal governing bodies” to “municipal legislative bodies.” It is unclear whether the change to “municipal legislative bodies” would require towns to bring a matter to a regular or special town meeting in order to be able to provide their views to the SEC. If this were the case it could limit or significantly delay a town’s ability to participate in a docketed matter. Further, during the SB99 process, there were concerns that the “orderly development of the region” was a term that needed further specificity.

Policy: Interplay between municipal standards and SEC review

Page 8, lines 17-19 address the SEC’s consideration of the views of regional planning commissions and municipal bodies in the context of considering the orderly development of a region. The reference to “municipal ... planning commissions” is deleted, and it would be

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helpful to understand what is intended by this deletion. For example, in prior docketed matters, the SEC has considered any views expressed by municipal planning or zoning boards. It is unclear whether the deletion of “municipal” in this context is to be understood as an instruction to the SEC not to consider the views of municipal planning or zoning boards, or simply to consider them as the SEC would consider any other “public comments.”

Policy: Unreasonable adverse cumulative effects

Page 8, line 20 creates a new standard of “unreasonable adverse cumulative effects” without further definition. Guidance on this term would be useful. Similarly, page 8, lines 24-27 require a finding of “net public benefits” for a proposed facility. Guidance on this term would also be useful.

Administration: Effective date and transitional concerns

Finally, the effective date of the legislation is 60 days after passage. Restructuring of this magnitude will require more time in order to develop the new infrastructure, and for an appropriate transition of pending matters from the currently constituted SEC to a newly constituted SEC.

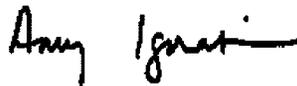
We would be pleased to assist in the development and evaluation of revisions to this legislation as requested.

Thank you for your consideration in this matter. If you have questions or need additional information, please contact Thomas Burack at 271-2958 or thomas.burack@des.nh.gov or Amy Ignatius at 271-2442 or amy.ignatius@puc.nh.gov.

Sincerely,



Thomas Burack, Chairman
Site Evaluation Committee



Amy Ignatius, Vice Chairman
Site Evaluation Committee

Cc: Sponsors of SB 245