



March 5, 2014

The Honorable Senator Jeanie Forrester:  
State House Room 105  
Concord, NH 03301

Dear Senator Forrester:

Thank you for the opportunity to provide comments on the draft amendment to SB 245-FN that was provided to us by Liz Shiel of your staff on March 3, 2014. We write in our respective capacities as Chairman and Vice Chairman of the SEC. As with our prior correspondence regarding this legislation dated February 18, 2014, please understand that we are not writing on behalf of the full Committee, as the SEC has not had an opportunity to call a public meeting for purposes of holding discussions or deliberations regarding this legislation. Although we are pleased at the general direction of the legislation, we're not able to endorse specific elements of the legislation or the proposed amendment. We hope that our comments below will be helpful in crafting legislation that may be capable of receiving broad support such that it will provide the common ground that we discussed in our letter of February 18, 2014.

The questions and comments below relate to specific sections (by page and line numbers) of the March 3, 2014 revision to SB 245, as amended by 2014-0658s and include policy and administration considerations, and other comments. These questions and comments are not intended to replace but rather to supplement our questions and comments provided to the Senate Energy and Natural Resources Committee on February 18, 2014. Again, today's letter represents our best effort to review and comment on the latest draft within a very short timeframe; upon further review of the draft it's possible that we will have additional comments or considerations.

**Policy: Determination of Need; Public Interest**

Page 1, lines 16-17, page 9, lines 35-37, page 10, lines 1-12: We note that the reference to need remains on lines 16-17, and we are aware that a provision for a finding related to need has been disputed in recent proceedings. Is it the intention that the finding of need language would remain in the bill? If so, would the amendment provide any further definition of that term? In addition, would it be in addition to or replaced with the public interest findings described in pages 9 and 10?

**Policy: Definition of Particular State Agencies**

Page 1, lines 29-30: We continue to be concerned that the definition of “participating state agencies” may be too narrow to encompass all agencies that would have jurisdiction or an interest in a matter coming before the SEC. An alternative definition was provided in the February 18, 2014 letter to the Senate Energy and Natural Resources Committee, as follows: “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.” We suggest that this may be a more appropriate definition.

**Administration: Creation of Staff Director and Other Positions**

Page 1, lines 31-32, page 2, lines 1-3, page 3, lines 10-12, page 8, lines 28-31:  
Upon further consideration, we are concerned that these sections may not be explicit enough in providing clear authority for the creation and filling of the staff director and other positions. We ask whether it is necessary to identify all of the authorized positions by labor grade or other class specification.

**Typographical Error:**

Page 2, line 6: Replace “site of certificate and facility,” with “certificates of site and facility”.

**Administration: Membership of the SEC**

Page 2, lines 10-27: As originally discussed, our understanding was that the amendment would provide for an SEC consisting of 8 members, 5 of whom would be selected based upon demonstration of experience or expertise in specific arenas and 3 of whom would be selected based upon geographic regions of the state. We believe strongly that the integrity and effectiveness of the SEC process has historically been assured and in the future can best be assured when the SEC membership demonstrates substantial technical expertise, understanding and competence.

Under the March 3, 2014 proposed draft, the SEC would consist of only 5 members, 3 of whom would be selected based upon geographic location and only 2 of whom would be selected based upon experience or expertise in specified disciplines. Particularly in light of the proposed provisions relating to public interest findings that would include substantial analyses of economic and planning issues, we respectfully suggest that consideration be given to instead of having 2 members appointed based upon geographic regions (e.g., one who resides in one of the 5 northern counties, and one who resides in one of the 5 southern counties) and 3 members appointed based upon experience or expertise, include; (a) environmental or natural resources conservation (b) energy facility design, construction, operation or management and (c) community or regional economic development or planning or both.

In addition, from a transition and continuity standpoint, consideration will need to be given to how to address extension of a member’s term if he or she is sitting on a matter that is underway when that person’s term expires.

**Policy: Ethical Standards of the Committee Members**

Page 2, lines 12-15: Upon further consideration, the proposed provisions are too narrow. We suggest consideration be given to referencing the requirements of RSA 15-A and RSA 15-B and that additional limitations be added to ensure that members would not have any pre-existing biases or pre-judgments and that they do not have a familial or financial relationship with any party having a financial or employment relationship with any energy facilities within jurisdiction of the SEC or appearing in any capacity in any matter before the Committee. It is essential to the integrity of the SEC process that all of the members meet ethical standards that are above reproach.

**Administration: Per Diem For SEC Members**

Page 2, lines 36-37, page 3, lines 1-2: Upon further reflection, the per diem rates included in the March 3, 2014 draft would be difficult to administer and may not offer a rate of compensation necessary to attract the caliber of persons necessary to serve as SEC members. Accordingly, we suggest revising the language to read: "Committee members should be compensated at a pro-rated, per diem rate for each day or portion thereof spent on Committee matters. The per diem rate shall be at a rate equal to the daily salary rate of a Commissioner of the public utilities commission at the middle step. The per diem rate for the Chairman shall be equal to the daily salary rate of the Chairman of the public utilities commission at the top step."

**Administration: Appointment of Alternates**

Page 3, Lines 8-9: Is it the intention that the alternates be appointed by the Governor with the consent of the Executive Council? Given that all of the other members of the SEC would be approved in this manner (Page 2, Lines 10-11), it would appear appropriate to include similar language for alternates.

Moreover, based upon our experience with efforts to ensure that a quorum is present for SEC proceedings under existing law, we think it is quite probable that situations will arise in which fewer than all 5 members are available to sit on a matter. Accordingly, consideration should be given to providing authority for the appointment of either more than 5 members initially (so that members for any particular panel could be selected by the Chairman from a pool of members), or to appointment of alternates before they may actually be needed for a particular matter. Without such provisions, there could be substantial delays in consideration of a matter while an alternate is identified, nominated by the Governor, and confirmed by the Executive Council.

**Administration: Participating State Agencies**

Page 4, Line 31: To ensure consistency with Page 4, Line 20, and with the revised definition of "participating state agency," the words "having jurisdiction" should be deleted on Line 31. We note, however, that maintaining a distinction between "participating state agencies" and other agencies that may have an interest in but not direct jurisdiction over a matter may be difficult in practice.

**Policy: Presentation of Alternatives**

Page 5, Lines 12-13: This language remains ambiguous as to what is expected of the applicant in terms of presentation of alternatives, and whether each proposed facility, regardless of type, must identify alternative approaches that would include utilizing overhead transmission lines or putting the facility underground. For example, would an applicant for a large solar array or a propane storage facility be expected to present alternatives for placing such structures underground?

**Administration: Public Hearings**

Page 5, Lines 26-30: In the case of applications for facilities that have locations in multiple counties, it may not be possible to conduct all of the required public information sessions or public hearings within 30 day timeframes. It may be more realistic to set a 30 day timeframe for facilities affecting only 1 county, and a 45-60 day timeframe for facilities affecting 2 or more counties.

**Administration: Submissions From State Agencies Not Having Jurisdiction**

Page 6, Lines 10-12: We strongly recommend deleting the sentence that reads: “The committee shall not consider untimely submissions from state agencies not having jurisdiction.” Such language would be inconsistent with long-standing SEC practice of considering all comments received from all parties, including comments received from the public, up to the time of final deliberations on a matter. It should be expected that state agencies will provide input in a timely manner to the SEC, but it also must be recognized that issues frequently arise or surface long after a matter has originated that were not known or anticipated early in a proceeding, and often due to changes proposed by an applicant in response to questions or concerns raised during the course of a proceeding. It would be highly prejudicial to state agency interests to preclude them from submitting comments following what could be an arbitrary deadline, or to subject them to a deadline different from that applying to members of the public.

**Administration: Compulsory Attendance of State Agency Representatives at All SEC Sessions**

Page 6, Lines 33-35: We strongly recommend deleting the sentence that reads: “The designated representative, or designee, shall attend all public hearings, adjudicative hearings, and adjudicative deliberating sessions for the docketed item to which he or she is assigned.” Based upon our long experience with SEC proceedings, we believe that such a requirement would place an extraordinarily heavy burden on state agencies without providing any substantial benefit to the SEC process, and without providing the agencies with any compensation for the large amount of time that would have to be spent. For example, there are many state agencies that may have only a minor role with respect to a proposed facility, such as the Department of Transportation which may issue a “curb cut” permit for installation of an access road off of a state highway. There would be no material benefit to the SEC, the DOT, the public or the applicant for DOT’s designee to sit in a hearing room for multiple days while the matter is being considered, when the issuance of the curb cut permit may be non-controversial and not receive any substantial attention from the SEC.

As an alternative, and in light of all of the other ways in which state agencies would participate in the process as specified on Page 6, Lines 15-30 and Page 7, Lines 1-2, which are substantially more extensive than under current law, this sentence could be replaced with language reading: “The committee chairman may request the attendance of an agency’s designated representative or designee at a session of the committee if that person’s availability could materially assist the committee in its examination or consideration of a matter.”

**Administration: Sources of Funds for Employment of Staff and Consultants**

Page 8, Lines 28-31: To ensure consistency with all of the funding sources available to the SEC, we strongly recommend revising this sentence to include language to the following effect: “The site evaluation committee may use any funds appropriated to or received by the committee to support positions that engage a consultant or consultants, legal counsel, hearing officers, staff responsible for public and municipal engagement with committee matters, and other staff, and to meet all other administrative costs and obligations in furtherance of the duties imposed by this chapter.” As currently drafted, this provision would only allow the use of “application fees” for most of these purposes, but the 3/4/14 version of the amendment also contemplates an advance from the Renewable Energy Fund (Page 10, Lines 18-22) and an annual operating fee (Page 10, Lines 33-36 and Page 11, Lines 1-2). To ensure the ability to efficiently and effectively administer the SEC, all sources of funding should be available without restriction to meet all of the necessary expenses of administration, except to the extent that costs are specifically recovered from applicants to cover specified costs such as the cost of engaging a stenographer for a specific matter

**Administration: Process for Establishing Operating Fees**

Page 5, Lines 19-21 and Page 10, Lines 25-27 and 34-35: The first reference to the establishment of application fees by the SEC (on Page 5, Lines 19-21) indicates that such fees would be adopted by the SEC by means of an Order, which would suggest that the SEC would set fees through a process similar to that followed by the Public Utilities Commission (PUC) in its fee-setting proceedings for the establishment of rates for the funding of the PUC’s operations. On the other hand, the descriptions of the processes for the establishment of both application fees and annual operating fees on Page 10 (Lines 25-27 and 34-35) refer to rules. To avoid any confusion, we strongly recommend that these provisions be harmonized so that it’s clear whether the fees are to be set by Order or by rulemaking. Given that fee rates may have to be adjusted on a fairly frequent basis, and given the length of time and complexities involved in rulemaking, it may be administratively more efficient to authorize the SEC to set fees by Order rather than by rule.

**Administration: Rulemaking Timeline and Resources**

Page 8, Lines 34-37, and Page 9, Lines 1-5: These lines include provisions that were enacted in 2013 as SB 99, and direct the SEC to adopt a broad set of substantive regulations by January 1, 2015. The pre-rulemaking process with stakeholders has been noticed by the SEC Chairman and will be initiated shortly with the funds remaining under the SB 99 appropriation. However, unless additional appropriations and staffing are

available through enactment of SB 245 or other legislation, the January 1, 2015 deadline may not be achievable. Moreover, if the SEC membership is reconstituted through enactment of SB 245 or other legislation, it will take some time for the new SEC members to get up to speed on the issues and complete development of a set of substantive rules, particularly if revisions to RSA 162-H include new or revised application requirements or findings to be made by the SEC. Accordingly, we recommend revising the January 1, 2015 deadline to provide, at a minimum, an additional 6-12 months for completion of the rulemaking process.

**Administration: Recovery of Costs by State Agencies**

As discussed in our letter of February 18, 2014, there are numerous instances in which state agencies must spend substantial amounts of time and expend financial resources in order to review and comment on pre-application and application materials for SEC matters. Many of these expenditures of time and money are not covered or reimbursed through application fees or other charges that agencies are authorized to assess. Accordingly, we strongly recommend adding a section to SB 245 that would provide, in effect, as follows: “All participating state agencies, and any other state agencies asked by the applicant or the committee to review any plans, reports, applications, or other documents or to participate in any meetings or communications prior to the filing of an application or other proceeding with the committee, or asked or required to participate in a committee proceeding following the filing of an application or other matter with the committee, shall be entitled to recover from the applicant its reasonable costs for all staff time and expenditures incurred in connection with such matters to the extent that such actual costs are not otherwise covered by an application fee paid to that agency for an underlying permit. All such state agencies shall submit invoices to applicants and prospective applicants for all such costs not less frequently than annually and not more frequently than monthly.”

**Administration: Failure of Applicant to Pay Fees and Expenses**

We recommend adding a provision that requires an applicant or any other party owing funds or fees (other than application fees) to the SEC, or reimbursements to state agencies for recovery of costs, to do so within 45 days, and further to authorize the SEC and state agencies to suspend proceedings until such payments have been received. We recommend adding language that states specifically that application fees are due upon filing.

**Policy: Source of Reasonable Alternatives**

Page 9, Line 21: It would be helpful if the amendment were to specify which parties would be entitled to propose “reasonable alternatives,” and to provide further definition of “reasonable” and what constitutes an “alternative” in this context. For example, is “alternative” in this context intended to include a natural gas generator instead of a wind facility, or an alternative location of wind turbines, or something else?

**Policy: Consideration of Views of Municipal Legislative Bodies**

Page 9, Lines 28-30: Is this language intended to require that a municipality must have held a vote at a town meeting or a special town meeting to consider an application before

the SEC may take final action on an application? Or is the SEC only required to consider such views or actions if a vote has actually occurred and been reported to the SEC? The former approach would not seem to be contemplated unless the deadlines for action on application were modified to extend them in the event that such meetings or votes had not yet occurred.

**Policy: Unreasonable Adverse Cumulative Impacts**

Page 9, Lines 31-32: The term “cumulative” is not defined, thus raising questions as to what other matters are to be considered in addition to the actual proposed energy facility. For example, is “cumulative” in this context intended to include only other potential future energy facilities, or other developments of any kind in the area, or both, or something else?

**Policy: Definitions and Roles of Policies and Zoning and Land Use Plans or Regulations**

Page 10, Lines 4-9: What does the term “policies” encompass in this context? Could Lines 4-5 be construed as enabling a municipality to have a “policy” that it may “veto” any facility that does not receive majority support at a meeting of its legislative body? And if so, would the SEC be bound to abide by such a “policy”? Could lines 6-9 be construed as repealing the preemption of municipal zoning and planning ordinances as currently exists under RSA 162-H, and instead requiring the SEC to apply any and all applicable municipal zoning or planning ordinances? If so, would the SEC be authorized to grant waivers or variances from such ordinances? And if so, what standards would be applicable to the granting of such waivers or variances?

**Policy: Reference to RSA 4-E:1, State Energy Strategy**

Page 10, Line 12: Please confirm the accuracy of this citation. Also, note that a state energy strategy has not yet been established under the process established by SB 191 (enacted in 2013). This is a policy document developed by a Commission and does not have the full force of law.

**Administration: Transition Provisions**

Page 11, Lines 7-16: Upon further consideration, there are many aspects and implications of the transition that will need further analysis. We are concerned that the language as currently drafted may result in a “filing frenzy” in which parties rush to file matters prior to July 1, 2014 in order to avoid having to deal with a reconstituted SEC. To help avoid such a possibility, and placing an overwhelming and unanticipated burden on the current SEC, we recommend developing a “trigger” or “transition process” based not on the date of filing but on whether or not any dispositive decisions have been made or evidentiary hearings or deliberations held on a matter. If such steps have occurred, it may be appropriate for the matter to be brought to final resolution under the existing statutory provisions and the current membership of the SEC; if none of these steps has occurred, however, it would be appropriate for the matter to be considered by the newly constituted SEC, and under the revised statute and rules, with provision for the applicant to provide any supplemental materials or revisions to conform with the new statutory or

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regulatory requirements. We have not yet been able to identify and analyze all of the potential situations and issues that could arise in the transition process, so we are not in a position at this time to recommend specific revised statutory language. Further time and thought will be required on this issue.

Again, we thank you for your leadership on this important issue and we appreciate your consideration of our thoughts and ideas. We look forward to continuing to work with you and all interested legislators and parties to help find common ground that can lead to improvements and modernization of New Hampshire's approach to the siting of energy facilities.

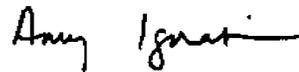
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Sincerely,



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Thomas Burack, Chairman  
Site Evaluation Committee,  
And Commissioner,  
Department of Environmental Services



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Amy Ignatius, Vice Chairman  
Site Evaluation Committee,  
and Chairman,  
Public Utilities Commission

Cc: Sponsors of SB 245