



April 9, 2014

Re: SB 245, relative to the siting of energy facilities; Issues relating to the structure of the Site Evaluation Committee

The Honorable David Borden, Chairman
House Science, Technology, and Energy Committee
Room 304, Legislative Office Building
Concord, NH 03301

Dear Chairman Borden:

We write in our respective capacities as the Chairman and the Vice Chairman of the Site Evaluation Committee (SEC) established pursuant to RSA 162-H to provide comments and other information that we believe will be helpful to your consideration of SB 245, as amended by the Senate, relative to the siting of energy facilities. We are responsible under RSA 162-H for the administration of the review process for the siting of energy facilities in New Hampshire, and we are seeing rapid changes in the energy field that will place unprecedented levels of burden on the SEC that it is not equipped to handle. We believe it is vital that the State be proactive in making changes to a very important process.

As the Science, Technology and Energy Committee (ST&E) heard last week, the legislation now before you is the result of a fast moving and ongoing series of deliberations in the Senate between and among key legislators, a diverse group of stakeholders, and affected state agency representatives. While this letter is limited to addressing the bill in its current form, it may be helpful to review [previous letters relative to SB 245](#) from our two agencies to provide greater context for your committee's consideration of this legislation. In particular, we would refer you to our letter of March 12 to the full Senate, which provides significant background and context relative to the need for reform of the SEC process to address the current and rapidly evolving energy needs of the state in a thorough and efficient process, particularly given the rising number and complexity of matters brought before the committee.

While we believe the current amendment makes a number of improvements to the existing SEC process, our comments below are intended in the spirit of providing substance for thoughtful additional discussions with your committee to ensure that the bill achieves its goals in a manner that is workable for all participants. As we have explained in our earlier correspondence on this legislation, 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

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regarding this legislation. Moreover, because we serve in quasi-judicial roles with respect to matters that may come before the Committee, we are not able to endorse substantive provisions relating to siting criteria. We look forward to additional discussions to clarify or amplify any of our comments and respond to additional questions or concerns from the committee.

We offer comments below on specific sections of the bill that we believe require additional consideration to ensure that they will be workable and effective.

The comments below are based upon SB 245, as amended by the Senate under amendment 1125s, adopted March 27, 2014, and reference the page and line numbers in that bill.

Section 3 SEC newly created (Page 1, lines 19-29, and Page 2, lines 1-33):

I. Members

The issue of SEC membership is complex and needs to address the potentially competing needs for responsiveness of the SEC to the public and stakeholders, ensuring the impartiality of the committee members in SEC matters, while also ensuring that state agency commissioners have the ability to properly manage their agencies and the ability to provide ongoing guidance to the Legislature and the Governor on energy issues outside of the SEC arena. The current requirement that SEC members refrain from ex parte communications or from pre-judging a matter presents a dilemma for committee members whose agencies have specific authority or other interests in facility siting or development in that they cannot communicate or otherwise articulate the agency's position and are effectively circumscribed from participating in broader policy discussions that may include information relative to a matter pending or likely to come before the SEC. The bill as drafted reduces the number of members, and revises the number of members necessary for a quorum. The ST&E Committee may wish to consider alternatives to provide greater efficiency and enable state agency commissioners to more effectively address the many competing demands on their engagement in the energy field, such as authorizing delegation of other high level agency representatives for full committee as well as subcommittee matters, requiring only 2 of the 3 PUC commissioners to serve on the full committee, and appointing additional public members to draw from to serve on subcommittees. Provisions of this kind would provide the committee with greater flexibility and also make it possible to consider multiple matters simultaneously or in parallel fashion.

Page 2, Line 7: Should (e) Director of the Division of Historic Resources be changed to Commissioner of the Department of Cultural Resources?

Page 2, Lines 8-13: I. (f) requires one public member to be an attorney licensed to practice in NH.

The ST&E Committee may wish to consider revising this requirement, as it might mean having the attorney member serve on all subcommittees if there are no other attorneys empaneled, assuming the "must have one attorney on each panel" provision of Section X (Page 3, Lines 8-9) is left in the bill. If this provision remains, the Committee should also consider whether a retired attorney would be "licensed to practice".

Page 2, Lines 17-18: III. No public member shall receive income from energy facilities.

To help ensure the impartiality of the public members, the ST&E Committee may wish to consider whether the bill should also prohibit public members from receiving income from or otherwise having affiliation with organizations that take positions regarding the development of energy facilities, whether in support or opposition.

Page 2, Lines 18-19: III. Public members must comply with RSA 15-A (Financial disclosure) and RSA 15-B (gifts, expenses).

To be consistent with the additional requirements that are applicable to the state agency employees and officials on the committee, the ST&E Committee may wish to consider adding language that would also make the public members subject to RSA 21-G (Code of Ethics).

Page 2, Lines 22-25: V. 7 of 9 members constitutes a quorum.

For reasons of practicality, the ST&E Committee may wish to consider amending this section to establish that 5 of 9 constitutes a quorum. Under current law the SEC uses a simple majority, i.e., 8 of 15, to establish a quorum.

Page 3, Lines 3-15: X. Authorizes subcommittee of no less than 7 at the discretion of the Chair, but still requires both public members to serve.

For reasons of practicality, the ST&E Committee may wish to consider amending this provision to require one public member if there is a 7 member subcommittee or to appoint more public members to be available in a pool to be drawn from for a particular panel (as will be the case with agency members).

Page 3, Lines 8-9: X. Requires at least one member of each subcommittee to be an attorney licensed to practice in NH.

For reasons of practicality, the ST&E Committee may wish to consider deleting this provision as it could require the one public member who is an attorney to sit on every proceeding if none of the state agency members available to sit on proceedings is a licensed attorney (see also Page 2, Lines 8-13).

Page 3, Lines 12-15: Establishes that 5 of 7 members constitutes a quorum.

The ST&E Committee may wish to consider amending the quorum requirement to 4 of 7, for practical reasons and to be consistent with current SEC statute (which requires a simple majority).

Section 4 Administrator, Page 3, Lines 16-23:

Creates an Administrator as a classified position or a contractor, and authorizes the administrator to engage additional technical, legal, administrative support to fulfill functions.

The ST&E Committee may wish to consider whether a classified or unclassified position would best serve the SEC and the interests of the state. In either event, the hiring, supervision and evaluation of the administrator should be assigned to the SEC Chairman. Given the need to ensure the responsiveness of the administrator to the needs of the committee, an unclassified position may provide a more workable scenario. The ST&E Committee may also wish to consider amending this section to create additional classified positions. For example, it will be

more expensive to provide legal support on a contractual basis, but without specifically creating new positions in legislation to fulfill this or other functions, the SEC Chairman may have authority only to hire contractors. Some of these provisions may belong in the RSA while others may properly be included in Session Laws.

Section 5 Powers of Committee (delegation of monitoring, technique etc.) (Page 3, Lines 25-34):

The ST&E Committee may wish to consider revising this language to ensure that state agencies can be reimbursed for the time that they spend conducting monitoring activities at the request of the SEC.

Section 6 Powers of Committee (authority of hearing officer) (Page 4, Lines 6-10)

The ST&E Committee may wish to consider an editorial amendment on page 4 line 6, by revising the language to read in pertinent part, "... the administrator, *after consultation with the chairman*, may designate..."

Section 9 Role of State Agencies (Page 5, Lines 20-37, and Page 6, Lines 1-14)

Page 5, Lines 33-36: I. (e) provides that certificate conditions or rulings are put out for comment from agencies having jurisdiction.

This is not required under current law, but was included in an earlier version of this bill when it was anticipated that the committee would consist entirely of members who were not otherwise employees of state agencies. The purpose of such an additional provision is to ensure that the SEC does not issue certificates containing provisions that would be inconsistent with laws or regulations implemented by agencies that are not represented on the SEC panel that hears a particular matter. The ST&E Committee may wish to consider whether such a provision is necessary in light of the currently proposed makeup of the SEC membership and, if so, how to best construct it so as to ensure that statutory deadlines for decisions can be met.

Page 6, Lines 7-9: IV. Authorizes Chair to request agency representative to attend session

This authority does not exist under current law, but was included in an earlier version of this bill when it was anticipated that the committee would consist entirely of members who were not otherwise employees of state agencies. If the ST&E Committee wishes to retain this authority, it may wish to clarify whether the agency representative would be called to testify and, if so, whether additional provisions are necessary to ensure due process.

Section 10 Public Hearings, Studies, Rules (Page 6, Line 17 through Page 8, Line 24)

Page 6, Lines 28-36: I-a. Requires the SEC to hold a public information session in each county in which a facility is to be located, within 45 days of acceptance of the application.

Current law requires that the SEC hold a public hearing in each county; this new provision would require that the applicant conduct a public information meeting in advance of the required public hearing. We understand that the purpose of adding a required public information meeting after the filing of the application but before the public hearing is to ensure that the public has an opportunity to learn about the project prior to the public hearing. Because

it is already standard SEC practice to include a project overview at the outset of all public hearings, and to save costs and provide greater efficiency, the ST&E Committee may wish to amend this section to provide that such meetings are to be administered by the applicant, and that neither the staff nor the members of the SEC are required to attend such public information meetings. The ST&E Committee may also wish to revise Page 6, lines 35-36 to read: “The session shall be for public information on the proposed facilities, at which the applicant presents information to the public.”

Page 7, lines 23-31: II. Provisions regarding hearings

The ST&E Committee may wish to consider making some editorial changes to address a potential inconsistency in terminology: the bill refers to informational “sessions” in I, I-a, I-b but switches to informational “meetings” in section II. It appears that use of the term “sessions” throughout would provide consistency.

Page 7, lines 34-35: III. Inserts “prior to closing of the record of a proceeding”

It is unclear to us why this insertion was made, as once the record is closed it is closed, unless the SEC grants a motion to reopen. The ST&E Committee may wish to consider deleting this insertion.

Page 7, lines 35-37: III. Refers to “free access to records,” and then states that the public must pay for copies of record and reports.

To avoid confusion, the ST&E Committee may wish to consider changing “free access” to “access”.

Page 8, lines 6-12: V. Authorizes SEC and counsel for the public to jointly conduct studies

Although this language mirrors current statute, it is an odd provision, as in SEC practice, counsel for public is treated as a party and it would be highly unusual for a party to jointly undertake studies with the decision-makers. The ST&E Committee may wish to consider amending this language to authorize the SEC to conduct such studies as it deems necessary, including such studies as may be recommended by counsel for the public. Provision could also be included for counsel for the public to conduct such studies as such counsel deems necessary.

Page 8, lines 15-18: VII. Requires adoption of certain rules no later than Jan 1, 2015

Work on developing these rules is underway, with hopes of meeting that deadline, but the complexity of the issues cannot be underestimated. However, because SB 245 if enacted will require additional revisions to the SEC rules, and because SB 281, if enacted, will provide further specificity on the requirements for rules for wind facilities, and because it would be most efficient for all parties to have a single set of rule amendments that addresses all of these issues, the ST&E Committee may wish to consider extending this date to July 1, 2015.

In addition, because the last portion of this section refers to duties that OEP has already fulfilled, the ST&E Committee may wish to consider deleting the final sentence (Page 8, lines 22-24).

Section 14 Fund, Funding Plan and Applicability (Page 9, lines 6-34)

Page 9, lines 9-14: I. Creates a continually appropriated fund in the office of State Treasurer, funded by a one million dollar loan from the Renewable Energy Fund (REF), to be repaid over 10 years.

The ST&E Committee may wish to add language affirmatively stating that, notwithstanding the requirement for the SEC to submit a permanent funding plan by December 1, 2014 (in 162-H:21, II, as discussed below) these funds will be available as of July 1, 2014, and that both before and after the Funding Plan is submitted or approved, the REF advance funds are available for payment of any and all SEC expenses that are not otherwise billable from applicants, including but not limited to: salary, benefits and other costs associated with hiring an administrator or other staff, payment of per diems to public members, reimbursement to state agencies for the time their representatives spend on SEC matters, including rulemaking, and all other technical or administrative assistance as needed. The ST&E Committee may also wish to further clarify that if the legislature does not create a staff attorney position, the fund does not support the legal expenses of a contract attorney hired on each particular matter, as those costs will continue to be direct billed to the applicant. The ST&E Committee may also wish to include a provision stating that even if a specific plan for application fees has not yet been developed, all matters that fall within the jurisdiction of the SEC as constituted effective July 1, 2014 shall be subject to payment of any such application fees once they have been duly established.

Page 9, lines 15-25: II. Requires the SEC to submit a permanent funding plan to the Governor and Finance Committees by December 1, 2014.

The ST&E Committee may wish to develop a funding plan for inclusion in SB 245 rather than deferring this issue to the SEC to develop and submit a plan. Alternatively, if the requirement for the SEC to develop a funding plan remains in the statute, the ST&E Committee may wish to clarify the language to address whether any loans received by the SEC must be repaid from funds collected, and to clarify whether the funding sources must be able to meet all of the SEC process costs, including the time for participation by agency staff in SEC proceedings, or whether some portion of the funding could come from the general fund.

Applicability (Page 9, lines 29-31): II. Pending matters that have had a public hearing prior to July 1, 2014 would be governed by the standards and committee in place prior to July 1, 2014

Based upon matters currently filed or reasonably anticipated to be filed, we currently estimate that this would potentially apply to 4 or more dockets. Because the term “public hearing” may be open to interpretation, the ST&E Committee may wish to consider replacing the term “public hearing” with the term “evidentiary hearing,” or otherwise clarifying what constitutes a public hearing.

Transitional Responsibilities (Page 9, line 35 through Page 10, line 16):
Page 9, line 36 through Page 10, line 3: I. Matters for which no public hearing is held prior to July 1, 2014, and all matters filed after July 1, 2014 are reviewed by new committee and parties in pending matters have reasonable opportunity to supplement filings.

The ST&E Committee may wish to amend to read in pertinent part, “... and all matter filed *on or* after July 1, 2014 shall be reviewed ...” In addition, for the same reason as discussed

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above, the ST&E Committee may wish to consider changing “public hearing” to “evidentiary hearing” or clarifying the term “public hearing”.

Page 10, lines 4-5: II. Requires SEC reorganization and the hiring of an administrator no later than November 1, 2014.

On 10, line 5, change “a” to “an”.

Page 10, lines 6-7: III. All time frames “under this chapter” shall be tolled until date committee is reorganized.

The ST&E Committee may wish to consider amending this provision to be clear that deadlines in this chapter that are unaffected by the formation of the new SEC are not tolled, such as a deadline to rule on an application that already had a public hearing before July 1, 2014 (or an evidentiary hearing if the ST&E Committee replaces all references to “public hearing” in 162-H:22 to instead be references to “evidentiary hearing”). One way to accomplish this would be to include language that reads: “All time frames under this chapter for applications or petitions for which a [public hearing/evidentiary hearing] has not been held prior to July 1, 2014 shall be tolled until the date that the committee is reorganized.”

Page 10, lines 14-16: V. Requires the committee in effect prior to July 1, 2014 to review application for transfers pursuant to RSA 162-H:5, I provided such application is filed no later than December 31, 2014

We have learned that this provision was added to address a specific situation which is currently confidential and may or may not come to fruition, and was included at a time when it appeared that the newly constituted SEC would not include any state agency employees. Because there is no reason to believe that such transfers of ownership could not be handled in a timely and efficient manner by the “new” SEC, such a provision appears unnecessary and would unduly prolong the existence of the “old” SEC.

Section 16 Repeal (Page 10, lines 21-25)

Page 10, line 23: II. Repeals RSA 162-H:6-a relative to time frames for renewable energy facilities

The ST&E Committee should carefully consider the potential unintended consequences of repealing this entire section, and may wish to consider retaining the SEC’s ability to “stop the clock” in certain circumstances as now provided for.

In summary, in light of the rapid changes occurring in the energy field and New Hampshire’s need to ensure that it has the best possible energy facility siting process for years to come, we urge the legislature to complete its work on SB 245 this year.

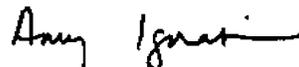
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Should you have questions or need additional information, please contact Tom Burack at 271-2958 or thomas.burack@des.nh.gov, or Amy Ignatius at 271-2442 or amy.ignatius@puc.nh.gov.

Sincerely,



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Site Evaluation Committee,
and Commissioner,
Department of Environmental Services



Amy Ignatius, Vice Chairman
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