CONFIDENTIAL

LEGISLATIVE BILL REVIEW FORM: 2013

Bill Number: S.201 **Name of Bill:** An Act Relating to Siting Review by the Public Service Board

Agency/ Dept: Public Service Dept. **Author of Bill Review:** Geoff Commons, Sheila Grace, and Anne Margolis

Date of Bill Review: 1/16/14 **Status of Bill: (check one):**

X Upon Introduction _____ As passed by 1st body _____As passed by both bodies _____ Fiscal

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Recommended Position:

_____Support __X__Oppose ____Remain Neutral _____Support with modifications identified in #8 below

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Analysis of Bill

1. **Summary of bill and issue it addresses.** *Describe what the bill is intended to accomplish and why.*
S. 201 proposes various changes to the statute that governs siting review by the PSB of electric generation, transmission, and natural gas facilities, including: revising the standards for obtaining party status; creating a "friend of the Board" category of participants; assessing application fees for non-utility and non-governmental facilities; and requiring "substantial deference" to the recommendations of local and regional bodies and to the local plan.

2. **Is there a need for this bill?** *Please explain why or why not.*
No. Of the three siting bills recently introduced by Senator Hartwell, S. 201's siting practices highlighted for change are the most similar to those highlighted in the recommendations of the Siting Commission (SC); however, they differ dramatically, both in detail and in terms of the degree of comprehensiveness. S. 201's provisions are likely the outcome of the Joint Energy Committee's summer hearings, in which they discussed the SC report and the Department's subsequent report examining specific provisions of the SC report at the Legislature's request. However, S. 201 does not adopt the SC recommendations specifically or as a package, as proposed by the SC and advocated by the Department.

S. 201 modifies § 248 to explicitly state that the parties with whom petitions must be filed – including the AG, PSD, and (for in-state facilities) the Dept. of Health, ANR, AOT, AAFM, municipal and regional planning commissions, municipal legislative body, and Byways Advisory Council – have the right to appear as a party in the proceeding. Under current Board practice, these entities are routinely allowed party status. The S.201 change allows these entities party status without asking the Board and apparently their participation will not be limited in scope.

Also, with reference to in-state facility applications S. 201 requires the PSB to allow as parties any adjoining property owner or any other person who demonstrates a particularized interest that may be affected. These requests are routinely allowed; however, S.201 makes it a little easier. Additionally, we are assuming that the

intervention would be limited to the particular interest. Moreover, S. 201 creates a "friend of the Board" category; similar to in Act 250. Such a friend may participate in proceedings without being accorded party status, and may play a limited or targeted role. This new status could create unduly burdensome proceedings unless appropriate safeguards are in place with regard to how many "friends" can participate and in what role. S.201 also contains a discovery provision that is similar to the Civil Rules of Procedure.

Another section of S. 201 prohibits the Board from using post-certification review – i.e. allowing a Certificate of Public Good to be conditioned on eventual receipt of various approvals, permits, or details – for in-state facilities. This essentially requires developers to lock in their design details, equipment specs, and environmental and other permits prior to being able to receive a CPG, which is a departure from current practice, and which will require a great deal of front-loading and associated expense for developers, without leaving them much flexibility to (or much cost-effective flexibility) to amend their projects in response to concerns from the (many) parties that will be part of the § 248 proceeding. The SC, by contrast, had recommended that petitioners must file for their environmental permits concurrently with filing for a § 248 petition, which was a compromise between greater front-loading/design specificity while leaving some reasonable flexibility for changes to the project throughout the proceedings.

S. 201 also proposes a filing fee for § 248 in-state electric generation facility applicants: $5.40 for each $1,000 of the first $15,000,000 of construction costs and $2.50 for each $1,000 of costs above that limit, and no more than $750,000. 80% of the fee will be allocated between the PSB and the PSD (except if costs of regular employees are allocated under Section 21, the fee shall offset this amount), while 20% will go to support ANR's participation via their Environmental Permit Fund. Exempt from the fee are net metering projects, projects that will pay expenses under 8005(a)1 (SPEED projects), facilities proposed or owned by the State or one of its political subdivisions, Vermont retail electricity providers, and natural gas distribution companies. One might surmise that the fee is targeted at large merchant wind and biomass facilities selling their power out of state.

The SC had similarly suggested several potential funding mechanisms for consideration to assist specifically with their enhanced planning and public engagement recommendations, and to ensure fairness between merchants and those entities paying into the gross receipts tax, including filing fees assessed to applicants (per MW), annual fees assessed on all generators (meant to capture merchants not paying the GRT), and bill-back, with the caveat that the cumulative fees/taxes should be fair and predictable for applicants. No specific fee structure was suggested by the SC, though examples from other states were provided in the final report. Note also that the fee is not applicable to merchant transmission or natural gas facilities; the application fee should perhaps be applied to these and any other facilities not currently covered by existing cost-recovery mechanisms. If not, there should be safeguards to at least ensure that developers do not dissemble pipeline/natural gas facilities into separate projects in order to avoid costs.

The final set of changes in S 201 have to do with planning and the weight afforded to towns and regions. As opposed to the SC's proposal the recommendations of the towns and regions receiving "substantial consideration" – a term they did not define but which they meant to mean something more than the current standard of due consideration – S. 201 proposes that the recommendations of the towns and regions and the town plan's land conservation measures receive "substantial deference," a la § 248(a). "Substantial deference" is defined in S. 201 to mean that the recommendation or measure shall be applied unless there is a "clear and convincing demonstration that other factors affecting the general good of the State outweigh application of the recommendation or measure." While it is not clear how the Board will modify their current practice of weighing

of the public good to effect such a demonstration, substantial deference as defined here gives much greater weight to the towns and regions.

Perhaps the most significant change suggested in S. 201 is that it would require a project to conform to the applicable regional plan, as long as the regional plan has been updated to: indicate areas in the region that are suitable/not suitable for electric generation siting; analyze the options available to the region and recommended actions the region should undertake to meet the State's greenhouse gas, building efficiency, and renewable energy goals; and state the basis for any provision that is specific to electric generation facilities. The SC recommended that deference be accorded the plans if they were updated similarly; but, with one major exception: the plans would need to be approved by the PSD, in isolation and also as part of a comprehensive look at all of the regions' plans. The SC felt that this approval process was necessary to make sure that the State could, as a whole, achieve its goals based on the cumulative provisions of all of the regional plans. S. 201 explicitly exempts regions from establishing a numerical amount or capacity of electric generation facilities to be sited within the region, and does not provide for any kind of review or approval process of individual plans or the sum total of all regional plans. S. 201 also requires the PSB to presume the regional plans comply with the above requirements and therefore are controlling, unless a "clear and convincing demonstration" that the above requirements aren't met, or are irrational, is made.

S. 201 also requires substantial deference – again instead of due consideration – for the "Act 250 requirements" [10 V.S.A. §§ 1424a(d) and 6086(a)(1) through (8) and (9)(K)] in § 248 proceedings. Here, "substantial deference" means the Public Service Board shall apply the criterion to the facts in the same manner that the criterion is applied under 10 V.S.A. chapter 151; and if the outcome of the petition under one of the environmental criteria is negative, the Board must deny the petition unless a clear and convincing demonstration that other factors affecting the general good of the State outweigh denial. Again, it is difficult to know how the Board would modify current practice to implement these provisions; but, it seems these criteria would be given much greater weight.

3. What are likely to be the fiscal and programmatic implications of this bill for this Department?

If all the provisions of S. 201 were to be implemented, the Department would probably find that § 248 proceedings would involve many more parties, with the added wild card of the "friends of the Board." The fact that applicants would be required to obtain all of their other approvals before the issuance of a CPG could mean that the Department would receive more detailed petitions, which would be helpful in terms of analyzing a project, though there might be fewer opportunities to influence details of the project on behalf of the State's consumers. The implementation of fees to cover the Department's involvement with merchant facilities would be helpful for maintenance of adequate staff to review these types of applications. However, since the Department can charge an applicant for the cost of regular Department employee time, the fiscal advantage of the bill providing the Department with a portion of the proposed application fee will be minor, if any. The amount the Department can charge an applicant for regular employee costs will be offset by the Department's portion of the fee. In most cases, the application fee would not cover the cost of the regular employee time and so the Department would still need to charge an applicant in order to be made whole.

The provisions of S. 201 that allow regional plans to be controlling could pose difficulties for the Department as it seeks to meet legislated energy goals and the goals of the Comprehensive Energy Plan; it is conceivable that no region would plan to meet its full electric/thermal/transportation needs, leaving a statewide deficit.

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4. **What might be the fiscal and programmatic implications of this bill for other departments in state government, and what is likely to be their perspective on it?**

The Board will see a lot more process from the involvement of more parties and their new friends, which will pose staffing and funding burdens for them that may or may not be compensated for by the new filing fees. They are also likely to labor with how to apply the substantial deference standard (i.e, how it differs from current practice). ANR is likely to appreciate the funding allocated for their participation, which has been a concern until now, though they do have bill-back authority as well. They may support the need for applicants to obtain all necessary approvals and finalize design details prior to receipt of a CPG, though this will require more up front staff time from them in terms of working out details and compromises with applicants prior to filing of petitions, and will provide less opportunity for modifying the project through the proceeding as new issues inevitably arise. Additionally, they think the addition of the substantial deference wording within the Act 250 criteria section of the statute may actually undermine their ability to address broader natural resource issues. Depending on how other agencies receiving notice are supposed to react (i.e., is their participation mandatory or optional), they may express resource concerns as well.

5. **What might be the fiscal and programmatic implications of this bill for others, and what is likely to be their perspective on it?** (*for example, public, municipalities, organizations, business, regulated entities, etc)*

Municipalities, residents, businesses, and organizations who advocate for greater local control in energy siting decisions are likely to support the enhanced regional plan weight provisions of S. 201, as are those who would like the § 248 process to function more like the Act 250 process, with a seemingly lower bar to achieving party (or friend) status for project abutters and host towns/regions. Nonprofits and other organizations engaged in advocacy for or opposition to a project may appreciate having the option to be admitted as a friend of the Board rather than participating as formal parties. Regional planning commissions are likely to support the enhanced consideration of their plans, though S. 201 does not contain any mechanism to fund their participation in § 248 proceedings, which is something they have requested and which was recommended by the SC. They may require greater specificity in understanding the energy-related enhancements they will be required to make in their regional plans, and additional guidance (and funding) toward making those enhancements. The addition of many potential statutory parties, and especially the uncertainty around regional plan criteria for compliance and compliance status at different stages of a project (should a regional plan change during the project's evolution), is likely to add time and expense to the process for project developers.

6. **Other Stakeholders:**

   6.1 Who else is likely to support the proposal and why? VCE & Energize Vermont, since it accomplishes their objectives of making § 248 more like Act 250, discouraging large merchant wind facilities, enhancing local control, and potentially elevating their participation in § 248 proceedings if they are able to be admitted as friends of the Board.

   6.2 Who else is likely to oppose the proposal and why? Covered in #5

7. **Rationale for recommendation:** *Justify recommendation stated above.*

If it continues to be the Department's position to support the entire package of recommendations from the SC, then it doesn't make sense to support S. 201. While it highlights some similar siting practices that require change, it does so in a manner inconsistent with the SC's individual recommendations and comprehensive whole. If the Department would prefer to advocate for the piecemeal approach, or suggest additions to S. 201

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to make it more comprehensive and in alignment with the SC (especially in order to keep S. 203 from making headway), then it might be possible to support all or part of the bill as modified.

8. Specific modifications that would be needed to recommend support of this bill: *Not meant to rewrite bill, but rather, an opportunity to identify simple modifications that would change recommended position.*
No recommended modifications unless the Commissioner requests changes that would allow the PSD to be more supportive. NO MODIFICATIONS SUGGESTED - NOT CLOSE ENOUGH TO WORK ON

Secretary/Commissioner has reviewed this document: _____ ***Date:*** 1/27/14

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