MCLANE MIDDLETON

BARRY NEEDLEMAN
Direct Dial: 603.230.4407
Email: barry.needleman@mclane.com
Admitted in NH, MA and ME
11 South Main Street, Suite 500
Concord, NH 03301
T 603.226.0400
F 603.230.4448

VIA ELECTRONIC MAIL

March 8, 2019

New Hampshire Site Evaluation Committee
Pamela G. Monroe, Administrator
21 South Fruit Street, Suite 10
Concord, NH 03301

Re: SEC Docket No. 2015-04: Public Service Company of New Hampshire d/b/a Eversource Energy for a New 115k Transmission Line from Madbury Substation to Portsmouth Substation
Applicant's Combined Objection to Town of Durham, Conservation Law Foundation, and Durham Residents Motions for Rehearing

Dear Ms. Monroe:

Enclosed for filing in the above-referenced docket please find the Applicant's Combined Objection to Town of Durham, Conservation Law Foundation, and Durham Residents Motions for Rehearing.

Please call me with any questions.

Sincerely,

Barry Needleman

BN:slb
Enclosure

Cc: SEC Distribution List

STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

SEC DOCKET NO. 2015-04

APPLICATION OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE D/B/A EVERSOURCE ENERGY FOR A CERTIFICATE OF SITE AND FACILITY

APPLICANT'S COMBINED OBJECTION TO TOWN OF DURHAM, CONSERVATION LAW FOUNDATION, AND DURHAM RESIDENTS MOTIONS FOR REHEARING

Public Service Company of New Hampshire d/b/a Eversource Energy ("Eversource" or the "Applicant") objects to the Motions for Rehearing filed by the Town of Durham (the "Town" or "Durham"), the Conservation Law Foundation ("CLF"), and the Durham Point Abutters (the "Abutters").[1] The Motions fail to raise any issue that was overlooked or mistakenly conceived by the Subcommittee and fail to present any new evidence, or *any* evidence, that was not available during the adjudicative hearing.[2] Instead, the Motions simply rehash prior positions[3] and argue that the SEC "got it wrong". The Motions also fail to state factual findings, reasoning, or legal conclusions that the moving parties propose the Subcommittee should make.[4] For these reasons, the Motions should be denied.

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[1] Eversource submits one consolidated objection to the Town's, CLF's, and the Abutters' Motions for Rehearing.
[2] Under RSA 541:3, the Site Evaluation Committee may grant rehearing or reconsideration when a party states good reason for such relief. Good reason may be shown by identifying new evidence that could not have been presented in the underlying proceeding, *see O'Loughlin v. N.H. Personnel Comm'n* 117 N.H. 999, 1004 (1977), or by identifying specific matters that were "overlooked or mistakenly conceived" by the Committee, *Dumais v. State*, 118 N.H. 309, 311 (1978). "A successful Motion for Rehearing does not merely reassert prior arguments and request a different outcome." *Public Service Company of New Hampshire*, NH PUC Order No. 26,224 at 11 (March 6, 2019) (citing *Public Service Company of New Hampshire*, NH PUC Order No. 25,239 at 8 (June 23, 2011)). To the extent the parties wish to introduce new evidence, they have all failed to show why that evidence could not have been presented at the original hearing. *O'Loughlin*, 117 N.H. at 1004.
[3] The Committee presided over 16 days of adjudicative hearings where all parties—including the Town, CLF, and the Abutters—were given a full and fair opportunity to question the Applicants' witnesses. The Committee heard from 41 witnesses; 21 Applicant witnesses, 4 CFP witnesses, and 17 from the interveners. The Committee considered over 450 exhibits and received oral and written statements from the public.
[4] *See* N.H. Code Admin R. 202.29(d)(3).

I. Eversource Currently Has All of the Necessary Property Rights to Construct the Project.

The Town and CLF re-argue that Eversource did not obtain approval from the Governor and Council for the Project to cross Little Bay, and therefore assert that Eversource lacks the necessary property rights to construct the Project.[5] CLF and the Town made identical arguments in their post-hearing briefs. *See Durham/UNH Post-Hearing Brief*, at 29–30; *CLF Post-Hearing Memorandum* at 15–17.

The Applicant responded to these arguments, demonstrating they were without merit. *See Applicant's Post-Hearing Memorandum*, at 141–149.[6] The Subcommittee fully considered these arguments and correctly concluded that Eversource has a valid license to cross Little Bay, Governor and Council approval is not required, and Eversource had properly notified the PUC of its intent to use concrete mattresses to ensure compliance with the National Electrical Safety Code ("NESC"). *Decision and Order Granting Application for Cert. of Site and Facility*, Docket 2015-04 at 68–74 (Jan. 31, 2019) (the "Decision").

A. The Applicant Has a Valid License—Which is All that is Required Under New Hampshire Law to Cross a Public Waterbody—to Construct and Operate the Project Across Little Bay.

The New Hampshire Public Utilities Commission ("PUC") issued a license to Eversource to install the Project across Little Bay. *See Complete PUC Docket for DE 16-441*, App. Ex. 187. Neither the Town nor CLF sought to intervene, oppose, challenge, or request a hearing on the merits of that license. The Town or CLF could have—and should have—intervened in the PUC proceedings if they wanted to challenge the issuance of the PUC license. *See* RSA 371:20 ("The

[5] As a preliminary matter, the SEC has ruled previously that adjudication of property rights should be left to the courts. *Order on Lagaspence Motion to Postpone and Grafton County Commissioners' Motion to Continue*, SEC Docket No. 2015-06 at 2–3 (April 7, 2017); *Applicant's Post-Hearing Memorandum*, 141–43.

[6] Eversource incorporates by reference here all of its arguments therein.

commissions shall hear all interested parties . . . [p]rovided, however, that such license may be granted without hearing when all interested parties are in agreement"). They failed to do so, did not submit comments to the PUC, and did not request a hearing—a requirement set out in the *Order Nisi Granting License*.[7] Their failure to make these arguments at the PUC constitutes a waiver.

The Town's argument that Eversource should have obtained an easement is also directly contrary to RSA 371:17, which specifically provides that:

> Whenever it is necessary, in order to meet the reasonable requirements of service to the public, that any public utility should construct a pipeline, cable, or conduit, or a line of poles or towers and wires and fixtures thereon, over, under or across any of the public waters of this state, or over, under or across any of the land owned by this state, it shall petition the commission for a license to construct and maintain the same.

(emphasis added). The plain language of this statute requires the Applicant to obtain a license. If the legislature intended to require a public utility to obtain an easement (or some other interest in land) when crossing state land or waters, it would have imposed such a requirement. *See Appeal of Phillips*, 165 N.H. 226, 230 (2013) (statutes are construed by their plain and ordinary meaning without considering language that might have been added). Here, the statute only requires Eversource to obtain a license from the PUC pursuant to RSA 371:17. *See Dunbeck v. Exeter & Hampton Elec. Co.*, 119 N.H. 4, 7 (1979) (RSA 371:17 "is merely a licensing provision to permit utilities to cross public waters or lands which are not subject to power of condemnation").

[7] The *Order Nisi* in PUC Docket DE 16-441 required all persons interested in responding to this Order *Nisi* to "submit their comments or file a written request for a hearing which states the basis for a hearing no later than March 27, 2017, for the Commission's consideration." App. Ex. 154 at p. 8.

B. The PUC License Does Not Require Governor and Executive Council Approval.

The Town and CLF argue that Eversource should have received approval from Governor and Council to cross Little Bay. The grant of a license is not subject to RSA 4:40. A license is "not an interest in land" but rather, a "transient or impermanent interest" and "merely a revocable personal privilege to perform an act on another['s] . . . land." *Waterville Estates Ass'n v. Town of Campton*, 122 N.H. 506, 509 (1982) (citations omitted). Utility licenses are simply agreements to occupy and use public property. *New England Tel. and Tel. Co. v. City of Rochester*, 144 N.H. 118, 120–21 (1999).[8]

The Town and CLF also argue that the license disposes of property pursuant to RSA 4:40. "Disposal" of land means to "sell, convey [or] transfer." RSA 4:40, I. The grant of a license to a public utility does not dispose of State land.[9] Consequently, a grant of a license does not require approval of the Governor and Council and the Subcommittee's determination is well supported by the record and the law. *Decision*, at 71–74; Deliberation Tr. Day 1 AM at 12–15.

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[8] The Town cites to a Georgia Court of Appeals decision for the proposition that a license may become an "irrevocable use of the land." *Durham Motion*, at 4. The facts of that case, however, are inapposite and have no precedential value in New Hampshire. The appeals court was assessing whether an oral license for ingress and egress could ripen into an easement pursuant to a specific state statute governing the Statute of Frauds. The state statute provided that "[a] parol license is not revocable when the licensee has acted pursuant thereto and in so doing has incurred expense; in such a case it becomes an easement running with the land." *Decker Car Wash, Inc., v. BP Products North America, Inc.* 649 S.E.2d 317, 319 (Ga. Ct. App. 2007). Apart from the fact that the Georgia statute is different from the public utility licensing statute applicable here, the *Decker* court held that the oral license at issue did not ripen into an easement. The Town fails to cite any New Hampshire case law or statute that would apply to a legally issued license by the PUC. The Town also cites a New Jersey Tax Court case for the proposition that the PUC license is actually a "lease". *Durham Motion*, at 4. In that case, the tax court was determining whether an agreement between two parties necessarily removed the owning entity's tax-exempt status. Here, there is no question that the PUC issued a license (not a lease) pursuant to its statutory licensing authority under RSA 371:17. *Dunbeck*, 119 at 7. Moreover, the PUC license does not contain any of the other hallmarks of a lease, namely, a lease term, rent, compensation, or a contract for the exclusive possessions of lands.

[9] Contrary to the Town's position, the Project will not use state lands permanently—the Project will eventually be decommissioned should it no longer be deemed necessary by ISO-NE. *See Order and Certificate*, at 9 ("Further Ordered that in the event that the Project ceases to be used and useful, the Applicant shall be obligated to decommission the Project in accordance with then applicable rules of the Committee or a successor regulatory body; and it is, Further Ordered that the Applicant shall . . . (ii) promptly notify the Committee of any retirement obligation that arises; and (iii) submit to the Committee a decommissioning plan, that shall address decommissioning of the Project, including concrete mattresses, in accordance with then applicable rules, upon any imposition of a decommissioning obligation, or prior to the retirement of any part of the Project").

The entire statutory scheme found at RSA 371:17–371:23 does not explicitly or implicitly require approval from the Governor and Council for a license issued by the PUC—a fact omitted by the Motions. If Governor and Council approval was required for the PUC to issue a license, the statute would have explicitly stated as such. *Appeal of Phillips*, 165 N.H. at 230. Indeed, many other statutes explicitly require approval from the Governor and Executive Council.[10] RSA 371:17 is not one of them.[11]

C. The Parties' Mistakenly Rely on an Informal Letter from an Assistant Attorney General and a Repealed Statute.

The Town and CLF mistakenly rely upon an informal letter from an assistant attorney general. CLF Ex. 23. But the letter has no precedential value or weight of authority because it is not an official Opinion of the Attorney General.[12] Furthermore, the letter—dated February 9, 2012—relied on 371:22. But on June 19, 2013, that statute was repealed, striking any requirement that "any such license creating rights over, under, or across any of the lands owned by the state shall be evidenced by an instrument executed in the name of the state by the governor." Following that repeal, it has been the practice of the PUC to grant licenses to cross public lands and public waters without obtaining an easement or other interest in land as evidenced by a deed. *See Applicant's Post-Hearing Memorandum*, at 145–46.

[10] *See e.g.*, RSA 432:31-a (requiring approval prior to the purchase of any agricultural land preservation restrictions or development rights in the name of the state); RSA 162-I:9 (requiring approval prior to the business finance authority acquiring interests in public facilities); RSA 230:13 (requiring approval for the laying out or alteration of a class I or class II highway); RSA 212:1-a (requiring approval prior to the state acquiring land by condemnation).
[11] The Town also argues that Eversource should have obtained approval from the Governor and Council for its wetland permit. The NHDES wetland permit does not contain any such requirement. Moreover, the Town overlooks a specific provision of the siting statute, namely, RSA 162-H:16, II, which specifically states that: "A certificate shall be conclusive on all questions of siting, land use, air and water quality." (emphasis added).
[12] The Attorney General is authorized to provide opinions on any question of law submitted by the Legislature and when requested, to provide advice to any state board, commission, agent or officer on questions of law relating to the performance of their official duties. RSA 7:7; RSA 7:8. CLF Ex. 23 is not addressed to either the Legislature or a state agency, nor is there any indication that it was requested. As a result, it binds no one.

D. The Applicant Informed the PUC of the Concrete Mattresses.

The Town repeats another erroneous argument it made previously, namely, that Eversource did not inform the PUC of its need to use supplemental protection for the underwater cables near the shore landing. *Durham Motion*, at 6–8; *Durham Post-Hearing Brief*, at 30. The Subcommittee fully considered these arguments during a discussion led by PUC General Counsel and Subcommittee Member David Shulock. *See* Deliberations Day 1, AM at 11–13; *Decision*, at 70–71. Moreover, the parties did not raise these issues before the PUC, and therefore, these arguments have been waived. *See supra* § I.A.

The PUC license issued to Eversource was expressly conditioned on "the requirement that Eversource constructs, installs, operates, and maintains, and, if applicable, alters the lines consistent with the provisions of the National Electrical Safety Code, in accordance with N.H. Code Admin. Rules Puc. 306.01, as may be applicable and as amended from time to time, and all other applicable safety standards in existence at that time . . . ." *Complete PUC Docket for DE 16-441*, App. Ex. 187 at pp. 72–73. In addition, the Applicant informed the PUC that if the required burial depth for the cable cannot be achieved, "supplemental mechanical protection will be used per the NESC to protect the cable and the public." *Complete PUC Docket for DE 16-441*, App. Ex. 187 at pp. 79–80.[13]

[13] The Town argues that Eversource did not meet the statutory requirement that its application contain sufficient information to satisfy the requirements of each agency having jurisdiction over any aspect of the Project. The Town is wrong. The PUC and Subcommittee found that the Application met the requirements of RSA 162-H:7, IV and that the Application was complete. *See* PUC Letter from Debra Howland to SEC Administrator Pamela Monroe, Docket 2015-04 (May 13, 2016) ("Pursuant to RSA 162-H:7, IV, the Public Utilities Commission has conducted a preliminary review of the application and determined that it contains sufficient information for the PUC to conduct its review for issuance of licenses under the jurisdiction of the PUC."); *Order Accepting Application*, Docket 2015-04 (June 13, 2016) ("The PUC advised the Subcommittee that it conducted a preliminary review of the Application and determined that it contains sufficient information for the PUC to conduct its review for the issuance of licenses under the jurisdiction of the PUC.").

II. The Subcommittee's Delegation of Authority to State Agencies is Fully Compliant with State Law and Standard SEC Practice.

The Town and CLF argue that the Subcommittee's delegation of authority to state agencies is unlawful. *Durham Motion*, at 8–11; *CLF Motion*, at 15–16. This argument overlooks or ignores prior SEC precedent, and statutory provisions of RSA chapter 162-H that explicitly grant authority to the Subcommittee to delegate oversight to agencies with permitting and regulatory authority. Neither the Town nor CLF has advanced any new arguments that were overlooked or mistakenly conceived (*see e.g.*, *Durham Post-Hearing Memorandum*, at 31 to 32; *Newington Post-Hearing Brief*, at 54), the Applicant (*see Applicant's Post-Hearing Memorandum*, at 99–100) and the Subcommittee addressed all these arguments. *See Decision*, at 55–60.

A. The Subcommittee Correctly Adopted the NHDES Recommended Conditions.

As a preliminary matter, the Town and CLF claim argue that the permit conditions recommended by NHDES are unreasonable. RSA 162-H:7-a, I(b) provides that in SEC proceedings, state agencies having permitting or other regulatory authority may "[r]eview proposals or permit requests *and submit recommended draft permit terms and conditions to the committee*." (emphasis added). RSA 162-H:16, I then states that "[t]he committee *shall* incorporate in any certificate such *terms and conditions* as may be specified to the committee by *any of the state agencies* having permitting or other regulatory authority, under state or federal law, to regulate any aspect of the construction or operation of the proposed facility." (emphasis added).

The moving parties fail to acknowledge that the permit conditions that are raised in their Motions[14] were initially recommended by the underlying permitting agency. As a result, the Subcommittee was required to incorporate those conditions into the Certificate unless the Subcommittee desired to impose different conditions. RSA 162-H:7-a, I(e). The Town and CLF had ample opportunity to provide comments on the draft permit terms and conditions, and in fact did so. *See Applicant's Post-Hearing Memorandum*, at 85–86. NHDES disagreed with a number of the parties' comments and recommended changes, and the Town "was unable to explain why NHDES rejected some of its recommendations and failed to provide sufficient support for the Subcommittee to adopt them." *Decision*, at 169.

B. RSA 162-H Provides the Subcommittee with Explicit Authority to Delegate Oversight to State Agencies With Permitting or Other Regulatory Authority.

The moving parties fail to acknowledge that RSA 162-H:4, III-a provides that "[t]he committee may delegate to the administrator or such state agency or official as it deems appropriate the authority to specify the use of any technique, methodology, practice, or procedure approved by the committee within a certificate issued under this chapter." (emphasis added). Here, the Subcommittee approved NHDES's recommended permit conditions, *see* Comm. Ex. 12c, which authorize the Department to follow its standard practice to review, finalize, and approve monitoring plans immediately prior to construction to ensure compliance with the terms of the permit.[15] Here, the Subcommittee not did delegate any of its statutorily

[14] Such permit conditions range from delegating requirements to NHDES for water quality monitoring, shellfish monitoring, and conducting additional surveys for rare, threatened, and endangered species, to providing notification to the Division of Ports and Harbors and/or the Department of Safety Marine Patrol to ensure that the placement of concrete mattresses does not create a navigational hazard. In addition, the Town argues that it was illegal for the Subcommittee to delegate authority to Department of Transportation to issue required permits, licenses, and approvals in accordance with DOT policies, rules, and recommendations. However, such delegations are all reasonable and lawful pursuant to RSA 162-H:4, III-a.

[15] It is standard practice for NHDES to issue permit conditions that require Department approval of monitoring plans just prior to construction. *See e.g., NHDES Final Decision and Conditions*, Application of Antrim Wind, Docket 2015-02 (July 26, 2016) (requiring the submission of a surface water quality monitoring plan, Spill Prevention,

required findings; it simply delegated the requirement of ongoing monitoring[16] to NHDES—consistent with typical agency practice.

The Town also argues that granting NHDES future approval authority to monitor plans "shuts all of the parties out of the process by not allowing them to review and comment on the results of the trial run." *Durham Motion*, at 9. This issue was explicitly raised by the Town in its *Post-Hearing Brief* at 31–32,[17] and fully considered and rejected by the Subcommittee.[18] Moreover, prior to the adjudicative hearings, Eversource submitted a draft of a majority of the required plans to NHDES and the parties, thereby providing all parties with a reasonable opportunity to review and provide comments. To the extent the moving parties have continuing concerns about the monitoring plans, they can submit additional comments to the Department for their potential consideration, as they have in the past.[19]

C. Delegation to NHDES to Oversee the Jet Plow Trial Run Was Lawful.

The Town and CLF erroneously argue that delegating oversight of the jet plow trial run to NHDES (which must be completed at least 21 days prior to construction) is unlawful. The

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Control, and Countermeasures plan (SPCC), and a plan to prevent water quality violations due to discharges of concrete wash water during construction, after permit issuance but at least 90 days prior to construction); *NHDES Final Decision and Conditions*, Application of Groton Wind, LLC, Docket 2010-01 (requiring the submission of a Construction BMP Inspection and Maintenance Plan, turbidity monitoring plan, SPCC plan, and a plan to prevent water quality violations due to discharge of concrete wash for NHDES approval at least 90 days prior to construction).

[16] RSA 162-H:4, III also specifically authorizes the delegation of authority to a state agency or official to *monitor* the construction or operation of an energy facility to ensure that the terms and conditions of the certificate are met.

[17] The Town and CLF also made similar arguments on other occasions. *See e.g.*, *Partially-Assented-to Motion Requesting a Suspension of the Proceedings and that the Parties be Included in DES/Applicant Discussions*, Docket 2015-04 (Aug. 21, 2018); *Joint Motion to Strike NHDES's Post-Final Decision Recommendation and Related Testimony*, Docket 2015-04 (Oct. 24, 2018). *See also Counsel for the Public's Response to the Joint Motion to Strike NHDES's Post-Final Decision Recommendations and Related Testimony* (Nov. 2, 2018) (sharing some of the concerns raised by Durham/UNH and CLF).

[18] *See e.g.*, Deliberations Day 4 at p. 93–98; *Decision*, at 38–39; 209–10 (acknowledging the Town of Durham's concerns regarding public comments; determining that the public is not precluded from providing comments to NHDES; finding that the NHDES has experience and expertise in reviewing and addressing plans, reports, and comments; concluding that an additional process before the Subcommittee for review, comments, and hearings would cause undue delay; and requiring Eversource to provide all plans to the SEC and post all plans on its website for public review).

[19] Tr. Day 13 AM at 181–82; *Decision* at 209 (the parties may provide comments and suggestions to NHDES).

SEC may delegate the authority to use *any* technique, methodology, practice or procedure that is approved by the Subcommittee. 162-H:4, III-a.[20] Oversight of the jet plow trial run was specifically requested by the Department and approved by the Subcommittee. There was no unlawful delegation.

The Town and CLF wrongly characterize the jet plow trial run as an initial evaluation of the jet plow procedure and argue that the Decision improperly delegates "important decision-making." The purpose of the jet plow trial run is simply to verify the accuracy of the model and make minor tweaks and/or adjustments based on installer equipment and personnel[21]—the Subcommittee has not delegated authority to NHDES to make statutory findings pursuant to RSA 162-H:16, IV. The Applicant also presented substantial evidence during the hearings demonstrating that the effects of the jet plow installation will be minimal and short-term, and that the construction will not have long-term impacts on Little Bay, the natural environment, or water quality. *Applicant's Post-Hearing Memorandum*, at 84–99. Delegating oversight of the jet plow trial run fully comports with RSA chapter 162-H.

III. The Subcommittee's Factual Findings and Conclusions Regarding Water Quality and the Natural Environment are Supported by Substantial Evidence in the Record.

The Town and CLF repeat many factual arguments about the Project's potential impact to the environment, *see e.g.*, *Durham Post-Hearing Brief*, at 8–16; *CLF Post-Hearing*

[20] RSA 162-H:16, VII also provides the Subcommittee with the explicit authority "to condition the certificate upon the results of required federal and state agency studies whose study period exceeds the application period." Here, the Subcommittee simply conditioned the certificate upon a successful jet plow trial run to confirm that the construction of the Project will not cause water quality violations.

[21] *Applicant's Post-Hearing Memorandum*, at 97–99; Tr. Day 13 AM at 105–06 (Durham's own witness, Mr. Dacey agreed that the trial run would enable additional data to be collected to verify the modeling outputs); *Decision* at 170 ("The trial run should verify the accuracy of the modeling and should provide the opportunity to adjust the specifications for the jet plow operation if necessary."). In addition, and contrary to CLF's position, ESS Group, Inc. confirmed that the jet plow trial run is typically performed one to two weeks prior to installation and that the proposed distance of 1,000 feet is typical in the industry. Tr. Day 12 PM at 21–23; 72–78; 95–96.

Memorandum, at 3–15, all of which are not supported by the substantial record in this docket and were fully considered by the Subcommittee.[22] The Motions fail to acknowledge that the issuance of final permits by NHDES is *prima facie* evidence that the construction and operation of the Project will not have an unreasonable adverse effect on water quality. Indeed, as declared in a prior docket, "DES's approval of [a] Project demonstrates that the Applicant has fully satisfied state water quality regulations." *Applicant's Post-Hearing Brief*, Application of Groton Wind, LLC, Docket 2010-01 at 41 (emphasis added).[23]

As aptly pointed out in the Subcommittee's Decision: "The opposing parties did not provide any evidence that would demonstrate the Project's anticipated impacts. Instead, they criticized the accuracy of the Applicant's reports and plans." *Decision*, at 168 (emphasis added). The Motions fail to acknowledge that each of their arguments was previously raised and considered by NHDES. *Decision*, at 169. Indeed, the moving parties have made no showing that NHDES is wrong, have not explained why NHDES rejected some of their recommendations, and have failed to provide a sufficient basis for the Subcommittee to adopt the recommended conditions. *Id.*

A. Applicant's Sediment Dispersion Model Provides Substantial Credible Evidence that the Project Will Not Materially Affect Little Bay.

The evidence before the Subcommittee demonstrates that construction of the Project will produce a sediment plume that lasts less than a few hours in any given location, that there is limited potential for prolonged resuspension of sediment, and that there will be no cumulative increases in suspended sediment. *Applicant's Post-Hearing Memorandum*, at 91–92. The

[22] The Town's Motion simply rehashes old factual arguments, but does not cite to the record. CLF did not proffer a single witness during the proceedings to support their positions and their motion cites to isolated quotes without examining the record as whole.

[23] *See also supra* note 15. In the Antrim Wind and Groton Wind dockets, the SEC issued certificates for projects with multiple monitoring plans that had not yet been reviewed and approved by NHDES, and would only be submitted to NHDES 90 days prior to construction.

Applicant's evidence was vetted by Counsel for the Public's independent construction witnesses, who confirmed the accuracy of the model used for this Project. ESS Group, Inc. specifically testified that in their experience the Applicant's model is "conservative," that sediment concentrations in prior projects were less than what the model predicted, and that the dissipation rate of sediment is "quite rapid."[24] Lastly, the jet plow trial run will confirm the adequacy of the model and to ensure that the construction of the Project will not result in water quality violations.

B. The Applicant's Evidence Demonstrates that the Project Will Not Introduce Nitrogen, Contaminants, or Pathogens in Little Bay.

The Town and CLF[25] re-hash the same arguments regarding nitrogen, contaminants, and pathogens—issues that NHDES did not voice concerns about. They devoted a substantial amount of time on cross-examination and in their briefs to debating these issues and the Town submitted extensive comments to NHDES. The Subcommittee thoroughly considered these arguments during deliberations and in the final decision. *See e.g., Decision*, at 162–65, 202–03, 207; Deliberation Tr. Day 3 at 6, 66–79, 97–104. Again, the Town and CLF are not able to show that NHDES unreasonably disregarded their comments, nor do they explain why the Subcommittee should have adopted more stringent standards. *Decision*, at 169.

By contrast, Eversource provided substantial proof that the construction of the Project will not adversely affect water quality or the natural environment.[26] While the moving parties make speculative arguments that the Project could release additional nitrogen or other bacteria into the water column, the Motions fail to provide any evidence demonstrating that construction of the Project would result in any unreasonable adverse effects.

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[24] Tr. Day 12 PM at 64–68; *Technical Review Report, Eversource Seacoast Reliability Project – Little Bay Crossing*, CFP Ex. 1-a at 12.

[25] CLF makes three separate nitrogen-related arguments, *see CLF Motion*, at 9–11, none of which include a single cite to the record. Given CLF has no evidence whatsoever to support its assertions, its arguments should be rejected.

[26] *See Applicant's Post-Hearing Memorandum*, at 94–97; 109–110; 127–28.

C. The Record Includes Overwhelming Evidence Supporting the Subcommittee's Conclusions On Eelgrass.

Eelgrass has not been present within nearly a mile of the Project corridor since at least 2012.[27] While CLF argues that the record does not support the Subcommittee's findings regarding eelgrass, it has not introduced any evidence demonstrating that the Project would impact eelgrass. The Project area will be re-surveyed for eelgrass during the growing season prior to in-water cable installation to confirm that eelgrass is not present.[28] Without ascertaining the degree to which eelgrass might return, the Subcommittee cannot assume that eelgrass would be impacted. *Decision*, at 207.

D. The Subcommittee Fully Considered The Potential For the Project to Impact Oysters and Public Health, and Reasonably Concluded That Installation of the Project will not Negatively Impact Public Health.

As discussed supra Section III.B., the Subcommittee fully considered the potential for the Project to introduce contaminants or pathogens into the water column. None of the moving parties submitted any evidence proving that construction of the Project would create such impacts. Instead, they merely speculated that the Project could cause an impact. The arguments of the Town and CLF are based merely on conjecture and NHDES did not share their concerns.[29] The Applicant's evidence, coupled with the NHDES permit conditions, provides substantial support for the Subcommittee's conclusion that construction of the project will not negatively impact public health from consumption of oysters.[30]

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[27] Tr. Day 5 AM at 92; App. Ex. 1 at 97–98.
[28] *Id.*; *see also NHDES Revised Final Decision*, Comm. Ex. 12c, Wetland Condition ¶ 41 (describing requirements of the eelgrass survey).
[29] *See Decision*, at 207–08 ("While being fully aware of Durham's concerns, NHDES decided not to require the Applicant to test oysters for pathogens.").
[30] *Applicant's Brief*, at 127–28. *See also* Comm. Ex. 12c, Condition 44 (a mixing zone will be established to ensure that aquaculture sites with active product will be protected).

IV. The Applicant's Communications with NHDES and the Issuance of the Revised Final NHDES Decision Are Consistent with RSA Chapter 162-H and Prior Permitting Practice.

For the fourth time, the Town argues that it was unlawful for NHDES to modify its recommended approval and permit conditions.[31] The Applicant responded to these arguments and fully incorporates the facts and arguments contained in prior objections and rulings made by this Subcommittee.[32] The Town offers no new facts or arguments that the Subcommittee failed to address.[33]

V. The Subcommittee's Determination That the Project Will Not Unduly Interfere With the Orderly Development of the Region is Fully Supported by the Record.

The Town asserts that the Subcommittee "ignore[d] the ways in which the Project will interfere with orderly development of the region," because it is contrary to precedent, namely, the order in Northern Pass Transmission, SEC Docket No. 2015-06. *Durham Motion*, at 15–18. According to the Town, "it is arbitrary, unreasonable and an error of law for the SEC to apply the

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[31] *See Partially-Assented-to Motion Requesting a Suspension of the Proceedings and that the Parties be Included in DES/Applicant Discussions*, Docket 2015-04 (Aug. 21, 2018); *Joint Motion to Strike NHDES's Post-Final Decision Recommendation and Related Testimony*, Docket 2015-04 (Oct. 24, 2018); *Durham/UNH Post-Hearing Memorandum*, at 35. *See also Counsel for the Public's Response to the Joint Motion to Strike NHDES's Post-Final Decision Recommendations and Related Testimony* (Nov. 2, 2018) (making similar arguments).

[32] *Applicant's Objection to Joint Motion to Strike NHDES's Recommendations and Related Testimony*, Docket 2015-04 (Nov. 2, 2018) and the *Applicant's Objection to Counsel for the Public's Motion to Strike NHDES's October 29, 2018 Revised Final Decision*, Docket 2015-04 (Nov. 9, 2018); *Applicant's Post-Hearing Memorandum*, at 151. *See also Order on Motion to Suspend*, Docket 2015-04 (Aug. 28, 2018) (denying the Town's request to make discussions with NHDES open to the public or to prohibit such discussions and holding that nothing in RSA 162-H prohibits the Applicant from continuing communications with NHDES following the issuance of NHDES's final recommendations); *Order on Motions to Strike*, Docket No. 2015-04 (Nov. 20, 2018) (denying requests to strike NHDES Revised Final Decision).

[33] To the extent that the Town faults the Presiding Officer for sending a letter to NHDES requesting clarification of their Final Permit Conditions without the approval of the entire committee, such approval is not necessary. *See* RSA 162-H:4, V ("In any matter before the committee, the presiding officer . . . may hear and decide procedural matters that are before the committee, including procedural schedules, consolidation of parties with substantially similar interests, discovery schedules and motions, and identification of significant disputed issues for hearing and decision by the committee."). Moreover, the Town did not file any objection to the Presiding Officer's letter. To the extent the Town contends that it did not have a "meaningful opportunity to be heard" on the NHDES permit conditions, that argument is meritless. The NHDES Response to the Presiding Officer's Letter Dated August 10, 2018, was submitted to the SEC Service List on August 31, 2018. Comm. Ex. 12b. The Town had ample opportunity after the submission of August 31, 2018 letter to question both the Applicant's technical and managerial panel, as well as the Applicant's Environmental Panel.

law in such different ways to these two projects." *Id.* at 18. But the Town errs in concluding that the Decision in this docket is the unreasonable and unlawful one.[34]

Although complaining that this Subcommittee erred, but the Northern Pass subcommittee did not, the Town offers no specifics supporting that claim, and thus no basis for rehearing. First, the Town concedes that the Subcommittee was not required to deny a project that is inconsistent with municipal views. *Id.* at 16. It ascribes error because the Subcommittee "did not listen to and consider those views to the extent it should have in this case." *Id.* But the Town fails to provide any facts about how the Subcommittee erred by "not listening," or what it should have listened to. The best the Town can do is to say that Eversource "did little in the way of applying the SRP project to local ordinances and master plans." *Id.* at 18. Without some explanation of what it claims should have been done, there is no basis for reconsideration of the Subcommittee's Order.

The Town next argues that the Subcommittee erred because, contrary to testimony from Mr. Varney, the Project was contrary to the Town's master plan and zoning ordinance. *Id.* at 16–17. But even assuming this to be true, it would not require rehearing. The Subcommittee pointed out that even if the project was inconsistent with the Town's master plan or zoning

[34] Durham points to the brief of Eversource and Northern Pass to the Supreme Court (the "Brief") as supporting its claim for "disparate and inconsistent treatment of the two applications." *Durham Motion*, at 18, note 2. It seems to suggest that Eversource cited to the Decision in this Docket to support its appeal, and that Eversource was not entitled to do so since this Subcommittee's Decision had not been issued when the Northern Pass Order was decided. In fact, the Brief cited to this Subcommittee's deliberations (not the Decision) to demonstrate how this Subcommittee treated certain issues, as opposed to how the Northern Pass subcommittee treated—or failed to treat—similar issues. And both the deliberations and the Decision are matters of public record that are appropriate for consideration in the Supreme Court. Following issuance of the SRP Decision, Eversource and Northern Pass filed a Notice of Supplemental Authority providing the SRP Decision to the Court in support of its argument that this Subcommittee's treatment of issues was consistent with the requirements of RSA chapter 162-H and the SEC Rules, as a means of demonstrating why and how the Northern Pass subcommittee had erred. Durham's actual complaint is that this Subcommittee should have followed the Northern Pass Order—and the analyses—of the Northern Pass subcommittee. There are many reasons—factual and legal—why this Subcommittee may have chosen not to do so, and without providing the specifics of why the Northern Pass Order should have been followed, Durham has provided no grounds for rehearing.

ordinances, the "region"—for purposes of deciding whether this project "unduly interferes with the orderly development of the region"—was broader than just Durham and thus, that any inconsistency did not prevent a finding that there was no undue interference.[35] The Town fails to explain why inconsistency with a plan or an ordinance in one town within a defined region would constitute undue interference with the orderly development of that region.

Third, the Town cites language from the Northern Pass Order stating that "there are places along the route where [that] Project would create a use that is different in character nature and kind from the existing use...[and] would have a substantially different effect on the neighborhood than the existing transmission facilities." *Id.* 17. The Town claims that "[t]his description is extremely applicable here." Even if this were a basis for the Northern Pass subcommittee's Order (and it was not, since the Order was based on an alleged failure to satisfy the burden of proof for allegedly failing to identify the possibility of such areas), and even if that applicable standard in the SEC Rules was whether a transmission line "would have a substantially different effect on the neighborhood" (and it is not, since the standard is whether a project is inconsistent with prevailing land uses, Site 301.09(a)), the Town fails to identify any locations or areas along the route of this Project, where the application of these standards should be applied or where, if they were applied, this Project would require a finding of undue interference with orderly development. Accordingly, the Town has offered no grounds for reconsideration.[36]

[35] The Subcommittee rightfully determined that the "region" for this Project is not limited to the municipalities where construction will be conducted; the region encompasses the entire Seacoast Region that the Project will serve. *Decision*, at 271; 313.

[36] CLF incorrectly argues that the Subcommittee failed to address the Great Bay Estuary in its assessment of orderly development of the region. A review of the deliberation transcripts and the Decision clearly demonstrate that Little Bay and the Great Bay Estuary were fully considered in the Subcommittee's assessment of the Project. *See e.g.*, Tr. Day 5 AM at 22–24 (determining no impact to tourism on Little Bay); Tr. Day 5 PM at 46; 81–82 (considering findings on historic resources, aesthetics and water quality when assessing land use and orderly development); Tr. Day 1 PM at 86, 93, 103–116, Tr. Day 2 AM at 7–10 (discussing aesthetic impacts to Little Bay and assessing

VI. RSA 162-H Does Not Require the Subcommittee to Find that There is a "Need" For the Project.

The Town appears to argue that the Subcommittee needs to find that there is a "need" for the Project.[37] *Durham Motion*, at 16–17. As a matter of law, the Subcommittee is no longer required to make such a finding as the Legislature has repealed RSA 162-H:16, V(a), which required a finding of the present and future need for electricity. *Applicant's Post-Hearing Memorandum*, at 151–55. As a factual matter, the evidence in the record clearly demonstrated that there is an immediate need for additional transmission capacity in the Seacoast region, that ISO-NE identified the Project as the preferred solution to ensure the safe and reliable delivery of electricity to the Seacoast region, and that ISO-NE expects the Project to be constructed. *Id.*; *Decision*, at 313–315.

The Town also appears to argue that the Subcommittee's reliance on ISO-NE to identify needs and solutions for the region is "another improper delegation of responsibility and authority." The Town is wrong. ISO-NE is the independent, not-for-profit company authorized by the Federal Energy Regulatory Commission to operate the regional electric grid, oversee the wholesale electricity market, and ensure that New Hampshire's electricity needs are met. *Applicant's Post-Hearing Memorandum*, at 152. ISO-NE is charged with conducting comprehensive system analyses and planning, assessing power system requirements 10 years into the future, and identifying adequacy of resources to ensure reliable delivery of electricity. *Id.*

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mitigation); Tr. Day 4 at 61–82 (discussing whether additional testing should be required for sediment in Little Bay and finding that additional testing was not necessary because DES did not recommend that such action be taken). *See also Decision,* at 166, 168, 176–77, 188, 196–97, 204. In fact, the Decision specifically states that while construction "will cause some permanent and temporary impacts on Little Bay[,] such impacts . . . will be effectively minimized and mitigated." *Id.* at 256. Indeed, the "Subcommittee received no evidence indicating that the[se] construction impacts, as mitigated, will rise to the level of unduly interfering with the orderly development of the entire region." *Id.*

[37] The Town made identical arguments in its Post-Hearing Memorandum at pp. 32–35. The Town of Newington also raised numerous arguments regarding the "need" for the Project, *see e.g.*, *Pre-Filed Testimony of Denis Hebert*, New Ex. 1 at 15–21, that were fully vetted and considered by the Subcommittee.

The SEC, on the other hand, is charged with assessing the impacts of siting of energy facilities and the SEC routinely relies on ISO-NE to identify needs and solutions to ensure the reliable operation of the regional electric grid. *See e.g., Decision and Order Granting Application for Certificate of Site and Facility*, Joint Application of New England Power Company and Public Service Company of New Hampshire, Docket 2015-05, at 58, 90 (Oct. 4, 2016) (stating that the "Project is a reliability project that has been determined by ISO-NE to be necessary to assure continued system stability and reliability to the region"; that "[t]he ISO-NE has determined that the Project is a necessary reliability project"; and that "[t]he entire New England region needs the Project to ensure an adequate supply of energy in the region."); *see also* App. Ex. 184, Stipulated Findings of Fact ¶¶ 2–3.

To the extent the Town is arguing that the SEC should have consulted with ISO-NE prior to issuing a Certificate, this issue was argued and briefed by many parties throughout the proceedings. *See Town of Newington's Partially Assented-To Motion to Consult with ISO-New England*, Docket 2015-04 (Nov. 22, 2017); *see also Town of Durham / UNH Post-Hearing Brief* at 32–34. The SEC held a hearing specifically to consider whether ISO-NE should be consulted and determined that such consultation was not necessary. *Order on Partially Assented-To Motion to Consult with ISO-New England*, Docket 2015-04 (April 24, 2018). In that Order, the SEC concluded that it was unnecessary to consult with ISO-NE because the Applicant continues to update its filings with ISO-NE and ISO-NE has not indicated that any information submitted by the Applicant would render the Project obsolete. *Id.* at 3.

VII. The DES-Issued Wetlands Mitigation Package Is Only Contingent Upon the Payment of Monies Into the Aquatic Resource Mitigation Fund.

The Town argues that the Committee should grant a rehearing because the wetlands mitigation package initially considered by NHDES cannot be specifically earmarked for Wagon Hill shoreline restoration. These arguments fail for a number of reasons.

First, the NHDES wetlands permit is only specifically conditioned upon payment of $349,834.26 into the Aquatic Resource Mitigation Fund ("ARM Fund"). Comm. Ex. 12 C, Condition 67. While Eversource engaged in discussions with Durham (and Newington) to develop potential projects for the use of those mitigation funds, the NHDES permit only provided that "the mitigation package may include the designation of mitigation funds to the Town[ ] of Durham." (emphasis added). Comm. Ex. 12 C, Condition 68. The ARM Fund is a competitive bid process. *See* N.H. Code. Admin. R. Env-Wt 808, *et seq.*[38] NHDES cannot guarantee that funds paid to that Fund will be used in any particular way. *See e.g.*, Tr. Day 5 AM at 46–48. Indeed, the Applicant's witness, Ms. Sarah Allen, specifically stated that:

> for mitigation[,] [Eversource] is essentially paying into the Aquatic Resource Mitigation Fund for an in lieu of fee payment. The towns, meaning specifically meaning Durham and Newington, have asked that that mitigation go to specific projects within their town. The DES agreed to consider those, and we provided information on those.

(emphasis added). Tr. Day 5 AM at 46. Ms. Allen further made clear that the ARM Fund is "basically outside of Eversource's control" and that "[o]nce Eversource has paid into the Aquatic Resource Mitigation Fund, and presumably those projects will be approved by NHDES to distribute the funds, at that point the responsibility for completing the project falls to the town."

[38] Env-Wt 808.07 and 808.08 establish eligibility criteria for restoration, enhancement, or conservation projects. NHDES cannot award money from the ARM Fund without meeting the requirements laid out in either Env-Wt 808.07 or 808.08. Moreover, RSA 482-A:32, I and Env-Wt 808.17 establish a Site Selection Committee, to identify projects to be funded from the ARM Fund.

Id. at 49. While Eversource has been working with the Town to develop plans for the use of ARM Funds, the Committee did not make any specific findings regarding the Project's impact on water quality that were dependent in part or in whole on a identified mitigation package for the Town.

Second, the NHDES wetland permit plainly states that if the proposed mitigation funds "cannot be achieved the funds will revert to the ARM Fund for issuance during a future competitive grant round." Comm. Ex. 12 C, Condition 73. Here, the Town has alleged that the proposed mitigation package contained in the Application and the NHDES permit cannot be executed due to conditions outside of the Applicant's control. Because the mitigation package cannot be achieved—a situation already contemplated by NHDES—the funds will revert directly back to the ARM Fund for issuance during a future competitive grant round. If the Town wishes to enter that competitive grant process, it is free to do so.

Third, to the extent there are any questions about NHDES's authority to make minor modifications to specific permit conditions, the Department is authorized by the Certificate to "specify the use of any appropriate technique, methodology, practice or procedure approved by the Subcommittee within the Certificate, as may be necessary, to effectuate conditions of the Certificate [and] the Wetlands Permit . . . ." *Order and Certificate*, at 3.

Lastly, the Applicant contemplated that changes to the ARM Fund may be necessary, and as such, the Subcommittee implemented a condition requiring the Applicant to "use the State's Aquatic Resource Mitigation (ARM) Calculator to determine the final amount of mitigation funds necessary to comply with the in-lieu fee program and shall make the required payment to the ARM Fund prior to the commencement of construction." The Decision does not specifically condition its approval on specific mitigation measures in the Town. Indeed, the Decision does

not directly tie any of its ultimate conclusions on water quality, or any other statutory finding, to the mitigation proposed at Wagon Hill Farm in the Town.

VIII. The Abutters Fail to Raise any Issue that was Overlooked or Mistakenly Conceived.

The Abutters claim that there is "no evidence in the record concerning which New Hampshire properties would be adversely affected by the Project, and by how much." *Abutters' Motion*, at 4. This assertion assumes, of course, that Eversource was required to show the Project's impact on specific properties and to quantify that impact for each such property.[39] In fact, the SEC Rules require only that Eversource include in its application an "assessment of...the effect of the proposed facility on real estate values in the affected communities." Site 301.09(b)(4). The fundamental problem with the Abutters' argument is that they fail to tie the alleged errors in the Subcommittee's Order to any section of RSA 162-H:16 or the SEC Rules.

The Abutters are correct that RSA 162-H:16 requires that a subcommittee consider and weigh the impacts and benefits of a project. But they do not explain how the Subcommittee allegedly failed in that task by pointing to any specific facts the Subcommittee did not consider and how, if those facts had been considered, they would have required a different result when measured against applicable standards in the statute or Rules. Instead, the Abutters create an elaborate argument—never raised before the Subcommittee—that the Order constitutes an improper delegation of authority, an improper shifting of the burden of proof to property owners,

[39] The Abutters also inaccurately argue that the Subcommittee's Decision does not state facts supporting its decision. *Abutters' Motion*, at 3–6. Among other holdings, the Subcommittee concluded that: (1) although the Subcommittee is not required to evaluate the impact of the Project on aesthetics of private properties, it reviewed several visual simulations for privately owned properties and determined that the Project will not be unreasonably adverse in those locations; (2) the Applicant conducted a comprehensive outreach campaign to identify concerns raised by various parties; (3) the Applicant agreed to various conditions to remedy potential impacts on private properties (including the Darius Frink Farm), including commitments to develop vegetation planting plans; (4) the Applicant entered into MOU's with Durham, UNH, and Newington (all of which also have conditions relating to private properties); and (5) the Dispute Resolution Process will minimize and mitigate potential impacts from the Project. *Decision*, at 115; 323–325.

a secret proceeding in violation of RSA chapter 91-A, and an unconstitutional violation of the separation of powers, all by virtue of providing an optional Dispute Resolution Process for property owners to seek relief if their property values are impacted. *Id.* These arguments are meritless.

First, the Abutters once again fail to identify any section of RSA chapter 162-H or the Rules upon which their assertions rest. As for the Dispute Resolution Process, it is a means of alleviating potential impacts on private property, including real estate values, relative to the standard of "undue interference with orderly development of the region." RSA 162-H:16, IV(b) and Site 301.09 and 301.15. The Subcommittee was not delegating authority at all. Rather, it was simply imposing a mitigation condition. The Abutters fail to explain why the Subcommittee could not condition the Certificate on such a process.

Second, no landowner is required to participate in the Dispute Resolution Process and the SEC has no authority to require any landowner to do so. *See Decision*, at 14 (explicitly stating that "[t]he Dispute Resolution Process is not mandatory"). The SEC can and did, however, provide an approach for addressing potential impacts. Any landowner can ignore this process and seek judicial redress should they so choose.[40] Rather than a "substitute for the SEC's balancing of adverse impacts of the Project," the Dispute Resolution Process simply offers a voluntary method to alleviate impacts to property.[41] If the Abutters were correct, the SEC (and

[40] The Abutters argue that the two-year limitation on filing a claim pursuant to the Dispute Resolution Process and the requirement that a landowner waive their right to file suit if a claim is submitted through Dispute Resolution Process are unlawful and unreasonable conditions. This argument fails to acknowledge that the Dispute Resolution Process is entirely voluntary. Neither the Subcommittee nor the Applicant are forcing any landowner to do anything against their will. The Dispute Resolution Process is meant to establish a swift process by which landowners can seek compensation without going through a long, drawn-out, and complicated legal battle. Of course, if a landowner does not want to use the Dispute Resolution Process, the landowner is free to file suit in a court of competent jurisdiction within the applicable statute of limitations.

[41] The Abutters' RSA chapter 91-A arguments are also without merit. If a landowner enters into the dispute resolution process, and it proceeds to an eventual mediation or a hearing on the merits, such additional legal process is not before the SEC—it is before an independent third party (either a mediator, attorney or retired judge

the Subcommittee) would be required to determine specific property rights by deciding the loss in value of each affected property and awarding damages. Apart from the fact that SEC proceedings would then take years, the SEC has no jurisdiction to evaluate or adjudicate individual property rights or claims. Rather, as the Town points out in its Motion, the "authority to decide property rights issues rests with the Courts, not the SEC." *Durham Motion*, at 5.

IX. Conclusion

The Motions fail to identify how any finding the Subcommittee made is unlawful or unreasonable, fail to identify any issue the Subcommittee overlooked or mistakenly conceived, and they fail to identify any new evidence, let alone evidence that was not available during the adjudicative hearing. Instead, the Motions simply rehash arguments previously made in pre-filed testimony, at the hearing and in post-hearing briefs. As a result, the Motions should be denied.

independent from the SEC). The documents exchanged between Eversource, the landowner, and the third party would not be provided to the SEC; therefore, the exchange of any documents between those parties is not subject to 91-A and the confidentially provisions in the Dispute Resolution Process are lawful and reasonable. The only publicly available information subject to 91-A would be the quarterly report of the Dispute Resolution Fund made to the SEC Administrator.

WHEREFORE, the Applicant respectfully asks that the Committee:

a. Deny the Town of Durham's, Conservation Law Foundations, and the Durham Abutters' Motion for Rehearing; and

b. Grant such other further relief as is deemed just and appropriate.

Respectfully Submitted,

Public Service Company of New Hampshire d/b/a Eversource Energy

By its attorneys,

McLANE MIDDLETON
PROFESSIONAL ASSOCIATION

Dated: March 8, 2019

By: _____

Barry Needleman, Esq. Bar No. 9446
Adam Dumville, Esq. Bar No. 20715
11 South Main Street, Suite 500
Concord, NH 03301
(603) 226-0400
barry.needleman@mclane.com
adam.dumville@mclane.com

Certificate of Service

I hereby certify that on this 8th day of March 2019, an electric copy of this Combined Objection was electronically sent to the New Hampshire Site Evaluation Committee and served upon the SEC Distribution List.

_____
Barry Needleman

clf
conservation law foundation

For a thriving New England

CLF New Hampshire
27 North Main Street
Concord, NH 03301
P: 603.225.3060
F: 603.225.3059
www.clf.org

March 4, 2019

Via Hand-Delivery and Email

Ms. Pamela G. Monroe, Administrator
New Hampshire Site Evaluation Committee
21 South Fruit Street, Suite 10
Concord, NH 03301

RE: Seacoast Reliability Project (Docket No. 2015-04)

Dear Ms. Monroe:

Please find enclosed for filing in the above-referenced matter an original and one (1) copy of Conservation Law Foundation's Motion for Rehearing and Reconsideration.

Copies of this letter and the enclosed Motion for Rehearing and Reconsideration have this day been forwarded via email to all parties on the Distribution List.

Thank you for your attention to this matter.

Sincerely,

Thomas F. Irwin
V.P. and Director, CLF New Hampshire

cc: Docket No. 2015-04 Distribution List

Encls.

STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

Docket No. 2015-04

Application of Public Service Company of New Hampshire
d/b/a Eversource Energy for a Certificate of Site and Facility for Construction of New Transmission Line (Madbury to Portsmouth)

[PARTIALLY ASSENTED-TO] MOTION OF CONSERVATION LAW FOUNDATION FOR REHEARING AND RECONSIDERATION

Conservation Law Foundation ("CLF"), an intervenor in this proceeding, hereby moves pursuant to RSA 162-H:11, N.H. Code of Admin. Rules Site 202.29, and RSA 541:3 for rehearing or reconsideration of the Site Evaluation Committee's ("Committee") January 31, 2019 Decision and Order Granting Application for Certificate of Site and Facility ("Decision") in the above-captioned docket. In support of its motion, CLF states as follows:

BRIEF OVERVIEW

1. This proceeding concerns an application by Eversource ("Applicant") for a certificate of site and facility to site, construct and operate a new 115kV transmission line from Madbury to Portsmouth ("project"). The project includes a proposal to install three cables across Little Bay using jet plow, hand-jetting, and trenching methods that are anticipated to release approximately 1,500 tons of sediments and a significant nitrogen load. It also includes the proposed installation of concrete mattresses – permanent structures covering up to 8,681 square feet of tidally submerged land in Little Bay that, pursuant to the public trust doctrine, is held in trust by the

state of New Hampshire for the benefit of the public.

2. Little Bay is part of the Great Bay estuary – a highly sensitive natural resource that has been designated an estuary of national significance and that faces numerous ecological challenges, including but not limited to nitrogen pollution, declining water quality, and the loss of eelgrass and oyster habitat. The project threatens to exacerbate these challenges and to undermine significant efforts by municipalities – including major public investments – to restore the estuary's health.

3. Following a lengthy adjudicatory process in which CLF participated as an intervener, on January 31, 2019, the Committee issued a decision granting Applicant a certificate of site and facility. CLF moves for rehearing and reconsideration of the Decision.

STANDARD FOR REHEARING

4. Decisions of the Committee are reviewable under RSA Ch. 541. *See* RSA 162-H:11. "Any party to [an] action or proceeding before the commission, or any person directly affected thereby, may apply for a rehearing," RSA 541:3, the purpose of which "is to direct attention to matters said to have been overlooked or mistakenly conceived in the original decision . . . ." *See Dumais v. State of New Hampshire Personnel Comm'n*, 118 N.H. 309, 311 (1978) (internal quotations omitted). Pursuant to RSA 541:4, a motion for rehearing must "set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." The Committee may grant rehearing for "good reason." RSA 541:3.

ARGUMENT

I. The Committee's determination that Applicant need not obtain Governor and Executive Council approval is beyond the Committee's authority, is erroneous as a matter of law, and is not supported by the facts.

5. It is undisputed that Applicant's proposal to install concrete mattresses will involve the use of tidally submerged lands that are subject New Hampshire's public trust doctrine – a doctrine that is rooted in common law and which provides that such lands are held in trust by the state for the benefit of the public. *See Opinion of the Justices (Public Use of Coastal Beaches)*, 139 N.H. 82, 89 (1994). The Decision focuses solely on the interplay between RSA 371:17 and RSA 4:40 to conclude that Applicant need not obtain approval from the Governor and Council. Decision at 71-74.

6. In the first instance, the Committee lacks authority pursuant to RSA Ch. 162-H to adjudicate, and in so doing, grant, property rights. Applicant had a burden to establish unequivocally that it has acquired all necessary rights to proceed with its project. Site 301.03(c)(6). The Decision effectively grants Applicant property rights, ignoring New Hampshire's longstanding public trust doctrine and bypassing the role of the Governor and Executive Council in making public trust determinations. Rather than rendering such a determination, the Committee should have included a condition in the Certificate requiring that Applicant proceed with its project only after its property rights have been clearly established by a court of competent jurisdiction or after seeking and obtaining approval from the Governor and Executive Council.

7. Alternatively, if the Committee had authority to render a decision relative to review and approval by the Governor and Executive, it nonetheless erred as a matter of law in concluding that such review is not necessary. Contrary to its analysis, the Public Utility Commission's review pursuant to RSA 371:17 does not address, and is not exclusive of, New Hampshire's public trust doctrine. There is nothing to suggest that public trust considerations have been delegated to the Public Utilities Commission under RSA 371:17 or that any such consideration by the Public Utilities Commission, if lawfully delegated, operates to the exclusion of the review conducted by the Governor and Executive Council. *See, e.g.,* RSA 482-A:3,II (requiring Governor and Executive Council review of NHDES wetlands permits for major projects in publicly-owned waters with no exception for projects seeking permission from the Public Utilities Commission pursuant to RSA 371:17). Indeed, the Attorney General's office has asserted the position that a pipeline project involving subtidal lands must obtain approval from the Governor and Council *in addition to* permission from the Public Utilities Commission. *See* CLF Exh. 23.

8. In addition to the foregoing, the Committee ignored public trust doctrine considerations based on a technical characterization of concrete mattresses as not involving a permanent use of subtidal lands. To the contrary, Applicant has itself characterized the presence and impacts of concrete mattresses as permanent: it "does not anticipate the need for decommissioning of the Project,"[1] and its application to NHDES for a wetlands permit is replete with descriptions of concrete mattresses in Little Bay as *permanent* impacts. *See* App. Exh. 32 (Joint NHDES/USACE Wetlands Permit Application) at electronic pages 29, 31, 45, 50, 54, 90,

[1] *See* Decision at 292. *See also id.* at 216 ("The Applicant does not anticipate decommissioning of the Project unless in the very long term.").

93. *See also* Decision at 185 ("The Applicant acknowledges that concrete mattresses will *permanently* change the substrate from unconsolidated to artificial hard (rock) substrate.") (emphasis added). The Committee's characterization of Applicant's use of subtidal lands for concrete mattresses as something less than permanent is not reasonably supported by the record.

9. For the foregoing reasons, the Decision is unlawful and unreasonable as it pertains to the public trust doctrine and review by the Governor and Executive Council. The Committee should rehear and reconsider this issue and, in so doing, should (1) issue a condition requiring Applicant to obtain all necessary property rights either by seeking review and approval by the Governor and Executive Council or by addressing this question in a court of competent jurisdiction, or (2) deny a certificate of site and facility unless and until Applicant has affirmatively sought and obtained approval by the Governor and Executive Council.

II. The Committee's determinations regarding the project's impacts on the Great Bay estuary and associated resources are erroneous as a matter of law and not reasonably supported by the record.

10. With the release of approximately 1,500 tons of sediment and a significant nitrogen load, Applicant's project threatens to harm the health of the Great Bay estuary – a sensitive and critically important natural resource that has been the subject of considerable planning and public investment by numerous communities in the watershed. The Decision – as it pertains to these impacts and to Applicant's burden to establish that the project will not unduly interfere with orderly development of the region;[2] will not have an unreasonable effect on aesthetics, water quality, the natural environment, and public health and safety;[3] and will serve the public interest[4]

[2] RSA 162-H:16, IV(b).
[3] RSA 162-H:16, IV(c).
[4] RSA 162-H:16, IV(e).

– is erroneous as a matter of law and not supported by the record for the following reasons.

A. The Decision is erroneous as a matter of law and not supported by the record because Applicant's sediment dispersion model fails to address important variables for assessing the project's impacts on estuarine resources.

11. The Decision relies heavily on Applicant's sediment dispersion analysis to address one of the most environmentally concerning aspects of the project – the release of approximately 1,500 tons of sediment in the highly sensitive and tidally dynamic Great Bay estuary. Applicant's sediment modeling analysis is flawed in the following ways, greatly undermining its ability to predict the project's impact on estuarine resources and failing to support the Committee's Decision.

12. First, the Committee found that Applicant's own witness, Mr. Swanson, acknowledged that the sediment plume "will travel further south into Little Bay than was estimated by the [sediment dispersion] model." Decision at 154. This shortcoming in the model poses a risk to Great Bay – which is located immediately south of Little Bay – where the estuary's most significant eelgrass habitat resides. *See* CLF Exh. 25. Absent a correction to the model to address this admitted flaw, the Decision's conclusion that sediments will not reach existing eelgrass resources is not supported by the record and should be reconsidered and revised.

13. Second, whereas Applicant's modeling assumed a seven-hour crossing time for the jet plow operation, the actual crossing time may significantly longer – up to fifteen hours. Day 13 AM at 38-39 (Dacey). Applicant has described the jet plow operation as starting at high slack tide, suggesting that jet plowing will occur only on the outgoing tide, preventing the project's sediment plume from traveling into Great Bay. However, the longer crossing time – up to fifteen

hours – would be inconsistent with Applicant's assumption that jet plowing will occur only on the ebb tide and raises significant questions about the Applicant's mixing zone projection, including the extent and impacts of the sediment plume reaching into Great Bay, including into Great Bay's eelgrass habitat, on a flood tide.

14. Additionally, the fact that the jet plow crossing time will not be continuous – as a result of the need to stop operations, re-set anchors, and pull the barge – was not part of the Applicant's model and, like a longer crossing time, undermines the model's predictions about the plume and mixing zone. Day 13 AM at 40-41 (Dacey).

15. In light of the foregoing, the Decision is unlawful and unreasonable. The Committee should rehear and reconsider this issue and, in so doing, should either deny the certificate on the grounds that Applicant has failed to fully assess the project's impacts on estuarine resources or require, as part of this review process and before rendering a final decision, that Applicant cure all defects in sediment dispersion model.

B. The requirement of a jet plow trial run does not properly and adequately address the many concerns associated with the dispersion of sediments in the estuary.

16. The Decision relies heavily on its requirement of a jet plow trial run to address concerns about the impacts of sediments on water quality and resources in the estuary. *See, e.g.,* Decision at 59-60. The manner in which it requires and relies upon a jet plow trial run is erroneous as a matter of law and not reasonably supported by the record.

17. First, the Decision improperly delegates to NHDES the review of, and jet plow operational modifications warranted by, the trial run and associated data. It provides no opportunity for review by the decisionmaker in this proceeding – the Committee. As discussed

in Part III, below, the condition is an unlawful delegation that is inconsistent with the adjudicatory process established by RSA Ch. 162-H and with the Committee's statutory role as the decision-making authority.

18. Second, whereas the Decision provides that NHDES shall review the results of the trial run and may require operational modifications, it does not properly address the consequences of a scenario in which the trial run reveals significant inconsistencies with Applicant's sediment dispersion model. The Decision states: "The Subcommittee is cognizant of the fact that the results of the jet plow trial run may indicate that modeled predictions were inaccurate, and no adjustments can be made to address the Project's impact." Decision at 59. Despite this important acknowledgment, however, the Decision does not make clear that NHDES is authorized to deny the project's ability to proceed with the jet plow cable installation method.[5] While it includes the condition that "[i]nstallation of the submarine cable in Little Bay shall not proceed until authorized by NHDES,"[6] it presupposes that the installation will, in fact, occur. As described above and in Part III, *infra*, the Committee should retain decision-making authority, including the ability to deny a Certificate for a project involving the use of a jet plow based on the results of the trial run. Alternatively, in the event the Committee can lawfully delegate authority to NHDES, it should at least amend the above-quoted condition to add the words "unless and," as follows: "Installation of the submarine cable in Little Bay shall not proceed *unless and* until authorized by NHDES."

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[5] *See, e.g.,* Decision at 169 ("NHDES is authorized to review the results of the trial and to request that the Applicant *adjust* its jet plowing operations to ensure that the impact on water quality of the Bay [is] minimized.") (emphasis added); *id.* at 170 (noting that the trial run "should provide the opportunity to *adjust the specifications for the jet plow operation* if necessary.") (emphasis added).

[6] Decision at 60.

19. Finally, it is important to note that the jet plow trial run – according to the terms described in the Decision – will not reasonably assure results that are representative of the full jet plow operation. Because the trial run will be limited in distance, and will therefore involve a shorter time duration, it is unlikely to be exposed to the tidal conditions involved in a full crossing of Little Bay. As described above, it could take up to fifteen hours for the jet plow to fully cross the bay, exposing the operation to a variety of tidal conditions. The much shorter trial run will necessarily avoid many of those tidal conditions. In fact, the trial run could potentially be implemented largely during slack-tide conditions, greatly reducing the influence of Little Bay's significant tides and thereby undermining the trial run's purpose – to assess the predictive value of the sediment dispersion model.

20. For the foregoing reasons, the Decision is unlawful and unreasonable as it pertains to the jet plow trial run. The Committee should rehear and reconsider this issue and, in so doing, should (1) secure a role for the Committee to review the results of the jet plow trial run as part of this adjudicatory process, (2) retain the right of the Committee to deny use of the jet plow method, and (3) impose conditions on the jet plow trial run to ensure its results are representative of the actual, proposed installation of cables by means of jet plowing.

C. The Decision does not properly address, and is premised on misapprehensions of fact and law related to, nitrogen pollution.

21. The project will result in a significant release of nitrogen pollution – the pollutant of greatest ongoing concern to the health of Little Bay and the Great Bay estuary and which has prompted significant planning efforts and municipal investments by communities in the watershed. The Decision is flawed, and fails to properly address this concern, in the following ways.

22. First, the Decision concludes that the project "will not add nitrogen," stating instead that it will "disturb and dispense nitrogen already present in the Bay." Decision at 169. This finding is wholly irrelevant for purposes of assessing the impacts of the project as it relates to nitrogen pollution and is premised on a misapprehension of the science as presented by the Town of Durham's qualified experts. While it is true that the project will cause the release of nitrogen that is already present in the estuary, such nitrogen – so long as it is contained in the sediments and not released into the water column – does not result in adverse impacts to water quality and associated resources like eelgrass. It is the *release* of nitrogen *into the water column* that is of concern, as it will then become bioavailable and contribute to water quality and eutrophication concerns. Indeed, the Decision's dismissive treatment of nitrogen as *already present* in the estuary is entirely inconsistent with the manner in which it – and Applicant – have addressed sediments, which, like nitrogen, will not be *added* to the estuary, but which will be disturbed and released into its water column and habitats.

23. Second, the Decision suggests that the jet plow trial run will address concerns related to nitrogen because it "should verify the accuracy of the modeling and should provide the opportunity to adjust the specifications for the jet plow operation if necessary." Decision at 170. However, with respect to nitrogen, the Committee's reliance on the jet plow trial run and Applicant's modeling is misplaced. Specifically, Applicant's model pertains to the disturbance and dispersion of *sediments*. It is not specifically related to nitrogen and does not address nitrogen contained in pore water – *i.e.*, nitrogen that is already in a dissolved phase, as opposed to pollutants that are adsorbed to sediments. Accordingly, the Committee cannot lawfully and reasonably rely on Applicant's sediment dispersion model, and the associated jet plow trial run, to address the project's impacts associated with nitrogen.

24. Finally, the Decision is premised on a misapprehension of both fact and law as it relates to the monitoring of nitrogen and compliance with New Hampshire's surface water quality standards. The Decision states in pertinent part: "The Subcommittee is confident in the ability of NHDES to monitor the amount of nitrogen that will be disturbed in Little Bay and to ensure that the Project will comply with New Hampshire Surface Water Quality Standards." Decision at 170. First, New Hampshire's surface water quality standards contain only *narrative* standards pertaining to nitrogen; they contain no *numeric* standard.[7] As a result, even if NHDES were to monitor total nitrogen releases associated with the jet plow trial run or the installation of cables in Little Bay, it lacks a numeric standard to apply as a benchmark and regulatory tool. Moreover, the Decision's reliance on monitoring nitrogen releases during and after the installation of cables in Little Bay fails to in any way protect the estuary from the project's adverse impacts. The Committee simply should not, and cannot within the context of applicable review criteria, rely on after-the-fact, post-project monitoring of water quality impacts as a means to avoid a full assessment of impacts – *before* they occur – as part of its decision-making process.

25. For the foregoing reasons, the Decision is unlawful and unreasonable as it pertains to the project's impacts caused by the release of nitrogen pollution. The Committee should rehear and reconsider this issue and, in so doing, should deny the certificate on the grounds that the project's nitrogen-related impacts on the estuary are unreasonable and /or have not been adequately assessed by Applicant. Alternatively, it should require further assessment of nitrogen-related impacts as part of this adjudicatory process and before rendering a final

[7] *See* Rules Env-Wq Part 1700, generally; *see* Rule 1703.14 Env-Wq for narrative water quality standards for nutrients, including nitrogen.

decision.

D. The record does not support the Committee's Decision as it relates to the project's impacts on eelgrass.

26. Great Bay, located immediately south of Little Bay, contains the estuary's most extensive eelgrass habitat. *See* CLF Exh. 25. Despite the proximity of eelgrass to the project, the Decision concludes: "The sediment dispersion model demonstrates that sediment associated with the Project will not reach known eelgrass beds." Decision at 207. For the following reasons, this finding is unsupported by the record.

27. First, Applicant provided conflicting information regarding the project's dispersion of sediments into Great Bay, where significant eelgrass habitat is present. On the one hand, according to Applicant: "Water quality modeling demonstrated that neither [the] plume nor deposition of suspended sediments resulting from in-water construction activities will reach any established eelgrass beds." Decision at 186. On the other hand, Applicant's expert (Mr. Swanson) admitted that the sediment plume will travel further south than estimated by the model. Decision at 154. In light of this admitted flaw in the model, Applicant cannot credibly claim, and the Committee could not reasonably conclude, that sediments will not be dispersed into eelgrass habitat in Great Bay.

28. Second, as described above in Part II.A, the sediment dispersion model contains important flaws that preclude an accurate assessment of sediment migration into Great Bay and eelgrass habitat present there.

29. In light of the foregoing, the record does not support the Committee's conclusion that the project will not adversely affect eelgrass habitat, rendering the Decision unlawful and

unreasonable. The Committee should rehear and reconsider this issue and, in so doing, should, as part of this adjudicatory process and before rendering a final decision, require further study and analysis of the project's potential impacts on eelgrass, particularly in light of Applicant's deficient sediment dispersion model.

E. The Decision fails to properly address the project's impacts on oysters and public health.

30. The Town of Durham's expert, Dr. Stephen Jones, raised significant environmental and public health concerns associated with the project's disturbance and release of bacteria, viruses and pathogens and the impacts thereof on oysters and people who consume oysters. *See* CLF's Post-Hearing Memorandum at 4-6. Dr. Jones also testified to changes in the location of commercial oyster operations in the estuary – changes that have resulted in oyster harvesting and aquaculture operations moving in close proximity to the project's proposed crossing of Little Bay. *Id.* at 6. The Decision fails in any way to address these important changes, which could expose more oysters, and the people who consume them, to pathogens and other contaminants.

31. As set forth in Part III, *infra*, the Decision also is flawed in that it improperly deferred and delegated to NHDES the concerns described by Dr. Jones to NHDES, stating that "NHDES decided not to require the Applicant to test oysters for pathogens"[8] as if to suggest that NHDES fully assessed the problem of pathogens and that, whatever its assessment may have been, NHDES's assessment of the issue could not or should not be scrutinized by the Committee.

32. For the foregoing reasons, the Decision is unlawful and unreasonable as it pertains to the project's release of pathogens from sediments, and the impacts thereof on oysters and public

[8] Decision at 208.

health. The Committee should rehear and reconsider this issue and, in so doing, should independently scrutinize this issue, taking into account the opening of shellfish harvesting areas in proximity to the project, and deny a certificate on the grounds that the project involves unreasonable impacts associated with pathogens, oysters and public health.

F. The Decision is erroneous as a matter of law and not reasonably supported by the record because it fails to address the project's impacts on the Great Bay estuary as part of its "orderly development of the region" analysis.

33. The project involves several risks to the estuary which, as described above, have not been properly addressed by Applicant or in the Decision, and which threaten to undermine significant planning efforts and public investments by numerous communities in the estuary's watershed. *See* Decision at 310 ("The Strafford Regional Planning Commission acknowledges the importance of [the] Great Bay Estuary and indicates that physical/human activities, such as dredging, are stressors that may have a negative impact on the key habitat due to suspended sediments."); CLF's Post-Hearing Memorandum at 21-23. The Decision is erroneous as a matter of law and not supported by the record because it fails to consider in any way the issues of water quality, habitat health, and municipal investments to improve the health of the estuary – investments that could be undermined by the project – as part of the "orderly development of the region" criterion required by RSA 162-H:16, IV(b). Decision at 311-313.

34. For the foregoing reasons, the Decision is unlawful and unreasonable as it relates to the project's impacts on the orderly development of the region. The Committee should rehear and reconsider this issue and, in so doing, should deny a certificate on the grounds that the project will unreasonably interfere with the orderly development of the region.

III. The Decision unlawfully and unreasonably delegates important decision-making and the development of further analyses to NHDES.

35. RSA Ch. 162-H makes clear that the Committee is the decision-maker in proceedings related to Certificates of Site and Facility, that such proceedings are adjudicatory in nature, and that a core purpose of the Committee's governing statute is to provide "*full* and *timely* consideration of environmental consequences." RSA 162-H:1 (emphasis added); RSA 162-H:4. Contrary to these requirements, the Decision relies heavily upon future analyses and decisions to be conducted by, and delegated to, NHDES, depriving the Committee and parties to this proceeding "full and timely" information pertaining to the project's impacts on the Great Bay estuary. Examples of this improper delegation of future analyses include the Decision's (1) reliance on NHDES to review the results of the jet plow trial run and to determine what, if any, modifications to jet plow operations are necessary; (2) reliance on NHDES to monitor water quality issues, such as related to nitrogen, after the fact (*i.e.*, during project construction); (3) dismissive treatment of, and failure to independently consider, concerns related to pathogens, oysters, and public health on the theory that NHDES did not to consider them and that, therefore, the Committee need not address them; and (4) "delegat[ion] to NHDES the authority to determine whether updated surveys for rare, threatened, and endangered species shall be completed prior to construction of the Project." Decision at 209. Individually and collectively, these delegations of authority and future analyses to NHDES are contrary to the governing statute, preclude critical information from being made available to the Committee and parties as part of the decision-making process.

36. For the foregoing reasons, the Decision is unlawful and unreasonable. The Committee should rehear this issue and reconsider the manner in which it has, and continues to,

rely on NHDES. In doing so, the Committee should refrain from delegating decision-making authority from NHDES and require further information to be developed by NHDES to be provided to the Committee, as part of this adjudicatory process, for its review prior to a final decision.

CONCLUSION

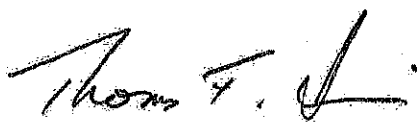
37. For the foregoing reasons, the Decision is erroneous as a matter of law and not supported by the record. Accordingly, CLF respectfully requests that the Committee grant this motion for rehearing and reconsider its Decision.

38. The following parties concur in the relief requested herein:

The following parties object to the relief requested herein:

Respectfully submitted,

CONSERVATION LAW FOUNDATION

BY: 

Thomas F. Irwin, Esq.
V.P. and CLF New Hampshire Director
Conservation Law Foundation
27 N. Main Street
Concord, NH 03301
(603) 225-3060 x3013
Fax (603) 225-3059
tirwin@clf.org

Date: March 4, 2019

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion has on this 4th day of March 2019 been sent by email to the service list in Docket No. 2015-04.

Thomas F. Irwin, Esq.
Conservation Law Foundation

Orr&Reno

Douglas L. Patch
dpatch@orr-reno.com
Direct Dial 603.223.9161
Direct Fax 603.223.9061
Admitted in NH and MA

March 4, 2019

Via Hand Delivery and Email
Pamela Monroe, Administrator
New Hampshire Site Evaluation Committee
c/o New Hampshire Public Utilities Commission
21 South Fruit St., Suite 10
Concord, NH 03301-2429

Re: SEC Docket No. 15-04, Application of Public Service Company of New Hampshire d/b/a Eversource Energy for a Certificate of Site And Facility for the Construction of a New 115 kV Transmission Line from Madbury Substation to Portsmouth Substation – Town of Durham Motion for Rehearing

Dear Ms. Monroe:

Enclosed, on behalf of the Town of Durham in the above-captioned docket, is a Motion for Rehearing. Also enclosed is a copy of the appearance of Jeremy D. Eggleton for the Town of Durham. Copies are being provided electronically to the Site Evaluation Committee and the Service List.

If you have any questions, please do not hesitate to contact me. Thank you for your assistance.

Sincerely,

Douglas L. Patch

DLP/eac
Enclosure

cc (via email): Service List in SEC Docket 15-04

2364153_1

STATE OF NEW HAMPSHIRE
BEFORE THE

NEW HAMPSHIRE SITE EVALUATION COMMITTEE

SEC Docket No. 2015-04

Application of Public Service Company of New Hampshire d/b/a Eversource Energy for a Certificate of Site And Facility for the Construction of a New 115 kV Transmission Line from Madbury Substation to Portsmouth Substation

TOWN OF DURHAM
PARTIALLY ASSENTED-TO MOTION FOR REHEARING

The Town of Durham ("Durham"), pursuant to RSA 541:3 and N.H. Code Admin. Rules Site 202.29, respectfully moves for rehearing of the New Hampshire Site Evaluation Committee's ("the Subcommittee" or "SEC") Decision and Order Granting Application for Certificate of Site and Facility with Conditions issued on January 31, 2019 in the above-captioned docket ("the Order") granting a certificate to Public Service Company of New Hampshire d/b/a Eversource Energy ("Eversource" or "the Applicant") to construct a new high voltage transmission line from Madbury Substation to Portsmouth Substation ("the Project").

INTRODUCTION

After three years of litigation and 15 days of contested hearings the Subcommittee granted a certificate of site and facility to Eversource for the Project. For the reasons spelled out below and further described in Durham and the University of New Hampshire's ("UNH") post-hearing brief, submitted in this docket on November 15, 2018 and incorporated herein by reference, Durham submits that the Order is unjust and unreasonable and that it contains a number of errors of law. Among these are that Eversource failed to meet its burden of showing by a preponderance of the evidence that the Project would meet the criteria in RSA 162-H:16, IV. Also, in granting a certificate the Subcommittee overlooked and failed to weigh substantial evidence that was contrary to the findings which it made. In addition, the Subcommittee also made a number of errors of law both during the adjudicative process and in the Order. Durham is therefore requesting that the Subcommittee rehear this case, correct these errors and deny a certificate for the Project.

ARGUMENT

A. Standard of Review.

Pursuant to RSA 162-H:11 decisions of the Subcommittee are reviewable under RSA 541. Under RSA 541:3 "any party to the action or proceeding before the commission, or any person directly affected thereby" may request rehearing. "The purpose of a rehearing is to direct attention to matters said to have been overlooked or mistakenly conceived in the original decision, and thus invites reconsideration upon the record upon which that decision rested." *Dumais v. State of New Hampshire Personnel Commission*, 118 N.H. 309, 311 (1978) (internal quotations omitted). A motion for rehearing must "set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." RSA 541:4. A rehearing may be granted upon a finding of "good reason." RSA 541:3. *See also O'Loughlin v. New Hampshire Personnel Commission*, 117 N.H. 999, 1004 (1977); *Appeal of Gas Service, Inc.*, 121 N.H. 797, 801 (1981).

Durham, a party to this proceeding as well as a person (*see* RSA 21:9) directly affected by the Order, respectfully submits that several conclusions in the Order are incorrect, unlawful, and/or unreasonable.

B. The Subcommittee's determination that the Applicant does not need to obtain approval from the Executive Council to install cable and concrete mattresses in Little Bay is unlawful.

During the course of this proceeding and in post-hearing briefs Durham and other parties noted that the SEC statutes and rules (RSA 162-H:7, IV and N.H. Code Admin. Rules Site 301.03(d)) require that the application must contain sufficient information to satisfy each agency having jurisdiction over any aspect of the Project and that the Applicant must identify all other state agencies having permitting authority or other regulatory authority.[1] Durham and other

[1] "Eversource is responsible for obtaining *any and all other permits for the construction and installation of the proposed crossings from any federal, state, and local authorities having jurisdiction.* Because the NHDES is responsible for maintaining the official list of public waters, we require that notice of the proposed crossings be sent to NHDES. We also require notice be provided to the New Hampshire Site Evaluation Committee and to the towns of Durham and Newington." March 10, 2017 PUC Order *Nisi* Granting License, page 7 (emphasis added). Eversource's reliance upon RSA 371:17, requiring it to obtain a "license from the Commission to construct a pipeline, cable, or conduit, or a line of poles or towers and wires and fixtures thereon, over, under or across any of the public waters of this state, or over, under or across any of the land owned by this state," is inapposite. This is

parties asserted that Eversource is required by RSA 4:40 to obtain the approval of the Governor and Council to construct the transmission lines and insert the concrete mattresses in Little Bay, a tidal water of the state, and that it failed to do so. In support of this position, the parties relied not only upon the statutory framework, which is clear, but upon a memorandum from the Office of the Attorney General in a prior SEC docket which stated that the approval of the Governor and Council was required in analogous circumstances. CLF Exh. 23; *see* SEC Docket No. 2012-02. The Subcommittee rejected this argument, essentially ruling that approval is required only when state-owned property is "disposed" or "leased" and saying that it is up to the Applicant to decide whether they need an easement or a license to install the lines and over 8600 square feet of concrete mattresses in tidal waters. Order, pp. 71-74.

This was an unlawful decision because the permanent use of property held by the state in the public trust for the benefit of a private applicant such as Eversource is a "disposal" or "disposition" of the property by any definition. *See Purdie v. Attorney General*, 143 N.H. 661, 663 (1999) ("[L]ands subject to the ebb and flow of the tide are held in public trust.") (citing *Opinion of the Justices (Public Use of Coastal Beaches)*, 139 N.H. 82, 89 (1994)); *Chernaik v. Brown*, ___ P.3d ___, (Or. App., January 9, 2019), Slip Op. at *9 (the "public-trust doctrine is rooted in the idea that the state is *restrained* from *disposing or allowing uses of public-trust resources* that substantially impair the recognized public use of those resources.")(emphasis in original and added). In essence, the state is providing Eversource a durable right to use state property held in the public trust for a term of years. This is a dedication of the property to one private user that necessarily implicates the interests of other users, including recreational users. *Opinion of the Justices*, 139 N.H. at 90 (citing *Hartford v. Gilmanton*, 101 N.H. 424, 425-26 (1958) (public waters may be used to boat, bathe, fish, fowl, skate, and cut ice). As RSA 4:40 requires the Governor and Council to approve the "disposal" of state owned property, that approval was necessary for Eversource to obtain as part of this application process. Since it did not obtain that approval, Eversource's application is incomplete.

In addition, the Subcommittee's interpretation that Eversource only needs to obtain a "license" not an "easement" is both incorrect and immaterial. It is incorrect because when a

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not, contrary to Eversource's argument and the Subcommittee's decision, an either/or proposition. Eversource must obtain the license from the PUC contemplated by RSA 371:17 *and* the review and approval by the Governor and Council of the disposition of the land beneath and adjacent to the tidal waters contemplated by RSA 4:40.

power company acquires property rights to run new power lines in any other context, it would never rely upon the uncertainty of a license that is unilaterally revocable by the grantor to construct a multi-million-dollar piece of infrastructure. If there is any form of guarantee or irrevocability attached to the property right given, then the right given is an easement, or, at minimum, a lease. This is particularly the case where the license is one that permits and encourages—as this "license" does—the expenditure of resources to create a permanent asset. *Decker Car Wash, Inc. v. BP Products North America, Inc.*, 649 S.E.2d 317, 319-20 (Georgia App., 2007) (and cases cited). Under such circumstances, the license becomes irrevocable and the use of the land is, in effect, an easement. *Id.* Even if the use of the land is not "permanent" in the sense that an express deeded easement of no specified duration might be, the use of the land in question is intended to be permanent in relation to the lifetime of the Project. Although no specific term of years is contemplated by the permit or license granted, there is no contemplation that the state will revoke the license given during the useful lifetime of the infrastructure in question. Again, such a provision would be anathema to any project that required financing or the amortization of investment. Thus, a license granted for the permanent duration of a project, until that project is concluded, is nothing other than a lease of the property in question, with all the concomitant guarantees of permanency and irrevocability that come with such an instrument. *See Gourmet Dining, LLC v. Union Twp.*, 30 N.J. Tax 381, 421 (2018) ("A lease is defined as a 'contract for exclusive possession of lands, tenements or hereditaments for life, for term of years, at will, or for any interest less than that of lessor, usually for a specified rent or compensation'... The name that parties give to an agreement is not determinative, and the court must distinguish a lease from a license, which is an agreement that only gives permission to use the land at the owner's discretion.") (citing Black's Law Dictionary 889 (6th Ed. 1990), other citations omitted).

The Subcommittee's own decision contemplates that the powerlines and concrete mattresses will be in place at least until the Project is ultimately decommissioned in the fullness of time. In addition, just as the record in this docket shows that the abandoned electric cables that have not been used for years are still in Little Bay, the transmission lines and concrete mattresses proposed for this Project are likely to be used indefinitely and to be abandoned in Little Bay when they are no longer used. Thus, there can be no legitimate question in this case that the permit or license at issue constitutes a "contract for exclusive possession of lands" for a

"term of years," to wit, the useful life of the proposed Project and beyond. *Id.* This represents a term of years, measured by the longevity of the infrastructure itself. Accordingly, RSA 4:40, I requires that the Governor and Council approve such a lease, and the Subcommittee's distinction on the point is immaterial.

The Subcommittee's rejection of the "disposal" argument is thus incorrect because it is based on the false assumption that concrete mattresses will not be permanently installed. The Subcommittee apparently believes that the structures could be removed in the future because the Applicant did not seek to exempt concrete mattresses from its future decommissioning plan. Order at 74. However, this position is invalid as it ignores the facts in the record which show that Eversource does not anticipate the need to decommission the transmission line. App. Exh. 1, p. 110. According to Eversource's witnesses Kenneth Bowes and David Plante "[i]t is extremely rare for transmission line owners to decommission and completely remove a 115 kV transmission line and related facilities." App. Ex. 140, p. 9. Lines 27-29. "Such lines are typically rebuilt, as needed, and continue in service indefinitely." App. Exh. 1, p. 110. Moreover, the Subcommittee's decision ignores the information in the record where Eversource describes the concrete mattresses as having *permanent* impacts. *See,* e.g. App. Exh. 1, pp. 28, 114, 119.

The foregoing evidence completely invalidates the Subcommittee's assumption that the transmission line and concrete mattresses will not be permanently installed and therefore no "disposal" of state land will occur. Rather, the more logical assumption, based on the Applicant's own testimony, is that that once the transmission line and concrete mattresses are installed in Little Bay that they will not be removed. To underscore the likelihood of such permanence, the Subcommittee need look no further than the four cables of inactive distribution line that Eversource's predecessor, Public Service Company of New Hampshire, abandoned and left in place under Little Bay. App. Ex. 154, p. 3.

Furthermore, as a matter of policy, the Subcommittee's interpretation empowers an applicant to avoid the Governor and Council review merely by choosing what permitting approach it would like to take. But in this case the Applicant will be placing powerlines and concrete mattresses in the fragile soils of an important public water body, irrespective of whether it obtains a license or an easement to do so. It is nonsensical as a matter of public policy to require review by the Governor and Council in one instance, but not the other.

The issue of Governor and Council review arises not only with regard to the placement of powerlines and concrete mattresses under the water. In addition, RSA 482-A:3, II requires that all requests for wetlands permits from DES involving public-owned water bodies must be submitted to the Governor and Council for approval. DES even recognized that this was the case. Applicant's Exh. 32, p. 27. Nonetheless, this was never done and should be considered yet another fatal absence in the list of approvals which the Project must obtain. This Subcommittee does not have the authority to waive or overlook this statutory requirement.

Just as important is the fact that the Subcommittee's ruling on this question oversteps the authority given to it by the Legislature. *See Appeal of Campaign for Ratepayers' Rights*, 162 N.H. 245, 255 (2011) (where the Court rejected the Committee's argument that it had inherent authority to assess costs on petitioners). The SEC only has such authority as is granted to it by the Legislature and it does not have authority to determine property rights of Eversource and landowners (which in this case are the state and the public since the land under tidal waters is held in trust for the public). As the Public Utilities Commission ("PUC") has determined and as should be the case here, authority to decide such property rights issues rests with the courts, not the SEC. *See* Order No. 25,882 (April 15, 2016) and Order No. 26,020 (May 24, 2017) in PUC docket DE 15-464.

C. The Subcommittee's determination that further review of the Public Utilities Commission's decision to grant a license to install cable in Little Bay is unnecessary despite the Applicant's failure to provide any information about concrete mattresses is unlawful and unreasonable.

Durham argued in its post-hearing brief that the Applicant's failure to inform the PUC in DE 16-441 of the need to install over 8600 square feet of concrete mattresses, which the evidence in this docket shows will interfere with the public's use and enjoyment of these tidal waters, was another flaw in the Applicant's case. While the Subcommittee agreed that the Applicant had failed to tell the PUC that it was using over 8600 square feet of concrete mattresses, by advising the PUC that it "*may be using* 'supplemental mechanical protection'" the SEC determined that further review by the PUC was unnecessary. Order at 71 (emphasis added). It is difficult to understand how the PUC could have made the determination it is required to make without the specific knowledge of the need for over 8600 square feet of concrete mattresses. As the PUC has made clear in recent orders, to grant a license to cross public waters

it "must find that the licensed use 'may be exercised without substantially affecting the public rights in said waters or lands.'" *See* for example Order No. 25,910 (June 28, 2016) in DE 15-460 and 15-461 at 10. This involves exploring "the proposed uses of the licenses and the impact, if any, of those uses on the public's rights. *Id.* To determine whether the public's rights would be affected by this Project the PUC would have had to explore the extensive use of concrete mattresses in Little Bay, something which it clearly did not do because it was not provided any information about the mattresses. This analysis is required by law. The propriety of concrete infrastructure in the bay goes beyond environmental and aesthetic issues, which the PUC leaves to the SEC, and the SEC has no authority to waive or limit this analysis, which the PUC was required to complete.

On the one hand the Subcommittee allows Eversource to continue to negotiate in private with one state agency, DES, when it does not like the permit conditions it recommends in a "final decision." *See* section D below. On the other hand the SEC says that all Eversource has to do is to provide another agency, the PUC, cursory, uninformative and arguably misleading information about the Project in order to get a "final decision" from that agency. The SEC gives Eversource what amounts to unbridled discretion about how it handles permit and license applications and how it provides information to the agencies, the parties and the public. This approach is contrary to the law and to the detriment of the process and the due process rights of the parties shut out of the decision-making loop. *Society for Protection of N.H. Forests v. Site Evaluation Comm.*, 115 N.H. 163, 168 (1975) ("Where issues of fact are presented for resolution by an administrative agency due process requires a meaningful opportunity to be heard.").

The failure to provide the concrete mattress information to the PUC means that Eversource did not meet the statutory requirement that the application must contain sufficient information to satisfy each agency having jurisdiction over any aspect of the Project. RSA 162-H:7, IV and N.H. Code Admin. Rules Site 301.03(d). The vague reference to "supplemental mechanical protection," Order at 71, failed to describe the Project to the PUC with sufficient detail to meet the requirements of the law. *See In re Londonderry Neighborhood Coalition*, 145 N.H. 201, 203-04 (2000) (holding that failure to provide adequate information was cured by describing "*in detail* the type and size of each part of its proposed facility") (citing RSA 162-H:7, V(a)). Consequently, the PUC could not render a meaningful "final decision" as required

by RSA 162-H:7. The Subcommittee erred as a matter law and should not have reached this conclusion.

D. The Subcommittee unlawfully and unreasonably delegates too much authority to state agencies and officials to make determinations that the Subcommittee is required by law to make.

RSA 162-H:4 limits the SEC's ability to delegate its authority as follows: "to the administrator or such state agency or official as it deems appropriate the authority *to specify the use of any technique, methodology, practice, or procedure approved by the committee* within a certificate issued under this chapter, or the authority to specify minor changes in the route alignment to the extent that such changes are authorized by the certificate for those portions of a proposed electric transmission line or energy transmission pipeline for which information was unavailable due to conditions which could not have been reasonably anticipated prior to the issuance of the certificate." RSA 162-H:4, III-a (emphasis added.) The statute also contains the following statement: "The committee may not delegate its authority or duties, except as provided under this chapter." RSA 162-H:4, III-b. The import of this language is quite clear. The Legislature granted to the SEC limited authority to delegate and did not want the Subcommittee to delegate its authority to state officials beyond what it had specifically authorized. What the Subcommittee has done in the Order is to illegally and unreasonably delegate a number of final decisions on plans, the results of further studies, and even yet-to-be obtained permits to state officials, in effect shirking its statutory responsibilities. Durham submits that this constitutes an error of law.

Although there are many examples of this illegal delegation, one of the primary ones involves the jet plow trial run, which the Subcommittee is delegating to DES. That delegation is not just to oversee the jet plow trial run, but to also make a decision as to whether the results of that trial run should cause either a delay or a significant modification to the jet plowing, or perhaps even another method of installing the three separate, mile long, high voltage cables in Little Bay. This goes well beyond the use of a technique, methodology, practice or procedure approved by the Subcommittee. This was not a matter of the Subcommittee choosing from among options approved and recommended by the appropriate state agency. *See Londonderry Neighborhood Coal.*, 145 N.H. at 205. This constitutes a delegation of authority to evaluate the impact of the jet plow procedure, the viability of the jet plow procedure, and whether or not that

procedure will result in an unreasonable adverse effect on the environment. In effect it delegates a ruling on all those criteria to DES. It also shuts all of the parties out of the process by not allowing them to review and comment on the results of the trial run to the SEC, the body required by law to be making this determination. *Id.* at 204 (intervenors and parties do not have a right to comment on conditions subsequent to approval). It thus violates the due process and transparency requirements of the SEC process and the New Hampshire Constitution as well. *Society for Protection of N.H. Forests*, 115 N.H. at 168.

In its February 2018 "final decision" DES recommended that the results of the jet plow trial run be provided *back to the SEC* for its review. App. Exh. 166, p. 3. Despite this recommendation from DES the Subcommittee is now content to cede all oversight of the jet plow trial run to DES and post the results of the trial run on the website, apparently believing that this cures any defects in the process. As the Subcommittee makes clear in the Order, it is only viewing the trial run as an opportunity to "verify the accuracy of the modeling" put forth by the Applicant's consultants. Order at 170. It is relying on "the experience and expertise of NHDES to appropriately review, approve and oversee the plans." Order at 169. The Subcommittee has handed this aspect of the Project off to DES like a hot potato, defying DES' express recommendation and denying the parties and the public any right to review or challenge the implementation of this untested procedure. This constitutes an unlawful delegation of authority.

The Order goes on to say: "The Subcommittee is confident in the expertise and ability of DES *to determine which conditions should be implemented.*" Order at 169 (emphasis added). Similarly, the Subcommittee noted: "NHDES has experience and expertise to determine the adequacy of the [Soil and Groundwater Management] Plan prepared by the Applicant." Order at 172. The determination of conditions for the implementation of aspects of the Project is part of the Subcommittee's non-delegable authority. *See* RSA 162-H:4, III-a, III-b. The same defect mars the Order's discussion of the impact of the proposed Project on oysters and other organisms in Little Bay, where the Subcommittee says "it relies on the experience and expertise of NHDES with regard to the *level of testing that should be required.*" Order at 208 (emphasis added). Also: "The Subcommittee delegates to NHDES the authority to determine whether updated surveys for rare, threatened, and endangered species shall be completed prior to construction of the Project." Order at 209. The Subcommittee also delegates to DES the process for review and

hearings to address any reports associated with this Project that will subsequently be filed with DES: "NHDES is sufficiently qualified to address such concerns and comments. Establishment of a duplicative process with the Committee will cause unnecessary delay in construction of the Project." Order at 209.

It is important to recall that Eversource first provided notice of this Project to the SEC four years ago, in 2015. Virtually all of the delays associated with this Project have been caused by the Applicant's own inability to complete the necessary studies and reports. Despite these significant delays, here we are four years later and many of the reports and analyses have yet to even be submitted to DES, yet the Subcommittee is now so concerned about causing any further delays in this Project that it is willing to delegate all of this authority to DES and remove itself from important decisions about the Project. These reports and analyses could have been "reasonably anticipated prior to the issuance of the certificate." *See* RSA 162-H:4, III-a.

One other example is the Subcommittee's delegation to the New Hampshire Division of Ports and Harbors and/or the NH Department of Safety Marine Patrol the determination of whether placing over 8600 square feet of concrete mattresses in Little Bay "creates a navigational hazard." Order at 229. Also of note is the Subcommittee's delegation to agencies with permitting and other regulatory authority the power to approve locations for marshalling yards and laydown areas: "The Subcommittee is confident in the ability of the respective agencies to review the required permit applications and *issue required permits* without the oversight of the Administrator." Order at 253 (emphasis added). It was also an illegal delegation of authority for the Subcommittee to delegate to the Department of Transportation (DOT) "the authority to make its determinations and to issue the required permits, licenses, and approvals in accordance with existing DOT policies, rules, and recommendations." Order at 68.

The purpose clause of the SEC statute, RSA 162-H:1, makes it very clear that through this process "full and timely consideration of environmental consequences be provided..." Relying upon so many unfinished reports to issue a certificate, delegating substantive reviews of those reports and trials to DES, and ceding permitting authority and other determinations to other agencies, does not accomplish this purpose. Moreover, it defeats the purpose of providing "full and complete disclosure to the public of such plans" and the purpose of resolving "all environmental, economic, and technical issues" in "an integrated fashion." Under the SEC

statute, RSA 162-H:7, IV, each application must contain "sufficient information to satisfy the application requirements of each state agency having jurisdiction, under state or federal law, to regulate any aspect of the construction or operation of the proposed facility, and shall include each agency's completed application forms." From the record and from the Order it is clear that this statutory requirement was not met. The Subcommittee's improper delegation of authority to DES, the Marine Patrol and other agencies to conduct substantive reviews, make fundamental decisions and impose material conditions is not a valid remedy for Eversource's failure to have submitted a complete and thorough application.

E. The Subcommittee unreasonably concluded that the Project will not have an unreasonable adverse effect on the environment.

The Subcommittee concluded that the Project will not have an unreasonable adverse effect on water quality and the natural environment. Order at 172, 199. Durham submits that this conclusion is contrary to the evidence in the proceeding and therefore unreasonable and an error of law. With regard to the Project impacts to nitrogen levels in Little Bay the Order states on page 168: "The Project, however, will not add nitrogen." On page 171 the Order concludes: "Considering the expert testimony and the avoidance, mitigation, and minimization measures adopted by NHDES and agreed to by the Applicant, and the conditions imposed, the Subcommittee finds that the Project will not have an unreasonable adverse effect on water quality." The Subcommittee appears to further support this conclusion on the assumption that remaining concerns can be addressed through the performance of a trial run, as stated on Page 168: "However, to address the level of uncertainty associated with the modeling, the Applicant agreed to and is ordered to conduct a jet plow trial run."

Durham submits that the Subcommittee's conclusion that the Project will not have an unreasonable adverse effect on water quality is based upon their incorrect interpretation of the evidence presented through testimony and/or a lack of understanding of the overall nitrogen cycle in the estuary. In addition, there are logistical issues associated with implementing the trial run as proposed that will make it difficult or impossible to make substantive changes to the field procedure before the full-scale Project takes place, and that will allow no changes relative to pore water nitrogen release.

The Environmental Protection Agency has designated the Great Bay estuary, including Little Bay, as officially impaired. Nitrogen loading is responsible for eutrophication that has, among other impacts, led to declining eelgrass habitat, a critical component of the estuarine ecosystem. During the testimony of Durham's experts, nitrogen loading and direct immediate impacts on water quality as a result of jet plowing activities were identified as significant concerns. These concerns were articulated in pre-trial expert testimony, responses to Applicant data requests, supplemental testimony, and in responses to questions during cross-examination and from Subcommittee members. The testimony provided to date clearly presents the ecological issues associated with nitrogen and how the proposed operations will exacerbate nitrogen loading issues in Little Bay. As clearly stated in Day 13 Hearing testimony by Dr. Stephen Jones, nitrogen levels in the Little Bay system are in a state of relative equilibrium between open water, sediment pore water, and sediments. The total nitrogen in the system includes nitrogen in sediments and associated pore water; however, nitrogen at depth is essentially unavailable to biological aspects of the nitrogen cycle and does not substantially impact available nitrogen levels in the estuarine water column.

By disturbing sediments to depths as great as five feet below the sediment surface, previously unavailable nitrogen will be introduced as available nitrogen into the water column where it will add to the nitrogen loaded to the estuary. This is an issue that local municipalities have spent hundreds of millions of dollars to mitigate over the past 10 years. So, although the total nitrogen in the system is unchanged, the available nitrogen in the water column, where algae of all sizes grow, will change significantly as a result of jet plow operations.

It is also evident from statements in the Order that the Subcommittee is relying upon the results of a jet plow trial run and associated water quality monitoring to address any uncertainties regarding sediment/pore water contaminant levels, sediment suspension/dispersion/resuspension, and sediment dispersion model accuracy. However, as articulated in the Durham experts Day 13 Hearing testimony, there are several concerns with the trial run. The trial run is proposed to occur just 21 days prior to the start of jet-plow activities and a report summarizing trial run activities and results is due to DES seven days after the trial run is completed. This schedule presents logistical issues for adequate data review and interpretation that could diminish the potential that trial run results can be used to make meaningful adjustments to the jet plow operations or to the monitoring program. The schedule requires that the trial run data be

collected, analyzed at a laboratory, tabulated, interpreted, and presented in a report within a seven day period. Then DES has 14 days to analyze the data and proposed modifications, if warranted. Considering the large volume of data that is proposed to be collected during the trial run, and the complicated nature of interpreting so many diverse analysis methods and their accuracy, let alone the frequent need to re-analyze samples, it is highly questionable that DES can review the data, formulate questions for clarification, and receive acceptable clarification from the Applicant within a 14-day period, in addition to then requiring the Applicant to re-formulate any problems with the monitoring and jet plow plans that would then require subsequent DES approval. In addition, it is clear that, given the compressed schedule and what the Subcommittee has indicated about how DES is to handle the process going forward, while those comments may be available to Durham and other interveners to review in advance of the actual crossing, there is no meaningful opportunity for anyone else other than DES and the Applicant to provide any further input and the Subcommittee has ceded all final determinations to DES.

The Applicant's testimony provided on Day 3 afternoon of the hearings revealed new information that the actual duration of the jet plow operation for an individual crossing is expected to take 15 hours, will be conducted during both ebb and flood tidal conditions, and will not be continuous. This directly contradicts the model submitted by the Applicant, which assumed that an individual crossing would be conducted continuously over a seven-hour period during an ebb tide. It should be noted that crossing duration is critical because the direction of tidally induced currents (and the corresponding direction of sediment transport) reverses approximately every six hours. Considering that the model results provided the basis for monitoring station locations, the monitoring station locations are not positioned to evaluate flood tide conditions (please note the proposed monitoring stations are located to monitor a mixing zone that is entirely predicated on the completely irrelevant seven-hour crossing-ebbing-tide modeled scenario.) This provides another aspect of uncertainty regarding the trial run and the ability to use it to identify issues and make adjustments pertaining to the monitoring plan and jet plow procedures. In addition, should the trial results indicate that monitoring station locations be adjusted, it is questionable whether the proposed trial run time table is adequate to accommodate such adjustments (e.g., as proposed, DES comments may not be provided until the actual day

that jet plow activities commence and there is no meaningful opportunity for anyone else to comment).

For the reasons articulated above and further discussed in Durham and UNH's post-hearing brief, which is incorporated by reference here, Durham submits that the Subcommittee's finding that the Project will not have an unreasonable adverse effect on water quality and the natural environment is unreasonable and unlawful.

F. The Subcommittee misinterpreted the law with regard to the import of "final decisions" by state agencies and unlawfully allowed the Applicant and DES to communicate and modify the agency's "final decision" on the issuance of a permit and made other unlawful procedural errors.

RSA 162-H:7, VI-c, establishes the process for agency review of aspects of the application and very specifically provides that "all state agencies having permitting or other regulatory authority shall make and submit to the committee a final decision on the parts of the application that relate to its permitting and other regulatory authority, no later than 240 days after the application has been accepted." In this case DES submitted its "final decision" on February 28, 2018, saying this: "Water Division staff have completed their technical review of the application and have made a final decision on the parts of the application that relate to NHDES permitting or regulatory authority..." App. Exh. 166, p. 1. During a technical session on July 10, 2018 Durham asked for any subsequent correspondence between Eversource and DES. The response to that request, provided on July 17, 2018, was the first notice that the SEC, Durham or any other party to the proceeding had that Eversource and DES were having ongoing, post-hoc discussions about making changes to the permit conditions established in the February 28, 2018 "final decision." All intervenor supplemental testimony had to be filed by July 20, 2018, three days later. Those parties were required to submit testimony without the benefit of any detailed knowledge about what else DES and Eversource might work out that would change DES' "final decision." When preparing and submitting this testimony the intervenors could not rely upon the DES "final decision" to be the final list of proposed permit conditions the statute specifically required. Durham and other parties also received weeks later other information that was not provided on July 17, 2018 but that was responsive to the July 10 discovery request. Eversource filed supplemental testimony on July 27, 2018 in which it stated it had concerns about the DES permit conditions and that it hoped to resolve those concerns with DES.

On August 10, 2018 the Presiding Officer, on her own without the approval of the rest of the Subcommittee, sent a letter to DES requesting that they identify the concerns about the permit conditions expressed by the Applicant and whether those concerns were appropriate in light of DES's statutory responsibilities. The authority the Presiding Office cited in the letter and relied on for sending the letter said "if the committee intends to impose certificate conditions that are different than those proposed by state agencies" it must notify the state agencies to seek confirmation that such conditions are appropriate and give agencies 10 days to respond. RSA 162-H:7-a, I(e). There are two problems with this letter. The first is that the Presiding Officer acted on her own, not with the approval of the Subcommittee, and the second that the statute clearly contemplates this kind of request take place only if the Subcommittee intends to impose different conditions. The hearings had not even started when this letter was sent so there is no way that the Subcommittee could have weighed testimony from all of the parties and made a neutral and unbiased determination based on the record. These were glaring procedural errors, contrary to the law and the process that was carefully established and spelled out in the law. They also violated fundamental principles of due process, which were prejudicial to the intervenors. As a consequence of the ongoing discussions between DES and the Applicant concerning further modification to the conditions of the "final decision," of which the intervenors had no notice and no part, the intervenors have been harmed. *Society for Protection of N.H. Forests*, 115 N.H. at 168 ("Where issues of fact are presented for resolution by an administrative agency due process requires a meaningful opportunity to be heard."). These procedural failings were unreasonable and unfair and constitute an error of law.

The Subcommittee erred as a matter of law in denying two motions associated with these errors. The first was an August 21, 2018 motion requesting a suspension of the proceedings and that the parties be included in any discussions with DES. The second was an October 24, 2018 motion requesting that the Subcommittee strike from the record the post-final decision recommendations from DES and related testimony.[2] For the reasons set forth above, these were clear errors of law.

[2] Later in the proceeding, DES submitted modifications to the "final decision" which were the product of exclusive discussions between Eversource and DES, to the exclusion of the public and other parties to the proceeding. Comm. Exh. 12-b, 12-c, and 12-d.

G. The Subcommittee unreasonably concluded that there is an immediate reliability need for the Project.

The Subcommittee concluded that the economy of the Seacoast is growing and the need for reliable energy is important for growth in the region. They noted that construction of the Project will resolve reliability issues of the grid and ensure that extreme emergency situations will not cause the Seacoast to face blackouts. The Subcommittee went on to note that it relies on the expertise of the Independent System Operator for New England ("ISO-NE") to identify the Project that presents the best solution for addressing reliability needs. Order at 325-326. This amounts to another improper delegation of responsibility and authority since the ISO did not choose the route for this Project, Eversource did.

The problem with this analysis by the Subcommittee is that it is dependent on reliability needs findings by ISO-NE that date back almost nine years and which at that time identified an immediate need for a reliability project in this area. The passage of this time without any apparent problems with the system suggests that the need is not what it was once thought to be. The appropriate way to address this would have been to involve the ISO in this proceeding to obtain an updated analysis and to make them available for questioning by the Subcommittee and the parties. The Subcommittee has clear statutory authority to do this. RSA 162-H:16, III. The Subcommittee arbitrarily and unreasonably refused to do this. *See* Order on Partially-Assented-to Motion to Consult with ISO-New England (April 19, 2018).

The analysis also overlooks the fact that Eversource has already invested approximately $50 million in the infrastructure of this area to improve reliability and that in doing so they have reduced the need for this Project. So far there have been no outages caused by the failure to build the remaining projects in the suite, which are the subject of this proceeding. Just because Eversource made the decision to build the other projects in the suite without first obtaining the approval for the Project that is the subject of this proceeding, the "linchpin" in the suite,[3] doesn't mean that the SEC should feel that it has no choice but to approve this Project. Moreover, as Durham and others noted in their post-hearing briefs, the SEC can and should require a deeper look at alternatives that do not require going under Little Bay and using what is a distribution ROW to accommodate a much larger high voltage transmission system. Because the

[3] Day 1AM, p. 34, lines 11-12.

transmission line under Little Bay would take up to six months to fix if it fails it is difficult to understand how this Project would meaningfully improve reliability. Day 4AM, pp. 54-55. In addition, the new load forecasts have been lower. Day 4AM, p. 120. Times have changed from when the study was done in 2010-2012; the increase in and effect of energy efficiency programs and distributed generation projects has been much more significant than expected. Demand growth in the Seacoast region has been 1-2 percent. On the one hand Eversource said that increased demand on the Seacoast is driving the need for this Project, but on the other that because the load is going to stay flat there is no need for a project like the Gosling Road Transformer to create more margin for future development. As Durham argued in its post-hearing brief, this Subcommittee should make them take the time to more thoroughly analyze and present a route that will not jeopardize Little Bay and severely negatively impact the Towns of Durham and Newington. The Subcommittee's failure to do so ignores the evidence in the record and is unreasonable and arbitrary.

H. The Subcommittee's determination that it should ignore the ways in which the Project will interfere with the orderly development of the region is contrary to precedent and is unlawful and unreasonable.

In the Order the Subcommittee said that it gave due consideration to the views of municipalities, as it is required to do, but that it was not required to deny a project that is inconsistent with those views. Order at 312. While the Subcommittee may be technically correct, what it has done in this case based on the evidence before it is unreasonable as a matter of law, and arbitrary because it is inconsistent with and departs from principles established in a clearly reasoned prior decision of the SEC. As the SEC noted in the Decision and Order Denying Application for Certificate of Site and Facility (March 30, 2018) in the Northern Pass docket SEC Docket Number 2015-06 ("Northern Pass Order"): "The pre-emptive authority of the Site Evaluation Committee does not diminish the importance of considering the views of municipal and regional planning agencies and municipal governing bodies. Rather, the Committee must listen to and consider the views expressed by municipalities." Northern Pass Order at 276. Durham submits that the Subcommittee did not listen to and consider those views to the extent that it should have in this case.

In reaching the decision in this case the Subcommittee said that Mr. Varney, Eversource's witness on this issue in both this and the Northern Pass dockets, did an analysis that

was "thorough and extensive." Order at 311. As Durham pointed out in its post-hearing brief, however, both the Eversource application and Mr. Varney's testimony contained significant misstatements about Durham's ordinances. Mr. Varney incorrectly stated that the Project is consistent with zoning ordinances in Durham. Day 8AM, p. 136. He also incorrectly testified that transmission infrastructure is not a prohibited use in any of the four communities and that it was an existing use, and that local ordinances do not speak to transmission lines as permitted or not. Day 8AM, p. 138. The Application made similar factually incorrect statements. App. Exh. 1, E-pp. 143-144. Under Durham Zoning Ordinances, TD-UNH Exh. 31, E-p. 48, section 175-11, any use not specifically permitted or permitted by conditional use permit is prohibited. Transmission lines are only permitted as conditional uses and only in the Wetland Conservation Overlay District (TD-UNH Exh. 31, E-p. 101, section 175-61) and in the Shoreland Protection Overlay District (TD-UNH Exh. 31, E-p. 106, section 175-72). Under town ordinances if something is allowed by conditional use it requires a several part test to be met and a super majority vote of the Planning Board. This means that the Project is very clearly contrary to the views of the Durham local planning board and governing body, which have approved these ordinances. The Subcommittee's failure to take this into account is unreasonable and arbitrary.

The Applicant did not meet its burden of showing by a preponderance of the evidence that the Project would not unduly interfere with the orderly development of the region. It is insufficient to argue that this Project, a high voltage transmission line, would utilize an existing right-of way ("ROW") for a partially abandoned distribution line to justify the Project being consistent with the orderly development of the region.[4] This is the primary argument relied upon by the Applicant's witness on this issue, Mr. Varney. App. Exh. 13, p. 7 of 10.

As the SEC noted in the Northern Pass Order at 277: "The Applicant's primary claim about land use, as expressed by Mr. Varney, is that the majority of the Project will be constructed

[4] The cases which the Applicant cited in the Application to support putting this Project in an existing electric utility corridor both involved an existing transmission, not distribution, corridor. App. Exh. 1, E-p. 25. One was an existing gas transmission corridor; the other was an existing electric transmission corridor. The SEC found that "the use of [an] existing right of way is much more consistent with the orderly development of the region and has less impact on the environment." Decision in Portland Natural Gas Transmission System Maritimes ("PNGTS") & Northeast Pipeline Company, SEC, Docket No. 96-01 and Docket No. 96-03, 1, 17 (July 16th, 1997). In addition, the SEC found that, in the context of sighting transmission projects, "the single most important fact bearing on this finding [that the facility will not unduly interfere with the orderly development of the region] is that the proposed transmission line occupies or follows **existing utility transmission rights-of-way**." Findings of the Bulk Power Facility Site Evaluation Committee, SEC DSF 850-155, 1, 11 (Sept. 16th, 1986) [Emphasis added].

in an existing transmission right-of-way corridor. Mr. Varney testified that construction of transmission lines in existing corridors is a sound planning principle. Tr., Day 37, Morning Session, 09/21/2017, at 18. Mr. Varney is correct, but he fails to note that it is not the only principle of sound planning nor is it a principle to be applied in every case." The Northern Pass docket involved a proposal to add high voltage transmission lines to a right of way that already has high voltage transmission lines. SRP involves a proposal to add high voltage transmission lines to a right of way that is only used for distribution lines and portions of that right of way are no longer in use at all. Because of this distinction the analysis articulated by the Subcommittee in SEC Docket 2015-06 should be even more applicable and persuasive in this docket. In the Northern Pass Order at 279 the SEC said: "There are areas along the route where the introduction of the Project with its increased tower heights and reconfiguration of existing facilities would *create a use that is different in character, nature and kind from the existing use.* There are places along the route where the Project would have a substantially different effect on the neighborhood than does the existing transmission facilities." *Id.* (emphasis added). That description could have been written about this Project.

What the SEC said in the Northern Pass Order at 280 also applies to the analysis on which Eversource relied in this docket: "While Mr. Varney did review relevant master plans and some local ordinances, he did little in the way of applying the details of the Project to the plans and ordinances." Given the inaccuracies in the application and testimony cited above, that is clearly the case here, *i.e.* Eversource did little in the way of applying the details of the SRP Project to the local ordinances and master plans. For this reason it is unreasonable and unlawful for the Subcommittee to rely on Mr. Varney's analysis. Although "the law has never bound commission discretion by a rigid adherence to stare decisis," decisions still need to demonstrate a basic consistency with one another. *Vautier v. State*, 112 N.H. 193, 196 (1972). To the extent that an agency departs from principles established in a clearly reasoned prior decision, it must explain its new decision and reasoning in a manner that allows parties to expect consistency and predictability in the administrative process. *Mendez-Barrera v. Holder*, 602 F.3d 21, 26 (1st. Cir. 2010); *Valdiviezo-Galdamez v. Attorney Gen. of U.S.*, 663 F.3d 582, 608 (3d Cir. 2011) ("An administrative agency can clearly change or adopt its policies; however, an agency acts arbitrarily if it departs from its established precedents without announcing a principled reason for its decision.") (quoting *Johnson v. Ashcroft*, 286 F.3d 696, 700 (3d Cir.2002)). In this case, the

Subcommittee failed to distinguish or differentiate the facts of this case from those of the Northern Pass Order in a way that would support the disparate outcome.

Durham submits that it is arbitrary, unreasonable and an error of law for the SEC to apply the law in such different ways to these two projects.[5] *See* Northern Pass Order.

I. The DES mitigation requirement that funds be set aside for salt marsh restoration at Wagon Hill in Durham is not guaranteed and should therefore be taken into consideration by the SEC.

In the Order in this docket the Subcommittee recognized that DES was requiring the Applicant to pay $349,834.26 into the Aquatic Resource Mitigation Fund ("ARM") within 120 days of the issuance of the Certificate. The Subcommittee noted that $213,763.28 "*will be paid to Durham* for salt marsh restoration at Wagon Hill Farm." Order at 33 (emphasis added). This contribution to the ARM fund for this purpose was included in the DES permit, which was adopted as a condition by the Subcommittee.

Durham recently learned that the Army Corps of Engineers and DES are now saying that these funds cannot be earmarked for Wagon Hill Farm shoreline restoration by the SEC, though Durham can apply for funding in 2019 and compete against others for this funding. In Durham's opinion the uncertainty of this funding significantly jeopardizes restoration efforts that would affect the shoreline grasses, ecology, siltation and water column clarity in the estuary at the base of Wagon Hill, directly adjacent to the Town of Durham. More broadly, the anticipated restoration efforts that the monies in question would have supported, and upon which the Subcommittee conditioned this Project, are of substantial importance to Durham and other communities that are concerned about and are heavily invested in improving the health of Little Bay. Based on a fair reading of the Order it appears that the Subcommittee relied upon these

[5] If there were any doubt in the minds of the Subcommittee members about the disparate and inconsistent treatment of the two applications, that doubt should be dispelled by the fact that Eversource, in its recent brief to the New Hampshire Supreme Court challenging the Northern Pass Order, relied extensively upon the Subcommittee's decision *in this case* to suggest that the Subcommittee unreasonably rendered its decision in that one. *See* Brief of Appellant, N.H. Sup. Ct. Docket No. 2018-0468, at e.g, 11, 17, 21, 32. Of course, the use by Eversource of the Subcommittee's order in this matter as if it were part of the Northern Pass record is entirely consistent with the approach Eversource took throughout this process—modifying the application on an ongoing basis and creating new facts on the ground without notice to the other parties. This order was not in existence at the time that the Northern Pass Order was issued, so it was improper for Eversource to rely upon it in regard to its appeal of the Northern Pass Order. However, the Northern Pass Order was part of the public record at the time this matter was considered, and the principles applied in it—and the conclusions drawn based upon those principles—should consistently animate the analysis in this case. The failure of the Subcommittee to do so was an error.

funds being provided to Durham for this purpose in reaching its determination that the Project will not have an unreasonable adverse effect on water quality and the natural environment and its ultimate decision to grant a Certificate. The Subcommittee should reconsider the granting of the Certificate based on this and other issues raised in this Motion.

CONCURRENCE WITH MOTION

Pursuant to N.H. Code Admin. Rules Site 202.14, Durham has made a good faith effort to obtain concurrence from the other parties. The following parties concur with the relief requested in this Motion: the Smith Family; Jeffrey and Vivian Miller; Helen Frink; Regis and Greg Miller; Donna Heald; Matthew and Amanda Fitch; Anne Darragh and Larry Gans; the Durham Historic Association; the Conservation Law Foundation. Counsel for the Public takes no position on the Motion. Eversource objects to the Motion. Other parties have not responded despite a good faith effort to reach them.

CONCLUSION

For the foregoing reasons, Durham respectfully requests that the Subcommittee:

A. Reconsider the January 31, 2019 Order and Certificate of Site and Facility with Conditions;

B. Issue an order denying a certificate of site and facility; and

C. Grant other relief that may be just and equitable.

Respectfully submitted,

TOWN OF DURHAM
By Its Attorneys,

Dated: March 4, 2019

Douglas L. Patch
Orr & Reno, P.A.
45 S. Main St.
P.O. Box 3550
Concord, NH 03302-3550
(603) 223-9161
dpatch@orr-reno.com

Jeremy D. Eggleton
Orr & Reno, P.A.
45 S. Main Street
P.O. Box 3550
Concord, NH 03302-3550
(603) 643-5159
jeggleton@orr-reno.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing post-hearing brief has on this 4th day of March 2019 been sent by email to the service list in SEC Docket No. 2015-04.

Dated: March 4, 2019

Douglas E. Patch

2361719_1

STATE OF NEW HAMPSHIRE

BEFORE THE

NEW HAMPSHIRE SITE EVALUATION COMMITTEE

SEC Docket No. 2015-04

Application of Public Service Company of New Hampshire d/b/a Eversource Energy for a Certificate of Site And Facility for the Construction of a New 115 kV Transmission Line from Madbury Substation to Portsmouth Substation

Appearance on Behalf of the Town of Durham

Please enter my Appearance pursuant to Admin. Rule Site 202.04 as counsel for the Town of Durham in the above-captioned matter, SEC Docket No. 15-04, Application of Public Service Company of New Hampshire d/b/a Eversource Energy for a Certificate of Site and Facility for the Construction of a New 115 kV Transmission Line from Madbury Substation to Portsmouth Substation. I am licensed to practice law in New Hampshire. I agree to adhere to the Site Evaluation Committee's rules of practice and procedure and to adhere to any orders of the Committee or agreements between the parties in the docket, including orders or agreements addressing confidentiality.

Respectfully submitted,

The Town of Durham
By Their Attorneys

Dated: March 4, 2019

Jeremy D. Eggleton
Orr & Reno, P.A..
45 S. Main Street
P.O. Box 3550
Concord, NH 03302-3550
(603) 643-5159
jeggleton@orr-reno.com

Certificate of Service

I hereby certify that a copy of the foregoing Appearance has on this 4th day of March, 2019 been sent by email to the service list in SEC Docket No. 15-04.

By: _____
Jeremy D. Eggleton

2364202_1

NH Brown Law

Environmental Law ▪ Utility Law

Marcia A. Brown
Attorney at Law

March 4, 2019

Pamela G. Monoe, Administrator
N.H. Site Evaluation Committee
21 South Fruit Street, Suite 10
Concord, NH 03301

Re: Docket No. 2015-04 Seacoast Reliability Porject
Durham Residents Group Motion for Rehearing

Dear Administrator Monroe:

Enclosed please find for filing, the Durham Residents Group partially assented-to joint motion for rehearing of the Site Evaluation Committee's decision dated January 31, 2019.

This filing is also being distributed to the electronic service list for this proceeding. Thank you in advance for your assistance with this filing.

Very Truly Yours,

Marcia A Brown

Marcia A. Brown

cc: Electronic Service List for Docket No. 2015-04.

STATE OF NEW HAMPSHIRE

BEFORE THE

NEW HAMPSHIRE SITE EVALUATION COMMITTEE

SEC Docket No. 2015-04

Application of Public Service Company of New Hampshire d/b/a Eversource Energy for a Certificate of Site and Facility for the Construction of a New 115 kV Transmission Line from Madbury Substation to Portsmouth Substation

DURHAM RESIDENTS PARTIALLY ASSENTED-TO JOINT MOTION FOR REHEARING

NOW COMES Matthew and Amanda Fitch, Jeffrey and Vivian Miller, Lawrence Gans and Anne Darragh, and Deborah Moore, (together, "Little Bay group"), Thomas and Yael DeCapo, Donna Heald, Dr. Regis Miller, and Nick Smith (all together, "Durham Residents"), pursuant to RSA 541:3 and N.H. Code Admin. Rules Site 202.29, respectfully move for rehearing of the New Hampshire Site Evaluation Committee's ("SEC") Decision and Order Granting Application for Certificate of Site and Facility with Conditions, dated January 31, 2019 ("Order") in this docket wherein the SEC granted a certificate to Public Service Company of New Hampshire d/b/a Eversource Energy ("Eversource") to construct a new high-voltage transmission line from Madbury Substation to Portsmouth Substation, also known as the Seacoast Reliability Project ("Project"). In support of this motion, the Durham Residents state as follows:

A. Standard of Review

Pursuant to RSA 162-H:11 decisions of the Subcommittee are reviewable under RSA Ch. 541. Under RSA 541:3 "any party to the action or proceeding before the commission, or any person directly affected thereby" may request rehearing. "The purpose of a rehearing is to direct attention to matters said to have been overlooked or mistakenly conceived in the original

decision, and thus invites reconsideration upon the record upon which that decision rested." *Dumais v. State of New Hampshire Personnel Commission*, 118 N.H. 309, 311 (1978) (internal quotations omitted). A motion for rehearing must "set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." RSA 541:4. A rehearing may be granted upon a finding of "good reason." RSA 541:3. *See also, O'Loughlin v. New Hampshire Personnel Commission*, 117 N.H. 999, 1004 (1977); *Appeal of Gas Service, Inc.*, 121 N.H. 797, 801 (1981). The Durham Residents group are landowners directly affected by the Project and the SEC's Order. The Durham Residents group respectfully argue that certain conclusions in the Order are unlawful or unreasonable for the reasons set forth below and that rehearing is warranted.

B. Arguments

1. RSA 162-H Obligates the SEC to Balance the Adverse Impacts of the Project against the Benefits of the Project.

The SEC has "the authority to consider and weigh both impacts and benefits of a project." Order at 323, citing RSA 162-H:16, IV(e). This authority stems from RSA 162-H:1, which states the purpose of RSA Chapter 162-H is, among other things, "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." Pursuant to RSA 162-H:16, IV(e) and Site 301.16(b), the SEC, "[a]fter due consideration of all relevant information…including potential significant impacts and benefits" the SEC shall find that the "[i]ssuance of a certificate will serve the public interest." In determining whether a proposed Project will serve the public interest, the SEC is required to consider the impact of the Project on "private property."

2. SEC Findings on Private Property Are Not Supported by Basic Facts and with Sufficient Specificity.

Findings by an administrative agency are necessary for the basic understanding of an agency's decision and to an understanding of "whether the facts and issues considered sustain the ultimate result reached." *Society for the Protection of New Hampshire Forests v. Site Evaluation Committee*, 115, N.H. 163, 172, (1975) citing K. Davis, *Administrative Law Text* § 16.04 (1972) (other citations omitted). Whether such findings are sufficient necessarily entails weighing the competing value of administrative efficiency against deliberate and considered decision making. *Society* at 172 citing, *Leventhal, Principled Fairness and Regulatory Urgency*, 25 Case W. Res.L.Rev. 66 (1974); *Leventhal, Environmental Decision Making and the Role of the Courts*, 122 U.Pa.L.Rev. 509, 510 (1974). Where the administrative agency is "required by statute to make... complex factual determinations of its effect on regional development, air and water quality, the natural environment and the public health and safety", however, "the law demands that findings be more specific than a mere recitation of conclusions." *Society at* 173-174. The Site Evaluation Committee must furnish basic findings of fact to support the conclusions that the statute requires it to make. *Society* at 174. Finally, in the process of making basic findings, the SEC is compelled to weigh with care the evidence before it and to delineate the basic facts supporting its conclusions, thereby rendering the process of public hearings more meaningful to the participants. *Id.*

The Durham Residents group respectfully aver that the "basic facts" to support private property-specific findings, which the SEC is required by statute to make, do not exist in the record. The facts supporting the SEC's finding relative to the Project's impact on private property and Public Interest are slim, however, the SEC's discussion on Orderly Development of the Region contains facts on the adverse impacts on private property. Order at 278-288. There, the SEC referenced testimony of Dr. James Chalmers. The SEC noted that Dr. Chalmers

evaluated case studies in New Hampshire, Massachusetts, and Connecticut.[1] Order at 279. The SEC noted that Dr. Chalmers stated that "[n]o comparable statistical studies were conducted in New Hampshire. Order at 281. The SEC noted that Dr. Chalmers "acknowledged that no case studies were conducted for the effect of transmission lines constructed in the right-of-way with previously existing distribution lines." Order at 281. The SEC noted that he "did not independently assess the impact on individual properties." Order at 283. Further, the SEC noted that "[h]e did not consider and evaluate specific features of the New Hampshire economy and real estate market." As a result, the SEC is left with no evidence in the record concerning which New Hampshire properties would be adversely affected by the Project, and by how much.

Lacking this specific evidence, the SEC extrapolated the following conclusions: "[i]t is reasonable to conclude, depending on the extent of increase in visibility of the Project, that the Project will have some effect on values of some of these properties." Order at 288. The SEC did not cite the degree of effect. "[I]t is reasonable to conclude that the Project will have some effect on values of additional properties." *Id.* Again, the SEC did not cite the degree of adverse effect.

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[1] For Corridors #1 and #2 and Study Areas #3 and #4, Dr. Chalmers retained appraisers to conduct forensic appraisals to determine a property's sale value absent a high-voltage transmission line. Then he compared the actual sale price to the hypothetical sale price. The case studies were not actual comparative sales data. Those case studies are as follows:
Corridor #1 Case Studies Single-family residences. ROW encumbering property was typically 350 feet wide and contained an existing 450 kV DC line and two 230 kV lines. The corridor starts in Littleton, skirts the western edge of the White Mountain National Forest, then proceeds south to the Massachusetts border roughly following I-93. None of these case studies are in the Seacoast.
Corridor #2 Case Studies (Subdivisions in Whitefield, Sugar Hill, Easton, Woodstock, Campton, Holderness, Franklin, Canterbury, Allenstown, and Deerfield). The ROW is usually 150 to 225 feet wide and contains one or more 115 kV lines. Existing structures are wooden, H-frame about 55 feet high or steel poles 75 feet high. The ROW originates in Dummer and runs to Northumberland, then south through Franconia Notch, generally following I-93 and terminating in Deerfield. None of the case studies are in the Seacoast.
Study Area #3 Case Studies (Subdivisions in Portsmouth, Newington, and Greenland) Case studies (6 total) are a composite of several existing high-voltage transmission line ROWs in and around Portsmouth.
Study Area #4 Case Studies (Dover (10 cases), Hooksett (6 cases), and Danville (4 cases)). Along Falcon Drive and Back Road (Dover): high-voltage transmission line (115 kV) laminated wood monopoles 65 to 84 feet high and 125-foot wide ROW. Gerrish Road and Toftree Lane (Dover): 115 kV line on steel monopoles 90 to 100 feet high. ROW is 150 feet wide. Hooksett ROW is 220 feet wide, with a 115 kV line on steel monopoles 70 to 79 feet high. Danville ROW is 280 feet wide and contains 345 kV line with structures 84 to 93 feet high, a 115 kV line with structures 61 to 66 feet high, and a second 115 kV line with structures 65 to 89 feet high.

As a result, it is evident that the SEC was aware of the lack of specific evidence upon which it could render a finding. Given that there was no evidence in the record on: 1) the impact of constructing a new 115 kV high-voltage transmission line in a 34 kV right-of-way on private properties; and 2) the degree of adverse impact on private property, the SEC's findings are based on conjecture.

The closest relevant evidence concerning the degree of adverse impact of the Project on private property are buried in the details of Dr. Chalmer's amended study. App. Ex. 147. The SEC did not make note of this data in its factual summary. Dr. Chalmers reviewed actual paired sales data of lots on Hannah Lane in Newington during 1989-1992. App. Ex. 147 at pages 109-112, Chapter 5, page 78-81. App. Ex. 147 at 17. The Hannah Lane subdivision is bisected by the same 100-foot wide right-of-way/34 kV distribution line right-of-way that will be used by the Project. In comparing lot sales data (encumbered vs. unencumbered), Dr. Chalmers found that the lots encumbered with the right-of-way had a 39% adverse price effect. This price effect is based on existing conditions, not on the additional price effect caused by the construction of a new 115 kV line in the 34 kV right-of-way and without taking into consideration that these lots now have homes. Therefore, the 39% price effect is likely higher. Dr. Chalmers did not pursue this analysis further. However incomplete, this paired sales data remains the only remotely relevant data on the potential effect of the Project on private property. It is important to note that the price effect was so substantial, even at the lot analysis level, that Eversource agreed to underground the Project, at great expense.

In conclusion, without knowing the extent of adverse impacts to private properties, the SEC is unable to quantify this adverse impact. If it cannot quantify the adverse impact, is it axiomatic that the SEC is unable to balance this impact against the benefits of the Project as required under RSA Chapter 162-H. Without these basic facts, the SEC is unable to support its

findings sufficiently, as required by law, which renders the SEC's findings relative to private property unlawful and unreasonable.

3. The SEC Impermissibly Delegated its Statutory Obligation to Determine the Public Interest as to Private Property.

Pursuant to RSA 162-H:4, the SEC's ability to delegate its authority is limited:

> "to the administrator or such state agency or official as it deems appropriate the authority to specify the use of any technique, methodology, practice, or procedure approved by the committee within a certificate issued under this chapter, or the authority to specify minor changes in the route alignment to the extent that such changes are authorized by the certificate for those portions of a proposed electric transmission line or energy transmission pipeline for which information was unavailable due to conditions which could not have been reasonably anticipated prior to the issuance of the certificate." "The committee may not delegate its authority or duties, except as provided under this chapter."

Notwithstanding the limits of RSA 162-H:4, the SEC relies on the Dispute Resolution Process Procedures ("Procedures") to resolve damages and mitigate the impacts. Order at 256. The SEC concluded that the "property owners may mitigate such [adverse] impacts...through Dispute Resolution Procedure." Order at 288. "[T]he Project will have some negative impacts on...private properties" but that "[t]hese impacts will be minimized and mitigated through implementation of the conditions of the Certificate, various Memorandums of Understanding, the Dispute Resolution Procedure, and administrative agency permit conditions." Order at 325. This delegation essentially moves the public interest determination on private property to a black box. Eversource is left not knowing its exposure to damages associated with the adverse impacts to private property, it gets a second bite at the apple with respect to private property values, the public is unable to ascertain the SEC's conclusions on the value of the adverse impacts on private property, the delegation removes these determinations from the due process protections of RSA Ch. 541 and RSA Ch. 541-A, and threatens to cause an unconstitutional regulatory taking of private property.

Nowhere in the statute does the legislature authorize the SEC to delegate necessary findings under RSA 162-H:16 as to public interest. RSA 162-H:16, IV(e). By moving the resolution of thee issues to the Procedures, the SEC is impermissibly avoiding its statutory obligation to: 1) identify sufficiently specific facts concerning the adverse impacts of the Project on private property, 2) balance those impacts with the benefits of the Project, and 3) render a determination on public interest. As such, the Durham Residents consider this an error of law.

4. The SEC Impermissibly Modifies the Burden of Proof by Moving Eversource's Burden to Prove the Benefits Outweigh the Adverse Impact to the Dispute Resolution Process Procedures where Private Property Owners must now Carry the Burden of Proving Damages.

Pursuant to N.H. Code Admin. Rule Site 202.19(b), *Burden and Standard of Proof*, "[a]n applicant for a certificate of site and facility shall bear the burden of proving facts sufficient for the committee or subcommittee, as applicable, to make the findings required by RSA 162-H:16." As noted above, Eversource failed to provide facts on the extent of adverse impacts of the Project on private property. In response, the SEC has created a dispute resolution process to resolve the unknown damages. In doing so, the SEC has impermissibly shifted the burden of proof to private property owners. Private property owners must now produce documents, including real estate appraisals, business records, and cost estimates by licensed professionals. Appendix XII at 2. Had Eversource provided adequate values for the adverse impacts to private property instead of prematurely stopping at the Hannah Lane lot analysis, the Durham Residents would not be subject to this shift in the burden of proof. The SEC's statutes and rules do not require private property owners to produce such evidence, that burden rests with the applicant. RSA 162-H:7. Site 202.19(b). Nor do the rules allow for a substitute process for determining the adverse impacts. The SEC's public interest balance of adverse impacts and benefits is, by statute, to be done in the hearing process. RSA 162-H:4, II. For this reason, the SEC's decision

to defer resolution of the extent of adverse impacts on private property to the Procedures is unlawful and unreasonable.

5. The Dispute Resolution Process Procedure is Contrary to RSA 91-A.

The public has a constitutional right of access to governmental proceedings. See N.H. CONST. pt. I, art. 8. The public's statutory right to know is codified in RSA ch. 91-A. The preamble of the statute states: "openness in the conduct of public business is essential to a democratic society." RSA 91-A:1. The purpose of RSA Ch. 91-A is to ensure the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people. *Id.* Pursuant to RSA 91-A:4, "[e]very citizen...has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies, including minutes of meetings of the public bodies, and to copy and make memoranda or abstracts of the records or minutes so inspected, except as otherwise prohibited by statute or RSA 91-A:5." The Dispute Resolution Process is a substitute for the SEC's balancing of adverse impacts of the Project and is overseen by an SEC appointee. See Order Appendix XII at 3, 4. As such, it is an extension of a government function and is subject to RSA Ch. 91-A. See, generally, *Bradshaw v. Shaw*, 116 N.H. 388 (1976); *Prof'l Firefighter of N.H. v. Health Trust*, 151 N.H. 501, 504 (2004).

RSA 91-A:5, provides limited exceptions to the open government policy and makes confidential: 1) records of grand juries, 2) master jury lists, 3) records of parole and pardon boards, 4) personal school records of pupils, 5) records pertaining to internal personnel practices, etc., 6) teacher certification records, 7) records pertaining to emergency functions, 8) unique pupil identification information, 9) notes and other materials not made as part of an official purpose, 10) preliminary drafts and notes, and 11) videos and audio recordings of law enforcement. Unless information conveyed in the Procedures are covered by these exceptions,

the information cannot be excluded from public review. As noted in Appendix XII, at 1, paragraph A, the Dispute Resolution Process and any final decisions are to be held confidential: "Initiation of the Dispute Resolution Process constitutes...the Applicant's agreement to hold the Dispute Resolution Process and any Final Decision confidential". See also Order at 277. This confidentiality term violates RSA Ch. 91-A and prevents the public from inspecting government records and holding its government accountable. For these reasons, the SEC's adoption of this confidentiality term is unlawful and unreasonable.

6. The SEC's Limits on Statute of Limitations and Waiver of Right to File Suit are unlawful and unreasonable.

State agencies are creatures of the legislature and only possess the powers delegated to them by the legislature. This is rooted in the concept of the separation of powers which is "designed to protect the people from the tyranny of government which could result from the accumulation of unbridled power in any one branch of the government." *Opinion of the Justices*, 121 N.H. 552, 556 (1981) citing The Federalist No. 47 (Madison). The N.H. Supreme Court has acknowledged that although the complete separation of powers would interfere with the efficient operation of government, "an encroachment upon the powers of one branch by another branch violates the separation of powers requirement of the constitution". *Opinion of the Justices*, 121 N.H. 552, 431 A.2d 783, (1981) citing *Opinion of the Justices*, 110 N.H. 359, 363 (1970); *Monier v. Gallen*, 120 N.H. 333, 339 (1980). In adopting a waiver of the right to file suit if a person pursues the dispute resolution process, the SEC is impermissibly encroaching on the judicial branch of government. The SEC's waiver interferes with the right of a party to avail themselves of a judicial remedy, especially once they have exhausted administrative remedies. Further, in adopting a two-year limitation on filing claims, the SEC abridges a person's right to file a suit within the time limits set forth in statute. See RSA Ch. 508, *Limitation of Actions*. For these reasons, the SEC's waiver and time limitations encroach on another branch of government

and unconstitutionally interfere with a person's right to file suit, and, therefore, are unlawful and unreasonable.

C. Concurrence with Motion

Pursuant to Admin. Rule Site 202.14(e) the Durham Residents have made a good faith effort to obtain concurrence from the other parties. The following parties concur with the relief requested in this motion: Conservation Law Foundation, Town of Durham, Durham Historic Association, Helen Frink, and Keith Frizzell. Eversource objects to the motion. The remaining parties did not respond to a request for their position despite a good faith effort to reach them.

WHEREFORE, the Durham Residents respectfully requests that the Subcommittee:

A. Grant this motion for rehearing;

B. Reconsider the January 31, 2019 Order and Certificate of Site and Facility with Conditions; and

C. Grant other relief that may be just and equitable.

Respectfully submitted,

DONNA HEALD

By Her Attorney,

Dated: March 4, 2019

Marcia A. Brown, Bar #11249
NH Brown Law, PLLC
P.O. Box 1623
Concord, NH 03302-1623
(603) 210-4911
mab@nhbrownlaw.com

MATTHEW and AMANDA FITCH

Dated: March 4, 2019

291 Durham Point Road
Durham, NH 03824
(603) 397-2516
mfitch@cal-chem.com

JEFFREY and VIVIAN MILLER

Dated: March 4, 2019

297 Durham Point Road
Durham, NH 03824
(603) 868-9200
vivtarazimiller@gmail.com

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Marcia A. Brown, Bar #11249
NH Brown Law, PLLC
P.O. Box 1623
Concord, NH 03302-1623
(603) 210-4911
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291 Durham Point Road
Durham, NH 03824
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mfitch@cal-chem.com

JEFFREY and VIVIAN MILLER

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297 Durham Point Road
Durham, NH 03824
(603) 868-9200
vivtarazimiller@gmail.com

LAWRENCE GANS and ANNE DARRAGH

Dated: March 4, 2019

3/04/19

3/04/19

289 Durham Point Road
Durham, NH 03824
(603) 868-3224
Larrysg01@comcast.net

DEBORAH MOORE

Dated: March 4, 2019

305 Durham Point Road
Durham, NH 03824
(603) 868-****
debioande@yahoo.com

THOMAS AND YAEL DECAPO

Dated: March 4, 2019

234 Causeway Street, Apt. 1010
Boston, MA 02114
decaposth@gmail.com

DR. REGIS MILLER

Dated: March 4, 2019

283 Durham Point Road
Durham, NH 03824
regismiller@yahoo.com

NICK SMITH

Dated: March 4, 2019

270 Durham Point Road
Durham, NH 03824
Nick.smith@unh.edu

LAWRENCE GANS and ANNE DARRAGH

Dated: March 4, 2019

289 Durham Point Road
Durham, NH 03824
(603) 868-3224
Larrysg01@comcast.net

DEBORAH MOORE

Dated: March 4, 2019

305 Durham Point Road
Durham, NH 03824
(603) 868-****
debicande@yahoo.com

THOMAS AND YAEL DECAPO

Dated: March 4, 2019

234 Causeway Street, Apt. 1010
Boston, MA 02114
decaposfh@gmail.com

DR. REGIS MILLER

Dated: March 4, 2019

283 Durham Point Road
Durham, NH 03824
regismiller@yahoo.com

NICK SMITH

Dated: March 4, 2019

270 Durham Point Road
Durham, NH 03824
Nick.smith@unh.edu

LAWRENCE GANS and ANNE DARRAGH

Dated: March 4, 2019

289 Durham Point Road
Durham, NH 03824
(603) 868-3224
Larrysg01@comcast.net

DEBORAH MOORE

Dated: March 4, 2019

305 Durham Point Road
Durham, NH 03824
(603) 868-****
debicande@yahoo.com

THOMAS AND YAEL DECAPO

Dated: March 4, 2019

Yael DeCapo

234 Causeway Street, Apt. 1010
Boston, MA 02114
decaposfh@gmail.com

315 Durham Pt. Rd.
Durham NH 03824

DR. REGIS MILLER

Dated: March 4, 2019

283 Durham Point Road
Durham, NH 03824
regismiller@yahoo.com

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Dated: March 4, 2019

Marcia A. Brown

LAWRENCE GANS and ANNE DARRAGH

Dated: March 4, 2019

289 Durham Point Road
Durham, NH 03824
(603) 868-3224
Larrysg01@comcast.net

DEBORAH MOORE

Dated: March 4, 2019

305 Durham Point Road
Durham, NH 03824
(603) 868-****
debicande@yahoo.com

THOMAS AND YAEL DECAPO

Dated: March 4, 2019

234 Causeway Street, Apt. 1010
Boston, MA 02114
decaposfh@gmail.com

DR. REGIS MILLER

Dated: March 4, 2019

283 Durham Point Road
Durham, NH 03824
regismiller@yahoo.com

NICK SMITH

Dated: March 4, 2019

Nick Smith

Digitally signed by Nick Smith
DN: cn=Nick Smith, o=UNH, ou=Philosophy, email=nick.smith@unh.edu, c=US
Date: 2019.03.04 08:15:30 -05'00'

270 Durham Point Road
Durham, NH 03824
Nick.smith@unh.edu

LAWRENCE GANS and ANNE DARRAGH

Dated: March 4, 2019

289 Durham Point Road
Durham, NH 03824
(603) 868-3224
Larrysg01@comcast.net

DEBORAH MOORE

Dated: March 4, 2019

305 Durham Point Road
Durham, NH 03824
(603) 868-****
debicande@yahoo.com

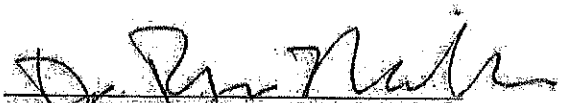
THOMAS AND YAEL DECAPO

Dated: March 4, 2019

234 Causeway Street, Apt. 1010
Boston, MA 02114
decaposfh@gmail.com

DR. REGIS MILLER

Dated: March 4, 2019



283 Durham Point Road
Durham, NH 03824
regismiller@yahoo.com

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