

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT
2018 TERM**

Appeal of Northern Pass Transmission, LLC & a.

Case No. 2018-0468

MOTION TO STRIKE PORTIONS OF BRIEF AND APPENDIX

Pursuant to Rule 16(3)(b) of this Court’s Rules, the Towns of Bethlehem, Bristol, Deerfield, Easton, Franconia, Littleton, New Hampton, Northumberland, Pembroke, Plymouth, Sugar Hill, the City of Concord, the Appalachian Mountain Club, Conservation Law Foundation, Society for the Protection of New Hampshire Forests and Bradley and Daryl Thompson, hereby move to strike arguments and evidence in the brief and appendix filed by Northern Pass Transmission, LLC and Public Service Company of New Hampshire d/b/a Eversource Energy which were not part of the record below or properly preserved, stating as follows:

1. The undersigned parties move to strike portions of the brief and the appendix filed by the appellants relative to the following two topics: (1) the portions of the brief and the appendix that reference deliberations that occurred in an unrelated matter before the New Hampshire Site Evaluation Committee (SEC) in the Seacoast Reliability Project, Docket No. 2015-04; and (2) the argument that the SEC failed to decide the extent of capacity market benefits and how they would affect the region’s economy. As discussed below, these statements and arguments should be stricken from the brief and appendix because they are not part of the record below or were not properly preserved. The undersigned parties understand that the Court may withhold its ruling on this motion until issuance of its opinion, but the parties raise these issues to ensure that these issues are preserved.

2. **Seacoast Reliability Project Deliberations:** First, the undersigned parties seek to strike all portions of the brief and the appendix that reference deliberations that

occurred in the Seacoast Reliability Project.¹ The arguments and evidence relating to the deliberations in the Seacoast Reliability Project should be stricken because they are not part of the record below.

3. This Court's rules expressly provide that:

The papers and exhibits filed and considered in the proceedings in the trial court or administrative agency, the transcript of proceedings, if any, and the docket entries of the trial court or administrative agency shall be the record in all cases entered in the supreme court.

Sup. Ct. R. 13(1). The record in this case was transferred by the SEC on December 11, 2018. It is inappropriate for the appellants to now attempt to expand the record by submitting twenty-three selected pages of deliberations from an unrelated proceeding before the SEC.

4. Furthermore, the isolated portions of deliberations are not the type of document this Court should accept under the judicial notice doctrine set forth in New Hampshire Rule of Evidence 201. This rule addresses when it is acceptable for a court to take judicial notice of facts and law. It is unclear whether the appellants are attempting to establish facts or law when they reference the Seacoast Reliability Project at Appellants' Brief at 11 (note 2), 17 (note 10), 21 (note 14), 35 (note 17), 32, 35 (note 21) and 37.

5. To the extent these references seek the judicial notice of facts, "the circumstances under which a judge may judicially notice a fact are limited." *In Matter of Rokowski*, 168 N.H. 57, 61 (2015). Under Rule 201, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the

¹ For context, the Seacoast Reliability Project involved a significantly different type of project with different facts and a different subcommittee. It was an application to site, construct and operate a new 115kV electric transmission line in the towns of Madbury, Durham, Newington and Portsmouth that was proposed to be 12.9 miles in length and comprised of a combination of aboveground, underground and underwater segments. There were nine days of deliberations in that proceeding that occurred between November 28, 2018 and December 10, 2018. Those deliberations occurred approximately ten months after the SEC voted to deny the application for the Northern Pass project. Order and Certificate of Site and Facility with Conditions dated January 31, 2019, SEC Docket No. 2015-04. The order and certificate for the Seacoast Reliability Project is available on the SEC website at https://www.nhsec.nh.gov/projects/2015-04/orders-notices/2015-04_2019-01-31_order_certificate_final.pdf. The full decision is available at https://www.nhsec.nh.gov/projects/2015-04/orders-notices/2015-04_2019-01-31_decision_order.pdf. The transcripts are available at <https://www.nhsec.nh.gov/projects/2015-04/2015-04.htm>. The undersigned parties do not seek to enlarge the record before this Court by citing this order, decision and transcripts, but rather, are referencing these documents to provide context for this motion and to verify the statements contained herein.

territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” N.H. R. Ev. 201(a). Selected pages of the deliberations of the SEC from an unrelated proceeding are insufficient to establish facts, and therefore, these documents and references to them should be stricken. *State v. Cox*, 133 N.H. 261, 266 (1990) (“As a general rule, courts will not judicially notice the records of another cause of action, even if tried in the same court and involving the same parties, to supply facts that have not been formally introduced into evidence”).

6. To the extent that the deliberations are being provided to establish law, Rule 201(b) states that a court may take judicial notice of law such as “(1) the decisional, constitutional, and public statutory law, (2) rules of court, (3) regulations of governmental agencies, and (4) ordinances of municipalities and other governmental subdivisions of the United States or of any state, territory or other jurisdiction of the United States.” The isolated sections of the deliberations from the Seacoast Reliability Project are insufficient to establish any law.

7. The selected twenty-three pages of deliberations chosen by the appellants are also unreliable and fail to provide the full context of the discussions raised by the members of the SEC in that case. The Seacoast Reliability Project case involved a significantly different type of project with different facts and a different subcommittee. It is impossible to verify that the appellants’ characterization of the deliberations is accurate based on the limited portions of the deliberations that were provided. For example, the appellants argue that a program similar to the property value guarantee program imposed in the Seacoast Reliability Project could have addressed concerns about impacts to property values in Northern Pass. Brief at 21, note 14. It is necessary to review the entire record of the proceeding to determine the full nature and extent of property value impacts expected to result from the Seacoast Reliability Project and how any mitigating conditions were deemed to address those impacts. The appellants also fail to mention that James Chalmers, the expert hired by the applicants to address property values in both matters, filed revisions and additions to his report in the Seacoast Reliability Project on

July 27, 2018 (approximately four months after the SEC issued its decision in Northern Pass) in an attempt to address some of the criticisms raised by the SEC in the Northern Pass case.² The deliberations in the Seacoast Reliability Project also occurred before the final vote on that project and the written decision was issued, and many of the discussions simply reflect the opinions of the individual members of the SEC. It should be further noted that, although the full 342 page written decision was available at the time the appellants filed their brief, the appellants chose to provide only selected pages of the deliberations.

8. For the foregoing reasons, it is inappropriate for the appellants to attempt to expand the record by including in their brief and appendix sections of the deliberations from the Seacoast Reliability Project. The undersigned parties seek to strike the appendix to the brief, as well as all references in the brief to the SEC's deliberations on the Seacoast Reliability Project that are contained on page 2 (note 2), page 17 (note 10), page 21 (note 14), page 32, page 35 (note 21) and page 37.

9. **Capacity Market Benefit Findings:** The undersigned parties also seek to strike the argument that the SEC allegedly failed to make a factual finding regarding the extent of capacity market benefits and how they would affect the region's economy. Brief at 38-41. Setting aside the merit of this argument, which is disputed³, the argument should be stricken because it was not properly preserved. *In re Hardy*, 154 N.H. 805, 810-11 (2007) (explaining that "administrative agencies should have a chance to correct their own alleged mistakes before time is spent appealing from them").

10. The Supreme Court rules expressly require parties to raise all issues on appeal in the proceeding below. N.H. Sup. Ct. R. 16(3)(b) provides, in pertinent part, the following:

² The supplemental pre-filed testimony of James Chalmers can be found at https://www.nhsec.nh.gov/projects/2015-04/application/2015-04_2018-07-27_app_supp_test_chalmers.pdf. Again, the undersigned parties do not seek to enlarge the record before this Court by citing this testimony, but rather, are referencing this document to provide context for this motion and to verify the statements contained herein.

³ The SEC did, in fact, make such a finding: "Based on the record before us, and the Applicant's admission that qualifying and clearing the Capacity Market is merely an intellectual exercise, we cannot conclude there will be savings from the Capacity Market." DK tab 1432 at 161.

After each statement of a question presented, counsel shall make specific reference to the volume and page of the transcript where the issue was raised and where an objection was made, or to the pleading which raised the issue. Failure to comply with this requirement shall be cause for the court to disregard or strike the brief in whole or in part, and opposing counsel may so move within ten days of the filing of a brief not in compliance with this rule.

The argument that the SEC failed to decide the extent of the forward capacity market benefits and how they would affect the region's economy should be stricken because it was not raised in the motion for rehearing that was filed on April 27, 2018. DK tab 1435. In the motion for rehearing, the *only* reference to the forward capacity market benefits appears in a footnote on page 33. DK tab 1435 at 33, note 30. That footnote simply addresses the appellants' disagreement with some of the SEC's findings that the economic impacts of the proposed project had been overstated by Julia Frayer, the expert hired by the appellants. *Id.* The appellants never raised the argument that the SEC failed to make sufficient findings regarding the extent of forward capacity market benefits and how they would affect the region's economy. DK tab 1435. The arguments now raised in the brief are significantly different and unrelated to any argument raised before the SEC. DK tab 1435 at 33, note 30. For that reason, the undersigned parties request the Court to strike the arguments on this issue that appear in Section C on pages 38-41 of the brief.

WHEREFORE, the undersigned parties respectfully request this Court:

- A. Grant this Motion to Strike; and
- B. Grant any other relief this Court may deem equitable and just.

Respectfully submitted,

**TOWNS OF BETHLEHEM, BRISTOL,
EASTON, FRANCONIA,
NORTHUMBERLAND, PLYMOUTH AND
SUGAR HILL**

By and through their attorneys,

DRUMMOND WOODSUM

Dated: February 14, 2019

By: /s/ C. Christine Fillmore
C. Christine Fillmore, Esq., Bar #13851
1001 Elm Street, Suite 303
Manchester, NH 03101-1845
Telephone: (603) 716-2895
cfillmore@dwmlaw.com

**TOWNS OF DEERFIELD, LITTLETON
NEW HAMPTON AND PEMBROKE**

By and through their attorneys,

MITCHELL MUNICIPAL GROUP, P.A.

Dated: February 14, 2019

By: /s/ Steven Whitley
Steven M. Whitley, Esq., Bar #17833
25 Beacon Street East
Laconia, New Hampshire 03246
Telephone: (603) 524-3885
steven@mitchellmunigroup.com

CITY OF CONCORD

Dated: February 14, 2019

By: /s/ Danielle L. Pacik
Danielle L. Pacik, Esq., Bar #14924
Deputy City Solicitor
41 Green Street
Concord, New Hampshire 03301
Telephone: (603) 225-8505
dpacik@concordnh.gov

APPALACHIAN MOUNTAIN CLUB

By and through its attorneys,

FOLEY & LARDNER LLP

Date: February 14, 2019

By: /s/ Courtney Worcester
Courtney Worcester, Bar #14403
111 Huntington Avenue
Boston, MA 02199
Telephone: (617) 502-3218
cworcester@foley.com

CONSERVATION LAW FOUNDATION

Dated: February 14, 2019

By: /s/ Melissa E. Birchard
Melissa E. Birchard, Bar #268341
Staff Attorney
27 N. Main Street
Concord, NH 03301
Telephone: (603) 225-3060
mbirchard@clf.org

**THE SOCIETY FOR THE PROTECTION
OF NEW HAMPSHIRE FORESTS**

By and through its attorneys,

BCM ENVIRONMENTAL AND LAND LAW,
PLLC

Date: February 14, 2019

By: /s/ Amy Manzelli
Amy Manzelli, Esq. Bar #17128
3 Maple Street
Concord, NH 03301
Telephone: (603) 225-2585
manzelli@nhlandlaw.com

BRADLEY AND DARYL THOMPSON

By and through its attorneys,

BERNSTEIN SHUR

Date: February 14, 2019

By: /s/ Andru Volinsky
Andru Volinsky, Esq. Bar #2634
Jefferson Mill Building
670 North Commercial Street, Suite 108
PO Box 1120
Manchester, NH 03105-1120

CERTIFICATE OF SERVICE

I hereby certify that on this date, a copy of the foregoing Motion was sent by electronic mail to parties on the electronic service list and by first class mail to parties without email addresses.

Dated: February 14, 2019

By: /s/Christine Fillmore
Christine Fillmore, Esq., Bar #13851