THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2018-0468

Appeal of Northern Pass Transmission, LLC & a.

Rule 10 Appeal from Orders of the New Hampshire Site Evaluation Committee Dated March 30, 2018 and July 12, 2018

BRIEF FOR THE SOCIETY FOR THE PROTECTION OF NEW HAMSHIRE FORESTS

INTERVENOR-APPELLEE

Amy Manzelli, Esquire (17128)
manzelli@nhlandlaw.com
Kelsey Peterson, Esquire (268165)
peterson@nhlandlaw.com
BCM Environmental & Land Law, PLLC
3 Maple Street
Concord, NH 03301
(603) 225-2585

Oral Argument Requested to be Presented by Amy Manzelli

March 21, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

State Statutes

Federal Statutes

Rules

Other Authorities

I. STATEMENT OF THE CASE

Appellant requested a Certificate of Site and Facility to construct a 192-mile transmission line from the Canadian border at the edge of the Great North Woods into the heart of the Merrimack Valley ("Project") that could wreak havoc on New Hampshire's special landscape as a result of undue interference.[1] The Subcommittee[2] made no reversible error when it determined Appellant did not provide sufficient, credible evidence to prove that the Project would not cause Undue Interference.

The Project is unprecedented in many ways: the transmission line would span an indirect, serpentine route of 192 miles, bisect 32 municipalities, erect more than 1,200 new and relocated towers, DK tab 982 at 146, at heights up to 160 feet, CFP Ex. 129 at 2805, require 20 to 25 concurrently-active work sites, DK tab 987 at 41, require 1,200 new crane pads, DK tab 982 at 146, and use 84 private roads. CFP Ex. 129 at 2804.

Appellant submitted tens of thousands of pages, but still left an unacceptable volume of basic questions unanswered, such as:

- Would specific tourism destinations be affected? If so, how and which ones?
- What would be the impacts to land use outside the utility right-of-way?

[1] "Undue Interference" refers to the criterion set forth in RSA 162-H:16, IV(b): "The site and facility will not unduly interfere with the orderly development of the region with due consideration having been given to the views of municipal and regional planning commissions and municipal governing bodies." "Undue Interference" is also referred to as the "Criterion".
[2] Subcommittee refers to the subcommittee the Chair of the Site Evaluation Committee appointed by order dated 11/2/15.

- What would be the impacts to property values, apart from the six to nine total properties Appellant acknowledged might be impacted?

Many of the application's deficiencies result from Appellant's witnesses consistently employing myopic methodologies in which their analysis of effects—be it on property values, tourism, or land use—was based on the narrowest (and often unlawfully narrow) interpretation of the pertinent rules. Only with blinders on and working in their own silos were Appellant's witnesses able to conclude that the 192-mile transmission line would not have *any* discernible Undue Interference.

Appellant's land use witness could not show that the Project would not unduly interfere with the prevailing land uses of the affected communities, including the 32 host communities. The witness did not generate the information Site 301.09 requires and instead employed a flawed, constricted methodology that eliminated effects.

The record also shows the Project could threaten New Hampshire's unique, highly valuable tourism appeal: outdoor- and forest-based recreation and enjoyment in superior scenic beauty. Appellant's witness for tourism did not offer a report and testimony that could sustain Appellant's burden. The witness was not qualified, performed an incomplete analysis (with unsound methodology), and did not address the weight of other evidence showing the Project's potential to have a measurably negative effect on New Hampshire tourism.

As for private property values, the methodology of Appellant's witness suffered from a severe lack of specificity. He considered only single-family, detached homes within 100 feet of the right-of-way and

invented a methodology that ignores most changes to view. Appellant's witness did not consider impacts on the value of condominium units (except in one belated instance) and prime outdoor recreational attractions in the vicinity of the right-of-way along the entirety of the 192-mile Project.

Finally, with respect to Undue Interference, the Subcommittee appropriately gave due consideration to the affected municipalities opposed to the Project, the public commenters opposed to the Project, and the tremendous public opposition.

Appellant did not prove this massive proposal would strike the balance of benefits against Undue Interference the law requires. The application (including all amendments and supplements to it through the close of the record) was deficient. Appellant simply did not provide the Subcommittee with information the law requires. Accordingly, lacking sufficient, credible evidence that the Project would not unduly interfere with the orderly development of the region, the Subcommittee was not authorized to approve the application. As such, the Subcommittee made no reversible error when it decided to not deliberate on all the criteria RSA 162-H:16, IV required in order to issue a certificate ("Criteria"). Implementing this strategy of judicial economy is appropriate and favored within the judicial system to promote efficiency.

The record contains ample, competent evidence to support the Subcommittee's decision. The Court should apply substantial deference to the Subcommittee's interpretation of its statute and regulations. For these reasons, the Court should affirm the decision below.

II. PROCEDURAL HISTORY

The voluminous, three-year procedural history of this matter is summarized in the following chart.

Date	Event or Occurrence	Cite
8/6/15 through 2/24/16	Over 160 petitions to intervene filed	DK tab 2 to 258; *see also* DK tab 336 at 1 (Order on Motions to Intervene from the Chairman)
10/19/15	Appellant filed application	DK tab 1
10/26/15 through 12/22/17	State agencies reviewed and commented on application	DK tab 13; DK tab 1353
10/28/15	Attorney General appointed Counsel for the Public	DK tab 16
11/2/15	SEC Chairman appointed Subcommittee	DK tab 23
12/4/15; 2016: 3/28, 4/14, 5/10, 7/12, 7/15, 7/18, 7/28, 7/29, 8/11, 12/14, 12/16; 2017: 1/25, 2/10, 2/15, 3/13, 9/18, 11/29	Applicant supplemented application, approximately 18 times	DK tab 61; 380; 440; 462; 463; 535; 537; 540; 556; 559; 567; 756; 758; 790; 809; 817; 847; 1175; 1315
12/7/15, 12/18/15	Subcommittee deliberates and accepts application as complete; Order memorialized acceptance	DK tab 64; DK tab 68
12/22/15; 2016: 4/22, 6/23, 7/28, 9/22, 10/28; 2017: 3/1, 9/12	Procedural Orders, approximately eight	DK tab 72; 444; 518; 553; 646; 706; 829; 1160

Date	Event or Occurrence	Cite
1/11/16, 1/13/16, 1/14/16, 1/20/16, 1/21/16	Five Public Information Sessions (Franklin, Londonderry, Laconia, Whitefield, Lincoln)	DK tab 84; 87; 88; 97; 98
3/1/16, 3/7/16, 3/10/16, 3/14/16, 3/16/16, 5/19/16	Six Public Hearings (Meredith, Colebrook, Concord, Holderness, Deerfield, Whitefield)	DK tab 265; 308; 315; 330; 332; 485
2016: 3/7, 3/8, 3/14, 3/16; 2017: 7/27, 7/28, 10/3	Site visits to portions of proposed route, approximately seven days	DK tab 1432 at 10
3/22/16, 4/28/17, 8/9/17	Prehearing conferences, approximately three	DK tab 351; 980–81; 1118
4/12/16, 5/19/16, 6/23/16, 8/15/16, 3/12/18	Hearings or meetings on pending motions, approximately five (Lincoln, Whitefield, Plymouth, Concord, Concord)	DK tab 439; 484; 522; 588; 1429
5/20/16	Subcommittee Order on Review of Intervention	DK tab 487
2016: 9/6–7, 9/9, 9/12, 9/14–16, 9/19–22, 9/30, 10/5–6, 10/11, 10/14, 10/18, 10/26–28, 11/8; 2017: 1/19, 1/23, 1/26–27, 2/1–2, 2/8, 2/14, 2/17, 2/21–24, 2/27, 3/1–2, 3/6–8, 3/13, 3/16–17, 3/23–24	Technical sessions (discovery mechanism), approximately 45	DK tab 565; 643; 647; 657; 672; 690; 711; 769; 774; 782; 793; 810; 812; 852

Date	Event or Occurrence	Cite
11/15/16 through 4/17/17	Pre-filed direct testimony (Counsel for the Public and Intervenors)	DK (no tab) Pre-Filed and Supp. Testimony (Track 2) – Counsel for the Public and Intervenors
4/13/17 through 12/21/17	Adjudicative Hearing days, approximately 70	DK tab 946–47; DK tab 1349–50; see also DK tab 1432, 3/30/18 Order at 6
12/22/17	Evidentiary record closed	DK tab 1347; DK tab 1432, 3/30/18 Order, at 6
1/9/18	Order on Exhibits and Official Notice of Documents Posted on the Website of the Department of Transportation	DK tab 1362
1/11/18 through 1/19/18	Parties filed Post Hearing Memoranda of Law	DK tab 1366; DK tab 1387
1/30/18 through 2/1/18	Subcommittee deliberated, concluded with voted to deny application	DK tab 1399–1403
2/28/18	Appellant filed motions regarding Subcommittee verbal votes made on 2/1/18	DK tab 1405–06
3/12/18 through 3/13/18	Public meeting on Appellant's 2/28/18 motions; Subcommittee Order Suspending [verbal] Decision of 2/1/18	DK tab 1429–30

Date	Event or Occurrence	Cite
3/30/18	Subcommittee [written] Decision and Order Denying Application	DK tab 1432
4/27/18	Appellant moved for rehearing of Decision and Order Denying Application	DK tab 1435
7/12/18	Subcommittee Order on Appellant's two motions for rehearing and other pending motions	DK tab 1478

Over the pendency of this matter before the Subcommittee, the parties collectively filed 2,176 exhibits, DK tab 1432 at 6, including over 1,000 pleadings. *See generally* DK tabs 1–1480.

III. STATEMENT OF FACTS

The Subcommittee denied the application because Appellant "failed to demonstrate by a preponderance of evidence that the Project will not unduly interfere with the orderly development of the region." DK tab 1432 at 6 (Decision and Order Denying Application for Certificate of Site and Facility) ("Order").

In its painstakingly careful, 287-page Order, the Subcommittee marshalled the mountain of evidence presented over the long pendency of this matter and distilled from that body of information the most important aspects of each State agency's input, each party's position, and, ultimately, what the Subcommittee deliberated on each issue. The Subcommittee devoted 20 pages to the first criterion (financial, technical, and managerial capability) and 210 pages to the second criterion (Undue Interference).

A. Overall Findings of Fact

The Order sets forth the Subcommittee's findings of fact relating to each of the considerations the rules require of the Subcommittee. This review of facts follows the sequence of issues as set forth in the Order.

1. Financial, Technical, and Managerial Capability

The Subcommittee began deliberations by considering whether Appellant satisfied the first criterion set forth in RSA 162-H:16, IV(a) concerning Appellant's financial, technical, and managerial capability. After discussing conditions of approval associated with this criterion, the Subcommittee informally agreed that that Appellant does have financial and technical capability. DK tab 1432 at 72–73.

2. Undue Interference

The Subcommittee continued working its way through the legal Criteria in the sequence set forth in RSA 162-H:16, IV and next considered the second criterion, Undue Interference." RSA 162-H:16, IV(b).

As part of "determining whether a proposed energy facility will unduly interfere with the orderly development of the region," the Subcommittee made several key findings based on considerations the law required the Subcommittee to make. Site 301.15 (setting forth factors relative to a finding of Undue Interference and stating "the committee shall consider" them).

a. Extent to which the siting, construction, and operation of the Project would affect land use, employment, and the economy of the region

The Subcommittee considered "the extent to which the siting, construction, and operation of the Project would affect land use,

employment, and the economy of the region." Site 301.15(a). In considering the effect, the Subcommittee considered both the potential benefits and harms of the Project. It found that Appellant "failed to demonstrate by a preponderance of evidence that the Project would not overburden existing land uses within and surrounding the right-of-way and would not substantially change the impact of the right-of-way on surrounding properties and land use." *Id.* It found Appellant "did not sufficiently demonstrate the effect the Project would have on the economy," affirming that "there would be some positive impacts on the economy" but concluding "the magnitude of those positive impacts was overstated" by Appellant. *Id.* The Subcommittee also found Appellant "failed to provide credible evidence regarding the negative impacts on tourism and real estate values" and "failed to provide a plan for construction of the Project that appropriately considered the Project's effects on municipal roads and businesses in the northern part of the State." *Id.* at 6–7.

b. Municipal Views

The Subcommittee considered the "views of municipal and regional planning commissions and municipal governing bodies regarding the proposed facility." Site 301.15(c) The Subcommittee found Appellant "failed to adequately anticipate and account for the almost uniform view of those groups that the Project, as planned and presented, would unduly interfere with the orderly development of the region." DK tab 1432 at 7.

c. All Relevant Evidence

In finding that Appellant "failed to demonstrate by a preponderance of evidence that the Project will not unduly interfere with the orderly

development of the region," the Subcommittee "considered all the relevant evidence and information regarding the proposed route of the Project and its potential impacts and benefits on the orderly development of the region." *Id*. At the time of deliberations, the Subcommittee had been immersed in this matter for over two years, which included the many events and occurrences noted in the preceding procedural history chart.

d. Conditions

Also in reaching the finding that Appellant "failed to demonstrate by a preponderance of evidence that the Project will not unduly interfere with the orderly development of the region," the Subcommittee considered conditions Appellant proposed. For example, the Subcommittee considered the two conditions Appellant proposed along with an offer Appellant made in its Post-Hearing Memorandum regarding roads maintained locally. *Id*. at 115–16. With respect to those conditions, the Subcommittee stated Appellant "failed to provide testimony or evidence demonstrating how the conditions should be implemented" and then went on to explain the several concerns raised by the N.H. Department of Transportation ("DOT"), municipal intervenors, and others that Appellant's proposed conditions would not resolve. *Id*. at 116.

During this discussion, the Subcommittee noted deficiencies in evidence. For example, the Subcommittee stated:

> The Subcommittee needs to understand which roads and where the Applicant intends to cross. The Applicant failed to provide documentation that clearly identified crossings over locally-maintained roads and instead provided a list which did not differentiate between State and local roads. This oversight is consistent with the Applicant's failure to provide serious

> consideration and planning with respect to the impact of the Project on local roads, especially in the northern portion of the State.

Id. at 117–18.

B. Specific Findings of Fact Regarding Undue Interference

We do not restate here the facts Appellant set forth in its Brief. In addition to what Appellant set forth, the record reflects competent evidence contesting Appellant's position and supporting the Subcommittee's findings of fact and conclusions of law.

In its Order, the Subcommittee separated out the several subtopics and devoted many pages to each (approximately 46 pages for construction, eight pages for employment, 35 pages for wholesale electricity market savings and various effects on the economy, 36 pages for property values, 28 pages for tourism, four pages for decommissioning, and 52 pages for land use and municipal views). *See generally id* at 73–283. In each of these sections, the Subcommittee paid exceedingly close attention to Appellant's position, devoting more pages to describing Appellant's position than to any other party's position. The sole exception is with respect to land use and municipal views, to which the Subcommittee devoted more pages to the position of municipal intervenors than that of Appellant.[3] *Id*.

[3] RSA 162-H:16, IV(b) requires "due consideration having been given to the views of municipal and regional planning commissions and municipal governing bodies." This Brief uses the shorthand term "municipal views" to refer to all bodies described in the statute.

1. Construction

In its Order, the Subcommittee summarized the positions of approximately 20 witnesses regarding construction impacts. *Id*. at 74–127. This included eight witnesses representing Appellant, four experts representing Counsel for the Public, one expert representing several municipalities opposed to the Project, one expert representing two intervenors opposed, and six witnesses opposed to the Project who represented themselves, a municipality, or a municipal board. *Id*.

After consideration of this evidence, the Subcommittee ultimately found that "testimony and evidence demonstrated that construction of the Project would have an impact on traffic in affected communities and that the degree of the impact would vary" and found an "area of particular concern is the impact of the traffic on orderly development of Plymouth." *Id*. at 118–19; *see also id.* at 102–04 (citing CFP Ex. 135, Att. B, 24–38). The Subcommittee expressed concerns about construction impacts, such as "inadequate traffic management strategies, combined with a lack of communication and consideration of business access." *Id*. at 119; *see also id*. at 105–06 (citing CFP Ex. 135, Att. B, 24–38). The Subcommittee found Appellant did not meet its burden of proof on "whether the degree of traffic interference caused by construction would not unduly interfere with orderly development of the region." *Id*.

Specifically, the Subcommittee found Appellant did not provide a final survey of the right-of-way accepted by DOT. *Id*. at 113–15. Therefore, neither Appellant nor the Subcommittee could know the boundaries of the right-of-way or the precise location of each component of the underground section of the Project or determine the number and nature of exceptions that

should be filed with DOT. *Id*. Also, Appellant could not prepare final construction plans or finalize the horizontal directional drilling layout. *Id*. at 113–15; *see also, e.g., id*. at 108 (citing Grafton County Comm'rs Closing Argument at 12–16); *id*. at 112 (citing CS 67, 68); *id*. at 46 (citing App. Ex. 107). The Subcommittee concluded, however, that not having this information was "problematic" but "does not necessarily preclude the Subcommittee from ascertaining the construction impacts on orderly development." *Id*. at 115.

Also, as noted previously, the Subcommittee found Appellant did not clearly identify which crossings would be over roads maintained locally. *Id*. at 117–18. The Subcommittee identified other gaps in Appellant's evidence with respect to roads maintained locally, such as not providing a Traffic Management Plan, *id*. at 64, 74 (citing App. Ex. 14 at 33), 118, and Appellant "failed to provide testimony or evidence explaining how the [SEC] Administrator or a consultant could avoid the same concerns expressed by DOT" "about usurping the authority of municipalities over locally-maintained roads." *Id*. at 116; *see also id*. at 101–02 (citing DOT Correspondence, Dec. 22, 2017).

Lastly, the Subcommittee found no evidence upon which to determine whether the two-year limit Appellant proposed as part of a condition of approval to correct "distortions" to roads maintained locally caused by the Project would be sufficient. *Id*. at 119–20 (citing DK tab 1386 at 400–01).

2. Employment

Appellant described in its brief evidence about employment and the economy presented through Julia Frayer and Dr. Lisa Shapiro and Counsel for the Public presented through Kavet Rockler & Associates. Brief of Appellant at 12–14.

In addition to what Appellant set forth, the Subcommittee summarized the positions of approximately 16 witnesses regarding employment impacts the Project would cause. DK tab 1432 at 120–27. This included two witnesses representing Appellant (Ms. Frayer and Dr. Shapiro), five witnesses representing businesses or municipalities in favor of the Project, two experts representing Counsel for the Public, and seven witnesses opposed to the Project who represented themselves, a municipality, or a municipal board. *Id*.

Putting all this evidence together, the Subcommittee relied in its Order on Dr. Rockler's and Mr. Kavet's testimony that the Project "would have a particularly adverse effect on employment and economy in Plymouth" including road closures, loss of parking, and loss of business. *Id*. at 125 (citing CFP Ex. 146 at 9; CFP Ex. 147 at 9). The witnesses set forth estimations of impacts based on several assumptions of the number of days of construction. *Id*. at 125–26. On the low end, they "estimated that 70 days of construction with road closures and total loss of parking spaces would result in a 30% reduction in business leading to direct income reductions of $1.2 million and the loss of more than 50 direct jobs and more than 80 jobs as a secondary impact. *Id*. at 125 (citing CFP Ex. 146 at 9; CFP Ex. 147 at 9; CFP Ex. 148 at 2).

They also provided testimony about overall job impacts, including that in the mid–term (2030–2040), late-term (2040–2050), and long–term (2050–2060) operational periods, the Project would cause negative impacts in the annual average number of jobs of 190, 357, and 468, respectively. *Id*. at 126 (citing CFP Ex. 147 at 11; CFP Ex. 148 at 4; *see also* DK tab 1297, 11/17/17, Counsel for the Public's Memorandum Regarding Correction Provided in Connection with KRA Testimony of 10/11/2017, at Table 24).

The Subcommittee found Appellant overinflated its estimate of job creation because it based the estimate on an original assumption of retail electricity savings that Appellant subsequently revised downward significantly. *Id*. at 127–28; *see also id*. at 123 (citing DK tab 1018 at 115–17). However, Appellant did not then revise its job creation estimate accordingly. *Id*.; *see also id*. at 123 (citing DK tab 1018 at 115–17).

3. Economy

As noted, Appellant covered some facts about economic impacts in its Brief. Brief of Appellant at 12–14.

In addition to what Appellant set forth, the Subcommittee summarized the positions of approximately 40 witnesses regarding economic impacts the Project would cause. *Id*. at 128–60. This included eight witnesses representing Appellant, four witnesses representing businesses or municipalities in favor of the Project, four experts representing Counsel for the Public, one expert representing several municipalities opposed to the Project, and 25 witnesses opposed to the Project who represented themselves, a municipality, or a municipal board. *Id*.

Putting all this evidence together, including having experienced live cross-examinations of the witnesses, the Subcommittee made seven key findings, some positive and others not.

First, the Project would "have a small, but, positive impact on the economy" as a result of energy savings. *Id*. at 161; *see also, e.g. id*. at 128–29 (citing App. 82 at 4–5, 8–9, Fig. 1). Second, the Subcommittee could not "conclude there will be savings from the Capacity Market" because Appellant admitted "that qualifying and clearing the Capacity Market is merely an intellectual exercise." *Id*. (citing *compare* App. 1, Appx 43 at 14 and App. 81 at 7). Third, "no actual greenhouse gas emission reductions would be realized if no new source of hydropower is introduced" and the "record is unclear as to whether the hydropower is new or will be diverted from another region." *Id*.; *see also id*. at 144 (citing CFP Ex. 144 at 2). Fourth, "production cost savings should not be counted in addition to the benefits from wholesale electricity market savings." *Id*.; *see also id*. at 146 (citing DK tab 1262 at 36–45). Fifth, the Project "would likely have a positive effect because of the substantial real estate taxes it would pay to the affected communities." *Id*. at 162; *see also* App. Ex. 1 at 87–89; App. Ex. 29 at 1–4). Sixth, "neither the Forward New Hampshire Fund nor the Job Creation Fund had a transparent structure of governance and were not associated with any economic or governmental entity that would be accountable." *Id*.; *see, e.g.*, DK tab 946, 4/13/17, Transcript for Adjudicative Hearing Day 1, Morning Session at 159–181 (Mr. Quinlan answering questions about the structure, plans, and purpose of the Forward New Hampshire Fund). Seventh, Appellant "failed to account for negative impact on businesses that could be caused by construction of the Project."

Id.; *see also*, *e.g.*, *id*. at 125 (citing CFP Ex. 146–148 regarding impacts on businesses in Plymouth).

Again in its consideration of the economy, the Subcommittee considered conditions of approval. The Subcommittee noted the business loss compensation program, which Appellant agreed to use to address concerns about negative impacts on businesses during construction. *Id*. However, because Appellant had not provided "an adequate assessment of the Project" with respect to construction-period business impacts, the Subcommittee found "it is impossible for anyone to know what level of compensation or mitigation would be appropriate." *Id*. at 163; *see also id*. at 125–26 (citing CFP 146–148 (addressing potential but unknown primary and secondary losses to local businesses in Plymouth).

4. Property Values

Appellant described in its brief evidence about property values presented through James Chalmers, Ph.D. Brief of Appellant at 18–21. Dr. Chalmers opined that along the entirety of the Project's 192-mile route, the Project would likely impact the value of only six to nine properties. *Id*. at 197; *see* DK tab 1100 at 54–81.

In addition to what Appellant set forth, the Subcommittee summarized the testimony of 48 witnesses, including the testimony of Dr. Chalmers on cross-examination, with his acknowledgement that he is not an expert in the New Hampshire real estate market or property valuation in New Hampshire. *Id*. at 163 (citing DK tab 1099 at 12; DK tab 1105 at 47). The Subcommittee's distillation of evidence on property values included two witnesses representing Appellant (Dr. Chalmers and Mr. Quinlan), one

witness representing a business in favor, two experts representing Counsel for the Public, one expert representing several municipalities opposed to the Project, and 42 witnesses opposed to the Project who represented themselves, a municipality, a municipal board, or other intervenors.

Relying on this body of evidence, the Subcommittee ultimately made one key finding. The Subcommittee principally found Dr. Chalmers's "report and testimony to be insufficient to demonstrate that the Project will not have an unreasonably adverse impact on real estate values throughout the region" and "to be shallow and not supported by the data." *Id*. at 194; *see also* App. 1, Appx. 46 at 3. The Subcommittee supported this finding with seven subsidiary findings.

First, the Subcommittee found Dr. Chalmers's "literature review did not support his ultimate conclusions" because the literature contained a wide range of percentages by which transmission lines can impact property values, for example, 1% to 6%, 3% to 6%, or 20% to 25% in rural areas, *id*. at 194 (citing App. Ex. 1 Appx. 46 at 14; CFP Ex. 379 at 31; CFP Ex. 379 at 40), and "affected properties also suffered extended times on the market," as compared to Appellant's position that the Project would have no discernible impact on property values. *Id*. at 194; *see also id*. at 195 (citing CFP Ex. 379 at 40). Dr. Chalmers admitted the literature is "unhelpful in determining the effect on specific property values." *Id*. at 196; *see also* DK tab 1106 at 87–88.

Second, the case studies performed by Dr. Chalmers were flawed because they "were based on retrospective appraisals of properties in proximity to other existing" transmission lines that "were not similar to properties along the Project route" and had "substantial differences"

"especially with respect to the size of the proposed structures and the nature of the surrounding region." *Id*. at 195; *see also id*. at 177–78 (citing CFP Ex. 146 at 6; CFP Ex. 147 at 6; CFP 148, Ex. B, at 22–27). The Subcommittee also found Dr. Chalmers conclusions from the case studies were unreliable, including his characterizing a frequency of 17% as "infrequent" and his dismissal of properties that sold for less than appraised value. *Id*. at 196 (citing App. 30 at 6; DK tab 1106 at 65–66). Dr. Chalmers admitted the case studies contained errors but he "failed to adjust his ultimate opinion." *Id*. (citing DK tab 1100 at 105–07).

Third, the Subcommittee found that Dr. Chalmers's subdivision study "suffered from similar data related problems" as the case studies. *Id*. at 196–97 (citing DK tab 1100 at 108–66; DK tab 1104 at 51–132).

Fourth, after noting Dr. Chalmers's testimony that he investigated the condominium market during the pendency of this matter, the Subcommittee identified several "significant gaps" in evidence, including that Dr. Chalmers "gave little, if any, consideration to commercial property, condominiums, multi-family housing, vacant land, second homes or to property along the underground portion of the route." *Id*. at 165, 197. While the transmission line itself would be buried in the underground portion of the route, impacts aboveground would be highly visible, long-lasting, and impact the aesthetic values of the area. *See* DK tab 1373, Final Brief of Counsel for the Public, at 62 ("The [underground] construction will also cause visual impacts on many areas that depend on its aesthetic qualities") (citing CFP Ex. 130 at 7); 62–63 ("[T]he removal of roadside vegetation and trees can have long-term impacts, including to scenic byways and historic resources") (citing CFP Ex. 130 at 51); 141 ("Cutting of trees

within the ROW may impact the views and value of encumbered private property").

Fifth, the Subcommittee rejected Dr. Chalmers's "artificial" categorization of view, including his assumption that no property beyond 100 feet from the right-of-way would be impacted, and the resultant lack of evidence of how many properties outside of 100 feet from the right-of-way would experience a change in view. *Id*. at 197; *see also id*. at 169 (citing DK tab 1099 at 51–52 (Dr. Chalmers stated "the real estate values of the properties that are located further than that distance would not be impacted by the Project."); *id*. (citing App. 30 at 12 (Dr. Chalmers determined that the properties affected by a change in view would be "very small"). Dr. Chalmers considered it to be a change in visibility *only* if a property would change from no view of utility pole to partial or clear view and omitted any property where the view would change from partial to full or from full to fuller and omitting any consideration of views of conductors (wires). *Id*. at 198; *see also id*. at 169 (citing DK tab 1104 at 6, 8–9; DK tab 1106 at 69–70).

Dr. Chalmers did not perform a visibility assessment or consider visual impact assessments and photosimulations from Appellant's or other parties' witnesses. *Id*.; *see also id*. at 170 (citing DK tab 1100 at 54–69). He also "did not rely on any scientific evidence or evaluation supported by reliable evidence and/or documentation to determine the extent to which visibility of the powerlines would increase." *Id*.; *see also, e.g.*, *id*. at 170 (citing DK tab 1100 at 69–70). Instead, Dr. Chalmers "relied on a 'windshield test' where he drove by the properties and estimated the

increase in visibility by looking at currently existing lines from public roads." *Id*. at 197–98; *see also* DK tab 1105 at 5–6.

The Subcommittee found Dr. Chalmers's conclusion about increased visibility "amounts to no more than a guess as he undertook no research to determine which properties or how many would have a change in view that may lead to a decrease in value." *Id*. at 198.

Sixth, the Subcommittee considered Appellant's proposed condition of a property value guarantee program. Appellant estimated that only the six to nine properties whose value Dr. Chalmers opined would be affected, all within 100 feet of the right-of-way, would be eligible for the program. *See id*. at 197–98 (citing App. 6, Att. L, § 2). The Subcommittee found that Appellant "failed to adequately analyze and assess the effects of the Project on property values, thus, the Subcommittee has insufficient evidence upon which to structure a broader property value guarantee program." *Id*. at 198 ("Eligibility appears to be conditioned on Dr. Chalmers's criteria and is subject to the same flaws we see in Dr. Chalmers's opinions."); *see also* App. Ex. 6, Att. L, § 2 (outlining the limited eligibility criteria). Appellant's evidence "is inadequate for the Subcommittee to determine which properties should actually be included in the program and the extent of remuneration that should be available." *Id*. at 198–99.

Finally, the Subcommittee found Appellant's evidence "insufficient" "to determine how far [from the Project] the impacts on property values will reach." *Id*. at 199; *see also id*. at 195–95 (citing varied predictions, reports, and values in Chalmers's studies, *e.g*. CFP Ex. 379 at 31, 40; documents, App. Ex. 1, Appx. 46 at 14; App. 30 at 6; and testimony, DK tab 1106 at 65–66, DK tab 1099 at 84–113).

In addition to the Subcommittee's findings, the record reflects that Dr. Chalmers's report had nothing to do with the Project; he had not changed or updated his ultimate opinion in this Project in any way from that which he had submitted in the Merrimack Valley Reliability Project. *See* DK tab 1099, 7/31/17 Transcript of Hearing Day 24 at 14–15. His report was the same in both. *See id*.

5. Tourism

Appellant described in its brief evidence about tourism it presented through Mitch Nichols. Brief of Appellant at 15–18. Appellant asserted the Project would "not impact travel demand or have a measurable effect on New Hampshire's tourism industry." App. Ex. 1 at 91.

In addition to what Appellant set forth, the Subcommittee summarized the testimony of 26 witnesses, including the testimony of Mr. Nichols on cross-examination. The Subcommittee's recitation of evidence on tourism included one witnesses representing Appellant (Mr. Nichols), two witnesses representing businesses in favor, two experts representing Counsel for the Public, and 21 witnesses opposed to the Project who represented themselves, a municipality, a municipal board, or other intervenors.

Relying on this body of evidence, the Subcommittee ultimately "did not find the report and testimony submitted by Mr. Nichols credible." *Id*. at 225; *see also id*. at 219 (citing CFP Ex. 146 at 7; CFP Ex. 147 at 7). Witnesses for Counsel for the Public also found Mr. Nichols's assessment on tourism impacts was not "reasonable or credible" noting Mr. Nichols did not have any experience evaluating the impact of transmission lines on

specific tourism destinations. *Id*. at 219 (citing CFP Ex. 146 at 7; CFP Ex. 147 at 7; DK tab 1373, 1/12/18 Final Brief of Counsel for the Public at 46 (citing DK tab 1084 at 27, 42, 106–107, 149–150)). The Subcommittee supported its finding with at least six subsidiary findings.

First, "Mr. Nichols did not exhibit familiarity with the New Hampshire tourism industry and tourism destinations in the North Country." *Id*. at 225; *see also id*. at 219 (citing DK tab 1373, Final Brief of Counsel for the Public at 46). Witnesses for Counsel for the Public found the same, and that Mr. Nichols did not study impacts on individual tourism destinations or any specific region through which the Project would pass, but instead addressed general New Hampshire tourism without any reference to the specific characteristics of Project. *Id*. at 219 (citing DK tab 1373 at 46 (citing DK tab 1086 at 82)).

Second, the listening sessions Mr. Nichols conducted and relied on were flawed, including that they were designed poorly, attended by only a limited number of people, and did not provide a variety of information and views on tourism and concerns about the Project's impact. *Id*. at 225; *see also id*. at 219 (citing DK tab 1373 at 47). The Subcommittee noted that its "own experience in conducting information sessions, public hearings and site inspections along the proposed route demonstrated that there was a lot of public interest in the Project." *Id*. (*see*, *e.g.*, five public information sessions, six public hearings, and approximately seven days of site visits, DK tab 84; 87; 88; 97; 98; 265; 268; 308; 313; 315; 316; 330; 332; 485; 521). For example, at the June 23, 2016 Plymouth public hearing alone, thirty-five individuals made public comments over more than 2.5 hours. *See* DK tab 521.

Third, the electronic surveys Mr. Nichols relied on were flawed, including that they were "poorly worded," "misleading," did not include visitor intercept surveys, and "[f]ailed to obtain and address the views of a substantial number of varied stakeholders." *Id*. at 225–26; *see also id*. at 219 (citing DK tab 1373 at 47–50).

The Subcommittee described "but one" example of the misleading and poorly worded nature of the survey:

> [A] survey question asked "[h]ow often have you made your decision to visit the destination based primarily on each of the following factors?" One available answer to the question was "the destination has visible power lines in certain areas." No survey participants indicated that they made their decision to visit a destination because the destination had visible power lines. From these answers, Mr. Nichols concluded that powerlines have no impact on a tourist decision to visit New Hampshire despite the fact that the question only asked if the tourist would come to New Hampshire to see power lines.

Id. at 225 (citing App. 1, Appx. 45, at 5–6); *see also* JTMUNI 227, Electronic Survey; DK tab 1087, 7/19/17 Transcript of Hearing Day 22, Afternoon Session at 109–115. The Subcommittee found Mr. Nichols's conclusion from this survey question to be "illogical and does not readily follow from the question asked" and found "problems inherent throughout" the rest of the survey. *Id*.

Fourth, the Subcommittee found "Mr. Nichols's comparison of the Project to the Hydro-Québec Phase II project and the Maine Reliability Project is flawed." *Id*. at 226 *see also id*. at 205–06 (citing DK tab 1085 at 9–10, DK tab 1087 at 33). The Subcommittee found those projects "are substantially different from the Project subject to review in this docket —

most notably because they were constructed fully within existing corridors, and the new structures remained below the tree canopy and were not plainly visible" and "are also located in areas that are substantially different from the Project's location." *Id*. Witnesses for Counsel for the Public opined that "there is ample evidence that scenic beauty and a pristine wilderness experience is a primary destination attribute affecting tourist visitation to New Hampshire." *Id*. at 220 (citing CFP Ex. 146 at 8; CFP Ex. 147 at 8).

Additionally, Mr. Nichols did not know how the economies of those areas would have grown if the projects had not been built, so his conclusion that during and after construction, "tourism establishments and employees continued to expand and grow" was not due the weight Appellant urges. *See* Brief of Appellant at 15 (citing DK tab 1, Appx. 45 at 19–22).

Fifth, the Subcommittee found Mr. Nichols's "comparison to the impact on tourism by the lines constructed at the Estes Park and North Cascades National Park are not persuasive" finding that such a comparison cannot be made persuasively by mere "reference to one or two photographs." *Id*. at 226; *see also id*. at 216 (citing DK tab 1087, 7/19/17, Transcript of Hearing Day 22, Afternoon Session at 36–42; DK tab 1085 at 7–9, 45–47).

Sixth, the Subcommittee found that Mr. Nichols "failed to address and analyze the impact that construction work over an extended period of time could have on tourism." *Id*.; *see also id*. at 201 (citing DK tab 1084 at 12, 90–91; DK tab 1086 at 17–18, 49–53; DK tab 1087 at 16, 146–47); *id*. at 220–21 (citing JTMUNI 89, Appx. A, at 1–3). The law required Appellant to assess tourism impacts during construction. *See* Site 301.15 (requiring committee to consider construction-period impacts on

employment and economy of the region"); *see also* Site 301.09 (requiring applicants to provide "information regarding the effects of the proposed energy facility on the orderly development of the region, including . . . the applicant's estimate of the effects of the *construction* and operation of the facility on: [t]he economy of the region, including an assessment of: . . . [t]he effect of the proposed facility on tourism and recreation") (emphasis added). Appellant did not otherwise fill this gap in information. Having received from Appellant only evidence it found to be not credible and not reliable and no evidence about construction-period impacts on tourism, the Subcommittee found it "cannot make a reasoned determination and cannot consider conditions that might mitigate or abrogate negative impacts on tourism." DK tab 1432, at 226–27.

The Subcommittee did not make a finding of fact, as Appellant asserts, that "there are valid reasons to believe that the Project would hurt tourism if it were built." *Id*. at 226–227; *see* Brief of Appellant at 17. Read in context, the Subcommittee expressed a finding of fact it might have made if Appellant had provided sufficient evidence.

6. Land Use and Municipal Views

Appellant described in its brief evidence about land use and municipal views, including that which it presented through Robert Varney. Brief of Appellant at 21–27. Appellant asserted the Project would be consistent with land use and municipal views. *Id*.

In addition to what Appellant set forth, the Subcommittee summarized the testimony of 48 witnesses. *Id*. at 231–274. The Subcommittee's distillation of evidence on land use and municipal views

included one witness representing Appellant (Mr. Varney), two witnesses representing municipalities in favor, one expert representing several municipalities opposed, and 44 witnesses opposed to the Project who represented themselves, a municipality, a municipal board, or other intervenors.

Synthesizing the evidence the parties presented, including having experienced Mr. Varney's cross-examination, the Subcommittee found Appellant "failed to demonstrate by a preponderance of evidence that proposed expansion of the right-of-way use would not interfere with the orderly development of the region." *Id*. at 280. The Subcommittee made at least seven subsidiary findings in support.

First, the Subcommittee took great care to explain that while not bound by municipal views, it must give them "due consideration." *Id*. at 275–76 (citing RSA 162–H:16, IV(b)). The Subcommittee found the evidence from 30 of 32 municipalities along the route who opined that the Project would interfere with orderly development, including the 22 of them who intervened, directly contradicted Mr. Varney's testimony and was generally persuasive. *Id*. at 275.

Second, with respect to Mr. Varney's primary claim about land use, that the majority of the Project would be constructed in an existing transmission right-of-way, the Subcommittee acknowledged it is a sound planning principle to locate new transmission lines in existing corridors, but found Mr. Varney "fails to note that it is not the only principle of sound planning nor is it a principle to be applied in every case." *Id*. at 277; *see* DK tab 1180, 9/21/17, Transcript of Hearing Day 37, Morning Session at 18). The Subcommittee also found "the Project includes 32 miles of new

aboveground right-of-way and 60 miles of underground installation in roads where there are no pre-existing transmission lines and certainly no existing corridor for transmission lines." *Id*. at n.101.

Third, the Subcommittee found that "[o]ver-development of an existing transmission corridor can impact land uses in the area of the corridor and unduly interfere with the orderly development of the region" and listed seven reasons why, in direct disagreement with Mr. Varney's testimony. *Id*. at 278; *see* DK tab 1174, Tr. Day 35, Afternoon Session, 09/18/2017, at 43–47 (Mr. Varney responding to cross examination); DK 1189, Tr. Day 40, Morning Session, 09/26/2017 at 131–135 (same).

Fourth, the Subcommittee found Mr. Varney's testimony "made no accommodation for differences between communities along the proposed route" and the "Project would have different configurations and different structures in these communities" and therefore, the Project's "level of consistency or inconsistency with existing land uses in these communities would be different." *Id*.; *see also compare id*. at 247–73 (Subcommittee's summarization of municipalities' testimony on land use impacts in their communities) and App. Ex. 1, Appx. 41 (Mr. Varney's report). The Subcommittee found the "[t]here 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" and "where the Project would have a substantially different effect on the neighborhood than does the existing transmission facilities." *Id*. at 279 (discussing examples, including the Towns of Whitefield and Deerfield, Turtle Pond in Concord, and McKenna's Purchase in Concord, affected by increased height of

towers and/or loss of vegetation). It then provided several examples, including that in "Pembroke, the Project would entail construction of 60–145 feet tall structures as opposed to the existing 41–97 feet tall structures." *Id*. at 280; *see also id*. at 270 (citing JTMUNI Ex. 146, Ex. A, at 4–5; JTMUNI Ex. 147 at 9, 15–16).

Fifth, the Subcommittee found Mr. Varney did too "little in the way of applying details of the Project to" master plans and ordinances. *Id*. at 280–81 (citing App. Ex. 1, Appx. 41, at 30; DK tab 1180 at 51–52).

Sixth, the Subcommittee found Appellant did not provide sufficient evidence for the Subcommittee to determine whether the underground portions of the Project would or would not unduly interfere. *Id*. at 281 ("[T]he Applicant directed little, if any, attention to the effects that the underground portion of the Project may have on the surrounding land uses. It is possible that there would be no negative effect, but the record contains little to assist us in making that determination").

Finally, the Subcommittee found that with respect to the northernmost communities of Pittsburg, Clarksville, and Stewartstown (apart from the Wagner Forest) Appellant "did not provide any testimony indicating that the Project would be consistent with residential, agricultural, and commercial uses in these areas" and "has not provided a satisfactory means and method to regulate the construction, maintenance and operation of the parts of the Project proposed to be constructed underneath municipal roadways." *Id*. at 281–82; *see also id*. at 231–32 (citing to App. Ex. 20 at 4; App. Ex. 1, Appx 41, at 5; DK tab 1174 at 8).

IV. SUMMARY OF ARGUMENT

This case presents no substantial question of law. The Court should apply substantial deference to the Subcommittee's interpretation of its statute and regulations. The record contains ample competent evidence to support the Subcommittee's factual findings, including its findings of fact with respect to the credibility of the testimony witnesses. The record thoroughly supports the Court affirming the Subcommittee's decision.

The Subcommittee's process throughout this matter epitomized the textbook definition of an administrative agency carefully and considerately adjudicating a complicated and controversial application.

The Subcommittee made no reversible error when it interpreted its statute and regulations to not require deliberations on all Criteria. Neither Statute nor the regulations require deliberation on all Criteria. The Criteria are independent. Therefore, it is not required or a good practice to deliberate on all Criteria in order to have completely deliberated on one criterion. Lastly, judicial economy is equally critical to the efficient functioning of the Site Evaluation Committee as it is to the efficient function of the judiciary. Judicial economy favors not reaching all issues when unnecessary for the disposition of a matter.

The Subcommittee did not use vague, arbitrary, or ad hoc standards for the following several reasons. "Region" is a term that is appropriately flexible and unambiguous. Only the Subcommittee's Order is relevant, not verbal statements made during deliberations. No fact-finder is required to define every term used in the law in reaching a decision. Finding an application to be administratively complete in no way equates to approving an application on the merits. Appellant's reliance on federal materials

prepared as part of the NEPA process is misplaced because nothing in those materials answered whether the Project would unduly interfere with the orderly development of the region. Deciding that municipal views were due significant consideration does nothing but implement the statute based on the facts; it in no way constitutes a new burden of proof. The Subcommittee was allowed to analogize to zoning law, as has been done in prior Site Evaluation Committee matters. Lastly, the Subcommittee did not find that the Project *would* unduly interfere. Instead, it found that Appellant did not provide sufficient, credible evidence that the Project *would not*.

The Subcommittee lawfully considered conditions of approval. Though not legally required to have considered conditions, the record contains many instances where the Subcommittee actually did so. The fact that Counsel for the Public and Appellant stipulated to some conditions of approval in the event the Subcommittee approved the Project imposed no obligation on the Subcommittee.

The Subcommittee made no reversible error with respect to precedent. By law, the Subcommittee is expressly not bound by prior subcommittee decisions. Moreover, the other decisions upon which Appellant relies are easily distinguished from this matter.

V. ARGUMENT

Given no substantial questions of law, substantial deference to the Subcommittee, and a record replete with competent evidence supporting the Subcommittee's decision, the Court should affirm.

A. Standard of Review

Generally, when reviewing a quasi-judicial agency's decision, the Court's scope of review is narrow. *Appeal of Conservation Law Found.*, 127 N.H. 606, 616 (1986) ("We have frequently enunciated our recognition of the narrowness of our scope of review of [Public Utilities Commission] orders"). The Site Evaluation Committee, like the Public Utilities Commission, is charged with balancing competing economic interests. Therefore, the decision of the Subcommittee, like the decision of the PUC in the *Appeal of Conservation Law Foundation*, benefit from substantial deference, which is "more acute" for these agencies because "discretionary choices of policy necessarily affect such decisions . . . ." *Id*. The Legislature entrusted such policy decisions to "the informed judgment" of such agencies, and "not to the preference of the reviewing courts." *Id.* As such, the Court's review of the Subcommittee's Order in this case should also be similarly narrow.

B. Specific Standard of Review

The Court and State statutes have established standards of review for the several different types of questions set forth in this appeal.

1. Findings of Fact *Prima Facie* Lawful and Reasonable

The Court should deem the Subcommittee's findings on all questions of fact "to be *prima facie* lawful and reasonable." RSA 541:13; *see also* RSA 162–H:11 (setting forth that the Subcommittee Order is reviewed pursuant to RSA 541). Under this standard, the Court shall not set aside or vacate the Order "except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or

unreasonable." RSA 541:13; *see also* RSA 162–H:11 (setting forth that the subcommittee decision is reviewed pursuant to RSA 541). The Court does not determine whether it would have found the facts differently than the Subcommittee and does not reweigh the years of evidence the Subcommittee considered. *Appeal of Allen*, 170 N.H. 754, 757–58 (2018). Rather, the Court determines whether factual findings are supported by competent evidence in the record. *Id*. (citing *Appeal of Malo*, 169 N.H. 661, 668 (2017)). As long as the record contains competent evidence that supports the Subcommittee's Order, the Court will not disturb the Order with respect to factual findings.

a. Witness credibility and weight is question of fact

The credibility and weight to be given a witness's testimony is also question of fact. *Merry v. Costa*, No. 2016–0393, 2017 N.H. LEXIS 87, at *2 (Apr. 6, 2017) (citing *Blagbrough Family Realty Trust v. A & T Forest Prods.*, 155 N.H. 29, 33 (2007)). In its Order, the Subcommittee made many findings of fact related to various witnesses' credibility and the weight to be given to their testimony. As questions of fact, these Subcommittee are deemed *prima facie* lawful and reasonable, not to be disturbed unless the record is void of competent, supportive evidence.

2. Most Questions of Law Reviewed *De Novo*

The Court reviews the Subcommittee's rulings of law *de novo*, with the following notable exception. *Appeal of Allen*, 170 N.H. 754, 757–58 (2018) (citing *Appeal of Malo*, 169 N.H. 661, 668 (2017)).

a. Substantial deference to agency interpretation of agency's laws

The Court affords substantial deference to an agency's interpretations of the statute or statutes that it is charged to implement, *Frost v. Comm'r, N.H. Banking Dep't*, 163 N.H. 365, 382 (2012), and its interpretations of its own rules. *Appeal of Michele (New Hampshire Wetlands Council)*, 168 N.H. 98, 101–02 (2015) (the Court uses "the same principles of construction when interpreting both statutes and regulations"). In this case, the Court should afford substantial deference to the Subcommittee's interpretations of RSA 162-H. *Appeal of Old Dutch Mustard Co., Inc.*, 166 N.H. 501, 294–95 (2014) (affording substantial deference to agency's interpretation of the undefined term "facility" in statute); *Frost*, 163 N.H. at 382 (2012) (stating the Court has "long taken the view that substantial deference is due to the interpretation placed on a statute of doubtful meaning by the agency charged with its implementation").

Affording substantial deference to the Subcommittee's interpretation of RSA 162-H and its own regulations accords with the composition of the Site Evaluation Committee required by State statute. The majority of the Site Evaluation Committee is comprised of the Commissioners, or their designees, of several of the State's departments. RSA 162-H:3, I. These departments include the Public Utilities Commission; the Departments of Environmental Services, Business and Economic Affairs, Transportation, and Natural and Cultural Resources; and the Division of Historical Resources. RSA 162-H:3, I(a)–(e). Leaders of the State's departments are members of the Site Evaluation Committee because they possess

specialized expertise about their departments' subject matters and can apply that specialized knowledge to the job of the Site Evaluation Committee.

Accordingly, it is reasonable and logical that the Court give substantial deference to the Subcommittee when, as here, its decision rests, in part, upon its interpretations of its own statute and regulations.

3. Mixed Question of Fact and Law Reviewed for Clear Error

A mixed question of fact and law concerns application of the law to facts and then determining if the facts satisfy the law. *Great Lakes Aircraft Co. v. City of Claremont*, 135 N.H. 270 (1992). The Court should not overturn the Subcommittee's rulings on mixed questions of fact and law unless the ruling is clearly erroneous. *Hogan Family Enters., Ltd. v. Town of Rye*, 157 N.H. 453, 456 (2008).

C. Subcommittee Made No Reversible Error When It Interpreted Its Statute and Regulations to Not Require Deliberations on All Criteria

The Subcommittee was not required to deliberate on all Criteria after it found Appellant failed to meet its burden on one Criterion. The Court should apply substantial deference to the Subcommittee's application of its statute and regulations and affirm the Subcommittee's not deliberating on all Criteria.

1. Statute Does Not Require Deliberation on All Criteria

RSA 162-H:16, IV requires findings on all Criteria only "[i]n order to issue a certificate." It sets forth no requirement to make findings on all Criteria when a certificate is not going to be issued. It would be unlawful to

issue a certificate if one or more of the criteria are not satisfied. Accordingly, once the Subcommittee found that Appellant did not meet its burden of proof on the Criterion, nothing in RSA 162-H:16, IV required the Subcommittee to continue deliberations.

2. Rules Do Not Require Deliberation on All Criteria

The regulations also contain no such requirement. Site 202.28 requires a single "finding" on the Criteria. "The committee or subcommittee, as applicable, shall make a finding regarding the criteria stated in RSA 162-H:16, IV, and Site 301.13 through 301.17, and issue an order pursuant to RSA 541-A:35 issuing or denying a certificate." The Subcommittee did exactly that. After determining Appellant did not meet its burden of proof on the one Criterion, it made that single finding and denied the certificate.

3. Criteria Are Independent

The Criteria are independent from each other and not so interrelated as to require deliberation on all others to lawfully have concluded deliberation on one. Site 301.15 outlines what a committee shall consider for the Criterion and does not include any discussion or consideration of other criteria. Nowhere in RSA 162-H or in the implementing regulations does it say anything about the Criteria being intertwined, informative to each other, or that over-satisfaction of one criterion can cure under-satisfaction of another. Importantly, the law does not establish a balancing test and the Criteria are not mere considerations or suggestions; the Criteria are required elements. If one is not met, no certificate may be issued.

4. Judicial Economy Favors Not Deliberating on All Criteria

The Subcommittee was not required to make findings on every aspect of the Application. Appellant is not entitled to consideration of their entire application. *See* Brief of Appellant at 32. Not making findings on all Criteria is not a failure of any kind by the Subcommittee. Appellant criticizes the timeframe the Subcommittee spent deliberating before denying the application, Brief of Appellant at 9–11, but there is no time requirement or other requirement in the statutes, rules, or anywhere else that requires the Subcommittee to deliberate for the full schedule of deliberation days, or any particular amount of them. A short deliberation might simply mean that "the evidence was overwhelming." *Patten v. Newton*, 102 N.H. 444, 446–47 (1960) (stating that a short jury deliberation may mean only that the evidence was overwhelming, not that the jury failed to perform its duties).

Courts often will not consider further arguments or other bases for relief when a dispositive argument or basis is granted (or denied). *See*, *e.g.*, *Bach v. Dep't of Safety*, 169 N.H. 87, 91, 94 (2016) (stating that the Court did not reach the constitutional argument because the statutory argument prevailed); *Buzzard v. F.F. Enters.*, 161 N.H. 28, 29 (2010) (stating that the Court reaches constitutional issues only when necessary); *Granite State Minerals, Inc. v. City of Portsmouth*, 134 N.H. 408, 414 (1991) ("Because our holding on [the first] issue is dispositive, we do not reach the issues raised by [the defendants] in their cross-appeal" (alterations added)). Otherwise, a court wastes judicial resources in contravention of judicial economy.

The very same principles apply here. The Subcommittee is quasi-judicial agency. *See Gould v. Director, N.H. Div. of Motor Vehicles*, 138 N.H. 343, 347 (1994) ("[A]ctions by administrative agencies are quasi-judicial if the adjudicatory process provided by statute requires notification of the parties involved, a hearing including receiving and considering evidence, and a decision based upon the evidence presented") (citing *Winslow v. Holderness Planning Board*, 125 N.H. 262, 266–267 (1984)); *see also Appeal of Campaign for Ratepayers' Rights*, 162 N.H. 245, 255 (2011) (applying law of quasi-adjudicative agencies to the New Hampshire Site Evaluation Committee). Quasi-judicial means that the members act as judges. *See*, *e.g.*, *Gould*, 138 N.H. at 347 (applying judicial immunity to quasi-adjudicative official). Therefore, the rules of judges apply, and judicial economy favors subcommittees not being required to reach all criteria after a subcommittee concludes it cannot issue a certificate because an applicant did not satisfy one criterion.

D. The Subcommittee Did Not Use Vague, Arbitrary, or Ad Hoc Standards

Appellant argues the Subcommittee applied vague, arbitrary, and ad hoc standards to this application and process. Nothing in the law or the record supports this claim, and therefore upon *de novo* review, the Court should affirm the Subcommittee's decision.

1. "Region" is Appropriately Flexible and Unambiguous

The statute and regulations contain ample information to understand that the "region" for the Criterion includes surrounding municipalities and the broader region. The regulations clearly set out that the "region" depends

upon the geographic and aesthetic scope of a project. For a project of this unprecedented, expansive scale, and geographic extent, the "region" is correspondingly very large. Appellant could have anticipated and understood this by reading the statute and rules.

Perhaps the cornerstone of this issue is the regulations' focus on "affected communities," defined in Site 102.07 as "the proposed energy facility host municipalities and unincorporated places, municipalities and unincorporated places abutting the host municipalities and unincorporated places, and other municipalities and unincorporated places that are expected to be affected by the proposed facility, as indicated in studies included with the application submitted with respect to the proposed facility." This is an exceedingly clear and appropriately flexible definition that explains which communities an applicant and a subcommittee must consider, no matter whether a project is miniscule or massive. The Subcommittee addressed impacts on "affected communities" several times in its Order, including with respect to traffic, DK tab 1432 at 118, and real estate taxes, *id*. at 162.

With that cornerstone in mind, Site 301.09(b) requires an applicant to provide an "estimate of the effects of the construction and operation of the facility on . . . [t]he economy of the region." That regulation then has six subparts which, with precision, identify what must be included, including references to the "affected communities."[4] The Subcommittee cites to this regulation in its Order. DK tab 1432 at 284.

[4] (1) The economic effect of the facility on the affected communities;
(2) The economic effect of the proposed facility on in-state economic activity during construction and operation periods;

Site 301.09 expressly clarifies geographic scope through the use of phrases such as "affected communities," "in-state economic activity," and "State tax revenues." While not all of these terms are defined by a regulatory definition, those that are not, such as "in-state economic activity" or "State tax revenues" are unambiguous in their plain meaning.

2. Subcommittee's Verbal Statements Irrelevant

As support for its argument about unlawful standards, Appellant relies on comments made by individual Subcommittee members. Verbal statements of individual Subcommittee members made during deliberations are no more part of a decision of the Site Evaluation Committee than verbal statements made by a Supreme Court Justice during oral arguments. Comments made by individual Subcommittee members during deliberations are irrelevant, as are comments made by members of other subcommittees in other dockets.

Site 202.28(a) requires the Subcommittee to "issue an order pursuant to RSA 541-A:35 issuing or denying a certificate." Only the Subcommittee's Order, pursuant to RSA 541-A:35 and Site 202.28(a), contain "findings of fact and conclusions of law." RSA 541-A:35.

Statements made during deliberations contain neither findings of fact nor rulings of law of the Subcommittee. Treating them as if they were

---

(3) The effect of the proposed facility on State tax revenues and the tax revenues of the host and regional communities;
(4) The effect of the proposed facility on real estate values in the affected communities;
(5) The effect of the proposed facility on tourism and recreation; and
(6) The effect of the proposed facility on community services and infrastructure.
Site 301.09(b)(1)–(6).

would have a chilling effect on the free and public discussion by board members. *See Daniels v. Town of Londonderry*, 157 N.H. 519, 525 (2008) (holding that "objectionable statements" expressed by board members during deliberations expressed "a general concern, rather than a final determination"). "It is fundamental that '[a]gency opinions, like judicial opinions, speak for themselves.' . . . Accordingly, '[w]here an agency has issued a formal opinion or written statement of its reasons for acting, transcripts of agency deliberations . . . should not routinely be used to impeach that written opinion.'" *PLMRS Narrowband Corp. v. FCC*, 182 F.3d 995, 1001 (D.C. Cir. 1999) (citations omitted).

3. Fact-finders Not Required to Define Terms

Appellant argues that the Subcommittee was required, but failed, to connect Site 301.15 and 301.09 and to define terms in Site 301.15 and, therefore, Site 301.15 is unconstitutionally vague as applied. Yet, no law requires the fact finder, such as the Subcommittee here, to express full definitions of all terms, requirements, and other phrases included in regulations. Such a requirement would paralyze the judicial system from functioning. Moreover, it would drastically, and perhaps unconstitutionally, shift the drafting of legislation and regulations to the judiciary and away from the Legislature. The Subcommittee's application of the regulations to the particular facts of this application shows how the Subcommittee interpreted the regulations in the context of that Application, and that showing is adequate because no law requires anything more.

4. Finding Application Complete Does Not Require Granting a Certificate

Appellant conflates the Subcommittee's early decision to accept the application as complete with the Subcommittee's eventual decision that Appellant did not meet its burden of proof. Presenting a complete Application is merely a box-checking exercise. The Subcommittee looked at the list of materials required in Site 301.09 and determined Appellant submitted them, without any regard to the merits of those materials. *See* DK tab 69 at 14–15. However, to determine whether to grant a certificate, with respect to the Criterion, the Subcommittee looked to Site 301.15 and considered the merits of Appellant's materials. It was only upon consideration of the merits of the Subcommittee found Appellant did not meet its burden of proof.

For one of many examples of this, Appellant provided an estimation "of the effects of the construction and operation of the facility on . . . [t]he economy of the region, including an assessment of . . . [t]he effect of the proposed facility on real estate values in the affected communities" pursuant to Site 301.09(b)(3) by submitting Dr. Chalmers's report, pre-filed direct testimony, and live examination testimony. However, submission in no way bound the Subcommittee to accept the merits of those materials as credible or sufficient to satisfy Appellant's burden to prove, pursuant to Site 301.15(a), that the Project would not "unduly interfere with the orderly development of the region," considering "the extent to which the siting, construction, and operation of the proposed facility will affect land use, employment, and the economy of the region."

Appellant's position in this respect would reduce the entire Site Evaluation Committee process to a mere box-checking exercise, where, so long as the items required in Site 301.09 were filed, no matter their merit, the certificate must be granted. Such a position is contrary to the statute and would violate the canon of statutory interpretation that words in a statute cannot be read to have no meaning. *State v. Wilson*, 169 N.H. 755, 765 (2017) (stating the "legislature is not presumed to waste words or enact redundant provisions and whenever possible, every word of a statute should be given effect").

5. Subcommittee Found Insufficient Credible Evidence the Project Would Not Impact; It Did Not Find the Project Would Impact

Appellant argues the Subcommittee improperly applied a no-negative or some-positive burden pursuant to Site 301.09 and/or Site 301.15 instead of Undue Interference. Nothing in the Order supports this. The core of the Subcommittee decision is that Appellant did not provide sufficient, credible information for the Subcommittee to determine potential impacts. As a result, the Subcommittee determined Appellant had not met its burden to show the Project would not unduly interfere. Nothing in the Order says the Subcommittee decided the Project *would* unduly interfere, only that the Subcommittee lacked sufficient, credible information upon which to find that it *would not*.

6. Federal Materials Irrelevant; Based on Different Standards

Appellant relies, in part, on documents provided as part of the federal National Environmental Policy Act ("NEPA") process to show the

Subcommittee acted in an ad hoc, arbitrary, or vague manner. *See*, *e.g.*, Brief of Appellant at 15 (citing App. Ex. 205 at S-24). The NEPA process is governed by a set of regulatory standards that are distinct and therefore irrelevant to the standards set forth in RSA 162-H:16, IV. *See* 42 U.S.C. § 4321, *et seq*. None of the federal materials Appellant cites address the standards set forth in New Hampshire law. 42 U.S.C. § 4321 (setting forth the purpose of NEPA as "To declare a national policy which will encourage productive and enjoyable harmony between man and his environment . . . ."). NEPA's purpose does not, expressly or impliedly, require any analysis of whether a proposed development would unduly interfere with the orderly development of the region, giving due consideration to municipal views.

7. Duly Considering Municipal Views Does Not Constitute a New Burden of Proof

Appellant also argues the Subcommittee created a new burden of proof relative to the views expressed by municipalities and arbitrarily deferred to their opinions. However, the statute and regulations plainly require the Subcommittee to give "due consideration" to "the views of municipal and regional planning commissions and municipal governing bodies" RSA 162-H:16, IV(b); *see also* Site 301.15(c) (subcommittee shall consider "[t]he views of municipal and regional planning commissions and municipal governing bodies regarding the proposed facility"). Therefore, this obligation is not a new standard; rather, it is a legal requirement the Subcommittee could not lawfully ignore.

The law authorized the Subcommittee to exercise its discretion to determine what amount of consideration was "due" in this case. This is a policy decision RSA 162-H entrusts to the Subcommittee and is therefore

entitled to substantial deference. *See supra* § V(A) at 39; V(B)(2)(a) at 41–42. Here, the Subcommittee determined that a good deal of consideration was due for a variety of reasons, including that 30 of the 32 municipalities along the route opined that the Project would interfere with orderly development; 22 of them that intervened and opined that the interference would be undue; Mr. Varney's testimony "made no accommodation for differences between communities along the proposed route"; and Mr. Varney did too "little in the way of applying details of the Project to" master plans and ordinances. *See supra* § III(B)(6) at 36.

The Subcommittee explicitly did not give municipal views so much consideration, however, that those views became dispositive. The dispositive factor in this case was the lack of sufficient evidence.

8. Subcommittee May Analogize to Zoning Law

Lastly, the Subcommittee did not analyze the Project as if it were a "non-conforming use" as Appellant claims. Instead, the Subcommittee pointed to the doctrine of non-conforming uses as an example that "New Hampshire law recognizes that land uses can change in nature and intensity." DK tab 1432 at 278. Like any other judge or quasi-adjudicatory agency, the Subcommittee had the discretion to consult any analogous law. In this case, it did so by considering some of the factors courts use to consider whether expansion of a non-conforming use is allowable, and then used those factors to inform its determination of whether the expanded use of the utility right-of-way was allowable. *Id*. at 278–79. The Site Evaluation Committee has previously used zoning doctrines without the Court finding any fault with such a legal analogy. *See Appeal of Allen*, 170 N.H. 754, 760

(2018) (assuming without deciding that *Fisher* doctrine applied to successive applications to the SEC (*see Fisher v. City of Dover*, 120 N.H. 187 (1980)).

E. The Subcommittee Lawfully Considered Conditions of Approval

Appellant errs on the facts and the law. In fact, the Subcommittee considered several conditions. The Subcommittee's findings of fact with respect to proposed conditions are *prima facie* lawful and reasonable. Because the record supports them with competent evidence, the Court should not disturb them. With respect to the law, the Subcommittee considered conditions though it was not required to do so. The Court should apply substantial deference to the Subcommittee's application of its statute and regulations and affirm the Subcommittee's not considering all proposed conditions of approval.

1. Subcommittee Considered Conditions

Appellant incorrectly claims the Subcommittee did not consider conditions. The record shows that the Subcommittee did consider conditions relevant to the two criteria upon which the Subcommittee deliberated.

First, only after discussing conditions of approval associated with financial, managerial, and technical capability, did the Subcommittee informally agree that Appellant does have financial and technical capability. DK tab 1432 at 72–73.

Second, in its consideration of Undue Interference, the Subcommittee considered many different conditions, including regarding

roads maintained locally, *see supra* § III(A)(2)(d) at 17, two-year period of fixing roadway distortions, *see supra* § III(B)(1) at 20, business compensation program, *see supra* § III(B)(3) at 24, and the property value guarantee program. *See supra* § III(B)(4) at 28.

The consideration the Subcommittee gave those conditions specific to these criteria did not yield any findings of fact or conclusions of law that the proposed conditions (or others) would alleviate the application's deficiencies because the Subcommittee lacked sufficient evidence to fully evaluate proposed conditions.

2. No Law Required the Subcommittee to Consider Conditions

Nothing requires the Subcommittee to deliberate on conditions before denying a certificate. The two sections of the statute primarily pertaining to conditions of approval authorize—but do not require—the Subcommittee to impose conditions. RSA 162-H:16, VI and VII. Importantly, these two sections of the statute use the permissive language "may" instead of the mandatory language "shall." (RSA 162-H:16, VI: "A certificate of site and facility *may* contain such reasonable terms and conditions"; RSA 162-H:16, VII: "the committee *may* condition the certificate") (emphasis added).[5]

[5] In one aspect, imposition of conditions is mandatory, but that provision is not at issue in this case. As a point of information, that provision states in pertinent part "[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 . . . ." RSA 162-H:16, I.

The primary section of the regulations that pertains to conditions requires consideration of conditions only "[i]n determining whether a certificate shall be issued for a proposed energy facility." Site 301.17. To get to this stage of analysis, the Subcommittee must first have sufficient evidence regarding any given criterion. If it does have sufficient evidence, it can then determine whether any conditions are required "in the certificate in order to meet the objectives of RSA 162-H." Site 301.17. In fact, as noted, that is precisely what the Subcommittee did with the first criterion, whether the "applicant has adequate financial, technical, and managerial capability to assure construction and operation of the facility in continuing compliance with the terms and conditions of the certificate." *See supra* § III(A)(1) at 14.

None of the other reasons Appellant sets forth establish that the Subcommittee erred with respect to conditions. Nothing required the Subcommittee to craft other conditions not proposed by Appellant. Site 202.19(b) places the burden of proof squarely on Appellant to prove "facts sufficient for the . . . subcommittee, . . . to make the findings required by RSA 162-H:16." Conditions that may relate to other criteria will not correct a failure to carry the burden on Undue Interference.

3. Positions of Counsel for the Public Impose No Requirement on the Subcommittee

That Counsel for the Public took the position that certain conditions proposed by Appellant would be agreeable if the Subcommittee granted the certificate in no way required the Subcommittee to have deliberated on those conditions Counsel for the Public found agreeable, or to have approved a certificate that contained those conditions. Counsel for Public

asserts that the Subcommittee correctly concluded Appellant did not provide sufficient evidence.

F. The Subcommittee Made No Reversible Error with Respect to Precedent

State statute expressly does not obligate the Subcommittee to follow its own precedent. RSA 162-H:10, III ("The committee shall consider, as appropriate, prior committee findings and rulings on the same or similar subject matters but shall not be bound thereby"). This State law alone dispositively demonstrates the Subcommittee made no reversible error with respect to precedent. Upon *de novo* review of this legal question, the Court should affirm the Subcommittee's decision on this issue.

Nevertheless, while not bound by prior decisions, it may be "appropriate" in some instances for a subcommittee to consider prior decision. Here, it was not appropriate for the Subcommittee to do so. The Court should apply substantial deference to the Subcommittee's application of its statute and regulations and affirm the Subcommittee's denial.

Appellant points to two other approved projects as proof the Subcommittee was wrong when it denied this Project. Brief of Appellant at 37, 49–50; *see also* Decision and Order Granting Certificate of Site and Facility, SEC Docket No. 2015-05 (October 4, 2016) ("Merrimack Order"); Decision and Order Granting Certificate of Site and Facility, SEC Docket No. 2015-04 (January 31, 2019) ("Seacoast Order").

The Seacoast and Merrimack Orders support the Subcommittee's denial of Northern Pass for two simple, yet significant, reasons: (1) Merrimack and Seacoast are factually distinct from the Project; and (2) the parties used different strategies.

1. Seacoast and Merrimack Factually Distinguishable from Northern Pass

By all meaningful measures, Seacoast and Merrimack are significantly smaller, less complicated, and subject to far less scrutiny from intervenors than the Project, as detailed in the following chart.

	Northern Pass	Seacoast	Merrimack	Northern Pass Cites	Seacoast Cites	Merrimack Cites
Reliability Project	No	Yes	Yes	DK 1432 at 206	Seacoast Order at 325	Merrimack Order at 36
Miles in NH	192	13	18	DK 1432 at 8	Seacoast Order at 7	Merrimack Order at 7
Interna-tional Crossing	Yes	No	No	DK 1432 at 15; 232	Seacoast Order at 7	Merrimack Order at 7
Towns Would Pass Through	32	4	4	DK 1432 at 276	Seacoast Order at 7	Merrimack Order at 8
New Trans-mission Right-of-Way Miles	92	Less than 1	0	DK 1432 at 277, fn 101	Seacoast Order at 11-14	Merrimack Order at 8-9
Inter-venors	145	9	1	DK 1432 at 10–14	Seacoast Order at 18-22	Merrimack Order at 21-23

Note that a "reliability project" is one the Independent System Operator-New England has identified as necessary to maintain reliability of the electric grid.

In sum, the respective subcommittees considered significantly different projects. That two subcommittees found two applicants in two other projects satisfied the burden of proof in no way means the Subcommittee in this case committed reversible error when it found Appellant did not.

2. Parties Took Different Strategic Positions Across Seacoast, Merrimack, and Northern Pass

The parties' strategic positions, including those taken by Appellant, across the three matters were also distinct.

Appellant took different positions and/or used different experts in Seacoast and Merrimack than it presented in this case. For example, in this case, Appellant was unwilling to accept the claims resolution process that Counsel for the Public proposed, stating it was "unworkable, cumbersome, and inefficient." DK tab 1432 at 159 n.59. In contrast, in Seacoast, the Applicant and Counsel for the Public jointly stipulated to a very similar process. Seacoast Order at 263–265.

As another distinction across the different projects, in Seacoast Mr. Varney served as the expert on tourism and was found credible in that respect. Seacoast Order at 290–91. As noted previously, in this case, Appellant used Mr. Nichols and the Subcommittee did not find his testimony or reports credible. *See supra* § III(B)(5) at 29–33.

As noted with respect to land use, the Subcommittee found Mr. Varney lacking in credibility and reliability for numerous reasons, *see* DK

tab 1432 at 276–83, and among those was his failure to apply the "details of the Project to [host community] plans and ordinances," and his premise that constructing within an existing corridor equates to land use consistency. *Id*. at 277–278; 280. In Seacoast, Mr. Varney appears to have taken this criticism to heart; his expert opinion was deemed credible in part because he appeared to apply the details of the project to the host community master plans and zoning ordinances and he based his ultimate opinion on more than the location of the project within an existing corridor. *See* Seacoast Order at 298–302, 311–313.

Lastly with respect to the different positions taken by applicants across the three projects, the applicants used Dr. Chalmers to opine about property values in all three cases. However, in Merrimack, Dr. Chalmers based his opinion, in part, on the fact that the project would be located within an existing right-of-way. Merrimack Order at 54. In Seacoast, the subcommittee also faulted Dr. Chalmers's analysis, Seacoast Order at 287–88, but still found the Applicant met its burden because the subcommittee implemented a "Dispute Resolution Procedure" to which Counsel for the Public had not objected which would address property value concerns. Seacoast Order at 288.

In addition to Applicant taking different positions, other parties' positions also differed across the three projects. For example, in this case, Counsel for the Public asserted Appellant did not satisfy its burden of proof with respect to Undue Interference. *See* DK tab 1432 at 23–26. In contrast, in both Seacoast and Merrimack, Counsel for the Public took no position on whether the Applicant satisfied the same burden of proof. Seacoast Order at 17; Merrimack Order at 20.

As another example, in this matter, 22 host communities intervened and presented testimony in opposition to the project, providing the Subcommittee with "evidence and cogent arguments" that Appellant did not meet its burden with respect to Undue Interference. DK tab 1432 at 276. In contrast, in Seacoast and Merrimack, two and zero host communities, respectively, intervened and presented testimony in opposition to the projects. Seacoast Order at 18–23; Merrimack Order at 21–23 (discussing the position of the sole intervenor, a layperson who opposed the project in its entirety).

Considering the differences in both the projects themselves, along with the positions' parties took in each of them, the Merrimack and Seacoast Orders do not support Appellant's claim that the Subcommittee erred because it did not approve this project but approved those two others.

Generally, it would be difficult bordering on impossible to require that a certain outcome on a particular criterion in one docket would require the same outcome in another, especially given the fact-intensive nature of the siting process for each individual project. One impediment to such rote consistency without regard to the facts is the Subcommittee is allowed to accept or reject witness testimony in each new docket based on the context and facts of the docket. *Appeal of Allen*, 170 N.H. 754, 762 (2018) ("[A] trier of fact is free to accept or reject an expert's testimony, in whole or in part") (internal citation and quotation omitted).

As noted, the Subcommittee's findings with respect to the credibility of and weight to give Appellant's witnesses' testimony are findings of fact, and therefore, entitled to the presumption of *prima facie* lawfulness and reasonableness, not to be disturbed by the Court unless the record is void of

competent evidence that supports the Subcommittee's findings. As noted previously, the record amply supports the Subcommittee's findings with the respect to credibility of Appellant's witnesses. *See supra* § III(B)(2) at 21 (Ms. Frayer); § III(B)(4) (Dr. Chalmers) 25–29; § III(B)(5) at 29–33 (Mr. Nichols); § III(B)(6) at 34–37 (Mr. Varney).

To the extent the issue of how the Subcommittee's assessment of the credibility of Appellant's witnesses factors into whether it is appropriate to consider prior cases, the Court may review this as a mixed question of law and fact. Under that standard of review, the Court should affirm the Subcommittee. Nothing in the record or the law supports a finding that the Subcommittee was clearly erroneous when it did not approve the Project because it approved Seacoast and Merrimack.

VI. CONCLUSION

The Society for the Protection of New Hampshire Forests respectfully requests the Court affirm the decision of the Subcommittee because the appeal presents no substantial question of law, the Subcommittee's decision is due substantial deference, and the record contains competent evidence to support the Subcommittee's decision.

VII. ORAL ARGUMENT

Amy Manzelli requests to present oral argument on behalf of the Society for the Protection of New Hampshire Forests (15 minutes).

Respectfully submitted,

SOCIETY FOR THE PROTECTION OF NEW HAMPSHIRE FORESTS

By and through their attorneys,

BCM ENVIRONMENTAL & LAND LAW, PLLC

Dated: March 21, 2019

By: /s/ Amy Manzelli

Amy Manzelli, Esq. (Bar No. 17128)
BCM Environmental & Land
Law, PLLC
3 Maple Street
Concord, NH 03301
manzelli@nhlandlaw.com
(603) 225-2585

CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2019, the foregoing Brief for the Society for the Protection of New Hampshire Forests was served via the New Hampshire Supreme Court efiling system on parties registered for eservice, via email to parties on the electronic service list, and via first class mail to parties without email addresses.

/s/ Amy Manzelli

CERTIFICATION OF WORD COUNT

I hereby certify that this Brief for the Society for the Protection of New Hampshire Forests contains 13,691 words, exclusive of the cover page, table of contents, table of authorities, signature block, certificate of service, and certificate of word count.

/s/ Amy Manzelli