THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2018-0468

NORTHERN PASS TRANSMISSION LLC AND
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE D/B/A
EVERSOURCE ENERGY

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

Brief of NGO Intervenors: Ammonoosuc Conservation Trust, Appalachian Mountain Club, and Conservation Law Foundation

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Oral argument requested.
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QUESTIONS PRESENTED FOR REVIEW

1. Whether the New Hampshire Site Evaluation Committee ("SEC") properly gave due consideration, in light of its broad authority and the discretion granted to the SEC by the legislature, to "all relevant information" as required by RSA 162-H:16 in finding that Appellant failed to provide credible and reliable evidence sufficient to meet its burden of proof that the site and facility would not unduly interfere with the orderly development of the region, and in doing so, lawfully determined that the conditions now proposed by Appellant were insufficient to overcome the failure to meet its burden of proof. *See* DK tab 1454.

2. Whether the SEC properly exercised its broad discretion in weighing competing evidence carefully examined over seventy days of hearings and considering its prior decisions and, thus, lawfully determined that Appellant failed to provide credible and reliable evidence sufficient to meet its burden of proof that the site and facility would not unduly interfere with the orderly development of the region. *See id.*

3. Whether RSA 162-H and the administrative rules adopted by the SEC provide sufficient notice regarding the standards and information that were required to be considered when deciding whether Appellant met its burden of proof that the site and facility would not unduly interfere with the orderly development of the region, and if so, whether the SEC properly applied those standards in its determination that Appellant failed to provide

credible and reliable evidence to meet its burden of proof. *See id.*

STATEMENT OF THE CASE

It is the understanding of Ammonoosuc Conservation Trust ("ACT"), Appalachian Mountain Club ("AMC"), and Conservation Law Foundation ("CLF") (collectively, "NGO Intervenors") that other parties will address the procedural history and facts of this appeal in detail. Therefore, in the interests of efficiency, we hereby rely on and adopt the Procedural History and Statement of Facts presented in briefing submitted in this matter by other parties on this date. For this reason, only a limited recitation of additional relevant facts is set forth in this consolidated brief.

This matter involves Northern Pass Transmission LLC and Public Service Company of New Hampshire d/b/a Eversource Energy's (collectively, the "Appellant") application for a certificate of site and facility from the New Hampshire Site Evaluation Committee (the "SEC"). Appellant sought a certificate for its proposed 192-mile transmission line and infrastructure project (the "Project") from the northern border with Canada, in Pittsburgh, to a Deerfield substation in southern New Hampshire. As envisioned by Appellant, the Project would directly impact thirty-two New Hampshire towns, five counties, and four Tourism Regions designated by the New Hampshire Department of Business and Economic Affairs (*i.e.*, Great North Woods, White Mountains, Lakes Region, and Merrimack Valley). The sprawling scope and widespread impact of the Project resulted in the most extensive and time-consuming review the SEC has undertaken in its history to date, and generated significant interest and opposition. One hundred sixty intervenors participated in the proceedings before the SEC – with 154 intervenors opposed to the Project and only five

in favor.[1] The SEC held seventy days of hearings over eight months, received more than 1,000 pleadings and 2,000 exhibits, and heard from 154 witnesses. Ultimately, the SEC issued a detailed 287-page Order describing the record, identifying shortcomings and failures in Appellant's application, and carefully explaining its decision to deny the application.

The SEC reviews applications for certificates of site and facility pursuant to the authority granted by the legislature in RSA 162-H:1, *et seq.* The statutory and regulatory guidelines for the SEC's procedures were recently reviewed and overhauled to improve the SEC's ability to address long-distance transmission and wind power projects whose impact, like the Project at issue here, would spread across a wide geographic area. In 2013, the legislature directed the New Hampshire Office of Energy and Planning to conduct a study of the SEC and its processes and to engage the public in its analysis of SEC decision-making criteria. *See* NGO Ex. 138; New Hampshire Office of Strategic Initiatives, Site Evaluation Committee Study (SB99), https://www.nh.gov/osi/energy/programs/sb99.htm (last visited Mar. 20, 2019). Significantly, the study led the legislature to act again in 2014, directing the SEC to adopt rules "including specific criteria to be applied in determining if the requirements of RSA 162-H:16, IV have been met by the applicant for a certificate of site and facility." *See* RSA 162-H:10, VII.

The SEC conducted public deliberations on Appellant's application in late-January and early-February 2018. During the deliberations, SEC

[1] One of the intervenors in support of the Project withdrew before the proceedings were completed.

members engaged in a detailed, methodical, and orderly review of the record. The SEC set out to address the four criteria of RSA 162-H:16, IV one-by-one, in the order in which they appear in the statute, with the correct understanding that each of the four criteria must be met in order for a certificate to issue. For each of the four statutory criteria, an SEC member first explained the criterion and related regulatory requirements and then recapitulated the evidence presented on that criterion before opening the floor for a discussion among the SEC members. The deliberations continued in this manner until the members realized that, based on the record before them, none of the SEC members believed that the Appellant had met its burden of proof to show that the Project would not unduly interfere with the orderly development of the region and all of them agreed that, as a result, it would be impossible for the Project to be certificated. After concluding that the application must be denied due to the failure to meet the requirements of RSA 162-H:16, IV, the SEC voted to end its deliberations and unanimously voted to deny Appellant's application.

SUMMARY OF ARGUMENT

The legislature delegated "broad authority" to the SEC to determine the impacts and benefits of energy projects in the state of New Hampshire. *Appeal of Mary Allen*, 170 N.H. 754, 762 (2018) (citing RSA 162-H:16, IV). In this instance, the SEC exercised its expertise in the area of energy-project siting in finding that Appellant failed to meet its burden of proving that the proposed 192-mile transmission line Project would not unduly interfere with the orderly development of the region. Thus, the application failed one of the four statutory criteria necessary for the SEC to issue a

certificate of site and facility for the Project. *See* RSA 162-H:16, IV.[2] The statute governing the siting of energy facilities, the SEC's implementing regulations, economy in the use of state resources, and common sense all compel the conclusion that the SEC's decision was well within the bounds of the SEC's authority and discretion.

One component of the SEC's broad authority is the discretion to conclude its analysis after finding that an applicant failed to meet its burden of proof with regard to one of the four necessary criteria in RSA 162-H:16, IV. The plain language of the statute requires the SEC to make findings for each of the four criteria only "[i]n order to issue a certificate." RSA 162-H:16, IV. Similarly, the SEC's rules provide that the SEC "shall make *a finding* regarding the criteria in RSA 162-H:16, IV," Site 202.28 (emphasis added): Either an applicant has met its burden of proof for each of the four criteria or it has not. Requiring the SEC to fully analyze each criterion when the failure to meet just one is dispositive would not streamline later application processes, as illustrated by the SEC's recent Antrim Wind decisions. Indeed, such a requirement would result in undue delay by needlessly consuming valuable SEC resources. Moreover, analysis of all four criteria is unnecessary for complete consideration of a single criterion. While a single aspect of an energy project may impact multiple criteria, the SEC's analysis of a single criterion need consider such impacts *only as they relate to that criterion*.

[2] For clarity, the four statutory conditions in RSA 162-H:16, IV, are referred to throughout this brief as "criteria." The lower-level considerations listed in the regulations as relevant to these criteria, such as those in Sites 301.09 and 301.15, are referred to as "factors."

The SEC's discretion as to whether to consider mitigating conditions before denying a certificate is similarly clear and broad. The structure and language of RSA 162-H:16 and the SEC's regulations make clear that the SEC must consider mitigating conditions relating to the orderly development of the region only for a to-be-issued certificate; any other consideration is at the SEC's discretion. *See* RSA 162-H:16; Site 301.17. Furthermore, to the extent that an applicant wishes the SEC to consider mitigating conditions in its analysis, the applicant bears the burden of providing such conditions. *See* Site 209.19(a), (b). Requiring the SEC to craft its own mitigating conditions to make up for an applicant's shortcomings would shift the burden of proof to the SEC in contravention of Site 202.19(b) and remove the burden from the party best positioned to bear it. Finally, because in this case the SEC found that Appellant failed to sufficiently demonstrate what the Project's impacts on the orderly development of the region would be, it was impossible for the SEC to find that mitigating conditions would bring the impact below the level of undue interference. DK tab 1432 at 284-85.

The SEC is entitled to great deference in making the decision whether to issue or deny a certificate. Acknowledging the SEC's "broad authority" to consider the impacts of energy projects, this Court refuses to second-guess the SEC's weighing of evidence. *See Appeal of Mary Allen*, 170 N.H. at 762 ("When reviewing the subcommittee's decision, it is not our task to determine whether we would have credited one expert over another, or to reweigh the evidence, but rather to determine whether its findings are supported by competent evidence in the record.") (citing *Appeal of Malo*, 169 N.H. 661, 668 (2017)). Faced with unreliable

evidence from Appellant and substantial credible evidence opposing the Project, the SEC acted well within its discretion by denying a certificate for the Project. Moreover, the SEC's decision in this instance was consistent with its prior decisions. Even if the SEC had departed from prior cases (which it did not), however, such departure would have been an appropriate exercise of the SEC's explicit authorization from the legislature to do so. 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*.") (emphasis added). The SEC requires this flexibility to evaluate a variety of applications without being constrained to methodologies that may be appropriate for one application and inappropriate for another.

Applicants bear the burden of proving "facts sufficient" for the SEC to make findings on the four statutory criteria. Site 202.19(b). This burden ensures that the SEC has sufficient evidence before it to make an informed decision by placing the burden on the party best able to provide information about the full scope of the project and its impacts. Such "facts sufficient" include the factors relevant to a project's impact on the orderly development of the region listed by the implementing regulations, including the views of municipalities and regional planning commissions. Site 301.15(c); Site 301.09.

Just as there is no flaw in the SEC's application of its regulations in this case, there is no flaw in the regulations themselves. Terms such as "region" in the regulations that can be applied at multiple geographic scales provide flexibility to assess the impacts of projects that vary widely in scope. The regulations consistently inform applicants as to what

geographic scale is relevant to a specific consideration, and they ultimately align with common sense: the relevant region is coextensive with the relevant effects of a project.

Finally, Appellant places great weight on comments made by individual committee members during deliberations. Reliance on deliberative comments, devoid of context, as a substitute for the SEC's final written order is inappropriate as the comments are not the SEC's ultimate decision, nor do individual comments necessarily accurately reflect the bases for that decision. The SEC's written order explains its decision-making process and final determination at great length and is the official statement of the SEC's decision in this matter.

In an attempt to turn its dissatisfaction with the outcome of the SEC's review into reversible error on the part of the SEC, Appellant has created a number of "plain errors" allegedly committed by the SEC. The above considerations make clear that the characterization of the SEC's exercises of discretion and expertise as "errors" does not hold water. Because the SEC's decision is supported by evidence and adheres to the governing statute and regulations, it should be affirmed.

STANDARD OF REVIEW

Under RSA 162-H:11, SEC decisions are reviewed in accordance with RSA 541, which provides that the Court shall not set aside the SEC's order "except for errors of law, unless [this Court is] satisfied, by a clear preponderance of the evidence, that it is unjust or unreasonable." *Appeal of Mary Allen*, 170 N.H. at 757-58 (citing RSA 541:13). The SEC's "findings of fact are presumed *prima facie* lawful and reasonable." *See id.* at 758; *see also* RSA 541:13. As further explained by this Court, the Court reviews the

SEC's findings "not to determine whether [it] would have found differently or to reweigh the evidence, but, rather, to determine whether the findings are supported by competent evidence in the record." *Id.* (citing *Appeal of Malo*, 169 N.H. at 668).

This Court reviews the SEC's rulings on issues of law *de novo*, *Appeal of Mary Allen*, 170 N.H. at 758, but "the construction of a statute by those charged with its administration is entitled to substantial deference." *New Hampshire Retirement Sys. v. Sununu*, 126 N.H. 104, 108 (1985). Moreover, this Court "accord[s] deference to an agency's interpretations of its own regulations," so long as they are "consistent with the language of the regulation and with the purpose the regulation is intended to serve." *In re Town of Nottingham*, 153 N.H. 539, 555 (2006).

ARGUMENT

I. THE SEC PROPERLY EXERCISED ITS DISCRETION TO STOP ITS ANALYSIS AFTER FINDING THAT APPELLANT FAILED TO SATISFY ITS BURDEN OF PROOF ON ONE OF THE STATUTORY CRITERIA

The SEC can only approve an energy project if it finds that the project meets all four criteria set forth in the statute. RSA 162-H:16, IV. After determining that an applicant has failed to meet its burden of proof regarding *one* of the statutory criteria, the SEC retains discretion to conclude its analysis. The plain language of the statute only requires the SEC to make a finding on each criterion in order to *issue* a certificate. *Id.* The regulations governing the SEC's decisions are similarly clear on this point. Site 202.28(a). This reduction of the SEC's "to-do" list is in accord with the statutory purpose of facilitating the efficient consideration of

energy projects without undue delay. *See* RSA 162-H:1 ("[T]he legislature finds that it is in the public interest . . . that undue delay in the construction of new energy facilities be avoided[.]"). The fact that certain impacts of a project may be relevant to more than one of the statutory criteria does not change this analysis or mean that consideration of one criterion is incomplete until or unless the SEC has considered all four.

A. The Plain Language Of The Statute And Regulations Makes Clear That The SEC May Stop Its Analysis After Finding That An Applicant Has Failed To Satisfy Its Burden Of Proof With Regard To One Criterion.

The plain language of the statute requires the SEC to make findings for each of the four criteria only "[i]n order to issue a certificate." RSA 162-H:16, IV. The statutory criteria are clearly necessary conditions for the granting of a certificate, and a finding that an applicant has failed to meet its burden of proof as to any one of the criteria requires the SEC to deny a certificate. *See id.* Thus, in this instance, it would have been fruitless and a waste of limited SEC resources for the SEC to continue considering the remaining criteria after determining that Appellant failed to meet its burden of proving that the Project would not unduly interfere with the orderly development of the region.

The statute's implementing regulations reaffirm this statutory language. The regulations provide that the SEC "shall make *a finding* regarding the criteria stated in RSA 162-H:16, IV, and Site 301.13 through 301.17" before issuing or denying a certificate. Site 202.28(a) (emphasis added). The use of the singular phrase "a finding" clearly indicates that the SEC is to make a single finding regarding the four necessary conditions:

Either an applicant has satisfied its burden of proof for all four criteria, or it has not. If the drafters had intended to require the SEC to make *multiple* findings, one for each criterion, they would have used the plural form of the noun. Indeed, they did so elsewhere in the regulations when referring to the findings the SEC must make for *each* of the four criteria in order to *issue* a certificate. *See* Site 202.19(b) ("An applicant for a certificate of site and facility shall bear the burden of proving facts sufficient for the [SEC] to make *the findings* required by RSA 162-H:16") (emphasis added). This deliberate distinction in language reflects the drafters' intent to grant the SEC discretion to deny a certificate after a finding that is fatal to a project. *See, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006) ("A familiar principle of statutory construction . . . is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute."); *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("Where Congress includes particular language in one section of a statute but omits it in another . . ., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation omitted). The SEC's determination that Appellant failed to demonstrate that the Project would not unduly interfere with the orderly development of the region was sufficient to make *a finding* that Appellant failed to satisfy all necessary conditions, and by law necessitated that the SEC deny the certificate.

The legislature's recognition in the statute's declaration of purpose that "the selection of sites for energy facilities may have significant impacts on and benefits to" a variety of issues addressed in RSA 162-H:16, IV, does not, as Appellant argues (Appellant's Brief at 30-34), demand a different

result. RSA 162-H:1. This statement simply underscores the rationale for the statutory criteria and does not purport to require the SEC to continue deliberations after making a finding that necessitates the denial of a certificate.

B. Requiring The SEC To Conduct A Full Analysis Of All Four Criteria When One Is Dispositive Would Result In Undue Delay In The Approval Of Energy Facilities.

One of the legislature's purposes in establishing the statutory scheme set forth in RSA 162-H is to provide a procedure for the review and approval of energy-project siting in which "undue delay in the construction of new energy facilities [will] be avoided." RSA 162-H:1. A rule requiring the SEC to deliberate on each of the statutory criteria *after* making a finding that the applicant failed to meet its burden of proof on one of the four required criteria would result in repeated and unavoidable undue delay. The SEC is an under-resourced governmental entity that receives an ever-increasing number of applications. *See* Projects, New Hampshire Site Evaluation Committee, https://www.nhsec.nh.gov/projects/index.htm (last visited Feb. 21, 2019) (showing that the number of proceedings before the SEC between 2011-2021 is already nearly six times the number between 1985-1998 and approximately 1.5 times the number between 2000-2010). Requiring the SEC to continue deliberating an application after it has made a finding that the applicant failed to submit sufficient evidence on one of the required criteria such that the application must be rejected would significantly limit and delay the SEC's evaluation of other, potentially more promising, applications.

Moreover, the SEC's deliberations demonstrate that the panel took an ordered and methodical approach to its assessment of Appellant's application. During its deliberations, the panel addressed the RSA 162-H:16, IV criteria in the order in which they appear in the statute, beginning with the question of whether the Appellant has "adequate financial, technical, and managerial capability" to construct and operate the facility in compliance with the certificate. *See* DK tab 1398 at 17:24-18:3, 105:6-9. Far from "focus[ing] on expediency," (Appellant's Brief at 32) the SEC's deliberations show the members thoroughly and painstakingly recounting the evidence it received over the course of seventy days of hearings on Appellant's application. *See, e.g.*, DK tab 1398 at 17:24-33:9 (SEC member Patricia Weathersby describing at length the record of evidence regarding the first criterion, RSA 162-H:16, IV(a), before the panel began deliberations on that criterion); *id.* at 105:6-141:1 (SEC members Christopher Way and William Oldenburg presenting the extensive record of evidence related to the second criterion, RSA 162-H:16, IV(b)); and DK tab 1399 at 4:3-7:16 (Mr. Oldenburg continuing his presentation of evidence related to the second criterion prior to deliberations by the panel). Only when it became undeniably clear that Appellant had failed to meet its burden of proof on the orderly development of the region criterion did the SEC discuss concluding its deliberations – and even then, the panel emphasized that its reason for doing so was because a failure on one criterion meant there was no possibility that a certificate could be issued. *See* DK tab 1403 at 6:10-11, 6:16-17 ("[O]n orderly development, it's not even close . . . . I don't see how you could issue a Certificate[.]"); *id.* at 4:18-19 ("We've reached a point where we know we can't grant the

certificate[.]"); *id.* at 5:13-15 ("[B]ased on our conversations earlier today . . . it would seem to me that we can't grant a Certificate."); *id.* at 9:5-11 ("I'm a realist. We essentially have a four-legged stool [referring to the four required criteria of RSA 162-H:16, IV] . . . I think we all know how we feel on at least one of those legs. And you need four legs to stand up in this case."). Thus, the SEC acted in accordance with its statutory duty to conduct its review so as to avoid undue delay in the construction of new energy projects.

Appellant suggests that deliberating on all four criteria would save time in later proceedings, should it reapply for a certificate (Notice of Appeal at 48), but this suggestion is unsubstantiated. A reapplication with material changes results in a *new application* that must go through the entire review process again. In order to issue a certificate, the SEC must again hear testimony and deliberate according to all statutory and regulatory requirements. It is difficult to imagine that a project that fails the statutory requirements for a certificate could be successfully refiled without significant changes requiring new consideration of the entire application. *See, e.g.*, *Appeal of Mary Allen*, 170 N.H. at 760 (assuming without deciding that the *Fisher* doctrine requiring "material changes" between successive applications applies to the SEC; discussing *Fisher v. City of Dover*, 120 N.H. 187 (1980)).

There is no basis to believe a second application would result in an abbreviated or expedited second review, whether or not the SEC reviewed all four statutory criteria in the first instance. The Antrim Wind proceedings are illustrative. Antrim Wind applied for a certificate to construct a wind energy project and its application was rejected after the

SEC reviewed all four criteria. Decision and Order Denying Application for Certificate of Site and Facility, Antrim Wind Energy, LLC, No. 2012-01 (Apr. 25, 2013), at 4, 20 (hereinafter "Antrim I"). When Antrim Wind subsequently submitted a new application, the review process was not shorter but longer. In response to Antrim Wind's revised application, the SEC received testimony and deliberated not only on the adverse impact criterion that had triggered rejection in the first instance, but on all other statutory criteria as well. Decision and Order Granting Application for Certificate of Site and Facility, Antrim Wind Energy, LLC, No. 2015-02 (Mar. 17, 2017), at 63-181 (hereinafter "Antrim II"). In Antrim I, the SEC received motions to intervene from 19 interested parties (Antrim I at 6), held 11 days of evidentiary hearings (*id.* at 4), and issued a 71-page order 15 months after it received the application. *Id.* In Antrim II, the SEC received motions to intervene from 27 interested parties (Antrim II at 11-12), heard testimony for 13 days (*id.* at 12), and issued a 182-page order 17.5 months after it received the application. *Id.* at 7. Because Antrim II was a new project that required new testimony and analysis for each statutory demand, deliberating on all four criteria during Antrim I did not increase efficiency in Antrim II.

The practice of this Court and others in declining to rule on multiple issues when one is dispositive is instructive. *See, e.g.*, *Trustees of Dartmouth Coll. v. Town of Hanover*, No. 2017-0595, 2018 WL 5796932, at *10 (N.H. 2018) ("In light of our decision, we need not address the college's claim that the general considerations are vague or ambiguous."); *Kurowski v. Town of Chester*, 170 N.H. 307, 310 (2017) ("[B]ecause we conclude that . . . under RSA 212:34, the Town is immune from liability on

all of the plaintiff's claims, we need not decide whether RSA 508:14 also immunizes the Town from liability."); *McWilliams v. Dunn*, 137 S. Ct. 1790, 1800 (2017) ("[O]ur determination that *Ake* clearly established that a defendant must receive the assistance of a mental health expert . . . is sufficient to resolve the case. We therefore need not decide whether *Ake* clearly established more."). Courts refrain from deciding more issues than necessary for resolution of a case to ensure judicial efficiency; the same considerations apply to the SEC concluding its analysis after it makes a determination on one criterion that is dispositive to an application to conserve valuable governmental resources and to ensure its capacity to serve all applicants effectively.[3]

C. Appellant's Argument That Consideration Of All Four Criteria Is Necessary For Full Consideration Of Any One Of Them Is Misplaced.

Appellant argues that because the four criteria are "intertwined," the SEC's analysis of a single criterion is incomplete without deliberation on the others. Appellant's Brief at 32. Essentially, this boils down to an argument that the SEC's consideration of the orderly development criterion was insufficient because it did not fully analyze all relevant issues. While Appellant can (and does) complain that the SEC's analysis on this single criterion was flawed, this has no bearing on whether the SEC is required to deliberate on all four criteria.

The SEC's regulations clearly spell out the factors the SEC is to consider "[i]n determining whether a proposed energy facility will unduly

[3] In this case, the Northern Pass review process had already consumed more of the SEC's resources and time than any other single project in the agency's history.

interfere with the orderly development of the region." Site 301.15; *see also* Site 301.09.[4] None of these regulatory factors require consideration of the other criteria in RSA 162-H:16, IV – to do so would be redundant. *See In re Morrissey*, 165 N.H. 87, 96-97 (2013) ("We will not interpret an administrative rule in such a way as to render a significant portion of it meaningless."). While one aspect of a project may *impact* multiple criteria, this does not mean that consideration of *all* such impacts is necessary for full consideration of a single criterion. For instance, Appellant points to the fact that the SEC considered aesthetics in its discussion of the Project's impacts on land use. Appellant's Brief at 32. However, the SEC considered aesthetics in this context *only as it relates to the impact on existing land uses in the region*. *See* DK tab 1432 at 278 ("Unsightly transmission corridors or infrastructure within corridors can impact real estate development in the surrounding area."); *see also* DK tab 1478 at 53 ("The impact on aesthetics, agricultural uses, and the natural environment of the land directly relates to the ability of the parties to continue to use the land for its current purposes."). Such consideration of the effects of the Project's aesthetic impacts on land use, a regulatory factor for the orderly development criterion, is separate from broader considerations of the Project's aesthetic impacts described in the regulatory factors for the "adverse impact" criterion. Indeed, the SEC would have exceeded its authority if it had included a full consideration of the Project's adverse

[4] The regulatory factors in Site 301.15 are (a) land use, employment, and the economy of the region; (b) the proposed decommissioning plan; and (c) the views of municipal and regional planning commissions and municipal governing bodies. Site 301.09 breaks down these factors into more specific elements.

impacts on aesthetics during its discussion of the orderly development of the region.

II. THE SEC APPROPRIATELY EXERCISED ITS DISCRETION AS TO WHETHER TO CONSIDER MITIGATING CONDITIONS BEFORE DENYING A CERTIFICATE

The SEC is authorized under the statute to include mitigating conditions in a certificate to offset the adverse impacts of projects "as the committee deems necessary." RSA 162-H:16, VI. The implementing regulations explicitly require the SEC to consider whether certain mitigating conditions should be included in an issued certificate. Site 301.17. However, neither the statute nor the regulations require the SEC to consider mitigating conditions before *denying* a certificate on the basis that an applicant failed to meet its burden of proof for the orderly development criterion. Even when the SEC exercises its discretion to consider mitigating conditions, the burden of proof is on the applicant to provide such conditions that would cause its application to meet the statutory and regulatory requirements for approval. The SEC is not required to craft its own mitigating conditions when an applicant fails to do so. Finally, where, as here, an applicant has not provided sufficient evidence to allow the SEC to determine the project's impact on the orderly development of the region, the SEC cannot meaningfully evaluate the effects any mitigating conditions might have.

A. By Their Plain Language, Neither RSA 162-H Nor The SEC's Regulations Requires The SEC To Consider Mitigating Conditions Before Denying A Certificate.

The SEC possesses considerable statutory and regulatory discretion as to whether to consider mitigating conditions before denying a certificate. The structure and plain language of RSA 162-H make clear that the SEC's consideration of mitigating conditions is not only optional, but secondary, to its decision regarding issuance of a certificate. Only after requiring that the SEC "determine if issuance of a certificate will serve the objectives of this chapter" "[a]fter due consideration of all relevant information," RSA 162-H:16, IV, does the statute even mention mitigating conditions: "A certificate of site and facility *may* contain such reasonable terms and conditions . . . as the committee deems necessary." RSA 162-H:16, VI (emphasis added). This chronological structure reflects the intent of the legislature to give the SEC discretion to consider what mitigating conditions "*may*" be necessary *after* determining that it will issue a certificate.

Consistent with the statute, the plain language of the implementing regulations preserves the SEC's discretion as to whether and when it considers mitigating conditions. In laying out the steps the SEC must take in the process of issuing or denying a certificate, the regulations provide that the SEC "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 . . . issuing or denying a certificate." Site 202.28(a). Site 301.15 further explicates the factors the SEC is to consider in making a finding regarding

the orderly development of the region and *makes no mention* of mitigating conditions.

Conversely, the regulatory provisions governing the SEC's analysis of the "adverse impact" criterion *explicitly require* the SEC at multiple points to consider "[t]he effectiveness of the measures proposed by the applicant to avoid, minimize, or mitigate unreasonable adverse effects" and whether certain mitigating conditions should be included when making a finding relative to unreasonable adverse impact. *See e.g.*, Site 301.14(a)(7), (b)(5), (e)(5), (e)(6), (f)(1), (f)(3). There is no such language in the regulatory provisions regarding the orderly development criterion. *See* Site 301.09; Site 301.15. Therefore, when interpreting the regulations "in the context of the overall regulatory scheme and not in isolation," it is clear that the drafters knew how to require the SEC to consider mitigating conditions before making a determination on orderly development – and chose not to here. *See Appeal of Old Dutch Mustard Co.*, 166 N.H. 501, 506 (2014); *see also id.* (stating that the Court "will neither consider what the legislature or commissioner might have said nor add words that they did not see fit to include"); *Hamdan*, 548 U.S. at 578 ("A familiar principle of statutory construction . . . is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute."); *Keene Corp.*, 508 U.S. at 208 ("Where Congress includes particular language in one section of a statute but omits it in another . . ., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation omitted).

The part of the regulations requiring the SEC to consider whether to include certain mitigating conditions in certificates, by its plain language,

similarly indicates that such conditions are to be considered only for a to-be-issued certificate. Site 301.17. The discussion of mitigating conditions in Site 301.17 frequently refers to "the certificate holder," the "facility subject to the certificate," practices "approved by the committee within the certificate," and changes "authorized by the certificate." *See* Site 301.17(a)-(f), (h). Thus, the SEC need not consider these mitigating conditions prior to denying a certificate. While Site 301.17(i) states that the SEC should consider "[a]ny other conditions necessary to serve the objectives of RSA 162-H or to support findings made pursuant to RSA 162-H:16," when read in the context of 301.17 as a whole this provision "is merely one part of the rule addressing conditions in a to-be-issued certificate." DK tab 1478 at 21; *see also State v. N.H. Gas & Elec. Co.*, 86 N.H. 16, 25 (1932) (describing *ejusdem generis*, the canon of statutory construction stating that a general term at the end of a list is narrowed by the specific class of items preceding it). Indeed, a broader reading of Site 301.17(i) would render superfluous the requirements in Site 301.14 that the SEC consider conditions when making a finding regarding unreasonable adverse impact. *See Morrissey*, 165 N.H. at 96-97 ("We will not interpret an administrative rule in such a way as to render a significant portion of it meaningless."). Even if the SEC were required under Site 301.17(i) to consider mitigating conditions during its orderly development analysis, it complied with any such requirement in this case, as discussed below, and the burden for identifying other potential mitigating conditions was on Appellant, *see infra* section II.B.

Although it was not required to do so, the SEC considered many of the mitigating conditions proposed by Appellant and, in most cases, found

them inadequate.[5] Conditions proposed by Appellant that the SEC did not consider were irrelevant to the orderly development of the region.[6] Appellant had three opportunities to introduce more conditions into the record—at the hearing, via a request to leave the record open at the conclusion of the hearing (*see* Site 202.06(b)), and via a request to reopen the record. *See* Site 202.27. Appellant did not take advantage of any of these opportunities. Instead, Appellant submitted more conditions only after its application was denied, as an attachment to its motion for rehearing. *See* DK tab 1435 at Attachment A. As required by the SEC's regulations, these proposed conditions were struck from the record because they were submitted after the close of the record. DK tab 1478 at 68; *see* Site 202.26(a) ("At the conclusion of a hearing, the record shall be closed and no other evidence, testimony, exhibits, or arguments shall be allowed into the record."). Appellant's failure to timely submit conditions is not a basis to overturn the SEC's decision.

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[5] *See, e.g.*, DK tab 1432 at 116 (finding that Appellant failed to demonstrate how its proposed mitigating conditions for construction impacts would be implemented and how they would avoid usurping the authority of municipalities); *id.* at 162-63 (finding Appellant's proposed business loss compensation program insufficient because it did not provide a mechanism for compensation of business losses); *id.* at 198 (finding Appellant's proposal to establish a property value guarantee program too limited in scope); *id.* at 230 (finding the conditions suggested by Appellant sufficient to guarantee the costs of decommissioning); *id.* at 282-83 (finding that each option for regulation construction underneath municipal roadways would unduly interfere with the orderly development of the region); *id.* at 284-85 (finding that Appellant's tourism witness provided no way to fashion conditions that might mitigate adverse tourism effects).

[6] Such conditions related to, for example, the protection of endangered species, wetlands, and historic resources.

B. The SEC Was Not Required To Craft Its Own Mitigating Conditions Because Appellant Bore The Burden Of Proposing Mitigating Conditions.

To compensate for the inadequacy of its own proposals, Appellant would require the SEC to come up with more promising mitigating conditions to save the Project. However, applicants "bear the burden of proving facts sufficient for the [SEC] to make the findings required by RSA 162-H:16." Site 202.19(b). To the extent that mitigating conditions could have brought the Project into compliance with the orderly development criterion, such conditions are part of the "facts sufficient" for the SEC to make such a finding under RSA 162-H:16, IV. Thus, if an applicant wishes the SEC to consider mitigating conditions in its analysis, the applicant must identify those conditions. The SEC is not obligated to come up with its own conditions to salvage applications that fail to satisfy their burden of proof. Such a rule would effectively shift the burden of proof to the SEC to show that there are no mitigating conditions that would bring a failed application up to the standards of RSA 162-H:16, IV. This outcome would contradict Site 202.19(b) and the statutory purpose of avoiding "undue delay in the construction of new energy facilities" (RSA 162-H:1) by relieving applicants of their burden of proof and diverting resources away from more complete applications.

Furthermore, applicants are in the best position to identify potential mitigating conditions. By holding public information sessions pursuant to Site 201.02, applicants can gather information about concerns interested parties might have with their project. Here, however, Appellant's failure to prospectively engage with municipalities, business owners, and other

interested parties to discuss the Project's impacts or even address concerns related to the Project is well documented. *See, e.g.*, DK tab 1432 at 119 ("Although the Applicant did conduct outreach to the businesses, the Subcommittee found the outreach to be mostly passive. The Applicant should have done more to engage local businesses and address their concerns and potential for economic loss."); *id.* at 276 (Appellant's expert, Mr. Varney, neglected to address North Country Council's public comments objecting to Appellant's assessment of visual impacts and suggesting a revised approach in his report and testimony until questioned about it during cross-examination). Applicants are also most knowledgeable about the effects potential mitigating conditions would have on their project and are therefore in a position to negotiate with interested parties and come up with mutually satisfactory mitigating conditions. But Appellant did not undertake such efforts, and the Project, and the SEC's review process, suffered as a result. *See, e.g.*, *id.* at 277 ("The Subcommittee is concerned that the Applicant's representatives would take the time to meet with local planning agencies and not solicit their views on the Project. If done early in the process, understanding local views could have resulted in a less adversarial process and perhaps an alternative route or design that was responsive to the concerns expressed by planning agencies."). For example, while the SEC could propose a financial compensation scheme to mitigate interference with orderly development, it is the applicant that must evaluate whether such a condition would affect the project's overall financial viability. The SEC is a resource-constrained government entity that serves a primarily adjudicative function. To burden it with crafting mitigating conditions to salvage deficient applications

would severely interfere with its directive to efficiently consider applications for energy projects without undue delay, and could result in conditions unacceptable to the applicant in any event.

C. The SEC Could Not Determine That Mitigating Conditions Would Bring The Project's Impacts Below The Level Of "Undue Interference" Because Appellant Failed To Demonstrate The Full Scope Of The Project's Impacts.

Where, as here, the SEC finds that an applicant has not provided sufficient evidence to determine a project's impact on the orderly development of the region, meaningful consideration of whether mitigating conditions would bring the project below the level of undue interference is impossible. The statute requires that "[a]ny certificate issued by the site evaluation committee shall be based on the record." RSA 162-H:16, II. The SEC cannot conclude from the record that mitigating conditions would salvage a project if the record does not fully address the project's impact.

Here, the SEC consistently found that Appellant failed to meet its burden of determining the Project's *impact* on the orderly development of the region, let alone establishing that it would not constitute undue interference.[7] Because Appellant did not provide the information necessary

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[7] *See, e.g.*, DK tab 1432 at 284 (finding "uncertainty" regarding the basis for Appellant's projections about employment and economic activity); *id.* at 127 (finding that the job creation estimated by Appellant "does not reflect the actual number of jobs that would be created using the Applicant's expert's methodology"); *id.* at 196-97 (finding the conclusions of Appellant's expert on property values "unreliable," "unpersuasive," and having "significant gaps"); *id.* at 225 (finding the methods of Appellant's tourism expert "poorly designed" and "dubious"); *id.* at 281 (finding that "more consideration of the provisions of master plans and ordinances [of municipalities] was required"); *id.* at 117-18 (finding that Appellant failed to provide "documentation that clearly identified crossings over locally-maintained roads" and "serious consideration and planning

for the SEC to determine the extent of the Project's impact, it was impossible for the SEC to consider whether mitigating conditions would bring it below the level of undue interference. Parts of Appellant's application fell so far short of its burden of proof requirement that the SEC's review was not aided *at all* by Appellant's presentation: "At best, we are no better off than we were before the evidentiary hearing." DK tab 1432 at 226-27. Moreover, "[w]ithout credible and reliable reports and expert testimony the Subcommittee cannot make a reasoned determination and cannot consider conditions that might mitigate or abrogate negative impacts[.]" *Id.* at 227; *see also id.* at 285 ("[B]ecause the Applicant's analysis of the effects was . . . inadequate, it was impossible for us to even begin to consider what an appropriate compensation plan might require."); DK tab 1478 at 22 ("Any condition that the Subcommittee could try to articulate to address a lack of information it had, by definition, would not be based on the record."). Asking the SEC to consider conditions in this context would be like asking it whether $x - y$ is less than 100 without requiring Appellant to define x and y and, importantly, would be contrary to the statutory requirement that the SEC's decisions be based on the record. RSA 162-H:16, II.

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with respect to the impact of the Project on local roads"); *id.* at 161 (finding it "unclear" whether greenhouse gas emission reductions would occur).

III. THE SEC PROPERLY EXERCISED ITS BROAD DISCRETION IN WEIGHING COMPETING EVIDENCE AND CONSIDERING PRIOR DECISIONS WHEN IT FOUND THAT THE PROJECT DID NOT SATISFY THE STATUTORY REQUIREMENTS

The legislature delegated broad authority to the SEC to evaluate the potential impacts of proposed projects and make findings regarding the credibility of the evidence before it. *See Appeal of Mary Allen*, 170 N.H. at 762 (citing RSA 162-H:16, IV). Moreover, the legislature explicitly granted the SEC discretion to consider – but not be bound by – its previous decisions when evaluating an application. RSA 162-H:10, III. Thus, the SEC acts within its broad authority when, as here, it reviews the evidence presented by all parties, makes credibility determinations and weighs competing evidence accordingly, and considers previous SEC decisions as it deems appropriate when determining whether to grant or deny and application.

A. The SEC Has Broad Discretion In Weighing Competing Evidence.

The SEC is tasked by the legislature with "consider[ing] and weigh[ing]" the evidence while "[e]valuat[ing]" an application for an energy facility. RSA 162-H:10, III; RSA 162-H:4, I(a). As this Court recently recognized in reviewing the SEC's Antrim Wind II decision, "[t]he legislature has delegated broad authority to the [SEC] to consider the 'potential significant impacts and benefits of a project,' and to make findings on various objectives before ultimately determining whether to grant an application." *Appeal of Mary Allen*, 170 N.H. at 762 (citing RSA 162-H:16, IV). This authority includes the discretion to evaluate the credibility of expert witnesses and decide how much weight to give expert

testimony. As this Court has explained, "[w]hen faced with competing expert witnesses, 'a trier of fact is free to accept or reject an expert's testimony, in whole or in part.'" *Id.* (quoting *Appeal of N.H. Elec. Coop.*, 170 N.H. 66, 74 (2017)). Because the SEC has broad discretion and exercises significant expertise in evaluating the evidence brought before it, "it is not [this Court's] task to determine whether [it] would have credited one expert over another, or to reweigh the evidence." *Id.*

In this case, the SEC reviewed extensive evidence – 154 witnesses and 2,176 exhibits were presented by the parties, including more than 160 intervenors – and held seventy days of hearings. DK tab 1432 at 6. With respect to each factor relevant to the orderly development criterion, Appellant claimed that the Project's impact would not unduly interfere with the orderly development of the region. On the other hand, Counsel for the Public, municipalities, conservation organizations, and individual intervenors argued that Appellant's analysis was unreliable or incomplete. *See, e.g.*, *id.* at 219 ("Counsel for the Public's experts . . . opined that the Applicant's assessment of the Project's impact on tourism was not 'reasonable or credible.'"). On each of these issues (apart from financial assurances for decommissioning), the SEC weighed the competing evidence and found that Appellant's evidence was insufficient to meet its burden of proof.[8] In doing so, the SEC properly fulfilled its role of evaluating evidence in accordance with its broad authority.

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[8] *See, e.g.*, DK tab 1432 at 194-99 (finding Appellant's property values expert's testimony to be "shallow," "not supported by the data," and, in any event, "not support[ing] the Applicant's position"); *id.* at 225 (finding Appellant's tourism expert's methods to be "poorly designed," "dubious," and "misleading," and his

Moreover, the record provides ample evidence to support the SEC's determinations that Appellant's experts lacked credibility and other evidence convincingly demonstrated the Project's impact on the orderly development of the region. For example, Appellant's tourism expert, Mitch Nichols, was tasked with determining whether and how the Project would affect tourism in the four regions impacted by the Project (*i.e.*, Great North Woods, White Mountains, Lakes Region, and Merrimack Valley). During his testimony before the SEC, however, Mr. Nichols could not identify the regions in which Keene, Portsmouth, and the Pemigewasset River are located. *See* DK tab 1084 at 122:16-20 ("Q Do you know which region Keene is located in? A Off the top of my head, I don't. Q Do you know what region Portsmouth is located in? A No. I'd have to look at the map."); *see also* DK tab 1086 at 97:1-4 ("Q What region did the Pemigewasset River fall into? A You know, I would have to look at a map to answer that.").

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conclusion "illogical"); *id.* at 127 ("[T]he number of new jobs estimated by the Applicant's experts is overinflated and does not reflect the actual number of jobs that would be created using the Applicant's expert's methodology."); *id.* at 161 (finding the positive economic impact to be "much less significant" than predicted by Appellant); *id.* at 118 (noting "the Applicant's failure to provide serious consideration and planning with respect to the impact of the Project on local roads"); *id.* at 119 (finding that Appellant's outreach to local businesses was "passive" and that Appellant "should have done more" to address their concerns regarding economic loss); *id.* at 162 ("The Applicant failed to account for negative impact on businesses that could be caused by the construction of the Project."); *id.* at 278-81 (finding that Appellant's land use expert "made no accommodation for differences between communities" and "no effort to identify where the impacts of the Project may be large or small," and concluding that "more consideration of the provisions of master plans and ordinances was required.").

Testimony from local industry experts, on the other hand, directly refutes Mr. Nichols' conclusion regarding the Project's impact on tourism. Howie Wemyss, for example, who has "been involved with the Mt. Washington Auto Road for around 37 years, the last 30 of which have been as their General Manager" described reading Mr. Nichols' testimony "with fascination" and concluding "that he does not understand tourism, at least as it plays out in New Hampshire on a real life, not a theoretical basis." DK tab 1148 at 15:3-17. Mr. Wemyss further testified that he "take[s] issue" with Mr. Nichols' statements that traffic and construction delays are "part of the traveling experience" and "make no difference" to tourists. *See id.* at 15:18-22. Drawing on his personal experience with Auto Road, he testified that traffic delays in North Conway caused AAA to advise people "to avoid North Conway all together, which, of course, had a negative [e]ffect on our business" and that "people are going to change their travel plans" to avoid delays created by the Project's construction corridor. *See id.* at 16:1-9. Thus, the SEC's determination regarding the Project's impact on the orderly development of the region is supported by evidence in the record.

B. The SEC Is Not Bound By Its Prior Decisions And Properly Exercised Its Discretion In Considering Prior Cases.

The legislature explicitly granted the SEC discretion to consider its prior decisions "as appropriate," but made clear that the SEC "shall not be bound thereby." RSA 162-H:10, III. This flexibility is necessary for the SEC's reasoned decision-making. Each application that comes before the SEC differs in scope and scale, and the methodology appropriate for one application may be inappropriate for another. The SEC is therefore given

discretion to adopt or depart from its prior decisions as it deems necessary through the exercise of its expertise in siting and certification.

Appellant argues that the SEC's analysis regarding land use and property values, factors relevant to the orderly development criterion, was inconsistent with its decision on the Merrimack Valley Reliability Project application. *See* Appellant's Brief at 45-46, 49-51. In that decision, the SEC found that an electric transmission line would not unduly interfere with the orderly development of the region, giving weight to the fact that the project would be constructed within an existing right-of-way. Decision and Order Granting Application for Certificate of Site and Facility, New England Power Company, No. 2015-05 (Oct. 4, 2016), at 58-59 (hereinafter "MVRP"). As a preliminary matter, even if the SEC had departed from its decision in MVRP, such a departure would be explicitly authorized by RSA 162-H:10, III. However, the SEC's analysis in the case at hand was entirely consistent with the principles laid out in MVRP. Appellant misreads MVRP for establishing hard and fast rules for the SEC's determinations regarding land use and property values: namely, that transmission lines within an existing right-of-way categorically do not interfere with existing land use. Contrary to Appellant's reading, MVRP suggested only that "[c]onstruction of the Project within an already existing and used right-of-way is *consistent* with the orderly development of the region." MVRP at 58 (emphasis added). Nowhere did the SEC state that construction within an existing right-of-way alone automatically brings a project within the statutory and regulatory requirements.

In its decision in this case, the SEC adopted the same principle as in MVRP, noting that constructing a project within an existing right-of-way

"is a sound planning principle," but clarified that "it is not the only principle of sound planning nor is it a principle to be applied in every case." DK tab 1432 at 277. The facts of this case required that the SEC look beyond the construction of the Project in an existing right-of-way. The Project is over ten times the length of the MVRP project, *compare* DK tab 1432 at 6 (192 miles), *with* MVRP at 7 (18 miles). Furthermore, unlike MVRP, almost half of these 192 miles would be built *outside* existing right-of-way, *i.e.*, 92 miles or 48% of the entire Project – would require new right-of-way. DK tab 1432 at 277, Note 101. Thus, even under Appellant's erroneous assertion that transmission lines within an existing right-of-way categorically cannot interfere with existing land use, the SEC was well within the exercise of its discretion to determine that the Project would interfere with existing land use. Even where the Project would be constructed within an existing right-of-way, it would require "significant increase in the height and relocation of [already-existing] structures." *Id.* at 280. In Pembroke, for example, new structures would be 60-145 feet tall as opposed to the existing structures that stand at 41-97 feet. *Id.*

Moreover, in MVRP, the issue of orderly development of the region was largely uncontested; Counsel for the Public stipulated that the utilization of existing rights-of-way would not interfere with the orderly development of the region, and no municipalities or planning boards weighed in. MVRP at 50, 57. In contrast, in this case, Counsel for the Public heavily criticized Appellant's methodology, and the "overwhelming majority" (thirty) of thirty-two municipalities along the route and a "large number" of regional planning bodies were "vehemently opposed to the Project," in part because of its impact on existing land use. DK tab 1432 at

245-46, 276, 285. It would be contrary to the SEC's charge to consider "all relevant information" if it disregarded such input and adopted a pre-determined outcome, ignoring the details of the application before it. RSA 162-H:16, IV. Thus, Appellant had to do more than simply assert that the Project would be constructed in an existing right-of-way to meet its burden of proof. *See* DK tab 1432 at 278 ("The only criterion [Appellant's expert] appears to have applied is whether the Project is to be located in an existing transmission corridor.").

IV. APPELLANT APPROPRIATELY BORE THE BURDEN OF DEMONSTRATING THE EXTENT AND NATURE OF THE PROJECT'S IMPACT ON EACH FACTOR RELEVANT TO THE ORDERLY DEVELOPMENT CRITERION

The SEC's regulations make clear that applicants "bear the burden of proving facts sufficient for the committee or subcommittee, as applicable, to make the findings required by RSA 162-H:16." Site 202.19(b). As set out in the regulations, the "facts sufficient" for the SEC to make a finding regarding a project's impact on the orderly development of the region include: (a) the project's effects on land use, employment, and the economy of the region; (b) the adequacy of the decommissioning plan; and (c) the views of municipal and regional planning commissions and municipal governing bodies. *See* Site 301.15. The regulations further break down each of these factors and require applicants to "include information regarding the effects" on each and "estimate the effects of the construction and operation of the facility" on land use, economy, and employment. Site 301.09. Applicants must provide sufficient information regarding their project's impact on each of the factors in Sites 301.09 and

301.15 so that the SEC can fulfill its obligation to consider each factor and make a determination regarding the orderly development of the region that is "based on the record." RSA 162-H:16, II. This framework ensures that the burden of proof is on the party best positioned to know the full scope of the project and its impacts.

While other parties may have an understanding of a project's effects in a particular area, applicants possess complete knowledge of the project and its impacts. Intervenors, on the other hand, face a number of obstacles that impede their ability to demonstrate a project's impact. While intervenors often have specialized expertise about particular issues raised by a project, such interested parties rarely individually hold information about the totality of the project's implications, especially in very large complex projects. Furthermore, in proceedings involving expansive projects, collecting information in an efficient manner would require an unreasonable amount of coordination among and expenditure of resources by intervenors, each of which often has a particularized interest. Municipalities, residents, and non-profit organizations are ill-equipped to conduct fulsome research to identify a project's impacts each time a new energy project is proposed in New Hampshire. Applicants, however, are perfectly positioned to know and demonstrate their project's impacts.

In order for an applicant to satisfy its burden of proving that its project does not unduly interfere with the orderly development of the region, it must first accurately identify the project's impacts. In this case, the SEC consistently found that Appellant failed to meet its burden of proof in demonstrating what the Project's impact on each factor *would be*, let

alone whether the Project would unduly interfere.[9] While Appellant did not have to prove that the Project's impact on *each* factor would fall below the level of undue interference, so long as the Project in its entirety would not unduly interfere with the orderly development of the region, Appellant *did* have to provide sufficiently reliable evidence of what the impacts on each factor would be.[10] DK tab 1478 at 13. Appellant's failure to provide the required evidence meant that the SEC could not adequately balance the factors to determine whether the Project would unduly interfere with the orderly development of the region and, thus, required denial of a certificate.

As discussed above, the views of municipalities and regional planning commissions are a factor that applicants bear the burden of addressing. Contrary to Appellant's argument, this burden is not "new." Appellant's Brief at 51. Indeed, Appellant Public Service Company of New Hampshire d/b/a Eversource Energy ("Eversource") and one of its experts participated extensively in the SEC rulemaking process in 2014 and 2015 that produced the regulations at issue here. *See* New Hampshire Office of Strategic Initiatives, Site Evaluation Committee Study (SB99) Report, https://www.nh.gov/osi/energy/programs/documents/sb99-rulemaking-final-deliverable.pdf at 15 (identifying Barry Needleman and Terry DeWan, both representing Eversource, as members of the aesthetics

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[9] *See supra* note 5.

[10] Appellant argues that the SEC required too much specificity with respect to the impact on the orderly development of the region. Appellant's Brief at 44. However, the SEC did not require Appellant to provide specific numerical estimates, but only "the extent and nature" of the impact. Surely, any certificate issued by the SEC absent knowledge of "the extent and nature" of the Project's impact on the orderly development of the region would be arbitrary and capricious and not "based on the record." RSA 162-H:16, II.

working group), 33 (identifying Tom Getz, representing Eversource, as co-lead of the orderly development working group) (last visited Mar. 20, 2019). Notably, the aesthetics working group, which Mr. Needleman and Mr. DeWan participated in, produced a report reflecting the group's agreement that "[l]ocal, regional and state master plans, local zoning and town votes should be considered by the SEC." *See id.* at 10.

Moreover, the regulations clearly put applicants on notice of this obligation: "Each application shall include information regarding the effects of the proposed energy facility on the orderly development of the region, *including the views of municipal and regional planning commissions and municipal governing bodies regarding the proposed facility*[.]" Site 301.09 (emphasis added). In fact, Appellant's own actions during the proceeding suggest that it was aware of this requirement. For instance, Appellant's expert reviewed master plans and local ordinances of affected communities, DK tab 1432 at 280, and "filed a report that attempted to explain how the Project would be consistent with these documents," DK tab 1478 at 56. The fact that Appellant's attempts were insufficient to satisfy its burden of proof does not allow Appellant to argue *post hoc* that the SEC created the burden out of thin air.

V. THE FLEXIBILITY IN THE IMPLEMENTING REGULATIONS IS NECESSARY FOR REASONED ANALYSIS OF THE WIDE RANGE OF ENERGY PROJECTS THAT COME BEFORE THE SEC

As discussed in Section III.B, the SEC reviews a wide array of energy projects. Just as the statute and courts recognize that this breadth of projects means that binding the SEC to its prior decisions would be

unworkable, the regulations also preserve the flexibility necessary to evaluate a variety of projects of different scope and scale. The regulations do so while providing sufficient guidance to the SEC, applicants, and interested parties. As the United States Supreme Court has noted, laws may be "marked by 'flexibility and reasonable breadth, rather than meticulous specificity,'" and still be clear as to their requirements. *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) (citation omitted); *see also Chad v. City of Fort Lauderdale*, 66 F. Supp. 2d 1242, 1245 (S.D. Fla. 1998) ("The language of the rule, while flexible and broad . . ., is nevertheless sufficiently clear as to what it prohibits."); *State v. Enyeart*, 676 N.W. 2d 311, 321 (Minn. Ct. App. 2004) ("A law that is flexible and reasonably broad is nonetheless constitutional if it is clear what the law as a whole proscribes.").

Appellant misses the distinction between rules that are fundamentally vague and rules that are necessarily flexible when it contends that the SEC's regulations regarding the orderly development of the region are "vague."[11] Appellant's Brief at 41-54. What Appellant fails to acknowledge is that defining terms like "region" with too much specificity would hamstring the SEC's ability to adequately evaluate each application that comes before it. The scope of the term "region" necessarily

[11] This argument is somewhat ironic, considering Appellant's advocacy for less specific regulations during the rulemaking process. *See* SEC Docket No. 2014-04, Rulemaking, Letter from Various Energy Companies, https://www.nhsec.nh.gov/projects/2014-04/documents/150323energy.pdf (letter from Eversource Energy and others stating the SEC requires "broad discretion because it is not possible to write rules that foresee every conceivable situation in the siting of energy facilities" and setting forth proposed rules).

varies between projects. *See supra* Section III.B (comparing this 192-mile Project with the 18-mile MVRP project). This variability does not mean, however, that applicants are left without sufficient guidance as to which region the SEC will consider when evaluating their application. The regulations clearly spell out for applicants the information that "[e]ach application shall include," and include geographic quantifiers such as "affected communities," "host and regional communities," "in-state economic effects," and "State tax revenues." Site 301.09. Furthermore, applicants must include the views of both "municipal and regional planning commissions." Site 301.09. Still more guidance is provided to the applicant by the regulatory definition of "affected communities":

> 'Affected Communities' means 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.

Site 102.07. These regulations make clear, in accord with common sense, that the relevant region is coextensive with the effects of a project. Applicants must provide information about both localized and state-wide effects so that the SEC can fully understand the potential impact of projects. Appellant's claim of due process woes fails because this is exactly how the SEC applied the statute and rules in this case, as clear on their face.

Moreover, Appellant attempts a backdoor attack on the constitutionality of RSA 162-H:6 and the SEC's rules regarding

orderly development by repeatedly claiming they are "vague,"[12] but this argument was not properly preserved for appeal. Appellant's Motion for Rehearing of Decision and Order Denying Application expressly stated that "[t]he Applicants do not contend that Site 301.15 and 301.09 are unconstitutional on their face[.]" DK tab 1435 at 48. The Court should disregard this backdoor attack.

VI. STATEMENTS MADE BY INDIVIDUAL SEC MEMBERS DURING DELIBERATIONS ARE IRRELEVANT WHERE A FORMAL WRITTEN ORDER PROVIDES THE SEC'S REASONS FOR ITS DECISION

As required, the SEC "issue[d] an order pursuant to RSA 541-A:35 issuing or denying a certificate." Site 202.28. This order, not comments made by individual members during deliberations, contains the SEC's "findings of facts and conclusions of law." RSA 541-A:35. Deliberative comments are neither the SEC's ultimate decision nor do they necessarily reflect the bases for the decision. *See Daniels v. Town of Londonderry*, 157 N.H. 519, 525 (2008) (holding that "objectionable statements" expressed by board members during deliberation expressed "a general concern, rather than a final determination"). Nor are an agency's deliberative comments grounds to impeach a later written order: "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

[12] *See, e.g.*, Appellant's Brief at 7, 42.

to impeach that written opinion.'" *PLMRS Narrowband Corp. v. FCC*, 182 F.3d 995, 1001 (D.C. Cir. 1999) (citations omitted). Just as judges are free to ask pointed questions during oral arguments and express doubt as to parties' arguments, members of the SEC must be free to deliberate openly during their meetings.

The benefits of such a rule are easily discernable. Statements of individual members do not represent the reasoned decision-making of the SEC as a unified whole. Rather, they embody individual attempts to express opinions, persuade others, or clarify a point of potential confusion in the midst of deliberations on complex topics. As a result, these real-time statements may not reflect the most precise or definitive framing of a proposition and, taken out of context, they are easy to cherry-pick and manipulate to contrive "confusion" or "inconsistency" where, in reality, there is none. Applying unnecessary judicial scrutiny to these deliberative comments will result in a chilling effect among SEC members (and potentially other commissions), hampering public deliberation and reasoned, informed decision-making. *See* K. Jack Haugrud, *A Primer on the Compilation and Use of the Administrative Record in Public Land Litigation*, 58 RMMLF-INST 22-1, 22-9 (2012) ("[T]he exclusion of deliberative materials is justified by the need to prevent injuring the agency decision-making process by inhibiting the frank discussion of legal and policy matters."). Indeed, the SEC's deliberations in this matter demonstrate the value of structured, statute- and regulation-driven discussion of project applications. *See, e.g.*, DK tab 1400 at 45:20-46:19 (SEC member stating that discussion of other members' views "ma[de] [him] think about this a lot harder than [he] originally thought" and assisted

him in identifying additional considerations regarding expansion of a right-of-way); *see also* DK tab 1432 at 278-80 ("The Applicant failed to demonstrate by a preponderance of the evidence that proposed expansion of the right-of-way use would not interfere with the orderly development of the region.").

Given these concerns, deliberative comments should be relied upon *only* where no formal written order sufficiently explains the agency's reasoning. This Court's jurisprudence regarding planning board decisions is instructive. Like RSA 541-A:35, the statute governing planning board decisions "anticipates an express written record that sufficiently apprises an applicant of the reasons for disapproval and provides an adequate record of the board's reasoning for review on appeal." *Limited Edition Props. v. Town of Hebron*, 162 N.H. 488, 491 (2011). In the planning board context, "[a] written denial letter combined with the minutes of a planning board meeting can satisfy the statutory requirement." *Motorsports Holdings, LLC v. Town of Tamworth*, 160 N.H. 95, 103 (2010). "[W]hether planning board records adequately informed the applicant as to the grounds for disapproval depends upon the particular facts of each case." *S.S. Baker's Realty Co. v. Town of Winchester*, No. 2013-0337, 2014 WL 11646612, at *2 (N.H. Mar. 19, 2014).

In planning board cases where this Court has looked to deliberative comments, it did so where the written record was inadequate to distill the board's reasoning. *See, e.g.*, *Limited Edition Props.*, 162 N.H. at 491 ("The board did not enumerate the reasons for denying the application in its written notice of decision."); *Motorsports Holdings, LLC*, 160 N.H. at 103, 107 (remanding because the board "did not issue a written decision that

outlined its reasons for denying [the] application," and therefore failed to "provide an adequate record of the board's reasoning sufficient for a reviewing court to render meaningful review"). Most recently, in *Trustees of Dartmouth College*, this Court looked to deliberative comments to determine the planning board's reasoning for denying an application. 2018 WL 5796932, at *5, *9. In that case, the board's written notice simply enumerated three reasons for the denial, almost verbatim from the Hanover Site Plan Regulations. *Id.* at *2-3. However, the other part of the written record – minutes from the planning board meeting – contained statements from board members indicating that their decision was based on personal feelings rather than permissible reasoning, and this Court relied on those statements to overturn the decision. *See* Hanover Planning Bd., Minutes from Meeting on December 13, 2016 at 7:30 PM, https://www.hanovernh.org/sites/hanovernh/files/minutes/12_13_16pb_min.pdf (last visited Mar. 20, 2019); *Trs. of Dartmouth Coll.*, 2018 WL 5796932, at *5, *9.

In contrast, in this case the SEC's Order thoroughly explained its reasoning for denying a certificate, and nothing in the record suggests that the SEC based its decision on factors other than those provided by statute and the SEC's implementing regulations. Because there is a written order enumerating and fully explaining the SEC's reasons for its decision, consideration of individual deliberative statements is inapposite here.

CONCLUSION

The SEC appropriately exercised its discretion and expertise in denying Appellant's application for a certificate of site and facility. The plain language of the governing statute and regulations supports the SEC's

decision, and, moreover, the SEC's expertise and interpretations of the statute and regulations are entitled to deference. For the reasons stated herein, the SEC's decision should be upheld.

ORAL ARGUMENT

Oral argument requested. Ms. Birchard will argue on behalf of NGO Intervenors.

Dated: March 21, 2019

Respectfully submitted,[13]

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[13] The NGO Intervenors would like to acknowledge the contributions to this brief by Gabriel Doble, a second-year student in the Emmett Environmental Law & Policy Clinic at Harvard Law School.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on March 21, 2019, a copy of the foregoing was served upon all parties on the electronic service list by email and by first class mail to parties without email addresses.

CERTIFICATION OF WORD COUNT

I HEREBY CERTIFY that this brief contains 11,836 words, exclusive of the cover page, table of contents, table of authorities, certificate of service, and certification of word count.