THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2018 TERM

FALL SESSION

DOCKET NO. 2018-0468

APPEAL OF NORTHERN PASS TRANSMISSION, LLC ET AL.
(New Hampshire Site Evaluation Committee)

MEMORANDUM OF LAW IN SUPPORT OF THE JOINT MOTION FOR SUMMARY AFFIRMANCE OF THE ORDERS OF THE SITE EVALUATION COMMITTEE DATED MARCH 30, 2018 AND JULY 12, 2018

Pursuant to Rule 25 of this Court's Rules, the Towns of Pembroke, Littleton, New Hampton, Deerfield, Plymouth, Sugar Hill, Easton, Franconia, Northumberland, Bristol, and Whitefield, the City of Concord, the Society for the Protection of New Hampshire Forests, the Conservation Law Foundation, the Appalachian Mountain Club, the New England Power Generators Association, and McKenna's Purchase Unit Owners Association ("Movants") move that this Court summarily affirm the Decision and Order Denying Application for a Certificate of Site and Facility of the Site Evaluation Committee ("SEC")[1] dated March 30, 2018 ("Order") and the SEC's Order dated July 12, 2018 ("Rehearing Order") (collectively, the "Decisions"). The Movants respectfully submit this memorandum of law in support of the Motion.

INTRODUCTION

Contrary to Appellant's assertions, this case does not implicate the entire future of the whole energy sector of New England or even of New Hampshire. Instead, this case is

[1] Pursuant to statute, the SEC acted in this matter by its duly constituted Subcommittee. An SEC subcommittee is authorized to "consider and make decisions on applications, including the issuance of certificates, or to exercise any other authority or perform any other duty of the committee under this chapter …." RSA 162 162-H:4-a, I. Further, "[f]or purposes of statutory interpretation and executing the regulatory functions of this chapter, the subcommittee shall assume the role of and be considered the committee, with all of its associated powers and duties in order to execute the charge given it by the chairperson." *Id*. Throughout this memorandum, the term SEC includes the Subcommittee.

about whether an administrative agency acted lawfully and reasonably in its determination that an applicant for a proposed energy facility failed to meet its burden of proof to demonstrate that the facility would not unduly interfere with the orderly development of the region. In this case, the SEC acted lawfully and reasonably and in no way does this appeal present any substantial question of law. Accordingly, the Decisions should be summarily affirmed, or, alternatively, the Court should decline to accept this discretionary appeal.

This appeal brought by Northern Pass Transmission, LLC and Public Service Company of New Hampshire d/b/a Eversource Energy (collectively, "Applicant") complains about the weight the SEC gave to various facts, the SEC's assessment of the credibility of the Applicant's witnesses, the SEC's assessment of the sufficiency of the evidence, and the fact that the Applicant was not guaranteed an approval. The Applicant does not identify any substantial question of law or how the Decisions were unjust or unreasonable.

The SEC is required to weigh and consider all relevant information even including "*potential* significant impacts and benefits" RSA 162-H:16, IV (emphasis added). The SEC has no authority to approve a proposal when the evidence is not sufficient. In the land use development context, some development projects are approved and some are not. Development approvals, especially at the SEC, are not merely rubber-stamping or box-checking exercises. The statute and the rules are clear. When consistent with the enabling legislation and supported by the record before the SEC, the SEC approves proposals. The Decisions, however, demonstrate that was not the case for the Northern Pass proposal.

The Applicant faces a heavy burden in challenging the decision of a specialized agency such as the SEC which, by legislative policy, is tasked with maintaining "a balance among [the] significant impacts and benefits in decisions about the siting, construction, and operation of energy facilities." RSA 162-H:1. The parties agree the Applicant has the burden to prove by a preponderance of the evidence that the proposed "site and facility *will not* unduly interfere with the orderly development of the region …."

RSA 162-H:16, IV(b) (emphasis added). The Subcommittee had a reasonable and just basis to find that the Applicant failed to provide sufficient evidence to prove by a preponderance that the proposed site and facility would not unduly interfere with the orderly development of the region.

ARGUMENT

I. Standard of Review

This is a discretionary appeal of an administrative decision pursuant to N.H. Supreme Court Rule 10.

Decisions by the SEC are reviewed in accordance with RSA chapter 541. RSA 162-H:11. Pursuant to RSA 541:13, this Court "will not set aside the subcommittee'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 Allen ("Antrim II")*, 186 A.3d 879, 883 (2018) (citing RSA 541:13). The SEC's findings of fact are presumed *prima facie* lawful and reasonable. RSA 541:13. In reviewing the SEC's findings, the Court's "task is not to determine whether [the Court] would have found differently or to reweigh the evidence, but, rather, to determine whether the findings are supported by competent evidence in the record." *Antrim II*, 186 A.3d at 883-84 (citing *Appeal of Malo*, 169 N.H. 661, 668 (2017)). The Court reviews the SEC's rulings on substantial issues of law *de novo*. *Id.*

II. Summary of the Site Evaluation Committee And Its Process in this Case

The SEC's enabling statute is RSA chapter 162-H and the rules implementing it are set forth at N.H. Admin. Rules, Site 100 through 300.[2] As this Court noted recently, in 2013 and 2014, the legislature amended RSA chapter 162-H. *Antrim II*, 186 A.3d at 882. One of those statutory amendments required the SEC to adopt "specific criteria to be applied in determining if the requirements of RSA 162-H:16, IV [(2014)] have been met

[2] For purposes of this memorandum, all textual references to the N.H. Admin. Rules Site are noted as Site followed by the particular section of the rules.

by the applicant for a certificate of site and facility." *Id.* (citing Laws 2013, 134:2; Laws 2014, 217:16). The SEC proceeded to promulgate such rules. *See generally* N.H. Admin. Rules, Site 301.06-301.18. As a result, the SEC process is governed by a comprehensive set of recently revised laws crafted by the legislature and the SEC. Many stakeholders participated at both the legislative and rule-making levels, including, notably, Applicant's representatives in a very prominent role.

RSA chapter 162-H created the SEC as an administrative agency with specialized expertise to evaluate and issue certificates for energy facilities; determine the terms and conditions of certificates; ensure compliance with such certificates; and assist the public in understanding the requirements of obtaining and maintaining certificates. RSA 162-H:4. The chairperson of the SEC routinely establishes subcommittees "to make decisions on applications, including the issuance of certificates." RSA 162-H:4-a, I. A subcommittee must include seven members, including both of the SEC's public members. RSA 162-H:4-a, II. When a duly formed Subcommittee takes an action, that action is legally an action of the SEC. RSA 162-H:4-a, I.

The process for seeking a certificate of site and facility is multi-step and comprehensive. In broad strokes, the process unfolded in this case meaningfully and methodically as follows:

a. Applicant held public information sessions at least 30 days prior to filing the application in each county where the proposed facility would be located on September 2, 2015 in Concord; September 3, 2015 in Deerfield; September 8, 2015 in Lincoln, September 9, 2015 in Whitefield; and September 10, 2015 in Laconia. RSA 162-H:10, I.
b. Applicant filed its application on October 19, 2015. RSA 162-H:7, II.
c. On December 5, 2015, the Subcommittee met to "expeditiously conduct a preliminary review to ascertain if the application contains sufficient information to carry out the purposes of this chapter" and determined that it did. RSA 162-H:7, III.

d. On October 26, 2015, the Subcommittee distributed the application to other state agencies, directing them to notify the Subcommittee in writing prior to November 13, 2015 whether the application satisfies that specific agency's needs. RSA 162-H:7, IV.
e. Within 60 days of the application's filing, on December 18, 2015, the Subcommittee issued an order accepting the application. RSA 162-H:7, VI.
f. Within 45 days of acceptance, the Applicant held public information sessions in each county where the proposed facility would be located on January 11, 2016 in Franklin; January 13, 2016 in Londonderry; January 14, 2016 in Laconia; January 20, 2016 in Whitefield; and January 21, 2016 in Lincoln. RSA 162-H:10, I-a, b.
g. The presiding officer ruled on well over 100 petitions for intervention. Upon requests for rehearing for some of the intervention decisions, the Subcommittee issued its final order on intervention on March 18, 2016. RSA 162-H:4, V.
h. Within 90 days of acceptance, the Subcommittee held a public hearing in each county on March 1, 2016 in Meredith; March 7, 2016 in Colebrook; March 10, 2016 in Concord; March 14, 2016 in Holderness; and March 16, 2016 in Deerfield. RSA 162-H:10, I-c.
i. Parties engaged in extensive discovery and motion practice regarding discovery requests. N.H. Admin. Rules, Site 202.12.
j. The Subcommittee conducted seven days of site visits on March 7, 8, 14, 16, 2016; July 27 and 28, 2017; and October 3, 2017. Site 202.13.
k. The Subcommittee held two additional public hearings on May 19, 2016 in Whitefield; and June 23, 2016 in Plymouth. RSA 162-H:10, II.
l. Three State agencies (Department of Environmental Services ("DES"), Public Utilities Commission ("PUC"), and Department of Transportation ("DOT")) submitted progress reports between May 16, 2016 and May 25, 2016. RSA 162-H:7, VI-b.

m. DES submitted its final decision on March 1, 2017; DOT submitted its final decision on April 3, 2017; and the PUC submitted its final decision on June 16, 2017. RSA 162-H:7, VI-c.

n. The Subcommittee held 70 days of adjudicatory hearings involving over 154 witnesses from April 13, 2017 through December 21, 2017. N.H. Admin. Rules, Site 202.11.

o. The parties submitted over 1,000 pages of post-hearing memoranda by January 19, 2018.

p. The Subcommittee deliberated for three days from January 30, 2018 through February 1, 2018. RSA 162-H, 16.

q. The Subcommittee issued its 287-page written decision and order denying the application on March 30, 2018. RSA 162-H:7, VI-d.

III. The SEC's Factual Findings are Entitled to Deference and Applicant's Questions are Not Substantial

Although the Applicant attempts to frame its various arguments in this appeal as "matters of law" entitled to *de novo* review, in reality the arguments are issues of fact entitled to *prima facie* presumption of lawfulness and reasonableness. Regardless, the Applicant does not identify any substantial questions of law and similarly does not explain how the Decisions were unjust or unreasonable.

A. The Subcommittee is not Bound by Prior Decisions

In its appeal, Applicant argues the Subcommittee did not follow its own precedent resulting in a fatal error requiring this Court to reverse the Subcommittee's decision. *See* Appeal of Northern Pass Transmission LLC and Public Service Company of New Hampshire d/b/a Eversource Energy Pursuant to RSA 541:6 and RSA 162-H:11 From Order of the SEC Dated March 30, 218 and July, 2018 (hereinafter "Notice") at 23-52 (Questions 2, 3d, and 3e). Many of the Applicant's arguments relate to the Subcommittee's findings that several of the Applicant's witnesses did not provide

sufficient and/or reliable evidence. These are issues of fact, not law, and therefore present no substantial question of law, nor does the appeal explain how the Decisions were unjust or unreasonable.

For example, the Applicant complains the Subcommittee should have found the testimony and reports of Dr. James Chalmers, the Applicant's witness for property values, provided sufficient evidence with respect to property values because *a different subcommittee in a different case* found Dr. Chalmers' testimony and reports sufficient. Notice at 74. The Subcommittee's Order in this case amply sets forward lawful and reasonable factual findings with respect to Dr. Chalmers' testimony and reports in *this* matter. Order at 163-98, 283-85.

The Subcommittee discusses in its Order for thirty-one pages the evidence and arguments submitted by the parties with respect to property values. *Id*. at 163-94. Despite the Applicant's argument to the contrary, this section is much more than a mere recitation of facts and arguments. Instead, it represents the Subcommittee's distillation from voluminous testimony, exhibits, and pleadings the relevant arguments pertaining to property values. The Applicant's witnesses withstood record-breaking durations of examination during the hearing, Dr. Chalmers approximately 46 hours, Mr. Nichols approximately 10 hours, and Mr. Varney approximately 30 hours, and in every instance the Subcommittee questioned each witness after the parties completed direct, cross, and redirect examinations. The evidence in this case provides more than a just and reasonable basis for the Subcommittee to independently evaluate Dr. Chalmers' testimony, even though a different subcommittee had found his testimony sufficient for a different case.

The Subcommittee then spent an additional six pages in its Order setting forth its own findings of fact. It made six principal findings. *Id*. at 194-99. These findings include, for example, that "[t]he Chalmers literature review did not support his ultimate conclusions", "Dr. Chalmers' New Hampshire case study analysis did not persuade us that there would be no discernible decrease in property values attributable to this Project," and that "[t]he Subcommittee found many of Dr. Chalmers' conclusions from

the case studies to be unreliable." After each of the six principal findings, the Subcommittee studiously explained its evaluation of the evidence on both sides, and how that evidence supported its conclusion.

The Subcommittee provided the same summary of evidence and factual findings with respect to all other factors within the orderly development standard. Although the Applicant argues that the Subcommittee failed to follow past precedent with respect to Mitch Nichols (tourism witness) and Robert Varney (land use witness), no factual or legal basis supports those arguments. For both of those witnesses, the Subcommittee exhaustively set forth its distillation of the evidence set forth by the parties and then provided its own findings of fact. With respect to Dr. Chalmers, Mr. Varney, and Mr. Nichols, when the Subcommittee was "faced with competing expert witnesses," it was "free to accept or reject an expert's testimony, in whole or in part." *Antrim II*, 186 A.3d at 887 (citing *Appeal of N.H. Elec. Coop*., 170 N.H. 66, 74 (2017) (quotation omitted)). The Subcommittee's factual findings were just and reasonable, and present no substantial question of law.

Even assuming that the Subcommittee's review of the witness testimony in this case presented a question of law, which is disputed, the question is not substantial. Although the Applicant argues at length that the SEC should be bound by past precedent, the Applicant omits RSA 162-H:10, III which states that the Subcommittee "shall consider, as appropriate, prior committee findings and rulings on the same or similar subject matter, *but shall not be bound thereby*." RSA 162-H: 10, III (emphasis added). The plain language of the statute gives each subcommittee the authority to review each application individually, regardless of how a prior subcommittee may have made findings and rulings on the same or similar subject matter. Moreover, the application at issue is not identical to any application that has been reviewed by the SEC. The current application is different in scope and scale from every other application to have come

before the SEC. The details of the proposed facility are different. The Subcommittee did not interpret the law differently but was applying the law to new facts.[3]

These distinctions, paired with the statute providing that that the SEC is not bound by "prior committee findings and rulings" demonstrates that the Applicant's appeal of this issue does not identify any substantial question of law or how the Decisions are unjust or unreasonable.

B. The Subcommittee Deliberated Lawfully and Reasonably

The Applicant makes three points with respect to deliberations. First, the Applicant claims that it was legal error for the Subcommittee to not deliberate on all of the factors enumerated in RSA 162-H:16, IV. Notice at 23 (Question 1). Second, it argues the Subcommittee unlawfully failed to consider mitigating conditions. Notice at 25 (Question 4). Third, the Applicant argues that the Subcommittee engaged in *ad hoc* decision making. Notice at 24 (Question 3). The Applicant attempts to support these arguments by cherry-picking statements from the transcripts of deliberations to support its various assertions. These arguments have no legal basis, and do not provide a valid reason for this appeal to be accepted.[4]

1. The Plain Language of the Statute and Rules Give Subcommittee Discretion to Not Deliberate on All Criteria of RSA 162-H:16, IV

The statute and rules governing the SEC do not prohibit the Subcommittee from terminating deliberations if it determines Applicant has not met its burden. RSA 162-H:16, IV states as follows:

[3] Also, some of the prior SEC matters relied upon by the Applicant were decided before the recent amendments to the statute and rules, and therefore, are not relevant. *See, e.g.*, Notice at 68 n. 39, 69 n. 41.

[4] As a preliminary point, the Applicant's characterization that the Subcommittee rushed through or short-shrifted deliberations on the orderly development standard is not accurate. In fact, the Subcommittee spent the afternoon of the first day of deliberations, all of the second day, and the morning of the third day focused on this standard. It appears that the longest any other recent subcommittee has spent on one single criterion was 4 hours and 10 minutes about aesthetics in the recent *Antrim Wind II* case. In re: SEC Docket No. 2015-02, Application of Antrim Wind Energy, LLC for a Certificate of Site and Facility, Day 1 PM Transcript. In fact, in this case, the Subcommittee's deliberations were painstakingly unhurried.

> After due consideration of all relevant information regarding the potential siting or routes of a proposed energy facility, including potential significant impacts and benefits, the site evaluation committee shall determine if issuance of a certificate will serve the objectives of this chapter. In order to issue a certificate, the committee shall find that:
> (a) 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.
> (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.
> (c) The site and facility will not have an unreasonable adverse effect on aesthetics, historic sites, air and water quality, the natural environment, and public health and safety.
> (d) [Repealed.]
> (e) Issuance of a certificate will serve the public interest.

The language of RSA 162-H:16, IV is clear and unambiguous. The Subcommittee is required to deliberate on all of the criteria in RSA 162-H:16, IV "in order to issue a certificate." The language of the statute does not require the continuation of deliberations on all statutory criteria after a decision is made that a certificate cannot be issued because an Applicant has not sustained its burden of proof with respect to one of the required findings.

2. Plain Language of the Statute and Rules Give Subcommittee Discretion to Not Deliberate on All Potential Conditions

The Applicant argues that the Subcommittee's decision to not deliberate on all proposed conditions was also in error. Notice at 45-48 (Question 4). As explained in the Subcommittee's Rehearing Order, neither RSA chapter 162-H nor the administrative

rules require the "Subcommittee to consider all potential conditions prior to the denial of a certificate." Order on Rehearing at 18. As with the Applicant's arguments that the statute or rules require the Subcommittee to deliberate on all four criteria of RSA 162-H:16, IV, the plain language of the statute and the rules simply contains no such requirement.

RSA 162-H:16, IV requires the Subcommittee to determine if issuance of a certificate will serve the objectives of RSA 162-H after "due consideration of all relevant information." The Subcommittee gave due consideration to all relevant information. RSA 162-H:16, IV does not require the Subcommittee to consider all potential conditions prior to the denial of a certificate.

Similarly, Site 202.28(a) states that "[t]he 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." It does not require the Subcommittee to consider potential conditions prior to denying a Certificate. *In re Appeal of N.H. DOT*, 152 N.H. 565, 571 (2005) (holding that an administrative rule must be read to effect the intent of the statutory provisions that authorize it).

The Applicant nonetheless argues Site 301.17 requires the consideration of all potential mitigation conditions before denying an application. That administrative rule states that the SEC is require to consider whether certain enumerated conditions "*should be included in the certificate* in order to meet the objectives of RSA 162-H." This emphasized language demonstrates that it applies only to decisions in which a certificate is issued. Although Site 301.17(i) states that the SEC should consider "[a]ny other condition necessary to serve the objectives of RSA 162-H or to support findings made pursuant to RSA 162-H:16," this rule cannot be read in isolation. *State v. N.H. Gas & Elec. Co*., 86 N.H. 16, 25 (1932) (discussing the statutory canon of construction of *ejusdem generis* — the last item of a list is restricted by the specific class of items that precede it). As the SEC correctly noted in its order denying rehearing "this provision in Site 301.17 is merely one part of the rule addressing conditions in a to-be-issued

certificate, as opposed to conditions of a certificate that will not be issued." Rehearing Order at 21. It is illogical and contrary to the principles of statutory interpretation to read the rule as requiring the SEC to consider or craft its own mitigating conditions for the purpose of satisfying an applicant's evidentiary burden of proof.

Finally, it is important to note that the Subcommittee did not determine that the proposed site and facility *will* unduly interfere with the orderly development of the region. Rather, the Subcommittee found the Applicant did not provide sufficient evidence to prove by a preponderance of the evidence that the proposed facility would *not* unduly interfere with the orderly development of the region. Without sufficient evidence to determine whether the proposed project would unduly interfere, it was impossible for the Subcommittee meaningfully to have considered conditions of approval. If one lacks evidence to understand an anticipated impact or interference, one cannot approve a condition designed to mitigate that undue interference.

Finally, The SEC employs the same sort of judicial economy that this Court and other decision-makers employ when rendering decisions that address only the most dispositive issues. The Subcommittee was under no legal obligation to consider all proposed conditions when finding the Applicant failed to sustain its burden to satisfy the orderly development standard. Many of the proposed conditions had no bearing on orderly development (for example, the protection of endangered species, wetlands and historic resources). It was entirely reasonable and lawful for the Subcommittee to end deliberations because it would otherwise have to address conditions that would never be used.[5] Again, Applicant's argument, at its core, is based on its incorrect assumption that a certificate of site and facility must be issued.

[5] Even though the Subcommittee was not legally required to consider and make factual findings on conditions proposed by the Applicant or which the Subcommittee itself created to fill in gaps for the Applicant, the Subcommittee did in fact consider conditions. It actually did so quite frequently — while presiding over the 70 days of hearings, during deliberations, and in its Order. The SEC was aware of all of the proposed conditions, and the SEC still determined that the Applicant failed to meet its burden of proof.

3. Comments of Individual Members of the Subcommittee Made During Deliberation are Irrelevant

RSA 541-A:35 requires that the decision of the SEC be supported by findings of material facts and legal conclusions. The statements by individual Subcommittee members during deliberations are not the "findings of material facts and legal conclusions," and therefore are insufficient to overcome the decision. Only the collective written statement of the Subcommittee, *i.e*., an order, amounts to the "findings of material facts and legal conclusions." *See, e.g., Motorsports Holdings, LLC v. Town of Tamworth*, 160 N.H. 95, 102-08 (2010) (rejecting argument that the record should be combed to determine which aspects of a project were deficient, and instead remanding for the board to issue a decision explaining their vote).

Moreover, arguments relying on deliberative comments to overturn an administrative tribunal's decision are routinely rejected in this and other jurisdictions and thus do not present a substantial question of law for the Court to review. *See*, *e.g.*, *Daniels v. Town of Londonderry*, 157 N.H. 519, 523-25 (2008) (holding that objectionable statements made by certain zoning board members during deliberations simply expressed "a general concern, rather than a final determination"); *S.S. Baker's Realty Company, LLC v. Town of Winchester*, 2014 WL 11646612 at *2 (March 19, 2014) (rejecting argument that the opinions of planning board members expressed during deliberations were adequate to overturn decision because "the planning board's written record, coupled with its denial letter, apprised the petitioner of the board's reasons for denial and enabled review on appeal"); *see also PLMRS Narrowband Corp. v. F.C.C.*, 182 F.3d 995, 1001 (D.C. Cir. 1999) (quotation and brackets omitted) ("Rendered at the conclusion of all the agency's processes and deliberations, they represent the agency's final considered judgment upon matters of policy the [legislature] has entrusted to it." *Id.* For these reasons, "where an agency has issued a formal opinion or a written statement of its reasons for acting, transcripts of agency deliberations at . . . meetings should not routinely be used to impeach that written opinion." *Id*.

Perhaps most important, allowing parties to purpose individual comments made during deliberations towards overturning a decision will have a chilling effect and severely stifle public deliberation.

C. The Subcommittee did not Apply the Phrase "Unduly Interfere with the Orderly Development of the Region" in a Vague Manner

The Applicant also argues the Subcommittee incorrectly applied the term "region" during its review of whether there would be undue interference with the orderly development of the region. In making this argument, the Applicant argues that the Subcommittee used "standards and criteria that are vague and moving targets." Notice at 49. That argument lacks any factual or legal basis to support the acceptance of this appeal.

As an initial matter, the Applicant incorrectly attempts to frame the issue of how to define "region" as a question of law. *Id*. at 50. This should be rejected. The statute and administrative rules provide sufficient guidance for the SEC to consider the potential "regional" impacts of a project. RSA 162-H:16, IV(b) requires the SEC to find that 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." The plain language of this statute makes it clear that the review of orderly development on the "region" includes impacts to municipalities as well as larger geographic areas such as the territories of regional planning commissions.

Site 301.09 further directs the SEC to focus on various regions for specific considerations. For example, the SEC is required to consider impacts to *land use* in the region by reviewing the prevailing land uses in each of the "affected communities." N.H. Admin. Rules, Site 301.09(a)(1).[6] The SEC is required to consider various impacts to the

[6] "Affected communities" is a defined term that includes host communities, as well as communities abutting host communities and other communities "expected to be affected." N.H. Admin. Rules, Site 102.07. For this proposed project, the affected communities included the 32 host communities, plus all abutting communities (another 50 or more municipalities in New Hampshire and Vermont), and all other communities expected to be affected (this

economy of the region by reviewing the effects on affected communities, host communities, regional communities and state-wide impacts depending on the economic activity. Id. 301.09(b). The SEC is required to consider impacts to e*mployment* in the region by looking at local jobs expected to be created, as well as by reviewing all jobs created (regardless of the location). *Id*. 301.09(c).

The plain language in the administrative rules is clear; the definition of "region" varies depending on the particular impact and project being reviewed. This Court has stated that it will "interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." *See Appeal of Local Gov't Ctr.*, 165 at 804. It will also "construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result." *Id.* "Moreover, we do not consider words and phrases in isolation, but rather within the context of the statute as a whole." *Id*. "This enables us to better discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme." *Id.*

The plain language of the statute demonstrates that the SEC is required to review the term "region" on both a macro and micro level. The Applicant should have been aware that the SEC has the discretion to apply the term "region" in this manner. For example, in its decision on the Portland Natural Gas Transmission System ("Portland Natural Gas") application to site a 100-mile underground pipeline, the SEC found that, in two short sections, the proposed project would unduly interfere with the orderly development of the region. *Decision*, SEC Docket No. 1996-01 & 1996-03, at 16-18 (7/16/97).[7] First, in the Town of Shelburne, the SEC did not approve the Portland Natural Gas's preferred route on a section of pipeline that would add 5.7 miles of new

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primarily reached municipalities whose biggest impact would be aesthetic, which is an issue the Subcommittee did not reach). This large swath of New Hampshire, comprised of the "affected communities", is the region the Subcommittee considered to varying degrees depending on the different issues, pursuant to the plain language of the statute and the rules.

[7] A copy of this decision is available at *https://www.nhsec.nh.gov/projects/1996/documents/071697_decision.pdf.*

right-of-way on the north side of the Androscoggin River. *Id.* at 13.[8] Second, the SEC did not approve Portland Natural Gas's preferred route on the southern section through the Town of Newton. *Id*. at 18.[9] Nothing in the current law changes the SEC's mandate to consider impacts at both the macro and micro levels.

Importantly, as part of its considerations, the Subcommittee noted that 30 of 32 host municipalities expressed the opinion that the proposed project would unduly interfere with the orderly development of the region, with 22 of those municipalities having intervened and presented evidence and cogent arguments. Order at 276. The "due consideration" that the Subcommittee gave the municipalities is sufficient, alone, to uphold the SEC decision.

In the end, the Applicant's arguments about the Subcommittee's alleged failure to properly apply the phrase "unduly interfere with the orderly development of the region" amount to the Applicant's disagreement with the Subcommittee's factual findings rather than to any questions of law about the meaning of any parts of that phrase. This case presents no substantial question of law with respect to what constitutes the region for any given SEC application or for this application in particular.

D. The Subcommittee did not Create Ad Hoc Requirements

Throughout its critique of the Subcommittee's deliberations, the Applicant references isolated statements made during deliberations and treats them as imposing *ad hoc* legal requirements. The Applicant attempts to portray concerns raised during deliberations as the imposition of new *ad hoc* standards. As set forth below, the acceptance of this appeal based on those arguments is unnecessary.

[8] In particular, the SEC found that the preferred route would impact the aesthetic value of "one of the most pristine panoramic views (over Reflection Pond) located in the North Country," have a large impact on tourism, unreasonably and permanently impact the natural environment, and impact orderly development and land use of the area. *Id*. at 16.

[9] In particular, the SEC found a short section of pipeline failed on a single standard, undue interference with the orderly development of the region, because of the Town's plans to build a library on a single parcel. *Id*. at 17–18.

1. The Subcommittee did not Create Ad Hoc Requirements Regarding Construction

The Applicant incorrectly argues that the Subcommittee "assigned a new burden of proof not present in the rules" regarding construction. Notice at 83. Site 301.15(a) requires the Subcommittee to "consider . . . [t]he extent to which the siting, *construction*, and operation of the proposed facility will affect land use, employment, and the economy of the region" (emphasis added). It should not have surprised Applicant that the Subcommittee considered evidence regarding construction when it deliberated on orderly development. The Subcommittee found the Applicant failed to produce a significant volume of missing or incomplete information concerning construction plans and the likely impact of construction on the region. *See* Order at 113-120.

Mr. Varney's report on the effect on prevailing land uses of the affected communities similarly did not address the impacts of construction, especially in Pittsburg, Stewartstown, and Clarksville. The Subcommittee concluded that the Applicant failed to meet its burden of proof to demonstrate impacts of construction because Mr. Varney did not analyze construction impacts beyond stating that the proposed transmission line would be consistent with prevailing land uses because this area is "sparsely populated." Order at 281-82.

The Subcommittee is required in accordance with Site 301.15(a), to consider the effects of construction on the orderly development of the region. The SEC's determination that the Applicant failed to supply sufficient evidence to establish that the proposed project's construction would not unduly interfere with orderly development was not based on a new burden of proof. This is another attempt by the Applicant to spin its own shortcomings into a legal question, this time, claiming the Subcommittee created a new standard.

2. The Subcommittee did not Create Ad Hoc Requirements for Site 301.09

The Applicant also argues that the Subcommittee unlawfully imposed separate burdens of proof for all of the impacts set forth in Site 301.09. More specifically, the Applicant argues that they were required to provide only an "estimate of the effects" on the orderly development of the region relative to land use, the economy and employment. Notice at 55. The fact that the Subcommittee concluded that the Applicant did not to meet its burden of proof did not constitute a new *ad hoc* requirement. Rather, although the Applicant provided "estimates" of impacts regarding each category, the Subcommittee found the proffered evidence submitted by several of the witnesses to be not credible. *See* Order at 275 (land use); 294 (property values); and 225 (tourism). By finding that the evidence offered by the Applicant on issues relative to land use, property value and tourism was not credible, the Subcommittee was well within its right to make an ultimate determination that the Applicant failed to satisfy its overall burden. The decision was not an ad-hoc or otherwise unjust or unreasonable action.

E. The Subcommittee Considered Purported Benefits of the Proposed Project

The Applicant also argues that the Subcommittee failed to adequately consider purported benefits of the proposed project. However, a review of the Decisions demonstrates that this argument is without basis and that the Subcommittee did, in fact, consider the purported positive benefits of the project with respect to the regional economy, employment, and real estate taxes.[10]

[10] For example, with respect to jobs, the Subcommittee found that "even if jobs were provided to out-of-state employees, New Hampshire's economy would benefit from induced and indirect jobs as a result of construction activities . . . . it appears that more jobs would be created as compared to the jobs that would be lost." Order at 127. The Subcommittee then concluded "the Project is likely to create a significant number of jobs during construction." *Id*. at 128. With respect to energy savings, the Subcommittee found that "[t]estimony and evidence presented indicate that there would be some savings from the energy market associated with construction and operation of the Project …" *Id*. at 160. The Subcommittee concluded "[w]e agree that the Project would have a small, but, positive impact on the economy although a much less significant impact than that predicted by the Applicant." *Id*. at 161. With respect to property taxes, the Subcommittee found that "the Project, if constructed as proposed, would likely have a positive effect because of the substantial real estate taxes it would pay to the affected communities." *Id*. at 162.

Given these findings, the Applicant's claim that the Subcommittee did not consider benefits also presents no substantial question of law.

CONCLUSION

This appeal amounts to nothing more than the unfounded complaints of an applicant displeased that its strategy miscalculated the evidence sufficient to prove that the project will not unduly interfere with the orderly development of the region.

This Court has recently had occasion to opine about the deference to be accorded the SEC with respect to the SEC's weighing of the evidence. "The 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." *Antrim II*, 186 A.3d at 887 (citing RSA 162-H:16, IV).

The Subcommittee's findings are supported by competent evidence in the record and the Applicant presents no substantial question of law because most questions raised in the appeal are actually questions of fact. Furthermore, where a legal question is raised, the appeal is meritless because the plain and unambiguous nature of the applicable law provides no support for the Applicant's assertions.