STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

SEC DOCKET NO. 2015-06

JOINT APPLICATION OF NORTHERN PASS TRANSMISSION LLC &
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
D/B/A EVERSOURCE ENERGY
FOR A CERTIFICATE OF SITE AND FACILITY

MOTION FOR REHEARING OF
DECISION AND ORDER DENYING APPLICATION

Northern Pass Transmission LLC ("NPT") and Public Service Company of New Hampshire d/b/a Eversource Energy ("PSNH") (collectively the "Applicants"), file this Motion for Rehearing pursuant to RSA 541:3. The Applicants seek a rehearing of the Decision and Order Denying Application for Certificate of Site and Facility dated March 30, 2018 (the "Order") of a subcommittee of the Site Evaluation Committee (the "Subcommittee" and the "SEC"). This Motion incorporates by reference the Applicants' February 28, 2018 Motion for Rehearing and Request to Vacate Decision ("February 28th Motion") with respect to the Subcommittee's February 1, 2018 oral decision (the "February 1st Decision").

I. Introduction

The Applicants recognize and appreciate the significant time and effort the members of the Subcommittee devoted over the past two years to reviewing the largest project ever to come before the SEC. Assimilating all the relevant information in this enormous record is a substantial challenge. One purpose of this motion is to sharpen the focus on how certain mitigation elements, based on evidence already in the record, would materially address concerns the Subcommittee expressed during deliberations regarding the Project's potential impacts on tourism, property values and land use, as well as other issues that may arise pertaining to the other siting criteria. Following the Subcommittee's vote to stop deliberations and deny the

Certificate on February 1, 2018, the Applicants accepted all of Counsel for the Public's ("CFP") proposed conditions with some modifications agreed upon by CFP. *See Motion for Rehearing and Request to Vacate Decision of February 1, 2018 and to Resume Incomplete Deliberations*, Docket No. 2015-06, Attachment A (February 28, 2018) (Attachments A, B and C are again to this Motion). In addition, the Applicants accepted conditions imposed by state agencies such as the Department of Environmental Services, the Department of Transportation, the Public Utilities Commission and the Division of Historic Resources. Finally, the Applicants provided examples of additional conditions the Subcommittee could impose, based on the existing record, to address the specific concerns that were raised during deliberations, as well as other potential concerns that could be raised during deliberations on the remaining statutory criteria. For example, CFP proposed a set of conditions in his post-hearing brief. *See Motion for Rehearing and Request to Vacate Decision of February 1, 2018 and to Resume Incomplete Deliberations*, Docket No. 2015-06, Attachment B (February 28, 2018).[1]

Specifically, several sample conditions would directly earmark funding from the $200 million Forward New Hampshire Fund ("Forward NH Fund") to address issues such as tourism, and would include direction as to how funds would be administered and distributed to ensure transparency and accountability. Other examples include an expansion of the Applicants' Property Value Guarantee ("PVG") and the retention of an independent third-party to administer the PVG, as well as any claims associated with property damage or business interruption that may arise during or after construction. The Applicants have also illustrated how the Subcommittee could rely on the existing record to impose a condition requiring an alternative

[1] CFP has not taken any position with respect to the additional conditions identified by the Applicants in Attachment B. Furthermore, to be clear, the Applicants are not seeking to reopen the record but are including these conditions as examples of what the Subcommittee could do, and could have done, based on what is already in the record and the powers it has under the statute and regulations.

construction method in places like Plymouth and Franconia that would substantially reduce business impacts in those locations.[2]

It was noted several times during deliberations that the Subcommittee (correctly) believed the Applicants would be receptive to expanding proposed mitigation measures. In fact, the Subcommittee can, consistent with prior SEC cases, use its statutory authority to craft conditions that would mitigate impacts of concern. RSA 162-H:2, II-a and H:16, I, VI and VII. The Forward NH Fund, with its explicit focus on tourism, economic development, community betterment, and clean energy innovation was designed specifically for that purpose.

The Applicants, as part of their case—and as part of the evidence offered to meet their burden of proof—specifically contemplated conditions, including mitigation measures, that address elements of the "undue interference" finding (e.g. property values and tourism). For example, the Applicants proposed the PVG and indicated their expectation that the program could be expanded as deemed appropriate by the SEC.[3] Similar mechanisms were also proposed as part of the evidence the Applicants offered to address business impacts and interruption, as well as property damage.

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[2] In addition, Attachment C is a composite, arranged according to the required statutory findings pursuant to RSA 162-H:16, IV, which includes the conditions agreed to by the Applicants and CFP, the conditions proposed by the Applicants in their brief, conditions proposed by certain interveners that were accepted by the Applicants in their brief, and additional conditions that the Subcommittee could impose based on the record.

[3] Early in the hearings, Chairman Honigberg asked Mr. Quinlan about the PVG and other commitments and conditions. Specifically, Chairman Honigberg asked:

> Q. To the extent that, as it currently exists, like the work-in-progress Guarantee Program, that may need some refinement before it can be rolled out and implemented. Would you agree?
> A. Yes, if you're referring to the property value.
> Q. That's the one.
> A. Again, right now it's a concept. I think we have the framework of a program, to the earlier question, that probably could use some further development before it's ready for execution, if you will.
> Q. And since we're not going to be done here tomorrow, there's time even through these proceedings and then through deliberations to work through how that might get improved or how other commitments might be refined and make their way into conditions. Would you agree with that?
> A. Yes. Tr. Day 2/Afternoon, p. 85.

The Applicants understand that the Subcommittee may have eventually found that any or all such proposals required modification, but the Subcommittee should thoroughly consider the beneficial effects of conditions when ultimately making its finding. As discussed below, the Subcommittee has the authority to tailor conditions that expanded upon, revised, or otherwise improved those proposals, based on the existing record, in a manner that addressed concerns raised by members of the Subcommittee during deliberations. In an effort to illustrate this opportunity, Attachment B sets forth a comprehensive set of conditions that the Subcommittee could consider to resolve specific concerns identified during deliberations as contributing to the finding regarding undue interference with the orderly development of the region, or that may arise during deliberation of other statutory criteria. Finally, Attachment C provides the framework for a solution, linking the conditions identified in Attachments A and B to the statutory criteria the Subcommittee must consider in rendering a decision.

II. Standard of Review and Summary of Argument

1. The purpose of rehearing "is to direct attention to matters that have been overlooked or mistakenly conceived in the original decision." *Dumais v. State*, 118 N.H. 309, 311 (1978) (internal quotations omitted). A motion for rehearing must (1) identify each error of fact, error of reasoning, or error of law which the moving party wishes to have reconsidered, (2) describe how each error causes the committee's order or decision to be unlawful, unjust or unreasonable, and (3) state concisely the factual findings, reasoning or legal conclusion proposed by the moving party. Site 202.29 (d). A rehearing may be granted when the Committee finds "good reason" or "good cause" has been demonstrated. *See O'Loughlin v. NH Pers. Comm.*, 117 N.H. 999, 1004 (1977); *Appeal of Gas Service, Inc.*, 121 N.H. 797, 801 (1981).

2. The Order is unlawful, unjust and unreasonable for several reasons, as described in detail in this Motion. First, as discussed above, the Subcommittee failed to assess

conditions proposed by the Applicants. The proposed conditions were an integral element of the evidence the Applicants presented to meet their burden of proof, and could be imposed to alleviate or mitigate the Subcommittee's concerns about potential interference with the orderly development of the region ("ODR"). Second, the Subcommittee failed to provide any definition for the vague "undue interference with the orderly development of the region," standard in Site 301.15 and failed to explain how its discussion regarding the elements of Site 301.09 (both in oral deliberations and the Order) were used to draw the legal conclusion regarding the Applicants' burden of proof. It compounded that failure by misapplying the standard in Site 301.15, and it failed to provide any factual findings for its conclusion of law that the Applicants' burden had not been met. Third, the Order relies on several elements in Site 301.09 to deny the Certificate namely, land use, the views of municipal bodies, property values, tourism and construction related issues. In so doing, the Subcommittee fails to explain how the Applicants' evidence on these elements failed to prove the negative that there would not be "undue interference" with ODR. Further, the Order ignores past SEC precedent, misapplies the SEC's rules or simply creates new standards, misconstrues the evidence offered by the Applicants, and fails to consider other evidence in the record establishing the effect of the Project. As a result of these errors, the Subcommittee should reconsider and vacate the Order, complete deliberations on all of the criteria in RSA 162-H: 16, IV (2017) and grant the Certificate.

III. Summary of Deliberations and Written Order

A. Deliberations

3. The first of twelve scheduled days of deliberations began on January 30, 2018. On the morning of Day One, the Subcommittee addressed the first finding under RSA 162-H:16, IV, namely, whether the Applicants have the financial, technical and managerial capability to assure construction of the Project in continuing compliance with the terms and conditions of a Certificate. The Subcommittee did not vote on the required finding but instead, the Chairman summarized what he understood to be a consensus among the members that the Applicants appeared to have demonstrated the required financial, technical and managerial capabilities, subject to working out the details of certain conditions applicable to this finding.

4. On the afternoon of Day One, and continuing through the morning of January 31, 2018, (Day Two), the Subcommittee turned to a discussion of the second finding under RSA 162-H:16, IV, namely, the orderly development finding. During this discussion, the Subcommittee reviewed various elements that the Applicants were required to include in their Application such as the effect of the Project on land use and on aspects of the economy (for example, property values and tourism). At several points during those initial deliberations, members of the Subcommittee discussed the possible consideration or imposition of conditions relating to the criteria underlying the ODR finding, but never actually deliberated on such conditions. *See e.g.* Deliberations Day 1/Afternoon, p. 43, lines 7-8; Deliberations Day 1/Afternoon, p. 104, line 21 - p. 106, line 17; Deliberations Day 2/Afternoon, p. 6, lines 15-18; Deliberations Day 2/Afternoon, p. 33, line 9 - p. 34, line 1.

5. On the morning of February 1st (Day Three) the Chairman sought to get a "sense of the Subcommittee" on the issue of whether the Applicants had met their burden to show that there would be no undue interference with ODR. Deliberations Day 3/Morning, p. 5-

6. Each individual member discussed his or her thinking on the elements included in Site 301.09 and indicated that for some of those elements, the Applicants had shown a positive impact, while on others the Applicants had failed to show that there would be no impact. Following that discussion, Chairman Honigberg stated as follows:

> And I'll note in closing on this topic that this is not a vote.....We're going to continue the discussion of all of the rest of the Application and the other elements. And until a vote is taken, everything is open for discussion. But that's where we are right now.

Deliberations Day 3/Morning, p. 32, line 21 - p. 33, line 5.

6. The Chairman's statement recognized a simple point, and one compelled by common sense, as well as by the statute: until all relevant information in the record is considered, all criteria in the rules are applied, and all findings are considered (including mitigating conditions), Subcommittee members lack the information and analyses needed to make a fully reasoned decision.

7. At the opening of the afternoon session, Commissioner Bailey made a motion to end deliberations on all issues based on the morning's discussions of the ODR finding. Deliberations Day 3/Afternoon, p. 3. Although recognizing that "[b]y statute, we have to make findings, we have to make four findings in order to grant the Certificate," she stated her belief that the Subcommittee could not grant the Certificate based on the views expressed regarding the orderly development finding and thus "it may be better for us just to stop now." Deliberations Day 3/Afternoon, p. 4, lines 5-23.

8. The Subcommittee voted to end deliberations by a 5-2 vote. Deliberations Day 3/Afternoon, p. 23, line 23 - p. 24, line 4. Both lawyers on the Subcommittee, Chairman Honigberg and Ms. Weathersby, voted to continue the deliberations in order to consider all of the required factors needed to decide whether to grant or deny the Certificate, while the other

Subcommittee members appeared not to credit this critical legal issue. Ms. Weathersby stated "I think it's worth considering all the different arguments on all of the different factors. I think the Committee can do a good and thorough job … I don't know … if expediency is at all a rationale for stopping now … I think there is some risk in not addressing them that we should consider." Deliberations Day 3/Afternoon p. 7, lines 9-22.

9. The decision to end deliberations after just two and one-half days, and without making all the findings, was not without controversy. Ms. Dandeneau expressed "concern about doing diligence to the rest of the information we've had presented over the course of 70 days of hearings." Deliberations Day 3/Afternoon, p. 5, lines 16-19. Ms. Weathersby stated that "the lawyer in me says we should be sure to dot all our i's and cross all our t's" and that "I think it's worth considering all of the different arguments on all of the different factors." Deliberations Day 3/Afternoon, p. 6, line 21 - p. 7, line 8. Although expressing her view that the Application might ultimately be denied, Ms. Weathersby indicated that "my preference would be to deny it after a full analysis of all the issues." Deliberations Day 3/Afternoon, p. 18, lines 14-17.

10. Despite these differences, Commissioner Bailey pointed to "some risks in continuing the deliberations,"[4] most particularly, the following:

> But, as an engineer, I look at things from a more practical matter than from a legal matter. And I'm worried that if we continue with our deliberations, we will really need to figure out what conditions we would impose on a lot of things. And that's not—that's not going to be simple and it's not going to be fast. And there's going to be a lot more things to appeal. And I think we have a pretty good record right now.

Deliberations Day 3/Afternoon, p. 8, lines 10-19.

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[4] Deliberations Day 4/Afternoon, p. 4, line 15.

11. The Subcommittee then spent almost half of the remaining discussion regarding the termination of deliberations considering how that decision might affect an appeal to the Supreme Court and the timing of such an appeal. Deliberations Day 3/Afternoon, p. 9-13.

12. It then voted to deny the Certificate. However, the Subcommittee never voted on the reasons for that denial, and never identified any findings of fact supporting its conclusion of law that the Applicants had failed to meet their burden of proof.

B. Written Order

13. The Subcommittee's Order addresses the same general ODR issues as the oral deliberations. Although the Order devotes hundreds of pages to summarizing the positions of the parties concerning the various application requirements of Site 301.09, it ultimately concludes, in a very few pages, that the Applicants failed to meet their burden of proof with respect to five elements, namely land use, the consideration of the views of municipal and regional planning commissions and municipal governing bodies, the effect of the Project on tourism and real estate values and issues relating to construction. *Order* at 283-85. The Order recognizes that, for some of the elements in Site 301.09, there were "positive impacts" but for other elements it posits "potential harms." *Id.* at 6.

14. At the end of the discussion of each element, the Order concludes that the Applicants did not meet their burden of proof with respect to that element, yet the Subcommittee does not explain *why* it believed the Applicants had any burden with respect to the individual elements in Site 301.09. Just like the oral deliberations, the Order never explains *how* the Subcommittee's decision on that element was used to conclude that the Applicants had not met their overall burden to demonstrate no undue interference with ODR. Just like the oral deliberations, in the discussions concerning the elements of Site 301.09, the Order applies standards that appear nowhere in the SEC rules. And just like the oral deliberations, the Order

contains no findings of fact explaining *why* the discussion of the elements in Site 301.09 amounted to a conclusion that the burden had not been met, *how* specifically the Project would interfere with ODR, and *why* any interference would be "undue."

15. The failure of the Order to explain its reasoning or to make findings of fact renders it invalid. Moreover, because the Order is replete with errors of fact, reasoning, and law, fails to consider all relevant information, including conditions, and misapplies the burden of proof to the required finding, it is unlawful, unjust and unreasonable.

IV. The Subcommittee Failed to Deliberate on the Four Statutory Criteria

16. In the Applicants' February 28th Motion, the Applicants raised arguments about the failure of the Subcommittee to deliberate on all four statutory requirements. *See Motion for Rehearing and Request to Vacate Decision of February 1, 2018 and to Resume Incomplete Deliberations*, Docket No. 2015-06, Section III, C (February 28, 2018). The Subcommittee did not address this issue in the Order. Rather than repeat their arguments on that point in the body of this motion, the Applicants hereby raise the argument again concerning the Subcommittee's failure to deliberate and incorporate into this Motion by reference the earlier arguments on this issue.

V. The Subcommittee Failed to Consider Conditions That Might Have Resulted in a Different Finding on Undue Interference

17. RSA 162-H:16, IV requires the Subcommittee to give due consideration to all relevant information, and Site 202.28 (a) and Site 301.17 require the Subcommittee to consider whether the imposition of conditions could have addressed issues with ODR.

18. This is not a hypothetical exercise. In the past thirty years, the SEC has issued at least thirteen certificates. In doing so, the SEC has imposed over 300 conditions. In fact, over time, the trend has been for the SEC to increase the number of these conditions. Often,

these conditions were imposed specifically to ensure that there was not "undue interference" or an "unreasonable adverse impact." Indeed, previous certificates address the issue of "undue interference" by stating as follows:

> WHEREAS, the Subcommittee finds that, subject to the conditions herein, the Project 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.[5]

19. In fact, one reason given to end deliberations was that the Subcommittee would need to address conditions. Deliberations Day 3/Afternoon, p. 8, lines 12-18. This point—standing alone—is a sufficient and compelling reason to grant rehearing. It is readily apparent that the imposition of conditions, as discussed below, might have resolved particular concerns.[6] In turn, and most critically, such a discussion may have caused members to change their minds: if conditions on a specific criterion satisfied the concerns of a member on that criterion, it may have altered that member's overall conclusion about ODR.

20. Likewise, the consideration or imposition of conditions might have satisfied some of the Subcommittee members' concerns about whether the Applicants had satisfied their burden of proof. As the Chairman so aptly stated: "And until a vote is taken, everything is open for discussion." Deliberations Day 3/Morning, p. 33, line 3. But by discontinuing deliberations and not considering conditions, "everything" was not "open for discussion" (including some very workable and effective conditions).

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[5] *See Decision and Order Granting Application for Certificate of Site and Facility With Conditions*, Docket No. 2015-05, p. 2 (October 4, 2016); *see also Decision and Order Granting Certificate of Site and Facility With Conditions*, Docket No. 2015-02, p. 2 (March 17, 2017); *Decision Granting Certificate of Site and Facility With Conditions*, Docket No. 2014-02, p. 2 (August 29, 2014).

[6] See, for example, footnotes 9, 16, and 18, where Members Weathersby, Way and Wright, respectively, pointed to potential conditions.

21. The mitigation measures and proposed conditions the Applicants included in their evidentiary presentation to address various impacts are not appendages to the record that are assessed separately from the burden of proof analysis. Rather, they are integral elements of the evidence the Applicants relied upon to meet that burden. For example, one component of the Subcommittee's overall review of ODR pertains to property value impacts. The Applicants' evidence consisted of a detailed empirical study of potential property value effects, coupled with explicit evidence as to how they proposed to mitigate impacts through the PVG, as well as a clear willingness to expand that guarantee as necessary.[7]

22. While the SEC process is an adversarial one, it is also a permit proceeding. Essential to any permit proceeding is the consideration and imposition of permit conditions to address impacts that might otherwise be unacceptable. It is difficult to think of any permit the State of New Hampshire issues that does not contain conditions. *See, e.g.* DES Final Decision, App. Ex. 75. Conditions limiting and regulating activities to avoid unacceptable effects are essential elements of all permits. SEC permits are no different.

23. In the permitting context, it is not logical or common practice to assess the impacts a project may have, but divorce from that assessment the mitigation measures/conditions the permit applicant has offered to address those impacts. It also explicitly violates RSA 162-H:16, IV which requires the Subcommittee to make the required statutory findings "[a]fter due consideration of *all relevant information* regarding the potential siting or routes of a proposed energy facility, including potential significant impacts and benefits." RSA 162-H:16, IV

[7] As described later herein (see e.g., section VII, B), the totality of the evidence also included opposition testimony framing the bounds of the potential impacts (e.g., tourism effects) as well as a recognition that such impacts could be addressed through the Applicants' proposed Forward NH Fund.

(emphasis added). The relevance of available conditions in this and all other permitting processes is readily apparent.

A. Property Values

24. One component of the economy criterion of the ODR finding, about which members of the Subcommittee expressed concerns in their deliberations, was the potential negative effect on property values. It therefore stands to reason that imposition of an expanded PVG might have addressed that concern.

25. By failing to consider the PVG, the Subcommittee failed to give due consideration to all relevant information. RSA 162-H:16, IV. In his Supplemental Testimony, Mr. Quinlan described the PVG, which is "designed to ensure that that owners of those properties identified as most likely to see property value impacts do not incur an economic loss in the event of a sale within 5 years after construction begins." *William Quinlan Supplemental Pre-Filed Testimony*, App. Ex. 6, p. 9.

26. Even CFP's economics witness, Mr. Kavet, believed this issue could be addressed: he testified that the Forward NH Fund "would be more than adequate to compensate affected parties" regarding property value effects. Tr. Day 45/Afternoon, p. 67. He also noted at that time that the Forward NH Fund was "a substantial amount of money that could be directed in different ways." Tr. Day 45/Afternoon, p. 67.

27. Chairman Honigberg also observed with respect to the PVG: "That was criticized as inadequate by a number of people. But I think it's fair to say that that proposal is a proposal and the Company would be open to revisions or expansions if the Subcommittee felt it was important to do so." Deliberations Day 2/Morning, p. 110. For example, if the Subcommittee wished to expand the PVG to cover more homeowners, including those adjacent

to ancillary facilities, it could have done so.[8] Had the Subcommittee imposed such a condition, it would have eliminated the property value issue as a concern as part of its deliberation on ODR.

28. During the deliberations, Ms. Weathersby proposed discussing the Applicants' PVG,[9] but Chairman Honigberg moved on to a discussion of taxes, and the Subcommittee never returned to it. At another point in the deliberations, Mr. Way questioned whether the Committee could request that the McKenna's Purchase condominium complex be included in the PVG. Deliberations Day 2/Morning, p. 112. Likewise, the Committee did not return to that point, nor discuss it as a potential condition. Despite the fact that the Subcommittee failed to deliberate on the proposed PVG, the Subcommittee concluded in the Order that the "evidence presented by the Applicants is inadequate for the Subcommittee to determine which properties should actually be included in the program and the extent of the remuneration that should be available." *Order* at 198-99.

29. This is not a proper basis for the Subcommittee's failure to consider proposed conditions (such as the PVG), that could mitigate some or all of the likely property value impacts. Even if the Subcommittee were not willing to accept Dr. Chalmers' estimate of the likely property value impacts, the totality of the evidence from the Applicants and other parties established clear boundaries that could be applied as a condition to address the perceived impacts. RSA 162-H:16, IV requires that the Subcommittee give due consideration to all such relevant information.

30. Based on all the relevant information regarding the likely property value impacts, the Subcommittee had sufficient evidence to impose a PVG condition that would serve

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[8] *See Motion for Rehearing and Request to Vacate Decision of February 1, 2018 and to Resume Incomplete Deliberations*, Docket No. 2015-06, Attachment B (February 28, 2018).

[9] "I think another point that we probably should discuss was the property value guarantee, the price guarantee that was offered by Northern Pass. Is this a good time to do that?" Deliberations Day 2/Afternoon p. 6, lines 15-18.

to mitigate impacts caused by the Project. If the Subcommittee determined that the proposed PVG was insufficient in some respect, it could have and should have expanded it to cover more homeowners, including for example those adjacent to ancillary facilities.[10]

B. Tourism

31. Potential tourism impacts were also a concern to members of the Subcommittee. For example, Mr. Way observed "I don't think this is going to have the impact they say or that some would say, but it is going to have an impact for some. I just don't know exactly where." Deliberations Day 2/Afternoon p. 87. Other members generally concurred (Deliberations Day 2/Afternoon pp. 88-93), although Mr. Oldenburg stated a different position: "I don't think the construction will unduly interfere with the orderly development of the region. So, all in all, I would – I'd say there's certain points that they definitely missed. But the point I discussed most was construction, and I don't see that as a negative." Deliberations Day 3/Morning, p. 20. The Subcommittee, however, never discussed conditions regarding this topic, despite the Chairman observing:

> But I think if planned properly and with the kind of outreach that you were talking about earlier, Mr. Way, construction disruption can be dealt with. Construction is unpleasant to have near you, around you, in front of you but can be dealt with if it's planned and organized. I just don't see from Mr. Nichols or any other source from the Applicant any analysis of what might happen. On the other side, the opposition who don't have the burden of proof, it was opinions, speculation about what would happen.

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[10] Applicants submitted a sample proposed expansion of the PVG for the Subcommittee's consideration based on the existing record. *See Motion for Rehearing and Request to Vacate Decision of February 1, 2018 and to Resume Incomplete Deliberations*, Docket No. 2015-06, Attachment B (February 28, 2018). As revised, the PVG goes well beyond the category of properties identified through the work of Dr. Chalmers, and would cover all homes located within 200 feet of the edge of the Project right-of-way. The Applicants firmly believe Dr. Chalmers' conclusion that the Project will only have a limited impact, but nonetheless provide this example of how the PVG could be expanded.

Deliberations Day 2/Afternoon, p. 92.[11] As discussed below, this is an area that could easily have been resolved by conditions.[12]

32. Based on its consideration of the Applicants' testimony and evidence only, the Subcommittee concluded that the Applicants had not met their burden of proof and that "[a]t best, we are no better off than we were before the evidentiary hearing. The Project may have a negative impact on tourism or it may not." *Order* at 227. Finally, the Subcommittee opined that "[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 on tourism." *Id.*

33. The Subcommittee's analysis, however, violated RSA 162-H:16, IV by not giving due consideration to all relevant information in the record.[13] Furthermore, it relied on information that was not supported by evidence or facts, and limited the scope of its review in a way that excluded consideration of relevant evidence supplied by CFP's expert Kavet, Rockler and Associates ("KRA") which set forth an estimate of the impacts on tourism. Finally, had the Subcommittee considered all the relevant information in the record it would have had a sufficient basis on which to fashion conditions. It could have made a reasoned determination based on

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[11] *But see*, Site 202.19 (a) which provides that any party "asserting a proposition shall bear the burden of proving the proposition by a preponderance of the evidence." Thus, opponents do have a burden of proof and their assertions, comments and views should be considered and weighed with that burden in mind.

[12] As explained in the February 28th Motion, dedication of $25 million of the Forward NH Fund to promoting tourism and recreation in the region could have mitigated any concern with respect to orderly development. *Motion for Rehearing and Request to Vacate Decision of February 1, 2018 and to Resume Incomplete Deliberations*, Docket No. 2015-06, p. 11, n. 18 (February 28, 2018).

[13] In addition to failing to meaningfully consider the testimony and report submitted by the Applicants, the Subcommittee also failed to give meaningful consideration to the testimony offered by other individuals relating to tourism. Specifically, while the Subcommittee in a cursory fashion summarized the testimony offered by Les Otten, Deliberations Day 2/Afternoon, p. 75, the Subcommittee did not give consideration to the testimony offered by Mr. Otten when making its findings of fact. Mr. Otten, who has years of experience in the tourism industry, testified that "as a business person, I made a decision that I don't believe that either the wind towers or the Northern Pass Transmission Line will negatively affect my ability to do tourism and be in the tourism business and the real estate business at this location." Tr. Day 44/Morning, p. 19.

expert testimony and imposed a condition that would have mitigated or abrogated negative impacts on tourism. *See Order* at 227. As a consequence, it could also have found that that the Project would not unduly interfere with the orderly development of the region.

34. Specifically, KRA filed a report titled "Economic Impact Analysis and Review of the Proposed Northern Pass Transmission Project" (*Pre-Filed Testimony of Thomas E. Kavet*, CFP Ex. 146) and associated pre-filed and supplemental pre-filed testimony. While the Subcommittee provided a summary of KRA's report and testimony, the Subcommittee did not otherwise consider or make findings with respect to KRA's testimony.

35. As the Applicants argued in their Post-Hearing Memorandum, KRA conceded that "it is difficult to quantify potential negative tourism impacts from the Project." *Pre-Filed Testimony of Dr. Nicolas O. Rockler*, CFP Ex. 147, p. 8. However, KRA constructed a range of theoretical impacts derived from estimates of current direct tourism spending in the region and the assumed degree to which the transmission line visibility may affect the region. *Id.* KRA went on to conclude that the Project could result in a loss of direct tourism spending of approximately $10 million per year and a loss of GSP of over $13 million. *Id.* Although the Applicants believe that KRA's methodology and calculation overstate the magnitude of potential impact, KRA's ultimate conclusion with respect to the overall relatively small impact on the region could have been considered by the Subcommittee for purposes of imposing conditions.

36. Specifically, KRA testified that the potential impact to tourism within the affected areas in New Hampshire is a "teeny tiny percentage." Tr. Day 45/Afternoon, p. 17. Mr. Kavet testified to a potential impact of "15 hundredths of one percent. 000.15 percent change in

tourism activity in the affected areas."[14] Tr. Day 45/Afternoon, pp. 17-18. He opined "[s]o you won't see it, when you see the state of New Hampshire tourism hit a new record high … It will keep going up. It's not going to be something, you know, where you're getting some decline in tourism. It's a small part of it. *It's a small change*." Tr. Day 45/Afternoon, p. 18 (emphasis added.).

37. Fundamentally, KRA found that tourism will continue to grow in New Hampshire regardless of whether NPT is built, but that NPT may decrease this growth by a very small amount. Tr. Day 45/Afternoon, pp. 13, 15-16.

38. Yet the Subcommittee limited its consideration of the evidence to disagreeing with Mr. Nichols and ignored evidence provided by Mr. Kavet on behalf of CFP.[15] Moreover, the Subcommittee's analysis failed to consider the Applicants' proposed $200 million Forward NH Fund, which expressly focuses on tourism and economic development and which has a value that far exceeds the "teeny tiny" impact calculated by KRA.[16] Had the Subcommittee considered all of this evidence, it could have imposed a condition that would have mitigated impacts on tourism and found that that the Project would not unduly interfere with ODR. The Subcommittee's failure to deliberate on KRA's testimony and report, and the Forward NH Fund, however, deprived the Subcommittee of this opportunity and violated the statutory charge in RSA 162-H:16, IV requiring the Subcommittee to give due consideration of all relevant information in the record.

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[14] Notably, the Department of Energy also examined potential tourism impacts in its Final Environmental Impact Statement and found them to be "not quantifiable." FEIS, App. Ex. 205, p. S-24.

[15] While the Applicants believe Mr. Nichols' testimony is the more reliable prediction of the potential impact of the Project on tourism in the region, the Applicants also believe that it is the Subcommittee's obligation to consider the totlality of the evidence on the issue, including the KRA prediction.

[16] Similar to Ms. Weathersby's statement on property values, Mr. Way said that the Forward NH Fund was one thing the Subcommittee might want to talk about, but did not return to. Deliberations Day 2/Afternoon, p. 32.

C. Business and Employment Effects

39. Certain Subcommittee members expressed concern about the impacts of construction on business, including potential employment impacts and business disruption. This is another area where the concerns of Subcommittee members could be addressed through conditions. *Order* at 119.

40. As for the impacts of construction on businesses, the record shows that CFP's economics witness, Mr. Kavet, also believed this issue to be manageable. He testified, in response to questioning by Mr. Way, that the business claims process and the Forward NH Fund would be more than adequate to compensate for any business losses. Tr. Day 45/Afternoon, pp. 65-67. Likewise, Chairman Honigberg appeared to believe conditions could address this issue: "I would be willing to bet that if we granted a Certificate and put in a condition or insisted on an improved and beefed-up claims process for business losses that would be a fairly easy thing to develop." Deliberations Day 2/Afternoon, p. 51. Moreover, during deliberations, Mr. Way appeared to express interest in discussing how the Forward NH Fund and the North Country Jobs Creation Fund might affect this issue.[17]

41. The Applicants recognized that there might be business impacts and specifically proposed measures such as the business loss policy and claims process to address those concerns. At least some Subcommittee members seemed to recognize that such proposals

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[17] "One thing we might want to talk about, too, is the Forward NH Fund and the Jobs Creation Fund, although in my mind whatever we come up with…they're separate entities. They're separate business structures. And so we really don't have a lot of, there's limited amount of jurisdiction we have to impact how they do their business …So I don't know during this process if we have the ability to offer nonbinding suggestions … or recommendation that we could make we could include them in the certificate?" Mr. Iacopino responded yes, they could. Deliberations Day 2/Afternoon, pp. 32-34.

would be effective, or at least be a good starting point.[18] To the extent the Subcommittee wanted to broaden, modify, or otherwise improve such protections, it certainly could have crafted conditions to accomplish that goal. For example, it could have ordered the expansion of both of these proposed programs. The Subcommittee could have created mechanisms for third-party oversight, including oversight from one or more State agencies. It could have ordered the Applicants to place money in escrow prior to commencing construction so that funds would be immediately available. Likewise, it could have ordered that additional resources from the Forward NH Fund be explicitly dedicated to addressing business impacts.[19]

42. The Applicants recognize that the Subcommittee's obligation to consider these conditions does not mean that it would have imposed them. But the statute and regulations require a deliberation over whether these conditions could have made a difference.

D. Land Use

43. The Subcommittee devoted a substantial portion of its deliberations on the ODR finding to a discussion of land use. Deliberations Day 2/Morning, pp. 6-74. As shown in Section VI, A, the Subcommittee addressed the issue without defining the "region," or defining land use in terms of "undue interference." Just as important, the members of Subcommittee did not consider whether conditions might be imposed to mitigate their concerns.

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[18] Mr. Wright, as part of his summation, mentioned it saying that "I think there will be some business losses. I think some of that could be recovered by the business compensation plan that the Company's offered up." Deliberations Day 3/Morning, p. 22.

[19] In addition to providing a business claims process administered by a third party with $500,000 of initial funding, as suggested by CFP, another sample condition could dedicate $25 million of the Forward NH Fund to addressing localized potential impacts that construction of the Project may cause by funding economic development initiatives in certain host communities affected by the construction. Had the Subcommittee considered and imposed such a condition, it could very well have concluded that impacts to business would be adequately mitigated by such a program and that such impacts would not rise to the level of undue interference with the orderly development of the region.

44. For example, the Subcommittee discussed the 32 miles of new overhead right-of-way in the North Country. Certain Subcommittee members seemed to tentatively conclude that with regard to that section that there would be no land use concerns for the 24 miles on Wagner Forest Management land. Deliberation Day 2/Morning, pp. 68-72.

45. However, with regard to the other 8 miles of new overhead right-of-way in Pittsburg, Clarksville and Stewartstown, the Subcommittee seemed to have concerns but there was no consideration of aspects of the Applicants' case that would address those concerns.[20] Order at 281.

46. The Subcommittee did not consider the use of resources from the Forward NH Fund, dedicated to specific communities and placed under their control, as mitigation for possible tourism impacts. As noted previously, the Forward NH Fund has four broad focus areas including tourism, economic development, community betterment and clean energy innovation. The Fund was specifically designed and included as part of the Applicants' evidence precisely for the purpose of mitigating impacts like this. The Subcommittee failed to consider the availability of funds for use by appropriate local or State authorities for items such as the enhancement of local tourism and recreation, as well as community services and infrastructure, all squarely within the four focus areas of the Forward NH Fund.[21]

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[20] The Subcommittee analysis of this issue was internally inconsistent. VI, A, 1.

[21] For example, in the recent grant of a Certificate to Antrim Wind Energy, LLC in Docket No. 2015-02, the SEC approved the use of conservation lands and the provision of funds for the purchase of additional conservation properties to mitigate the aesthetic impact of that project. *See Decision and Order Granting Application for Certificate of Site and Facility*, Docket No. 2015-02, p. 121 (March 17, 2017). Similarly, the Subcommittee here may mitigate potential impacts to one criteria or component of a criteria by imposing a condition that promotes another criteria or component of a criteria so as to assure that overall, there is no undue interference with the orderly development of the region.

VI. The Subcommittee's Oral and Written Decisions Constitute Arbitrary and Ad Hoc Decision-Making. As a Result, Site 301.15 is Unconstitutionally Vague as Applied.

47. Despite discussions over three days of deliberations (covering 500 pages of transcript) and a 285 page Order, the deliberations and the Order never provided a definition to Site 301.15, and never explained *how* the regulation was to be applied (specifically, how 301.09 was to be reconciled with 301.15), *how* the Subcommittee actually applied the burden of proof standard in Site 301.15 or *why* the burden of proof had not been met.[22]

48. As a result, the application of the SEC's regulation on ODR—which has no definition on its face—is so arbitrary and capricious as to violate both the New Hampshire and United States Constitutions.[23] The Applicants do not contend that Site 301.15 and 301.09 are unconstitutional on their face; they contend that the application of the rules here was arbitrary and capricious.

49. Based on the vote of February 1st, and the Order, no court can determine how the decision was made and no reasonable applicant can determine what is required to meet the "undue interference" standard in Site 301.15. More specifically, no one can determine how the Subcommittee applied the individual elements in 301.09 to find some undue interference and

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[22] The Subcommittee, moreover, fails to mention or apply the Burden and Standard of Proof set forth in Site 202.19 (b), i.e., that "an applicant for a certificate of site and facility shall bear the burden of proving facts sufficient for the committee or subcommittee" to find that the Project will not unduly interfere with the orderly development of the region.

[23] A statute or regulation is void for vagueness when it either forbids or requires "the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." *Sheedy v. Merrimack County Superior Court*, 128 N.H. 51, 54 (1986)(quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). *See also MacPherson v. Weiner*, 158 N.H. 6, 11 (2008) ("stating that a statute can be impermissibly vague for either of two independent reasons: (1) "if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or (2) "if it authorizes or even encourages arbitrary and discriminatory enforcement"). Here, the Subcommittee's discussion of the "undue interference" factor evidences that they applied such a vague and undefined construction of Site 301.15 that no reasonable person could understand or meet. Put differently, in its application, the dividing line between what the Subcommittee believed did, or did not, constitute undue interference was simply left to conjecture, which renders its legal conclusion regarding "undue interference" void for vagueness.

thus to conclude that the Applicants did not meet their burden of proof. The Subcommittee's decisions constitute pure *ad hoc* decision-making. For this reason alone, the Subcommittee should grant rehearing.

A. The Deliberations and Order Fail to Provide any Definition to Site 301.15.

50. Site 301.15, which implements RSA 162-H:16, IV, provides as follows:

> Criteria Relative to a Finding of Undue Interference. In determining whether a proposed energy facility will unduly interfere with the orderly development of the region, the committee shall consider:
>
> (a) The extent to which the siting, construction, and operation of the proposed facility will affect land use, employment, and the economy of the region;
>
> (b) The provisions of, and financial assurances for, the proposed decommissioning plan for the proposed facility; and
>
> (c) The views of municipal and regional planning commissions and municipal governing bodies regarding the proposed facility.

51. Accompanying this rule, Site 301.09 sets out the requirements for an SEC application and directs that an applicant include "the applicant's *estimate* of the effects of the construction and operation of the facility" on three broad areas namely, "land use in the region," "the economy of the region," and "employment in the region." Site 301.09 (a), (b) and (c) (emphasis added). However, while elsewhere the rules set out the ultimate finding the Subcommittee must make regarding orderly regional development (Site 301.15), and the matters that the Applicants were to cover in their Application (Site 301.09), nothing in RSA chapter 162-H, or in the rules, provides any guidance to an applicant as to the meaning of the terms used in Site 301.15. Likewise, the rules provide no explanation of how the ten elements of Site 301.09 are to be taken into account in assessing the criteria in Site 301.15.[24]

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[24] Because the rules are devoid of definition, past precedent of the SEC becomes even more significant. *See* Section VII, A, 1 below.

52. Although the key terms in Site 301.15 have no definition, the Subcommittee could have given definition to the language in that rule, and could have explained how the elements of Site 301.09 were factored or weighed in order to make the "undue interference" finding in 301.15. A regulation that appears vague and arbitrary on its face can be given meaning or definition in its application through the use of objective criteria. *Webster v. Town of Candia*, 146 N.H. 430, 434 (2001). The Subcommittee made no attempt to define the terms in either rule or to provide the objective criteria underlying its conclusion of law that the Applicants did not meet their burden.

53. RSA 162-H:16, IV (b) and Site 301.09 contain three terms that require definition: (a) What constitutes "interference" with ODR? (b) When does interference become "undue?" and (c) In assessing whether there has been undue interference, what is the "region" at issue? The Subcommittee made no attempt to define these terms or to explain what they meant to the Subcommittee in this case. How can a court possibly assess whether the Subcommittee was correct when it determined that the Applicants did not meet their burden to satisfy a standard that the Subcommittee never defined?

54. For example, the record demonstrates that members of the Subcommittee were confused about the meaning of "region" and had no idea how to define that term:

> I'm still interested, and I brought this up yesterday, this idea of the 'region' everything being measured by the region. And I understand that we say "region" in the rules and in the statute. But what constitutes that region? Because the other thing, too, is you don't want to minimize the municipalities that combined make up that region. So if we're looking at it as one whole, why are we even getting the input of municipalities? So I think there's got to be more discussion about, are we looking at this project in chunks, in regions? Is it the sum of its parts? I'm not clear on that yet.

Deliberations Day 2/Morning, p. 30, line 18 - p. 31, line 14.[25] Likewise, Chairman Honigberg stated as follows:

> Mr. Way, I guess a thought in response to your question about what does the "region" mean, or what areas do we have to consider. It's different in different parts of the statute and different parts of our own rules. In some places we are directed to look at what's going on within the affected municipalities, and in some instances it seems like we're being directed to talk about a region that may even be larger than the state of New Hampshire, and there are gradations in between. That's something I think that we might want to have a non-meeting with our own lawyer to talk about that. But it's also something that in some areas we're just going to have to wrestle with and decide what's important, given the particular criterion or set of criteria that we're considering at the time.

Deliberations Day 2/Morning, p. 39, line 8 - p. 40, line 1.

55. If, in fact, the Subcommittee consulted with its lawyer, it never explained or defined the term in its oral decision or in the Order. If the Subcommittee could not define the "region" that the Applicants were to address, or the "region" it applied in finding that the burden had not been met, how could it possibly conclude that the Applicants did not meet their burden? And if the Subcommittee members could not define the term, or agree among themselves on a common understanding of it, how could the Applicants ever hope to meet their burden of proof?[26]

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[25] *See also*, Deliberations Day 1/Afternoon, pp. 90-92 (Mr. Way: [T]he Applicant said when you look at the region as a whole, that you're not going to get an unreasonable impact. And you know that's something we have to chat about at some point is region versus the sum of its parts. I mean you can't have a region without the sum of its parts." Mr. Oldenburg: "And where I need sort of help on that is, yes, downtown Plymouth is not a 'region'").

[26] In its Objection to the Applicants' February 28th Motion, the Society for the Protection of New Hampshire Forests states: "[T]o the extent that the collective finding of the Subcommittee members on a certain point—like the definition of region—is unclear from reviewing the individual statements of Subcommittee members, that is exactly the sort of clarification one would expect from the written decision." *Objection of the Society for the Protection of New Hampshire Forests to Applicant's Motion for Rehearing and Request to Vacate Decision of February 1, 2018 and to Resume Incomplete Deliberations*, Docket No. 2015-06, p. 20 (March 9, 2018) But no such clarification was provided in the Order. Moreover, it is difficult to understand how the written order could actually provide such clarification if, when the Subcommittee was actually publicly deliberating on the issue, there was no common understanding of the term at that time.

56. The Subcommittee's failure to define these terms is significant. As the SEC has noted elsewhere:

> In considering whether the Project will unduly interfere with the orderly development of the region, the Subcommittee must first determine whether such interference impacts the entire region, as opposed to a limited number of residences. Thereafter, the Subcommittee must consider whether the degree of such interference is so excessive that it warrants mitigation or denial of the Certificate."

Decision Granting Certificate of Site and Facility, Docket No. 2010, p. 38 (May 6, 2011). Without a definition of the "region," this analysis is impossible.

57. The Subcommittee's failure to define the terms in Site 301.15—or to even reach a common understanding of them—resulted in an oral decision, and an Order, based entirely on each Subcommittee member's individual interpretation of the elements in Site 301.09, the application of those elements to the criteria in Site 301.15, and thus to the conclusion that the Applicants had not satisfied their burden. This type of *ad hoc* decision-making by agencies has been rejected by the New Hampshire Supreme Court and results in the statute and regulations being unconstitutional as applied. *Derry Sr. Dev., LLC v. Town of Derry*, 157 N.H. 441, 451 (2008)(holding that the planning board improperly denied site plan approval stating that "[a]lthough the board is entitled to rely upon its own judgment and experience in acting upon applications for site plan review, the board may not deny approval on an *ad hoc* basis because of vague concerns…Further, the board's decision must be based upon more than the mere personal opinion of its members").

B. Neither the Deliberations Nor the Order Explain How the Subcommittee Correlated the Elements in Site 301.09 with the Standard in Site 301.15

58. Although Site 301.15 sets out the three criteria that the Subcommittee must consider in determining whether a proposed energy facility unduly interferes with ODR,

those criteria do not stand alone. Rather, they must be evaluated collectively, and in connection with the component parts of the information that must be included with the Application, namely, those set out in Site 301.09.[27] However, nothing in either rule explains how consideration of the elements in Site 301.09 are to be applied when making the ultimate determination of undue interference in Site 301.15.

59. Further, nothing in the Subcommittee's decision explains how they were actually applied in this case. During the deliberations, the Subcommittee members spoke to each of the components in Site 301.09, and then summarized their personal views on each of those factors. The Order follows that format. But the members' public deliberations, and the Order, never explained *how* those elements were taken into account to conclude that there was some "undue interference." Put differently, there is no explanation of how any of those individual components added up to "undue interference," whether any particular weight was given to one factor in Site 301.09 over another, or how, based on their statements about each factor, it was decided that the Applicants had not met their burden.

60. Following their discussion of each component identified in Site 301.09 (b), the members apparently concluded that if one or more of those elements demonstrated some negative effect, that amounted to undue interference. *See, e.g.,* Deliberations Day 3/Morning, p. 8, line 9 - p. 11, line 1; *see also* Section VI, C below. The problem with this reasoning is that the SEC rules do not require (or even contemplate) that disagreement with the Applicants as to one or more of the components set out in Site 301.09 leads inevitably to a failure to meet the burden. Rather, the rules require that all of the elements in Site 301.09 be considered as part of the larger

[27] Chairman Honigberg recognized the interaction between Site 301.15 and 301.09 in discussing the process of making a finding on orderly development. Deliberations Day 3/Morning, p. 4, line 5 - p. 5, line 5.

whole in order to determine the effect the project would have on ODR. Moreover, that is how the SEC has approached this analysis in the past. *See, e.g., Tr. Deliberations Day 1,* Docket No. 2015-05, p. 42 (June 14, 2016).

61. The analysis required here stands in contrast to RSA 162-H: 16, IV(c), which mandates that the SEC make individual findings that a facility will not have an unreasonable adverse effect on specific topics (aesthetics, historic sites, air and water quality, the natural environment, and public health and safety). The SEC rules make this dichotomy clear by providing specific criteria to be considered for each of the subcategories identified in RSA 162-H:16, IV (c). *See* Site 301.05 - 301.08.

62. The Subcommittee's analysis (both in its deliberations and the Order) is flawed. The Applicants have the burden to show no "undue interference with orderly development of the region" under Site 301.15. They do not have a burden concerning each component of 301.09.[28] Moreover, some of the components that the Subcommittee evaluated (for example, tourism and property values) are not even mentioned in Site 301.15, yet the Subcommittee treated these elements as imposing a separate burden on the Applicants, while never explaining how the specific elements relate to the broader ODR finding.

63. The Subcommittee provides no explanation of how its conclusion concerning the burden of proof was made. For example, the members of the Subcommittee individually seemed to conclude that the Applicants had shown that the Project would have a positive impact on employment, the economy generally, and taxes, yet concluded that the

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[28] Nothing in the rules requires an Applicant to meet a burden of proving that there would be no impact on each of the elements in Site 301.09. All that the rule requires is that the Application: (a) *include* "*a description* of prevailing land uses" and "*a description*" of how the Project is consistent or inconsistent with those uses; (b) *include* "*an assessment*" of the economy of the region looking at the "effect" in certain areas; and (c) *include* "*an assessment*" of the employment in the region including the number and type of jobs to be created.

Applicants failed to show that there would be no impact on land use, property values and tourism. This raises a number of questions about how the decision was rendered including, for example:

- Did the individual members add up the "pluses and minuses?" If so, on what legal basis?
- Did the Subcommittee weigh the factors and if so, how was that done and what was the legal basis?
- Was there any analysis of interference, or how much interference was "undue?"

The record of the Subcommittee's deliberations and the Order are silent on these questions, and others. Nothing in the deliberations or Order explain how the individual members of Subcommittee made this decision (other than the individual thoughts of the members) or on what basis the Subcommittee as a whole decided these issues.

64. The Applicants were required to meet their burden of proving facts sufficient for a finding that there would be no undue interference with ODR. If the Applicants were required to prove no effect on ODR, or a positive effect on ODR, as to each of the elements in Site 301.09, the rules should have clearly required that (assuming such a requirement could even be workable given the irreconcilable conflict that such an approach would create with the statutory requirement that interference not be "undue"). And the Subcommittee was legally required to justify in its Order how its consideration of the separate elements resulted in its overall decision on undue interference.

C. The Subcommittee Applied Criteria or Standards That Are Contrary to Site 301.15 and That Appear Nowhere in the Statute or Regulations.

65. In addition to its failure to explain how it applied the elements of Site 301.09 in making its finding that the Applicants had failed to meet their burden, the Subcommittee also applied criteria that are contrary to Site 301.15. The Subcommittee members appeared to apply a definition of that rule and of the burden of proof as follows: unless the

Applicants demonstrated for each of the components in Site 301.09 (and which underlie the criteria in Site 301.15) that there was *no negative impact*, or some *positive impact*, the Applicants had necessarily failed to meet their overall burden on ODR.

66. Nothing in RSA 162-H:16 or the SEC rules require or permit such an analysis. In fact, framed in this manner, such an analysis runs directly counter to the statute, which explicitly provides that a proposed project can actually interfere with orderly regional development (*i.e.,* have a negative effect) as long as the interference is not "undue." The Subcommittee's apparent reading violates the tenets of statutory construction. *See Town of Wolfeboro v. Smith*, 131 N.H. 449, 453 (1989) (The Court "must assume that all words in a statute were meant to be given meaning in the interpretation of a statute."); *State v. Powell,* 132 N.H. 562, 568 (1989)(the Court has the obligation to "presume that 'the legislature does not enact unnecessary and duplicative provisions.'")

67. The Legislature unequivocally recognized that the construction of energy facilities would likely have negative effects and that those effects were not, by themselves, sufficient reason to deny a Certificate.[29] RSA 162-H:1. In light of that fact, it created standards that allowed for such effects provided interference with ODR was not "undue." RSA 162-H:16, IV(b). The Legislature recognized in other parts of the statute that while there may be adverse effects, such effects must rise to the level of being unreasonable to deny a Certificate. RSA 162-H:16, IV(c).

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[29] In *Re New* England *Electric Transmission Corporation*, DSF 81-349, (December 17, 1982) 67 NHPUC 910, 923, the Bulk Power Facility Site Evaluation Committee stated that "every human activity has some effect on the environment and construction and operation of the proposed facility is no exception to the rule. However, the relevant inquiry under the statute is whether the proposed facility will have an 'unreasonable' environmental impact. Whether the impacts are 'unreasonable' depends on the assessment of the environment in which the facility will be located, an assessment of statutory or regulatory constraints or prohibitions against certain impacts on the environment and a determination as to whether the proposed facility exceeds those constraints or violates those prohibitions." The same analysis applies to whether interference is "undue".

68. The issue is not whether there is *an impact* with regard to one or more of the components but whether, as a whole, the collective impacts on ODR amount to "undue interference." Even if the Subcommittee concluded that the Project would have a negative impact on each of the component parts in Site 301.09, it could not deny an application unless it properly concluded that the Project would unduly interfere with ODR.

69. A brief review of some of the comments of Subcommittee members during the deliberations demonstrates that they applied an improper standard (emphasis added in each case):

Land use:

> **Ms. Dandeneau:** "I'm concerned...that vegetative clearing will have **an impact** on land use." Deliberation Day 3/Morning, p. 12, lines 15-19.

Tourism:

> **Mr. Way:** "I do not believe that the Applicant has met the burden of proof that there will be **no impact** on tourism. I'm not sure I know one way or the other." Deliberation Day 3/Morning, p. 9, lines 9-12.
>
> **Ms. Dandeneau: "**I am not convinced that the construction phase of this project will not have **an impact** on tourism." Deliberation Day 3/Morning, p. 11, lines 22-24.
>
> **Commissioner Bailey:** "I also, like the others, have not been convinced that there wouldn't be **an impact** on tourism." Deliberation Day 3/Morning, p. 27, lines 9-11.

Property Values:

> **Commissioner Bailey:** "With respect to property values, I don't believe that the Applicant has met its burden to demonstrate that there will not be **an impact** on property values.....And I think that there could be **an impact** on property values." Deliberation Day 3/Morning, p. 26, line 20 – p. 27, line 9.
>
> **Mr. Oldenberg:** "I do believe, as the other folks have stated that the property values **will be affected in a negative way** and that land

use, especially up north **would be impacted.** And **to some degree** all the areas **would be impacted**, from a land use standpoint, some less than others I think, especially in the existing right-of-way." Deliberation Day 3/Morning, p. 19, lines 10-17.

Mr. Way: "I'm not sure I accept the argument that there will be **no impact** on property values....I just don't think it passes the **"straight-face test** that there will **be none."** Deliberation Day 3/Morning, p. 10, lines 1-9.

Municipal views:

Director Wright: "Municipal views.....I wasn't convinced that lack of specificity in some of the initial plans was sufficient to indicate that there **could not be an impact.**" Deliberation Day 3/Morning, p. 24, lines 6-14.

70. As these examples illustrate, most members appeared to believe that in order to meet their burden, the Applicants had to demonstrate there would be no impact as to each of the elements in Site 301.09. While each Subcommittee member concluded his or her discussion in the deliberations by stating that he or she believed that the Applicants had not met their burden of proof, the record reveals no explanation of what that burden meant to any individual member or the Subcommittee as a whole. Moreover, the tests they described are completely unrelated to the actual legal standard of "undue interference," and there is nothing in the oral deliberations or the Order evidencing any attempt to articulate a common understanding of that standard.

71. In addition, other statements referenced an arbitrary (and undefined) "tipping point," a new standard that has never been used in prior SEC cases and appears nowhere in the SEC's rules (all emphasis added):

Mr. Way: "Regarding land use, I was not convinced that the **entire project** would be **consistent with prevailing land use**. I think we brought up several areas where we had concerns. I think we brought up the issue of a **tipping point** when it's no longer conforming with what was the original intent and design for the ROW." Deliberation Day 3/Morning, p. 8, lines 10-17.

> **Ms. Weathersby:** I do believe that there is **a 'tipping point'** [concerning land use] in which the nonconforming use…becomes different in some places and I do believe that will be the case….I do believe that the Applicant's analysis fell short **by requiring actual physical interference** with land use." Deliberation Day 3/Morning, p. 17, lines 1-11.

72. Requiring the Applicants to prove, for each topic in 301.09, that there was "no impact," "no effect," or no "tipping point," is contrary to law and places a burden on the Applicants that is impossible to meet.

73. The Subcommittee's misunderstanding and misapplication of the undue interference standard is replicated in the Order. The Order begins by noting what the Subcommittee "found" (although no Subcommittee finding on these elements occurred during the deliberations). In particular, the Order states the Subcommittee made its decision based on four of the elements of Site 301.09:

> The Subcommittee *found* that the Applicant failed to demonstrate by a preponderance of the evidence that the Project would not **overburden existing land uses** within and surrounding the right-of-way and would **not substantially change** the impact of the right-of-way on surrounding properties and land use.
>
> The Subcommittee further *determined* that the Applicant (sic) did not sufficiently demonstrate the effect the Project would have on the economy. While there would be **some positive impacts** on the economy, the magnitude of these positive impacts was overstated by the Applicant (sic).[30] As for the **potential harms** of construction

[30] In fact, in her Updated Pre-filed Testimony (February 15, 2017) Ms. Frayer updated wholesale electricity market benefits as required by the Subcommittee but did not update the employment or local economic benefits. The Order, however, characterizes those benefits as being "overstated," thereby assigning a negative connotation not justified under the circumstances. *Order* at 128. Ms. Frayer did not err in her calculations and she agreed that if she had updated those benefits as well that they would be similarly reduced. *Julia Frayer Updated Pre-Filed Testimony*, App. Ex. 82, p. 12. The Subcommittee follows a similar pattern of seeking to minimize the extent of the positive impacts of the Project when it discusses, in particular, employment, the economy and property taxes. It acknowledges that there will be a significant number of new jobs during construction but nonetheless refers to unsubstantiated claims that businesses would let employees go due to the effects of construction. Order at p. 127. In addition, it takes out of context the Applicants' statement in their brief that the dispute about clearing the capacity market is not outcome-determinative to finding that the Project does not unduly interfere with the ODR, wrongly calling it an "admission" that qualifying and clearing in the Capacity Market is merely an intellectual

> and operation of the Project, the Applicant failed to provide credible evidence regarding the **negative impacts** on tourism and real estate values. The Applicant also failed to provide a plan for construction of the Project that appropriately considered the Projects **effects** on municipal roads and businesses in the northern part of the State.
>
> Finally, with respect to the views of municipal and regional planning commissions and municipal governing bodies, which the Subcommittee must consider, the Applicant (sic) failed **adequately to anticipate and account for** the almost uniform view of those groups that the Project, as planned and presented would unduly interfere with the orderly development of the region.

Order at 6-7 (emphasis added). These general statements are briefly supplemented at the end of the Order. *Id.* at 284-85. There, the Subcommittee states that the Project would have a "**somewhat positive** effect on the regional economy, employment and real estate taxes," but that it had "no way to evaluate the Project's **tourism effects**," that it did not find "credible" the opinion of the Applicants' expert that "there would be no **discernible effect** on property value," and that the Applicants failed to demonstrate that the Project would not "**overburden** existing land values." *Id.* (emphasis added).

74. As with the individual statements during deliberations, the Order sets out criteria or standards that appear nowhere in Site 301.15 and requires the Applicants to satisfy their burden of proof against those newly articulated standards for each element of Site 301.09, without explaining how that was to be done. As discussed, this is contrary to the statute and the SEC's rules.

75. This error is further demonstrated by the portions of the Order that address the four factors that the Subcommittee relied on to conclude that the burden had not been met. In

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exercise. Order at p. 160-161. It also says that it is undisputed that the Project will have a substantial impact on property taxes paid to communities but nonetheless credits unproven claims that property taxes could be reduced by tax abatements. Order at 162.

its analysis of the extent to which the Project will affect land use (*Order* at 275-83), the Subcommittee states that construction in the right-of-way is not "the only principle of sound planning…[or] a principle to be applied in every case." *Id.* at 277. Yet the SEC has consistently applied that principle in other dockets. (See discussion concerning land use in Part VI A. below). The Order does not explain why the principle does not apply in this one.

76. The Subcommittee also states that "[**o]ver-development** of an existing transmission corridor **can impact** land uses in the corridor and unduly interfere with the orderly development of the region," citing various ways in which that could occurred. *Order* at 278 emphasis added). But the ways in which "[o]ver-development" were alleged to possibly occur were simply supplied by *ad hoc* reasoning of the Subcommittee. *Id.*

77. In the area of "municipal views," the Subcommittee faults the Applicants for "fail[ing] to adequately anticipate and account for the almost uniform view of these groups that the Project would unduly interfere with the orderly development of the region." *Order* at 7. It also criticizes the Applicants for not sufficiently soliciting the views of planning agencies and their expert for "doing little in the way of applying the details of the Project" to master plans and zoning ordinances. *Id.* at 280.

78. Yet nothing in the SEC rules requires the Applicants to prove *anything* regarding municipal views. Instead, the rules provide only that in assessing the "undue interference" standard, the *committee* shall consider those views. Site 301.15 (c). Moreover, the Subcommittee's conclusion amounts to a finding that unless the Applicants can satisfy some unspecified portion of host municipalities, they cannot meet their burden of proof. The SEC is given preemptive power over local regulations precisely to avoid that outcome.

79. The Subcommittee's findings relating to the effect of the Project on property values are equally defective. The Subcommittee found that the Applicants' expert report and testimony was "insufficient to demonstrate that the Project will not have an **unreasonably adverse impact** on real estate values throughout the region." *Order* at 194 (emphasis added). The Subcommittee also states that the expert "did not persuade us that there would be **no discernible decrease** in property values attributable to the Project." *Id.* at 195 (emphasis added). It concludes that the "properties that are encumbered by the right-of-way and properties that are not encumbered by the right-of-way **will be affected** by the Project." *Id.* at 199 (emphasis added). Again, these tests apply the wrong standards. Moreover, the Order does not explain how these statements regarding property values inform the Subcommittee's ultimate decision on "undue interference."

80. Finally, the Subcommittee's discussion of the effect of the Project on tourism follows the same pattern. It concludes that the Applicants failed to meet their burden because the Project "may have a **negative impact on tourism** or it may not, although there are **valid reasons** to believe that the Project **would hurt tourism** if it were built." *Order* at 227 (emphasis added.) The Subcommittee does not explain how *any* "negative impact" equates to undue interference on ODR or what the "valid reasons" are. Indeed, it suggests that the Applicants had the burden to show that the Project would have a positive impact on tourism. *Id.* at 226-27.

81. The Order also faults the Applicants' expert for failing to "conduct appropriate surveys, including visitor intercept surveys," failing to "obtain and address the views of a substantial number of varied stakeholders" and failing to "address and analyze the impact

that construction work over an extended period of time could have on tourism." *Order* at 226. However, none of those items are required in the SEC regulations.

82. In fact, some of the SEC application requirements call for intense detail. *See, e.g.*, Site 301.05 (b) (setting forth the requirements for a visual impact assessment); Site 301.18 (setting forth the sound study methodology for a wind energy system). By contrast, there is no detail whatsoever regarding tourism reports in Site 301.09 (b)(5). That rule simply requires that an applicant include information on "[t]he effect of the proposed facility on tourism." It is the SEC's prerogative to require applicants to provide prescriptively detailed expert reports in its rules. But it is fundamentally unfair and violates due process to fault applicants for not providing such detail, and base decisions upon the absence of such detail, when the rules do not require it.

83. In sum, the vote of February 1st and the Order are simply an expression of views of individual Subcommittee members concerning the elements in Site 301.09. There is no explanation of how those views bear any relationship to the decision criteria in Site 301.15 or how they informed the ultimate conclusion of law. Absent that explanation, the decisions are arbitrary and thus, unlawful and unreasonable, and should be vacated.

D. The Subcommittee Did Not Make Findings of Fact Explaining Why the Applicants Failed to Satisfy their Burden.

84. As described above, the Subcommittee failed to explain—either in the deliberations or the Order—how the discussion of the elements of Site 301.09 correlated to its ultimate decision. The consequence of this failure is that no vote was taken at the time of the February 1st decision stating *why* the burden was not met. Nor was an explanation given in the Order, other than the statements as to why the Applicants supposedly did not prove various

elements of 301.09 (which, as discussed, is not their burden.) In short, there are no findings of fact supporting the Subcommittee's conclusion of law.

85. At the end of the discussions on the first two days of deliberations, Chairman Honigberg stated:

> I do not have any sense of where the Subcommittee is on "undue interference with the orderly development of the region," and so what we are going to do is ask people to talk about where they are on this. There's no motion. There's no vote right now. But we're going to ask people to say where they are as a way of bringing the discussion about orderly development to a close.

Deliberations Day 3/Morning, p 5. As noted previously, following the discussion of the views of individual members Chairman Honigberg stated that a vote had not been taken and until such a vote occurred, "is open for discussion." Deliberations Day 3/Morning, p. 33, line 4.

86. While the Subcommittee voted on its conclusion of law (that the Applicants did not meet their burden) it never went back and explained the *findings of fact by the Subcommittee* supporting that conclusion. The Subcommittee never explained, and never voted on *why* the Applicants failed to meet their burden. Thus, just as the record of the deliberations was simply a sense of the individual members of the Subcommittee, (who were applying their own standards), the February 1st vote demonstrates nothing more than that sense, since the Subcommittee never sought to articulate—as a Subcommittee—the facts supporting their findings, and thus made no findings of fact at all. The Order suffers from the same defect. It provides a number of statements about what the Applicants demonstrated (or allegedly failed to demonstrate) regarding elements of Site 301.09, but never provides reasons why those statements

amount to "undue interference" or why the Subcommittee could not determine that the interference was not "undue" under Site 301.15.[31]

87. Consequently, the Order is legally insufficient. RSA 541-A:35 requires that a final order issued by an administrative agency "include findings of fact and conclusions of law separately stated." The New Hampshire Supreme Court in *Petition of Support Enforcement Officers I and II*, 147 N.H. 1 (2001), found that the Personnel Appeals Board had failed to provide an adequate basis upon which the Court could review the Board's decision because the Board had failed to identify specific factual findings supporting its conclusions.

88. Likewise, the Court has recognized that the SEC must make "basic findings of fact to support the conclusions that [RSA 162-H:16, IV] requires it to make." *Soc'y for the Prot. of New Hampshire Forests v. Site Evaluation Comm.*, 115 N.H. 163, 173-74 (1975). The Court explained:

> Where, as in this case, the administrative agency is required by statute to make not only general discretionary findings such as the effect of the nuclear facility on esthetics and historic sites, but also complex factual determinations of its effect on regional development, air and water quality, the natural environment and the public health and safety, the law demands that findings be more specific than a mere recitation of conclusions.

Id.

89. Among other things, the Court found that it needs findings of fact "to understand administrative decisions and to ascertain whether the facts and issues considered sustain the ultimate result reached." *Id.* at 173. The Court further determined that the SEC should make "explicit those basic findings drawn from the evidence that led it to decide as it

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[31] Site 301.15 essentially requires the Applicants to prove a negative, namely to show facts sufficient to demonstrate that there will be no undue interference with ODR. *See also* Site 202.19(b). If the proof demonstrates *some* interference, the burden still would be satisfied. Apparently, the Subcommittee concluded that the evidence demonstrated undue interference or that it could not say that there would not be undue interference. But it never states why the evidence led to that conclusion.

ultimately did and indicate[s] the experts or expert evidence upon which it relied." *Id.* at 174. Finally, the Court observed that "in the process of making basic findings the committee will be compelled to weigh with care the evidence before it and to delineate the basic facts supporting its conclusions, rendering the process of public hearings more meaningful to participants." *Id.* at 174.

90. Finally, the Order is also invalid because the Subcommittee's findings were not made in public session and thus violate the Right-to-Know Law, RSA chapter 91-A. New Hampshire's Right-to-Know Law requires the SEC to open its meetings to the public (RSA 91-A:2, II) and to deliberate "on matters over which it has supervision, control, jurisdiction, or advisory power" only in meetings held open to the public. RSA 91-A:2-a. The statute excludes from the definition of meeting the "[c]irculation of draft documents which, when finalized, are intended only to formalize decisions previously made in a meeting; provided, that nothing in this subparagraph shall be construed to alter or affect the application of any other section of RSA 91-A to such documents or related communications." RSA 91-A:2, I (d). This exception does not render the Order or the deliberations compliant with the statute. Rather, when read together, these statutes require the Subcommittee to make its findings of fact and conclusions of law in a meeting open to the public.

91. The statutory schemes governing some administrative bodies in New Hampshire exempt deliberative sessions from RSA 91-A. *See e.g.* RSA 363:17-c and RSA 325:34, VI. The statutory scheme governing the SEC, RSA 162-H, does not. Here, the Subcommittee was required to deliberate in public and did so, yet it failed to make *any* factual findings supporting its conclusion of law in public. As a result, there was nothing for the Subcommittee to "formalize" by its written Order and the Order does far more than memorialize

the decisions previously made in public. See Order at 7. There is no point to public deliberations if the decision of the Subcommittee can be made privately, and the discussions regarding the factual findings of the Subcommittee—if any exist—can be made privately.[32]

92. Taken together, all these defects lead to one conclusion: as applied by the Subcommittee, Site 301.15 has no definition at all, and the Subcommittee's reasoning is so arbitrary that the Order cannot stand.

VII. The Subcommittee's Application of the Criteria Set Forth in Site 301.15 and its Analysis of the Information Supplied under Site 301.09 Overlooked and Misconceived Evidence in the Record

93. As shown below, the Subcommittee reached its conclusions with respect to land use, property values and tourism based on errors of fact, reasoning and law.

A. Land Use and Municipal Views

94. On the issue of whether the Project was consistent with prevailing land uses, the Applicants submitted a report of Robert Varney, former Commissioner of the Department of Environmental Services and, serving in that capacity, a former Chair of the SEC. Relying on past precedent from the SEC coupled with his own analysis under the SEC's new

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[32] In their objections to the Applicants' prior Motion for Rehearing, the opponents conceded that the oral deliberations did not result in any findings of fact. In arguing that the Motion was premature, for example, Counsel for the Public stated that "without a final written order setting forth the reasoning of the Subcommittee the Applicants and other parties are forced to speculate as to all the Subcommittee's reasoning and the substance of its actual decision based on snippets of conversations during the course of extended discussions of various topics." *Counsel for the Public's Response to Applicants' Motion for Rehearing and Request to Vacate*, Docket No. 2015-06, pp. 2-3 (March 9, 2018). That Response also noted that until a written order is issued, "Applicants and any reviewing court cannot determine whether the Subcommittee applied the correct legal standards or whether the Subcommittee committed an error of fact, reasoning or law." *Id.* at p. 3, n.3. But that is exactly the problem. The Subcommittee's public vote did not go beyond those "snippets." And while the Subcommittee's oral vote is not required to reflect every aspect of its reasoning, the public deliberations are meaningless if the Subcommittee does not have to provide *any facts to support* its conclusion of law. Likewise, the Objection of the Municipal Interveners characterizes the deliberations as being "conducted to allow members of the Subcommittee to discuss their opinions about the application," and it opines that "[t]he statements of the individual Subcommittee members during deliberations constitute their personal opinions because they were never adopted by a formal vote of the Subcommittee." *Municipal Groups 1 South, 2, 3 South and 3 North's Objection to Motion for Rehearing and Request to Vacate Decision of February 1, 2018 and to Resume Deliberations*, Docket No. 2015-06, p. 4 (March 8, 2018). Again, that is the problem. The public vote of the Subcommittee was nothing more than a conclusion drawn from the opinions of individual members without any collective decision of the Subcommittee.

rules (Site 301.09 (a)), Mr. Varney described by category the different types of land uses along the corridor and concluded that the Project was consistent with those uses because it was primarily within an existing utility corridor. App. Ex. 20, p. 4.

95. The Subcommittee's oral deliberations, and the Order, ignored its past precedent, stating that "construction of transmission lines in existing corridors is a sound planning principle" but that "it is not the only principle of sound planning, nor is it a principle to be applied in every case." *Order* at 277. The Subcommittee does not explain *why* the principle does not apply in *every* case or even in *this* case or what considerations it took into account in deciding not to apply that "sound planning principle" here. Nor does it explain what other principles it applied in concluding in this case that construction in existing corridors is not consistent with prevailing land uses. But one thing is clear: by rejecting the principle that construction of a line in an existing corridor is consistent with prevailing land uses, the Subcommittee jettisoned years of precedent in which that principle was followed, and on which applicants were entitled to rely.

96. The Order employs new tests, including the unsubstantiated presumption that the existing transmission lines are non-conforming uses, in concluding that the Applicants failed to demonstrate that the Project would not overburden existing land uses, when it should have been considering whether the Project will be consistent with the prevailing land use patterns in the region, one of which is the existing transmission line right-of-way.

1. The Subcommittee Ignored Past Precedent Regarding the Construction of New Transmission Lines in an Existing Corridor

97. Site 301.09 (a) requires an applicant to include information in an application describing the prevailing land uses in the affected communities and stating how the

proposed facility is consistent or inconsistent with such uses. Site 301.15(a) requires the SEC to consider the extent to which a proposed facility will affect land use.

98. In his pre-filed testimony Mr. Varney described the prevailing land uses along the right-of-way to "include forest, agriculture, residential, commercial, industrial, transportation, utilities, historic, natural resources, as well as conservation and recreation resources." *Pre-Filed Testimony of Robert Varney*, App. Ex. 20, p. 4. He also pointed out that these "uses have coexisted with existing electric utility and transportation corridors as part of the fabric of local and regional development" and he concluded that the Project "will not prevent these uses from continuing in the future." *Id.*

99. Despite Mr. Varney's reliance on the principle that construction in an existing right-of-way is consistent with prevailing land uses, the Order is highly critical of his adherence to that principle—one that the SEC has consistently applied in past decisions. *See Order* at 234-237. The Order does so on the basis that uses in the corridor might "intensify," a concept that seems self-evident when another line is constructed in an existing right-of-way. *Id.* at 237. But the SEC has not previously applied this "intensification" concept, even in very recent decisions.

100. The SEC in prior transmission line projects invariably recognized that utilizing existing transmission corridors for new lines supports a finding on no undue interference. In DSF 81-349, *Re New England Electric Transmission Corporation* (HQ Phase I) Order No. 16,060 (December 17, 1982), the Bulk Power Facility Site Evaluation Committee stated that the *single most important fact* bearing on its finding that there would be no undue interference was that "the proposed transmission line with the exception of 2000 feet of new right of way, occupies or follows existing transmission line for its entire length of 6.3 miles." *Re*

New England Electric Transmission Corporation, Docket No. DSF 81-349, Order No. 16,060, 67 N.H.P.U.C. 910, 921 (December 17, 1982) (emphasis supplied). It further concluded that the "proposed facility is compatible with land use patterns in the area and will not interrupt or conflict with land use plans or developments or interfere with existing commerce." *Id.*

101. Likewise, in Docket DSF 85-155, *Re New England Hydro-Transmission Corporation* (Hydro Quebec Phase II), the Bulk Power Facility Site Evaluation Committee found that the proposed transmission line would not unduly interfere with the orderly development of the region. The Committee stated that "*the single most important fact* bearing on this finding is that the proposed transmission line occupies or follows existing utility transmission rights-of-way or utility-owned property for its entire length of 121 miles." *Re New England Hydro-Transmission Corporation*, Docket DSF 85-155, Order No. 18,499 (December 8, 1986) p. 11, (emphasis added). Like the present proceeding, the Phase II proposal in Docket DSF 85-155 included the addition of a transmission facility to a right-of-way burdened by existing transmission facilities. Moreover, with structure heights ranging from 70 to 115 feet high, and with a typical structure height of 90 feet, the Phase II structures were substantially taller than the existing structures. Nevertheless, the SEC found that the Phase II facility "was compatible with land use patterns in the area and will not interrupt or conflict with existing commerce." *Id.* at 17.

102. Subsequently, in two proceedings concerning 115-kV transmission lines, the Bulk Power Facility Site Evaluation Committee again found that the single most important fact bearing on a finding that an electric transmission facility would not unduly interfere with the orderly development of the region was the selection of an existing, occupied utility corridor. *See* DSF 91-130, *Re Public Service Company of New Hampshire*, Order No. 20,739 (February 2, 1993); DSF 93-128, *Re New Hampshire Electric Cooperative, Inc.*, Order No. 21,268 (June 14,

1994). In the former, it held that: "Use of the existing right-of-way for the proposed line will be consistent with the established land use patterns in the area." In the latter, it held that following the existing right-of-way "makes the proposed facility compatible with the land use patterns in the area and will not interfere or conflict with land use plans or developments or interfere with commerce."

103. More recently, in the Merrimack Valley Reliability Project ("MVRP") proceeding, in finding that the project would not unduly interfere with the orderly development of the region, the Subcommittee agreed with Mr. Varney's application in that proceeding of this "single most important factor" stating that "[c]onstruction of the Project within an already existing and used right-of-way is consistent with the orderly development of the region." *Decision and Order Granting Certificate of Site and Facility*, Docket 2015-05, p. 58 (October 4, 2016). The Subcommittee explained that "the Applicant seeks to construct the Project within the existing right-of-way that, for years, has been used to transmit electricity and is encumbered by associated structures and equipment." *Id.*

104. The facts and evidence the Subcommittee relied on in MVRP are very similar to the facts and evidence submitted here. First, like Northern Pass, in MVRP "land used along the right-of-way includes forest, agriculture, residential, commercial/industrial, transportation, institutional/government, recreation areas, conservation, historical, and natural features." *Id.* at 50. The heights of the structures in MVRP were approximately 40 to 50 feet taller than the nearest existing structures and relocated structures ranged from 3 to 30 feet taller. *See id.* at 7-8. Yet the Subcommittee did not find that the addition of a new 345-kV transmission line, with structures that were 40 to 50 feet higher than existing structures, would negatively

impact land use or interfere with development patterns along the corridor, nor did it discuss the notion of overdevelopment.

105. In this proceeding, the Subcommittee ignored this precedent in favor of wholly new standards, and it did so without warning to the Applicants. It also did so notwithstanding its full acceptance in MVRP of Mr. Varney's application of the principle that construction of the line in an existing corridor was consistent with prevailing land uses during the pendency of this proceeding. What differences in the Northern Pass Docket caused the Subcommittee to change course? Nothing in the deliberations or the Order answers that question.

106. The SEC serves as a quasi-judicial permitting body. The First Circuit has recognized that when an agency "fills a quasi-judicial role, it builds a body of precedent which it cannot thereafter lightly disregard." *Com. of Mass., Dep't of Educ. v. U.S. Dep't of Educ.*, 837 F.2d 536, 544 (1st Cir. 1988). The Court also pointed out that "[l]ike courts, agencies 'have an obligation to render consistent opinions and to either follow, distinguish, or overrule' their own earlier pronouncements." *Id.*[33]

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[33] While administrative agencies are generally given a degree of deference when interpreting their own rules, a departure from prior rule interpretation without any meaningful explanation generally receives no deference and may be "an arbitrary and capricious change from agency practice under the Administrative Procedures Act." *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). The Supreme Court of the United States has held that "the fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, *its consistency*, formality, and relative expertness, and to the persuasiveness of the agency's position." *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (emphasis added); *citing Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) (holding that "the consistency of an agency's position is a factor in assessing the weight that position is due. As we have stated: 'An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view.'") An agency's shift in interpretation of its governing statute is not by itself invalid, as one of the goals of *Chevron* "is to leave the discretion provided by the ambiguities of a statute with the implementing agency." *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). Nevertheless, an agency must recognize such a departure and provide an explanation for its departure. *Shaw's Supermarkets, Inc. v. N.L.R.B.*, 884 F.2d 34, 36 (1st Cir. 1989). As the First Circuit noted, "the dominant law clearly is that an agency must either follow its own precedents or explain why it departs from them." *Id.*

107. In the MVRP Docket and this one, the SEC applied fundamentally different approaches to whether the construction of a new transmission line in an existing corridor is consistent with prevailing land uses. Moreover, in MVRP, the SEC accepted the expert testimony of Mr. Varney applying this principle and in this docket, rejected the application of *the same principle from the same expert.* "[W]hen an agency treats two similar transactions differently, an explanation for the agency's actions must be forthcoming." *Baltimore Gas & Elec. Co. v. Heintz*, 760 F.2d 1408, 1418 (4th Cir. 1985).

108. The decision to "depart *sub silentio* from its usual rules of decision to reach a different, unexplained result" suggests a level of *ad hoc* decision making that has been found to be inadequate by reviewing courts, despite the deference generally provided to administrative agencies. *Shaw's Supermarkets, Inc. v. N.L.R.B.*, 884 F.2d 34, 37 (1st Cir. 1989). Such *ad hoc* rule interpretation is arbitrary and capricious and does not give parties the type of administrative certainty that the rules are intended to provide.[34]

2. In Addition to Ignoring Prior Precedent, The Subcommittee Improperly Relied on Criteria That Do Not Appear in its Rules and That it Has Never Previously Applied

109. The Order concludes that the Project is inconsistent with prevailing land uses under two entirely new tests, never before applied by the SEC. First, it explains that "over-development of an existing transmission line can impact land uses in the area of a transmission corridor and unduly interfere with the orderly development of the region." *Order* at 278. Second, although admitting that is "not legally required to apply" zoning criteria, it does so, contending that "there are places along the route where the Project would have a substantially

[34] While RSA 162-H:10, III states that the SEC "shall consider, as appropriate, prior committee findings and rulings on the same or similar subject matters, but shall not be bound thereby," in the absence of an explanation for the departure in this case, the result is *ad hoc* decision-making. *See* footnote 33 above.

different effect on the neighborhood than....the existing transmission facilities," and would "create a use that is different in character, nature and kind from the existing use." *Id.* at 279.

110. The "over-development" test was stated in response to a criticism of what the Subcommittee saw as Mr. Varney's opinion that "as long as a corridor is used for transmission lines, there can never be a 'tipping point' where the effect of transmission infrastructure on the land becomes too intense." *Id.* at 278. Yet Mr. Varney made no reference to a "tipping point." This incongruous "tipping point" test, however, was relied on by Subcommittee members during deliberations but it was given no definition then or in the Order.

111. In support of this new "over-development" or "tipping point" test—but without any reference to the record—the Order supposes a number of ways in which overdevelopment can occur:

> Over-development of an existing transmission corridor *can* impact land uses in the area of the corridor and unduly interfere with the orderly development of the region. Increases in the use of a transmission corridor require increased maintenance requirements, increased access requirements, and increased readiness of emergency response personnel. Access to transmission corridors is ultimately obtained from publicly maintained roads and thoroughfares. Unsightly transmission corridors or infrastructure within corridors *can* impact real estate development in the surrounding area. Increased maintenance, repair and emergency operations require the use of heavy machinery and trucks placing the continued use of lands for agricultural purposes at risk. A highly developed corridor *may* discourage use of the corridor and surrounding lands for recreational purposes.

Id (emphasis added).[35] What the Order does *not say* is where *this line*—to be constructed in accordance with the SEC's past precedent —actually *does* impact land uses, where "unsightly transmission corridors" actually *do* impact real estate development, or where the line actually

[35] The SEC raised none of these concerns in the MVRP docket.

does discourage use of the corridor. And nowhere does the Order say that this supposed overdevelopment *has* occurred, *where* it has occurred or *how*, if these activities were to occur, they would amount to undue interference.

112. The Order thus boils down to the following result. The Subcommittee rejects a principle that it has consistently applied without explaining why it does not apply in this case. It applies the new principle of over-development or intensification based on an elusive "tipping point" without explaining when and how that tipping point occurs. And it apparently finds that the Applicants failed to meet their burden of proof by failing to explain why and where the "tipping point" had not occurred. At bottom, the Subcommittee rejected Mr. Varney's testimony—and then found that the Applicants had failed to meet their burden—because he relied on a well-known principle but failed to address a different principle that was unknown until the Subcommittee's deliberations.[36]

113. The Subcommittee's second land use test, which relies on the concept of non-conforming uses from zoning laws, is equally new, and equally deficient. The law of non-conforming uses is purely a matter of local zoning.[37] It protects and allows uses of property that

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[36] Earlier in the Order, the Subcommittee finds that the Applicants "failed to demonstrate by a preponderance of the evidence that the Project would not overburden existing land uses." Order at 6. This suggests yet another test: whether the Project overburdens the specific easements in which it was to be constructed. Yet the Public Utilities Commission has determined that this is not an appropriate subject for consideration by administrative agencies and it did so in connection with an examination of whether PSNH had the right to lease the easements in which this line was to be constructed. Order No. 26,001, Docket DE 15-464, (April 4, 2017) at 13. As the PUC recognized, whether a utility line overburdens land uses in an easement is a matter of property law for the Superior Court.

[37] In fact, the nonconforming use doctrine has meaning and application only in the context of the specific requirements of an individual town's zoning ordinances. Stated differently, a town's zoning ordinances effectively define what is a conforming use, and, therefore, what is a nonconforming use. Therefore, without reference to a particular town's zoning requirements, there is no basis for understanding what is or is not a conforming or nonconforming use. The fact that neighboring towns of similar character may have zoning ordinances that are inconsistent (meaning, what is a conforming use in one may be a nonconforming use in the other, and vice versa), serves to highlight how inapt it is to apply that principle to making a determination as to a region (however that is defined). Further complicating the application of the principle here is the fact that the host community zoning ordinances, with the exception of the City of Franklin, do not address the siting of electric transmission lines, and do not, for that matter, characterize them as nonconformities that should be limited and ultimately eliminated. Lastly, applying the nonconforming use doctrine is squarely at odds with the purpose of RSA 162-H:1 et seq. which

predated zoning ordinances but strictly limits expansions of such uses so that eventually, non-conforming uses die out. "The burden of establishing that the use in question is fundamentally the same use and not a new and impermissible one is on the party asserting it. This is in accordance with the general policy of zoning to carefully limit the extension and enlargement of nonconforming uses." *New London v. Leskiewicz*, 110 N.H. 462, 467 (1970). The *Leskiewicz* criteria focus on whether a use is "fundamentally the same" and whether it has a "substantially different effect on the neighborhood." The case establishes a policy bias of "carefully limiting" the expansion of a non-conforming use.

114. These principles have no bearing on undue interference with ODR. Not only has the Subcommittee reduced the scope of the analysis to purely local impact, ignoring the required "regional" focus of the statutory criteria, but the narrow and limiting objectives of the law of nonconforming uses are at odds with the broad policy goals laid out in RSA 162-H:1 and render meaningless the SEC's preemptive authority under RSA 162-H:16, II. The Subcommittee also applied these new zoning-based tests in an arbitrary manner.[38]

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preempts all local zoning and expressly provides for the permitting of altogether new energy facilities whether they are on newly developed land or located on land where existing energy facilities are already present (application of the nonconforming use doctrine is limited to uses that existed prior to the adoption or amendment of zoning ordinances that render the use nonconforming).

[38] For example, a portion of the Subcommittee's deliberations focused on the new, 40 mile section of right-of-way. Deliberations Day 2/Morning, p. 70. Subcommittee members identified the section of the new right-of-way outside of the Wagner Forest area as a location of concern. "[T]here's more new right-of-way being cut up there. I mean, do people have opinions about that?" Deliberations Day 2/Morning, p. 71.Yet, no consideration was given to the fact that towns in that part of the route (Pittsburg, Clarksville and Stewartstown) do not having any zoning ordinances. App. Ex. 1, Appendix 41, *Review of Land Use and Local Regional and State Planning*, p. 30. Furthermore, in discussing the Wagner Forest, Subcommittee members recognized that the owners had made a conscious decision preferring overhead construction, and deferred to that preference. "If we're talking land use where it's under private ownership, you know, they're making a conscious decision that that's what they want to do with their private property." Deliberations Day 2/Morning, p. 68. Yet the exact same rationale is applicable to the eight miles of nearby overhead construction on land acquired by the Project (which is also private land), yet a wholly different analysis, without any explanation whatsoever for the inconsistencies, was applied to that segment. Deliberations Day 2/Morning, pp. 68-69.

115. The SEC rules make clear that the inquiry with respect to the land use criterion begins with understanding whether the Project is consistent with prevailing land uses (and use of the right-of-way for electric transmission is one prevailing land use) and follows with a determination of the extent to which the Project affects the prevailing land uses. Furthermore, the SEC has articulated two overarching principles when analyzing arguments relative to orderly development: (1) the Subcommittee must determine whether the alleged interference impacts the entire region, as opposed to a limited number of residences or businesses, and (2) orderly development relates to economic development, as opposed to effects on, for example, aesthetics or public health and safety, which are addressed separately. *Decision Granting Certificate of Site and Facility,* Docket No. 2010-01, p. 37 (May 6, 2011).

116. While ignoring the fact that the existing transmission line right-of-way is itself a prevailing land use, the Subcommittee's application of the non-conforming use test focuses on aesthetic considerations such as "increased tower heights," and "reconfiguration of existing facilities," which it claimed would have a "substantially different effect on the neighborhood." *Order* at 279-80.[39] And the Order criticizes Mr. Varney's discussion of land use by adopting CFP's assertion that "Mr. Varney failed to evaluate or consider impact on land use associated with the impact of the Project on aesthetics and the natural environment." *Id.* at 245.

117. The Subcommittee cites several examples in support of this test. The examples contain inaccuracies and focus not on non-conforming uses, but on aesthetics. *Id.* at 279-280.

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[39] The Subcommittee recognized that it was straying into aesthetic considerations in its land use discussions. Specifically, Messrs. Way, Oldenburg and Wright each referred to aesthetics in their comments about land use. In discussing the so-called "tipping point" Mr. Way said "we're talking about aesthetics here, particularly as we talk about intensification;" Mr. Oldenburg said "land use is for the view…I know part of that is aesthetics;" and Mr. Wright said "I guess to me it matters what aspect of this we're talking about. If we're talking about potential visual or aesthetic impacts." Deliberations Day 3/Morning, pp. 44, 66, 68.

- The Order incorrectly states "[a]reas such as Turtle Pond in Concord, where forty-foot wooden poles carry an existing line, would be subject to the installation of large industrial metal structures towering above the pond." *Id.* at 279. Aside from the fact that the Subcommittee does not explain how the addition of the Northern Pass structures would be inconsistent, or interfere with, the land use(s) associated with Turtle Pond, the statement is incorrect. While it is true that the right-of-way adjacent to Turtle Pond contains forty-foot wooden structures, it is also true that **the right-of way currently contains in excess of 90-foot steel monopole structure**s located linearly along the edge of Turtle Pond. It is also true that the structures proposed by Northern Pass are shorter than the existing monopole structures in some locations at Turtle Pond. Tr. Day 9/Morning, p. 33, line 11.

- The Order incorrectly states that "McKenna's Purchase Association ... would lose a substantial vegetative and earthen buffer that would expose the existing transmission line, the Project and the commercial/industrial zone on the opposite side of the right-of-way." Order at 279. In fact, this statement directly conflicts with a prior statement in the Order that "[v]egetation of the west boundary of the right-of-way would be maintained and the berm would be relocated closer to the west boundary." *Id.* at 172; See also App. Ex. 104, p. 10. In addition, the Applicants' construction panel testified that "the buffer that exists, that runs along the western side of the transmission right-of-way will not be cleared but some localized clearing is planned near proposed structures 318-129 and 218-130." Tr. Day 7/Afternoon, p. 102. Thus, the record clearly shows that **the vegetative buffer adjacent to McKenna's would not be cleared and that the earthen berm would be relocated closer to McKenna's.**

- The Subcommittee said that "the proposed structures would be taller than the current permitted 35 feet structures and would entail construction of one of the structures within 35 feet of private roads." Order at 280. The Subcommittee, however, fails to acknowledge that there are structures higher than 35 feet currently in the right-of-way through New Hampton. App. Ex. 201, Bates APP68005-APP68013 (Sheet 126-130).

118. The Order also fails to explain how these individual examples of effects on "the neighborhood" amount to undue interference with orderly development of the "region."

Order at 279. Instead, the Order addresses only specific neighborhoods and raises concerns about the height of the structures.[40]

119. Finally, the Order criticizes Mr. Varney for failing to address certain issues in his report including, among others, failing to address differences in communities along the line (*id.* at 278), to identify where the "impacts of Project may be small or large," (*id.*) "to explain whether the Project would be consistent or inconsistent with specific terms, statements, goals and directives expressed by [local governing documents]," (*id.* at 246), or for "doing little in the way of applying the details of the Project to the [master] plans and [local] ordinances." *Id.* at 280. But nothing in the SEC rules specifies that any of these matters were required to be included in the Application.[41]

120. In summary, having failed to follow its own precedent or explain why it was departing from that precedent, the Order imposes tests that have never been imposed before and that have no bearing on undue interference with orderly development of the *region*, as opposed to local zoning laws. Furthermore, the new tests were imposed without notice or grounding in SEC rules or precedent.

3. The Written Order Misconceives the Role of Municipal Views in the Context of the Land Use Criterion.

121. The Subcommittee must give due consideration to the views of municipalities when making a finding with respect to ORD. *See* RSA 162-H: 16, IV (b) and Site

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[40] The Subcommittee apparently concludes that when proposed structure heights do not comply with municipal height restrictions, the proposed structures interfere with land use. Such a finding runs afoul of preemption and strands in stark contrast to the SEC's statutory charge. Based on the Subcommittee's finding here, municipalities could effectively ban energy facility development (e.g. transmission lines, wind turbines, etc.) by adopting ordinances limiting the permitted height of structures.

[41] As discussed in Section VII, A, 2 with respect to land use and Section VII, B, ¶ 137 with respect to real estate values, the Subcommittee improperly relied on criteria that do not appear in SEC rules and have never been previously applied.

301.15 (c). Inasmuch as the Legislature has preempted local authority over the siting of energy facilities, municipal views, including master plans and zoning ordinances, carry no greater weight than views expressed by the Applicants or other interveners. The Subcommittee recognized that municipal views merit some weight, but also acknowledged that the SEC preempts local authority. Deliberations Day 3/Morning, p. 16. The Order also describes the role of municipal views, acknowledging that the SEC preempts local authority. *Order* at 275-76, 285.

122. The New Hampshire Supreme Court was crystal clear in *Public Service Company of New Hampshire v. Town of Hampton* that: "[T]he legislature has preempted any power that the defendant towns might have had with respect to transmission lines embraced by the statute." *Public Service Company of New Hampshire v. Town of Hampton*, 120 N.H. 68, 71 (1980). "By specifically requiring consideration of views of municipal planning commissions and legislative bodies, the legislature assured that their concerns would be considered in the comprehensive site evaluation." *Id.* In this instance, however, the Subcommittee went beyond considering the municipal views, instead giving them dispositive consideration.

123. Based on the statements of individual members, it is clear that the Subcommittee misconstrued the role that municipal views play in the determination of undue interference. For example, Commissioner Bailey stated:

> So we really do have to take into account the views of municipal officials, and those have all been very negative and have in many cases demonstrated their belief that this is not consistent with their master plans, their zoning ordinances. So, therefore, I don't think that the Applicant has met its burden of proof with respect to that either.

Deliberations Day 3/Morning, p. 28. The Applicants, however, do not have a burden of proof with respect to municipal views[42] and there is no legal basis for deferring to master plans and

[42] *See* Section VI, C, ¶ 78, above.

zoning ordinances, and the beliefs of municipal officials about them. Municipal views, whether expressed through testimony or comments, are no different from the testimony or comments of other parties to the proceeding.

124. The requirement that the SEC give due consideration to municipal views only means that such views should be assessed in the context of a particular criterion or with respect to particular information or evidence provided by the Applicants. For example, a generalized municipal comment that the Project is inconsistent with the "rural character" of a town has little probative value and should be given little consideration.[43] To merit consideration, a municipal view, like other evidence, should be in the form of testimony, subject to cross-examination, and should address factual issues, such as explaining just how, and to what extent, the construction of the Project in an existing right-of-way would be inconsistent with or change prevailing patterns of land use.

125. Nonetheless, the Order states that:

> The predominant view of local governing agencies in this docket is quite clear. Thirty (30) of the thirty-two (32) municipalities along the route have, in one way or another, expressed an opinion that the Project will interfere with the orderly development of the region. Twenty-two of those communities have intervened in the process and presented evidence and cogent arguments that the construction and installation of the Project will unduly interfere with the orderly development of the region. The Applicant's argument that the Project is consistent with local, regional, and statewide long-range plans because, in most instances, those plans do not directly address construction and operation of the Project, is directly contradicted by the testimony of municipal officials. *The Subcommittee finds those views expressed by those municipalities to be generally persuasive.*[44]

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[43] *See e.g.*, *Order* at 247-73 (the Subcommittee's multiple references to the master plans of individual towns, many of which refer to the goal of preservation of the "rural" or "small town" character of the town.).

[44] The SEC rules do not set forth a burden of proof that municipal views be generally persuasive. A municipality, like any party that asserts a proposition, bears the burden of proving that proposition by a preponderance of the evidence. Site 202.19 (a).

Order at 276 (emphasis added). In addition, the Subcommittee states with respect to municipal views that the "overwhelming majority of those views were *vehemently* opposed to the Project," apparently giving some weight to how strongly the municipalities felt. *Id.* at 285 (emphasis added.)

126. The Order appears to regard municipal views as a numbers game, assigning weight to the views based on the number of proponents or opponents of the Project. Notably, the Order does not identify particular views, analyze their reliability, or recognize the additional evidence from the cross-examination of the municipal witnesses. Instead, in concluding that the Applicants failed to satisfy their burden, the Order apparently deems it sufficient that a large number of municipalities are opposed to the Project. Ultimately, however, it is not a question of whether the Project will be consistent with local master plans and zoning ordinances; the Project is not subject to those requirements. What is relevant under the orderly development standard is whether the Project will be compatible, as a matter of fact, with prevailing land uses. The Subcommittee, however, applies the land use criterion incorrectly and rests its determination on the conclusory statement that it finds "generally persuasive" the arguments by municipalities that the Project will be inconsistent with local, regional and long range plans. Such a "finding" is inadequate as a matter of fact, reasoning, and law.[45]

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[45] The Subcommittee also says that it agrees "with the argument set out on pages 36 through 58 of the Post-Hearing Memorandum Filed by Municipal Group 1 South, 2,3 South and 3 North." The wholesale reliance on 23 pages of argument overlooks the fact that the positions taken by the municipalities in that section are internally inconsistent, beginning with an allegation that Mr. Varney lacked a full understanding of the scope of the master plans of the affected communities and closing with the disclaimer that "many host communities did not specifically consider how a project such as Northern Pass might be inconsistent with the community's long range planning goals because proposals under the jurisdiction of the Site Evaluation Committee are not subject to a host community's land use or planning ordinances." *Post-Hearing Memorandum Filed By Municipal Groups 1 South, 2, 3 South and 3 North,* Docket No. 2015-06 (January 12, 2018), p. 58. Furthermore, the Subcommittee accepts these arguments with absolutely no recognition of the Applicants' cross-examination or other questioning of municipal witnesses.

127. The Order criticizes the Applicants for "fail[ing] to adequately anticipate and account for the almost uniform views of those groups that the Project, as planned and presented, would unduly interfere with the orderly development of the region." *Id.* at 7. It identifies its "concern... that the Applicant's representatives would take the time to meet with local planning agencies and not solicit their views on the Project," noting that "[i]f 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." *Id.* at 277. But nowhere does the Order identify any obligation on the part of the Applicants to solicit those views or to meet with those agencies. Likewise, it states that: "[w]e agree with the municipalities in this case that, given the magnitude of this Project, more consideration of master plans and ordinances was required." *Id.* at 281. Yet again, it does not identify what type or degree of consideration was required to satisfy the Subcommittee, or the legal standard the Applicants failed to meet. *Id.*

128. Throughout its deliberations and the Order, the Subcommittee erroneously conflates the land use criterion and the broader requirement to consider municipal views when making the ODR finding. The Order creates a straw man, making a finding that is not a finding. There is no requirement in statute, rule or precedent that an applicant for a Certificate to construct an energy facility consider the views of municipalities, either through meetings with officials or review of planning documents, or that it anticipate and account for such views.

B. Property Values

129. Subcommittee members misconceived Dr. Chalmers' studies and certain key findings, and these misconceptions led to the determination that his conclusions were

unreliable.[46] As explained below, contrary to the Subcommittee's conclusions, Dr. Chalmers (1) did not opine that the Project would have *no impact* on property values, (2) did not rely on a "windshield analysis" of the 89 properties along the route with homes within 100 feet of the ROW, and (3) did address the so-called gaps raised by the Subcommittee members. In addition, the Subcommittee failed to cite evidence to support its rejection of Dr. Chalmers' uncontroverted opinion that property values of unencumbered properties are not likely to be affected by the Project.

130. First, regarding property value impacts generally, after Chairman Honigberg presented a summary of the testimony and evidence related to property values, Mr. Way questioned the other members of the Subcommittee:

> I guess the question I have for the Committee, and I'm not suggesting anything here, but is everybody accepting the fact – is it straight face that there's not going to be an impact on property values as a result of this structure, this project.

Deliberations Day 2/Morning, p. 113. He further clarified his question: "Well, I mean, there's no impact to property values that's being proposed. Do we accept that as a committee?" *Id.* at 114. In his summary comments regarding the project's potential impact on ODR, Mr. Way concluded: "I'm not sure I accept the argument that there will be no impact to property values. It just doesn't make sense to me that there won't be any." Deliberations Day 3/Morning, p. 10.

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[46] With respect to the issue of witness credibility, the Subcommittee misconstrues the term. In *Appeal of Seacoast Anti-Pollution League*, 125 N.H. 708, 716 (1984) the Supreme Court distinguished, in the case of expert witnesses, between a credibility judgment and a reliability judgment. In the context of discussing the general rule that an administrative officer may act on a written record of testimony, the Supreme Court said that "it is well to remember that we are not dealing here with an eyewitness' account of past events, but with expert witness' predictions about future conditions." There is no doubt that the Applicants' witnesses are experts in their respective fields and there is no basis for challenging the truthfulness of their testimony. Rather, members of the Subcommittee appear to have made "a reliability judgment about the odds that the expert's prediction will prove to have been accurate." *Id.* Thus, it is incorrect to say the witnesses, or their testimony, are not credible.

131. Mr. Way's comments reflect a significant misunderstanding of Dr. Chalmers' ultimate opinion. Dr. Chalmers concluded that over the course of the 192-mile Project, there would be no discernible impact on *local or regional real estate markets*. At no time, however, did Dr. Chalmers testify that there would be no impact to property values—the predicate of Chairman Honigberg's question and Mr. Way's test. Instead, Dr. Chalmers explicitly stated in his pre-filed and supplemental testimony that his extensive research and studies found no evidence that the Project would "result in consistent measurable effects on property values, and, where there are effects, the effects are small and decrease rapidly with distance." *Pre-Filed Testimony of James Chalmers,* App. Ex. 30, p. 10; App. Ex. 1, Appendix 46, *High Voltage Transmission Lines and Real Estate Markets in New Hampshire*, p. 95. For the Northern Pass Project specifically he concluded that there is a likelihood of property value effect for properties that meet certain characteristics. Tr. Day 24/Afternoon, pp. 45-49.

132. Second, regarding the "windshield analysis," Dr. Chalmers found that there were 89 properties encumbered along the project route that also had homes within 100 feet of the right-of-way. He personally inspected those 89 properties from public roads and viewing points and concluded that "a dozen or so" may experience an increase in structure visibility. Tr. Day 24/Afternoon Session, p. 47; *Supplemental Pre-Filed Testimony of James Chalmers,* App. Ex. 104, p. 3. Dr. Chalmers emphasized that he was giving only an order of magnitude estimate of those properties along the route whose value could be impacted. He made it clear that the precise number of the 89 properties whose value could be impacted would require on-site inspection to determine visibility changes due to the Project. *Supplemental Pre-Filed Testimony of James Chalmers,* App. Ex. 104, p.3.

133. In their oral deliberations, Subcommittee members misconstrued how Dr. Chalmers assessed the potential change in visibility from the 89 properties with homes located within 100 feet of the ROW. Chairman Honigberg explained to the other Subcommittee members: "I believe his testimony was that he didn't go to any of the properties to actually see what can be viewed today, that he relied on people on the ground here to talk about existing properties and existing sales." Deliberations Day 2/Morning, p. 120. When Mr. Wright noted that "he thought there was some eyeball test done by Dr. Chalmers," Chairman Honigberg responded "in some places I think." *Id.* Ms. Weathersby then indicated that he talked about a "windshield test or something."[47] *Id.* In the Order, when discussing how Dr. Chalmers assessed potential visibility change of the 89 properties he inspected, the Subcommittee concluded: "His 'drive-by' or 'windshield review' is not an adequate substitute for competent analysis of the actual effects on property values." *Order* at 198.

134. In fact, Dr. Chalmers testified that he personally visited and physically inspected all 89 properties located within 100 feet of the ROW to assess existing and potential visibility. The deliberations and Order evidence a clear misunderstanding of that point.

135. Further, Dr. Chalmers viewed the properties from publicly accessible locations and explained in response to questioning by Mr. Wright that

> it wasn't a windshield. It was, you know, on the ground. And I would run up and down the frontage trying to peek around the back of the house, to the extent I could get an angle. And as I indicated, on occasion I would walk – if I couldn't quite figure it out from the street, I would walk up the right-of-way and look at it from that angle and see if that answered the question.

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[47] Subcommittee members may have confused the use of the term "windshield" with Dr. Chalmers' use of that term when explaining the use of "windshield appraisals" in the case studies as those appraisals of homes done without physically going inside a home. Tr. Day 25/Afternoon, p. 5.

Tr. Day 26/Afternoon, pp. 7-8. He again emphasized in response to Mr. Wright that his analysis was not intended to give a precise estimate of how many properties would be impacted, but rather an order of magnitude estimate of how many properties along the route likely could have a sales effect. *Id.* at 9.

136. Third, at times during the deliberations, Subcommittee members questioned what they perceived to be gaps in Dr. Chalmers' studies on property values:

> The Subcommittee was also concerned with significant gaps in the research performed by Dr. Chalmers and in his overall conclusions. He gave little, if any, consideration to commercial property, condominiums, multi-family housing, vacant land, second homes or to property along the underground portion of the route.

Order at 197. Basing a finding of property value effect (and, thus, some interference with ODR) on these perceived "gaps" is an error of fact and reasoning.

137. To begin, there is nothing in the SEC rules that requires that each of these components must be analyzed in order to meaningfully assess a proposed project's effect on real estate values in the region.[48] Moreover, the Subcommittee overlooked the fact that although these components were not the principal focus of his New Hampshire-specific case studies, Dr. Chalmers did consider these elements and provided his conclusions based on the empirical data and literature he reviewed.

138. With respect to commercial real estate, Dr. Chalmers explained that the research consistently found no value impacts unless commercial development of a property was physically constrained by a transmission corridor such that it reduced the income producing

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[48] Site 301.09, which prescribes the information that must be filed with an application, provides only that an applicant include an assessment of "the effect of the proposed facility on real estate values in the affected communities." Site 301.09(b)(4). As explained in Section VII, A, 2 above with respect to land use, this is a further exemplification of the Subcommittee's improper reliance on criteria that do not appear in SEC rules and that have never been previously applied.

potential of the properties. *Pre-Filed Testimony of James Chalmers,* App. Ex. 30, p. 3, *Supplemental Pre-Filed Testimony of James Chalmers,* App. Ex. 104, p. 12. This was not a "gap" in Dr. Chalmers' opinion, but rather his conclusion based on the professional literature on the topic and the fact that the configuration of this Project largely would be in existing transmission and transportation corridors.

139. With respect to second homes, Dr. Chalmers noted that properties along the studied locations extended north/south across most of the State, and it is reasonable to assume that the properties are a representative mix of primary residences and secondary or seasonal residences. Tr. Day 24/Afternoon, p. 93. In fact, he analyzed property addresses and property owner mailing addresses and determined that a number of the cases studies were likely second homes. *Supplemental Pre-Filed Testimony of James Chalmers,* App. Ex. 104, p. 4. Furthermore, Dr. Chalmers noted that he was not aware of any evidence (and no party introduced any such evidence) suggesting that permanent residents are less sensitive to the view of HVTL corridors than seasonal residents. *Supplemental Pre-Filed Testimony of James Chalmers,* App. Ex. 104, p. 4.

140. As for condominiums, Dr. Chalmers performed a thorough analysis of McKenna's Purchase and included it as part of his supplemental testimony. He analyzed the sales history of the condominium complex and provided comprehensive empirical data that showed no relationship between the location of units relative to the existing HVTL and the price at which units sold. On this basis, and given what the relationship of the units to the corridor would be after the Project was constructed, Dr. Chalmers concluded the complex would suffer no adverse market value effect. *Supplemental Pre-Filed Testimony of James Chalmers* App. Ex. 104, pp. 8-12. McKenna's own witness offered evidence confirming that analysis. Specifically,

when Ms. Kleindienst testified on behalf of McKenna's Purchase, she noted that despite the high profile of the Project, the average sale price of the McKenna's Purchase condominium units has been *increasing*. Tr. Day 70/Morning, pp. 173-174. That fact was never mentioned in the Order.

141. Concerning the underground HVTL, because of evidence suggesting that visibility and encumbrance combined with proximity are necessary before the likelihood of market value effects is discernible, Dr. Chalmers concluded that underground HVTL, once in place, would not affect the market value of nearby properties. *See* Tr. Day 26/Morning, p. 119. Again, this was not a gap and Dr. Chalmers did not ignore this issue. Instead, he provided empirical evidence supporting his conclusion that there likely would be no impact to properties abutting or encumbered by underground HVTL.

142. Many of the Subcommittee's conclusion's on property value effects also lack any basis in the record. The Order states that the "Subcommittee believes that properties that are encumbered by the right-of-way and properties that are not encumbered by the right-of-way will be affected by the Project." *Order* at 199. The Subcommittee reached this conclusion without providing any support for its belief that property values of unencumbered properties would likely be impacted by the Project. Moreover, they rejected Dr. Chalmers' findings without citing any evidence to controvert his findings.

143. Mr. Sansoucy contended that property values of unencumbered or "tertiary" properties would likely be impacted. But as Dr. Chalmers explained, not one of the nearly two thousand tax cards provided by Mr. Sansoucy showed an unencumbered property to have an assessment adjustment due to the presence of a transmission corridor. *Supplemental Pre-Filed Testimony of James Chalmers,* App. Ex. 104, pp. 5-6. Dr. Chalmers also analyzed 478 unencumbered properties in six New Hampshire towns having some portion within 600 feet of

the existing Phase II HVTL. He found that not one of those properties had an assessment adjustment due to the presence of a transmission corridor. *Id.* In sum, the Subcommittee's finding that the property values of unencumbered properties will be affected by the Project is not supported by any evidence in the record.

144. During deliberations, individual Subcommittee members questioned Dr. Chalmers' studies but, instead of pointing to contrary *evidence*, they couched their statements in terms of *concerns or beliefs*. Mr. Wright explained:

> My gut reaction, and I don't know if I should say 'gut reaction,' but the fact that the conclusion's that [sic] would be no impacts outside of things 100 feet away doesn't seem to me to be credible. I'm not sure I can pinpoint something to that, but it just doesn't seem credible to me.

Deliberations Day 2/Morning, pp. 116-117. Ms. Dandeneau concluded that "I did not find the analysis credible or convincing, and I do have concerns about this project's impact on property values." Deliberations Day 3/Morning, p. 13. Ms. Weathersby noted "I have real concerns about property values, and I do believe that property values will be affected by the presence of this project in a much greater degree that was stated by the Applicant." Deliberations Day 3/Morning, p. 16. Mr. Oldenberg stated "I do believe, as the other folks have stated, that the property values will be impacted in a negative way." Deliberations Day 3/Morning, p. 19. Commissioner Bailey stated "I think that it's more likely than not that there will be more of an impact on property value than the Applicant claims." Deliberations Day 3/Morning, pp. 26-27.[49]

145. Although the Subcommittee found that Dr. Chalmers' studies were "roundly criticized" by other parties, the Subcommittee never evaluated the validity of the

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[49] Dr. Chalmers testified that if one focuses purely on HVTL, most people intuitively would expect the direction of the effect on market value to be negative. But his comprehensive literature assessment and the empirical data from his New Hampshire-specific studies established that it does not necessarily follow that there is a discernible effect on market value. App. Ex. 30, p. 12.

criticisms.[50] *Order* at 195. During deliberations, Chairman Honigberg simply pointed out that "[w]e had a number of witnesses testify under oath regarding property values…there were roughly a dozen individual property owners who testified that they believed their properties would be affected adversely." Deliberations Day 2/Morning, p. 108. He also noted that a lot of people provided opinions about property values that were "instinctive." Deliberations Day 2/Morning, p. 107. Nor did the Subcommittee cite to any evidence presented by witnesses retained to provide expert testimony that controverted Dr. Chalmers' conclusions. The only expert testimony cited by the Subcommittee other than Dr. Chalmers was that of Mr. Sansoucy who, as noted, had little credibility, at least with Chairman Honigberg. Deliberations Day 2/Morning, p. 117.

146. In sum, other than their own views regarding the impact of the Project on property values and their reference to the various lay opinions that property values would be impacted, the Subcommittee cited no empirical data in their deliberations to refute Dr. Chalmers' conclusions. Instead, the Subcommittee concluded its deliberations by stating their opinion that his testimony was not credible. However, as shown by the examples above, Subcommittee

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[50] Much of the opposition evidence on the property value issue, and the defects with that evidence, was never considered. *See, e.g.,* Tr. Day 59/Afternoon, pp. 88-90 (Peter Powell acknowledged during cross-examination that he is not a licensed appraiser or an assessor in the State of New Hampshire and that his testimony was based on his lay experience as a real estate agent in the North Country.); Tr. Day 59/Afternoon, pp. 95-96, 107-112, 114 (Mr. Powell reached the conclusion, based on his review of just 5 examples, that "the loss in value due to NP can range from 35 or 40 percent to as high as 75 percent." After going through these examples, in which Mr. Powell attributed the entire reduction in value to the presence of Northern Pass, it was established that several of them were not qualified sales and should not have been considered.); Tr. Day 70/Morning, p. 174 (When asked by Commissioner Bailey if buyers at McKenna's were aware of Northern Pass, Ms. Kleindienst responded "A lot of people don't pay attention to that."); Tr. Day 66/Afternoon, pp. 60-61 (Ms. Menard acknowledging that her lay opinion testimony is based on her experience as a realtor in the Deerfield area and that she is not an assessor or licensed appraiser.); Tr. Day 66/Afternoon, pp. 68-69 (Ms. Menard acknowledging that she has noted "access to trails along the power line" as a selling feature of some of her listings.); Tr. Day 66/Afternoon, pp. 73-75 (After criticizing Dr. Chalmers for using expired listings in his analysis, Ms. Menard acknowledged that one of the comparable properties she had evaluated was an expired listing.); Tr. Day 67/Afternoon, p. 75 (John Petrofsky, offering his lay opinion testimony regarding effects on second home purchases, agreed that his view is that "nobody will buy a second home in New Hampshire if this Project is built.").

members found Dr. Chalmers' testimony to be unreliable or not credible largely because they disregarded uncontroverted record evidence, misconstrued key findings made by Dr. Chalmers, and relied on their own views.

C. Tourism

147. The Subcommittee's consideration of the testimony and evidence presented by the Applicants on tourism is also deficient. First, the Order contains significant factual errors. Second, the Subcommittee failed to consider evidence the Applicants presented in their cross-examination of CFP and intervener witnesses.

148. In the first sentence of the Tourism section, the Order states that the Applicants' position is that there will be "absolutely no adverse impact on tourism in the region." Order at 199 (citing App. Ex. 1, p. 91). This is an incorrect statement. The Applicants' position is that the Project will not have "a measurable effect on New Hampshire's tourism industry." Tr. Day 21/Morning, p. 8; App. Ex. 1, p. ES-12. In fact, Mr. Nichols acknowledged that there would be some locational tourism impacts. *See, e.g.*, Tr. Day 22/Morning, pp. 131-132 (Mr. Nichols explaining that "[i]n some instances, with some of the construction, [visitors] might choose a restaurant or a retail location three blocks or three miles down the road, but I don't believe there would be any impact on a regional tourism basis.); *see also* Tr. Day 21/Afternoon, p. 76 (Mr. Nichols testifying that in a scenario where traffic is diverted around downtown Plymouth, "[i]f visitors aren't allowed to go into the downtown area, I would assume that would have, you know, some influence, some impact on that.) It was therefore an error to have discounted Mr. Nichols' testimony in large measure based on this incorrect premise.

149. The Subcommittee found that Mr. Nichols' comparison of the Project to the Hydro-Québec Phase II ("Phase II") project and the Maine Reliability Project ("MPRP") was flawed. Order at 226. The Subcommittee based this finding on the position that those "projects

are substantially different from the Project" in this case, "most notably because they were constructed fully within existing corridors, and the new structures remained below the tree canopy and were not plainly visible." *Id.*

150. The Subcommittee does not cite any factual support or evidence substantiating these statements. Moreover, it states that Mr. Nichols "admitted that the Phase II line structures are lower than the Project's towers and are 'shielded by the crown' of the tree line'."[51] *Id.* at 207. Mr. Nichols actually testified that the Phase II line towers are shielded by the crown of the tree line "in many places" and that the Northern Pass structures are higher in "many" places. Tr. Day 21/Morning, p. 10. Relying only on the second statement, the Subcommittee found that "[t]he structures designed for this Project are *considerably* taller and *will be* seen above the tree canopy in most of the region." Order at 226 (emphasis added).

151. The Subcommittee took it as fact that the Phase II line is below the tree line for its entire length and has considerably lower structures than the Project, but there is no evidence in the record substantiating such findings. While KRA makes similar assertions in its report, it does not provide any citation or support for its claim. *See Pre-Filed Testimony of Thomas E. Kavet*, CFP Ex. 146, p. 32. Moreover, the Subcommittee determined that the "structures designed for this Project … will be seen above the tree canopy in most of the region." *Order* at 226. It is unclear how the Subcommittee came to this determination since it did not consider or deliberate on the testimony or evidence provided with respect to the visual impact of the Project.

152. The Subcommittee makes several errors here. It relied on information that was not supported by facts or evidence to find fault in Mr. Nichols' analysis. There is no

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[51] The SEC cites to two transcript references Tr. Day 21/Morning, pp. 9-10; Tr. Day 22/Afternoon, p. 33.

evidence in the record showing that the Phase II line is below the tree line. There was no visual assessment for the Phase II project introduced, no testimony and no data whatsoever. There was also no information set forth during deliberations or in the Order about the relative heights of the Phase II and MPRP structures compared to those proposed for the Project, and the testimony on which the SEC could rely to determine that the proposed structures are "considerably taller" than the Phase II line actually contradicts the SEC's finding. With respect to the Phase II line, Dr. Chalmers testified that the "typical" height of the 450 kV line is 95 feet. Tr. Day 24/Morning, p. 48.

153. As noted above, KRA made similar assertions to those articulated by the Subcommittee with respect to Phase II structure heights and visibility. *See Pre-Filed Testimony of Thomas E. Kavet*, CFP Ex. 146, p. 32. KRA did not, however, provide any support for their statements. Nevertheless, it appears the Subcommittee accepted them as true inasmuch as the Order employs KRA's qualifier "considerably" when attempting to distinguish the two projects. *See Pre-Filed Testimony of Thomas E. Kavet*, CFP Ex. 146, p. 32; *see also Order* at 226. Again, the Subcommittee fails to apply the burden of proof required under Site 202.19 (a) that a party asserting a proposition prove that proposition by a preponderance of the evidence.

154. The Subcommittee also based its tourism finding on the position that "[t]he Phase II and Maine projects are also located in areas that are substantially different from the Project's location." *Order* at 226. This finding is not supported by the record.

155. The Phase II line is located in New Hampshire and runs through many of the same counties as the Project. For the majority of its length the Phase II line effectively runs parallel to the Project, approximately 10 to 15 miles west. Concerning MPRP, there is no evidence or testimony in the record demonstrating that its location in Maine is substantially

different from the Project. In fact, Mr. Nichols testified that the four economic regions in Maine that the MPRP runs through "are key tourism areas of the state, accounting for two thirds of the state's tourism expenditures." *Supplemental Pre-Filed Testimony of Mitch Nichols*, App. Ex. 105, p. 6. Therefore, the Subcommittee's finding with respect to Mr. Nichols review of the Phase II and MPRP transmission lines lacks support.

156. In addition, the Subcommittee found that "[r]eferences and comparison to the impact on tourism by the lines constructed at the Estes Park and North Cascades National Park are not persuasive." *Order* at 226. The Subcommittee states that "[v]isibility, or lack thereof, of the power lines at Estes Park and North Cascades National park and visibility of the Project at New Hampshire tourist destinations cannot be reasonably compared by reference to one or two photographs." *Id.* The Subcommittee's analysis on this issue is also deficient.

157. First, with respect to North Cascades National Park, the Subcommittee states that Mr. Nichols "admitted that the transmission lines in North Cascades National Park are located along the road through the Park and are visible for 'a few seconds or a few minutes.'" *Id.* at 216. This statement is not accurate. To the contrary, Mr. Nichols testified that the transmission facilities in this location are consistently prominent at key areas.

158. For example, Mr. Nichols testified that the transmission facilities include a dam on a lake where "a significant amount of recreation" occurs and explained that transmission lines stretch from that lake through the State of Washington to Seattle. He stated that "one of the prominent elements of the Byway is the 'Skagit Power Project' located near Ross Lake which houses major facilities and transmission lines." *Supplemental Pre-Filed Testimony of Mitch Nichols*, App. Ex. 105, Attachment A. He went on to explain that "The Skagit Power Project is

located in the Cascade Mountains. It is almost entirely within the Ross Lake National Recreation Area." *Id.*

159. Mr. Nichols' testimony with respect to the duration of visibility along the road was intended only to contextualize his opinion that despite the visibility of transmission lines, "it's the broader experience that is attracting" visitors to the park. Tr. Day 22/Afternoon, pp. 41-42. Contrary to the characterization in the Order, Mr. Nichols did not "admit" that the lines were only located along the roads and visible for a few seconds or minutes.

160. Moreover, there is additional testimony and evidence in the record with respect to North Cascades National Park that the Subcommittee overlooked. Notably, the Applicants introduced App. Ex. 312 during the cross examination of KRA.

161. When cross examining KRA the Applicants presented a photograph taken from Diablo Lake Vista Point along the North Cascades Scenic Byway. Tr. Day 45/Morning, pp. 103-104. KRA agreed that the location was a scenic tourist destination. *Id.* KRA also agreed that "there are transmission lines and transmission structures right at the end of the lake in the center of the photo." *Id.*

162. This exhibit and KRA's testimony not only contradict the finding that the transmission lines in North Cascades National Park would only be visible from the road, which is of course itself a scenic byway, but it provides further support for Mr. Nichols' opinion that despite the presence of transmission lines "it's the broader experience" that attracts visitors to tourist destinations.

163. The Subcommittee's consideration of the effects of the Project on tourism was incomplete and it overlooked or misconstrued important evidence in reaching its conclusion that the Applicants had not met their burden of proof. As discussed herein, the Applicants

demonstrated that the impacts of the Project on tourism would likely be limited and not measureable on a regional basis. The Subcommittee was obliged to consider all the evidence in the record, including that submitted by other parties, and the Subcommittee was obliged as well to consider the Applicants' proposed condition (see Section V) to mitigate any impacts the Project would have on tourism.

D. Construction.

164. The Subcommittee concluded that the Applicants had "not provided a satisfactory means and method to regulate the construction, maintenance and operation of the parts of the Project proposed to be constructed underneath municipal roadways." *Order* at 282. In addition, it stated that the Applicants "failed to convince us, by a preponderance of the evidence, that a delegation of authority to the Administrator and her consultant would better resolve opposing viewpoints and inherent conflicts that would arise between the Applicant and the municipalities." *Id.* at 117. The Subcommittee further expressed that it is "concerned that inadequate traffic management strategies, combined with a lack of communication and consideration of business access, may have an unreasonable impact on certain communities." *Id.* at 119.

165. First, issues related to traffic management and the crossing of public highways primarily concern the effects of the Project on public health and safety, not whether the Project will unduly interfere with the orderly development of the region, which is an economic issue. The Subcommittee in *Joint Application of New England Power Company and Public Service Company of New Hampshire,* with respect to MVRP, specifically addressed traffic management and the crossing of locally-maintained highways as matters of traffic safety. *Joint Application of New England Power Company and Public Service Company of New Hampshire, Decision Granting Application for Certificate of Site and Facility,* Docket No. 2015-05 (October

4, 2016), p. 85. There is no basis for treating the issues differently in this proceeding and insofar as the Applicants implement the traffic safety measures consistent with means and methods applied in MVRP and proposed here there will be no unreasonable impacts on communities or interference with the orderly development of the region.

166. Second, the SEC rules do not, either pursuant to Site 301.09 or 301.15, contemplate consideration of traffic safety matters under orderly development. It appears that the Subcommittee has erroneously drawn these issues under the umbrella of orderly development simply because municipalities have a view on the matters, which is not a sufficient basis. Municipalities may, and have, expressed views on various topics pertinent to the other required findings in this proceeding. Just because there may be "disagreements between the Applicant and municipalities over an appropriate manner of regulation and oversight of construction under and over local roads" does not mean that the SEC does not preempt local authority or relieve the Subcommittee of its duty to exercise its authority. *Order* at 117.

167. Finally, the Subcommittee, among other things, stated that the Applicants "failed to provide documentation that clearly identified crossings over locally–maintained roads and instead provided a list which did not differentiate between State and local roads." *Order* at 117. The Subcommittee overlooks the detailed assessment of local road crossings that the Applicants provided with Appendix 10 to their Application and their characterization of the list of State and local roads and its relationship to the Applicants' planning with respect to the impact of the Project on local roads is unfounded. Moreover, the issue raised during deliberations concerning the list of State and local roads was addressed with Counsel for the Subcommittee during the break on the afternoon of January 30, 2018. Deliberations Day 1/Afternoon, p. 47.

VIII. Conclusion

168. The Subcommittee's vote that the Applicants failed to prove by a preponderance of the evidence that the Project will not unduly interfere with the orderly development of the region is not supported by the record. The Applicants have demonstrated good reason for the Subcommittee to grant rehearing.

169. Accordingly, the Applicants request that the Subcommittee vacate its decision to deny the application and resume its deliberations on all the required statutory and regulatory considerations, including such conditions of approval that may address issues identified in the course of those deliberations and vacate the decision to deny the Application.

WHEREFORE, the Applicants respectfully request that the SEC:

A. Grant rehearing as requested herein; and;

B. Grant such further relief as is just, equitable and appropriate.

Respectfully submitted,

Northern Pass Transmission LLC and Public Service Company of New Hampshire d/b/a Eversource Energy

By Its Attorneys,

McLANE MIDDLETON,
PROFESSIONAL ASSOCIATION

Dated: April 27, 2018

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Certificate of Service

I hereby certify that on the 27th of April, 2018, an original and one copy of the foregoing Motion was hand-delivered to the New Hampshire Site Evaluation Committee and an electronic copy was served upon the Distribution List.

_____
Barry Needleman

COUNSEL FOR THE PUBLIC'S PROPOSED CONDITIONS
REVISED AND AMENDED BY AGREEMENT WITH THE APPLICANTS
FEBRUARY 28, 2018

1. **Best Management Practices – Construction.**

Further Ordered that, prior to any construction activity, Applicants shall file with the SEC a copy of all Best Management Practices ("BMPs") for all construction activity; including, without limitation BMPs for entering and exiting the ROW or any construction site; sweeping paved roads at access points; BMPs relating to Applicants' Storm Water Pollution Prevention Plan; BMPs for specific locations such as steep slopes near water bodies; BMPs for HDD/micro-tunnel drilling locations; and BMPs for work near archeological and historic sites.

2. **Avoidance, Minimization and Mitigation – Natural Environment.**

Further Ordered that, prior to any construction activity, Applicants shall identify and implement the following avoidance, minimization and mitigation measures ("AMMs") in addition to or supplementing *Avoidance, Minimization and Mitigation Measures and Time of Year Restrictions for Wildlife Resources* and *Plant Protections -- Avoidance and Minimization Measures* as required by Condition 2 of the of NHDES Wetlands Bureau's March 1, 2017 Final Decision and recommended approval of the wetlands application filed by the Applicants. The AMMs will apply except in the case where the Applicants receive a specific waiver in advance from the New Hampshire Department of Environmental Services after consultation with the New Hampshire Fish and Game Department and the New Hampshire Natural Heritage Bureau

a. Eastern Small-Footed Bats.

Investigate and confirm which rocky outcrops are inhabited by eastern small-footed bats and avoid any blasting and/or construction activities on or adjacent to any rocky outcrops inhabited by eastern small-footed bats.

b. Northern Long-Eared Bats.

No tree removal activity shall be conducted in proximity to identified long-eared bat sites, including the Bristol mine location, between August 1 and May 31, and Applicants shall perform acoustic monitoring within any area that will be cleared to verify the absence of bats prior to tree clearing activity.

c. Indiana Bat.

Applicants shall establish AMMs to protect this species from construction activity.

d. Butterflies.

Applicants shall limit all construction activity within the locations of the Karner Blue Butterfly ("Kbb") in Concord and Pembroke to the period of December 21 to March 20 (winter conditions). Timber mats shall be used.during construction activities in wild lupine habitat, and shall not be maintained in place for more than ten (10) consecutive days during the growing season unless specifically approved in advance by the New Hampshire Department of

Environmental Services after consultation with the New Hampshire Fish and Game Department and the New Hampshire Natural Heritage Bureau

Applicants shall develop a restoration plan for the parcel of land in Concord to be used to offset the impacts to the Kbb and shall fund the restoration of this property.

Applicants shall develop and file with the SEC a ROW management plan for avoidance and minimization of impacts to the Kbb during operation of the Project.

e. Birds.

(1) Great Blue Heron.

Prior to construction, Applicants shall perform an aerial survey to locate great blue heron nests and shall utilize a quarter-mile buffer zone for any activity near active blue heron nests.

(2) Active Raptor Nests.

Prior to construction, Applicants shall perform an aerial survey to identify active raptor nests and follow Applicants' proposed AMMs for active raptor nests.

(3) Common Nighthawk.

Prior to construction, Applicants shall file AMMs for the common nighthawk that describes the methodology to "predetermine" the buffer area around nests.

(4) Bald Eagles.

Prior to construction, Applicants shall file AMMs that provide for nest identification by an aerial survey.

f. Mammals.

(1) Lynx

Prior to construction, Applicants shall file with the SEC AMMs that describe how Applicants will survey sites for lynx denning sites to discover the presence of lynx, and shall not clear any trees between May 1 and July 15 in locations where Lynx are discovered.

(2) American Marten.

Prior to construction, Applicants shall file with the SEC proposed AMMs to avoid or minimize impacts to the American Marten, which shall include seasonal restrictions on construction and the prohibition of off-highway recreational vehicles in the new ROW and access roads. Applicants also shall confirm that the proposed mitigation parcels provide accessible high quality martin habitat.

g. Plants.

(1) Wild Lupine.

Applicants shall limit all construction activity in the Concord and Pembroke locations where wild lupine are present to the period of December 21 to March 20, and shall use timber

mats, during any construction activity. Any timber mats used shall not be maintained in place for more than ten (10) consecutive days during the growing season unless specifically approved in advance by the New Hampshire Department of Environmental Services after consultation with the New Hampshire Fish and Game Department and the New Hampshire Natural Heritage Bureau.

(2) Licorice Goldenrod.

Prior to construction, Applicants shall file with the SEC proposed AMMS for the licorice goldenrod.

(3) The Small Whorled Pogonia.

Prior to construction, Applicants shall survey the ROW and file with the SEC an inventory of all small whorled pogonia within the ROW and shall file AMMs for this plant.

(4) Red Threeawn.

Prior to construction, Applicants shall file with the SEC BMPs that include seasonal restrictions, seed collection, the establishment of conservation areas and reseeding areas after construction.

3. Monitoring.

Further Ordered that, once construction begins, Applicants shall file weekly with the SEC a copy of all reports by all construction and environmental monitors. The SEC shall post said reports on its website. Applicants also shall identify a specific contact person from the Project, with their contact information, to whom all questions, concerns or other communications should be sent regarding monitoring reports. The Project's contact person shall respond in writing within ten (10) days to all written communications they received regarding a monitoring report. The SEC, or any state agency to which the SEC delegates authority to, shall have continuing jurisdiction to address any violations of these conditions, all BMPs or all AMMS for the Project. Following remediation of any such violation, Applicants shall file with the SEC a report of remediation, and the SEC shall post said reports on its website.

4. Blasting.

Further Ordered that, prior to any blasting, Applicants shall identify drinking water wells located within 2,000 feet of the proposed blasting activities and develop a groundwater quality sampling program to monitor for nitrates and nitrites, either in the drinking water supply wells or in other wells that are representative of the drinking water supply wells in the area.

Further Ordered that, the groundwater quality sampling program shall include pre-blasting and post-blasting water quality monitoring to be approved by the New Hampshire Department of Environmental Services ("NHDES") prior to commencing blasting.

Further Ordered that, the groundwater sampling program shall be implemented by Applicants once approved by the NHDES.

Further Ordered that, the NHDES is authorized to monitor the implementation and enforcement of the groundwater quality sampling program to ensure that terms and conditions of the program and the Certificate are met, and any actions to enforce the provisions of the Certificate must be brought before the SEC.

Further Ordered that, the NHDES is authorized to specify the use of any appropriate technique, methodology, practice or procedure, as may be necessary, to effectuate conditions addressing the groundwater sampling program or to carry out the requirements of the groundwater quality sampling program.

5. Noise.

Further Ordered that, within 15 days of receiving a complaint, the Applicants shall conduct a field test to evaluate the complaint, and within 30 days of the complaint provide a report of the results to the complainant, including, if applicable, a plan to resolve the issue. Unresolved complaints shall be referred in writing to the SEC Administrator, who will resolve the dispute, including determining whether it is appropriate to retain a third-party noise expert to take field measurements in order to evaluate and validate noise complaints.

6. Timber Mats.

Further Ordered that, Applicants shall minimize the length of time timber mats are left in place and shall not maintain any timber mats on wild lupine habitat during the growing season for more than 10 consecutive days, unless specifically approved in advance by the New Hampshire Department of Environmental Services after consultation with the New Hampshire Fish and Game Department and the New Hampshire Natural Heritage Bureau.

7. Tamarack Tennis Camp.

Further Ordered that, Applicants shall not perform any construction activity within 1000 feet of the Tamarack Tennis Camp during the Camp's summer session for youth instruction.

8. Municipal Construction Rules and Regulations.

Further Ordered that, Applicants shall coordinate with the municipal engineer, road agent or other authorized municipal officer for any municipality through which the Project will pass in order for Applicants to comply with existing municipal construction rules and regulations. If it is not practicable for the Applicants to comply with such municipal rules and regulations, the Applicants shall work with the municipal officials to reach an agreement. In the event a dispute arises as to the Applicants' compliance with any rule or regulation that the Applicants are unable to resolve directly with the municipal officials, the Applicants and/or the municipality may refer the matter in writing to the SEC Administrator for resolution.

9. Restoration of Municipal Roads.

Further Ordered that, Applicants shall coordinate with all host municipalities to restore all municipal roads that are damaged by construction of the Project to the same or better condition, subject to the review of the municipal engineer, road agent or other authorized municipal officer and approval by the SEC administrator.

10. Public Meetings.

Further Ordered that, prior to construction of the underground portion of the Project, Applicants shall hold a minimum of three (3) combined public meetings with the Boards of Selectmen for (1) Pittsburg, Clarksville, and Stewartstown; (2) Bethlehem, Sugar Hill, Franconia, and Easton; and (3) Woodstock, Thornton, Campton, Bridgewater, and Plymouth, to discuss the construction schedule in their respective towns and to coordinate the construction in order to avoid or minimize impacting local or regional events that are scheduled to be held in said towns. To the extent that any such Board(s) are unavailable to attend combined meetings, the Applicants shall hold additional separate public meetings with such Board(s).

Further Ordered that, Applicants shall provide each host town and the Administrator of the SEC with copies of Applicants' proposed construction plans, blasting plans, schedule and other public information (Ref. RSA 91-A:5) to be made available to the public.

Further Ordered that, the construction plans, schedule and other information provided to each host town and Administrator of the SEC shall be updated at least monthly or sooner if necessary to reflect changes in the Project's schedule or other changes during construction.

Further Ordered that, the meetings between Applicants and the Boards of Selectmen of host towns shall be attended by persons knowledgeable with Applicants' construction plans and responsible for managing construction activities.

Further Ordered that, the public meetings between Applicants and the Boards of Selectmen of host towns required above shall be public meetings under RSA 91-A, moderated by the towns' Board of Selectmen, except as provided by RSA 91-A:3.

Further Ordered that, Applicants shall provide to the SEC for posting on the SEC's website information concerning complaints during construction, if any, and their resolution, except that confidential, personal or financial information (Ref. RSA 91-A:5) regarding the complaint should be redacted.

Further Ordered that, in the event of significant unanticipated changes or events during construction that may impact the public, the environment, compliance with the terms and conditions of the Certificate, public transportation or public safety, Applicants shall notify the Board of Selectmen of all affected host towns or their respective designee and Administrator of the SEC in writing as soon as possible but no later than seven (7) days after the occurrence.

Further Ordered that, in the event of emergency conditions which may impact public safety, Applicants shall notify the host town's appropriate officials and the Administrator of the SEC immediately.

11. Independent Claims Process.

Further Ordered that, the SEC shall appoint an attorney or retired judge (the "Claims Administrator") who shall independently administer a claims process for all claims relating to damage to property, loss of business or loss of income caused by construction of the Project (the "Claims Process"). Counsel for the Public and Applicants shall jointly or separately file with the SEC proposed procedures for filing and deciding said claims, including criteria for eligibility, a procedure for filing claims, required proof of the damage or loss, the presentation and consideration of claims, the basis for recovery and the manner of deciding claims. Applicants shall establish a fund for the payment of claims ("Claims Fund") which fund shall be solely administered by the Claims Administrator, who shall provide to the SEC a quarterly report of the Claims Fund, including all disbursements. The Claims Administrator shall be paid an hourly rate to be determined by the SEC, and said compensation and all expenses of the Claims Administrator shall be paid from the Claims Fund, subject to approval by the SEC. Upon issuance of a certificate, Applicants shall deposit Five Hundred Thousand ($500,000) Dollars to establish the Claims Fund, and shall deposit any additional funds necessary to pay all claims awarded by the Claims Administrator and to pay the Claims Administrator's compensation and expenses. The Claims Administrator shall accept written claims until the three-year anniversary date of the date when the transmission line becomes operational. The Claims Administrator shall process and provide a written decision on all written claims filed with the Claims Administrator prior to said deadline. The Claims Administrator's decision and any reconsideration thereof shall be final and non-appealable. The Claims Process is not mandatory. Any party may file a claim in any court of competent jurisdiction in lieu of filing a claim in the Claims Process. If a party files a claim in the Claims Process, that party waives the right to file the same claim in court, and the Claims Process becomes the exclusive forum for deciding all claims filed in the Claims Process. All funds remaining in the Claims Fund after the payment of all timely filed claims and the payment of the Claims Administrator's compensation and expenses shall be returned to Applicants.

12. Cape Horn State Forest.

Further Ordered that, Applicants shall work with the Office of Attorney General to resolve an error identified in an easement held by Public Service Company of New Hampshire for a specific parcel in the Cape Horn State Forest. The Applicants shall report the status of their discussions with the Office of the Attorney General to the SEC Administrator prior to the commencement of construction of the Project, and shall submit evidence of the resolution of the easement issue to the SEC prior to construction in the Cape Horn State Forest. This condition shall not constitute a waiver of any of the Applicants' rights to cross public waters or state lands, or other property interests.

13. EMF Monitoring.

Further Ordered that, Applicants, in consultation with the PUC's Safety Division, shall measure actual electro-magnetic fields associated with operation of the Project both before and after construction of the Project during peak-load, and shall file with the SEC the results of the electro-magnetic fields' measurements.

Further Ordered that, if the results of the electro-magnetic fields measurements exceed the guidelines of the International Committee on Electromagnetic Safety ("ICES") or the International Commission on Non-Ionizing Radiation Protection ("ICNIRP"), Applicants shall file with the SEC a mitigation plan designed to reduce the levels so that they are lower than the ICES or ICNIRP guidelines.

14. North Country Jobs Fund.

Further Ordered that, Applicants shall require as a condition of their funding commitment to the North Country Jobs Fund (the "Jobs Fund") that the Jobs Fund employ an independent economic development professional to provide advice on the selection of grant recipients and that the Jobs Fund file annually with the SEC a summary of all disbursements, the use of all disbursements, and the results of all grants awarded by the Jobs Fund.

15. The Forward New Hampshire Fund.

Further Ordered that, Applicants shall require the following as conditions of their funding commitment to the Forward New Hampshire Fund ("FNH Fund"): (1) that the FNH Fund shall have a board of directors who have no financial affiliation (employment, vendor, etc.) with Applicants; (2) that the FNH Fund employ an independent economic development professional to establish written criteria for the application and receipt of loans or grants from the FNH Fund; and (3) that the FNH Fund file annually with the SEC and with the Director of Charitable Trust in the Office of the Attorney General a report of its activities, including a report of its expenditures, all loans or grants made by the FNH Fund and a review of how each loan or grant was used and their results in creating jobs or economic development.

16. Decommissioning.

Further Ordered that, prior to construction Eversource Energy shall execute a payment guarantee in the face amount of $100 million, in a form acceptable to Counsel for the Public and the SEC, that will unconditionally guarantee the payment of all costs of decommissioning the Project, consistent with the Decommissioning Plan prepared by GZA GeoEnvironmental, Inc. that was filed on July 22, 2016. On each tenth anniversary of said payment guarantee, NPT shall file the SEC an updated budget for the costs of decommissioning the Project, and Eversource Energy or its successor or assigns shall provide a replacement payment guarantee in the face amount of said updated budget.

17. **Coos Loop.**

Further Ordered that, NPT shall complete, as part of the construction of the Project, all of the upgrades to the Coos Loop and the transmission lines that connect the Coos Loop to the New England electrical grid that are required to remove the current constraints or flowgate restrictions on the Coos Loop, including without limitation, upgrading 16 miles of the Q-195 transmission line, 1.2 miles of the Q-195 transmission line to the Moore substation, 12.1 miles of the O-154 transmission line and 0.5 miles of the O-154 transmission line to the Paris substation, 18 miles of the D-142 transmission line, as set forth in Counsel for the Public's Exhibits 46 and 47.

Further Ordered that the Applicants shall request that ISO-NE conduct a study, fund the study, and, in the event that ISO-NE determines an upgrade is necessary to address voltage stability at the substation in Berlin or at another substation on the Coos Loop, work with generators, Staff of the Public Utilities Commission, the Office of Consumer Advocate, and Counsel for the Public to determine sources of funding for voltage stability upgrades. To the extent that other sources of funding are not available or sufficient, the Applicants will condition their funding commitment to the FNH Fund on payment by the FNH Fund of the additional costs of necessary voltage stability upgrades.

POTENTIAL ADDITIONAL CONDITIONS
FEBRUARY 28, 2018

1. ***Public Outreach.*** Further Ordered that, to ensure robust public outreach prior to and throughout construction, the Applicants shall adopt and submit to the SEC Administrator, within 30 days of issuance of a Certificate, a public outreach plan that sets forth the steps that will be taken to keep local government officials and local residents informed of each phase of project construction, in order to avoid, minimize and mitigate impacts arising from construction of the Project. Such plan shall include coordination with local emergency responders.

2. ***Business Outreach***. Further Ordered that, to ensure robust business outreach prior to and throughout construction, the Applicants shall adopt and submit to the SEC Administrator, within 30 days of issuance of a Certificate, a business coordination plan that sets forth the steps that will be taken in order to avoid, minimize and mitigate impacts to businesses arising from construction of the Project. Such plan shall include the Independent Claims Process described at paragraph 11 of the Counsel for the Public's proposed conditions.

3. ***Land Use.*** Further Ordered that, in order to address potential localized impacts of the Project in host communities, the Applicants shall condition their funding commitment with the FNH Fund on earmarking $25 million for economic development as follows: (i) to provide a one-time payment of $100,000 to each of the thirty-one host municipalities for the purpose of developing and implementing Master Plans for development; and (ii) to promote community betterment in host communities.

4. ***Municipal MOUs (land use)***. Further Ordered that, in order to further limit construction related impacts in host communities, the Applicants shall enter a Memorandum of Understanding with any requesting municipality based on the template included as Attachment H to the March 24, 2017 Supplemental Testimony of William J. Quinlan.

5. ***Plymouth HDD (business impacts, land use)***. Further Ordered that, in order to avoid and limit construction impacts to businesses in Plymouth, the Applicants shall work with the Department of Transportation ("DOT") to provide for the installation of the underground segment of the transmission line in downtown Plymouth along Main Street using horizontal directional drilling ("HDD") construction techniques.

6. ***Franconia HDD (business impacts, land use)***. Further Ordered that, in order to avoid and limit construction impacts to businesses in Franconia, the Applicants shall work with the DOT to provide for the installation of the underground segment of the

transmission line in Franconia on Main Street and Church Street using HDD construction techniques.

7. ***Tourism Growth Fund.*** Further Ordered that, in order to mitigate potential impacts to tourism in affected areas, the Applicants shall condition their funding commitment with the FNH Fund on 1) earmarking $25 million for projects or initiatives promoting tourism and recreation in affected areas and 2) requiring the FNH Fund to consult with NH tourism leaders to identify, design and fund programs that will promote tourism and recreation in affected areas.

8. ***Property Value.*** Further Ordered that, in order to address potential property value impacts of the Project in communities where overhead construction is anticipated, the Applicants shall condition their funding commitment with the FNH Fund on earmarking $25 million to address property value impacts in these communities during the first five years following commencement of commercial operation, as follows: (i) to authorize the Independent Administrator to draw on these earmarked funds to fund the Property Value Guaranty; and (ii) to provide an offset for municipal property tax abatements attributable to Northern Pass. To the extent that the earmarked funds are not fully distributed on expiration of the five-year period, all remaining funds shall be available for distribution by the FNH Fund for the purpose of community investment in impacted municipalities.

9. ***Property Value Guaranty.*** Further Ordered that the Applicants shall expand eligibility for the Property Value Guaranty Program described in Attachment L to the March 24, 2017 Supplemental Testimony of William J. Quinlan to include any detached residence or condominium unit located within 200 feet of the Project right-of-way along the overhead segments of the route, and including all transition stations, substation expansions, and the AC-DC converter terminal.

10. ***Property Tax Pledge.*** Further Ordered that, the Applicants shall make a binding Tax Stabilization Pledge to each of the host communities substantially in the form attached as Attachment I to the March 24, 2017 Supplemental Testimony of William J. Quinlan.

11. ***Energy Cost Relief Fund.*** Further ordered that, in order to provide a benefit comparable to the proposed 2016 power purchase agreement between PSNH and HRE, the Applicants shall secure 400,000 MWh in environmental attributes annually for the first 20 years of Northern Pass' operation at no cost to customers. The Applicants shall monetize such environmental attributes for the purpose of providing a reduction in energy costs to low income and business customers, in addition to the projected wholesale market price benefits of the Project. Such benefits may be delivered through rate credits to large commercial and industrial customers, directing funding to the Electric Assistance Program or its equivalent administered by the

Community Action Program agencies, or other means. By way of example, assuming a $40/MWh price for renewable energy credits, such attributes have a potential value up to $300 million over a 20-year period. See Testimony of James Daly, NH PUC Docket No. DE 16-693, page 9, lines 3-13.

12. ***Public Interest Programs.*** Further Ordered, that the Applicants shall condition their funding commitment with the FNH Fund on earmarking $20 million for the purpose supporting programs that advance clean energy innovation, community betterment and economic development in the State of New Hampshire, including without limitation the Core Energy Efficiency Programs or successor programs, or as part of funds used to finance programs that are part of an Energy Efficiency Resource Standard, as provided in the Settlement Agreement dated May 20, 2016 and subsequently approved by the PUC.

13. ***Right-of-Way Lease Payment.*** Further Ordered that the Applicant, NPT, shall make annual lease payments to Applicant, PSNH, to be flowed back to customers through transmission rates, averaging $460,000 over the 40-year term, commencing upon the start of construction pursuant to the Lease and Settlement Agreement approved by the NH PUC on February 12, 2018.

14. ***Additional Right-of-Way Lease Benefits.*** Further Ordered that the Applicant, NPT, shall make annual payments totaling approximately $15 million into a fund under the direction and control of the NH PUC for programs, projects or other purposes that provide benefits to New Hampshire distribution customers, including but not limited to demand response, distributed generation (including energy storage), electric vehicles, and other non-transmission alternatives, pursuant to the conditions of the Settlement Agreement approved by the NH PUC on February 12, 2018. In addition, the Applicants shall collaborate with the New Hampshire Department of Environmental Services and Hydro Quebec to facilitate the build out of electric vehicle charging infrastructure along interstate highway corridors I-89 and I-93 in New Hampshire, including but not limited to development of appropriate rate treatment and US and Canadian compatible payment systems.

ATTACHMENT C
CORRECTED VERSION
MARCH 9, 2018

Potential Conditions of Approval Grouped by Statutory Finding
February 28, 2018

Below is a combined list of conditions for the Subcommittee's consideration, which includes 1) those agreed to between Counsel for the Public ("CFP") and the Applicants, based on the CFP's brief, 2) those proposed by the Applicants as part of their brief, including those specified by DES, DOT, PUC and DHR, 3) those proposed by certain Intervenors and accepted by the Applicants in their brief, and 4) additional conditions that the SEC could require based on the existing record to address issues identified during deliberations. The conditions are grouped by the statutory finding each is primarily aimed at addressing, but some conditions of approval could be placed under two or more of the statutory criteria.

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.

AGREED TO WITH CFP

1. ***Decommissioning***. Further Ordered that, prior to construction Eversource Energy shall execute a payment guarantee in the face amount of $100 million, in a form acceptable to Counsel for the Public and the SEC, that will unconditionally guarantee the payment of all costs of decommissioning the Project, consistent with the Decommissioning Plan prepared by GZA GeoEnvironmental, Inc. that was filed on July 22, 2016. On each tenth anniversary of said payment guarantee, NPT shall file the SEC an updated budget for the costs of decommissioning the Project, and Eversource Energy or its successor or assigns shall provide a replacement payment guarantee in the face amount of said updated budget.

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.

AGREED TO WITH CFP

2. ***Municipal Coordination***. Further Ordered that, Applicants shall coordinate with the municipal engineer, road agent or other authorized municipal officer for any municipality through which the Project will pass in order for Applicants to comply with existing municipal construction rules and regulations. If it is not practicable for the Applicants to comply with such municipal rules and regulations, the Applicants shall work with the municipal officials to reach an agreement. In the event a dispute arises as to the Applicants' compliance with any rule or regulation that the Applicants are unable to resolve directly with the municipal officials, the Applicants and/or the municipality may refer the matter in writing to the SEC Administrator for resolution.

3. ***Municipal Road Restoration.*** Further Ordered that, Applicants shall coordinate with all host municipalities to restore all municipal roads that are damaged by construction of the Project to the same or better condition, subject to the review of the municipal engineer, road agent or other authorized municipal officer and approval by the SEC administrator.

4. ***Public Meetings***. Further Ordered that, prior to construction of the underground portion of the Project, Applicants shall hold a minimum of three (3) combined public meetings with the Boards of Selectmen for (1) Pittsburg, Clarksville, and Stewartstown; (2) Bethlehem, Sugar Hill, Franconia, and Easton; and (3) Woodstock, Thornton, Campton, Bridgewater, and Plymouth, to discuss the construction schedule in their respective towns and to coordinate the construction in order to avoid or minimize impacting local or regional events that are scheduled to be held in said towns. To the extent that any such Board(s) are unavailable to attend combined meetings, the Applicants shall hold additional separate public meetings with such Board(s).

5. ***Construction Plans***. Further Ordered that, Applicants shall provide each host town and the Administrator of the SEC with copies of Applicants' proposed construction plans, blasting plans, schedule and other public information (Ref. RSA 91-A:5) to be made available to the public.

6. ***Periodic Updates***. Further Ordered that, the construction plans, schedule and other information provided to each host town and Administrator of the SEC shall be updated at least monthly or sooner if necessary to reflect changes in the Project's schedule or other changes during construction.

7. ***Applicant Representatives***. Further Ordered that, the meetings between Applicants and the Boards of Selectmen of host towns shall be attended by persons knowledgeable with Applicants' construction plans and responsible for managing construction activities.

8. ***Public Meetings***. Further Ordered that, the public meetings between Applicants and the Boards of Selectmen of host towns required above shall be public meetings under RSA 91-A, moderated by the towns' Board of Selectmen, except as provided by RSA 91-A:3.

9. ***Complaint Resolution***. Further Ordered that, Applicants shall provide to the SEC for posting on the SEC's website information concerning complaints during construction, if any, and their resolution, except that confidential, personal or financial information (Ref. RSA 91-A:5) regarding the complaint should be redacted.

10. ***Notification of Changes***. Further Ordered that, in the event of significant unanticipated changes or events during construction that may impact the public, the environment, compliance with the terms and conditions of the Certificate, public transportation or public safety, Applicants shall notify the Board of Selectmen of all affected host towns or their respective designee and Administrator of the SEC in writing as soon as possible but no later than seven (7) days after the occurrence.

11. ***Emergency Conditions***. Further Ordered that, in the event of emergency conditions which may impact public safety, Applicants shall notify the host town's appropriate officials and the Administrator of the SEC immediately.

12. ***Independent Claims Administrator***. Further Ordered that, the SEC shall appoint an attorney or retired judge (the "Claims Administrator") who shall independently administer a claims process for all claims relating to damage to property, loss of business or loss of income caused by construction of the Project (the "Claims Process").

13. ***Claims Procedures***. Further Ordered that, with respect to the Claims Process, Counsel for the Public and Applicants shall jointly or separately file with the SEC proposed procedures for filing and deciding said claims, including criteria for eligibility, a procedure for filing claims, required proof of the damage or loss, the presentation and consideration of claims, the basis for recovery and the manner of deciding claims. Applicants shall establish a fund for the payment of claims ("Claims Fund") which fund shall be solely administered by the Claims Administrator, who shall provide to the SEC a quarterly report of the Claims Fund, including all disbursements. The Claims Administrator shall be paid an hourly rate to be determined by the SEC, and said compensation and all expenses of the Claims Administrator shall be paid from the Claims Fund, subject to approval by the SEC. Upon issuance of a certificate, Applicants shall deposit Five Hundred Thousand ($500,000) Dollars to establish the Claims Fund, and shall deposit any additional funds necessary to pay all claims awarded by the Claims Administrator and to pay the Claims Administrator's compensation and expenses. The Claims Administrator shall accept written claims until the three-year anniversary date of the date when the transmission line becomes operational. The Claims Administrator shall process and provide a written decision on all written claims filed with the Claims Administrator prior to said deadline. The Claims Administrator's decision and any reconsideration thereof shall be final and non-appealable. The Claims Process is not mandatory. Any party may file a claim in any court of competent jurisdiction in lieu of filing a claim in the Claims Process. If a party files a claim in the Claims Process, that party waives the right to file the same claim in court, and the Claims Process becomes the exclusive forum for deciding all claims filed in the Claims Process. All funds remaining in the Claims Fund after the payment of all timely filed claims and the payment of the Claims Administrator's compensation and expenses shall be returned to Applicants.

14. ***Cape Horn.*** Further Ordered that, Applicants shall work with the Office of Attorney General to resolve an error identified in an easement held by Public Service Company of New Hampshire for a specific parcel in the Cape Horn State Forest. The Applicants shall report the status of their discussions with the Office of the Attorney General to the SEC Administrator prior to the commencement of construction of the Project, and shall submit evidence of the resolution of the easement issue to the SEC prior to construction in the Cape Horn State Forest. This condition shall not constitute a waiver of any of the Applicants' rights to cross public waters or state lands, or other property interests.

ADDITIONAL CONDITIONS

15. ***Public Outreach.*** Further Ordered that, to ensure robust public outreach prior to and throughout construction, the Applicants shall adopt and submit to the SEC Administrator, within 30 days of issuance of a Certificate, a public outreach plan that sets forth the steps that will be taken to keep local government officials and local residents informed of each phase of project construction, in order to avoid, minimize and mitigate impacts arising from construction of the Project. Such plan shall include coordination with local emergency responders.

16. ***Business Outreach***. Further Ordered that, to ensure robust business outreach prior to and throughout construction, the Applicants shall adopt and submit to the SEC Administrator, within 30 days of issuance of a Certificate, a business coordination plan that sets forth the steps that will be taken in order to avoid, minimize and mitigate impacts to businesses arising from construction of the Project. Such plan shall include the Independent Claims Process, described at paragraph 11 of the Counsel for the Public's proposed conditions.

17. ***Land Use.*** Further Ordered that, in order to address potential localized impacts of the Project in host communities, the Applicants shall condition their funding commitment with the FNH Fund on earmarking $25 million for economic development as follows: (i) to provide a one-time payment of $100,000 to each of the thirty-one host municipalities for the purpose of developing and implementing Master Plans for development; and (ii) to promote community betterment in host communities.

18. ***Municipal MOUs (land use)***. Further Ordered that, in order to further limit construction related impacts in host communities, the Applicants shall enter a Memorandum of Understanding with any requesting municipality based on the template included as Attachment H to the March 24, 2017 Supplemental Testimony of William J. Quinlan.

19. ***Plymouth HDD (business impacts, land use)***. Further Ordered that, in order to avoid and limit construction impacts to businesses in Plymouth, the Applicants shall work with the Department of Transportation ("DOT") to provide for the installation

of the underground segment of the transmission line in downtown Plymouth along Main Street using horizontal directional drilling ("HDD") construction techniques.

20. ***Franconia HDD (business impacts, land use). Further Ordered that, in order to*** avoid and limit construction impacts to businesses in Franconia, the Applicants shall work with the DOT to provide for the installation of the underground segment of the transmission line in Franconia on Main Street and Church Street using HDD construction techniques.

21. ***Tourism Growth Fund.*** Further Ordered that, in order to mitigate potential impacts to tourism in affected areas, the Applicants shall condition their funding commitment with the FNH Fund on 1) earmarking $25 million for projects or initiatives promoting tourism and recreation in affected areas and 2) requiring the FNH Fund to consult with NH tourism leaders to identify, design and fund programs that will promote tourism and recreation in affected areas.

22. ***Property Value.*** Further Ordered that, in order to address potential property value impacts of the Project in communities where overhead construction is anticipated, the Applicants shall condition their funding commitment with the FNH Fund on earmarking $25 million to address property value impacts in these communities during the first five years following commencement of commercial operation, as follows: (i) to authorize the Independent Administrator to draw on these earmarked funds to fund the Property Value Guaranty; and (ii) to provide an offset for municipal property tax abatements attributable to Northern Pass. To the extent that the earmarked funds are not fully distributed on expiration of the five-year period, all remaining funds shall be available for distribution by the FNH Fund for the purpose of community investment in impacted municipalities.

23. ***Property Value Guaranty.*** Further Ordered that the Applicants shall expand eligibility for the Property Value Guaranty Program described in Attachment L to the March 24, 2017 Supplemental Testimony of William J. Quinlan to include any detached residence or condominium unit located within 200 feet of the Project right-of-way along the overhead segments of the route, and including all transition stations, substation expansions, and the AC-DC converter terminal.

24. ***Property Tax Pledge.*** Further Ordered that, the Applicants shall make a binding Tax Stabilization Pledge to each of the host communities substantially in the form attached as Attachment I to the March 24, 2017 Supplemental Testimony of William J. Quinlan.

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.

AGREED TO WITH CFP

25. ***Best Management Practices***. Further Ordered that, prior to any construction activity, Applicants shall file with the SEC a copy of all Best Management Practices ("BMPs") for all construction activity; including, without limitation BMPs for entering and exiting the ROW or any construction site; sweeping paved roads at access points; BMPs relating to Applicants' Storm Water Pollution Prevention Plan; BMPs for specific locations such as steep slopes near water bodies; BMPs for HDD/micro-tunnel drilling locations; and BMPs for work near archeological and historic sites.

26. ***Avoidance, Minimization and Mitigation***. Further Ordered that, prior to any construction activity, Applicants shall identify and implement the following avoidance, minimization and mitigation measures ("AMMs") in addition to or supplementing *Avoidance, Minimization and Mitigation Measures and Time of Year Restrictions for Wildlife Resources* and *Plant Protections -- Avoidance and Minimization Measures* as required by Condition 2 of the of NHDES Wetlands Bureau's March 1, 2017 Final Decision and recommended approval of the wetlands application filed by the Applicants. The AMMs will apply except in the case where the Applicants receive a specific waiver in advance from the New Hampshire Department of Environmental Services after consultation with the New Hampshire Fish and Game Department and the New Hampshire Natural Heritage Bureau.

a. Eastern Small-Footed Bats.

Investigate and confirm which rocky outcrops are inhabited by eastern small-footed bats and avoid any blasting and/or construction activities on or adjacent to any rocky outcrops inhabited by eastern small-footed bats.

b. Northern Long-Eared Bats.

No tree removal activity shall be conducted in proximity to identified long-eared bat sites, including the Bristol mine location, between August 1 and May 31, and Applicants shall perform acoustic monitoring within any area that will be cleared to verify the absence of bats prior to tree clearing activity.

c. Indiana Bat.

Applicants shall establish AMMs to protect this species from construction activity.

d. Butterflies.

Applicants shall limit all construction activity within the locations of the Karner Blue Butterfly ("Kbb") in Concord and Pembroke to the period of December 21 to March 20

(winter conditions). Timber mats shall be used during construction activities in wild lupine habitat, and shall not be maintained in place for more than ten (10) consecutive days during the growing season unless specifically approved in advance by the New Hampshire Department of Environmental Services after consultation with the New Hampshire Fish and Game Department and the New Hampshire Natural Heritage Bureau.

Applicants shall develop a restoration plan for the parcel of land in Concord to be used to offset the impacts to the Kbb and shall fund the restoration of this property.

Applicants shall develop and file with the SEC a ROW management plan for avoidance and minimization of impacts to the Kbb during operation of the Project.

e. Birds.

(1) Great Blue Heron.

Prior to construction, Applicants shall perform an aerial survey to locate great blue heron nests and shall utilize a quarter-mile buffer zone for any activity near active blue heron nests.

(2) Active Raptor Nests.

Prior to construction, Applicants shall perform an aerial survey to identify active raptor nests and follow Applicants' proposed AMMs for active raptor nests.

(3) Common Nighthawk.

Prior to construction, Applicants shall file AMMs for the common nighthawk that describes the methodology to "predetermine" the buffer area around nests.

(4) Bald Eagles.

Prior to construction, Applicants shall file AMMs that provide for nest identification by an aerial survey.

f. Mammals.

(1) Lynx

Prior to construction, Applicants shall file with the SEC AMMs that describe how Applicants will survey sites for lynx denning sites to discover the presence of lynx, and shall not clear any trees between May 1 and July 15 in locations where Lynx are discovered.

(2) American Marten.

Prior to construction, Applicants shall file with the SEC proposed AMMs to avoid or minimize impacts to the American Marten, which shall include seasonal restrictions on construction and the prohibition of off-highway recreational vehicles in the new ROW and access roads. Applicants also shall confirm that the proposed mitigation parcels provide accessible high quality martin habitat.

g. Plants.

(1) Wild Lupine.

Applicants shall limit all construction activity in the Concord and Pembroke locations where wild lupine are present to the period of December 21 to March 20, and shall use timber mats, during any construction activity. Any timber mats used shall not be maintained in place for more than ten (10) consecutive days during the growing season unless specifically approved in advance by the New Hampshire Department of Environmental Services after consultation with the New Hampshire Fish and Game Department and the New Hampshire Natural Heritage Bureau.

(2) Licorice Goldenrod.

Prior to construction, Applicants shall file with the SEC proposed AMMS for the licorice goldenrod.

(3) The Small Whorled Pogonia.

Prior to construction, Applicants shall survey the ROW and file with the SEC an inventory of all small whorled pogonia within the ROW and shall file AMMs for this plant.

(4) Red Threeawn.

Prior to construction, Applicants shall file with the SEC BMPs that include seasonal restrictions, seed collection, the establishment of conservation areas and reseeding areas after construction.

27. ***Reporting.*** Further Ordered that, once construction begins, Applicants shall file weekly with the SEC a copy of all reports by all construction and environmental monitors. The SEC shall post said reports on its website. Applicants also shall identify a specific contact person from the Project, with their contact information, to whom all questions, concerns or other communications should be sent regarding monitoring reports. The Project's contact person shall respond in writing within ten (10) days to all written communications they received regarding a monitoring report. The SEC, or any state agency to which the SEC delegates authority to, shall have continuing jurisdiction to address any violations of these conditions, all BMPs or all AMMS for the Project. Following remediation of any such violation, Applicants shall file with the SEC a report of remediation, and the SEC shall post said reports on its website.

28. ***Groundwater Sampling Program***. Further Ordered that, prior to any blasting, Applicants shall identify drinking water wells located within 2,000 feet of the proposed blasting activities and develop a groundwater quality sampling program to monitor for nitrates and nitrites, either in the drinking water supply wells or in other wells that are representative of the drinking water supply wells in the area.

29. ***Water Quality Monitoring***. Further Ordered that, the groundwater quality sampling program shall include pre-blasting and post-blasting water quality monitoring to be approved by the New Hampshire Department of Environmental Services ("NHDES") prior to commencing blasting.

30. ***Approval by NHSEC***. Further Ordered that, the groundwater sampling program shall be implemented by Applicants once approved by the NHDES.

31. ***Monitoring and Enforcement***. Further Ordered that, the NHDES is authorized to monitor the implementation and enforcement of the groundwater quality sampling program to ensure that terms and conditions of the program and the Certificate are met, and any actions to enforce the provisions of the Certificate must be brought before the SEC.

32. ***NHDES Authority***. Further Ordered that, the NHDES is authorized to specify the use of any appropriate technique, methodology, practice or procedure, as may be necessary, to effectuate conditions addressing the groundwater sampling program or to carry out the requirements of the groundwater quality sampling program.

33. ***Noise Complaint Resolution***. Further Ordered that, within 15 days of receiving a complaint, the Applicants shall conduct a field test to evaluate the complaint and within 30 days of the complaint provide a report of the results to the complainant, including, if applicable, a plan to resolve the issue. Unresolved complaints shall be referred in writing to the SEC Administrator, who will resolve the dispute, including determining whether it is appropriate to retain a third-party noise expert to take field measurements in order to evaluate and validate noise complaints.

34. ***Timber Mats***. Further Ordered that, Applicants shall minimize the length of time timber mats are left in place and shall not maintain any timber mats on wild lupine habitat during the growing season for more than 10 consecutive days, unless specifically approved in advance by the New Hampshire Department of Environmental Services after consultation with the New Hampshire Fish and Game Department and the New Hampshire Natural Heritage Bureau.

35. ***Tamarack Tennis Camp.*** Further Ordered that, Applicants shall not perform any construction activity within 1,000 feet of the Tamarack Tennis Camp during the Camp's summer session for youth instruction.

36. ***EMF Measurements***. Further Ordered that, Applicants, in consultation with the PUC's Safety Division, shall measure actual electro-magnetic fields associated with operation of the Project both before and after construction of the Project during peak-load, and shall file with the SEC the results of the electro-magnetic fields' measurements.

37. ***EMF Mitigation Plan***. Further Ordered that, if the results of the electro-magnetic fields measurements exceed the guidelines of the International Committee on Electromagnetic Safety ("ICES") or the International Commission on Non-Ionizing Radiation Protection ("ICNIRP"), Applicants shall file with the SEC a mitigation plan designed to reduce the levels so that they are lower than the ICES or ICNIRP guidelines.

PROPOSED IN APPLICANTS' BRIEF

DEPARTMENT OF ENVIRONMENTAL SERVICES

38. Further Ordered that all permits and/or certificates recommended by the New Hampshire Department of Environmental Services (DES), including the Wetlands Permit, the Alteration of Terrain Permit, and the Shoreland Permit, shall issue and this Certificate is conditioned upon compliance with all conditions of said permits and/or certificates which are appended hereto as Appendix I.

39. Further Ordered that DES is authorized to monitor the construction and operation of the Project to ensure that the terms and conditions of the Wetlands Permit, the Alteration of Terrain Permit, the Shoreland Permit, and the Certificate are met, however; any actions to enforce the provisions of the Certificate must be brought before Committee.

40. Further Ordered that DES is authorized to specify the use of any appropriate technique, methodology, practice or procedure approved by the Subcommittee within the Certificate, as may be necessary, to effectuate conditions of the Certificate, the Wetlands Permit, the Alteration of Terrain Permit, and the Shoreland Permit.

41. Further Ordered that this Certificate is conditioned upon compliance with the Section 404 General Permit (the New Hampshire Programmatic General Permit) and the 401 Water Quality Certification.

42. Further Ordered that DES is authorized to monitor the construction and operation of the Project to ensure that terms and conditions of the Section 404 Permit and the 401 Water Quality Certification are met, however, any actions to enforce the provisions of the Certificate must be brought before the Committee.

43. Further Ordered that DES is authorized to specify the use of any appropriate technique, methodology, practice or procedure approved by the Subcommittee within the Certificate, as may be necessary, to effectuate conditions of the Section 404 Permit and the 401 Water Quality Certification.

DEPARTMENT OF TRANSPORTATION

44. Further Ordered that all permits and/or approvals recommended by the New Hampshire Department of Transportation (DOT) shall issue and this Certificate is conditioned upon compliance with all conditions of said permits and/or approvals.

45. Further Ordered that DOT is authorized to monitor the construction and operation of the Project to ensure that terms and conditions of the Certificate and permits and approvals issued by DOT are met, however; any actions to enforce the provisions of the Certificate must be brought before the Committee.

46. Further Ordered that DOT is authorized to specify the use of any appropriate technique, methodology, practice or procedure approved by the Subcommittee within the Certificate, as may be necessary, to effectuate conditions of the Certificate and permits and certificates issued by DOT.

47. Further Ordered that with respect to the underground installation in locally-maintained roads, a properly qualified consultant selected by and subject to the supervision of the SEC Administrator and paid for by the Applicants is authorized to monitor the construction of the Project in locally-maintained highways and enforce the relevant requirements of the DOT *Utility Accommodation Manual* to the Applicants' request to install lines underground in the Towns of Stewartstown and Clarksville.

48. Further Ordered that with respect to the underground installation in locally-maintained roads, the SEC Administrator is authorized to monitor the Applicants' excavations consistent with RSA 236:9 to perform shovel tests related to Phase I-B archeological surveys within locally-maintained highways in the Towns of Stewartstown and Clarksville.

49. Further Ordered that with respect to the underground installation in locally-maintained roads in the Towns of Stewartstown and Clarksville, a properly qualified consultant selected by, and subject to the supervision of the SEC Administrator, and paid for by the Applicants, is authorized to review and approve all requests relative to curb cuts, driveways, detours, etc., involving locally-maintained highways in the Towns of Stewartstown and Clarksville in the same manner that it reviews and approves comparable requests for state-maintained highways.

50. Further Ordered that with respect to the underground installation in locally-maintained roads in the Towns of Stewartstown and Clarksville, a properly qualified consultant selected by, and subject to the supervision of the SEC Administrator, and paid for by the Applicants, is authorized to review and approve traffic control measures and a traffic management plan for the underground installation in locally-maintained roads in the Towns of Stewartstown and Clarksville.

51. Further Ordered that, to the extent DOT denies Applicants' exception requests, DOT is authorized to monitor and enforce the Applicants' tree preservation commitment (i.e., that the Applicants agree not to cut trees greater than 6" in diameter within a Cultural or Scenic Byway) where the Project may be constructed outside the paved portion of the highway right-of-way. To the extent the Applicants seek to deviate from this condition, the Applicants must seek approval from the SEC Administrator.

52. Further Ordered that with respect to the overhead installation, the Applicants shall employ traffic controls in accordance with the 2009 edition of the Manual on Uniform Control Devices and DOT policies.

53. Further Ordered that any future surface distortion within the trench area in locally-maintained roads, due to settlement or other causes attributable to the construction shall be corrected by the Applicants as required during construction and for a period of two (2) years following the commencement of commercial operations of the Project.

54. Further Ordered that the Applicants agree to assume such additional cost as a municipality may incur due to the maintenance, operation, renewal, or extension of the underground installation components of the Project or appurtenances thereto within the locally-maintained roads.

PUBLIC UTILITIES COMMISSION

55. Further Ordered that all licenses approved by the New Hampshire Public Utilities Commission (PUC) shall issue and this Certificate is conditioned upon compliance with all conditions of said licenses.

56. Further Ordered that PUC is authorized to monitor the construction and operation of the Project to ensure that terms and conditions of the licenses issued by PUC are met, however; any actions to enforce the provisions of the Certificate must be brought before Committee.

57. Further Ordered that PUC is authorized to specify the use of any appropriate technique, methodology, practice or procedure approved by PUC or in the Certificate, as may be necessary, to effectuate conditions of the Certificate and licenses issued by PUC.

58. Further Ordered that the Applicants will comply with the requirements of RSA 374:48 *et seq.*, the Underground Facility Damage Prevention System administered by the PUC, when the Applicants excavate within 100 feet of an underground facility used to convey cable television, electricity, gas, sewerage, steam, telecommunications, or water.

59. Further Ordered that the PUC is authorized to monitor and enforce measures the Applicants shall take to comply with the interference assessment filed on June 30, 2017, otherwise known as the Co-Location Study, and that the Applicants shall coordinate their construction efforts with the Portland Natural Gas Transmission System.

DIVISION OF HISTORICAL RESOURCES

60. Further Ordered that, in the event that new information or evidence of historic sites, archeological sites, or other archeological resources is found within the area of potential effect of the Project, the Applicants shall immediately report said findings to New Hampshire Division of Historical Recourses (DHR).

61. Further Ordered that to the extent changes in the construction plans of the Project affect any archeological resources, historic sites, or other cultural resources, the Applicants shall notify DHR of any such change and shall notify DHR of any new community concerns related to such change.

62. Further Ordered that consistent with the terms of the Programmatic Agreement (App. Ex. 204), DHR is authorized to specify the use of any appropriate technique, methodology, practice, or procedure associated with archaeological, historical and other cultural resources affected by the Project, however; any action to enforce the conditions must be brought before the Committee.

STANDARD

63. Further Ordered that the Site Evaluation Subcommittee's Decision, and any conditions contained therein, are hereby made a part of this Order.

64. Further Ordered that the Applicants may site, construct, and operate the Project as outlined in the Application, as amended, subject to the terms and conditions of the Decision and this Order and Certificate.

65. Further Ordered that this Certificate is not transferable to any other person or entity without the prior written approval of the Site Evaluation Committee (Committee).

66. Further Ordered that the Applicants shall immediately notify the Committee of any change in ownership or ownership structure, or its affiliated entities, and shall seek approval of the Committee of such change.

67. Further Ordered that the Applicant shall construct the Project within five (5) years of the date of the Certificate and shall file as-built drawings of the Project with the SEC Administrator within 120 days of commercial operation of the Project.

PEMIGEWASSET RIVER LOCAL ADVISORY COMMITTEE

68. Further Ordered that the Applicants will hire four environmental monitors with appropriate credentials and will provide weekly and monthly monitoring reports to NH DES. In addition, the Project's general contractor will have their own environmental monitors to inspect construction activities and verify that work is being conducted in accordance with applicable regulations and permit conditions. The Applicants are not required to provide additional financial support to NH DES to hire additional monitors.

69. Further Ordered that the Applicants shall restore all temporarily disturbed wetlands within the ROW to pre-existing conditions. The Applicants shall not directly impact wetlands outside of the ROW. Identification of pre-existing conditions may include inventories, flagging, and photos of wetlands prior to construction.

D. Issuance of a certificate will serve the public interest.

AGREED TO WITH CFP

70. ***North Country Jobs Fund***. Further Ordered that, Applicants shall require as a condition of their funding commitment to the $7.5 million North Country Jobs Fund (the "Jobs Fund") that the Jobs Fund employ an independent economic development professional to provide advice on the selection of grant recipients and that the Jobs Fund file annually with the SEC a summary of all disbursements, the use of all disbursements, and the results of all grants awarded by the Jobs Fund.

71. ***Forward New Hampshire Fund***. Further Ordered that, Applicants shall require the following as conditions of their funding commitment to the $200 million Forward New Hampshire Fund ("FNH Fund"): (1) that the FNH Fund shall have a board of directors who have no financial affiliation (employment, vendor, etc.) with Applicants; (2) that the FNH Fund employ an independent economic development professional to establish written criteria for the application and receipt of loans or grants from the FNH Fund; and (3) that the FNH Fund file annually with the SEC and with the Director of Charitable Trust in the Office of the Attorney General a report of its activities, including a report of its expenditures, all loans or grants made by the FNH Fund and a review of how each loan or grant was used and their results in creating jobs or economic development.

72. ***Coos Loop Upgrades***. Further Ordered that, NPT shall complete, as part of the construction of the Project, all of the upgrades to the Coos Loop and the transmission lines that connect the Coos Loop to the New England electrical grid that are required to remove the current constraints or flowgate restrictions impacting small renewable generators on the Coos Loop, including without limitation, upgrading 16 miles of the Q-195 transmission line, 1.2 miles of the Q-195 transmission line to the Moore substation, 12.1 miles of the O-154 transmission line

and 0.5 miles of the O-154 transmission line to the Paris substation, 18 miles of the D-142 transmission line, as set forth in Counsel for the Public's Exhibits 46 and 47.

73. ***Coos Loop Voltage Stability Study.*** Further Ordered that the Applicants shall request that ISO-NE conduct a study, fund the study, and, in the event that ISO-NE determines an upgrade is necessary to address voltage stability at the substation in Berlin or at another substation on the Coos Loop, work with generators, Staff of the Public Utilities Commission, the Office of Consumer Advocate, and Counsel for the Public to determine sources of funding for voltage stability upgrades. To the extent that other sources of funding are not available or sufficient, the Applicants will condition their funding commitment to the FNH Fund on payment by the FNH Fund of the additional costs of necessary voltage stability upgrades.

ADDITIONAL CONDITIONS

74. ***Energy Cost Relief Benefits.*** Further ordered that, in order to provide a benefit comparable to the proposed 2016 power purchase agreement between PSNH and HRE, the Applicants shall secure 400,000 MWh in environmental attributes annually for the first 20 years of Northern Pass' operation at no cost to customers. The Applicants shall monetize such environmental attributes for the purpose of providing a reduction in energy costs to low income and business customers, in addition to the projected wholesale market price benefits of the Project. Such benefits may be delivered through rate credits to large commercial and industrial customers, directing funding to the Electric Assistance Program or its equivalent administered by the Community Action Program agencies, or other means. By way of example, assuming a $40/MWh price for renewable energy credits, such attributes have a potential value up to $300 million over a 20-year period. See Testimony of James Daly, NH PUC Docket No. DE 16-693, page 9, lines 3-13.

75. ***Public Interest Programs.*** Further Ordered, that the Applicants shall condition their funding commitment with the FNH Fund on earmarking $20 million for the purpose supporting programs that advance clean energy innovation, community betterment and economic development in the State of New Hampshire, including without limitation the Core Energy Efficiency Programs or successor programs, or as part of funds used to finance programs that are part of an Energy Efficiency Resource Standard, as provided in the Settlement Agreement dated May 20, 2016 and subsequently approved by the PUC.

76. ***Right-of-Way Lease Payment.*** Further Ordered that the Applicant, NPT, shall make annual lease payments to Applicant, PSNH, to be flowed back to customers through transmission rates, averaging $460,000 over the 40-year term, commencing upon the start of construction pursuant to the Lease and Settlement Agreement approved by the NH PUC on February 12, 2018.

77. ***Additional Right-of-Way Lease Benefits.*** Further Ordered that the Applicant, NPT, shall make annual payments totaling approximately $15 million into a fund under the direction and control of the NH PUC for programs, projects or other purposes that provide benefits to New Hampshire distribution customers, including but not limited to demand response, distributed generation (including energy storage), electric vehicles, and other non-transmission alternatives, pursuant to the conditions of the Settlement Agreement approved by the NH PUC on February 12, 2018. In addition, the Applicants shall collaborate with the New Hampshire Department of Environmental Services and Hydro Quebec to facilitate the build out of electric vehicle charging infrastructure along interstate highway corridors I-89 and I-93 in New Hampshire, including but not limited to development of appropriate rate treatment and US and Canadian compatible payment systems.