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 AND REQUEST TO VACATE DECISION OF FEBRUARY 1, 2018 AND TO RESUME INCOMPLETE DELIBERATIONS

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 rehearing on the February 1, 2018 decision of the Site Evaluation Committee ("SEC") to end deliberations regarding the above-referenced Application.[1] More specifically, the Applicants request that the Subcommittee vacate the decision to deny the Application and resume deliberations.[2]

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 expressed by the Subcommittee 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

[1] Throughout this pleading, the Subcommittee of the SEC will be referred to as the "SEC "or the "Subcommittee."

[2] The decision to deny the Application includes the finding that the Applicants failed to meet their burden of proof to demonstrate that the Project will not unduly interfere with the orderly development of the region.

criteria. For example, Counsel for the Public ("CFP") proposed a set of conditions in his post-hearing brief. Since the Subcommittee's decision, the Applicants have agreed to accept all CFP's proposed conditions with some modifications agreed upon by CFP. *See* Attachment A. In addition, the Applicants have 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 have 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 others that could be raised during deliberations on the remaining statutory criteria. *See* Attachment B.[3]

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 directions as to how funds would be administered and distributed to ensure transparency and accountability. Other examples include an expansion of the Applicants' Property Value Guaranty ("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 construction method in locations like Plymouth and Franconia that would substantially reduce business impacts in those locations.[4]

---

[3] 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.

[4] 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 intervenors that were accepted by the Applicants in their brief, and additional conditions that the Subcommittee could impose based on the record.

It was noted several times during deliberations that the Subcommittee believed the Applicants would be receptive to expanding proposed mitigation measures. That is correct: the Subcommittee can, consistent with prior SEC cases, use its statutory authority to craft conditions that would mitigate impacts of concern. In fact, the Forward NH Fund, with its explicit focus on tourism, economic development, and community betterment, and clean energy innovation was designed specifically for that purpose.

As part of their case, the Applicants 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 a guaranty program to address potential impacts on property values and indicated their expectation that the program could be expanded as deemed appropriate by the SEC.[5] Similar mechanisms were also proposed to address business impacts and interruption as well as property damage.

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

---

[5] Early in the hearings, Day 2, PM (April 14, 2017) at p. 85, Chairman Honigberg asked Mr. Quinlan about the property value guarantee 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.

Citations to the record will be to the day of deliberation, am or pm session and the page and line numbers of the transcript, which is attached to this motion. *See e.g.,* 3PM 23/6. The purpose of citing to the transcript of the hearings in this motion is not (at this point) to address the merits of the Subcommittee's decision but rather, to demonstrate that evidence concerning conditions was, in fact, available to the Subcommittee when it ended its deliberations.

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 causing an 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. Summary of Legal Basis for Rehearing

1. After 70 days of hearings over a period of eight months, with the record closing two years and four days after the Application had been accepted, the decision to end deliberations two and one-half days into a scheduled twelve days was contrary to the statute and rules governing the SEC. Whatever decision the Subcommittee might eventually reach, that decision must be made after due consideration of all relevant information and a full consideration of all the required findings, including an analysis of conditions that might resolve any of the Subcommittee's concerns. RSA Chapter 162-H requires due consideration of all relevant information precisely because the deliberations concerning each finding may well inform the others. With respect, if the Subcommittee properly applied all the criteria, considered the imposition of conditions -- particularly those imposed by DOT, DES, DHR and the PUC, and those proposed by CFP, and revised and amended by agreement with the Applicants, or proposed by the Applicants -- and deliberated on all the findings, it should reach a different decision.

2. The consideration of mitigating conditions is an integral element of the burden of proof and the Subcommittee's failure to even address potential conditions is contrary

to RSA 162-H and the SEC regulations. The Applicants applied for a Certificate as part of a permitting process. Unlike a trial, in which a court does not have the ability to issue conditional orders, the accepted method—in this State and elsewhere—of evaluating and issuing permits commonly includes conditions to mitigate or eliminate potential findings of undue interference or unreasonable adverse impact. The consideration and imposition of such conditions is thus an integral part of the evaluation of applications before the SEC. In fact, as discussed below, the SEC has commonly imposed such conditions in determining whether to issue a Certificate and, as importantly, in evaluating whether an applicant has met its burden of proof. Put simply, the failure of the Subcommittee to address potential conditions is contrary to RSA 162-H, applicable SEC regulations and denied Applicants a fair opportunity to meet their burden.

3. Under RSA 162-H:11, proceedings of the SEC are subject to review under RSA Chapter 541. Although there is no written order in this matter, RSA 541:3 provides that "any party to the action or proceeding" may apply for rehearing "[w]ithin 30 days after *any* order or *decision* has been made." (Emphasis added.) The decision to end deliberations and the decisions that flowed from it, are subject to RSA 541:3. Under the law and the relevant facts, the Applicants are not required to wait until a written order is issued to move for reconsideration of the Subcommittee's decision, particularly in the circumstances of this case, where the decision to end the deliberations is a plain error of law that can, and should, be remedied now, and that a written order cannot resolve.[6]

4. 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 rehearing may be granted when the Committee finds

---

[6] The Applicants preserve their right to challenge the merits of the Subcommittee's final written order pursuant to RSA 541:3 upon the issuance of such an order.

"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).

5. The SEC's decision constitutes a plain error of law for several reasons. First, by cutting off deliberations after two and one-half days, the Subcommittee violated RSA 162-H:16, IV (Supp. 2017), and its own regulations.[7] The statute and regulations *require* the Subcommittee to apply *all of the* criteria set out in the rules and to make each finding set out in the statute before granting or denying an application.

6. Second, by cutting off deliberations, the Subcommittee failed to assess conditions that could be imposed to alleviate any concerns about potential interference with the orderly development of the region ("ODR"). The statute and regulations also require that such conditions be considered. Moreover, such conditions have been an integral component of SEC decision-making in all prior dockets.

7. Third, the Subcommittee's conclusion that the Applicants had failed to meet their burden of proof regarding undue interference with ODR did not apply the required standard set out in the statute and regulations. The fragmented deliberations that did occur show that the Subcommittee erroneously believed that unless the Applicants demonstrated that there was *no impact* on ODR for each underlying component of the criteria set forth in Site 301.15, they had failed to meet their burden. By requiring the Applicants to prove "no impact" at all, as opposed to an overall showing of no "undue interference," the Subcommittee imposed a burden of proof that is both contrary to the statute and regulations, and impossible to meet.[8]

---

[7] All references to RSA Chapter 162-H are to the 2017 Supplement.

[8] 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. RSA 162-H:1. In light of that fact, the Legislature created standards that allowed for such effects so long as, in this case, interference with ODR was not "undue." RSA 162-H:16, IV(b). Likewise, the Legislature recognized in other parts of the statute that

8. The Subcommittee's failure to deliberate fully, and its utilization of an improper standard, amounts to a denial of due process. The Applicants were entitled to a consideration of their entire Application. Furthermore, the Subcommittee's discussions demonstrate that it either failed to define the "undue interference" standard, or applied the regulation in an *ad hoc* manner that was so vague that no applicant would know whether it had met the burden of proof, or understand how it ever could.

9. In sum, the SEC simply failed to complete the process that the law requires. As a result, the Applicants have been subjected to an unfair process and an unjust result. For all these reasons, the Applicants request that the Subcommittee vacate its decision to deny the Application and resume deliberations.

III. The SEC's Failure to Complete Deliberations Violates RSA Chapter 162-H and Its Own Regulations

10. The Subcommittee's decision to end deliberations was unlawful, unjust or unreasonable, and an error of law contrary to the statute and regulations that govern the SEC. The decision is so arbitrary and capricious as to constitute a denial of due process.

A. By Ending the Deliberations, the Subcommittee Failed to Even Consider Mitigating Conditions That Might Have Resulted in a Different Finding on Undue Interference or Other Statutory Findings

11. As discussed above, Site 202.28 (a) and Site 301.17 require that the Subcommittee consider whether the imposition of conditions could have addressed issues associated with each of the statutory findings including ODR. This is not a hypothetical exercise. In the past thirty years, the SEC has issued at least thirteen certificates. In doing so,

---

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).

the SEC has imposed over 300 conditions.[9] In fact, over time, the trend has been for the SEC to increase the number of these conditions.[10] 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…[11]

(Emphasis added.)

12. One reason given to end deliberations was that the Subcommittee would "really need to figure out what conditions we would impose on a lot of things," an issue "that's not going to be simple and…fast,"[12] and would provide "a lot more things to appeal." 3PM 8/12-18. This point—standing alone—is a sufficient and compelling reason to resume deliberations. The Applicants fully appreciate the complexity of this process and the time that the Subcommittee members have dedicated to it. Yet it is readily apparent that the imposition of

---

[9] These Committee-level conditions were imposed in addition to the many hundreds, if not thousands of conditions that were imposed by the SEC's constituent agencies.

[10] A review of prior SEC decisions and orders demonstrates that the SEC has become more involved in the crafting of conditions over time. For example, the 1985 Hydro Quebec Phase II Certificate contained approximately 9 conditions imposed by the SEC in addition to those imposed by other state agencies, whereas the 2009 Granite Reliable Certificate contained approximately 26 such conditions, and the 2016 Antrim Wind Certificate included approximately 80 such conditions.

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

[12] Again, contrast this statement with another statement of Chairman Ignatius in *Antrim I*: "We move now to the question of aesthetics that we've already discussed and taken a vote that we find, from visual impact, there to be an undue adverse effect on aesthetics within the community. But we didn't talk about whether that's an impact that has a solution to it, in terms of conditions or mitigated steps. And so I want us to go back and work through that again and hear people's views. What is it that you find that makes it an undue adverse effect, and is it something that, for example, given your finding, you could resolve through a condition? And it may be different people have different reasons for finding it to be an adverse effect and, therefore, would have different solutions available to them. *So this may take a little while to go through, but I think it's really important that we do this carefully and as thoroughly as we can.*" (Emphasis supplied.) Day 3, PM, pp. 6-7 (February 7, 2013).

conditions might have resolved particular ODR concerns.[13] 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.

13. 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." 3AM 33/3. But by discontinuing deliberations and not considering conditions, "everything" was not "open for discussion" (including, as discussed herein and below, some very workable and effective mitigating conditions).

1. Property Value

14. One component of the economy criterion of the ODR finding, about which members of the Subcommittee expressed concerns in their deliberations, was property values. It therefore stands to reason that imposition of an expanded property value guaranty might have addressed that concern. Ms. Weathersby proposed discussing the Applicants' guaranty proposal, which was intended to address concerns about the impact of the Project on property values,[14] but Chairman Honigberg moved on to a discussion of taxes and the Subcommittee never returned to the property value guaranty.

15. The consideration of such a guaranty was especially relevant where, as here, the Applicants offered such a program.[15] Even Counsel for the Public's ("CFP")

---

[13] See Section III. A. 1-4 for examples of members mentioning conditions as apparent means to address concerns about orderly development criteria; conditions that received no consideration in the Subcommittee's final analysis.

[14] "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?" 2PM 6/15.

[15] In his Supplemental Testimony, Mr. Quinlan described the Property Value Guaranty Program that is "designed to ensure that that owners of those properties identified as most likely to see property value impacts do not incur an

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 Session (November 11, 2017) at 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." *Id.*

16. Chairman Honigberg also observed with respect to the property value guaranty: "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." 2AM at 110 *see also* Footnote 5. For example, if the Subcommittee wished to expand the Property Value Guaranty Program to cover more homeowners, including those adjacent to ancillary facilities, it could have done so.[16]

2. Tourism

17. 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." 2 PM 86-87. Other members generally concurred (*Id.* at 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

---

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.

16 Attachment B contains such an expansion of the Property Value Guaranty Program. As revised, the Property Value Guaranty Program 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 Program could be expanded. Importantly, had the Subcommittee considered and decided to impose such a condition, it would have eliminated the property value issue as a concern as part of its deliberation on the ODR criterion.

negative." 3 AM at 20. The Subcommittee, however, never discussed conditions regarding this topic, although the Chairman made the following observation:

> 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.

2 PM at 92.[17] This is an area that could easily have been resolved by conditions as demonstrated in the record that the Subcommittee was required to consider.[18]

18. Also missing from the Subcommittee's analysis of this issue during the deliberations was consideration of the Applicants' proposed $200 million Forward NH Fund, which expressly focuses on tourism and economic development.[19] As with property values, the economics witness for the CFP also offered testimony that tourism impacts would be minimal. Specifically, Mr. Kavet testified that the potential impact to tourism would be a "teeny tiny percentage," that is a "15 hundredths of one percent. 000.15 percent change in tourism activity in

---

[17] 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.

[18] Attachment B includes a sample condition that could have addressed concerns over possible tourism impacts. In addition to conditions requiring the development of business coordination and outreach plans for the SEC's review and approval prior to commencing construction, another sample condition would dedicate $25 million of the Forward NH Fund (almost four times New Hampshire's total annual tourism budget based on the budget for the latest completed fiscal year) to promoting tourism and recreation in the region, and requiring the Forward NH Fund to work with state tourism leaders to identify, design and fund programs that will promote tourism and recreation in affected areas. Had the Subcommittee considered and imposed such a condition, it could very well have concluded that any potential impact to tourism the Project might cause could be avoided, minimized or adequately mitigated and would not present any concern with respect to ODR.

[19] 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. 2PM 32.

the affected areas."[20] Hearing Tr. Day 45PM 17-18. His opinion reinforces the conclusion that mitigation of such impacts through resources from the Forward NH Fund is easily achievable.

19. Given this record, the Subcommittee was required to consider any number of approaches to address its concerns. Based on evidence in the record, the SEC could have imposed conditions such as those set forth in Attachment B (all of which Applicant is fully prepared to accept) as well as any number of other conditions that could be imposed that would be fully supported by the record in this case. *See* Attachment B.

3. Business and Employment Effects

20. 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.

21. 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. Hearing Tr. Day 45, 65-67. Likewise, the Chair 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." 2PM 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.[21]

---

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

[21] "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

22. 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 would be effective, or at least be a good starting point.[22] 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.[23]

23. 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 conditions could have made a difference.

4. Land Use

24. The Subcommittee devoted a substantial portion of its deliberations over the ODR finding to a discussion of land use. 2AM 6-74. As shown in Part IV, the Subcommittee addressed the issue without defining the "region," or defining the land use in terms of "undue

---

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. 2PM 32-34.

[22] 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." 3AM 22.

[23] Attachment B includes an example of such a condition. In addition to providing a business claims process administered by a third party with $500,000 of initial funding, as suggested by Counsel for the Public, 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.

interference." Moreover, the Subcommittee members described the alleged failure by the Applicants to meet their burden of proof not with respect to undue interference or, for that matter, any interference at all. One member appears to have evaluated the land use criterion regarding zoning issues, and in particular, with whether construction of the new line within an existing right of way should be evaluated as a "non-conforming use," proceeding from the misconception that the existing use of the right-of-way for transmission is non-conforming and "the use of the corridor for the Northern Pass Transmission Project, becomes a different use in some places." 3AM 17/1; 21/19. Taking up on this formulation, other Subcommittee members also expressed concern that the construction of another line in the right-of-way would be a "tipping point," in which the Project became a "different use." The evaluation of zoning criteria is not the standard required by the statute or rules.[24] Further compounding that problem, the Subcommittee as a whole did not identify the specific areas of concern with respect to this alleged "tipping point."

25. The law of non-conforming uses is purely a matter of local zoning. It is designed to protect and allow specific uses of property that predated zoning ordinances and limit the expansions of such uses so that eventually, non-conforming uses cease. "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

[24] While the SEC rules require consideration of local zoning ordinances, nowhere do the rules direct the SEC to consider zoning principles like non-conforming uses and variances. They are unique to municipal land use boards. Moreover, while Subcommittee members identified the section of the new ROW outside of the Wagner Forest area as a concern, no consideration was given to the fact that towns in that part of the route do not having any zoning ordinances. Furthermore, in discussing the Wagner Forest, Director Wright and Commissioner Bailey recognized that the owners had made a conscious decision preferring overhead construction, a rationale that is equally applicable to the eight miles of nearby overhead construction on land acquired by the Project. Day 2, AM, pp. 68-69.

"fundamentally the same" and whether it has a "substantially different effect on the neighborhood." The case also establishes a policy bias of "carefully limiting" the expansion of a non-conforming use. These principles have no bearing on undue interference with orderly development of the region in the context of certificate issuance under RSA 162-H. They reduce the scope of the analysis to purely local impact, ignoring the required "regional" focus of the statutory criteria. They also actively work to limit the scope of non-conforming uses and encourage their extinction. Surely, RSA 162-H does not exist to limit the scope of energy facility siting or encourage its extinction. The two concepts are legal apples and oranges. To apply local zoning law to judging regional impact is to consider irrelevant principles and ignore the plain meaning of the statute.

26. Moreover, the Subcommittee's discussion of a "tipping point" (allegedly the point at which the Project should be evaluated as a non-conforming use) stands in stark contrast to the Subcommittee's determinations with respect to land use in the Merrimack Valley Reliability Project ("MVRP") proceeding. Specifically, in finding that the project would not unduly interfere with the orderly development of the region, the Subcommittee stated, agreeing with the Applicants' witness Robert Varney, that "[c]onstruction of the Project within an already existing and used right-of-way is consistent with the orderly development of the region."[25] *Decision and Order Granting Application for Certificate of Site and Facility,* Docket No. 2015-05 (October 4, 2016), p. 58.

---

[25] The facts and evidence the Subcommittee relied on in MVRP are substantially 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." *Decision and Order Granting Application for Certificate of Site and Facility,* Docket No. 2015-05 (October 4, 2016), p. 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. The Subcommittee did not find that the addition of a new 345 kV transmission line, with structures that are 40 to 50 feet higher than existing structures, would negatively impact land use or interfere with development patterns along the corridor. Moreover, the Subcommittee did not consider whether this could constitute a non-conforming use.

27. Just as important, the members of Subcommittee—once again—did not even consider whether conditions might be imposed to mitigate their concerns. For example, certain Subcommittee members seemed to tentatively conclude that with regard to 32 miles of new right-of-way in the North Country, there would be no land use concerns for the 24 miles on Wagner Forest Management land, nor would there be land use concerns for the 8 miles of underground construction in Pittsburg, Clarksville and Stewartstown. 2 AM 68-72. However, there was no discussion of specific concerns related to the 8 miles of new overhead right-of-way in Pittsburg, Clarksville and Stewartstown, or consideration of conditions that would address those concerns. Such conditions could have included the use of resources from the Forward NH Fund, dedicated to specific communities and placed under their control.[26] The Subcommittee might also have considered providing 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.

B. The Subcommittee's Decision to End Deliberations Was Premature

28. 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. Instead, the Chairman summarized the consensus among the members that the Applicants appeared to have

[26] The Forward NH Fund has four broad focus areas including economic development, tourism, community betterment and clean energy innovation.

demonstrated the required financial, technical and managerial capabilities, subject to working out the details on certain conditions applicable to this finding.[27]

29. On the afternoon of Day One, and continuing through the morning of January 31, 2018, the Subcommittee turned to a discussion of the second finding under RSA 162-H:16, IV, namely, the ODR finding. At several points during those preliminary 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 over such conditions. *See e.g.* 1 PM 43/7; 1 PM 104/21-106/10; 2 PM 6/15; 2 PM 33/9-34/1.

30. On the morning of February 1st, the Subcommittee discussed the issue of whether the Applicants had met their burden to show that there would be no undue interference with ODR. 3AM 3/2-33/6. 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.

3 AM 32/21-33/5.

31. 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 deliberated (including mitigating conditions), Subcommittee members lack the information and analyses needed to make a fully reasoned decision. This is why, as discussed below, the statute and regulations

---

[27] This example illustrates how the Subcommittee should factor conditions into the context of making a finding: In addressing the Technical/Managerial/Financial finding, the Subcommittee appeared to contemplate a favorable ruling on this issue, but only with conditions it deemed suitable. Yet in voting on the ODR finding, the Subcommittee failed to consider – or even recognize – that suitable conditions could have, in fact, addressed the concerns of Subcommittee members so as to alter the Subcommittee's ultimate decision. This occurred despite Subcommittee members indicating their interest in discussing conditions relative to certain aspects of ODR earlier in the deliberations. *See* Section III, A for further discussion on this point.

require the Subcommittee to make all the required statutory findings before deciding to grant or deny a certificate.[28]

32. After beginning its deliberations on air and water quality later on the morning of February 1, the Subcommittee broke for lunch. 3AM 33/11-78/9. During the lunch break, the Subcommittee apparently discussed procedural matters in a non-public session. 3PM 4/23-5/4. At the opening of the afternoon session, Commissioner Bailey made a motion to end deliberations on all issues based on the morning discussions of the ODR finding. 3PM 3/12. 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 ODR finding and thus "it may be better for us just to stop now." 3PM 4/5-5/23.

33. The Subcommittee voted to end deliberations by a 5-2 vote. 3PM 23/23-24/4. Both lawyers on the Subcommittee voted to continue the deliberations in order to consider all of the required factors needed to decide whether to grant or deny the Certificate. *Id.*[29]

34. 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." *Id.* 5/16. Ms. Weathersby stated that "the lawyer in me says we

---

[28] One example of the interplay between required findings is found in the discussion of the effect of the Project on prevailing land uses during the morning session of deliberations on Day 2. In discussing the so-called "tipping point" related to the effects in existing right-of-way, various members indicated that: a) it would be different and look different in different places (Ms. Bailey, 3AM 34); b) "we're talking about aesthetics here, particularly as we talk about intensification (Mr. Way, 3AM 44): c) "land use is for the view… I know part of that is aesthetics (Mr. Oldenburg, 3AM 66); and, d) "I guess to me it matters what aspect of this we're talking about. If we're talking about potential visual or aesthetic impacts" (Mr. Wright, 3AM 68).

[29] The two attorneys on the Subcommittee, Chairman Honigberg and Ms. Weathersby, seemed to recognize this point, while other Subcommittee members appeared not to credit this critical legal issue. Ms. Weathersby: "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…" 3PM 7/6-7/21.

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." *Id.* 6/21-7/8. 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." *Id.* 18/12-17. She also opined that "I don't know what—if expediency is at all a rationale for stopping now [and] I think that without too many more days we can be done and have addressed all the topics." *Id.* 7/13-17.

35. Despite these differences, one member pointed to "some risks in continuing the deliberations." *Id.* 4/15; *see also Id.* 8/10-19.[30] With respect, the statute required both continued deliberations and the consideration of the conditions.

36. 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. *Id.* 9-13. Whatever the reason may have been for the Subcommittee's decision to end deliberations, that decision was an error of law. In the absence of full and proper deliberations, the Subcommittee has no ability to make the required findings. Furthermore, the deliberations that were conducted were done so in such a conclusory fashion that they failed to satisfy the requirements of RSA 541-A:35. See *Petition of Support Enforcement Officers I and II,* 147 N.H. 1, 5 (2001). The Subcommittee thus failed to provide on the record an adequate basis upon which the Supreme Court could review the Subcommittee's decision.

---

[30] In the *Antrim I* decision, Chairman Ignatius took a different view on the same subject: "We could have stopped a couple of days ago when we got that first vote on aesthetics, and I thought it was important that we continue to work through all of the issues and hear everybody's views and see if they evolved, see if they changed. And also because people have put an awful lot of time and effort and emotion into this – the Applicants and intervenors and all of the Committee members, and I think we – I felt we owed it to everyone, ourselves included, to really hash it through." Day 3, PM, p. 73. As explained herein, the Applicants do not agree that the Subcommittee could have stopped after voting on aesthetics but do agree that it was the right thing to do to consider all of the findings.

C. RSA Chapter 162-H and the SEC Regulations Require Application of All Factors Before Voting to Issue or Deny a Certificate

37. The failure of the Subcommittee to deliberate on each finding violates the SEC's own rules, which require the Subcommittee to make *all* of the findings set out in RSA 162-H:16, IV. State law requires the SEC to adopt rules relative to "the criteria for the siting of energy facilities, including specific criteria *to be applied* in determining if the requirements of RSA 162-H:16, IV have been met by the applicant for a certificate of site and facility." RSA 162-H:10, VII (Emphasis added). In its deliberations, the Subcommittee failed to apply the regulatory criteria the Legislature had instructed it to adopt and then follow.

38. Site 202.28 (a), titled "Issuance or Denial of Certificate" provides:

> The committee or subcommittee, as applicable, *shall make a finding* regarding the criteria stated in RSA 162-H:16, IV, *and* Site 301.13 through 301.17, and issue an order pursuant to RSA 541-A:35 issuing or denying a certificate.

(Emphasis added). The rule dictates that the SEC must deliberate on each criterion so that all the findings can be made, whether the Subcommittee is deciding to issue, or deny, a certificate. Moreover, Site 301.17 requires that "the committee *shall* consider whether…conditions should be included in the certificate in order to meet the objectives of RSA 162-H." (emphasis added).

39. The regulatory requirement mandating that the Subcommittee make findings on each of the statutory criteria is consistent with RSA 162-H:16, IV (Supp. 2017), titled "Findings and Certificate Issuance," which provides as follows:

> *After due consideration of all relevant information* regarding the potential siting or routes of a proposed energy facility, *including potential significant impacts and benefits,* the site evaluation committee *shall determine* if issuance of a certificate will serve the objectives of this chapter. In order to issue a certificate, the committee *shall find that*:
>
> (a) The applicant has adequate financial, technical, and managerial capability to assure construction and operation of the

> facility in continuing compliance with the terms and conditions of the certificate.
>
> (b) The site and facility will not unduly interfere with the orderly development of the region with due consideration having been given to the views of municipal and regional planning commissions and municipal governing bodies.
>
> (c) The site and facility will not have an unreasonable adverse effect on aesthetics, historic sites, air and water quality, the natural environment, and public health and safety.
>
> (d) [Repealed.]
>
> (e) Issuance of a certificate will serve the public interest.

(emphasis added). As is evident from the plain language of the subsection, the SEC must consider "all relevant information" in the process of deliberation and must weigh the impacts and benefits of the various factors.

40. "The law of this State is well settled that an administrative agency must follow its own rules and regulations." *Attitash Mt. Service Co. v. Schuck,* 135 N.H. 427, 429 (1992). An agency "must also comply with the governing statute, in both letter and spirit." *Appeal of Morin*, 140 N.H. 515, 519 (1995). If an administrative agency or board fails to follow its rules, the agency has abused its discretion and an appellate court will reverse the agency's decision. *Id.* at 518 ("If the board abuses its discretion—whether by making arbitrary decisions; by failing to comply with the requirements of its governing legislation or with its own rules and regulations; or by failing to follow fair procedures—then we 'will not hesitate to reverse' the agency's decision.").

41. Contrary to its own regulations and authorizing statute, the Subcommittee ended its deliberations after discussing and informally indicating that the Applicants had the financial, technical and managerial capability, but only partially considering ODR, thus failing to make the remaining findings. By failing to deliberate further, the Subcommittee halted the integrated process called for by its own rules, and by the statute. Had the Subcommittee deliberated further and had applied the criteria from the rules and considered the additional

required findings, it could have imposed conditions in the Certificate that resolved its concerns relating to ODR, and that permitted it to conclude that there was no undue interference.

42. In fact, in other proceedings, SEC members have specifically noted the need to reach a decision after deliberating on *all* of the factors. For example, in the recent deliberations regarding the Antrim Wind Energy project, SEC member Clifford, in the context of discussing a condition that would address public health and safety as well as aesthetics, stated:

> It's not a game-changer. In other words, we're voting on the entire Application, and I think everyone on the Committee has a right to voice their opinions and concerns as we work our way through the process. But the vote at the end of the day would be a vote on the whole. But people may have varying opinions about different components of this entire application. But at the end of the day, there is one vote on the entire Application. So I say carry on.

SEC Docket No. 2015-02, Deliberations Day 3, PM, p. 20 (December 12, 2016).

43. By stopping its deliberations essentially at the outset, the Subcommittee ignored the fact that in any deliberative process, people can change their minds, as Chairman Ignatius observed in *Antrim I*. *See* footnote 30. In order to make a reasoned decision, Subcommittee members are required by law to consider all of the factors in the statute and the rules. For these reasons, the Subcommittee is required to vacate its decision to deny the Application and resume deliberations.

IV. The Subcommittee Failed to Properly Deliberate With Respect to the "Undue Interference" Finding

44. The Subcommittee's failure to complete its deliberations on all of the statutory or regulatory findings was compounded by its failure to properly deliberate with respect to one of the findings it *did* partially consider namely, its conclusion that the Applicants had failed to meet their burden to show that the facility would not unduly interfere with ODR. In

reaching that conclusion, the Subcommittee misconstrued the standard to which the burden of proof applied.

45. To the best of the Applicants' knowledge, the SEC has never denied an application based on the ODR finding. Here, the Subcommittee never defined for the benefit of individual Subcommittee members what it meant by "undue interference," or how the "region" should be viewed. Its failure—or inability—to do so is reflected in its deliberations.[31] Indeed, the Subcommittee failed to ascribe any meaning to the term "unduly interfere." "Unduly" requires the Subcommittee to view the Project's alleged interference in context. In other words, the Project does not need to show that it will not interfere with orderly development at all, but only that its alleged interference is not undue, or extreme, or disproportionate to its scale and scope. The Subcommittee's failure to ascribe meaning to the word affects both procedural and substantive aspects of the Subcommittee's decision.

46. The Subcommittee's deliberations on this issue were deficient in three respects. First, it treated the various components of the criteria to be addressed under the undue interference finding in isolation, overlooking the fact that an impact to one or more components does not amount to a finding of *undue* interference.

47. Second, the Subcommittee erred substantively because members appeared to conclude that "unduly interfere" means to "impact" the orderly development of the region. This position is contrary to the plain language of the statute and rules of statutory construction. If the statute prohibited all interference with, or impact on, orderly development, the word

---

[31] The Subcommittee never defined what constituted the "region" for the purpose of determining "undue interference with the orderly development of the region." As Mr. Way noted: "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." 2 AM 30/18-31/14.

"unduly" would be superfluous.[32] The purpose section of the statute bolsters the above argument. Indeed, the statutory scheme contemplates that projects that are granted certificates may nonetheless interfere with ODR. State law recognizes that the selection of sites for energy facilities will have "significant impacts on and benefits to" enumerated criteria set forth in the statute. RSA 162-H:1. There is clearly a distinction between "unduly interfere" and mere interference or impact from a project.

48. Third, as discussed above, the Subcommittee improperly failed to consider conditions that might have been imposed to mitigate—or eliminate—impacts associated with various of the underlying criteria comprising the ODR finding when considered as a whole, and thus that might obviate the potential for undue interference. As a result of these errors, the Subcommittee should vacate its decision to deny the Application and resume its deliberations.

A. The SEC Must Evaluate The Orderly Development of the Region As A Whole By Considering Relevant Information In the Application and Applying the Criteria in the Rules

49. Site 301.15 sets out the three criteria that the Subcommittee must consider in determining whether a facility unduly interferes with ODR. Those criteria do not stand alone, but must be evaluated collectively, and in connection with the component parts of the information included with the Application, namely, those set out in Site 301.09.[33] The Subcommittee members discussed each of the components in Site 301.09, and summarized their views, but never explained *why,* when taken as a whole, that their respective, or collective, views of each of the components amounted to undue interference.

---

[32] Basic tenets of statutory construction require that "all of the words of a statute must be given effect and that the legislature is presumed not to have used superfluous or redundant words." *Appeal of Reid*, 143 N.H. 246, 252 (1998) (quotations omitted). It follows that the Subcommittee must afford all the words in the statute their meaning and must, therefore, give the word "unduly" meaning in the context of the remaining language. "Unduly interfere" must be more than mere interference with, or a mere impact on, ODR.

[33] Chairman Honigberg recognized the interaction between Site 301.15 and 301.09 in discussing the process of reaching a decision on the ODR finding. 3AM 4/5-5/5.

50. The Subcommittee members appeared to believe that they were to make individual findings with respect to each component identified in Site 301.09 (b) with the result that if one or more of the components were negative, there was undue interference. *See* discussion by Mr. Way. 3AM 8/9-11/1; s*ee also* the discussion in part IV. B below. But the rules do not require or contemplate that the SEC would make individual findings with respect to each of the components set out in Site 301.09. Rather, they require—and the SEC has historically considered—that all of the parts be considered as part of the larger whole with respect to the effect that a facility would have on the orderly development of the region. *See e.g. Tr. Deliberations Day 1,* Merrimack Valley Reliability Project, Docket No. 2015-05, p. 42. This is in contrast to the other parts set out in RSA 162-H: 16, IV(c), which mandate that the SEC make individual findings that a facility will not have an unreasonable adverse effect on aesthetics, historic sites, air and water quality, the natural environment, and public health and safety. The SEC rules make this 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.

51. The individual components in 301.09 are part of the ultimate determination as to whether any interference is "undue." 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 orderly development amount to "undue interference." Even if the Subcommittee concluded that the Project would have *an impact* on each of the component parts that make up the ODR finding, it could still conclude that the Project did not unduly interfere with ODR. It appears that many Subcommittee members did not consider this critical difference. And the Subcommittee never considered it as part of its vote.

52. The absence of any clear standard in the deliberations about what constitutes *undue* interference, and the absence of a rigorous process to apply the facts and potential conditions to the analysis of that issue, resulted in the application of a regulatory standard that is so vague as to constitute a violation of due process under both the New Hampshire and United States Constitutions.[34]

B. The Subcommittee Misconstrued the Burden of Proof Necessary to Constitute a Showing of "Undue Interference"

53. The Subcommittee ended deliberations and concluded that NPT had "failed to prove by a preponderance of the evidence that the Site and Facility, the Project, will not unduly interfere with the orderly development of the region." 3PM 3/12; 3PM 19/11. In reaching that conclusion, the members of the Subcommittee mistakenly conceived the "undue interference" standard and thus misapplied the burden of proof necessary to meet that standard. The Subcommittee members appeared to apply a definition of the standard and of the burden of proof as follows: unless the Applicants demonstrated that—as to each of the components in 301.09, 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 its larger burden of proving facts sufficient for the Subcommittee to find that the Project will not unduly interfere with the orderly development of the region. This is not what the statute or the rule requires.

---

[34] 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 it applied a vague standard for the burden of proof that no applicant could understand or meet. Put differently, the dividing line between what the Subcommittee believed did, or did not, constitute undue interference was simply left to conjecture, which renders the rules relative to the finding of "undue interference" void for vagueness.

54. As noted above, each of the Subcommittee members went through the various components (although some did not evaluate all of the components) stating whether, as to each one, they believed there was a positive, or negative impact. 3AM 6-33. The deliberations demonstrate that the Subcommittee members did not apply an "undue interference" standard, but rather concluded that where there was "any impact" on a particular component, that was enough to find that the Applicants had failed to show that there would be no "undue interference" and thus had failed in their burden of proof. Moreover, the discussions plainly show the lack of any clear standard for how the burden of proof was to be met.[35]

55. While each of the Subcommittee members concluded by stating that they did not believe that the Applicants had met their burden of proof, it is clear from their discussions that they believed that, in order to meet that burden, the Applicants had to demonstrate—for each and every component in Site 301.09, which underlie the criteria in Site 301.15—that there would be *no impact at all.*[36] For example, one Subcommittee member summarized her views on the impact on the economy as follows:

> I agree that I think that the Applicant demonstrated that it will have some—the Project will have **some positive effect** on the economy. Therefore it won't unduly interfere with the orderly development because **it's not going to be a negative impact on the economy.**

Id. 26/5-11 (Emphasis added.) In other words, in order to meet its burden of proof and to avoid a finding that any component of a criterion would not "unduly interfere" with the orderly development of the region, NPT was required to show either no impact, or a positive impact.

---

[35] *See e.g.* 3AM 7/23-8/1; *Id.* 8/12; 9/11; 10/1-9; 10/18-24;11/24; 12/19; 13/15; 16/9; 17/11; 18/23; 19/6; 23/10; 24/14; 26/20-27/8; 27/11; 28/17.

[36] In addition to the members' misconceptions about the application of the burden of proof, there appears to be a misunderstanding of the role of municipal views in making a finding relative to orderly development. Member Weathersby correctly observes that municipal views, as well as ordinances and plans do not preempt SEC jurisdiction but that they should be given some weight. But in application, "some weight" has effectively been elevated to an unjustified level of deference. Negative views and beliefs are not evidence and deferring to those views and beliefs amounts to consideration that is undue.

This formulation is contrary to the statute and a misapplication of the criteria set out in Site 301.15, and places a burden on the Applicants that is impossible to meet.[37] In addition to the failure to consider and apply all of the statutory factors, this error of law requires the Subcommittee to vacate its decision and resume deliberations.

V. Conclusion

56. The Applicants recognize and appreciate the efforts of the Subcommittee throughout the many months of review of the Application and hearing. However, the Applicants have demonstrated good reason for the Subcommittee to vacate its decision to end deliberations prematurely and, therefore, request that the Subcommittee complete its deliberations on all the criteria, including the consideration of the many potential conditions identified in Attachments A, B and C. If this request is granted, that Applicants believe that, based on the substantial record in this proceeding together with these proposed conditions, the Subcommittee should conclude that the Applicants have met their burden of proof. Accordingly, the Applicants respectfully request that the Subcommittee vacate its decision and resume its deliberations on all the required statutory and regulatory considerations, including conditions of approval that may address issues identified in the course of those deliberations.

---

[37] Neither the statute nor the regulations define what constitutes "undue" interference, and as noted, the Subcommittee made no attempt to provide a definition. The common, dictionary definition of "undue" is "exceeding or violating propriety or fitness," or "as going beyond a normal or acceptable limit in degree or amount." Webster's Third International New International Dictionary, Merriam Webster 2002, at 2492. "Interfere" is defined as "to come in collision: to be in opposition to: to run at cross purposes: to clash." *Id.* 1178.

WHEREFORE, the Applicants respectfully request that the SEC:

A. Act on this Motion for Rehearing within 10 days as required by RSA 541:5 and Site 202.29(e);

B. Vacate the Decision of February 1st;

C. Resume deliberations on the Application as requested herein; and

D. 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: February 28, 2018

By: _____
Barry Needleman, Bar No. 9446
barry.needleman@mclane.com
Wilbur A. Glahn III, Bar No. 937
bill.glahn@mclane.com
Thomas B. Getz, Bar No. 923
thomas.getz@mclane.com
11 South Main Street, Suite 500
Concord, NH 03301
(603) 226-0400

Certificate of Service

I hereby certify that on the 28th of February, 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