

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

Docket No. 2015-04

Application of Public Service Company of New Hampshire d/b/a Eversource Energy
("Eversource") for a Certificate of Site and Facility for the Construction of a New 115 kV
Transmission Line from Madbury Substation to Portsmouth Substation

COUNSEL FOR THE PUBLIC'S RESPONSE TO
THE JOINT MOTION TO STRIKE NHDES'S POST-FINAL DECISION
RECOMMENDATIONS AND RELATED TESTIMONY

Counsel for the Public, by his attorneys, the Office of the Attorney General, hereby submits this Response to the Joint Motion to Strike (the "Joint Motion") filed by the Conservation Law Foundation ("CLF"), the Town of Durham/University of New Hampshire ("Durham/UNH") and the Town of Newington ("Newington"), and avers as follows:

1. The Joint Motion addresses certain communications between the Applicant and the New Hampshire Department of Environmental Services ("NHDES"), as well as the Presiding Officer's request for agency response and the resulting response from NHDES. The Joint Movants contend that the post-Final Decision communications with NHDES violated the statutory permitting process and request that NHDES' August 31, 2018 Response, and associated testimony, be stricken.

2. Counsel for the Public ("CFP") shares some of the Joint Movant's concerns, but disagrees with the requested relief, as set forth below. This Response outlines CFP's analysis of the relevant statutory provisions and responds to the specific relief requested in the Joint Motion. Contemporaneously with this Response, CFP is filing a separate Motion to Strike the October 29, 2018 "Revised Final Decision" issued by NHDES and marked as Committee Ex. 12c and 12d.

3. With regard to the Joint Motion, CFP agrees that an agency “final decision” submitted pursuant to RSA 162-H:7, VI-c constitutes the agency’s “final decision on the parts of the application that relate to its permitting and other regulatory authority.” Following the issuance of a “final decision” the role of a state agency in the SEC process is limited, and the ultimate decision on whether or not to issue a Certificate of Site and Facility (a “Certificate”) rests squarely with the designated SEC Subcommittee.

4. Indeed, while a state agency with permitting or regulatory authority may block the issuance of a Certificate,¹ the agency’s authority to propose terms and conditions of a Certificate ends with its issuance of a “final decision.” Accordingly, a state agency’s “final decision” is the final expression of the agency’s proposed terms and conditions for inclusion in a Certificate if issued by the SEC, unless, as discussed below, the SEC requests further input from the agency.

5. CFP also agrees that attempts to seek agency approval of revisions or additions to the agency’s “final decision” are improper. Because the decisional authority over Certificate conditions rests with the SEC, and not with the agency, any request for deviation from the agency’s “final decision” should be directed to the SEC. RSA 162-H:4, I(a) and (b); RSA 162-H:16.

6. This serves two related purposes. First, because it is the SEC’s responsibility to issue a Certificate and to determine appropriate conditions, the SEC needs all relevant information regarding potential disagreement with or suggested improvement of agency conditions to make an informed and reasoned decision. Second, it provides all parties timely

¹ Pursuant to RSA 162-H:16, I, when a state agency “denies authorization for the proposed activity over which it has permitting or other regulatory authority,” such denial is final and precludes the SEC from issuing a Certificate.

access to the request and an opportunity to express any supportive or contrary positions for consideration by the SEC.

7. To be clear, requests to revise or supplement agency “final decisions” should be distinguished from routine communications with state agencies to exchange information or to seek clarification of the agency’s final decision. Such non-decisional communications are appropriate and often necessary to the permitting process. However, to the extent such informal communications invade upon the decisional authority of the SEC, they are *ultra vires* and should be instead directed to the SEC for resolution through the adjudicatory process.

8. In the instant case, CFP agrees that the Applicant engaged in inappropriate negotiations with NHDES seeking to revise certain provisions of NHDES’ February 28, 2018 Final Decision. *See* Applicant’s Exhibit 182. Such requests to revise a “final decision” should have been submitted to the SEC with notice to all parties, and any purported decision by NHDES to amend its “final decision” would be legally ineffective.

9. Here, prior to a formal response from NHDES, the Applicant later disclosed its request for amendments to the Final Decision and requested that the SEC incorporate the requested amendments in final Certificate conditions if a Certificate is issued. *See* Supplemental Testimony of Sarah D. Allen, Anne E. Pembroke, and Kurt Nelson (July 27, 2018), p. 10. Thus, the request eventually was made in the proper forum with notice to all parties.

10. Following the Supplemental Testimony, the Presiding Officer issued a Request for Agency Response requesting that NHDES provide its position on the Applicant’s requested amendments. To the extent the Request was framed in the context of RSA 162-H:7-a, I(e), CFP agrees with the Joint Movants that RSA 162-H:7-a, I(e) is not applicable to pre-decisional requests. By its plain language RSA 162-H:7-a, I(e) contemplates that the SEC has already

decided to issue a Certificate and to impose conditions different than those recommended by a state agency prior to requesting agency input. Clearly, those pre-requisites cannot be satisfied prior to conclusion of the adjudicatory proceedings.

11. Nonetheless, CFP asserts that there is nothing that prohibits the SEC or the Presiding Officer from seeking input from a state agency after the agency has issued its “final decision.” Indeed, it would be nonsensical to prohibit the SEC from obtaining the input of state agencies when new considerations have arisen after the agency final decisions are submitted.

12. Importantly, a request for information is distinguished from a request for a decision. In performing its statutory duty to decide whether or not to issue a Certificate and what conditions to impose, the SEC is required to consider “all relevant information,” RSA 162-H: 16, IV, and RSA 162-H:7-a, I expressly contemplates agency input in the SEC’s decisional process if requested.² RSA 162-H:7-a, I (d) and (e). By contrast, a request for NHDES to decide whether to amend its “final decision” would be contrary to the statutory scheme and could constitute an impermissible delegation of the SEC’s ultimate responsibility to decide whether or not to issue a Certificate and what conditions to include in any Certificate.

13. Moreover, allowing a state agency to make amendments to a “final decision” without notice to the parties and after the statutory deadline could interfere with the parties’ right to an opportunity “to respond and present evidence and argument on all issues involved.” RSA 541-A:31, VI. Rather, any amendment to final agency decisions should be made by the SEC after considering evidence and argument presented in the adjudicatory proceedings.

² CFP notes that as an alternative to requesting a written response, RSA 162-H:7-a, I(d) and IV authorizes the SEC to request that a state agency designate a representative to appear as a witness before the Committee.

14. Accordingly, to the extent the Presiding Officer's August 10, 2018 letter can be read differently, its legal effect is limited to a simple request for NHDES's position regarding the Applicant's requested amendments. Similarly, because state agencies have no statutory authority to amend a "final decision," NHDES' response cannot legally constitute a revision to its "final decision," but can only provide NHDES' position regarding the proposed amended conditions.

15. Thus, NHDES' February 28, 2018 Final Decision remains the agency's "final decision" pursuant to RSA 162-H:7, VI-c that sets out the terms and conditions that the "committee shall incorporate in any certificate." RSA 162-H:16, I.

16. To the extent that the Subcommittee considers deviating from the conditions set out in the February 28, 2018 final decision, whether to incorporate the Applicant's requested amendments as acceptable to NHDES per the August 31, 2018 NHDES response letter, or to make other adjustments at the Subcommittee's discretion, the Subcommittee can decide during deliberations to utilize the procedure set forth in RSA 162-H:7-a, I(e).

17. One other distinction is necessary to the above analysis. The Joint Movants take issue with the alleged revision of NHDES' initial recommendations regarding further HDD analysis and, more particularly, a jet plow trial run. These matters, however, were not recommended terms or conditions under NHDES' permitting authority, but additional suggestions for consideration by the SEC. *See* Applicant's Exhibit 166 at 1. *But see* Counsel for the Public's Motion to Strike Revised Final Decision.

18. Moreover, the August 31, 2018 response does not purport to change NHDES' initial recommendations regarding a jet plow trial run, but merely states that the Applicant's jet plow trial run proposal is acceptable to NHDES.

19. Importantly, the requirement of a jet plow trial run, and the particulars of when and how it is conducted, have always been left to the discretion of the Subcommittee. The August 31, 2018 NHDES response letter does not alter the Subcommittee's responsibility to make its own decision on the scope, timing and procedures for any required jet plow trial run.

20. Indeed, the Subcommittee is required to make an independent decision, based on all relevant evidence, on whether issuance of a certificate will serve the objectives of RSA ch. 162-H and on each of the statutory findings set forth in RSA 162-H:16, IV. While the Subcommittee must take certain action to deviate from conditions proposed by a state agency "with permitting or regulatory authority," the ultimate decision lies with the SEC.

21. Based on the above analysis, CFP disagrees with the requested remedy of striking the August 31, 2018 NHDES response and related testimony set forth in Request A. The NHDES response is informative and relevant to the Subcommittee's review, but should not be considered as effectuating an amendment to the February 28, 2018 NHDES final decision.

22. CFP does, however, concur with the Joint Motion's Request B in that RSA 162-H:7-a, I(e) sets forth a required process for deviation from a state agency's "final decision."

23. Finally, CFP believes that the parties have had an opportunity to address the August 31, 2018 NHDES response during the adjudicative hearings, and that Request C is, therefore, moot.

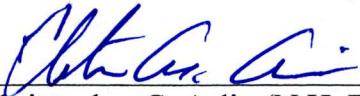
WHEREFORE, Counsel for the Public respectfully submits this response to the Joint Motion and requests that the Subcommittee grant such relief as may be just.

Respectfully submitted,

COUNCIL FOR THE PUBLIC

By his attorneys

Dated: November 2, 2018



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Certificate of Service

I, Christopher G. Aslin, certify that on this day a true copy of the foregoing has been forwarded to the persons named on the Distribution List in this docket.

Dated: November 2, 2018



Christopher G. Aslin, Esq.